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The Smithfield Packing Company, Inc., Tar Heel Division *and* United Food and Commercial Workers Union, Local 204, AFL–CIO, CLC. Cases 11–CA–15522, 11–CA–15634, 11–CA–15666, 11–CA–15750, 11–CA–15871, 11–CA–15986, 11–CA–16010, 11–CA–16161, 11–CA–16423, 11–CA–16680, 11–CA–17636, 11–CA–17707, 11–CA–17763, 11–CA–17824, 11–RC–6221

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 15, 2000, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

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 brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as specified below, and to adopt the recommended Order as modified.[3]

The issues in this proceeding pertain to alleged unfair labor practices and objectionable conduct surrounding elections held among the Respondent's employees on August 25–26, 1994, and on August 21–22, 1997.

THE 1995 COMPLAINT[4]

Section 8(a)(1) violations

We adopt the judge's findings, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by threatening employees Lawanna Johnson and Steve Ray with discharge;[5] disparately applying its no-solicitation/no-distribution rule;[6] intimidating and coercing employees while union literature was being distributed;[7] and confiscating union literature.[8]

[1] Pursuant to the Respondent's request, the Board granted the Respondent a waiver of the page limitation prescribed in Sec. 102.46(j) of the Board's Rules, and permitted the Respondent to file a brief not to exceed 150 pages. The Respondent filed a brief of 122 pages. In that brief, however, the Respondent stated that the page limitation precluded it from addressing each violation found by the judge, and referred the Board generally to its posthearing brief regarding the remaining violations. We have not considered the Respondent's posthearing brief, which is 481 pages long. Even if we were to identify and review only the portions of the posthearing brief concerning the numerous issues not discussed in the Respondent's brief to the Board, the resulting submission would far exceed the 150-page limit.

The Respondent also filed a motion to reopen the record for the purpose of admitting evidence pertaining to a lawsuit filed by former Production Support Manager Sherri Buffkin against the Respondent. The General Counsel filed an opposition to the Respondent's motion. The evidence that the Respondent seeks to introduce concerns the reasons for the Respondent's discharge of Buffkin. The Respondent asserts that the evidence would be relevant to the judge's crediting of Buffkin's testimony in this proceeding. We find that the evidence that the Respondent seeks to admit would not affect the judge's finding that Buffkin was a credible witness at this hearing, and we deny the Respondent's motion.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

On November 12, 2003, a motion was filed on behalf of attorneys William P. Barrett, Margie T. Case, and Joel H. Katz, seeking to intervene for the limited purpose of challenging the judge's findings and conclusions supporting his recommendation, discussed below, to refer these matters to the General Counsel for investigation of possible misconduct in this proceeding. The Charging Party filed an opposition to the motion, and the Movants filed a reply to the opposition. The motion states that the Movants do not intend to file a brief in this proceeding. We grant the motion solely with respect to the issue of the conduct of the Movants. However, because we make no findings in this proceeding regarding the propriety of their conduct, but only refer the matter to the General Counsel, we find that the intervention of the Movants does not affect our decision here. Member Liebman would deny the motion because the Board does not decide in this proceeding the matters as to which the Movants seek to intervene.

[2] 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.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] In view of the number of allegations at issue in this proceeding, we shall designate them by the complaint paragraphs in which they appear, as the judge did in structuring his decision.

In the absence of exceptions, we adopt pro forma the judge's dismissal of the allegations of par. 9(ss).

[5] Par. 9(c).

[6] Par. 9(o). In view of this finding, we find it unnecessary to pass on par. 8(m) of the 1998 complaint, which alleges disparate enforcement of the no solicitation/no distribution rule at the time of the 1997 election.

[7] Par. 9(v). Because we find that the Respondent violated Sec. 8(a)(1) as alleged in this paragraph, we find it unnecessary to pass on the judge's findings that the Respondent also engaged in verbal assaults and attempted to confiscate union literature, as alleged in pars. 9(t) and 9(u), respectively.

[8] Par. 9(w). We find it unnecessary to pass on the allegation that the Respondent unlawfully threatened to withhold a pay increase (par. 9(z)). In light of our finding that the Respondent violated Sec. 8(a)(1) by threatening to freeze wages, as alleged in par. 8(r) of the 1998 complaint, this violation would be cumulative and would not affect the remedy.

Paragraph 9(b). We adopt the judge's finding that the Respondent unlawfully threatened employees with plant closure. The judge credited testimony that in a March 2, 1994 meeting with about 200 employees, Vice President of Operations Henry Morris stated that the "Union couldn't do nothing for the employees and the only thing the Union could do is close plants," and that "before a union came in there they would close the plant." In agreeing with the judge that Morris' threats violated Section 8(a)(1), we rely on the judge's finding that Morris deviated from the prepared text of his speech. Therefore, we find it unnecessary to pass on the judge's further finding that the prepared text contained an additional threat to close.[9]

Paragraph 9(d). The judge found that supervisor Marty Hast unlawfully threatened employee Kenneth Spann with discipline for engaging in union activity. When Hast saw Spann in the breakroom assisting another employee to complete a union authorization card, he informed Spann that it was against company policy and that if the Respondent caught him doing it again he would be disciplined. Hast further stated that Spann could not engage in soliciting cards on company time or company property. In agreeing with the judge, we reject the Respondent's argument that Hast's conduct was not unlawful because he believed (erroneously) that Spann was on an unauthorized break at the time of the solicitation. The standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

Paragraph 9(i). We agree with the judge that supervisor James Hargrove unlawfully interrogated employee Chris Council regarding his union sentiments. According to the credited testimony, Hargrove—in the presence of two other employees—asked Council what he thought about the Union, repeated the question when Council did not answer, and then stated, "Come on, you can talk to me." We find, as did the judge, that the circumstances of this case are distinguishable from *Cartridge Actuated Devices, Inc.*, 282 NLRB 426 (1986). There, the Board found that a supervisor's warning to an employee that "they know" about the employees' union activities was not unlawful because the supervisor was low-level, had established friendships with many employees, and merely conveyed well-known information. In this case, by contrast, the record does not show that Hargrove had developed friendships with employees. In addition, Hargrove was clearly seeking information from Council, not conveying well-known information to him. Finally, the record does not indicate that, at the time of the interrogation, Council was an open union supporter. See *Rossmore House*, 269 NLRB 1176 (1984).

Paragraph 9(j). As the judge found, the Respondent violated Section 8(a)(1) through Morris' informing employees that it would be futile to select the Union as their bargaining representative. As discussed regarding paragraph 9(b) above, Morris stated at a meeting of 200 employees that the "Union couldn't do nothing for the employees and the only thing the Union could do is close plants." We find that, in the context of Morris' other statements in the meeting, including another threat to close, Morris' statement conveyed to employees that their selection of the Union would be futile.

Paragraph 9(m). The judge found that the Respondent, through the conduct of Supervisors Tony Murchinson and Marty Hast, promulgated an unlawful no-solicitation/no-distribution rule. The credited testimony shows that when employee Keith Ludlum was in the locker room, soliciting employee Steve Ray to sign an authorization card, Murchinson walked in and stated, "Hey, I wouldn't do that. You will get fired." Murchinson went on to state that Ludlum could not solicit on company time, and when Ludlum responded that the employees were on a break, Murchinson said that he could not solicit on company property. Similarly, the judge found that Hast informed employee Kenneth Spann that he could not solicit on company time or company property, and that the Respondent would take disciplinary action if he were caught doing so again. In agreeing that these statements by Murchinson and Hast, prohibiting the employees from soliciting on company property, interfered with the exercise of employee rights in violation of Section 8(a)(1), we find it unnecessary to pass on whether these statements constituted the promulgation of a no-solicitation/no-distribution rule.

Paragraph 9(n). We adopt the judge's finding that the Respondent unlawfully maintained an overbroad no-solicitation/no-distribution rule based on the posting near its driveway of a sign that read:

> No Trespassing
>
> All persons and vehicles entering/departing [Carolina Food Processors] are subject to search. Solicitation & distribution of literature which is not authorized by the Director of Human Resources is prohibited.

[9] We also do not pass on the judge's discussion of Jones' testimony that Bishop asked him why he was wearing a union T-shirt and Jones' testimony that he did not remember doing so. This incident was not alleged as a violation in the complaint.

> C.F.P. does not allow any type of loitering or solicitation on company property, the use of alcohol, drugs, or the display/carrying of firearms are prohibited.
>
> Failure to comply with the above rules will result in C.F.P. prosecuting to the fullest extent of the law.

In its exceptions, the Respondent contends that the sign is clearly applicable only to nonemployees. The Respondent asserts that the policy for employees is set out in the employee handbook, which prohibits solicitation in nonworking areas during working time, which expressly does not include meal or break times. Like the judge, we reject the Respondent's argument and find that it is not clear that the sign pertains solely to nonemployees. On the contrary, the sign begins with a warning that explicitly pertains to "[a]ll persons."[10]

The Respondent, citing *Gooch Packing, Inc.*, 187 NLRB 351 (1970), also argues that the sign did not infringe on employee rights because some employees testified that they knew that they could engage in soliciting during nonwork time. *Gooch Packing* is distinguishable, however. In that case, the record showed that employees had engaged in nonwork time solicitation without interference by the employer. Here, on the other hand, employees who solicited authorization cards at the Respondent's facility during nonwork time were threatened with discipline or discharge.

Paragraph 9(r). The judge found that, when employee Ludlum was handbilling with a union representative on February 2, 1994, Corporate Director of Security William Daniel Priest, Jr. and Security Officer Kevin Peak parked about 15-20 feet away from the handbillers for a period of approximately 30–45 minutes. When someone in a vehicle accepted a handbill, Peak looked at the back of the car and said something to Priest, who appeared to write something down. We agree with the judge that this conduct by Priest and Peak created the impression of surveillance of employees' union activities. As the judge found, Priest and Peak observed the handbilling from a location close to the activity and appeared to record license plate numbers of employees who accepted a handbill. Moreover, the record does not contain evidence that the Respondent had any reasonable basis for concern about damage to its property. Therefore, we adopt the judge's finding that this conduct violated Section 8(a)(1). *Hospital Episcopal San Lucas*, 319 NLRB 54, 59 (1995) (human resources director's observation of picketing from window of facility, asking identity of picketing employees, and writing down their names unlawful).[11]

Paragraph 9(s). Based on the credited testimony of Union representatives Todd Chase and George Carrillo, the judge found that on September 9, 1993, Security Officers Peak and Harry Grauling were parked in a vehicle on the side of the Respondent's plant, with Peak videotaping in the direction of union handbillers as employees entered and exited the parking lot. Videotaping of protected activity is lawful only if justified by legitimate concerns. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). In this case, the videotaping was directed at the employees' handbilling activity, and the Respondent made no showing of a legitimate concern. Therefore, we agree with the judge that the videotaping by Peak and Grauling constituted unlawful surveillance of employees' union activities.[12]

Paragraph 9(ff). The judge credited the testimony of employee Council that, on the day of the election, Supervisor Hargrove gave him a stamper and instructed him to stamp hogs as they went down the line. After stamping approximately 50 hogs, Council learned that the stamp read, "Vote No." Council then informed Supervisor Randy Hall that he did not want to stamp the hogs. Supervisor Randy Gebbie directed him to go back to the line and had another employee continue the stamping. The judge found that Council was an open union supporter, having been on the stage earlier in the month during the Union rally featuring Rev. Jesse Jackson, at which several members of the Respondent's management were present.

We adopt the judge's finding that the Respondent unlawfully harassed Council based on his support of the Union. The Board has held that an employer may not compel employees to express opposition to union representation. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 496 (1995), enfd. in relevant part 97 F.3d 65, 72, 74 (4th Cir. 1996) (directing an employee to wear a "Vote No" T-shirt); *Florida Steel Corp.*, 224 NLRB 587, 588–589 (1976), enfd. mem. 552 F.2d 368 (5th Cir. 1977) (requiring employees to pose for photographs holding "vote no" signs). In *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), the Board held that an employer's solicitation of employees to participate in an antiunion videotape is lawful only under certain conditions, notably including

[10] We find it unnecessary to pass on the judge's finding that the overbroad wording of the sign was intentional.

[11] We therefore find it unnecessary to pass on the judge's finding of additional incidents of the creation of the impression of surveillance, which are cumulative and do not affect the remedy.

[12] Because we adopt the judge concerning this incident, we find it unnecessary to pass on his finding of additional incidents of unlawful surveillance.

assurances to the employees that their participation is voluntary. In these cases, the Board found that the employers' actions pressured employees into making an observable choice concerning their participation in the election campaign. The Board stated

> [A]n employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning representation. This includes whether to oppose the union independently of the employer's own efforts, or to oppose representation by, for example, wearing an employer's campaign paraphernalia or, alternatively, by appearing in an employer's campaign videotape. Each of these alternatives represents a distinct level of involvement in the election campaign. A direct solicitation pressures employees into making an observable choice, and thereby coerces them in the exercise of their Section 7 rights.[13]

In the same way, Hargrove's assignment to Council to stamp the hogs coerced Council to participate in the Respondent's campaign. Council was neither informed that his task supported the Respondent's antiunion effort nor given an opportunity to decline. As in the above cases, in order to discontinue his participation in the Respondent's campaign activities, Council had to make an observable choice by objecting to a supervisor, thus demonstrating his support for the Union. Thus, we find that the Respondent harassed Council by coercing him into engagning in campaign activities in violation of his Section 7 right to determine, free of employer coercion, the nature and extent of his involvement in such activities.

Our dissenting colleague argues that the Respondent's conduct was not coercive because Council was a known union adherent. However, as the Board found in *Allegheny Ludlum*, requiring an employee to make a choice whether to accept or decline a solicitation to engage in the employer's campaign is coercive even when the employee's views concerning union representation are already known.[14] There, the Board found that soliciting employees to appear in an antiunion videotape is inherently coercive, unlike interrogation under the *Rossmore House*[15] line of cases relied on by our colleague.[16] In those cases, the Board has recognized the need to protect both the employee's Section 7 right to freedom from coercion and the employer's free speech right under Section 8(c). Accordingly, rather than finding interrogation per se coercive, it applies a "totality of the circumstances" test, under which, contrary to the dissent's suggestion, whether the employee is an open union supporter is but one factor. By contrast, preventing the employer from enlisting employees to assist involuntarily in its antiunion campaign does not hinder the employer or any manager from exercising the right to express an opinion about the union. It only prohibits the employer from expressing those views through a nonconsenting employee.[17] Thus, we find that the Respondent harassed Council by coercing him into engaging in campaign activities in violation of his Section 7 right to determine, free of any employer coercion, the nature and extent of his involvement in such activities.

Our dissenting colleague states that the Respondent did not coerce Council into stamping the hogs. He points out that Council did not at first look at the message of the stamp and, when he realized the nature of his assignment and protested, he was permitted to stop. We disagree with our colleague's conclusion.

Hargrove's direction to Council to stamp the hogs with the Respondent's campaign message interfered with Council's Section 7 right to participate in the campaign or decline to do so. Contrary to our dissenting colleague's suggestion, Council's lack of awareness of the import of his activity does not diminish the coerciveness of the Respondent's conduct. In *Sony of America*, 313 NLRB 420 (1993), the Board found that the employer violated Section 8(a)(1) by taking photographs of employees, including union stewards, without explanation, and then using the photographs in an antiunion video in its decertification election campaign. The Board found that the employer's action was unlawful, because it did not obtain the employees' consent to having their pictures used in this manner, but rather "tricked employees into posing for pictures to incorporate into its antiunion film." Similarly, Council's compliance with the stamping assignment without questioning the message did not constitute the consent necessary to render his participation in the Respondent's campaign noncoercive.

Nor was the coerciveness of the assignment remedied by allowing Council to discontinue his unwitting but involuntary participation in the Respondent's campaign. According to Council's credited testimony, he was alerted that something was wrong when other employees

[13] *Allegheny Ludlum*, supra at 741.

[14] Id.

[15] 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[16] *Allegheny Ludlum*, supra at 741.

[17] With respect to coercive circumstances, we also note that the Respondent's action of placing Council in the position of having to decline a direct assignment from his supervisor in order to cease assisting in the Respondent's antiunion campaign presented an additional element of coercion. Given the entirety of the coercive circumstances here, we would find the Respondent's actions unlawful even if we were to apply the "totality of the circumstances' test under *Rossmore House*.

on the line were smiling, laughing, and talking. After he learned the message that he had been stamping and realized that he had been enlisted in the Respondent's campaign, he was required to affirmatively protest the assignment in order to be relieved of it. As discussed above, an employer violates Section 8(a)(1) by pressuring an employee to make an observable choice concerning participation in its election campaign.

Paragraph 9(gg). About 3 weeks before the 1994 election, Supervisor Kerry Coleman gave Council approximately 600 copies of a sheet of paper containing an antiunion message and instructed Council to distribute them to kill floor employees as they clocked out. Council complied with Coleman's direction, but as he did so he told employees to throw the papers away. Council was still on the clock when he performed this task. The judge found that, by making this assignment, Coleman solicited Council to abandon his support for the Union.

We find that the record evidence does not support the violation found by the judge. We accept the judge's finding that Coleman assigned this activity to Council because Council was an open union adherent to whom the task would be repugnant. We further accept his finding that the instruction was a demonstration of the Respondent's power over Council. However, we find no basis for concluding that Coleman's actions constituted solicitation of Council to abandon his support for the Union, as alleged, or that they would reasonably have that effect. We need not pass on whether Coleman unlawfully required Council to participate in the Respondent's antiunion campaign, because the violation would be cumulative with that found above concerning Par. 9(ff).

Paragraph 9(xx). We adopt the judge's finding that supervisor Frank Patenburg violated Section 8(a)(1) when he approached employee and open union supporter Fred McDonald on the work line and stated, "Why do you all guys want a Union, the Union can't do anything for you but cause trouble between the workers and the Company." In *Action Auto Stores*, 298 NLRB 875, 901–902 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991), the Board held that the employer unlawfully told an employee that it had good information that he was active on behalf of the union, asked his reasons for wanting a union, and stated that all a union would do is cause trouble. The Board adopted the judge's reasoning that the employer's conduct put the employee in a defensive posture because the employer, which controlled his livelihood, did not approve of his union activity. For the same reason, we find that Patenburg's remark, directed to open union supporter McDonald, reasonably coerced McDonald in the exercise of his Section 7 rights.[18]

Paragraph 9(yy). Based on the credited testimony of employee Larry Jones, the judge found that on August 29, 1994, a few days after the election, Supervisor Hast instructed the employees to remove all stickers from their helmets.[19] Jones further testified, and Hast did not deny, that Hast told the employees to remove all stickers that referred to union activity from their clothes and their helmets. We agree with the judge that, through these statements, Hast unlawfully promulgated a total ban on paraphernalia and insignia of any type, including those expressing union sentiments. It is well established that employees have a protected right to wear union insignia at work, absent special circumstances not demonstrated by the Respondent here.[20] We also agree with the judge that the Respondent's assertion that employees were still permitted to wear union T-shirts or other insignia besides stickers is not supported by the record. Therefore, we find it unnecessary to pass on the judge's additional finding that a ban on stickers but not union T-shirts would also be unlawful.

Section 8(a)(3) violations.

We adopt the judge's conclusion, for the reasons he stated, that the Respondent violated Section 8(a)(3) and (1) by suspending employee Fred McDonald and refusing to rescind the suspension;[21] by discharging and failing and refusing to reinstate employees McDonald,[22] Chris Council, Larry Charles Jones, Keith Ludlum, and

[18] Chairman Battista concludes that, at most, Patenburg was conveying the message that it would be futile for the employees to select the Union as their representative. Further, inasmuch as there were other expressions of such futility, Chairman Battista finds it unnecessary to pass on this allegation.

[19] Jones testified that Hast's direction applied to Union and Company stickers. The record indicates that during the 1994 election campaign the Respondent suspended its policy prohibiting stickers on hardhats.

[20] *Bell-Atlantic Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. mem. 99 Fed. Appx. 233 (D.C. Cir. 2004); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Special circumstances are found when the prohibition against union insignia or apparel is necessary "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Nordstrom, Inc*., 264 NLRB 698, 700 (1982).

[21] Par. 11. We find this violation based on the Respondent's disparate treatment of McDonald as compared with employee Nelson Drake.

[22] We do not rely on the judge's speculation that Director of Human Resources Sherman Gilliard did not respond to McDonald's questioning whether he had accumulated the 12 attendance points relied on for his discharge because Gilliard knew that McDonald did not have 12 points.

George Simpson;[23] and by issuing a written warning to Simpson.[24]

Paragraph 12. The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging employee Lawanna Johnson. We agree.

Lawanna Johnson was employed by the Respondent from November 1992 until her discharge on November 4, 1993. She was a member of the Union organizing committee, and her name was included in the list of committee members sent to the Respondent and posted in several locations at the plant. In addition, at a meeting of employees held by Vice President Morris in early 1993, Lawanna Johnson expressed her opinion that what the management representatives said about the Union was "a bunch of lies." Following that meeting, Hast, who was then her supervisor, instructed Lawanna Johnson to clean the floor alone on two occasions, a job that she had never been assigned before and that normally requires two men. In the spring of 1993, she applied for higher paying jobs at the plant, but Harold Allen, a supervisor in the next department, informed her that she could not get another position because everyone knew she supported the Union.

Lawanna Johnson subsequently got a job on the cut floor, and experienced problems with her hands that the doctor attributed to carpal tunnel syndrome. In addition to her absences due to pain in her hands, she occasionally missed work because her husband was ill with a deteriorating lung condition. Around September 21, 1993, Lawanna Johnson became ill and brought in a doctor's note stating that she needed to be out of work from September 21, 1993, until October 10, 1993. Timothy Dale Smith, her supervisor, told her not to return until her doctor completely released her. On October 22, 1993, her doctor gave her a note stating that she could return to work on November 1, 1993.

When she returned on November 1, 1993, the director of human services at the time, Henry Grauling, had her sign a last chance agreement, which required her not to miss work for any reason for the next 3 months. The last chance agreement was also signed by Plant Manager Larry Johnson.

During a break a few hours later, Lawanna Johnson loudly urged two employees to vote for the Union. When she returned to work, Larry Johnson pointed his finger in her face and said that if he heard her mention anything about voting for the Union he would fire her on the spot.[25]

On November 4, 1993, Lawanna Johnson's husband had a respiratory attack and had to be taken to the hospital. Lawanna Johnson telephoned the Respondent and left word that she was taking her husband to the hospital and that she would contact them when she returned. When she and her husband got home, she went out to get his prescriptions and asked him to call work for her and let the Respondent know that, in view of the time, there was no point in her coming in that day. Upon her return to work the following day, she met with Grauling and Larry Johnson and was terminated for failing to report her absence the previous day. The termination letter was already prepared when she met with Grauling and Larry Johnson and was signed by Grauling, who did not testify.

We agree with the judge's finding that, based on Lawanna Johnson's overt union activities, which were known to the Respondent, and the Respondent's numerous demonstrations of animus, including the threat to discharge her for discussing the Union, the General Counsel has met his initial burden under the Board's *Wright Line* standard.[26] We further adopt the judge's finding that the Respondent has failed to satisfy its burden to show that it would have discharged Lawanna Johnson even in the absence of her protected union activities.

The Respondent argues in its exceptions that Lawanna Johnson had a history of attendance problems and had been counseled about the matter on several occasions. According to the Respondent, it terminated her when she failed to return on October 11, 1993, as expected, based on the initial note from her doctor, but reinstated her, with a last chance agreement, when she reported on November 1, 1993. The Respondent emphasizes, as does our dissenting colleague, that only 3 days after signing the last chance agreement, Lawanna Johnson again failed to report for work as scheduled. The Respondent further asserts that she "never called in."

We find no merit in the Respondent's arguments. Despite Lawanna Johnson's apparent attendance problems, the evidence shows that the Respondent was motivated to take action against her based on her union activity. In the months preceding her discharge, she had been required to clean the floors, a job otherwise assigned to two men, in retaliation for her critical comments at Vice President Morris' meeting. Moreover, Supervisor Allen informed her that she would not succeed in obtaining a higher paying job because everyone knew she was for the Union. Only hours after Lawanna Johnson signed her last chance agreement, Larry Johnson overheard her

[23] Par. 12.

[24] Par. 16.

[25] The judge found, and we agree, that Larry Johnson's threat violated Sec. 8(a)(1). Par. 9(c).

[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)..

talking to other employees about the Union and threatened to fire her if she did so again. Finally, when Lawanna Johnson had to take her husband to the hospital for emergency treatment, her supervisor, Smith, did not grant her an exception to the attendance rules, as he admitted doing for other employees who encountered a hardship situation requiring them to care for a sick family member. Instead, the Respondent decided to terminate her and had the letter prepared before she met with Grauling and Larry Johnson about her November 4, 1993 absence.

Even if Lawanna Johnson's poor attendance record could have provided a lawful reason for the Respondent to terminate her, the Respondent has failed to present credible evidence demonstrating that it in fact acted on that basis. Hast and Smith testified about her termination, but both admitted that they were not involved in the decision. Their testimony about the basis for it is therefore unreliable. The judge also discredited Larry Johnson's testimony regarding the discharge. What remains is evidence of unsatisfactory attendance, but no evidence that her attendance, rather than her union activity, motivated the Respondent's action. Thus, the Respondent has failed to satisfy its burden under *Wright Line*. Accordingly, we adopt the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging her.

THE 1998 COMPLAINT[27]

Section 8(a)(1) violations

We adopt the judge's findings that the Respondent, during the time period surrounding the 1997 election, violated Section 8(a)(1) by interrogating employees Paul Walker, Margo McMillan, and Ada Perry concerning their union sentiments;[28] threatening plant closure;[29] threatening unspecified reprisals;[30] polling employees about their support for the Union;[31] making a promise of benefit to discourage support for the Union;[32] threatening to freeze wages;[33] threatening to close the plant in the event of a strike;[34] assaulting employee Ray Ward in retaliation for his union activities;[35] and causing the arrest of Ward.[36]

Paragraph 8(d). The judge found that the Respondent, through Supervisor Johnnie Brown and General Manager Jere Null, threatened employees with loss of wages and benefits if they selected the Union as their collective-bargaining representative. In adopting the judge's finding, we rely specifically on the statements of Null in his August 19, 1997 meeting with employees.[37]

According to the credited testimony of employees, in a meeting conducted on August 19, 1997, Null told the employees, among other things, that if the Union came in employees would lose their benefits, would not have health insurance, would not get government benefits such as unemployment compensation, welfare, or food stamps, and would be replaced. He further stated that the Union would probably call the employees out on strike, and the employees would lose their health benefits.

We agree with the judge that these statements constitute unlawful threats of loss of wages and benefits.[38] In adopting his conclusion, we rely on his discrediting of Null's testimony regarding the content of his 25th-hour speeches. In doing so, we note, inter alia, that Null's denial of the alleged unlawful threats was qualified. As discussed with respect to paragraph 8(e) below, however, we do not rely on the judge's suggestion that the Respondent should have videotaped Null's 25th-hour meetings in order to establish definitively what he said to employees.

Paragraph 8(e). Based on the credited testimony of employee Rosa Garcia, the judge found that General Manager Null stated at a meeting of employees on Au-

[27] In the absence of exceptions, we adopt pro forma the judge's dismissal of the allegations in pars. 8(b) and (c).

[28] Par. 8(a). We find it unnecessary to pass on the judge's further finding that the Respondent unlawfully interrogated employee Latonya Robinson, because the violation would be cumulative and would not affect the remedy.

[29] Par. 8(g). See *Garvey Marine*, 328 NLRB 991, 1009, 1018 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (statement that employer could fire employees and reopen after short time without union representation and that rehired employees would earn lower wages unlawful).

[30] Par. 8(n).

[31] Par. 8(p).

[32] Par. 8(q). In adopting the judge's conclusion, we find it unnecessary to rely on his speculation that, had employee Darrell Thomas instead offered to sell his vote to supervisor David Smith, as the Respondent asserted, this would have been a rare occurrence that Smith would have told someone about at the time.

[33] Par. 8(r). See *Superior Emerald Park Landfill*, 340 NLRB No. 54 (2003) (statement that if the union won the election, everything would be frozen and the freeze could last for a year or more unlawful).

Because we find, as alleged in this paragraph, that General Manager Jere Null unlawfully informed employees that, if the Union were elected, they would not receive the September 1997 raise, we find it unnecessary to pass on the allegation in Par. 8(h) of the complaint that Slaughter supervisor Randy Gebbie threatened the loss of the pay increase through a similar statement.

[34] Par. 8(t).

[35] Par. 8(u).

[36] Par. 8(v).

[37] We find it unnecessary to pass on the allegation concerning Gebbie, as his statement, i.e., that employees would not receive their September 1997 wage increase because it would be frozen, is cumulative with the violation by Null, as well as with the unlawful threat that wages would be frozen found under Par. 8(r).

[38] Chairman Battista does not rely upon the prediction that the Union would "probably call the employees out on strike." In addition, inasmuch as an employer has no obligation to pay wages or benefits during a strike, the Respondent did not violate the Act by stating this fact.

gust 20, 1997, that if the Union won the election, the Respondent would not negotiate with it and the Union would take the employees out on strike. The judge also credited the testimony of employee Darrell Thomas that, in an August 20, 1997 meeting of at least 500 employees, Null said that before they (i.e., the Respondent) would let the Union come in, they would take a strike. The judge concluded that Null's statements violated Section 8(a)(1). We adopt the judge's conclusion, to which the Respondent filed no exceptions.[39]

In agreeing with the judge, however, we do not rely on his comments regarding the Respondent's failure to videotape Null's meetings with employees. According to the judge, the Respondent videotaped Union handbilling and made campaign videos to show employees, and thus could have videotaped Null's meetings in order to remove doubt as to his statements. The judge speculated that the Respondent's failure to do so was motivated by a desire to preserve deniability. We disagree. Although a videotape of the meetings could provide useful evidence in establishing what was said, the Respondent had no obligation to make such videotapes and its failure to do so does not influence our findings.

The judge also granted the General Counsel's motion to strike Null's testimony as to his statements in meetings with employees in which videos or films were shown. We agree with his ruling.[40] As the judge found, Null held numerous meetings with groups of 20–25 employees, at which he showed the employees a film or video and answered questions. According to Null, he appeared in some of the videos and Larry Johnson appeared in one film or video, in which he spoke about plant closings and job loss and very likely spoke about wages, benefits, and strikes. Some of the other films similarly discussed strikes, wages, benefits, and past plant closings.

The Respondent refused to produce the films and videos pursuant to a subpoena and a direction from the judge. The judge found that the Respondent's refusal warranted an adverse inference that unlawful statements were made, in one form or another, at the employee meetings, and specifically that the materials would not support Null's testimony that he made no unlawful statements at the meetings, because his testimony did not exclude statements he made in the videos. In the absence of the videos and films, the judge properly found that Null's testimony regarding his statements at the meetings in which films or videos were shown constitutes secondary evidence and must be striken. It is well established that a respondent that has refused to produce subpoenaed materials that are the best evidence of a fact may not introduce secondary evidence of matters provable by those materials. *Bannon Mills*, 146 NLRB 611 (1964); *Avondale Industries*, 329 NLRB 1064, 1244–1245 (1999).

Paragraph 8(f). The judge found that Null, in a 25th-hour speech before approximately 400 employees, also threatened the employees with job loss by stating that, "if the Union was to get in [we] would have layoffs." In adopting the judge's finding, we rely on his crediting of employee Andrea Hester and his discrediting of Null, in part based on his finding that Null deviated from the prepared text of his speech. Thus, we find it unnecessary to rely on the judge's further reliance on the adverse inference that Null had previously made unlawful statements in employee meetings.[41]

Paragraph 8(i). The judge found that Plant Manager Larry Johnson, in an antiunion film, and Supervisor Billy Jackson, by showing the film to employees, threatened employees with the inevitability of strikes and strike violence. The judge relied on Null's testimony that Larry Johnson appeared in some of the Respondent's films and that some of the films discussed strikes. In addition, Latasha Peterson, who the judge found was an agent of the Respondent in its antiunion campaign, testified that she showed employees a video about strike violence. The judge also relied on the testimony of Crew Leader Margo McMillan that she attended meetings at which Supervisor Billy Jackson showed films informing employees that, if the Union came in, the result would be strikes, and that employees were also shown films depicting strike violence. Finally, the judge drew an adverse inference, based on the Respondent's refusal to produce the videos and films shown to employees, that they would not support the Respondent's denials that they contained such threats.

In agreement with the judge, we find that the record demonstrates that the Respondent threatened employees that, if they selected the Union as their collective-bargaining representative, strikes would be inevitable. Although we further agree with his finding that the Re-

[39] We therefore find it unnecessary to pass on the judge's further finding that Kill Floor Superintendent Bill Bishop also made a threat of futility on August 19, 1997.

[40] The judge found that Null did not show a film or video in his 25th-hour meetings with employees, including the meeting at issue under par. 8(e). However, he found that the Respondent's films and videos could have been relevant in determining the probability that Null made the alleged unlawful statements in the 25th-hour speeches. Although we adopt the judge's ruling and rely on it with respect to his findings of other violations, we find it unnecessary to rely on it concerning par. 8(e) and rely instead on his crediting of the employee witnesses.

[41] We find it unnecessary to pass on the judge's findings of additional threats of job loss by Null and Supervisor Johnnie Brown, as these violations would be cumulative.

spondent, through its films, conveyed to employees that strike violence was also possible, the record does not establish that the Respondent informed them that such violence was inevitable. Therefore, we dismiss this aspect of the allegation.

Paragraph 8(k). Crediting the testimony of employee Latonya Robinson, the judge found that Supervisor Bishop told employees in the August 19, 1997 employee meeting that if they voted the Union in, the Union would "turn Immigration on the Latinos." The judge found that Bishop's statement unlawfully disparaged the Union.

Although we adopt the judge's credibility determination and agree that the statement is disparaging of the Union, we do not find that it violated Section 8(a)(1). The Board has found that threats involving immigration or deportation are particularly coercive because they place in jeopardy not only the employees' jobs and working conditions, but also their ability to remain in their homes in the United States. *Viracon, Inc.*, 256 NLRB 245, 247, 252–253 (1981); see also *Mid-Wilshire Health Care Center*, 342 NLRB No. 43, slip op. at 5 (2004). However, the coercive aspect of an unlawful threat derives from the ability of the speaker or party to carry out the threat. *Viracon, Inc.*, supra; *Avondale Industries*, 329 NLRB 1064, 1244–1245 (1999). Here, Bishop did not threaten that he or the Respondent would take any action regarding the Latino employees' immigration status. Nor did he indicate that the Respondent could or would cause the Union to do so. Because employees would reasonably understand that Bishop's statement did not involve any action within the control of the Respondent, we find that it was not an unlawful threat under the Act.

Paragraph 8(s). Based on the credited testimony of employee Latonya Robinson, the judge found that, in an August 19, 1997 meeting attended by about 10 other employees, Bishop told the employees that, if they voted for the Union, the employees would be subject to a strike and the Respondent would shut down the plant. Bishop further stated that the employees would receive only $40 a week in strike benefits and that when they were out on strike they would be replaced. The judge concluded that these statements constituted an unlawful threat of job loss in the event of a strike.[42]

In adopting the judge as to this violation, we find it unnecessary to rely on the adverse inference drawn by the judge based on the Respondent's refusal to produce the videos that Bishop showed employees in meetings he conducted. Because the credited testimony pertains to statements that Bishop made in person at the meeting, the content of the video would not affect our finding that Bishop unlawfully threatened the employees as alleged in the complaint.[43]

Paragraph 8(w). In the cafeteria after the ballots in the 1997 election were counted and it became apparent that the Union had lost, Null and Plant Manager Larry Johnson told Anthony Forrest, an observer for the Respondent, "to go kick Chad Young's ass." Forrest then approached Young, and pushing and shoving began in the cafeteria. The judge based his findings on the testimony of employee Ray Ward, which he credited, and on an adverse inference that he drew from the Respondent's failure to call Forrest to testify. In adopting the judge, we find that his conclusion is sufficiently supported by the credited testimony, and find it unnecessary to rely on the adverse inference concerning Forrest.

8(a)(3) Violations

Paragraph 9. For the reasons set forth by the judge, including his credibility findings, we adopt his conclusions that the Respondent violated Section 8(a)(3) and (1) by discharging and failing and refusing to reinstate employees Tara Davis, Margo McMillan, Ray Ward, and Ada Perry.[44] However, we reverse his finding of a violation regarding Patsy Lendon.

In its exceptions, the Respondent contends that the allegation that Lendon was unlawfully discharged was procedurally barred. Specifically, the Respondent argues that the Union failed to timely appeal the Regional Director's dismissal of the charge allegation and that the allegation was reinstated outside the 6-month limitations period prescribed by Section 10(b). For the reasons discussed below, we find merit in the Respondent's exception.

Lendon was discharged on July 14, 1997, assertedly based on her use of a racial slur. The Union filed a charge on August 21, 1997. On January 30, 1998, the Regional Director dismissed this charge allegation, and, according to the General Counsel's representation at the hearing, the General Counsel subsequently denied the

[42] Chairman Battista relies solely on the threat to close the plant.

[43] Because we adopt the judge's finding of a violation based on Bishop's statement, we find it unnecessary to pass on the judge's additional findings regarding statements by Null on August 20, 1997.

[44] Contrary to our dissenting colleague, we find no reason to sever the allegations concerning McMillan and Perry. As discussed below, we refer for investigation by the General Counsel the issue of possible misconduct by the Respondent's counsel in the taking of the affidavits of Sherrie Buffkin regarding these and other allegations. However, the judge's crediting of Buffkin's hearing testimony does not depend on the outcome of such an investigation. The judge stated that he made his findings of fact, which include his credibility findings, based on the demeanor of the witnesses. With respect to the significant issues regarding McMillan and Perry, the judge credited Buffkin and discredited the Respondent's witnesses. We find that these determinations are sufficient and would not be affected by the outcome of the General Counsel's investigation of the circumstances of Buffkin's affidavits.

Union's appeal of the dismissal. Just before the first day of the hearing, the Union filed a motion for reconsideration, and, on October 30, 1998, the ninth day of the hearing, the General Counsel granted the motion.

On the same day, the General Counsel filed a motion to amend the consolidated complaint to allege an additional violation based on Lendon's termination. The Respondent objected on the grounds that the amendment was barred by Section 10(b). The General Counsel stated at the hearing that the motion was based on evidence, newly discovered during trial preparation, that the Respondent had no specific disciplinary rule and that the use of racial slurs was commonplace in the plant and tolerated by the Respondent. According to the General Counsel, this evidence demonstrated that the Respondent's asserted reason for Lendon's discharge was pretextual. The judge granted the motion to amend the complaint.

Section 102.19(c) of the Board's Rules and Regulations states that, when the General Counsel sustains the Regional Director's refusal to issue a complaint, a motion for reconsideration must be filed within 14 days of service of the General Counsel's decision.[45] A motion may also be filed based on newly discovered evidence that has become available since the decision on appeal. Here we find that neither of these circumstances has been shown.

Applying the provisions of Section 102.19(c) to the facts of this case, we find that the allegation concerning Lendon is time barred. First, the information on which the motion for reconsideration was based, that the Respondent allegedly has no disciplinary rule regarding the use of racial slurs and that the Respondent tolerated the use of such language by employees, was discoverable before the General Counsel's decision. Second, the dismissed charge was not properly reinstated.

In *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), the Board held that the General Counsel may properly accept motions for reconsideration of a dismissal after the period prescribed in the Board's Rules, but must do so within the 10(b) period. On the other hand, the Board held that the regional director contravened the purposes of Section 10(b) by reinstating a charge 10 months after the alleged violation had occurred, when no appeal of the dismissal had been filed. In *Sioux City Foundry*, 323 NLRB 1071 (1997), the Board held that the regional director could properly reinstate a charge allegation, even after the 10(b) period had expired, when an appeal of the prior dismissal was still pending with the General Counsel. The Board adopted the administrative law judge's reasoning in that case that, in contrast to *Ducane*, the issue was not closed because the appeal was pending. In the present case, the record does not show, and the General Counsel and the Union do not assert, that an appeal of the dismissal of the allegation regarding Lendon's dismissal was pending following the General Counsel's decision. Therefore, under *Ducane* and its progeny, the charge allegation could not be reinstated pursuant to the motion for reconsideration after the 10(b) period.

Nor do we find merit to the General Counsel's argument, raised at the hearing, that the allegation concerning Lendon was closely related to other allegations in the complaint. The Board has held that, even if the 10(b) period has expired, an otherwise untimely allegation may be considered if the allegation is closely related to a timely filed charge. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). In determining whether the new allegation is closely related to other allegations, the Board considers (1) whether the untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. Id.

We do not find that the allegation pertaining to Lendon's termination is closely related to other complaint allegations. The allegation that her discharge was motivated by discrimination is arguably related to the allegation of disparate enforcement of the Respondent's policy on solicitation and distribution, because Lendon's union activity involved principally solicitation of authorization cards and union support. However, the Section 8(a)(1) allegation regarding disparate enforcement of the policy on solicitation relies on a different legal theory than the Section 8(a)(3) allegation regarding Lendon's discharge. The disparate enforcement allegation rests on a legal theory of unlawful restraint, coercion, and interference with Section 7 rights, from the point of view of a reasonable employee. The legal theory of the discharge allegation, on the other hand, focuses on the discriminatory motivation of the Respondent. In addition, Lendon's alleged discharge for her union activities does not arise from the same factual situation as the disparate enforcement allegation, because the latter allegation specifies a timeframe of August 14–21, 1997, after Lendon was discharged. Finally, the Respondent's defenses to the two allegations are not the same. Its defense to the allegation about the disparate enforcement of its solicitation policy would be that it applied its policy evenhandedly. Its defense to the termination allegation, in contrast, would be that Lendon would have been discharged

[45] The General Counsel does not contend that the motion for reconsideration was filed within the 14-day period.

for nondiscriminatory reasons, i.e., using a racial slur, even in the absence of her union activities.

Similarly, the allegation at issue is not closely related to the other unlawful discharge allegations in the complaint. Although the legal theory of each violation is discrimination based on the employee's union activities, the discharges did not arise from the same sequence of events. Lendon was terminated over a month before the discharges alleged in the complaint and based on different events. In addition, the Respondent's defense regarding Lendon's discharge, citing her use of racial slurs, is different from its asserted defenses concerning the discharges of other employees.

Having found that the reinstatement of the charge allegation involving Lendon's discharge was untimely under Section 10(b) and that the allegation was not closely related to other complaint allegations, we dismiss that allegation.

OBJECTIONS

The judge found, and we agree, that the Respondent engaged in certain objectionable conduct preceding the 1997 election that warrants setting aside the election.[46] We adopt the judge's findings, for the reasons discussed in his decision, that the Respondent interrogated employees;[47] informed employees of the futility of selecting the Union as their collective-bargaining representative;[48] threatened plant closure;[49] threatened to reduce or eliminate benefits;[50] threatened to deny or delay a wage increase;[51] threatened the inevitability of strikes and plant closure;[52] discouraged employees from wearing union stickers;[53] conducted surveillance of Union handbilling;[54] and polled employees regarding their support for the Union.[55]

Objection 10. The Union alleged that the Respondent engaged in objectionable conduct by threatening employees with job loss and discharging or constructively discharging union supporters. The judge recommended sustaining the objection. The judge relied on his findings, regarding Paragraphs 8(f) and (g) of the complaint, that the Respondent unlawfully threatened job loss through layoffs and plant closure. We have adopted these unfair labor practice findings above, and we further adopt the judge's recommendation to sustain the objection.[56] In sustaining that portion of the objection that alleges that the Respondent discharged or constructively discharged union supporters, the judge specifically relied on the discharge of Patsy Lendon. We have dismissed as untimely the complaint allegation that Lendon's discharge was unlawful, and therefore have not passed on the merits of the discharge. For that reason, and because the other incidents of objectionable conduct are more than sufficient to warrant setting aside the election, we find it unnecessary to rely on the aspect of this objection pertaining to Lendon's discharge.

Objection 13. The judge recommended sustaining this objection, which asserts that General Manager Null and Supervisor Bishop threatened that, if selected as the bargaining representative, the Union would call in the Immigration and Naturalization Service. Contrary to the judge's recommendation, we overrule this objection.

As discussed in the unfair labor practice context of paragraph 8(k) above, the Board finds that threats are coercive to employees in the exercise of their Section 7 rights when the person making the threat has the ability to carry it out. *Viracon, Inc.*, supra, at 252–253; *Avondale Industries*, supra. We dismissed the allegation of Paragraph 8(k) because Bishop's statement that the Union would "turn Immigration on the Latinos" did not pertain to action by the Respondent or within the Respondent's control. With respect to this objection, we likewise find that employees would reasonably understand that the statements by Bishop and Null, to the effect that the Union would call the Immigration and Naturalization Service, did not threaten action that the Respondent would take or could cause the Union to take if

[46] Because we find that the election must be set aside on the basis of other objectionable conduct, we find it unnecessary to rely on the conduct alleged in Objections 12, 16, 19, and 32. In addition, with regard to Objection 33, we find it unnecessary to rely on the Respondent's August 21, 1997 conduct prior to the election, and do not rely on events that occurred after the ballots were counted. In the absence of exceptions, we adopt pro forma the judge's recommendations to overrule Objections 3, 8, 11, 15, 18, 20–24, and 26–30.

[47] Objection 1. We adopt the judge's findings that Plant Manager Johnson and Supervisors Charlie Newton and Roosevelt Stocks engaged in objectionable conduct by interrogating employees. We find it unnecessary to pass on the additional allegations concerning Jeff White and Lee Mount.

[48] In adopting the judge's recommendation, we rely on the conduct of General Manager Null and find it unnecessary to pass on the conduct of Supervisor Bishop.

[49] Objection 4.

[50] Objection 5.

[51] Objection 6.

[52] Objection 7. We have found above, regarding Pars. 8(g), (i), (s), and (t), that the Respondent threatened employees that strikes and plant closure would be inevitable if they selected the Union as their representative. We therefore find it unnecessary to pass on the incident described in the testimony of employee Jonathan Cook.

[53] Objection 9. We find it unnecessary to pass on whether the Respondent also discouraged employees from soliciting union cards, as also alleged.

[54] Objection 25.

[55] Objection 31.

[56] In adopting the judge's recommendation, we find it unnecessary to rely on the statements attributed to Supervisor Johnnie Brown.

the employees voted in favor of the Union. Under these circumstances, we find that employees would not reasonably be coerced by the Respondent's statements and therefore that the statements could not have interfered with employee free choice in the election.

Objection 14. The judge found that, in his 25th-hour speeches on August 20, 1997, Null engaged in objectionable conduct by threatening to take a strike rather than negotiate, threatening the inevitability of strikes and job loss, and making other objectionable statements. We adopt the judge's findings and conclude that Null's conduct interfered with employee free choice in the election. As discussed above concerning paragraph 8(e), however, in adopting the judge's crediting of Buffkin and the employee witnesses over Null, we do not rely on the judge's consideration of the Respondent's failure to videotape Null's speeches to employees. In addition, we find that the judge's ruling striking Null's testimony regarding meetings in which films or videos were shown does not apply to this objection. The credited testimony pertains to statements made by Null in person in his 25th-hour speeches, and the record does not indicate that a videotape or film was shown on these occasions.

Objection 17. The judge found that the Respondent, through former Human Resources Director Sherman Gilliard and former employee Joey Dockery, who returned to assist in the Respondent's antiunion campaign, as well as Respondent's observer Jay Ray and Security Chief Priest, engaged in electioneering near and in the polling area. In adopting the judge's recommendation to sustain the objection, we rely specifically on the conduct of Gilliard, and find it unnecessary to pass on the remaining incidents.

As the judge found, Gilliard was the human resources director and later the public relations director at the plant until March 1997, when he left for a position at another of the Respondent's facilities. He returned in July 1997 to assist in the Respondent's election campaign and spoke on behalf of the Respondent against the prospect of unionizing the plant to at least one outside group, with employees present. The judge found, and we agree, that Gilliard was an official of the Respondent at the time of the election, and that employees perceived him as such.

According to the unrefuted testimony of employee Tara Davis, Gilliard entered the voting area about six times during the election and remained there for 20–30 minutes at a time, during which time he spoke with Respondent's observers Dockery and Ray. In his testimony, Gilliard did not provide any reason for his presence in the voting area on these occasions.

We agree with the judge that Gilliard's prolonged presence in the voting area during the election constitutes objectionable conduct. In *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), the Board found objectionable one supervisor's presence 10–15 feet from the entrance of the voting area and two other supervisors' presence in areas that employees had to pass in order to vote. The Board reasoned that the only plausible explanation for their conduct was to convey to employees that they were being watched. Similarly, the Board set aside an election in *Performance Measurements Co.*, 148 NLRB 1657 (1964), because the employer's president stood by the door to the election area for prolonged periods, and employees had to pass him to enter the area.

Gilliard was known to employees as a former human resources and public relations director at the plant and as a current public relations official at another location. Employees were also aware of his role in speaking for the Respondent concerning the union campaign. Under these circumstances, we find that Gilliard's frequent and extended presence in the polling area would reasonably convey to employees that they were being watched, and that his conduct would tend to interfere with employee free choice in the election.

ATTORNEY-CLIENT PRIVILEGE

The Respondent contends that the judge erred by permitting certain testimony by former Production Support Manager Sherrie Buffkin, asserting that the testimony was subject to the Respondent's attorney-client privilege. The Respondent argues that testimony elicited by the General Counsel about meetings in July and August 1997 regarding campaign tactics and about a meeting concerning potential discipline of employee McMillan pertained to privileged attorney-client communications. In addition, the Respondent contends that the judge erred by permitting Buffkin to testify about the reasons for inconsistencies between her testimony at the hearing and her two earlier affidavits (because those inconsistencies similarly implicated the Respondent's attorney-client privilege).

We find that, even assuming arguendo that the cited attorney-client communications regarding the discipline of McMillan were privileged, the judge did not err in permitting Buffkin's testimony as an offer of proof, and that even without the offer of proof the evidence establishes that the Respondent unlawfully discharged McMillan. Furthermore, we find that the content of the July and August 1997 meetings was not privileged,[57] and that the

[57] According to Buffkin's testimony, the meetings concerning campaign tactics were conducted by General Manager Null and Plant Manager Johnson and attended by other managers. Null and Johnson instructed the managers, among other things, to enforce rules more strictly and to warn employees of possible adverse consequences if they selected the Union. The Respondent suggested in its hearing objection

communications between Buffkin and the Respondent's attorneys regarding the preparation of Buffkin's affidavit were within the scope of the crime/fraud exception to the attorney-client privilege.

The Board recognizes the fundamental principle that communications made in confidence between an attorney and his or her client for the purpose of seeking and obtaining legal advice are privileged. *Patrick Cudahy, Inc.*, 288 NLRB 968, 969 (1988). See also 8 *Wigmore on Evidence* § 2292 (McNaughton rev. 1961). Without the protection afforded by this privilege, the open communication necessary for accurate and effective legal advice would be virtually impossible. When the advice pertains to future wrongdoing, however, the policy considerations underlying the privilege do not apply. Id. at § 2298. For this reason, the crime/fraud exception to attorney-client privilege is also well established in federal law. Id. The Board applies the crime/fraud exception, but has held that the exception does not encompass violations of the Act. *Cudahy*, supra, at 973.

Testimony Regarding McMillan Discharge. Buffkin was asked on direct examination by the General Counsel about a discussion among the Respondent's counsel, William P. Barrett, superintendent John Hall, Null, and Buffkin regarding the possible discharge of McMillan.[58] The Respondent objected to the testimony on the basis of attorney-client privilege, and the General Counsel asserted that the crime/fraud exception applied. The judge permitted the General Counsel to elicit the testimony as an offer of proof. In summarizing Buffkin's direct testimony in his decision, the judge did not discuss the substance of this conversation, nor did he cite it in his analysis concerning McMillan's discharge. In his recitation of the testimony elicited by the Respondent from Hall and Barrett, the judge included their denials of the statements described by Buffkin.

Even assuming that the discussion with the Respondent's counsel regarding the possible discharge of McMillan was protected by the attorney-client privilege, we find nothing improper in the judge's rulings at the hearing or in his decision. When the Respondent objected to Buffkin's testimony on the ground of attorney-client privilege, the judge allowed testimony concerning the discussion to be presented as an offer of proof. See *Blankenship & Associates*, 290 NLRB 557, 564 (1988). Even excluding the testimony, the violation is established. That is, applying the *Wright Line* test, the judge found, based on other evidence, that the General Counsel satisfied his initial burden and that the Respondent failed to show that it would have discharged McMillan in the absence of her union activity. Therefore, we find that Buffkin's testimony, in the offer of proof, did not affect the result as to the complaint allegation.

Testimony Regarding Buffkin's Affidavits. The Respondent contends that the judge improperly questioned Buffkin regarding the reasons for contradictions between her hearing testimony and affidavits offered into evidence by the Respondent. In addition, the Respondent argues that the judge improperly permitted Buffkin to testify about communications with attorney Barrett concerning the preparation of the affidavits. We reject the Respondent's contentions.

During her direct examination by the General Counsel, Buffkin testified about the terminations of employees McMillan and Perry. On cross-examination, the Respondent introduced two affidavits signed by Buffkin that contradicted her testimony. The Respondent directed Buffkin's attention to each affidavit statement that appeared inconsistent with her testimony and asked her whether she had signed the affidavit containing the statement under penalty of perjury. Buffkin acknowledged the content of the affidavits and that she had signed them under penalty of perjury. However, she testified that her hearing testimony, rather than the statements in the affidavits, was true.

After a long series of such exchanges, the judge asked whether Buffkin was aware that the affidavits were false when she signed them. She replied that she was, but that she had a job and could not "go against" the Respondent. The judge further inquired whether there were any communications between Buffkin and Barrett during the preparation of the affidavits that indicated that Barrett was aware that the facts in the affidavits were untrue. Buffkin testified that Barrett was aware of the false statements. According to Buffkin, although certain statements appeared to be simple mistakes, others were included, even though she informed Barrett that they were incorrect, because he said that she needed to make the statements as they appeared. She testified that the affidavits also included statements that she had never made but that were inserted when the Respondent's attorneys prepared the final copies.

The judge found that the communications between Buffkin and Barrett regarding the affidavits were not

that the instructions conveyed to the managers may have resulted from privileged communications between the Respondent's upper management and its attorney. However, Buffkin's testimony pertained only to her instructions from her management superiors, not to any communications to or from counsel. Therefore, we find no basis for an attorney-client privilege as to Buffkin's testimony.

[58] In agreement with the judge, we have found above that McMillan was unlawfully discharged.The issue of Buffkin's affidavits, discussed below, had not yet arisen in the record. As discussed below, the Respondent introduced the affidavits in its cross-examination of Buffkin because of her testimony in contradiction of those prior statements.

covered by attorney-client privilege. He reasoned that, by introducing the affidavits to impeach Buffkin's testimony and questioning her about the inconsistencies, the Respondent opened the issue of perjury, as well as possible subornation of perjury and knowing introduction of false statements of material fact. He concluded that the affidavits fell within the crime/fraud exception to the attorney-client privilege, and that by introducing them the Respondent had waived any attorney-client privilege regarding them.[59]

We agree with the judge that the communications between Buffkin and the Respondent's attorneys involving the taking of the affidavits are within the scope of the crime/fraud exception. Even assuming that these communications were otherwise protected by the Respondent's attorney-client privilege, Buffkin's credited testimony indicates that the communications pertained to the alleged preparation of false affidavits and therefore involved the alleged future commission of one or more of the crimes identified by the judge.[60]

[59] The judge further recommended that the Board refer attorneys Barrett and Margie Case for investigation of possible misconduct, including perjury in their testimony and, in Barrett's case, suborning perjury by Buffkin. Board's Rules and Regulations, Sec. 102.177. Although the Rules permit any person, including the judge involved in the proceeding, to make a referral to the Investigating Officer, we nevertheless agree with the judge's recommendation and refer the matter for investigation.

[60] See *White v. American Airlines*, 915 F.2d 1414, 1423–1424 (10th Cir. 1990) (applying crime/fraud exception under Oklahoma law to employer's outside counsel's request that employee commit perjury in deposition).

The Respondent argues that the General Counsel failed to meet his burden of making a prima facie showing that the crime/fraud exception applies. A prima facie showing of the applicability of the crime/fraud exception requires evidence that, if believed, would establish the elements of an ongoing or future crime or fraud. *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997). We find that the record demonstrates a prima facie showing, based on the inconsistencies between Buffkin's testimony and her affidavits, and her testimony that the affidavits contained false statements, that she knew the statements were false, and that the Respondent's counsel knew they were false.

In addition, the Respondent contends that the judge improperly failed to consider the evidence in camera before permitting Buffkin's testimony on the record. We disagree. *In re Richard Roe*, 168 F.3d 69 (2d Cir. 1999), cited by the Respondent, involved the in camera inspection of documents in a grand jury proceeding in order to determine, as a matter of law, whether they were covered by the crime/fraud exception. There, the introduction before the grand jury of documents properly protected by the privilege could taint the fact-finding decisions of the grand jury. Here, by contrast, not only was the evidence asserted to be covered by the privilege testimony rather than documents, but it was also to be considered by the judge as finder of fact and law. Thus, the harm sought to be avoided in *Roe*, i.e., the undue influencing of the grand jury by evidence that might be determined to be inadmissible, does not arise in these proceedings. See 2001–2002 Cumulative Supplement, *Wigmore on Evidence* § 2298. We find no error by the judge.

REMEDIES

The Respondent excepts to the judge's recommendation of several extraordinary remedies for the Respondent's unfair labor practices. We find that the following remedies recommended by the judge are appropriate in the circumstances of this proceeding: a broad cease-and-desist order; mail notice to all employees employed since July 3, 1993; the posting and mailing of a Spanish-language notice; a reading of the notice by a Board Agent (in English and Spanish); and providing the Union a list of the names and addresses of current employees, upon request within a year of this Decision.[61] The judge also recommended that the new election be conducted at a neutral site or by mail ballot. As in all cases, we leave the determination of the appropriate method and location for the election to the discretion of the Regional Director.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, The Smithfield Packing Company, Inc., Tar Heel Division, Tar Heel, North Carolina, its officers, agents, successors, and assigns shall take the action as set forth in the Order as modified.

1. Cease and desist from

(a) Threatening employees with plant closure if they select the Union as their collective-bargaining representative.

(b) Threatening employees with discharge because of their support for the Union.

(c) Threatening employees with discipline for engaging in union activity.

(d) Coercively questioning employees about their union support or activities.

(e) Informing employees that it would be futile to select the Union as their bargaining representative.

(f) Promulgating an unlawful no-solicitation rule in order to discourage employees from supporting the Union.

(g) Maintaining and continuing to maintain an overly broad no-solicitation and no-distribution rule regarding Respondent's premises in order to discourage employees from supporting the Union.

(h) Applying its no-solicitation and/or its no-distribution rule in a disparate manner in order to discourage employees from supporting the Union.

(i) Creating the impression among employees that their union activities are under surveillance.

[61] Member Walsh would provide all of the special notice and access remedies proposed by the judge for the reasons set forth by the judge in his opinion.

(j) Engaging in surveillance of employees in order to discourage them from supporting the Union.

(k) Intimidating and coercing employees while union literature is being distributed to its employees in order to discourage them from supporting the Union.

(l) Confiscating union literature from employees in order to discourage them from supporting the Union.

(m) Harassing employees because of their support for the Union.

(n) Threatening employees that selecting the Union as their collective-bargaining representative would cause trouble between the Respondent and its employees.

(o) Promulgating a rule prohibiting employees from wearing union or nonunion insignia or paraphernalia of any type while on its premises.

(p) Threatening employees with loss of wages and benefits if the employees selected the Union as their collective-bargaining representative.

(q) Threatening employees with the futility of selecting the Union as their collective-bargaining representative.

(r) Threatening employees with loss of jobs in the event of a strike.

(s) Threatening employees with plant closure in the event of a strike.

(t) Threatening employees with the inevitability of strikes.

(u) Threatening employees with unspecified reprisals if the Union won the election.

(v) Polling employees concerning their support for the Union.

(w) Making a promise of benefits and improved working conditions to discourage employees from supporting the Union.

(x) Threatening employees that wages would be frozen if the Union were elected as their collective-bargaining representative.

(y) Assaulting employees in retaliation for their union activities.

(z) Causing the arrest of employees in retaliation for their union activities.

(aa) Threatening violence in retaliation for employee union activities.

(bb) Suspending employee Fred McDonald because of his union and other protected activities.

(cc) Discharging or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union, Local 204, AFL–CIO, CLC or any other labor organization.

(dd) Issuing a written warning to George Simpson because of his union or other protected activities.

(ee In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry full reinstatement to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed.

(b) Make whole employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, rescind the written warning unlawfully issued to George Simpson on January 10, 1994.

(d) Within 14 days from the date of this Order, rescind the unlawful suspension of Fred McDonald on September 20, 1994.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against its employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, and within 3 days thereafter notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Within 14 days from the date of this Order, rescind its unlawful no solicitation/no distribution rules and publish notices to employees that such rules have been rescinded and what the lawful rule is, in conspicuous places including all places where notices to employees are customarily posted.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Tar Heel, North Carolina facility copies of the at-

tached notice marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Mail copies of the notice to all its present employees and all former employees employed by the Respondent since July 3, 1993.

(j) Post, mail, and publish in the same manner a Spanish language translation of the Board notice.

(k) During the time the notice is posted, convene the unit employees during working time at the Respondent's Tar Heel, North Caroline facility, by shifts, departments, or otherwise, and have a Board agent, in the presence of a responsible management official of the Respondent, read the notice to employees. The notice must also be read in Spanish.

(l) Supply the Union, upon request made within 1 year of the date of this Decision and Order, the full names and addresses of its current unit employees employed at its Tar Heel, North Carolina plant.

(m) 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 a second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers, Local 204, AFL–CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C., December 16, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would dismiss the allegations that the Respondent violated Section 8(a)(1) by having employee Chris Council stamp an antiunion message on hogs as they went down the line.[1] In addition, I would dismiss the allegation concerning the discharge of Lawanna Johnson,[2] and I would sever and hold in abeyance the allegations concerning the discharges of Margo McMillan and Ada Perry.[3]

Chris Council. The majority finds that the Respondent unlawfully harassed employee Council, a union sup-

[62] 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."

[1] 1995 complaint, par. 9(ff).
[2] 1995 complaint, par. 12.
[3] 1998 complaint, par. 9.

porter, by having him stamp hogs with a "Vote No" stamp. In the majority's view, the Respondent compelled Council, through this assignment, to participate in its antiunion campaign. The facts, however, do not show that Council was compelled to perform the assignment. In the absence of any coercion by the Respondent, I find that the Respondent's actions were lawful.

On the day of the election, Supervisor James Hargrove gave employee Council a stamp and instructed him to stamp the hogs on the line. Council initially complied with Hargrove's direction without inquiring about the purpose or message of the stamp. At that point, Council did not know the content of the message. After having stamped about 50 hogs, Council asked Supervisor Randy Hall what he was stamping on the hogs, and Hall replied that the stamp said, "Vote No." Council then told Supervisor Randy Gebbie that he objected to the assignment. Gebbie relieved Council of the task, and another employee continued the stamping.

There is no contention that the Respondent could not place any message it wanted on its own product. Rather, the allegation is that, inasmuch as the message was an antiunion one, the Respondent could not force an employee to perform that task. In the instant case, the Respondent did not force the employee to perform the task. As soon as Council became aware of the message and protested the task, the Respondent immediately removed him from the task.

Nor can it be said that the Respondent tricked Council into performing the task before he realized what the message was. The message was not hidden. It was there for all to see. Indeed, other employees on the line saw it. Thus, the Respondent was not tricking Council. If Council had simply looked at the stamp, he could have immediately protested and he would have been relieved of the task.

My colleagues say that the Respondent's assignment of the task placed Council in the position of continuing the assignment or revealing his prounion position. Even assuming arguendo that this amounts to an unlawful inquiry into Council's sentiments, the fact is that the complaint does not even allege an unlawful interrogation. Accordingly, no violation can be found on this basis. Further, even if interrogation were properly alleged, the fact is that Council was a known union adherent.[4]

My colleagues say that the solicitation of an employee to appear in an antiunion videotape is "inherently coercive" citing *Allegheny Ludlum*, 333 NLRB 734 (2001). That concept is wholly inconsistent with the court cases, cited with approval in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.3d 1006 (9th Cir. 1985), which teach that interrogation cases are not to be decided on a "per se" basis. The Board must look to all of the surrounding circumstances to determine whether the conduct is coercive. In addition, *Allegheny Ludlum* addresses a different issue. In that case, the employer solicited an employee to appear in a video that the employee knew to be antiunion. Thus, the employee was forced to tell his employer whether he consented or declined to participate in the antiunion activity. By contrast, in the instant case, Council did not know that the activity was antiunion, and he was therefore not put "on the spot" to declare his allegiance.

Finally, Council's fellow employees would not reasonably view him as being antiunion as a result of the incident. He was a known prounion adherent, and he protested the assignment as soon as he became aware of the antiunion nature of the stamped message.[5]

Lawanna Johnson. I agree with the findings of the judge and my colleagues that the General Counsel established a prima facie case, under *Wright Line*,[6] that the Respondent's discharge of Lawanna Johnson was motivated by antiunion animus. However, unlike them, I would find that the Respondent satisfied its rebuttal burden of showing that it would have discharged her even in the absence of her union activity.

The Respondent asserts that it discharged Lawanna Johnson because of her violation of the last chance agreement. The record supports that position. Lawanna Johnson had a history of absences during her 1 year of employment with the Respondent. When she became ill around September 21, 1993, she presented a doctor's note to her supervisor, Timothy Dale Smith, which stated that she needed to be out of work until October 10, 1993. When she failed to return to work on October 11, 1993, as anticipated, she was terminated. However, when she subsequently presented a new note extending the period of her absence until November 1, 1993, the Respondent reinstated her.

[4] The Board has found that employers have not unlawfully interrogated employees where the employees are open union supporters and the interrogation is not accompanied by other coercive circumstances. See, e.g., *A. Montano Electric*, 335 NLRB 612, 618 (2001); *Briar Crest Nursing Home*, 333 NLRB 935, 944–945 (2001); *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 626 (1987), enfd. mem. 849 F.2d 601 (3d Cir. 1988), cert. denied 488 U.S. 1041 (1989). As even my colleagues acknowledge, the fact that Council was a known union adherent is a factor to be considered.

[5] Compare the cases cited by my colleagues where fellow employees could reasonably conclude that the wearer of the antiunion T-shirt and bearers of the antiunion signs were antiunion.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

When Lawanna Johnson returned to work on November 1, 1993, she signed a last chance agreement, which required, among other things, "that for the next three (3) month period, you do not miss anytime [sic] from work for any reason." The agreement further stated

> Failure to follow the conditions set forth in this 'last chance agreement' will result in your employment being terminated by reason of excessive absenteeism, failure to comply with last chance letter, generally unsatisfactory employee.

On November 4, 1993, however, Lawanna Johnson again missed work when her husband experienced medical problems. When she reported to work the following day, the Respondent terminated her in accordance with the terms of the last chance agreement.

The General Counsel does not allege that the Respondent acted with a discriminatory motive in requiring her to sign the last chance agreement.[7] Nor can it be disputed that she violated the clear requirement of that agreement that she not miss work *for any reason* for a period of 3 months. The Respondent had every right to enforce the agreement, which also provided specific notice that the penalty for further absenteeism was discharge.

The majority states that the Respondent made exceptions to its attendance policy for other employees in hardship situations involving a sick family member. However, the record does not show that any employee who was allowed such an exception was subject to a last chance agreement. By virtue of the last chance agreement, Lawanna Johnson was in a different position from all other employees with respect to the Respondent's attendance policy. The agreement specifically set forth the terms applicable to her, which included that she not be absent for any reason. The Respondent demonstrated that she failed to comply with that requirement. Therefore, I would find that the Respondent met its burden of showing that it would have discharged her even in the absence of her union activities, and I would dismiss the complaint allegation.[8]

Margo McMillan and Ada Perry. The majority adopts the judge's findings that the Respondent violated Section 8(a)(3) by discharging employees McMillan and Perry. I would sever these allegations for further consideration after the General Counsel's investigation of possible misconduct by the Respondent's counsel.

The judge's findings as to the Respondent's motivation in discharging each of these employees depend substantially on the testimony of Sherrie Buffkin, which testimony the judge credited. With respect to McMillan, the judge found, based on Buffkin's testimony, that General Manager Null considered the laundry, where McMillan worked, to be a hothouse of union support. The judge also relied solely on Buffkin's testimony in finding that Plant Superintendent Hall withdrew his offer to transfer McMillan to the label cage because Null told Hall and Buffkin that he did not want McMillan in the label cage because it was "still too populated." Hall sent McMillan home and subsequently discharged her. Citing Buffkin's testimony, the judge rejected the Respondent's contentions that it did not know that McMillan was engaged in union activity and that it discharged her based on a history of complaints about her behavior toward other employees and managers.

Similarly, Buffkin provided the critical testimony in the judge's determination that the Respondent unlawfully discharged Perry. Perry was terminated on January 30, 1998, a time significantly removed from the August 1997 election. Nevertheless, the judge found that the discharge was unlawfully motivated by Perry's union activities. In doing so, the judge relied on Buffkin's testimony that, after an antiunion campaign meeting approximately a week before the election, Null told her that he wanted Perry terminated, but that he wanted her to wait 4–5 months "till all of this blew over."

It is clear that Buffkin's testimony as to both of these employees was key. The Respondent excepts to the judge's crediting of Buffkin's hearing testimony, however, on the basis that it conflicted with pretrial affidavits introduced by the Respondent. The judge did not credit the affidavits, and recommended a referral to the General Counsel for investigation of possible misconduct by the Respondent's counsel regarding the taking of the affidavits.

I agree with my colleagues that it is appropriate to refer this matter for investigation. Unlike my colleagues, however, I would sever the allegations regarding the discharges of McMillan and Perry, which crucially depend on Buffkin's testimony, until the questions concerning her affidavits are thoroughly investigated. The investigation might produce no basis for disturbing the judge's reliance on Buffkin's hearing testimony. However, it is at least possible that it could produce findings that would support the proposition that the affidavits were freely given by Buffkin. If so, Buffkin would have given inconsistent versions of the same incidents. This would tend to undermine Buffkin's credibility at the hearing to

[7] Similarly, none of the other incidents set forth in the majority opinion are even alleged to be unlawful (e.g., the assignment to clean the floor, and the termination of October 1993).

[8] I recognize that there may have been extenuating circumstances for Lawanna Johnson's absence. However, the Respondent could lawfully enforce the literal language of the last chance agreement (i.e., absence for any reason).

such a degree that "the clear preponderance of all the relevant evidence" would show that the judge's credibility determination was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Under the circumstances presented here, in which a further examination of an important matter will be undertaken, the Board should defer its decision until all of the relevant evidence is received.

Dated, Washington, D.C., December 16, 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 threaten you with plant closure if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with discharge because of your support for the Union.

WE WILL NOT threaten you with discipline for engaging in union activity.

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

WE WILL NOT inform you that it would be futile to select the Union as your bargaining representative.

WE WILL NOT promulgate an unlawful no-solicitation rule in order to discourage you from supporting the Union.

WE WILL NOT maintain an overly broad no-solicitation and no-distribution rule regarding our premises in order to discourage you from supporting the Union.

WE WILL NOT apply our no-solicitation and/or our no-distribution rule in a disparate manner in order to discourage you from supporting the Union.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT engage in surveillance of you in order to discourage you from supporting the Union.

WE WILL NOT intimidate and coerce you while union literature is being distributed in order to discourage you from supporting the Union.

WE WILL NOT confiscate union literature from you in order to discourage you from supporting the Union.

WE WILL NOT harass you because of your support for the Union.

WE WILL NOT threaten you that selecting the Union as your collective-bargaining representative would cause trouble between us.

WE WILL NOT promulgate a rule prohibiting you from wearing union or nonunion insignia or paraphernalia of any type while on our premises.

WE WILL NOT threaten you with loss of wages and benefits if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with the futility of selecting the Union as your collective-bargaining representative.

WE WILL NOT threaten you with job loss in the event of a strike.

WE WILL NOT threaten you with plant closure in the event of a strike.

WE WILL NOT threaten you with the inevitability of strikes.

WE WILL NOT threaten you with unspecified reprisals if the Union wins the election.

WE WILL NOT poll you concerning your support for the Union.

WE WILL NOT make a promise of benefits and improved working conditions to discourage you from supporting the Union.

WE WILL NOT threaten that wages would be frozen if the Union were elected as your collective-bargaining representative.

WE WILL NOT assault you in retaliation for your union activities.

WE WILL NOT cause your arrest in retaliation for your union activities.

WE WILL NOT threaten violence in retaliation for your union activities.

WE WILL NOT suspend you because of your union or other protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting United Food and Commercial

Workers Union, Local 204, AFL–CIO, CLC or any other labor organization.

WE WILL NOT issue a written warning to you because of your union or other protected activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights or privileges previously enjoyed.

WE WILL make Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL rescind the written warning unlawfully issued to George Simpson on January 10, 1994.

WE WILL rescind the unlawful suspension of Fred McDonald on September 20, 1994.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions against Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

THE SMITHFIELD PACKING CO., INC.

Jasper C. Brown, Esq., Donald R. Gattalaro, Esq., and *Joseph T. Welch, Esq.,* for the General Counsel.

William P. Barrett, Esq., James C. Dever, III, Esq., Terence D, Friedman, Esq., Joel H. Katz, and *Joshua M. Krasner, Esq. (Maupin, Taylor & Ellis, P.A.),* of Raleigh, North Carolina, for the Respondent and Employer.

Ana Avendano, Esq., Renee L. Bowser. Esq., and *Mr. Frank Jackson,* all of Washington, DC, for the Charging Party and the Petitioner.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Charges were filed by United Food and Commercial Workers Union, Local 204, AFL–CIO, CLC (the Union, the Charging Party, or the Petitioner) against The Smithfield Packing Company, Inc., Tar Heel Division (Respondent or the Employer).[1] Complaints were issued collectively alleging that, as more fully set forth below, Respondent engaged in unfair labor practices in 1993, 1994, 1995, 1997, and 1998 within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] Respondent denies violating the Act.

The above-entitled unfair labor practice cases were consolidated, and they were further consolidated with Case 11–RC–6221, which involves the Union's Objections to the Election and Conduct Affecting the Results of the Election of August 21 and 22, 1997.

A hearing on these consolidated cases was held before me in Whiteville, North Carolina, on October 19–22, 1998, and in Elizabethtown, North Carolina, on October 26–28, November 2–5, 1998, January 13–14, 19–22, and 25–28, February 1–5, 10–12, 16–19, and 22–25, March 1–5, 10–12, and 16, and July 19, 1999.[2] On the record in this proceeding, including the de-

[1] It formerly did business as Carolina Food Processors, Inc.

[1] The allegations to be considered herein are found in a consolidated complaint issued herein on October 25, 1995, GC Exh. 1(wwww), and a consolidated complaint issued herein on May 21, 1988, GC Exh. 1(jjjjjj). On October 16, 1998 the Region amended the May 21, 1998 consolidated complaint by renumbering par. 7 to become par. 7(a) and adding, as par. 7(b), the following:

> At all times material herein, an Unnamed Agent has been, and is now, an agent of Respondent, acting on its behalf, and is an agent within the meaning of Section 2(2) and 2(13) of the Act.

At the hearing herein counsel for the General Counsel amended (1) the October 25, 1995 consolidated complaint on October 19, 1998, and January 13, 1999, by withdrawing certain allegations, and (2) the May 25, 1998 consolidated complaint on January 13, 1999, by withdrawing certain allegations, on November 5, 1998, by naming William P. Barrett as the heretofore "Unnamed Agent" specified in par. 7(b) of the complaint, and on November 3, 1998, by adding Patsy Lendon to par. 9 of the complaint. Henceforth the allegations will be specified in terms of the 1995 complaint or the 1998 complaint. All of the allegations involve Respondent's Tar Heel, North Carolina facility.

[2] The scheduled November 30, 1998 resumption was postponed indefinitely by Order of the National Labor Relations Board (the Board), dated November 25, 1998, pending the Board's consideration of the Respondent's request for special permission to appeal. By Order dated December 16, 1998, the request for special permission to appeal was denied, with one Board member dissenting. The hearing resumed on January 13, 1999.

Toward the end of the March 1999 session of the hearing herein counsel for the General Counsel moved that the record be kept open in view of the fact that the Board's Region 11's dismissal of a charge involving Darrell Thomas in Case 11–CA–18184 had been appealed to the Office of Appeals of the Board and another charge involving Thomas in Case 11–CA–18247 was being investigated by the Region. The motion was granted.

On May 6, 1999, Respondent filed a motion to supplement record. Both counsel for the General Counsel and the Charging Party filed opposition pleadings.

During a telephonic conference with the parties on May 14, 1999, it was indicated that the Board's Office of Appeals had denied the appeals from the Region's dismissals in both of the aforementioned cases. The Charging Party indicated that it would file a petition for reconsideration. Counsel for the General Counsel was directed to file a motion to close the record.

Counsel for the General Counsel filed a motion to close the record datd May 17, 1999.

meanor of the witnesses and after due consideration of the briefs filed by the General Counsel, the Union,[3] and Respondent in January 2000, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Virginia corporation, has a facility, as noted above, located at Tar Heel where it is engaged in the slaughtering of hogs and in the processing and sale of pork products. Respondent admits that during the 12 months preceding the issuance of the involved complaints it sold and shipped from its Tar Heel facility products valued in excess of $50,000 directly to points outside the State of North Carolina. I find that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The 1995 Complaint

1. Paragraph 9(b)

Paragraph 9(b) of the complaint alleges that Respondent, through Supervisors Henry Morris in mid-March 1993, on March 2, and on August 10, 1994, and Bill Bishop, on or about August 20, 1994, threatened its employees with plant closure if they selected the Union as their bargaining representative.

With respect to the allegation involving Henry Morris on March 2, 1994, Respondent's former employee Waymon Lock testified that he attended a meeting on March 2, 1994, with about 200 other employees in the upstairs cafeteria; and that the then-Plant Manager Henry Morris spoke to the employees telling them that the "Union couldn't do nothing for the employees and the only thing the Union could do is close plants," and before he would let a Union come in there he would close the plant or bring in Hispanics. Lock also testified that Greg Spann and Kenneth Spann attended this meeting. On cross-examination Lock testified that Morris was reading from a prepared statement.

Respondent's former employee Kenneth Spann, who worked for Respondent from 1993 through 1994, testified that on March 2, 1994, he attended a meeting in the breakroom with about 300 to 400 employees; and that Henry Morris spoke at this meeting saying that "to have a Union in there, with the Union dues that we were paying, we could save that money by taking our kids to a movie or buying groceries and before a Union came in there they would close the plant." On cross-examination Kenneth Spann testified that he was about 15 feet from Morris and while Morris had papers in front of him he was not sure if Morris was reading from them; and that as he was giving the speech Morris did repeatedly look down at the papers.

With respect to the allegation involving Bill Bishop threatening employees on or about August 20, 1994, Respondent's former employee Larry Jones testified that in mid-July 1994 Bishop asked him why he wore a union T-shirt to work, Bishop said that the Union could not do anything for the employees but cause the plant to shut down and cause the employees to lose wages; and that supervisor Marty Hast and a couple of employees were passing when Bishop made these statements.

Diane Fairley's testimony regarding what Morris allegedly said on August 1, 1994, is summarized below under paragraph 9(z) of the 1995 complaint.

The Respondent's former Supervisor Bill Bishop, who was assistant superintendent in conversion at Tar Heel at the time, testified that he never commented to Larry Jones about wearing a union T-shirt and he never told Larry Jones that he was disappointed in him for wearing a union T-shirt; that he never told Jones or any other employee during 1994 that if the Union got into the Tar Heel facility, the employees would lose pay, the plant would close, or employees would lose wages or benefits; and that he did not remember questioning Jones about why he was wearing a union T-shirt.

Larry Jones also testified that in early August 1994 he attended a big company meeting in the cafeteria where Henry Morris said that they should not "vote for the Union because the only thing . . . [the employees] will have to do is pay Union dues and the plant would shut down and our family wouldn't have no way for sick benefits or nothing like that." On cross-examination Jones testified that Morris said that "the Union would make the Company shut down and we would have to pay Union dues and our families wouldn't have no benefits"; that Morris was standing at a podium but he did not know if Morris was reading the speech; and that the meeting lasted about 40 minutes.

Henry Morris, who was the vice president of operations at Respondent's Tar Heel facility from 2 months after it opened in October 1992 until he left Respondent on June 30, 1995, testified that he was in charge of the Tar Heel operation, the top site official at that facility; that there was a UFCW organizing drive which began sometime in 1993 and culminated in an election in

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During a telephonic conference on May 17, 1999, with the parties, Respondent indicated that it would be filling a second motion to supplement record because it had just received three of Respondent's personnel files from the Charging Party, which files the Charging Party indicated were inadvertently retained by it The Respondent indicated that it wanted to introduce certain of the involved records which if it had earlier, it would have introduced at the hearing herein. Respondent was directed to file a motion giving the specifics.

Respondent filed a second motion to supplement record dated May 21, 1999. The Charging Party filed a response indicating that it did not object to the introduction of specified documents from the returned documents. On June 7, 1999, counsel for the General Counsel filed a motion in response to Respondent's second motion to supplement record. In it, one of counsel for the General Counsel indicated that he did not object to Respondent's introduction of the involved documents provided all parties had the opportunity to respond to the documents through cross-examination and opposing counsel be allowed to present a limited response to their introduction. Also, counsel for the General Counsel rquested that a ruling on his motion to close the hearing be deferred until all evidence is presented.

During a telephonic conference on June 7, 1999, with the parties it was determined that the earliest all parties would be available was July 19, 1999.

[3] The Union's motion to correct its brief is granted.

August 1994; that he gave speeches (R. Exhs. 83 through 87), to the Respondent's Tar Heel employees during the organizing drive; that he gave Respondent's Exhibit 83 from April through August 1994; that it was his practice to read the prepared text, with his handwritten changes, word for word; that he did not vary from the prepared text and he did not ad lib anything prior to the speech or afterwards; that he delivered Respondent's Exhibit 84 on or about the date indicated at the top of the first page, namely May 18, 1994, and he delivered it as written; that Respondent's legal counsel had gone over the speeches he gave to make sure that he was not saying anything that was improper or illegal; that he gave Respondent's Exhibit 85 from May through August 1994, probably later than Respondent's Exhibits 83 and 84; that he gave Respondent's Exhibit 86 within 30 or 45 days of the August 25, 1994 election; that he gave Respondent's Exhibit 87, the Respondent's 25th hour speech, just prior to the election in August 1994 in the dry storage warehouse over the new conversion room, which was large enough to accommodate about 99 percent of the employees;[4] that he only gave these five speeches to the employees during this campaign and he did not address the employees assembled as a group in any other fashion during that campaign; that he never told employees in any of his speeches that the Company would close the plant if the Union came in;[5] that he never told employees that the Union would make the Company shut the Tar Heel plant down; and that he never told employees that they would lose wages[6] and benefits[7] if the Union came in. During cross-examination of Morris by one of counsel for the General Counsel the following happened:

> Q. Now going back to my very first question. What do you recall if anything instructing supervisors on how to conduct themselves during the campaign?
>
> MR. BARRETT: Objection to the extent this calls for revealing legal advice given to Mr. Morris and transferred to the rest of the Management Team.
>
> JUDGE WEST: Overruled.
>
> MR. BARRETT: I instruct the witness not to answer that.
>
> MR. GATTALARO: Your Honor, I again move that the witness' testimony be stricken as well as the speeches.
>
> JUDGE WEST: I'll take it under advisement.

Analysis

On brief the General Counsel contends that Morris would not have found it difficult to ad lib a direct threat of plant closure in his speeches, and, in the alternative, that Morris' statements about plant closing violated the Act because he clearly equated unionization with plant closure and loss of jobs without any explanation therefor; and that employees could reasonably infer that their employer was telling them that they would lose their jobs due to plant closure if they selected the Union as their representative.[8]

The Respondent on brief argues that Larry Jones' testimony is uncorroborated; that Chris Council testified that Morris, in

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[4] All of Morris' prior speeches to the employees had been given in the cafeteria, the size of which necessitated giving those speeches more than once. R. Exh. 87 was given once and Morris testified thathe read the speechf rom a teleprompter.

[5] The following appears at pp. 17 and 18 in R. Exh. 87:

> This business is very competitive, and it is also highly regulated by the U.S. Government. There are long lists of rules which we all must follow in the meat packing industry. We don't think that there should be any more rules imposed by unions on how we run our business. We must maintain as much flexibility as we can in order to better serve our customers. If the day ever comes when we cannot say, "We have given our best to our customers," then *we should close the doors forever*. [Emphasis added.]

The following appears at p. 5 in R. Exh. 86:

> You would be smart to look around you and see who these people are that talk the union up. Ask yourself, are you willing to risk your job and the future of this operation on them.
>
> One thing is certain, if the going get[s] rough, they ain't going to be around to help you pay your bills or find you a job.

And the following appears at p. 9 in R. Exh. 86:

> The Union has won election[s] in over 500 pork processing plants across America. How many of those plants were they won elections are open today? The answer is . . . there are only 46 plants open. Of the 500 plants where the union won elections, where the union promised people the same things they are promising you, only 46 remain open.

[6] The following appears in R. Exh. 83:

> THOSE OF YOU WHO WERE HERE IN FEBRUARY WILL REMEMBER I TOLD YOU THAT BY SEPTEMBER OF THIS YEAR WE WILL HAVE SOLVED MOST OF OUR START-UP PROBLEMS REGARDING PERSONNEL, QUALITY, YIELDS AND PRODUCTIVITY AND THAT A PAY RAISE IS ANTICIPATED. THAT IS STILL THE PLAN AND WE ARE RECEIVING AND RECOMPARING JOB RATES FORM [SIC] JOB TO JOB.

The following appears in R. Exh. 84:

> I told you I wanted to talk to you about some good news and so let's discuss the good news. I mentioned in an earlier meeting that we were going to give a raise in September, and we are. We are working on the amount of the raise right now and we will be in a position to tell you about that in the near future.

The following appears in R. Exh. 86:

> I hope the union doesn't mes up your September pay increase the way they've messed things up for Lundy employees for over a year now.

[7] The following appears in R. Exh. 83:

> WHAT THE LAW ACTUALLY SAYS IS THAT *DURING* THE BARGAINING PROCESS WAGES AND BENEFITS CANNOT BE CHANGED BUT IN THE END EVERYTHING REGARDING WAGES, BENEFITS AND WORKING CONDITIONS IS OPEN FOR BARGAINING AND CAN BE CHANGED UPWARDS OR DOWNWARDS. EVERYTHING STARTS FROM SCRATCH IN BARGAINING, SO, IN THE END THE PROMISE THAT YOU HAVE EVERYTHING TO GAIN AND NOTHING TO LOSE IS ANOTHER UNION LIE. [Emphasis in original.]

[8] The General Counsel moves to amend par. 9(b) of the 1995 complaint to add (1) August 1, 1994, with respect to the alleged violations by Morris; and (2) Morris' implicit threat of plant closure contained within the text of his speeches as violations of Sec. 8(a)(1) of the Act. The only specific support in the record for specifying August 1, 1994, with respect to the allegation regarding Morris (Larry Jones' testimony that Morris said that the Union would make the Company shut down referred to early August) is the testimony of Diane Fairley that Morris said in a speech he gave on August 1 that the Union came into 44 or 54 plants and of those plants only 9 were still open. Fairley also testified that she fell asleep during the speecha nd missed nearly half of it. In these circumstances, there is no way to know what she may have heard if she had stayed awake. With respect to any "implicit threat" on the part of Morris, it is rather late in the proceeding to be taking such an approach. Since the Respondent did not have notice of this approach, it did not brief this. In these circumstances, th motion to amend on both counts is denied.

his August 23, 1994 speech, said that if the Union won the election the plant would continue to operate;[9] that Morris read from prepared speeches; that it is extremely doubtful that Bill Bishop made any remark about the plant closing; and that Bishop's alleged interrogation of Larry Jones, even if it occurred, was not unlawful since Jones was an open and obvious supporter of the Union so any alleged questioning regarding Jones' choice of apparel did not violate the Act.

Larry Jones testified that Bishop asked him why he wore a union T-shirt to work. Bishop testified that he did not remember asking Jones this. If one has to choose between someone who makes an unequivocal statement and someone else who makes an equivocal statement, the choice should be obvious. Jones is credited. Bishop asked him this question. The Respondent now argues that the question did not violate the Act. But that is not the issue. The issue is whether Bishop was telling the truth, the whole truth, and nothing but the truth when he testified that he did not remember. Bishop was not being candid. He remembered but neither he nor the Respondent's attorney who conducted his direct wanted to make this admission at the time. On or about August 20, 1994 (this would cover mid-July 1994), Bishop threatened Larry Jones with plant closure.

Did Bishop act on his own or had be been instructed to engage in such conduct? When one of counsel for the General Counsel attempted to elicit testimony with respect to what supervisors were told regarding how to conduct themselves during the campaign, the Respondent asserted attorney-client privilege. The Respondent's position, as described more fully at transcript pages 7267–7277, is that even though an attorney is not present at a daily production meeting of managers and even though the manager who is speaking to the other managers or supervisors does not indicate that he is passing on a communication from the attorney(s), and even though it is only assumed that what the speaker is saying must have come from the attorney(s) because "where else would the speaker have gotten this information" (Tr. 7273), that communication from the manager who is speaking to the other managers or supervisors is privileged communication. What managers were being told regarding how to conduct themselves is relevant in determining whether it was more probable or less probable that the manager engaged in unlawful conduct. As noted above, when Morris refused to answer, one of counsel for the General Counsel moved to strike his testimony as well as the speeches. What Morris told other managers out of the presence of the Respondent's attorneys could have been considered in determining whether, in view of his statements, it was more or less probable that he ad libbed during his speeches and did threaten to close the plant. Nonetheless, the motion of counsel for the General Counsel is denied with respect to the speeches.

Although the Respondent used video cameras during the 1997 organizing drive, Morris' speeches were not video taped or, if video was not available at that time, tape recorded. Consequently, we are left with Morris' assertion that it was his practice to read prepared text, with his handwritten changes, word for word and he did not vary from the prepared text, and he did not ad lib anything prior to the prepared speech or afterwards. So the Respondent puts one in the position of deciding whether to take the word of Morris or to take the words of Waymon Lock, Kenneth Spann, and Larry Jones. The fact that the alleged prepared texts of the speeches were introduced carries no more weight than Morris' assertions that these memorialize what he said.

As noted above, one of the speeches (R. Exh. 87), contains the following: "If the day ever comes when we cannot say, 'We have given our best to our customers,' then we should close the doors forever." This apparently would be a subjective determination based on some unstated criterion or criteria. This, in my opinion, crossed the line of permissible persuasion as to the consequences of unionization because it is unaccompanied by any statement of objective facts that conveyed the Respondent's belief that such consequences were beyond its control. *Ann's Laundry*, 268 NLRB 1013, 1016 (1984).

In my opinion the testimony of Lock, Spann and Jones is credible. While claiming that he never told employees in any of his speeches that the Company would close the plant if the Union came in, his own Exhibit, Respondent's Exhibit 87, holds this out as a possibility without giving the objective reasons beyond the Respondent's control. August 23, 1994 is not one of the dates specified in paragraph 9(b). This speech is cited only to demonstrate that Morris' testimony that he never told employees that the Company would close the plant if the Union came in is not true. Morris did not impress me as being a credible witness. Morris' testimony is not credited. As alleged, he threatened employees on March 2, 1994 and August 10, 1994 (early August) with plant closure if they selected the Union as their bargaining representative. And, as alleged, Bishop threatened an employees on or about August 20, 1994 (mid-July 1994) with plant closure if the Union was selected as the employees' bargaining representative.

2. Paragraph 9(c)

Paragraph 9(c) alleges that Respondent, through Supervisors Randy Feldberg on August 25, 1994, Larry Johnson on November 1, 1993, Tony Murchinson on January 26, 1994, and Lenwood Shirley on January 28, 1994, threatened its employees with discharge because of their support of the Union.

With respect to Larry Johnson, Gregory Spann, who was a first shift crew leader in the laundry department, testified that on November 1, 1993, Lawanna Johnson, who was working for him at the time, came back early from the lunchroom where she was on lunchbreak and she was talking to two gentlemen in the hall near the laundry room; that Lawanna Johnson's back was toward him and Larry Johnson, who was the supervisor over the cut floor and was standing to his immediate left, overheard the conversation; that when the two gentlemen noticed Larry Johnson looking at them they left; that at that point Lawanna Johnson turned around and walked toward the laundry room; that Larry Johnson pointed his finger in Lawanna Johnson's face and told her that if he heard her mention anything about voting for the Union that he would fire her on the spot; that

[9] Obviously what Morris may have said in one speech does not necessarily mean that he did not express a different sentiment in another speech. Moreover the August 23, 1994 speech, R. Exh. 87, does not include anything about the plant continuing to operate if the Union won the election. Indeed, as treated below, Morris indicated that a plant closing based on some subjective standard was a possibility.

Lawanna Johnson immediately turned to him and asked him if he heard what Larry Johnson just said; that he told her he did; that he said to Larry Johnson that he did not have the right to tell her that since she can talk about the Union if she is on her lunch break, and Larry Johnson told him to shut the hell up and mind his own business; that later that day Larry Johnson and another unidentified individual came to the involved laundry room and told him that he was out of line or out of place for speaking out against what Larry Johnson had to say to Lawanna Johnson; that after the incident with Larry Johnson and Lawanna Johnson, Jerry Null, Larry Johnson, and the female interpreter came to the laundry room and "they" told him regarding the conversation between Larry Johnson and Lawanna Johnson that, for him to speak out it was none of his business; that about a day or two later he was called to Jerry Null's office and there was a woman from human resources there, along with the crew leader and the interpreter; and that at this second meeting "they" said that he "butted" in during the above-described Larry Johnson-Lawanna Johnson conversation.

On cross-examination Gregory Spann testified that he was unjustly fired because of the Larry Johnson-Lawanna Johnson incident, he was "railroaded out of there" but he did not have a grudge against Respondent for that; that he was 15 to 20 feet from Lawanna Johnson when she was talking to the two men; that she was loudly telling the two men that they should vote for the Union and how it would better the plant; that Larry Johnson was less than 2 feet from him leaning against the laundry room counter and Larry Johnson pointed his finger in her face and told Lawanna Johnson that if he heard one word coming out of her mouth about promoting this union thing that she would be fired on the spot; that when he told Larry Johnson that he did not have the right to tell her that Larry Johnson told me "to shut the hell up and mind my business"; that he gave an affidavit to the Board on June 8, 1994, and he read it;[10] and that there was a big meeting with Plant Manager Jerry Null and the employees present were told that they could discuss the Union during breaks and lunch but anyone caught promoting the Union during working hours would be dealt with. On redirect Gregory Spann testified that Lawanna Johnson was on a break when the above-described incident occurred.

Respondent's former employee Keith Ludlum testified that on January 26, 1994, he was in the locker room on break getting employee Steve Ray to fill out a union authorization card; that Ray asked him if he could get fired or harassed for filling out the card and he told Ray that he was protected by National Labor laws; that Supervisor Tony Murchinson walked into the locker room while Ray was filling out the card; that Murchinson said to Ray, "[H]ey I wouldn't do that. You will get fired"; that he told Murchinson that he just violated the Labor laws and it was illegal for him to say what he just said; that Murchinson told him that he could not do it on company time and he told Murchinson that he and the employee were on break; that Murchinson told him that he could not do it on company property and he told Murchinson that he could as long as they were on break; and that Ray then tried to give him the card back.

Respondent's former employee Lawanna Johnson testified that on November 1, 1993, she was talking about the Union to employees in line waiting to get their gloves, smocks, and caps and Larry Johnson told her that she could not talk union and if he saw any more of it, it would not be tolerated and she would be terminated; that employee Gregory Spann was present at the time; and that she said to Spann, with Johnson present, they can't tell me what to say when I'm on my own time. On cross-examination Lawanna Johnson testified that this occurred probably after lunch.

The plant manager of the Respondent's Tar Heel facility, Larry Johnson, testified that in 1993 he was the superintendent of the cut floor; that he did not recall ever telling a heavy set black man in the laundry to "shut up"; that he did not recall ever calling a large male black laundry employee down to his office to reprimand him for talking about the Union or getting involved in other people talking about the Union; and that he never told Lawanna Johnson that if he heard her mention anything else about a vote on the Union he would fire her on the spot.

Analysis

The Respondent on brief argues that there are inconsistencies in the testimony of Gregory Spann and Lawanna Johnson; that Larry Johnson denied (1) threatening Lawanna Johnson for talking about the Union with other employees, and (2) ever telling any employee fitting Gregory Spann's description to "shut up"; that at worst Murchinson's comment to Ludlum, if true, reflects a technical misinterpretation of the Respondent's no-solicitation/no-distribution rule; that an overbroad reading of "company time" would not demonstrate any antiunion bias but rather a supervisor trying to enforce policy; and that given the credibility questions surrounding Ludlum, it is possible that this incident really occurred during worktime and Murchinson was correct in his application of the rule.

The Respondent avoids addressing an operative fact. Murchinson did not testify at the hearing herein. Ludlum's testimony that Murchinson told him that he would be fired for soliciting signatures on union authorization cards on company property, therefore, is not denied by Murchinson. Ludlum's unchallenged testimony is credited. Murchinson threatened Ludlum with discharge on January 26, 1994, because of his support for the Union.

With respect to the alleged inconsistencies in the testimony of Gregory Spann and Lawanna Johnson, it is noted that the people who are standing on line to use the laundry do stand in the hallway outside the laundry; that since Lawanna Johnson

[10] The affidavit reads in pertinent part as follows:

> I worked at . . . [Respondent] until December 1993. I recall an incident that occurred on or around November 1, 1993, which involved Lawanna Johnson, an employee, and supervisor [sic] Larry Johnson. It was around 9 am . . . and I was handing out linen in the laundry. Lawanna was talking to a man in the area and Johnson walked up. When he did this, the other employee left. I then heard Larry Johnson say to Lawanna, that the next time he heard union come out of her mouth, she was fired. Lawanna looked at me and asked if I heard what he had said, and I said I heard it. I told Larry Johnson that he had no right to tell her that. He told me to mind my own business and he walked off.

After this inconsistency was pointed out to Spann, he testified that Lawanna Johnson was talking to two men and that he did not write the affidavit but he read it, swore it is true, and it is true.

had her back to Larry Johnson and two employees who she was talking with were facing her and Larry Johnson was behind her, it is understandable that she might not have realized why they left the area; that contrary to the Respondent's assertion on brief, Gregory Spann did testify that Lawanna Johnson did speak to him after being confronted by Larry Johnson; that the fact that Lawanna Johnson did not testify that Larry Johnson pointed his finger in her face would be nothing more than an omission of an immaterial fact in that what matters is what Larry Johnson said; that Gregory Spann's affidavit does indicate that Larry Johnson said, "[T]he next time he heard union come out of her mouth"; and that while the affidavit does refer to employee instead of employees, Gregory Spann testified that this was a mistake. Apparently Gregory Spann did not catch the mistake when he reviewed the affidavit drafted by someone else. Larry Johnson's denial with respect to Gregory Spann's testimony was equivocally phrased in terms of he did not recall. Neither Null nor Larry Johnson denied that they later went to the laundry and told Spann to mind his own business. While Larry Johnson testified that he did not recall calling a large black male down to his office, Gregory Spann's testimony was that he was called to Null's office and not to Larry Johnson's office. Spann's testimony was unequivocal. Spann is credited. Spann overheard Larry Johnson threaten Lawanna Johnson with discharge because of her support for the Union. The testimony of Gregory Spann and Lawanna Johnson is credited. I do not credit the testimony of Larry Johnson. The Respondent violated the Act as alleged in paragraph 9(c) above through Larry Johnson and Tony Murchinson.

3. Paragraph 9(d)

Paragraph 9(d) alleges that Respondent, through Supervisor Marty Hast on or about August 26, 1993, and on or about August 26, 1994, threatened its employees with discipline for engaging in union activity.

Respondent's former employee Kenneth Spann testified that during the union campaign in 1993 he handed out cards and talked to employees about getting a union in there; that on August 26, 1993, he and Wayne Edwards were on break in the breakroom; that he was helping Edwards fill out a union authorization card since Edwards had problems reading and writing; and that his Supervisor Marty Hast, approached him and told him that he was not supposed to do that because it was against company policy and if they caught him doing that again, they would take disciplinary action against him. On cross-examination Kenneth Spann testified that he and Edwards were in the main breakroom; and that Hast told him that he was free to engage in that activity on his own time but not on company time or on company property.

The Respondent's former Supervisor Marty Hast[11] testified that he had a conversation with Kenneth Spann in August 1993 regarding union authorization cards; that he told Kenneth Spann that he needed to come back to work; that Spann replied that he could not be stopped from talking to people about the Union; that he told Spann that "it's time to go back to work. You need to be back in there. Let's get going, you can do that on your own time"; that Spann was not on a personal break; that this conversation occurred in the breakroom right off the production floor; that he could not recall how Spann got in the breakroom if he was not on a break but he "seem[ed] to remember that maybe he went on a bathroom break or telephone break or something like that. He left the line, but—I knew he was to be back into work"; that the Respondent had a no-solicitation rule regarding union cards at the time and he understood the rule to prohibit soliciting during company time when the employee was supposed to be out there working on the floor; and that while he told Spann he could not solicit signatures on union cards on company time, he did not remember discussing discipline; and that he did not discipline Spann over this matter. On cross-examination Hast testified that when he spoke to Kenneth Spann he and one other employee had a union card and they were discussing it; that he told Spann that he needed to get back to work; that Spann said, "[Y]ou can't tell me I can't help this guy with this card"; that he then said, "Ken, you need to [be] out there working . . . you can do what you want on your own time, I don't care if your do that on your own time, but not—you need to be out there working"; that "we talk about that [the no solicitation or no distribution rule] all the time in line meetings. . . . People know the rules"; and that in his affidavit to the Board he indicated, "I have never had any conversations with employees regarding the plant's no solicitation, no distribution rule or its application to employees or Union materials."

Analysis

The General Counsel on brief contends that Supervisor Eddie Faircloth testified that his superiors had instructed him to enforce the Company's no-solicitation policy against employees who solicited during break time; and that Hast's veracity is questionable in that assertedly his testimony concerning material facts relating to Respondent's discharge of Lawanna Johnson contradicts statements he made in sworn affidavits.

On brief, the Respondent argues that Hast specifically recalled that Kenneth Spann was not on a personal break but, as the Respondent concedes, Hast was not certain how Kenneth Spann got in the breakroom if he was not on break; and that Kenneth Spann acknowledged that Hast told him that he could not engage in that kind of activity on company time but was free to do so on his own time.

The Respondent does not give the full sentence that it elicited from Kenneth Spann on cross-examination. More accurately, Spann testified that Hast told him that he was free to engage in that activity on his own time but not on company time or on company property. Hast never specifically denied that he told Kenneth Spann on August 26, 1994, that he could not solicit signatures on union authorization cards on company property. So with this point of view, it would not have mattered to Hast whether Kenneth Spann was on break. According to Hast at the time Kenneth Spann could not solicit signatures on union authorization cards on company property whether or not he was no break. Hast's testimony about whether he discussed "discipline" with Kenneth Spann was equivocal in that he did not deny it but rather testified that he did not remember discussing discipline. And then there is Hast's affidavit.

[11] When he testified at the hearing herein Hast no longer worked for the Respondent.

Unlike Gregory Spann's affidavit discussed above, here we are dealing with an inconsistency regarding a material fact. As noted above, Hast, in his affidavit, indicated that "I have never had any conversations with employees regarding the plant's no solicitation, no distribution rule or its application to employees or Union materials." Hast now admits that he did have such a conversation. Kenneth Spann's testimony is credited. The Respondent through supervisor Hast on or about August 26, 1993, threatened its employee Kenneth Spann with discipline for engaging in union activity.

4. Paragraph 9(i)

Paragraph 9(i) alleges that Respondent, through Supervisors Eddie Faircloth on January 7, 1994, James Hargrove in early June 1994, Ray Krause on August 16, 1994, and Larry Johnson on August 16 and 24, 1994, interrogated employees about their union sentiments.

With respect to James Hargrove, Respondent's former employee Chris Council testified that he had a conversation about the Union with James Hargrove in early June 1994 on the kill floor; that employees Ed Melvin and Gary Allen were present; that Hargrove asked him what he thought about the Union, when he did not respond Hargrove asked the question again, and when he did not respond the second time Hargrove said, "[c]ome on you can talk to me"; and that before this he had shown his support for the Union but he did not recall Hargrove ever seeing him before this doing anything in support of the Union.

James Hargrove testified that he did not recall ever talking to Chris Council about anything about the Union; that he never asked Council what he thought about the Union; and that he did not remember whether Council was a union supporter.

Analysis

The Respondent on brief argues that Hargrove denies that he asked Council about the Union but that even if it occurred, Hargrove's interrogation was not unlawful because the interrogation involved a low-level supervisor, it contained no threatening language, Hargrove did not make any antiunion comments or provide any antiunion material to Council, and Council openly supported the Union before the alleged interrogation.

As noted above, Council testified that before the alleged interrogation he had shown his support for the Union but he did not recall Hargrove ever seeing him before this doing anything in support of the Union. And as noted above, Hargrove testified that he did not remember whether Council was a union supporter. It would appear, therefore, that Council was correct in testifying that Hargrove did not see him acting in support of the Union, or perhaps Hargrove just forgot, or perhaps Hargrove did not want to concede—in view of other actions taken against Council—that he was aware that Council supported the Union. In *Rossmore House*, 269 NLRB 1176 (1984), the Board, by Chairman Dotson and Members Zimmerman, Hunter, and Dennis, with Member Zimmerman dissenting in part, held that an employer's questioning of an open and active union supporter about their union sentiments, in the absences of threats or promises, does not necessarily interfere with, restrain, or coerce employees in violation of Section 8(a)(1) of the Act. Here it has not been shown that Hargrove either knew or was advised that Council was an open and active union supporter. Here, unlike the situation cited by the Respondent in *Cartridge Actuated Services*, 282 NLRB 427, 427 (1986), the employee would not answer the supervisor's question, namely, what he thought about the union. Here Hargrove denies asking Council what he thought about the Union. Council's testimony regarding this matter is credited. Here Hargrove did not ask him just once what he thought about the Union. Here Hargrove asked Council twice and when Council still would not answer, Hargrove said, "[c]ome on you can talk to me." In these circumstances, Hargrove's conduct was coercive. And when one considers the Respondent's other unlawful conduct at the Tar Heel plant during the first union organizing drive, it makes this interrogation all the more coercive. As alleged in paragraph 9(i), the Respondent violated the Act by James Hargrove in early June 1994, interrogating an employee about his union sentiments.

5. Paragraph 9(j)

Paragraph 9(j) alleges that Respondent, through Supervisors Henry Morris on March 2, 1994, and Butch Edwards on August 18, 1994, informed its employees that it would be futile to select the Union as their bargaining representative.

With respect to the allegation involving Henry Morris on March 2, 1994, Respondent's former employee Waymon Lock testified that he attended a meeting on March 2, 1994, with about 200 other employees in the upstairs cafeteria; and that the then-Plant Manager Henry Morris spoke to the employees telling them that the "Union couldn't do nothing [sic] for the employees . . . . [and] the only thing the Union could do is close [p]lants," and before he would let a Union come in there he would close the plant or bring in Hispanics. Lock also testified that Greg Spann and Kenneth Spann attended this meeting. On cross-examination Lock testified that Morris was reading from a prepared statement.

Morris' testimony regarding his speeches is summarized above under paragraph 9(b).

Analysis

The General Counsel on brief contends that Morris' statement was clearly designed to impress upon employees that selection of the Union would not only be futile but in fact have a drastic impact on continued employment; and that Morris' statement pertaining to the election results at the Lundy plant and the fact that the results will be tied up in the courts for some time suggest by implication that union representation is an exercise in futility, *Forrest City Grocery Co.*, 306 NLRB 723 (1992).

The Respondent on brief argues that Morris did not make the statement that "the Union couldn't do anything for them" and this is merely Lock's subjective conclusion or interpretation of Morris' speech; that none of Morris' speeches contain statements similar to those Lock has attributed to Morris; that

> even if the ALJ finds that Mr. Morris did comment that "the Union couldn't do anything for them," that statement would not violate the Act. See *Hatteras Yachts, AMF Inc.*, 207 NLRB 1043, 1049 (1973) (objection overruled where supervisor allegedly told employee that she was a fool for wearing

> a union button, and that the Union could not do anything . . . [for] her.[12]

For the reasons already specified above in paragraph 9(b), Lock's testimony is credited. Morris was not a credible witness and the alleged memorializations of his speeches rely on the credibility of Morris. With respect to the Respondent's assertion that even if Morris said this it would not be a violation of the Act, it is noted that the administrative law judge, whose findings the Respondent cites in *Hatteras Yachts, AMF Inc.*, supra, found as follows:

> I find no evidence of any other remarks which could be characterized as derogatory and I find that this evidence constitutes insufficient grounds to set aside the election. Considering that the unit in which the election was conducted exceeded 300 persons and the greatest number of persons to whom such derogatory remarks were directed is not shown to exceed two [The employee who testified in that proceeding testified that the remark was also made to an employee who did not testify in that proceeding.], I do not believe that the objection warrants further consideration. Accordingly , I recommend that it be overruled.

The judge in that proceeding did not make a finding that "that statement would not violate the Act." The statement of Morris involved in this paragraph of the 1995 complaint violated Section 8(a)(1) of the Act since Morris informed the employees that it would be futile for them to select the Union as their bargaining representative without offering a specific objective basis for this assertion. *NLRB v. Gissel Packing Co.*, 395 U.S.575, 617–620 (1969).

6. Paragraph 9(m)[13]

Paragraph 9(m) alleges that Respondent, through Supervisors Marty Hast on or about August 26, 1993, and Tony Murchinson on January 26, 1994, promulgated an unlawful no-solicitation rule in order to dissuade its employees support for the Union.

As indicated above under paragraph 9(c), Respondent's former employee Ludlum testified regarding the conduct of Supervisor Murchinson.

As indicated above under paragraph 9(d), Respondent's former employee Kenneth Spann testified regarding the conduct of Supervisor Marty Hast.

Analysis

As found above, both Hast and Murchinson collectively told employees that they could not solicit signatures on union authorization cards on company property. As alleged, the Respondent violated Section 8(a)(1) of the Act through Hast on August 26, 1993, and through Murchinson on January 26, 1994, by promulgating an unlawful no-solicitation rule in order to dissuade its employees support for the Union.

7. Paragraph 9(n)

Paragraph 9(n) alleges that Respondent, through Supervisor Harry Grauling in early July 1993 "until the present," maintained and continues to maintain an overly broad no-solicitation and no-distribution rule regarding Respondent's premises in order to discourage its employees' union support.

Todd Chase, who is an international representative of the Union, testified that during the week of July 3, 1993, Respondent posted a sign near its driveway; that the sign was about a 3- or 4-foot square and faced the highway which runs along the plant; and that the sign (GC Exh. 11) read as follows:

No Trespassing

> All persons and vehicles entering/departing C.F.P. are subject to search. Solicitation & distribution of literature which is not authorized by the Director of Human Resources is prohibited.
>
> C.F.P. does not allow any type of loitering or solicitation on company property, the use of alcohol, drugs or the display/carrying of firearms are prohibited.
>
> Failure to comply with the above rules will result in C.F.P. prosecuting to the fullest extent of the law.

Analysis

The General Counsel on brief contends that this posted rule is unlawful in that it requires the Respondent's employees to obtain permission from the Respondent's director of human resources to solicit or distribute materials on company property when they are on their own time; and that rules that require employees to get prior approval from the employer for solicitations on their own time are overly restrictive of employee rights, and are unlawful. *Opryland Hotel*, 323 NLRB 723, 728 (1997).

The Respondent on brief argues that the Respondent's policy with respect to solicitation and distribution of materials, which is set forth in the applicable employee handbook (CP Exh. 7) prohibits the solicitation by employees and the distribution of literature on company property in nonworking areas during working time; that the policy explicitly defines working time as the time an employee is expected to be performing his job and specifically does not include break periods, meal times, or other periods when employees are properly not engaged in performing their work; that it is clear that the posted sign was applicable only to nonemployees; that the General Counsel introduced no evidence from an employee indicating confusion as to the nature of the Respondent's policy; and that even assuming that the sign may have created ambiguity as to the Respondent's no-solicitation/no-distribution policy, the Respondent has not violated the Act because the General Counsel has not shown employee confusion or that permission to solicit during nonworktime would have been denied had it ever been requested, *Gooch Packing, Inc.*, 187 NLRB 351 (1970).

Contrary to the assertion of the Respondent on brief, it is not clear that the posted sign was applicable only to nonemployees. As noted above, the sign begins with "[a]ll persons." It would have been very easy to indicate nonemployees in the second sentence of the first paragraph and in the second paragraph of the body of the notice. But in my opinion the omission was intentional. While the Respondent argues on brief that supervisors were telling employees about the Respondent's no-solicitation/no-distribution policy, the Respondent continues to avoid conceding that the supervisors were telling the employees

[12] R. Br. 165.

[13] No evidentiary showing was made in support of the allegation in par. 9(1) of the 1995 complaint.

that they could not solicit on company property. That is just what the sign says, namely, "does not allow . . . solicitation on company property." The sign did not create ambiguity. Rather, the sign intentionally reinforced the Respondent's position that notwithstanding any policy statement in the employee handbook, the Respondent was not allowing any solicitation—even by employees—on company property. The Respondent, through Supervisor Harry Grauling in early July 1993 and thereafter violated Section 8(a)(1) of the Act by maintaining and continuing to maintain an overly broad no-solicitation and no-distribution rule regarding Respondent's premises in order to discourage its employees' union support.

8. Paragraph 9(o)

Paragraph 9(o) alleges that Respondent, through Supervisors Tony Murchinson on January 26, 1994, Danny Priest on August 8, 1994, Eddie Faircloth on August 15, 1994, Sherman Gilliard on August 17, 1994, and Valerie Spearman on August 18, 1994, applied its no-solicitation and/or its no-distribution rule in a disparate manner in order to dissuade its employees support for the Union.

With respect to the allegation regarding Valerie Spearman, Waymon Lock testified that about 20 employees work on his line; that a week before the union election Spearman, who is his supervisor, asked him if he wanted a vote no T-shirt for the Company against the Union or pamphlets; that when she asked this he was on the floor working;[14] that prior to this solicitation he had openly displayed his support for the Union by handbilling out at the road; that Spearman gave employee Kim Richardson a pad and some handbills to pass out for the Company to vote no against the Union; that Richardson told him that she knew he was for the Union and she asked him if he wanted a vote no T-shirt or a pamphlet and he told her he did not; that when Richardson asked him he was on the floor working; that Richardson had a few names on the pad she had but he could not see who they were; that he saw Richardson going up the line asking everybody if they wanted a vote no T-shirt or pamphlets for the Company; that when Richardson came back down off the line she gave the pad and "stuff" back to Spearman, who was standing about 10 feet from him; and that when Richardson came up to him she did not write his name down.

As indicated above under paragraph 9(c), Respondent's former employee Ludlum testified regarding the alleged conduct of Supervisor Murchinson.

The Respondent's former employee Patsy Lendon testified that on January 10, 1994, during her break she had been passing out union authorization cards in the break area and when she went back to the line her supervisor, Eddie Faircloth, had a union authorization card in his hand and he asked her to report to personnel; that in personnel, Faircloth had her stand by the receptionist's desk and Faircloth met with Henry Morris, who she believed was the head of human resources; that she overheard Faircloth tell Morris that she was getting union cards signed during her break; that she overheard Faircloth call for Plant Manager Larry Johnson to come down to personnel; that when Johnson arrived he went into Grauling's office and then Johnson told her to go back to work; that on August 15, 1994, an employee named Tim was passing out "Vote No" antiunion T-shirts, caps and sun visors on the work line to employees; that Tim had a list and a box with the materials in it and he spent at least an hour passing out the materials; that her supervisor, Eddie Faircloth, was standing on the line in back of her the whole time Tim was distributing the antiunion material; that Tim asked her if she wanted a "Vote No" T-shirt and a cap and she took the T-shirt; that later Tim gave her a "Vote No" pink sun visor; that on August 17, 1994, on her way off her shift she saw two employees at a table, accompanied by Sherman Gilliard, passing out antiunion materials; that she asked the ladies why were they passing out this material and one of them said that they were making up their hours, because they were on light-duty work; that Gilliard said, "Patsy, I know you're going to take some of this literature of mine"; and that Gilliard did not dispute in any way the fact that the two employees were making up light-duty work. Subsequently Lendon testified that Gilliard was standing at the table near the two employees.

Supervisor Eddie Faircloth testified that Patsy Lendon passed out union cards, she was out every day trying to promote the Union, she would be at the union hall "every afternoon or whatever"; that when he went to the bank, to the Riverside Cafe or to the Texaco station, all of which are near the bank, he saw Lendon or her car at the union hall; that one day in 1994 right after break he had several employees give him union authorization cards, telling him that Lendon was passing them out during her break; that he took the cards to human resources and he was then asked to bring Lendon to human resources to be disciplined for passing out union authorization cards on company time; that after he took Lendon off the line and brought her to human resources, he, Larry Johnson, and the personnel director discussed the matter and it was decided that since the Company only pays for 15 minutes of the 30-minute break they could not distinguish which 15 minutes the Company paid for so Lendon was asked to return to her job; that Lendon was not disciplined, written up, or suspended for this incident; and that he did not wave a union card in Lendon's face and he was not holding the union cards in his hand. On cross-examination Faircloth testified that he went to the bank and the restaurant near the union hall every Friday and he went to the Texaco station whenever he needed gasoline; that he told Larry Johnson that he saw Patsy Lendon and other of the Respondent's employees who worked in his division at the union hall; that he was told by management that employees could not solicit on company time, including breaktime if the Company pays for the time; and that Lendon was on the line when the employees gave him the authorization cards.

Analysis

The General Counsel on brief contends that while Patsy Lendon was taken to go to the personnel office to be disciplined for soliciting signatures on union authorization cards while she was on break away from the line, the Respondent allowed employees to distribute antiunion materials during working time.

The Respondent on brief argues that the four incidents alleged by the General Counsel, even if proven, are simply too

[14] The above-described conversation between Lock and Spearman could not be considered as anything other than background regarding the enforcement of the no-solicitation rule in a disparate manner issue.

isolated to support the General Counsel's burden of establishing that the Respondent disparately enforce its no-solicitation and no-distribution rules since five incidents were not sufficient in *Summitville Tiles, Inc.*, 300 NLRB 64 (1990); that Faircloth took Lendon to human resources because he believed that Lendon violated company policy by campaigning during paid breaktime; that Lendon was not disciplined over this incident; that the Respondent effectively communicated its lawful no-solicitation/no-distribution rule to its employees, as demonstrated by the testimony of Gregory Spann; that Lendon did not testify that employee "Tim" passed out antiunion materials during his worktime; that Lendon's failure to fully identify employee "Tim" deprived the Respondent of the ability to fully cross-examine Lendon and prepare a defense to the allegation, and Lendon should not be credited because she was not able to provide employee "Tim's" last name and Lendon is an alleged 8(a)(3) discriminatee also; that if the two employees standing at a table passing out antiunion materials with Gilliard present occurred at all (which the Respondent disputes) it is clear that the employees were distributing literature either before or after their shift and not on worktime; and that even if Waymon Locks' allegations about employee Kim Richardson are true (which the Respondent denies), there is no evidence indicating that Supervisor Valerie Spearman was aware that Richardson was soliciting until Richardson gave her the notepad and pamphlets.

The five incidents which the Respondent argues were involved in *Summitville Tiles, Inc.*, supra, were really one at each of the two plants of the respondent in that proceeding. Additionally, here, unlike *Summitville Tiles, Inc.*, supra, there were violations of the Act involving the Respondent's no-solicitation/no-distribution policy other than the four covered in this paragraph of the 1995 complaint. In the circumstances existing here the incidents are not too isolated to satisfy the General Counsel's burden of establishing by a preponderance of the evidence that the no-solicitation and no-distribution rules were disparately enforced. With respect to the Respondent's assertion on brief that it effectively communicated its lawful no-solicitation/no-distribution rule to its employees (as demonstrated by the testimony of Gregory Spann) as noted above, Gregory Spann's understanding was contradicted by Respondent's action.[15] Also, as noted above, what the Respondent told Kenneth Spann was that he could not solicit signatures on union authorization cards on company property. While Lendon did not testify that employee "Tim" passed out antiunion materials during his worktime, Lendon did testify that employee "Tim" passed out antiunion materials for over 1 hour to employees on the work line. It is doubtful that the employees would be at the work line for over 1 hour and not be on worktime. The distribution took place during the worktime of the employees on the line. Since employee "Tim" made the distribution on the work line during the employees' worktime it must follow that this is not a break area but rather a work area. Since employee "Tim" spent over an hour making the distribution, it is very likely that he did it on his own worktime since it does not appear that the Respondent gives breaks of over an hour. Lendon's inability to supply employee "Tim's" last name did not deprived the Respondent of the ability to fully cross-examine Lendon and prepare a defense to the allegation. Lendon testified that Supervisor Eddie Faircloth was standing on the line in back of her the whole time employee "Tim" was distributing the antiunion material. Faircloth did not deny this. Faircloth knows who employee "Tim" is. Lendon's testimony is credited. And Gilliard did not deny Lendon's testimony that he was standing at the table with the two employees who were passing out antiunion materials. The time for the Respondent to dispute that this occurred was at the hearing not for the first time on brief. And with respect to the Respondent's argument that it is clear that the two employees with Gilliard were distributing literature either before or after their shift and not on worktime, Lendon's unrefuted testimony is that the two employees, in the presence of Gilliard, told her at the time that they were passing out the antiunion materials, that they were making up their hours because they were on light-duty work. Gilliard did not contradict them. Lendon's unrefuted testimony is credited. Lock's testimony regarding Richardson and Spearman is unrefuted. Neither Spearman not Richardson testified at the hearing herein. Lock's unrefuted testimony is credited. Contrary to the Respondent's assertion on brief, Spearman knew long before Richardson gave her the notepad and pamphlets that Richardson was soliciting during working time. As noted above, Lock testified that Spearman gave employee Richardson a pad and some handbills to pass out for the Company to vote no against the Union and he saw Richardson going up the line asking everybody if they wanted a vote no T-shirt or pamphlets for the Company.[16] On brief, the Respondent argues that "[t]here is not evidence in the record that any of Richardson's alleged actions were controlled or directed in any way by Spearman or any other member of management."[17] There is no legal requirement that the Respondent control or direct. The question is did the Respondent see or know. Lock's unrefuted testimony demonstrates that Spearman knew exactly what was going on. So, on the one hand, the Respondent is verbally telling employees that they cannot solicit signatures on union authorization cards on company property even if they are on break in the breakroom, the Respondent is unlawfully telling employees by notice posted outside the plant that they cannot solicit on company property and it is enforcing this unlawful rule only against union supporters, the Respondent threatens to fire an employee who solicits a signature on a union authoriza-

[15] Gregory Spann testified that while he believed that the employees could talk about the Union during breaks and lunch, Larry Johnson, in his presence, threatened to fire Lawanna Johnson, who was on break, for talking about the Union.

[16] In fn. 47 on p. 176 of its brief, the Respondent conveniently leaves out Lock's testimony that Spearman, in addition to the pad, gave Richardson handbills to pass out for the Company to vote no against the Union. This is done so the Respondent can argue "Mr. Lock's testimony indicates that Ms. Richardson was merely taking orders for T-shirts at the time." R. Br. 176. As noted above, Lock's testimony was not refuted since neither Spearman nor Richardson testified herein. Consequently, there is no basis for even arguing that Spearman did not give Richardson antiunion handbills to distribute. Yet, on brief, counsel for the Respondent presented it as a fact.

[17] R. Br. 176.

tion card during his break in the breakroom, the Respondent threatens to discipline an employee who solicits a signature on a union authorization card in the breakroom during his break, and the Respondent makes a showing to other employees on the line by pulling an employee off the line and taking her to human resources when the employee solicited signatures on a union authorization card during her break. On the other hand, the Respondent did not enforce the no-solicitation rule when it was aware that employees were engaged in antiunion solicitation and distribution on company property, on working time, and in working areas. The General Counsel has shown that Respondent, through Supervisors Tony Murchinson, Eddie Faircloth, Sherman Gilliard, and Valerie Spearman, applied its no-solicitation and/or its no-distribution rule in a disparate manner in order to dissuade its employees support for the Union in violation of Section 8(a)(1) of the Act.

9. Paragraph 9(r)[18]

Paragraph 9(r) alleges that Respondent, through Supervisors Robert Williams on September 9, 1993, Eddie Faircloth on January 7 and 10, 1994; Henry Morris on January 10, and on or about May 19, 1994; Larry Johnson on January 11, 1994; Danny Priest on September 20, 1993, January 12 and 21, and February 2, 1994; Harry Grauling on January 12 and 25, 1994; Tony Murchinson on January 26, 1994; Lenwood Shirley on January 28, 1994; Roger Baumgartner on February 14, 1994; James Portsman on July 24, 1994; Kenny Coble on August 15, 1994; Scott Wilson on August 16, 1994; and Randy Feldberg on August 25, 1994, and through agents Chris Kinlaw on September 23, 1993; Scott Ussery on October 21, 1993; Timm Pridgen on October 21, 1993; and Kevin Peak on January 12, February 2 and 9, 1994, created the impression among its employees that their union activities were being surveiled.

Respondent's former employee Keith Ludlum testified that on February 2, 1994, while he was handbilling employees with union representatives at the front of the plant, he saw Danny Priest, who is in charge of security at the plant, and Kevin Peak; that they were parked on the grass about 15 to 20 feet away from the handbillers; and that whenever someone in a vehicle accepted a handbill he saw Peak looking at the back of the car, say something and Priest appeared to be writing something. On cross-examination Ludlum testified that Priest and Peak stayed there for about 30 to 45 minutes; that he could not see what Priest was writing on; that he saw a pen in Priest's hand; and that he had seen them parked out there before.

Former union organizer James McGilberry testified that he attended a union rally the Saturday before the election in August 1994; that the rally was held at the Bladen County Technical College and the guest speaker was the Reverend Jesse Jackson;[19] that a number of the Respondent's employees were at the rally on stage with Reverend Jackson; that he saw Respondent's chief of security, Danny Priest, outside the auditorium with a Sheriff's deputy; that the rally was filmed; and that copies of the film were distributed on the handbill line and on home calls. On cross-examination McGilberry testified that this rally was open to the public.

The Respondent's former employee Patsy Lendon testified, as noted above, that on January 10, 1994, she had been passing out some union authorization cards in the break area; that when she went back to her work station her supervisor, Eddie Faircloth, who had a union authorization card in his hand, told her to report to personnel; that in the personnel area she overheard Faircloth tell Henry Morris that she was getting union authorization cards signed during her break; that she overheard Faircloth call for Plant Manager Larry Johnson to come to Personnel; that when Johnson came to personnel they all went into Grauling's office; and that after a few minutes Larry Johnson came out of the office and told her to go back to work. Subsequently Lendon testified that about 12 employees on her line saw Faircloth holding the union authorization card. Faircloth's testimony regarding this incident is set forth above under paragraph 9(o).

Lendon's and Robert Williams' testimony regarding what occurred on September 9, 1993, is set forth below under paragraph 9(v) of the 1995 complaint.

The Respondent's corporate director of security, William Daniel Priest Jr., testified that one time during the course of the 1993–1994 organizing campaign he observed the union handbilling without actually being out at the driveway himself; that he had been instructed by the director of human resources, Harry Grauling, to make sure that the union handbillers were not crossing the Respondent's property line; that security officer Kevin Peak video taped the union handbillers crossing the line in violation of a consent order; that he never recorded in any way the identity of employee vehicles as they were exiting the facility; and that he never wrote down license plate numbers. On cross-examination Priest testified that during the 1993 campaign Reverend Jackson came for a rally at the college auditorium; that neither he nor any of his security guards attended the Reverend Jackson rally in 1993;[20] that security guard Peak used a video camera while the union representatives were handbilling to record whether they were crossing the line; and that he did go by the union hall in Tar Heel when numerous individuals were standing out in front.[21] On redirect Priest testified that when Peak video taped the union handbillers they were on the Respondent's side of the property line; and that the bank in Tar Heel was built after that Respondent built its plant there.

Analysis

The analysis for paragraphs 9(r), (s), (t), (u), (v), and (w) of the 1995 complaint will be set forth under paragraph 9(w) of the 1995 complaint.

10. Paragraph 9(s)

Paragraph 9(s) alleges that Respondent, through Supervisors Danny Priest on September 23 and 30, October 21, 1993, Janu-

[18] No evidentiary showing was made in support of the allegation in par. 9(q) of the 1995 complaint.

[19] Chris Kalso and Fred McDonald were specifically named.

[20] Priest also testified that he did not attend Reverend Jackson's 1997 rally.

[21] Priest also testified that he probably went by the union hall in 1997 when he was either escorting someone to the bank or going to a nearby place to eat.

ary 12 and 26, and February 18, 1994; Joe Lewis on September 23, 1993; Harry Grauling on September 23, 1993, January 12 and 26, and February 18, 1994; and through agents Timm Pridgen on September 23 and 30, October 21, 1993, and February 18, 1994; Chris Kinlaw on January 26, 1994; and Jeffrey Gause on February 18, 1994; Scott Ussery on September 23, 1993, October 21, and February 18, 1994; and Kevin Peak on September 23, 1993, January 12, and February 18, 1994, engaged in surveillance of its employees in order to dissuade their support for the Union.

Union International Representative Todd Chase testified that on October 21, 1993, he handbilled at Respondent's Tar Heel plant; that it was a payday and there was a long line of vehicles; that at least four times he heard Scott Ussery tell the employees that the Company was sorry to be holding them up on payday but if the Union was not out there the Company would not be out there either; that an employee refused to take company literature from Timm Pridgen who then looked down and wrote something on a piece of paper; that as the employee who would not take literature from Pridgen left, Scott Ussery yelled out the plate number and asked Pridgen if he got it, and Pridgen said he did; and that he asked Danny Priest if what Ussery was telling the employees about the reason the company representatives were out there was true, and Priest said yes.

Union Representative George Carrillo testified that in 1993 he was a union organizer; that he handbilled at Respondent's involved plant and he went to employees' homes; that on September 9, 1993, he observed Harry Grauling and Kevin Peak in a vehicle with Peak video taping toward the handbillers as the workers were coming in and out of the plant parking lot; that later on September 9, 1993, Danny Priest, along with the Bladen County sheriff, came to the Union's office where a cookout was being given by the Union for approximately 50 of the Respondent's employees;[22] that Priest was 30 feet away from the employees and was there for about 5 minutes; that early on the morning of October 21, 1993, the Union was setting up for a cook out for Respondent's employees and he was told that two of Respondent's supervisors drove by the Union's office; that the Union always handbilled at the involved plant on the day of a cookout; that on October 21, 1993 when they went to the plant to handbill at the entrance about 1:30 p.m. Danny Priest, Kevin Peak, Timm Pridgen, and Kerry Garrett were there; that on October 21, 1993, Scott Ussery apologized to the employees for the inconvenience and indicated that they had to be out there because the Union was out there; that Todd Chase asked Priest if that was the reason they were out there and Timm Pridgen said, "Hell, yes, it is my fucking region—we're out here"; and that on October 21, 1993, he noticed that Ussery and Pridgen looking at the employees' license plates and on one occasion Ussery yelled the plate number to Pridgen who wrote it down. Subsequently, Carrillo testified, "No, I didn't handbill October 21, I'm confused it was September 9th, I'm sorry." On cross-examination Carrillo testified that he was aware that there was a yellow line at the plant entrance over which union handbillers were not supposed to cross and he was a little familiar with a consent order which was reached concerning where the Union could handbill and could not handbill; and that he handbilled at the plant on October 21, 1993, and when he arrived to handbill there were already supervisors outside handbilling.

Former union organizer James McGilberry testified that he handbilled at the involved plant entrance on January 12, 1994; that he saw Harry Grauling and Danny Priest pull up in a vehicle about 200 feet from the handbillers and watch the union representatives handbill for about 15 minutes; and that Danny Priest and Kevin Peak later pulled up in a vehicle to within 5 feet of where the union handbillers were and Priest was looking at the back of employees' vehicles and he was saying something and Kevin Peak was writing something; and that when he handbilled on February 18, 1994, he witnessed one of the Company's security officers, Jeffrey Gause, "reaching in the car and telling . . . [the employees] don't take the Union S and on several occasions he would be taking the handbills out of their hands and giving them—what they called the company guarantee cards [(GC Exh. 34)], telling them . . . this is what you need, this is the real deal." McGilberry further testified that when the union handbilled at the plant they normally arrived at about 2 p.m. and handbilled until about 4:30 p.m.; and that during the 1993–1994 organizing campaign the union representatives handbilled two and sometimes three times a week. On cross-examination McGilberry testified that he did not hear any union representatives doing any cursing while handbilling on September 23, 1993; and that there was a lot of cursing on that day by representatives of the Company.

Priest testified that he and the Respondent's security guards played a role in the Company's campaign in 1993; that they conducted traffic control in the company parking lot, in the driveway and directly in front of the plant; that often (15 to 20 times in 1993 and at least a couple of days a week in 1994) when he was in the driveway he noticed union handbilling activity; that three or four of his guards handed out company literature on three occasions and he was present when this occurred one or two times but not every time and not the whole time they were out there; that one time there was no one out there when the guards went out, and one or two times the union handbillers were already there when the guards went out there; that when he and the guards handbilled at the same time as the union handbillers they all were pretty much side-by-side, within 2 to 3 feet of each other; that there was heckling or name calling going on by the union handbillers; that he did not curse nor did the guards curse at the union handbillers in his presence; that he was aware that the Union had an office (a mobile home trailer) behind the bank in Tar Heel; that he, along with the Bladen County sheriff, did not attend an outdoor event at the Union's property on September 9, 1993, and on that date he, along with a Bladen County's sheriff department deputy, did not go to the Union's property and threaten to arrest George Carrillo for trespassing; and that he has never been on the Union's property in Tar Heel.

[22] Ostensibly the sheriff, according to Carrillo's testimony regarding what he was told by Union Representative Todd Chase, was there to arrest Carrillo because he parked illegally.

11. Paragraph 9(t)

Paragraph 9(t) alleges that Respondent, on September 23, 1993, through agents Timm Pridgen, Kevin Peak, and Chris Kinlaw, interfered with its employees' rights through verbal assaults in order to dissuade their support for the Union.

Union International Representative Todd Chase testified that Timm Pridgen on September 23, 1993, was in the area where union organizers were giving out handbills to employees by the employees' entrance/exit at Respondent's plant; and that Pridgen was handbilling for the Company and as the union people handbilled Pridgen would say to the employees, "You don't need to take that union shit. Roll up your windows, don't take their union material."

Union Representative George Carrillo's testimony regarding what occurred during union handbilling on September 23, 1993, is set forth below under paragraph 9(v) of the 1995 complaint.

Former union organizer James McGilberry testified that he handbilled at the involved plant on September 23, 1993; that when he arrived at the plant entrance at about 2 p.m. he saw Harry Grauling, Danny Priest, Timm Pridgen, and security officer Chris Kinlaw passing out company literature along side the people who were passing out union literature to the employees; that Pridgen told the union representatives, "[Y]ou guys, you need to go F on somewhere"; that Priest called the union representatives "SOBs"; that Kinlaw called employees and union representatives "SOBs"; that when employees refused to take company literature, Kinlaw would tell the employees "well go F on, you know MF words"; that the company handbillers were right beside the union handbillers; and that the above-described remarks the company handbillers made could be heard by the employees. On cross-examination McGilberry testified that when he arrived at the involved plant on September 23, 1993, ompany representatives were already present.

Priest testified that on September 23, 1993, he did not engage in any cursing at union organizers at the end of the driveway and he did not call any union organizers a "SOB" or "son of a bitch" or "mother fuckers"; that Timm Pridgen is not a guard, he does not supervise Pridgen, and he does not have any authority over Pridgen; that Pridgen did hand out company literature in his presence at the truck entrance to Respondent's facility; that he heard Pridgen cursing at union representatives but he was not in a position to make Pridgen stop because Pridgen was not on company property but rather he was out by the highway on the State property portion; and that pursuant to a consent order (R. Exh. 145), yellow lines were drawn on both of the Respondent's driveways 50 feet from the center of Highway 87. On recross Priest testified that he did not report Pridgen for anything he said, testifying, "Well, why would I."

12. Paragraph 9(u)

Paragraph 9(u) alleges that Respondent, through agents Scott Ussery on August 6, 1993, and Timm Pridgen on September 23 and 30, 1993, attempted to confiscate union literature from its employees in order to dissuade their support for the Union.

Union International Representative Todd Chase testified that Timm Pridgen on September 23, 1993, was in the area where union organizers were giving out handbills to employees by the employees' entrance/exit at Respondent's plant; and that Pridgen was handbilling for the Company and he saw Pridgen snatch union literature from employees three of four times.

Union Representative George Carrillo testified that while handbilling in front of the Respondent's plant on September 23, 1993, he saw Tim Pridgen on more than several occasions snatch union literature out of the hands of employees who had just accepted the literature from the union handbillers; and that Pridgen said, "You don't need that Union shit." On cross-examination Carrillo testified that he saw Pridgen reach into every car whose occupant(s) took the Union's literature, over a couple of hundred cars in a period of about 3 hours.

13. Paragraph 9(v)

Paragraph 9(v) alleges that Respondent, through Supervisors Robert Williams on September 9, 1993, and Danny Priest on September 23 and 30, 1993, and through agents Scott Ussery on September 23, 1993, and Timm Pridgen on September 23 and 30, 1993, intimidated and coerced its employees while union literature was being distributed to the employees in order to dissuade their support for the Union.

Union International Representative Todd Chase testified that Timm Pridgen on September 23, 1993, was in the area where union organizers were giving out handbills to employees by the employees' entrance/exit at Respondent's plant; and that Pridgen was handbilling for the Company and as the union people handbilled Pridgen would say to the employees, "You don't need to take that union shit. Roll up your windows, don't take their union material"; that on one occasion when a female employee would not take his literature and took the Union's literature, Pridgen said, "Fuck you anyway"; that when employees did not take company literature, Pridgen and Danny Priest, who was in charge of security and who was also out where the union organizers were handbilling, would look into the car window and say, "I know you"; that Respondent employed prisoners from a correctional institution and they are transported on a correctional facility bus; that usually the prisoners put there hands out of the bus windows and take the union literature; and that on October 21, 1993, Pridgen had the bus stopped before it got to the union handbillers and Pridgen got on the bus, handed out company literature and told the prisoners to put up the windows of the bus.

Union Representative George Carrillo testified that when he handbilled at the entrance to the Respondent's involved plant on September 23, 1993, he observed Danny Priest and Timm Pridgen, when employees accepted union handbills, lean over and look into the cars and point at the employees and say, "[Y]es, I know you, I remember you. I know you"; and that Priest and Pridgen did this to every vehicle that went through while the union handbillers were there. Carrillo also testified that while he was handbilling at the Respondent's involved plant, Ussery yelled out to him that "[y]ou come by my house and I'll shoot your fucking ass." Originally, Carrillo indicated that this occurred on October 21, 1993. Then he testified that he did not handbill on October 21, 1993. Subsequently, he testified that Ussery's comment was very loud but it is not clear on what specific date the alleged statement occurred. On cross-examination Carrillo testified that when he arrived to handbill

on September 23, and October 21, 1993, company officials were already outside.

The testimony of former union organizer James McGilberry regarding what occurred on September 23, 1993, at the plant entrance during handbilling is summarized above under paragraph 9 (t). With respect to the handbilling which occurred at the involved plant entrance on September 30, 1993, he testified that Timm Pridgen and Danny Priest began throwing company literature into the employees' cars when the employees did not take the company literature; that Pridgen also told employees, "[D]on't take the Union S. You don't need the S . . . . F— the Union, go to H, don't stop for the Union"; that this type of conduct continued for 30 or 40 minutes; and that during the time they were handbilling this afternoon the union organizers had to deal with the company representatives calling them "SOBs" and "MFs."

The Respondent's former employee Patsy Lendon testified that on September 9, 1993, she attended an open house at the union office in Tar Heel; that about 25 people attended the cookout; that Supervisor Robert Williams, who is in the casing department, showed up at the cookout; that three or four of the Respondent's female employees who were at the cookout were filling out union authorization cards; that one of the woman, on seeing Williams, said, "[T]hat's our supervisor"; that Williams walked up to the women and said to them that "they needed to be ashamed of themselves for—over there filling out the cards"; and that the women "kind of put the papers down and took off in a big hurry."

Robert Williams, who is a supervisor for Wolfson Casing which is a Company that works with the small intestine of the hogs in the involved Tar Heel plant and has a contract with the Respondent but is not owned by the Respondent, testified that he has been on the property of the union hall; that he never said to anyone that they should be ashamed of themselves for filling out union cards; and that he never said to anyone that they should be ashamed of themselves for filling out union cards while they were at the union property. On cross-examination Williams testified that he was in the area of the union hall when he went to the bank, took other people to the bank or purchased gasoline; that he gave an affidavit dated July 22, 1994, in which he indicated that he saw one of his employees, Anthony Patterson, at the union hall; that Johnny Smith asked him to come over to the union hall and he said that Patterson was over there eating the union folks' food and he did not sign a union card; that he could not recall if at that point he told them they should be ashamed of themselves for signing a union card; and that his affidavit indicates that he did tell employees who were eating on the lawn in front of the union trailer that they ought to be ashamed of themselves for signing a union card, and a group of employees got up and left. On recross Williams testified that two union people came up to him when he was by the union trailer speaking to employees and he told the two union people to "get out of his face. He did not want that Union mess."

Priest testified that he did not throw company literature in through the windows of employees' automobiles as they exited the facility on September 30, 1993, or on any other date, and he never saw his guards engage in such conduct; that he did not recall seeing Pridgen engage in such conduct; that he did not comment to employees, "[D]on't take that Union shit," on September 30 or any other date but he did hear Pridgen make a comment like that on September 30, "There was a lot of that sort of thing going on out there"; and that he may have been out at the driveway on October 21, 1993 and he did not recall hearing Usury tell Carrillo, "[I]f the Union came by my house I'll shoot your ass." On cross-examination Priest testified that Pridgen was out handbilling with other company people handing out company materials during times that the union representatives were handbilling; that he did not recall time of day he saw Pridgen handbilling; and that he was not out there the whole time Pridgen was out there.

14. Paragraph 9(w)

Paragraph 9(w) alleges that Respondent, through agents Jeffrey Gause on February 18, 1994, and Timm Pridgen on September 30, 1993, confiscated union literature from its employees in order to dissuade their support for the Union.

Former union organizer James McGilberry testified that when he handbilled on February 18, 1994, he witnessed one of the Company's security officers, Jeffrey Gause, "reaching in the car and telling . . . [the employees] don't take the Union S and on several occasions he would be taking the handbills out of their hands and giving them—what they called the company guarantee cards [(GC Exh. 34)], telling them . . . this is what you need, this is the real deal."

The testimony regarding Timm Pridgen confiscating union literature from employees is set forth in paragraph 9(u) above.

Analysis

The General Counsel on brief contends that the pleadings should be amended to comport with the proof where feasible as the matters alleged have been fully litigated. The General Counsel also moves to amend the pleadings to accurately reflect that Respondent's unlawful surveillance by Grauling and Peak, and the threat to arrest Carrillo (The issue with respect to Priest on September 9, 1993, is whether he engaged in surveillance.) occurred on September 9, 1993, rather than September 23, 1993. It is contended that Carrillo's testimony regarding the unlawful surveillance by Grauling and Peak on September 9, 1993, should be credited as the Respondent failed to rebut this testimony by calling either to testify; that the recording of license plate numbers by Pridgen and Ussery constitutes an unlawful surveillance and or impression of surveillance and since the Respondent called neither Pridgen nor Ussery to testify, Carrillo's testimony was not rebutted; that the Respondent's use of security guards and other agents to interfere with the Union's right to communicate with employees and to intimidate employees from communicating with the Union violates Section 8(a)(1) of the Act, *Mediplex of Wetherfield*, 320 NLRB 510, 516 (1995); that on September 9, 1993, Robert Williams intimidated and coerced employees at union trailer to abandon the union authorization cards; and that in making a showing of knowing that Patsy Lendon was soliciting union authorization cards on her break, Eddie Faircloth created the impression among employees that their union activities were being surveilled.

The Respondent, on brief, argues that Williams acknowledged that in his affidavit he indicated that he told the employees at the union hall that they should be ashamed of themselves for signing a union authorization card; and that Williams was only joking.

In response to the 1995 complaint the Respondent admitted that Robert Williams was an agent of the Respondent and acting as a supervisor within the meaning of Section 2(11) of the Act. On direct Williams testified unequivocally that he never said to anyone that they should be ashamed of themselves for filling out a union card. It was only after his admission in his affidavit was brought out on cross-examination that one of the Respondent's attorneys asked him whether he was serious or joking. So we are presented with the hackneyed "it never happened—okay you have shown that it happened but I was only joking." But then Williams had to concede on recross that in his affidavit he (a) did not indicate that there was any laughter when he said that they all ought to be ashamed of themselves for signing a union card, and (b) he indicated that the employees, except one, got up and left; and that when two union people came up to him at that time he was not joking when he told them "to get out of his face. He did not want that union mess." Williams was not joking when he told the employees that they should be ashamed of themselves and the fact that all but one got up and immediately left indicates that the employees did not take it as a joke. The Respondent through Williams on September 9, 1993, violated the Act as alleged in paragraphs 9(r) and 9(v) of the 1995 complaint.

Contrary to the Respondent's assertion on brief, the General Counsel did present evidence in support of the complaint allegation in paragraph 9(r) of the 1995 complaint regarding the conduct of Eddie Faircloth, as here pertinent, on January 10, 1994. Patsy Lendon's testimony regarding what happened with Eddie Faircloth on January 10, 1994, is credited. Notwithstanding the Respondent's rationalization on brief, namely, that Faircloth believed that "paid time" (assertedly 15 minutes of the 30-minute break was paid time) was the same as "work time," Faircloth took the union authorization cards from the employees and then took Lendon to human resources. This was done on the line. This would create the impression in the minds of employees that if they attempted to solicit signatures on union authorization cards during breaks, they ran the risk of having the cards turned over to a supervisor, the supervisor would take the cards and then the supervisor would take them to human resources. All Faircloth had to do was tell the employees that if they did not want the cards, they should throw them away, and it was a matter between the employees and the person who was soliciting the signatures. By taking the approach he took, he created the impression that he had employees who would spy for him. Since Faircloth did not testify that after this incident he explained to the employees who witnessed his conduct that he would not engage in similar conduct in the future, the employees who were on the line or in the vicinity when this occurred had to assume that he would know when they solicited signatures on union authorization cards and if they did, they too would be taken to human resources. The Respondent, through Faircloth, on January 10, 1994, violated the Act as alleged in paragraph 9(r) of the 1995 complaint.

Danny Priest was the only witness that the Respondent called in its attempt to refute all of the evidence introduced by the General Counsel regarding the remaining allegations in paragraphs 9(r), (s), (t), (u), (v), and (w). As set forth above, there are a number of allegations involving a number of people other than Priest. The Respondent chose not to call Harry Grauling, Kevin Peak, Jeffrey Gause, Scott Ussery, Chris Kinlaw, and Timm Pridgen.[23] To paraphrase a sentence found at page 180 in the Respondent's brief, "It is telling that the . . . [Respondent] failed to present any of these witnesses." As the Respondent concedes at page 183 of its brief,

> there is no evidence that Mr. Priest was even present during many of the incidents alleged by the Union representatives. Mr. Priest himself testified that he was not present each time the guards handbilled and that when he was present, it was not for the entire time the guards were handbilling.

As noted above, Priest did admit that he was present (1) when Pridgen was cursing at union representatives, and (2) on September 30, 1993, when Pridgen told employees, "[D]on't take that union shit," but he did not "recall" seeing Pridgen throw company literature through the windows of employee automobiles as they exited the facility on September 30, 1993. Also as noted above, Priest testified that he was not in a position to make Pridgen stop cursing at union representatives because Pridgen was beyond the Respondent's property; and that he did not report Pridgen for anything. Priest testified, "Well why would I." For a number of reasons I did not find Priest to be a credible witness. Priest testified that only once during the course of the 1993–1994 organizing campaign did he observe the union handbilling without actually being at the driveway himself. As noted above, the Respondent's former employee Ludlum placed Priest in a car with Peak on February 2, 1994, about 15 to 20 feet from union handbillers outside the Respondent's plant. Peak did not testify to deny this. McGilberry placed Priest in a vehicle with Grauling about 200 feet from the union handbillers on January 12, 1994. Grauling did not testify to deny this. McGillberry placed Priest in a vehicle with Peak within 5 feet of the union handbillers later on January 12, 1994. Peak did not testify to deny this.

As pointed out by the General Counsel, the Respondent's use of security guards and other agents to interfere with the Union's right to communicate with employees and to intimidate employees from communicating with the Union violates Section 8(a)(1) of the Act. Ludlum's above-described testimony under paragraph 9(r) about the activities of Priest and Peak on February 2, 1994, while they sat in a vehicle is credited. The allega-

[23] Grauling is an admitted supervisor of the Respodnent. It is found that security guards Peak, Gause, Ussery, and Kinlaw, and water conservation officer Timm Pridgen are agents of the Respondent, acting on its behalf, and are agents within the meaning of Sec. 2(2) and (13) of the Act. While Pridgen was not a security guard working under Priest, Priest, who is a member of the Respondent's management, saw Pridgen engage in the unlawful conduct and he did not take steps to demonstrate that the Respondent repudiated Pridgen's conduct. The Respondent affirmed Pridgen's conduct. *Diamond National Glass Co.*, 317 NLRB 1048 (1995). Indeed Priest himself engaged in similar unlawful conduct.

tion in this paragraph of the complaint is that the Respondent *created the impression* among its employees that their union activities were being surveilled. Peak did not deny that he engaged in the conduct described by Ludlum. Priest denied that he ever recorded license plate numbers of employees. Priest was not a credible witness. Although he denied writing down license plate numbers, he never did explain what he was writing. As noted, this allegation of the 1995 complaint speaks to *creating the impression* of surveillance as opposed to engaging in surveillance. In other words it is not necessary to have a witness testify (or have a picture or a video of or the sheet(s)) that he or she saw the employees' license plate numbers on the sheet(s) of paper in Priest's possession in the vehicle. It is enough that a credible witness testified that Priest and Peak engaged in the above-described conduct [Peak looked at the back of a car when its occupant(s) accepted a union handbill, Peak said something to Priest and Priest appeared to be writing something] which *created the impression* of surveillance. This testimony is not refuted by credible evidence. While Priest denied that he wrote down license plate numbers, he did not deny that he sat in a car with Peak, spoke with Peak, and used a writing instrument in the same manner which someone who was writing something would use the instrument. The Respondent violated the Act through Priest and Peak on February 2, 1994, by creating the impression of surveillance.

As here pertinent, paragraph 9(s) of the 1995 complaint alleges that Grauling, Peak, Pridgen, Ussery, and Gause unlawfully engaged in surveillance of the Respondent's employees on specified dates. None of these individuals testified at the hearing herein to refute the collective testimony of Chase, Carrillo, and McGilberry, which testimony is credited. The motion of the General Counsel to amend the pleading to accurately reflect that the pertinent violations of Grauling and Peak occurred on September 9, 1993, and not September 23, 1993, is granted. Regarding Priest, the motion of the General Counsel to amend the pleading to accurately reflect that the pertinent violation of Priest occurred on September 9, 1993 and not September 23, 1993, is granted. Carrillo's testimony that Priest came to the union trailer on September 9, 1993, and engaged in surveillance is credited. At page 188 of its brief the Respondent argues as follows: "It is important to note that Mr. Priest is also an auxiliary deputy sheriff. . . . . Thus, even if the ALJ credits Mr. Carrillo's testimony on this issue, absolutely no evidence was presented to show that Mr. Priest was not on legitimate business at the time." Priest denied that he was even there. He is not a credible witness. His testimony is not credited. As noted above, on October 21, 1993, (1) while the Union was preparing for an outside cookout on that date, two of the Respondent's supervisors drove by the union trailer; (2) the Union went to the plant to handbill after the cookout as they always did on the days that they held a cookout; (3) the company handbillers were already outside handbilling when the union handbillers arrived outside the plant; (4) Pridgen made a note on a piece of paper when an employee refused to take company literature and Ussery would yell out the license plate number to Pridgen when this happened; (5) Ussery was telling the employees that the Company was sorry to be holding them up on payday but if the Union was not out there the Company would not be out there either; and (6) when Chase asked Priest if what Ussery said was true, Priest answered, "[Y]es." As noted, neither Ussery nor Pridgen testified. It can be concluded that the guards and Pridgen were out handbilling because they knew that the Union would be handbilling, that the guards and Pridgen used the opportunity to engage in surveillance, and that Priest admitted such when he said answered, "[Y]es," to Chase's question. McGilberry testified that on January 12, 1994, he saw Priest in a vehicle observing the union handbillers first with Grauling and later with Peak. Neither Grauling not Peak denied this. Nor did Peak deny that on January 12, 1994, while they were sitting in the vehicle, Priest looked at the back of employees' vehicles said something to Peak, and Peak wrote something. As noted above, Priest claimed that only once did he observe the handbilling at the driveway without actually being out at the driveway himself. These two occasions and the one on February 2, 1994, would make three. Priest also claimed that he never recorded and he never wrote down the license plate numbers. McGilberry, however testified that Peak was the one doing the writing. Peak did not deny this. McGilberry's testimony is credited. The Respondent, through Priest on September 9 and October 21, 1993, and January 12, 1994 (with Grauling and later with Peak), through Grauling and Peak on September 9, 1993, through Pridgen and Ussery on October 21, 1994, and through Gause on February 18, 1994, violated Section 8(a)(1) of the Act by engaging in surveillance of its employees in order to dissuade their support for the Union.

As noted above, neither Pridgen nor Kinlaw testified at the hearing herein. Consequently Chase's and McGilberry's testimony about what these two agents of the Respondent told employees on September 23, 1993, as described above, is not refuted. The testimony of Chase and McGilberry about the unlawful conduct of Pridgen and Kinlaw is credited. The Respondent, as alleged in paragraph 9(t) of the 1995 complaint, through Pridgen and Kinlaw, violated Section 8(a)(1) of the Act on September 23, 1993, by interfering with its employees' rights through verbal assaults in order to dissuade their support for the Union.

The testimony of Chase and Carrillo that on September 23, 1993, Pridgen reached in and snatched (to show what he was trying to accomplish) is not refuted. The testimony of Chase and Carrillo is credited. As alleged in paragraph 9(u) of the 1995 complaint, the Respondent, through its agent Pridgen, violated Section 8(a)(1) of the Act on September 23, 1993, by attempting to confiscate union literature from its employees in order to dissuade their support for the Union.

With respect to paragraph 9(v) of the 1995 complaint, as found above, Williams engaged in the conduct alleged on September 9, 1993. Pridgen did not testify at the hearing herein so he obviously does not deny the above-described collective testimony of Chase, Carrillo, and McGilberry. The testimony of Chase, Carrillo, and McGilberry regarding Pridgen's unlawful conduct on September 23 and 30, 1993 is credited. Priest did testify. But he is not a credible witness and his denial is not credited. The collective testimony of Chase, Carrillo, and McGilberry regarding the unlawful conduct of Priest on September 23 and 30, 1993, as described above, is credited. As alleged in paragraph 9(v) of the 1995 complaint, the Respon-

dent, through Williams on September 9, 1993, through Priest on September 23 and 30, 1993, and through Pridgen on September 23 and 30, 1993, violated Section 8(a)(1) of the Act by intimidating and coercing its employees while union literature was being distributed to said employees in order to dissuade their support for the Union.

As noted above, neither Gause nor Pridgen testified at the hearing herein. Consequently they did not deny that they confiscated union literature. The testimony of McGilberry that Gause snatched union literature on February 18, 1994, is credited. The testimony of Chase and Carrillo that Pridgen snatched union literature on September 23, 1993, is credited. Pursuant to the request of the General Counsel on brief, the date for Pridgen in this paragraph of the complaint will be amended to read September 23, 1993, which is in accord with the evidence and the allegation in paragraph 9(u) above. As alleged in paragraph 9(w) of the 1995 complaint, as amended herein, the Respondent, through Gause on February 18, 1994, and through Pridgen on September 23, 1993, violated Section 8(a)(1) of the Act by confiscating union literature from its employees in order to dissuade their support for the Union.

15. Paragraph 9(z)[24]

Paragraph 9(z) alleges that Respondent, through Supervisors Ray Krause and Larry Johnson on August 22, 1994, and Henry Morris on August 1 (two occasions) and 23, 1994, threatened its employees with withholding a pay raise should the Union be selected as their collective-bargaining representative.

With respect to the allegation regarding Henry Morris on August 1, 1994, Waymon Lock testified that he attended a company meeting on August 1, 1994, with more than 300 employees; and that during this meeting Morris said that the Union came into the Lundy plant, which is a meatpacking plant in Clinton, North Carolina, and they had not had a raise in 1-1/2 years because it was tied up in court, and if the Smithfield employees got a union, Respondent would do the same thing that Lundy did and tie it up in court and the employees would not get a raise;[25] and that he had received a raise in 1993. On cross-examination Lock testified that Morris was reading from a prepared statement.

With respect to the allegation regarding Henry Morris on August 1, 1994, Diane Fairley testified that she attended an employee meeting on August 1, 1994, about 8:30 a.m. with between 500 and 600 other employees; that Morris spoke on behalf of the Company saying that if the Union came in the employees would not get their raise because "they would have to go negotiations. Have to be a bargaining table and then they would put a freeze on the wages and it would be tied up for a long time"; and that Morris said that the Union came into 44 or 54 plants and of these plants only 9 are still open. On cross-examination Fairley testified that it appeared that Morris was reading from a text but she did not know because she was all the way in the back of the room; and that she fell asleep during the speech and, according to her affidavit, she missed nearly half of the meeting.

With respect to the allegation regarding Henry Morris on August 1, 1994, Chris Council testified that about 3 weeks before the August 25, 1995 union election he attended a company held meeting near the cut floor by the cafeteria; that Henry Morris spoke at the meeting saying that "if we had a vote no for the Union, we would be a September raise, but we had to vote no for the Union to be a September raise"; and that about 600 hundred or more employees attended this meeting. On cross-examination Council testified that he was far away from Morris during this meeting and he could not recall whether Morris was reading his speech from some papers.

With respect to the allegation regarding Henry Morris on August 23, 1994, Chris testified that on August 23, 1994, he attended another meeting held by the Company; that about 700 employees from the kill and cut floors were there; and that Henry Morris:

> was saying about the same, about the raises, and he spoke about that if the Union would come in that he still would—the plant would still operate, and what I can recall of right now, it was still about the—about—he didn't say too much about the raise then.

Morris' testimony regarding his speeches to employees is set forth under paragraph 9(b) above.

Analysis

The Respondent, on brief, argues that nowhere in any of his speeches does Morris threaten to withhold a pay raise should the Union be selected as the employees' collective-bargaining representative; that it is likely that Respondent's Exhibit 86 is the speech that Lock recalls; and that in that speech Morris stated in relevant part, as follows:

> This same union over a year ago promised employees at Lundy Packing Company in Clinton that if employees could vote the union in, the union would get them a big pay raise. An election was held in June of 1993. The union claims they won the election. They told the news media and everyone else that they won. Yet it's been well over a year and no one at Lundy has gotten a raise like the union promised. In fact, wages at Lundy have been frozen for over a year since the election and no one has gotten a raise.
>
> I'm sure Lundy employees would love to have the raise you're scheduled to get in September. But they haven't gotten a raise in well over a year and it doesn't appear that they'll be getting one anytime soon, thanks to all the legal problems involving the UFCW and the union election that was held there over a year ago.

The next paragraph in Morris' speech is also relevant but the Respondent failed to include it in the portion of the speech it quotes on brief. That paragraph reads as follows: "I hope the union doesn't mess up your September pay increase the way they've messed up things for Lundy employees for over a year now." This was a threat to withhold a scheduled September raise in the event of union organization. The Board has held

[24] No evidentiary showing was made in support of the allegations in pars. 9(x) and (y) of the 1995 complaint.

[25] Lock also testified that at a meeting on July 4, 1994, Morris told the employees that they would get their raise in September.

such a threat to be a violation of Section 8(a)(1) of the Act.[26] As alleged in paragraph 9(z), the Respondent through Morris on August 1, 1994, threatened its employees with withholding a pay raise should the Union be selected as their collective-bargaining representative in violation of Section 8(a)(1) of the Act.

16. Paragraph 9(ff)[27]

Paragraph 9(ff) alleges that Respondent, through Supervisor James Hargrove on August 25, 1994, harassed its employees because of their support for the Union.

Respondent's former employee Chris Council testified that on August 25, 1994, the day of the union election, Supervisor James Hargrove gave him a stamper and told him to stamp hogs; that after stamping 50 or more hogs he asked Supervisor Randy Hall what was being stamped on the hogs and when Hall told him it was "Vote No" and he saw that it said, "Vote No" on the hogs he told Hall that he did not want to stamp any more hogs; and that Supervisor Randy Gebbie told him to go back to the line and someone else stamped the hogs.

Hargrove testified that hourly employees do not use an ink stamp in their job,[28] he never ordered Council to stamp hogs, he never told him to put "Vote No" stamps on hogs, and around the time of the 1994 election he never saw hogs stamped with "Vote No" stickers.

Analysis

On brief the Respondent argues that the General Counsel did not present any evidence in support of this complaint allegation. The Respondent treats this matter under that portion of its brief which deals with paragraph 9(gg) of the 1995 complaint. There it argues that there is no testimony by Council that he was ordered to stamp hogs under threat of disciplinary action; and that Council did not object after being instructed to do it.

Although Randy Hall testified at the hearing herein, he never denied Council's testimony that he told Council that he was stamping "Vote No" on the hogs on August 25, 1994. Similarly, while Gebbie testified at the hearing herein, he did not deny that on August 25, 1994, he told Council to go back to the line and had another employee stamp the hogs, which according to Hargrove would have been an unusual event since employees did not use a stamp, and only USDA inspectors use a stamp on hogs. Council was on the stage at the union rally with the Reverend Jesse jackson in August 1994 before the Board election. Council wore a union T-shirt while he was on the stage. As set forth below, some of the Respondent's supervisors were at the rally. Council also handed out union authorization cards outside of the plant and in the locker room. Hargrove testified that he could not say if Council was a union supporter; that he did not attend the Reverend Jackson rally and he did not know that Council was on the stage at the rally. Hargrove's testimony is not credited. Although he might not have wanted to admit it, he knew that Council was a union supporter. That is why he assigned the task to Council. Imagine having a known union supporter, who was on the stage with the Reverend Jackson at a union rally, now stamping "Vote No" on hogs for the other employees to see on the day of the Board election. Council's testimony regarding this matter is credited. He was not asked to perform this task. He was not told up front what the task actually entailed. He was not told that he had a choice as to whether he wanted to do it. As soon as he became aware of the true nature of the exercise, he quit doing it. The Respondent, through Hargrove on August 25, 1994, violated Section 8(a)(1) of the Act by harassing Council because of his support for the Union.

17. Paragraph 9(gg)

Paragraph 9(gg) alleges that Respondent, through Supervisors Kerry Coleman in mid-August 1994 and Ronnie Simmons on August 10, 1994, solicited its employees to abandon support for the Union.

Respondent's former employee Chris Council testified that about 3 weeks before the August 25, 1994 union election supervisor Kerry Coleman approached him on the floor and asked him to come upstairs; that Coleman gave him about 600 sheets of paper which contained an antiunion message; that Coleman instructed him to give a sheet to the kill-floor employees as they clocked out; and that he did as instructed, except that he told the employees to take the paper and throw it in the trash; and that he was still on the clock when he did this.

Analysis

The Respondent on brief argues that the Respondent is free to attempt to persuade its employees to abandon support for the Union; and that there is no violation of the Act where an employee is asked to pass out company literature absent evidence that the employee refused and then was ordered to do so under threat of disciplinary action.

While Coleman testified at the hearing herein, he did not testify about this matter. Therefore, Council's testimony is not refuted. Council was not asked to pass out antiunion literature. Council was instructed to pass out the antiunion literature. Coleman did not tell Council that he had a choice. Contrary to the argument made by the Respondent on brief, this is not about infringing on the Respondent's right to attempt to persuade its employees to support the Company. What this is about is intimidating and coercing a known union supporter to perform a task which would be repugnant to him, and at the same time demonstrate to other employees the power of the employer and how it can abuse that power with a known union supporter. The Respondent did not ask and it did not advise Council that he had a choice. Coleman testified that he knew that Council was a union supporter before the August 1994 election. As noted below, Supervisor Patenburg did not deny that he later accused Council of insubordination for simply asking Patenburg why Patenburg wanted him to go upstairs. Council voiced his objection in the safest way possible when he told the employees to whom he gave the company literature to throw it in the trash. No one would deny the Respondent the right to attempt to persuade its employees to support the Company. However, the means which the Respondent used here in its attempt to get employees to abandon support for the Union was

[26] *General Telephone Directory Co.*, 233 NLRb 422 (1977), enf. denied 602 F.2d 912 (9th Cir. 1979).

[27] No evidentiary showing was made in support of the allegations in pars. 9(aa), (bb), and (ee) of the 1995 complaint.

[28] Hargrove testified that USDA uses an ink stamp.

unlawful to say the least. The Respondent, through Kerry Coleman, in mid-August 1994, violated Section 8(a)(1) of the Act when it instructed Chris Council, a known union supporter, to solicit its employees to abandon support for the Union.

18. Paragraph 9(ss)[29]

Paragraph 9(ss) alleges that Respondent, through Supervisors Henry Morris on August 23, 1994, Marty Hast on August 24, 1994, and Roy Faison on August 24 and 25, 1994, promised its employees a pay raise in order to dissuade their support for the Union.

With respect to the allegations regarding Roy Faison, Chester Sykes testified that he was employed by Respondent from January to December 1994; that Roy Faison was a supervisor over the kill pit area; that on August 24, 1994, he overheard Faison talking to Juanita Lowery in the pen area; that Faison spoke loudly because he was in a noisy area and he told Lowery that he was in a supervisors' meeting the night before with Henry Morris and the employees were going to get a $1 raise if there was a no vote for the Union; that Faison repeated this statement to a female employee who was next to him, Sykes; that during first break he asked Faison about the statement and Faison told him that he had been in a supervisors' meeting with all of the supervisors including Henry Morris and they were told if there was a "no" vote against the Union, they would give everybody across the board a $1 raise, but if there was a "yes" vote for the Union, they would not get anything; that he asked Faison if Morris put it in writing and Faison said no; that on August 25, 1994, Faison told him and about 12 other assembled employees that they had an extra 20 minutes for lunch in order to vote, and Faison told the assembled group if they voted "no," they would get a $1 raise, and if they voted "yes," they would not get a raise; and that at this time he did not openly support the Union, and he had never worn any union paraphernalia or spoken to Faison or any other supervisor in support of the Union. On cross-examination Sykes testified that he attended a union rally with Reverend Jesse Jackson present, a video was made of the rally, he appears in the video and the Union asked him to sign a release which he did; that the rally occurred about 2 weeks before Faison made his above-described statements; that he was asked to sign a release about 2 days after the rally; that he did not speak on the video; that the video shows him sitting in the audience; that he was not wearing any union paraphernalia in the video; that he was 5 or 6 feet from Faison and Lowery when they had the above-described conversation and he was wearing earplugs at the time of this conversation; that the second woman Faison spoke to that day was standing right next to him, almost shoulder to shoulder; that at the time of these conversations Faison was the acting supervisor of the kill pit area; that at one time Faison was a crew leader but when these conversations occurred he was an acting supervisor; and that Faison became acting supervisor in late July early August 1994.

Roy Faison testified that during the 1994 union campaign he was a crew leader in the stick pen department; that as crew leader he helped the supervisor run the department in that when the supervisor was at a meeting or taking care of paperwork he kept the lines running; that he could not fire or discipline employees, and he did not attend supervisory meetings; that while he was a crew leader he did not become a temporary supervisor; that he became a supervisor in February 1995 after the 1994 Board election; that he never had an occasion to attend a meeting that was just for supervisors during the 1994 union campaign; that he recalled Chester Sykes who worked in the stick pen on light duty; that he never discussed the Union with Sykes; that he never discussed pay raises with hourly employees; that employees did ask him questions about raises or more specifically about rumors going around about the employees getting a $1 raise; that when employees asked about the rumors he told them that he did not know anything about it and if they wanted to, they could ask the supervisor about it; that neither Henry Morris nor any company manager ever told him that there would be a dollar raise if the Union lost the election; and that he was considered an hourly employee in 1994 and he voted in the 1994 Board election. On cross-examination Faison testified that in 1994 his supervisor was Charlie Newton; that when Newton took vacations at that time the Respondent sent another supervisor into the department; that the rumor he heard in 1994 about a raise was that Henry Morris had been telling people that the employees would get a $1 raise if the Union lost the election; that he asked Newton in front of employees if he had heard the rumor about the raise; that Newton said that he did not know anything about it; that Sykes was working near him at the time of the 1994 Board election; that Sykes was not around him when he was telling other employees that he had heard the rumor about Henry Morris and Sykes could not have heard him say that to somebody; that Sykes was within 10 feet of him more than once during the day; that Newton was not out sick or on vacation in August 1994; and that he never drafted a disciplinary document of any kind while he was a crew leader. On redirect Faison testified that he first heard the rumor in the break room from another employee; that in September the Respondent gave a 50-cents-an-hour raise; that the area where he works is very noisy in that the animals are killed in this area and there is machinery in this area; that employees wear earplugs in his work area; that the supervisor did not discipline employees based only on his recommendation but rather the supervisor looked into the matter himself; that he did not discuss the rumored one dollar raise with anybody on the day he voted in the Board election in 1994; and that he never told anybody that a "no" vote meant a $1-per-hour increase in September and a "yes" vote meant no increase. On recross Faison testified that when it was time for his department to vote the line was shut down; that when the line was shut down it got kind of quiet; that all of the employees in his department went to vote at the same time and some people were talking to each other as they walked together to the voting area; and that he did not hear the rumored one dollar raise being discussed as they walked to the voting area.

Henry Morris testified that in the early part of 1994 management had mentioned to the employees that management anticipated giving a pay increase in September 1994; that the amount of the increase was never announced during the campaign; that the Company had not determined the amount of the

[29] No evidentiary showing was made in support of the allegations in pars. 9(jj), (kk), (ll), (mm), (nn), and (rr) of the 1995 complaint.

raise during the campaign; that he did not hold any meetings with supervisors just prior to the August 1994 election and tell the supervisors what the raise would be; that he was familiar with the rumor that circulated in the plant prior to the election as to what the raise would be; that he did not start the rumor, he did not know where the rumor started and to his knowledge no one in management started the rumor; and that in September 1994 the Respondent gave a raise of 50 cents an hour. On cross-examination Morris testified that he did not do anything to let the employees know that the rumor was not true.

Ezzard Charles Smith testified that at the time of the Board election in August 1994 he worked in the stick pen[30] and Roy Faison was a crew leader in his department; that prior to the 1994 Board election he was familiar with a rumor that circulated around the plant regarding a $1 raise if the Union lost; and that he never heard Faison tell anybody that if the Union lost the election everybody would get a $1 raise. On cross-examination Smith testified that he did not really recall who he heard the rumor from; that he heard the rumor just before the Board election; that he remembered Morris' name coming up in the rumor that employees would get a $1-an-hour raise if the Union lost the election; that he remembered the rumor about the $1 but he did not know who made the promise; that he did not remember Morris' name being part of the rumor; that he did not remember Chester Sykes; that he voted in the 1994 Board election; that Faison came and told the employees that it was time to vote; that the rumor of the $1-an-hour raise did not come up as the employees in his department were walking from his department to the voting area; and that he did not know if Faison's supervisor, Charlie Newton, was not at work on the day of the Board election in 1994.

Charlie Newton, who was a supervisor on the kill floor in 1994, testified that in 1994 Roy Faison was his crew leader; that Faison could not hire or fire, or grant pay raises, or formally discipline an employee without his knowledge or approval; that an acting supervisor is someone who is filling in for the supervisor and he is the supervisor at the time; that an acting supervisor cannot hire or fire, or grant pay raises, or discipline an employe without checking with someone above him; that in the weeks leading up to the August 1994 Board election he was not on vacation because all vacations were frozen and no supervisor was supposed to be away from the plant except by approval of Henry Morris; that weeks before the August 1994 Board election employees asked him if it was true that they would get a $1 raise if the Union did not come in and he told the employees that he did not know a thing about it; that he did not start the rumor and he was not aware if a supervisor or Morris started the rumor; and that Morris did not tell him to tell employees that they would get a $1 raise if the Union did not come in. On cross-examination Newton testified that Morris placed the freeze on vacations by supervisors before the 1994 Board election; and that he heard the rumor about the $1 raise 2 or 3 weeks before the election.

Lee Mount, who was the director of human resources at the involved Tar Heel plant at the time of the hearing herein, sponsored Respondent's Exhibit 185, which is Respondent's earnings and tax record for Roy Faison for the period May 4, 1994, through December 29, 1994.

Analysis

The General Counsel on brief contends that Faison was an acting supervisor; that Morris adopted the rumor; and that Morris had a legal obligation, citing *American Boiler Mfg. Assn.*, 366 F.2d 458 (9th Cir. 1964), to deny the veracity of the promised wage increase. The General Counsel moves to amend the 1995 complaint to add this alleged violation.

The Respondent on brief argues that Faison voted in the 1994 election and he was not an acting supervisor; and that as a crew leader Faison did not exercise either hiring or firing authority or independent judgement in the implementation of disciplinary measures.

The burden of proof is on the party claiming supervisory status. The General Counsel has not met its burden of proof. The General Counsel's motion to amend is denied in that no legal authority is provided for its position. (The above-described citation is incorrect.)

19. Paragraph 9(xx)[31]

Paragraph 9(xx) alleges that Respondent, through Supervisor Frank Patenburg in mid-August 1994, threatened its employees that selecting the Union as their collective-bargaining representative would cause trouble between the Respondent and its employees.

Respondent's former employee Fred McDonald testified that a couple of weeks before the August 19, 1994 election Supervisor Frank Patenburg came up the work line and said to him, "[W]hy do you all guys want a Union, the Union can't do anything for you but cause trouble between the workers and the Company."

Analysis

The Respondent argues that the General Counsel did not present any evidence in support of this complaint allegation.

Patenburg did not testify at the trial herein and so this allegation is not denied. The Respondent violated Section 8(a)(1) of the Act by threatening its employees that selecting the Union as their collective-bargaining representative would cause trouble between the Respondent and its employees.

20. Paragraph 9(yy)

Paragraph 9(yy) alleges that Respondent, through Supervisor Marty Hast on or about August 26, 1994, promulgated a rule prohibiting its employees from wearing union or nonunion insignia or paraphernalia of any type while on its premises.

Respondent's former employee Larry Jones testified that on Monday, August 29, 1994, a couple of days after the 1994 election, Supervisor Hast came around and told all employees to remove all stickers for the Union from their helmets; and that Hast went up and down the line and told everyone to remove all that referred to union activity from their clothes and helmets.[32]

[30] At the time of the hearing Smith was a crew leader.

[31] No evidentiary showing was made in support of the allegations in pars. 9(tt), (vv), and (ww) in the 1995 complaint.

[32] Jones testified at Tr. 599–600 as follows:

On cross- examination Jones testified that he did not know if Hast told the "Vote No " people to take theirs off; that Hast said that all stickers had to be removed from helmets; and that he agreed that Hast was referring to both Company and Union stickers when he told employees to remove all stickers.

The Respondent's former supervisor, Marty Hast, testified that during the campaign employees were allowed to put campaign stickers on their hardhats; that after the election he required all employees to remove the "Vote Yes" and "Vote No" stickers; that the Company had a policy against placing stickers on hardhats in effect prior to the 1994 campaign but the policy was suspended during the campaign and reinstated after the campaign; and that the policy was established to keep foreign material from contaminating the product. On cross-examination Hast testified that he did not know who allowed the stickers to be placed on the hard hats during the union campaign; that he was told about the change in the policy by his supervisor, Ray Krause, and that he believed that he questioned Krause about this change since he did not like stickers on the hardhats.

Analysis

The Respondent on brief indicates as follows:

> Larry Jones testified that a couple of days after the 1994 election he had a conversation with Marty Hast during which Mr. Hast told him that he had to remove all union stickers from his helmet. Tr. 599. According to Mr. Jones, Mr. Hast went up and down the line telling each employee the same thing. Tr. 600. However, on cross-examination, Mr. Jones acknowledged that he had previously provided an affidavit to the Board in which he acknowledged that Mr. Hast asked employees to remove *all* stickers—both Company and Union—from their helmets. [Emphasis in original and footnote omitted.]

The Respondent goes on to cite cases for the proposition that an employer does not unlawfully violate employees' 8(a)(1) rights where the employees were free to wear union insignia on other articles of clothing. The only problem with this approach is that Jones testified that Hast also told the employees to remove "[a]ll Union activity from our clothes" and Hast never denied saying this. Jones' unrefuted testimony regarding this complaint allegation is credited. This would amount to a total ban. Even if the Respondent takes the position that Hast did not ban union T-shirts—this is not Hast's testimony—since the employees on the line apparently wear butcher coats, being allowed only to wear a union T-shirt which is covered up while on the line would not justify a finding that the ban was only inconsequential.[33] The Respondent, through Hast on or about August 26, 1994, violated Section 8(a)(1) of the Act by promulgating a rule prohibiting its employees from wearing union or nonunion insignia or paraphernalia of any type while on its premises.

21. Paragraph 11

Paragraph 11 alleges that Respondent on September 20, 1994, suspended Fred McDonald and thereafter failed and refused to rescind said suspension.

Frederick McDonald testified that he was employed by Respondent from June 22, 1993, until December 22, 1994; that he was a hog opener and his supervisors were Kerry Coleman and James Hargrove; that during the union campaign at Respondent he had over 100 union authorization cards signed, he participated in union meetings, he handbilled on several occasions and he attended the Reverend Jesse Jackson union rally in 1994; that he was on the podium and he spoke for 5 minutes at the above-described rally; that there were between 150 and 200 people at the rally, including some of Respondent's supervisors;[34] that the Monday after the rally Supervisor James Hargrove said, "I saw you on T.V. this weekend"; that he was on the kill floor just before starting work when this conversation occurred; that he handbilled at the company entrance and while he was handbilling Supervisors James Hargrove, Kerry Coleman, and Randy Hall passed by him on their way out of work; that he solicited signatures on union authorization cards in the cafeteria on break and after work but he did not recall any supervisors being present; that he was an alternative observer for the Union during the 1994 Board election; that his job entails preparing the hogs for the removal of their entrails by cutting the hogs from top to bottom on the belly side; that the hogs are suppose to come to him on a conveyor with the belly facing him; that the employees on the line, as here perti-

> A. Yes, Marty Hast . . . came around and told all employees to remove all stickers for the Union from off their helmets and so forth. That was August 29th which was that Monday.
>
> . . . .
>
> A. Yes, he [Hast] went all up and down the line telling everyone to remove the stickers from their helmets. All Union activity from our *clothes* and the helmets. [Emphasis added.]

[33] At p. 236 of its brief the Respondent indicates "[i]t is important to note that the Respondent did not prohibit the rights of its employees to wear all union insignia. Despite the ban on the stickers, employees were still free to wear Union T-shirts, buttons, and other paraphernalia." There is no record cite for this assertion. Also, in fn. 67 of its brief, the Respondent cites certain testimony of Hast to which objections were sustained. There is no indication in the footnote that the testimony was in fact an offer of proof. And finally, it is noted that Jones testified about Bill Bishop asking him, while they were in an office, about Jones wearing a union T-shirt. It appears that the employees do not have to wear butcher coats while in the offices and they are not supposed to wear soiled butcher coats in the cafeterias. The fact that the T-shirts are not always covered up would not change my conclusion, assuming agruendo that the Respondent's unsupported position that union T-shirts were not included in the ban is correct.

[34] McDonald testified that he saw the following of Respondent's supervisors at the rally: Jimbo (McDonald could not recall his last name), Sherman Gilliard, who was the human resource manager, Ronnie Simmons, who is a supervisor on the cut floor, and Eason, who worked in personnel. Greg Denier, who is the assistant to the Union's International president and is the director of the department of communications, testified that he was present at the August 1994 union rally at Bladen Community College which featured the Reverend Jesse Jackson; and that he saw an individual who was one of the counsel for Respondent stipulated, after reviewing a video received as CP Exh. 47, was Supervisor Dale Smith. The other supervisor allegedly on the video was neither specifically identified by a witness nor was his identity stipulated. The video was considered only for the purpose of establishing the identity, along with the aforementioned stipulation, of the person Denier testified he saw at the above-described rally.

nent, had been instructed by Supervisor James Hargrove that if a hog came down the line with the back instead of the belly facing the worker and the worker could not unhang or turn it around, he was supposed to cut it down; that on September 20, 1994, a hog came down the line turned the wrong way and when he was unable to turn it around or unhang it he cut it down; that Supervisor Kerry Coleman, who was a supervisor on A line at the time, asked him why he cut the hog down; that he told Coleman, "because I wanted to"; that he then saw Coleman talking to Randy Gebbie, who is the superintendent of the kill floor; that Coleman then came and told him that Gebbie wanted to see him upstairs in the kill floor office; that he went to the office where he found Coleman, Gebbie, and Frank Patenburg, who was the assistant superintendent of the kill floor at that time, waiting; that Gebbie told him that he did not have a problem with him cutting the hog down but he did have a problem with him "disrespecting" Coleman; that he told Gebbie that he and Coleman joke and kid around a lot; that he had worked with Coleman previously at Rokko Turkeys in St. Paul and they joked and kidded around; that he was joking on September 20, 1994, with Coleman; that he felt that Coleman was kidding around when he asked why the hog was cut down and he told Gebbie this at the meeting; that Gebbie told him that they decided to give him a 3-day suspension; and that he overheard employee Nelson Drake, who did not openly express his opinion about the Union at work, tell Coleman "fuck you" and he did not know whether Drake was disciplined but he saw Drake at work days and weeks after that incident and assertedly there was no gap in Drake's attendance right after he cursed out Coleman. On cross-examination McDonald testified that in the early part of 1994 James Hargrove was his supervisor and in the latter part of 1994 Kerry Coleman was his supervisor; that there were a lot of people from the community at the Reverend Jackson rally; that he exchanged greetings with Sherman Gilliard at the rally; that he did not know if any supervisor knew that he was getting union authorization cards signed; that the September 20, 1994 suspension was approximately 1 month after the election; that when Coleman asked him why he cut the hog down he told Coleman that he did it because he wanted to; and that he admits that the response was sort of a "smart aleckie" response. On redirect, McDonald testified that when Coleman asked him why he cut the hog down he thought that Coleman was joking since they joked and kidded around all of the time and he thought that Coleman knew of Supervisor Hargrove's instruction that the employee should cut the hog down if it came down the line turned the wrong way.

The Respondent's former supervisor, Kerry Coleman, testified that he never worked with Fred McDonald before and the first time he worked with him was at Smithfield Packing Company; that McDonald cut a hog's legs and dropped it down off the production rail onto the floor; that this was not a common occurrence in that section of the line because there is a place further down the line where if there is a problem with the hog it can be taken out without dropping it on the floor; that the USDA does not like it when a hog is dropped on the floor because it contaminates the hog; that normally USDA will give them enough time to pick the hog up but if it is on the floor for any time they will stop the production line; that he witnessed McDonald cut the hog down and he asked him why he did it; that McDonald told him, with a USDA inspector present, that "he felt like it or he wanted to" (Tr. 5717); that McDonald was not laughing or smiling when he made this statement; that the USDA inspector did not say anything about the hog incident to him; that McDonald was written up and suspended over this incident; that later McDonald apologized to him for giving him a hard time; that he signed the Respondent's Exhibit 149 which is a disciplinary record of Fred McDonald dated "12–14–94" regarding an incident of the same date involving "[e]mployee caused product loss & downtime by bursting hogs"; that he prepared the Respondent's Exhibit 149 and this document was presented to McDonald on December 14, 1994; that when an opener cuts into the guts of the hog, USDA stops the line until the mess is cleaned up; and that it was a common occurrence and when an opener burst the guts, the opener was written up. On cross-examination Coleman testified that McDonald's cutting the hog down had no effect on the production line that day; that he did not think that USDA issued a citation over the incident; that he did not recall if he recommended that McDonald be suspended over the incident; that he reported the incident to Superintendent Randy Gebbie and it was Gebbie's idea to suspend McDonald; that he did not think he wrote McDonald up for insubordination over this incident; that with Respondent's Exhibit 149 McDonald was written up for bursting a hog[35] and causing product losses, and he was there at the time; that Respondent's Exhibit 149 was a written warning because McDonald had been written up before for an oral warning; that the prior oral write up should be in McDonald's personnel file; that the hog bursting incident was not one of the reasons for terminating McDonald; that he knew that McDonald was a union supporter; that he did not know whether McDonald intentionally burst the hog; that he counted back to determine that the burst hog was one that McDonald opened; and that he did not remember if he saw McDonald actually burst the hog or if he counted back to determine that it was McDonald. On redirect, Coleman testified that McDonald was a skilled knife man and a skilled knife man might not burst a hog in a whole week and sometimes he might burst 100 in 1 day; and that a skilled person rarely "bursted" any hogs unless they were doing it intentionally. Subsequently, Coleman testified that Respondent's Exhibit 149 involved McDonald bursting more than one hog but he could not remember how many hogs were involved.

Analysis

For the reasons specified below under paragraph 12 of the 1995 complaint, as it relates to Fred McDonald, I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Fred McDonald and thereafter failing and refusing to rescind said suspension.

22. Paragraph 12

Paragraph 12 alleges that Respondent discharged the following employees on the following dates and thereafter failed and refused to reinstate them: Lawanna Johnson on November 5, 1993; Keith Ludlum on February 3, 1994; George Simpson on

[35] The form indicates "by bursting *hogs*." (Emphasis added.) McDonald's signature does not appear on the form.

February 10, 1994; Chris Council on November 5, 1994; Fred McDonald on December 19, 1994; and Larry Jones on January 25, 1995.

(a) Chris Council

Chris Council testified that he was hired by Respondent on October 20, 1992; that he worked on the kill floor and was supervised by Randy Hall and James Hargrove; that he, along with two other workers at the involved station, opened hogs with a knife as the hogs came down the line; that he estimated that a total of 21,000 or 22,000 hogs are slaughtered daily by the three shifts at Respondent's Tar Heel facility; that in February 1994 he handed out union authorization cards outside the plant and in the locker room which is used by employees and supervisors, and he attended union meetings; that he attended the Reverend Jesse Jackson's rally, went to union cookouts and went to the union office in Tar Heel behind the bank; that he was on stage at the Reverend Jesse Jackson's rally with approximately 20 other employees, they had union signs and he wore a union T-shirt; that the Union videotaped the rally, he received a copy of the tape which he watched, and he saw himself on the tape; that the 2-hour rally was held at Bladen Community College; that in mid-September 1994 he went to Plant Manager Mitch Bailey's office with employee Gary Allen to inquire about changing jobs; that when he was in Bailey's office he saw a black and white tape with a white cover on it with "Union Yes" written on it; that the tape he saw in Bailey's office was the same tape he had in his house; that "What Time Is It," which was the title of the Reverend Jesse Jackson's rally, was written on the tape he saw in Bailey's office; that on November 3, 1994, he was opening hogs with two other employees and one of the employees had to go to the bathroom; that he and the one other employee continued to open hogs; that he injured his shoulder and asked the supervisor if he could go to the doctor; that Hargrove asked him if he was horse playing on the line and he did not let him go to the doctor; that about 30 minutes later Supervisor Kerry Coleman gave him a note (GC Exh. 4), to go to see the company nurse; that after work he went to his doctor who X-rayed the injured area and told him that he may have torn some tissue or pulled a muscle; that his doctor, Ward Bennett, gave him a note (GC Exh. 5), which is dated "11/3/94" and which indicates that Council "is to be absent from . . . work 11/4/94"; that at about 6 a.m. on November 4, 1994, he telephoned the security office and instructed them to let his supervisor know that he would be out for the day due to his injury on the job; that later that morning he went to the plant and gave a copy of the doctor's note to Kill Floor Supervisor Frank Patenburg; that Patenburg told him that he had to see him upstairs and he asked Patenburg for what; that Petenburg said that he needed to see him upstairs "you're about gone anyway"; that when they got upstairs and met with Randy Gebbie, Patenburg looked at the note and he said, "Chris this looks like your handwriting"; that he said that it was not his handwriting; that he told Patenburg to telephone the doctor's office and Patenburg did; that Patenburg sent him to the company doctor that morning around 10 or 11 a.m. and that doctor wrote a note which indicated that he should be out for a day; that he went back to the plant after seeing the Company's doctor and Petenburg told him to go home and be ready for tomorrow; that he went to see Petenburg and Gebbie the next day when he arrived at work; that Petenburg told him that he was insubordinate for asking why Petenburg wanted him to go upstairs the day before; that he said, "What are you trying to do to me . . . [i]t sounds like you're just harassing me and nagging me . . . [j]ust do what you have to do"; that Gebbie then said, "Chris what it is—boils down to is you're termed"; that they did not give him any documents at the time and they did not have him sign anything; that he did not recall receiving the written warning for safety dated "6–10–94," received herein as General Counsel's Exhibit 6[36]; that he did recall receiving the "6–21–94" written warning (GC Exh. 7), which indicates that employees were throwing water at each other on the production line; that the employees were splashing the next person but they were also doing their jobs; that he did not recall seeing General Counsel's Exhibit 9, dated "11–1–94," which is a memorialization of an oral for working without an arm guard and which indicates that employee refused to sign; that at the beginning of that day he told Supervisor Kerry Coleman that he forgot his arm guard; that Coleman told him to go and get it; that he told Coleman that the hogs would be on the line and Coleman told him to go on the line and he would get his arm guard; that he began to open hogs and Coleman brought his arm guard; that he put the arm guard on and he wore it throughout the shift; that he has seen other named employees working on the line without an arm guard; and that on "11–3–94" he received a written warning (GC Exh. 8), which indicates as follows:

> Employee was observed by another supervisor and crewleader showing off and trying to open every hog by himself, he then start[ed] complaining that he injured himself. Corrective Action Taken Written Warning. Employee warned several times in the past about horse play and working safety. Told once again how to do job correctly. Employee has trouble following instructions.

Council testified that he refused to sign this warning; that one or two days after he was terminated he went to Doctor Bennett and was given a note from the doctor, General Counsel's Exhibit 10, which is dated "11/9/94" and which indicates that the doctor wrote the note for patient Council 11/3–11/4; and that he gave the second note from Doctor Bennett to Patenburg.

On cross-examination Council testified that he believed that the Company became aware that he was supporting the Union at the time of the Reverend Jesse Jackson rally, which was held a few days before the union election; that he remembered receiving a written warning from Supervisor Mike Johnson and a 3-day suspension for absenteeism around October 1993; that in 1993 he received four or five oral warnings from supervisors such as James Hargrove, Randy Hall, and Bill Bishop for contaminating meat and getting to the line late, which a lot of employees get warned for; that in 1994 he got five or six oral warnings from Randy Hall, Jimbo Portsman, Randy Gebbie, Patenburg, and Coleman mainly for contaminating meat; that

[36] The warning refers to a date of violation of "6–10–94" and indicates that it involved the employee not having his ear plugs in. The document also indicates that the employee refused to sign.

he did remember getting a warning for not wearing ear plugs around the time of General Counsel's Exhibit 6 but he did not remember the supervisor named on the form, Portsman; that when he and Ed Melvin received warnings for splashing water in June 1994 he was not openly prounion at the time; that Portsman was also designated as supervisor on this warning and he did remember a supervisor named Jimbo in his department;[37] that he could not recall if Jimbo gave him the two above-described June 1994 warnings; that prior to the warning about the arm guard he had been reminded by a supervisor that he needed to put an arm guard on; that he thought that Supervisor James Hargrove warned him about the need to wear an arm guard and he was warned about this about five or six times; that he only recalled hurting his shoulder one time while he worked for Respondent; that previously he had been on light duty because of his wrist but he could not recall when this occurred; that when he went to Mitch Bailey's office he only saw the label on the cover of the tape and Bailey did not play the tape for him; that on November 3, 1994, when he hurt his shoulder, he was working with John Sylvester and Morrell opening hogs but Morrell was not at the work station so he and Sylvester were opening hogs; that he did not tell Sylvester to stand aside, he was going to show everyone how he could open the hogs by himself; that Sylvester did not stop opening hogs; that he remembered Supervisor James Hargrove telling him not to do what he was doing and that he was going to get hurt; that nonetheless he continued opening hogs before they got to the next line; that he did not recall telling people in the area that he was going to show them how to gut hogs; that he remembered Kerry Coleman showing him the warning for working without an arm guard; that he recalled being shown General Counsel's Exhibit 8, which is the "11–3–94" warning by Coleman; and that he did not know whether the other employees who he saw not wearing arm guards received warnings for this. Subsequently, Council testified that he handed out authorization cards before he attended the Reverend Jesse Jackson rally; that he did not handbill in support of the Union; that when he called in on November 4, 1994, to the security office it was standard operating procedure for the employee to be given an authorization number so that a record would be made of the fact that the employee called in; and that contamination of meat occurs quite frequently in the plant and when it occurred with him it was unintentional.

Randy Gebbie, who since August 1998 no longer works for the Respondent, testified that during the campaign and union election of 1994 he was the assistant slaughter superintendent at the Respondent's Tar Heel facility; that he recalled that Chris Council worked on the kill floor, he was constantly in trouble, and he got in trouble for opening hogs on the line by himself; that normally it takes three people to open a hog; that one person trying to do the work of three can lead to injury; that Council received a warning for opening up hogs by himself (GC Exh. 8); that his signature appears on the warning; that he did not recall why Council was terminated; that he did not recall meeting with Council before he was discharged; that he did not recall whether Council received any other safety violations; and that he did not remember if he made the decision to discharge Council. On cross-examination Gebbie testified that in 1993 and in 1994 he did not normally issue employee discipline records but he signed them after they were issued; that while the discipline record (GC Exh. 8), indicates "Employee was observed by another supervisor and crew leader," he did not know who the other supervisor was; and that he did not observe the incident recorded on General Counsel's Exhibit 8.

The Respondent's supervisor, James Hargrove, testified that in 1994 he was Chris Council's supervisor; that one afternoon late in the shift he saw Council opening every hog on his line by himself when he was supposed to open every other hog; that the other hog opener on the line at the time was standing back watching Council; that he pulled Council off the line and he told Council that the job was for two people, he should open every other hog like he was supposed to, and if he caught him doing that again he would have to write him up; that it is dangerous for one person to open hogs because it could cause problems with the opener's hands; that 10 minutes after he spoke with him, Council asked to go to the clinic because his hands and shoulder were hurting; that he never talked to Council about the Union; that he never asked Council what he thought about the Union; and that he could not say if Council was a union supporter. On cross-examination Hargrove testified that he counseled Council about trying to open hogs by himself but he did not think he wrote him up for it; that he told the worker who was standing back watching Council to open his own hog; that he could not recall if this incident occurred in October 1994; that when he counseled Council about opening hogs by himself he did not know if Kerry Coleman or Randy Gebbie were there; that he did not know if anyone wrote Council up for this incident; that he never saw General Counsel's Exhibit 8 before he testified herein; that there was a time when Council worked for Coleman; that he did not tell any other supervisor about the incident; that he was not involved in Council's discharge and no one in management discussed it with him; and that he did not attend the Reverend Jesse Jackson rally and he did not know that Council was on the stage at the rally.

The Respondent's former supervisor, Kerry Coleman, testified that he Supervised Chris Council who worked at the hog opening station on the kill floor; that at the time there were four employees at the hog opening station on both of the two line and each opener was expected to open every fourth hog; that about 8000 thousand hogs were killed on his shift; that Council was a problem employee who was written up for not wearing his safety equipment, namely his arm guard; that Council was hurt a lot; that he witnessed the incident when Council was opening hogs by himself; that Council was on light duty and he and his fellow openers were having a contest and Council was opening all the hogs by himself; that the other three workers were just watching him to see how long Council could open the hogs by himself; that he signed General Counsel's Exhibit 9 which is an oral warning to Council for not wearing his arm guard; that he wrote Council up with General Counsel's Exhibit 8 which is a written warning to Council for opening all of the hogs by himself; that he signed General Counsel's Exhibit 8; that according to the written warning, Council had been warned

[37] The 1995 complaint lists and Respondent admits that James Portsman was the dry side kill supervisor.

several times in the past about horseplay[38]; that it was not always a standard practice to give write ups for safety violations but after the Respondent had been open for a year or so management got real strict about safety rules because they had a lot of injuries, lost time and horseplay; that in the past a failure to wear safety equipment resulted in an oral warning but that changed when there was a management meeting in 1994 and supervisors were told that the injury rate was too high and supervisors would be held accountable; that subsequently monthly safety meetings were held and the employees were advised that they would be written up if they were not wearing their safety equipment; and that Supervisor James Hargrove was written up for working on the line without a chain glove on. On cross-examination Coleman testified that employees on light duty are not assigned to open hogs and Council was probably doing other jobs in the hog opening line area; that he did not recall who the other three employees were who watched Council open all the hogs on that line at that time; that the other three employees were not written up for that incident; that Council was not one of the four individuals responsible for opening the hogs that day; that Council had switched places with an employee who then worked the burn gun, which is light duty and can be done with one hand; that 8000 thousand hogs were opened a day and that meant that each of the four openers would open approximately 2000 thousand hogs a day; that a lot of the employees had repetitive motion injuries and it was common for somebody working the line to be hurt; that Council was hurt more than most; that after Council opened a lot of hogs by himself he complained that his arm or hand was hurting but the injury could have occurred before he opened the hogs by himself; that he was pretty sure that Council was terminated because of the attendance policy; that he did not recommend that Council be terminated based on attendance; that he knew that Council was a union supporter; that he witnessed Council trying to open all the hogs himself; that he has worked short handed with three openers on the line; that he wrote up General Counsel's Exhibit 8; that some of the handwriting on the document is his; that he wrote the "Explain Violation" portion of the form (GC Exh. 8)[39]; that another supervisor on the line brought it to his attention and then he saw Council trying to open every hog; that Linwood Morrell was the crew leader that saw Council trying to open every hog himself; and that he knew that Council was a union supporter before the August 1994 election. On redirect, Coleman testified that

> The other guys were standing there looking. The guys used to have contests among theirselves [sic] seeing how long they could go opening the hogs and the management didn't have a problem with it as long as they weren't busting hogs and the line didn't stop.
>
> But Mr. . . . [Council] was hurt, he was supposedly hurt at the time he was doing that and after he finished doing that he came up and he had a problem. He said his hand was bothering him or something. [Tr. 5786.]

Coleman also testified on redirect that he did not remember if Council was on light duty or if he had just gotten off light duty but after the incident Council told him that he had to go to the nurse because his hand was hurting. On recross Coleman testified that supervisor James Hargrove was the one who witnessed Council opening the hogs by himself; and that nothing on General Counsel's Exhibit 8 indicates that Council was on light duty.

As noted above, in view of the Respondent's second motion to supplement record, a continued hearing was held on July 19, 1999. At the continued hearing the Respondent introduced Respondent's Exhibit 237, which was the subject of its first motion to supplement record filed May 6, 1999. That motion alleged that (1) Respondent's Exhibit 237, as indicated in the attached affidavit of Lee Mount, is a copy of Smithfield's safety rules and employee accident procedures which were in effect from approximately October 1992 until approximately June 1995, (2) this evidence was not presented during the hearing in this matter due to an oversight on the part or Respondent, (3) shortly after the Respondent opened its facility in 1992 it distributed these rules and procedures, along with an employee handbook, to employees, and (4) in mid-1995 the Respondent issued an updated version of its employee handbook (GC Exh. 45), which contained, by and large, all these rules and procedures. and thus the underlying subject matter of the safety rules for which Chris Council had received discipline remained in effect and are already in evidence. That Motion was opposed by both the General Counsel and the Charging Party. The former argued that the document should be subject to the normal safeguards of trial procedure, including cross-examination; that Lee Mount was not with the Respondent before December 1995 so he was not present when the document was allegedly in effect; that Mount already had testified and the Respondent's failure to submit the document into evidence during his testimony calls into question the legitimacy of the document; that the document fails to reflect any date or dates of its effectiveness at the Tar Heel plant; that there is no indication on the face of the document showing whether or not it was distributed to the employees at the Tar Heel plant; and that its admission without the normal safeguards of trial procedure would be a denial of due process. The latter argued that prior to the commencement of the hearing on this matter the General Counsel subpoenaed, among other things, the following:

> 1. All documents relating to company work and/or disciplinary rules or procedures in place during the time period January 1, 1992, to the present, including, but not limited to, company handbooks, posted documents, supervisory handbooks and attendance policies and all changes thereto during the aforementioned time period.

The Union further argued that since the Respondent failed to produce the involved document under *Bannon Mills*, 146 NLRB 611 (1964), it is precluded from relying on that document for its defense, *Be-Lo Stores*, 318 NLRB 1, 14 (1995);

[38] The form indicates that Council refused to sign it. The form also indicates "[e]mployee was observed by another Supervisor & crew leader."

[39] That portio of the form reads as follows: "Employee was observed by another Supervisor & crew leader showing off and trying to open every hog by himself, he then start complaining the he injured himself."

and that cross-examination on the document was crucial with respect to, among other things, if the rules were ever distributed to employees. The document was sponsored by Lee Mount at the continued hearing on July 19, 1999. He testified, "Yes," when asked if Respondent's Exhibit 237 is a document that is kept in the regular course of business at Smithfield Packing Company, Tar Heel Division and to his knowledge were these safety rules and employee accident procedures in effect in calendar years 1993 and 1994. The parties had the opportunity to cross-examine Mount on the document. As the custodian of records, it is not necessary under the Federal Rules of Evidence that he was employed by the company at the time of the business record entry or that the custodian have knowledge of the actual data contained in the business record. But the Respondent was placed on notice that there was a question as to whether the document was ever distributed to employees. Mount did not testify at the hearing herein that Respondent's Exhibit 237 was distributed to the employees in 1992, 1993, or 1994. More specifically, no one testified, or sponsored documentary evidence that a copy of Respondent's Exhibit 237 was distributed to Chris Council while he was employed at the Respondent. It was never explained on the record why the document was not turned over pursuant to the above-described subpoena. Respondent's Exhibit 237 lists personal protective equipment which includes arm guards and ear plugs, and it indicates that employees are not to participate in horseplay. On page 8 of the document the following appears in paragraph 4.3:

> Any violation of Company safety rules by an employee are considered serious misconduct and will result in progressive discipline, in accordance with our Corrective Action Policy, as follows:
>
> 1. First Offense—Verbal Warning
> 2. Second Offense—Written Warning
> 3. Third Offense—Final Warning and 1 day suspendsion
> 4. Fourth Offense—Termination

Analysis

The General Counsel on brief contends that Chris Council was an ardent supporter of the Union's organizing drive and Respondent, aware of such, terminated him and then presented an array of pretextual and shifting defenses which deviated from its disciplinary procedures to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The Respondent on brief argues that the Respondent's work rules (R. Exh. 237), specified that four violations of the Company's safety policy would result in employment termi-nation; that on June 10, 1994, Council received his first safety offense for not wearing his earplugs; that on June 21, 1994, Council received his second offense for throwing water at another employee; that on November 1, 1994, Council received his third safety offense for working without an arm guard; that on November 3, 1994, Council received a fourth offense for gutting hogs by himself after being told by a supervisor not to gut hogs by himself; that some of Council's offenses predate his union activity; and that the record lacks evidence that any procompany employee with a similarly poor safety record was treated more favorably.

As can be seen above, the Respondent's witnesses were not as specific as its attorneys. Of the two supervisors involved in Council's termination one, Patenburg, did not testify at the hearing herein. And the other, Gebbie, did not recall (a) why Council was terminated, (b) meeting with Council before Council was terminated, (c) whether Council received any other safety violations, and (d) if he made the decision to discharge Council. Hargrove, who was Council's supervisor, along with Randy Hall, testified that he was not involved in Council's discharge and no one in management discussed it with him. Hall testified at the hearing herein but he did not testify about Council's termination. Coleman testified that he was Council's supervisor; that he was pretty sure that Council was terminated because of the attendance policy; that he did not recommend that Council be terminated based on attendance; and that he knew that Council was a union supporter.

Contrary to the Respondent's assertion on brief, Council was not terminated pursuant to Respondent's Exhibit 237. There is no evidence of record that the rules and procedures in Respondent's were given to Council while he worked at the Respondent. There is no evidence of record that the rules and procedures in Respondent's Exhibit 237 were applied in 1994. Mount could sponsor the document as custodian of the business records of the Respondent but other than answering "yes" to a leading question, Mount did not explain how he could have personal knowledge that the rules and procedures were in effect in 1994 at Tar Heel when he did not work for the Respondent at the time. According to another of the Respondent's witnesses it was not until mid-1994 that employees were even written up over safety equipment. And if one looks at the last two disciplinary records in chronological order (GC Exhs. 9 and 8), respectively, one would note that (a) while the progressive discipline in Respondent's Exhibit 237 calls for a "Final Warning and 1 day suspension" for the third offense, here the discipline record is checked off for "Oral" and not for "Written" or for "Final/Suspension" although those were available on the form, and (b) while the progressive discipline in Respondent's Exhibit 237 calls for a "Termination" for the fourth offense, here the discipline record is checked off for "Written" and not for "Final/Suspension" or "Termination" although those are available on the form. Coleman signed the November 1, 1994 discipline form. He did not testify herein that he was giving Council a "Third Offense–Final Warning and 1 day suspension." Coleman testified that he signed the November 1, 1994 discipline record for an oral warning to Council. Coleman testified that he wrote Council up with the November 3, 1994 discipline record, which is a written warning to Council for opening all the hogs by himself. Coleman did not testify that the November 3, 1994 discipline record was a termination. Indeed, Coleman was not sure why Council was terminated, speculating that it was for attendance. Of the two who terminated Council, one does not testify at all and the other, Gebbie, testifies that he cannot recall anything about it. Obviously the document received herein as Respondent's Exhibit 237 was not relied on in the termination of Council. While Respondent's

Exhibit 237 was received as a business record, under the circumstances existing here it is not being given any weight.

Under *Wright Line*, supra, the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, Council engaged in union activity. Gilliard and other supervisors were at the union rally where the Reverend Jesse Jackson appeared, and they saw Council up on the stage with a group of the Respondent's employees wearing union T-shirts and carrying union signs. This record contains substantial evidence of antiunion animus. The Respondent has not shown that it would have engaged in the same action even if Council had not engaged in protected activity. There was no business justification for the termination. Of the two floor supervisors involved with the incident, one—Hargrove, did not write Council up but rather told him that if he caught him opening hogs by himself again he would write him up. The other supervisor, Coleman, drafted a "Written" and not a "Final/Suspension" or "Termination." While on brief the Respondent contends that it cannot be argued that the lack of any suspension deceived Council into believing that his safety was satisfactory, this sentence indicates that the Respondent appreciates one of the purposes of progressive discipline, forewarning or foreknowledge. It was never proven that any employee, including Council, or supervisor received the rules and procedures the Respondent now cites. It is clear that Coleman was not operating pursuant to the rules and procedures first brought up in this proceeding in a motion to supplement the record. Patenburg did not testify. Gebbie did not testify that he was operating pursuant to the rules and procedures in Respondent's Exhibit 237. Gebbie claimed that he did not remember anything about this termination. Therefore, the only one referring to in any way the rules and procedures covered in Respondent's Exhibit 237 is Mount as director of human resources and custodian. But Mount was not there at the time and he did not demonstrate that he had any personal knowledge about this matter or the rules and procedures that were being applied at the time. The Respondent had unlawfully singled out Council in the past because he was an active union supporter. This was a continuation of that approach. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating Chris Council on November 5, 1994.

(b) Frederick Mcdonald

Frederick McDonald testified that the attendance policy that Respondent had in place in October 1994 was a 12-point attendance policy under which you received a point if you missed a day, if you missed a day and did not call in you received 2 points, and once you received 12 points you were terminated; that in October 1994 he received an attendance record summary (GC Exh. 3) which showed that he had a total of 5 points as of October 10, 1994[40]; that from October 10, 1994, through December 10, 1994, he did not go to work on November 19, 1994, because he was sick and he called in, he did not go to work on November 29, 1994, because he had to file police and insurance reports regarding his home being burglarized the day before, and he called in and spoke to Coleman; that on December 9, 1994, he went to Dr. Anderson, who is an orthopedic surgeon, in Wilmington, North Carolina, which was in regards to "a Company related issue, it was supposed to have been excused"; that the visit to Dr. Anderson was scheduled by the company nurse at the time, Rosa Britt, because he was having problems with his hands and wrists; that after work on December 10, 1994, Coleman called him and a few other employees upstairs to his desk and issued the employees attendance warnings; that his warning indicated that he had nine points and he told Coleman that this could not be correct because he had only missed 3 days since October 10, 1994, and Coleman said that the only thing he had to go by was what they sent him from the front office; that on December 12, 1994, Coleman gave him another attendance warning, which warning indicated that he had six points; that he asked Coleman what was going on and Coleman replied that the only thing he had to go on was what they sent him from the front office; that on December 15, 1994, Debra Cowen, who is an attendance clerk at Respondent, told him that he needed to come to personnel to check his attendance record because they had him down for 12 points and he was on the termination list; that he told Coleman that he had to go to personnel to check his attendance record and Coleman said that everybody wants to go to the front office now to check their attendance record; that he did not go to personnel but rather he went back to work; that on December 22, 1994, he was told to report to the kill floor office where he found Coleman and Randy Gebbie; that Coleman told him that as of December 17, 1994, he had 12 points and Coleman said that he had no other choice but to terminate him; that he told Coleman that he did not have 12 points since he had only been out 3 days and the third day was the doctor's appointment in Wilmington, which should not have counted as it was company related; that he also told Coleman that when he was out he called in; that Coleman said that he had to go by what they sent him from the front office and Gebbie told him to make sure that he turned in all of his stuff so he would not be charged for it; that he clocked out and went to the union hall from where he telephoned Gilliard who told him that he would see him at 2 p.m. and he would let him see his attendance record and explain the termination; that he went to the plant at 2 p.m. and he informed the clerk that he was there to see Gilliard; that he waited until 5:30 p.m. to see Gilliard and then he left; and that when he picked up his check on December 29, 1994, he asked to see Gilliard but he neither saw Gilliard nor did anyone ever show him his attendance record. On cross-examination McDonald testified that he was aware that other workers in his department checked on their attendance and he tried to check on his on December 15, 1994, which was a week before he was discharged; that he did not remember being absent on October 17 and November 5, 1994, but it was possible that he was; that when he was absent on November 19 and 29, 1994, he was positive he called in; that on November 19, 1994, he spoke with Thelma who was the interpreter on the kill floor and on November 29, 1994, he spoke with Supervisor Coleman; that he started calling in be-

[40] The summary indicates that "[a]ctive points can be worked off after the anniversary of the infraction."

fore 6:30 p.m.; that he received written attendance warnings on November 17, 1994, and December 8 and 10, 1994 (R. Exhs. 7, 9, and 8), respectively; that Respondent's Exhibit 9 refers to a "12–05–94" violation and indicates that McDonald was being given a step 4 (nine points) written warning and Respondent's Exhibit 8 refers to a "11–29–94" violation and indicates that McDonald was being given a step 3 (six points) written warning; that he did not recall a procedure under which an employee calling in an absence was supposed to telephone the guard and get an authorization number to protect himself in case the person he spoke to did not remember the telephone call; that he was not late coming into work on December 6, 1994, because he was never late to work; that between October 10, 1994, and the time he was discharged he could only recall three times when he was absent; and that Respondent has never shown him how it computed his attendance points.

The Respondent's supervisor, James Hargrove, testified that Fred McDonald worked in his department; that McDonald was a good worker but he had an attitude in that instead of asking to go to the bathroom he would just walk off the line; and that he disciplined McDonald for walking off the line and for cutting down a hog. On cross-examination Hargrove testified that he was present when McDonald cut the hog down and he did not know if Kerry Coleman was there; that he did not write up any incident with McDonald; that he was not involved in the discharge of McDonald and no one asked him about any warnings he gave McDonald; that he did not tell anyone in management that he had to counsel McDonald at anytime; and that he did not tell anyone in upper management that McDonald cut down a hog. On redirect Hargrove testified that he signed Respondent's Exhibit 82, which is an "EMPLOYEE DISCIPLINE RECORD" for McDonald dated "9–26–94" and which has "would not do what I tell him. [W]alked off line and went to bathroom without . . . [permission]" under the "Explain Violation" portion of the form and "Employee told if incident happens again he will lose his job" under the "Corrective Action Taken" portion of the form; that he did not write the entry in the "Corrective Action Taken" portion of the form; that he did write the entry in the "Explain Violation" portion of the form; that Randy Gebbie wrote the entry in the "Corrective Action Taken" portion of the form, namely, "Employee told if incident happens again he will lose his job"; that under "Violation level" he checked off "Written" and he did not know who checked off "Oral" and who crossed out the checkmark for "Oral"[41]; that he gave Respondent's Exhibit 82 to Randy Gebbie and Gebbie spoke with McDonald; that under the progressive discipline which was in place at the time an employee would get an oral warning, then a written warning and then a suspension; that this warning on paper should have been an oral written warning; that normally at that time they were supposed to go one step at a time; that the next step would be suspension; and that he did not know if the "Employee . . . will lose his job" was on the form when he signed it. On redirect, Hargrove testified that what happened with Respondent's Exhibit 82 was that

> When my line was stopped I came around to where the hog was—opening the hogs. I asked the boy what happened. He said Fred cut a hog down to make sure I got the hog. The heel strings sure enough had been cut. [I] got Fred off the line I said lets go upstairs.
>
> Went upstairs and told how important it was—he knowed [sic] but he still cut it down just playing games. By cutting the hog down the whole hog had to be skinned.
>
> That's—Randy Gebbie was in the office. Wrote it and he wasn't going to sign it. Me and Randy stood up in the office and Randy talked to him how important it is about you don't cut hogs down which he knowed [sic]. [As noted above R. Exh. 82 involved McDonald walking off the line.]

Hargrove further testified on redirect that McDonald said he cut the hog down but he refused to sign the form; that McDonald admitted that he left the line but he refused to sign the form; and that he left Respondent's Exhibit 82 with Gebbie, he did not see Gebbie sign the form and Gebbie's signature was not on the form when he left Gebbie's office. On recross, Hargrove testified that he was mixed up and he "talked to Fred McDonald about opening the hog, I didn't take it to the office. I talked to him about opening the hog"; that when McDonald walked off the line he had to take it to the office; that he could not remember if he checked "Oral" or "Written" before he gave Respondent's Exhibit 82 to Gebbie; that he checked "Written" and not "Oral"; that he did not cross out the checkmark for "Oral"; and that he never saw the form again until the day he testified at the hearing herein.

Sherman Gilliard, who at the time he was called by the General Counsel to testify herein was the director of human resources for the Smithfield Packing Company, Wilson Division, testified that he had been employed by the Respondent since April 1992; that he held his most recent position since March 1997; that before that he was the public relations director for Smithfield Packing Company, Tar Heel Division for 1 year; that prior to that he was the director of human resources at the Tar Heel Division; that in October 1994 Respondent implemented a no-fault attendance policy under which employees were given points and at 12 points there employment was automatically terminated; that this policy did not apply to salaried employees, members of management, special staff, support personnel, clerical staff, quality assurance, and security; that the no-fault policy was changed in the spring of 1996 to allow absences when the employee had a doctor's note to be excused; that excused absences included workers compensation, jury duty, FMLA[42] and personal leave; that as demonstrated by General Counsel's Exhibit 36(a), although the involved employee, James Merritt, had 15.5 points in January 1996, he was not terminated; that he could not explain why employee Merritt was not disciplined when he, as shown on General Counsel's Exhibit 36(b), had 13.5 points and later 14 points; that with respect to General Counsel's Exhibit 37, which is an absentee calendar for former employee Brian Mitchell, he did not know how the employee could accumulate 24.5 points on January 13, 1995; that the application of the no fault policy was not consis-

[41] Under "Nature of Violation" a checkmark appears after "insubordination."

[42] Family Medical Leave Act.

tent across the board; that perhaps Mitchell was a great worker so his supervisor sat on any discipline; that in addition to the 24.5 points, Mitchell's above-described absentee calendar indicates that he gave Mitchell a number of excused absences, two of which refer to a house fire; that when he gave Mitchell excused absences he did not look to see what his point total was at that time; that at the same time he was giving a number of excused absences to Mitchell who already had 16 points as of December 12, 1994, he was aware that Respondent terminated Fred McDonald on December 19, 1994, because he allegedly had gone over 12 points; that General Counsel's Exhibit 38 is a personnel transaction form which indicates that employee Kevin Leak was terminated "5–19–95" because "[i]nvolved in altercation + 24 points attendance"; that he could not explain how Leak would have been able to accumulate 24 attendance points and the situation with this employee required that he be involved in an altercation before he was terminated; and that the changes in the attendance policy were in writing and they were distributed to employees.

Gilliard further testified that from April 1992 to July 1993 he was the employee relations manager at the involved plant; that from July 1993 until March 1994 he was not in human resources; that from April 1994 to February 1996 he was the director of human resources; that from February 1996 until March 1997 he was the director of public relations; that from October 1992 until October 1994 Respondent's attendance policy was an excused/unexcused system which was a very loosely written policy which was very subjective and left a lot to the discretion of the supervisors to define excused and unexcused and what was excessive; that sometime before October 1994 the attendance policy changed to a five-step program in his absence; that in September 1995 the no-fault policy was changed so that an employee could work off 1 point if they were not absent for 30 days from their last occurrence; that human resources maintained the absentee calendars until sometime in 1995; and that there was no written criteria when he excused an employee, and it was very subjective.

In response to questions of Respondent's counsel, Gilliard testified that the Respondent modified its attendance policy several times to alleviate the turnover in that the majority of the employees which the Respondent was losing at the Tar Heel facility were because of absenteeism; that the application of the attendance policy was suspended completely, the moratorium lasted a couple of months in the 1995–1996 time frame, during that period no one was terminated, but while the department heads were aware of the moratorium the employees were not told because management did not want the employees taking advantage of the situation;[43] that some years there was a 100-percent turnover at the involved plant; and that he was not aware of any company plan to rid itself of union supporting employees through the attendance policy.

In response to further questions of counsel for the General Counsel Gilliard testified that while Merritt received points after he signed a last chance agreement, he was not terminated; that only after receiving an additional 5.5 points for a total of 15.5 points was Merritt suspended; that there was at least one moratorium on discharging employees for attendance and perhaps two; that he believed that one moratorium occurred in early 1995 and perhaps late 1995[44]; that there was no such moratorium in 1994; that when Mitchell accumulated 16 points as of December 12, 1994, there was no moratorium in effect; that he did not have any written documents reflecting the moratorium and the orders to the supervisors were verbal; that the moratorium was communicated to the primary staff, the department heads and human resources; that he was not sure of the specific dates of the moratorium; that Fred McDonald was an excellent employee; and that when McDonald asked him to go over his attendance points he did.

Subsequently Gilliard testified, when asked if the moratorium was communicated to supervisors, that the moratorium was communicated to department heads which would include the kill and cut floor superintendents and the conversion superintendent; that they were told at a morning meeting; that the decision involved Tom Ross, who was the vice president of human resources, Henry Morris, who was the general manager, and Mitch Bailey, who was the facility manager; and that even during the moratorium employees with horrible attendance records would have been fired.

The Respondent's supervisor, Harold Allen, testified that the Respondent has taken a number of different approaches with respect to the employees' attendance problems; that the Respondent has had way over 100-percent turnover in many of the years at Tar Heel; that the Respondent has utilized a point system but he was not sure if it was in effect during the 1994 union organizing campaign; that employees were not always terminated when they accumulated too many points because they may have had trouble at home or there may have been a health situation of they were a "super good" worker; and that he personally kept an employee on the job after the point when they should have been terminated. On cross-examination Allen testified that he recalled that he went to human resources on a number of occasions to indicate that an employee had reached the maximum number of points; that some employees did greatly exceed the points allowed; that a number of times he had employees who reached their limit and he went "to bat" for them because there were unusual circumstances behind their absence or they were a particularly good worker; that he was not told that he would have discretion in applying the point system; that when he went "to bat" for an employee who had exceeded the allowable number of points this would be noted on the employee's attendance card file; and that when he went "to bat" for employees in 1993, 1994, and 1995 human resources followed his recommendation all of the time. On redirect, Allen testified that he never took into consideration whether a person was prounion or procompany when he was deciding whether to go "to bat" for them.

[43] Henry Morris testified that he did not remember placing a moratorium on any rules during the time he was there. Morris left the Respondent's Tar Heel facility on June 30, 1995.

[44] Respondent's former manager, Sherri Buffkin, testified that she was a supervisor in 1995 and she was not familiar with a moratorium on discipline; and that she was not ever instructed by anyone not to discipline anybody over attendance in 1995.

The Respondent's former supervisor, Randy Gebbie, testified that the Respondent had attendance problems; that the Respondent's attendance policy has changed over time; that there have been three attendance policies at the plant since he came to the plant in January 1994; that he did not remember much about the first policy; that the second policy was a point system under which an employee was allowed 12 points in a 12-month period and after that termination; that the third policy is termination for the sixth unexcused absence in 6 months; that he had fired many employees under the 12-point policy; and that there were three or four time periods when he was instructed not to terminate employees for attendance and that information was handed down through the chain of command.

The Respondent's superintendent of the cutting division, Timothy Dale Smith, testified that when he began working at the plant in 1992 the Respondent had an excused, unexcused attendance policy under which an absence was considered unexcused unless the employee had documentation indicating that there was a legitimate reason for being absent; that sometime in 1994 the Respondent began using a no-fault 12-point system under which the employee was terminated if he or she was "out" more than 12 times; that if the employee was out of work, other for than military or death in the family, he or she would get a point, and if the employee came in to work late, he or she would get one half of a point for tardiness; that "[a]t one point in time we were given directions to no longer terminate employees . . . for points, but to continue to document"; that he could not remember when this occurred approximately but he remembered that Larry Johnson instructed him not to terminate employees, he remembered that the instruction did not apply to some type of severe behavioral problem, and he remembered that the period during which employees were not terminated lasted a couple of months; that if a person had a hardluck situation or had a sick child or was taking care of a parent or had a "severe need," that employee might not be terminated right at 12 points; that the human resources department had the discretion to disagree with a supervisor's recommendation to terminate an employee; that he was aware of several situations where this occurred; that he never considered whether an employee supported the Union or the Company in making personnel decisions; that in 1997 the Respondent changed its attendance policy to an occurrence (six) type situation; and that this was the policy which was in effect at the time of the hearing herein. On cross-examination Smith testified that exceptions for a hardship would include having to care for those in a household including a child, husband or wife; that in 1993, 1994, and 1995 the Respondent had a 100-percent turnover each year; and that the Respondent had problems keeping workers.

Bill Gray, who was a human resources assistant in 1994, became an employment manager in early 1995 and an employee relations manager in September 1995 at the involved facility,[45] testified that when he started at the Tar Heel facility in June 1994 the Respondent had an excused, unexcused attendance policy; that under such policy with the first unexcused absence the employee received an oral warning, with the second there was a written warning, the third a written warning and a 1-day suspension, the fourth a written warning and a 3-day suspension, the fifth was a final written warning with a 5-day suspension and the sixth was termination; that there were problems with tracking attendance on a timely basis because there were so many absences; that the Respondent hired about 300 employees a month in late 1994 and the turnover rate at that time and up until he left was 100 percent per annum; that in late 1994 the personnel files were kept by the human resources office and corrective actions were created in the human resources office and sent to the floor for the supervisor to go over with the employee; that filing all of the documents for every unexcused absence, unexcused tardy, and unexcused leaving work early became burdensome so a file was created on the production floor for all of the corrective actions and the documents submitted by employees; that it was a common occurrence for the steps in the attendance policy not to be followed; that in October 1994 the attendance policy changed to a points policy which does not track days as excused or unexcused but rather as occurrences and their is a point value assigned to certain types of absences; that no points are assigned for certain types of absences, i.e., a death in the family, work related illness, Family Medical Leave and short-term military duty; that employees were supposed to call in 1 hour prior to the start of their shift and if they did not they received a point for being absent and a point for not calling in; that employees called the guard shack to report an absence and received a call in number from the security guard to verify that they had called in; that employees received one half a point if they were late or left early but worked at least 4 hours that day; that there was a 12-point limit within a 1-year time frame; that sometime in 1995 the calls became too much for the guards to handle so employees on the second shift were instructed to telephone the receptionist; that the Charging Party's Exhibit 9 addresses the changes to the point system; that Charging Party's Exhibit 10 is a clarification memorandum that was forwarded to all managers regarding the points policy; that unexcused absences were assigned point values and each employee received a letter stating how many points they had because of prior unexcused absences; that there were some problems converting unexcused absences into points under the new policy and at least 50 employees complained to him that they thought that they had been assigned too many points in the transition from the excused/unexcused system to the point system; that he went through the employees' attendance cards and he would check payroll records to determine whether they were absent; that Respondent's Exhibit 114, dated "11/3/94" is a policy statement regarding bonuses for a good attendance record[46]; and that when the point system went into effect in late 1994, department division clerks on the floor kept track of the points and submitted corrective action back to the supervisor, who had previously filled out the attendance report, to issue to a particular employee.

[45] At the time he testified herein he was safety and human resources manager at the Respondent's Kinston, North Carolina facility. He took that position on May 1, 1998.

[46] Employees who had three or less points during a 12-month period received an amount equal to a 40-hour week at their rate of basic pay, and with up to five points, they received one half that amount.

On cross-examination Gray testified that while he was at the Tar Heel facility, June 1994 to May 1998, the biggest problem the plant had with regard to personnel was turnover; that most of the jobs in the plant are very difficult and it is hard to recruit for those jobs; that the goal of the attendance program was to try to keep employees on the job and not to punish employees and get rid of them; that tracking attendance was not a high priority; that one of the problems with tracking attendance was that the supervisors would not report it; that the supervisors would not discipline employees if human tesources asked them to; that he was not aware of any supervisor ever being disciplined for failing to enforce the attendance guidelines; that the Tar Heel facility has computerized timeclocks; that there were extensive problems with the timecards because employees who management knew were at work claimed that they clocked in and out but it was not recorded on the timecards; that the time clock did accurately reflect who was not at work; that in 1994 (his knowledge was limited to late 1994 in that he started working for the Respondent in June 1994) and 1995 the Respondent was hiring constantly; that every time the Respondent had a displacement (when jobs were eliminated) every one of the displaced employees was offered an opportunity somewhere else in the plant; and that to his knowledge, other than the job eliminations, there has never been a layoff at the Tar Heel facility.

Gilliard, when called by the Respondent, testified that when the Respondent started production in October 1992 at the Tar Heel facility it did not have a defined attendance policy, it was very subjective, it was left up to the managers and supervisors to determine what was excused or unexcused; that absenteeism was a major problem for the Company in late 1992; that he left the Company in July 1993 and when he returned in March 1994 as director of human resources the Respondent had an excused/unexcused attendance policy in place, Charging Party's Exhibit 7, which was administered by human resources; that under that policy the supervisors determined whether an absence was excused or unexcused using the definitions in the policy as guidelines; that the Respondent's Exhibit 146 is a copy of the daily absentee report which each department turned into human resources on a daily basis; that the daily absentee report was used at least from 1994 to present; that when he returned in 1994 human resources kept attendance calendars for all the departments in the plant based on the daily absentee reports; that under the attendance policy specified in Charging Party's Exhibit 7 there was a step or progressive disciplinary action with the first offense (unexcused absence) resulting in an oral warning in the form of a written documentation, the second unexcused absence would result in a written warning, the third would result in a 1-day suspension, the fourth a 3-day suspension, and the fifth a 5-day suspension; that the policy was not always enforced as written because in the definition section there was a lot of latitude regarding whether a person would be terminated after their fifth unexcused absence; that the departments did not always provide accurate information; that human resources sent disciplinary actions to the floor and they were never carried out; that in those situations human resources would issue a last-chance letter; that it was a very common occurrence that all of the progressive steps were not followed; that at this time in 1994 it was the supervisor's responsibility to give the discipline to the employee that was forwarded from human resources; that terminations were being sent to the floor by human resources and the supervisors were not terminating the employees; that he talked to the superintendent on the kill floor, Randy Feldburg, about Supervisor Kerry Coleman not administering discipline; that Supervisors Terry Smith and Thomas Staggs were two others who did not administer disciplines; that from March to September 1994 there was a lot of supervisor turnover; that supervisors were evaluated on production, among other things, and absenteeism affected production a lot; that he audited the books of the major departments regarding attendance and he determined that the kill floor was the worst in keeping up with their absences and making sure that documentation was being conducted properly; that the problem was that the attendance policy was so loosely written in terms of determining what was excused and unexcused, it was very subjective and different members of management saw it differently in terms of what was excused and unexcused; that Ray Krause who was in charge of the loin boning area, considered every absence as unexcused if the employee did not have a doctor's note; that, as noted above, the superintendent on the kill floor was Randy Feldburg and the kill floor was not indicating the codes on the daily attendance reports to show whether the absence was excused or unexcused, and it would not provide this information later; that some disciplinary actions had to be rescinded when it was later determined that an absence was not unexcused but rather excused; and that it was a very frequent occurrence that attendance calendars were not correct for whatever reason.

Gilliard further testified that in October 1994 the attendance policy changed to a no fault policy under which absences were assigned a point value and the only excused absences were those covered by law such as Family Medical Leave, Worker's Compensation, jury duty, and medical leaves of absence; that under the October 1994 attendance policy an employee was terminated when they received 12 points, there was no suspensions and there were five disciplinary steps with the employee being terminated at step five when the employee had 12 points[47]; that he was the principal author of the October 1994 attendance policy and the policy was implemented because the Respondent wanted to remove the subjectivity of the prior policy, it did not want employees questioning whether an absence was excused or unexcused, and it wanted employees to change their behavior and come to work; that employees were allowed more occurrences under the point system then under the excused/unexcused policy; that employees were notified of the new policy and all the outstanding unexcused absences were converted to points; that there were employees who questioned the points they received as a result of the conversion; that he remembered former employee Fred McDonald who worked on the kill floor on day shift; that he did not recall having a discussion with McDonald concerning his points total after the con-

[47] Step one was 3 points and verbal counseling, step two was 6 points and a written warning, and steps three and four were written warnings with the former for 9 points and the latter for 11 points. R. Exh. 115.

version process took place; that he did recall McDonald coming to him and stating that he thought his point total was not accurate the day he was terminated; that McDonald did not think he had 12 points; that this was the only conversation he had with McDonald regarding points; that he told McDonald to go home the day he was terminated and he asked McDonald for his telephone number telling McDonald that the would get back with him; that he was not sure if he did get back with McDonald; and that he did not recall asking for a printout for McDonald from payroll which would have indicated clock in and clock out times and he did not recall reviewing the cards.

Gilliard further testified that under the point system human resources was still tracking attendance but this changed in early 1995 when the departments were made responsible for managing their own daily absentee report books; that human resources was still the administrator of the policy and did periodic audits of the attendance books; that human resources was available for employees who may have disagreed with their discharge or their attendance calendars; that in early 1995 the Respondent started receiving complaints from employees that they did not like the points policy because it did not take into consideration such things as excused absences and doctor's notes; that while the attendance calendars were being maintained on the floor and supervisors were responsible for annotating the absences and conducting the discipline, human resources discovered during the termination process that disciplinary actions were not being conducted; that human resources discovered that this was a common occurrence; that in those situations where it was discovered that all five steps had not been followed the employee would be given a last chance letter or told that they could not miss any more time in the next 30 days; that once the book went back to the floor termination proceedings were initiated at the supervisor/superintendent level and human resources would only get involved if the employee went to human resources and complained about their discharge or told the supervisor that they wanted to go to human resources; that he audited the attendance books kept by the departments and discovered that on the kill floor there were numerous employees who had more than 12 points and they either had not been disciplined or they were disciplined but not discharged; that when he spoke to the superintendent of the kill floor, Randy Feldberg, about it he was told that they were trying to run the floor, they had good employees that they could not afford to lose, and they did not have cross-trained employees to step in and continue to run the line speeds that they were running; that he met with Mitch Bailey, who at the time was the facility manager, and they discussed the problem with the kill floor; that he thought that Henry Morris, who was the vice president and general manager, got involved; and that in early 1995 turnover was extremely high as a result of employees exhausting the 12-point system.

Gilliard further testified that in early 1995 there was a moratorium on attendance because turnover was horrible, the Respondent had a tough time staffing the plant, and it had lines which were running at half speed;[48] that a decision was made at Corporate to put a moratorium in place and not to terminate any employee unless they were reviewed by human resources; that there was no specific time frame on how long the moratorium would last; that during the moratorium attendance points were still tracked at the department level; that supervisors were not notified about the moratorium because the Respondent did not want the employees to take advantage of it; that some employees were still terminated during the moratorium if they had a pattern of absences; that there were no written guidelines with respect to the exceptions to the moratorium; that Tom Ross, who is the vice president of human resources for Smithfield Foods and Smithfield Packing Company, informed him that this moratorium was going into place; that points were still accrued during the moratorium; that employees who did not call in or show up for work for 3 consecutive days were still terminated during the moratorium; that as director of human resources he could excuse an employee's absence under the point system; and that this would occur when a department manager or a human resources time and attendance clerk at the behest of a superintendent advised him that an employee had a particular problem such as a house fire or a major emergency, and he had to be away from work.

Gilliard further testified that in 1994 the Respondent had an attendance bonus at the Tar Heel facility, which bonus was given in December 1994; that October 1993 to September 1994 was the qualifying period; that an employee could receive either one half or a full week's pay depending on the number of unexcused absences the employee had; that a list of the qualified employees was posted for the employees to see; and that some employees advised human resources either directly or through their supervisors that they believed that they should have qualified for a bonus.

On cross-examination Gilliard testified that when attendance was being kept by the departments the supervisors could excuse absences under the excused/unexcused system but only he could excuse absences under the 12-point (no-fault) system; that under the excused/unexcused system Ray Krause would not excuse anything without a document, and the attendance policy during that time gave a lot of latitude to the supervisor to determine what was excused or unexcused; that Kill Floor Superintendent Randy Feldburg had employees who had far more unexcused absences then were allowed, Feldburg did not fire the employees, and human resources did not fire the employees at the time; that with respect to an organizational chart, in 1994 Henry Morris was the vice president and general manager,[49] Mitch Bailey was the facility manager and he directed the activities of the superintendents and primary staff, he was director of human resources, Randy Feldburg was the Kill Floor Superntendent Larry Johnson was the Cut Floor Superintendent Ray Krause was the Conversion Superintendent Tim Sullivan was the Distribution Manager Butch Edwards was the Maintenance Engineer Mark Ellison was the comptroller, and Phil Price was the quality assurance manager; that not all of the people on the organizational chart attended the morning meetings; that the operational people attended the morning meetings, namely, Krause, Johnson, Feldburg, Price, and Edwards;

[48] Gilliard testified that there was another moratorium on attendance either in the latter part of 1995 or early part of 1996.

[49] Gillard testified that Morris was not at the facility every day because he had other responsibilities.

that the no fault system was written to give him the authority to make exceptions to the policy; that it does not say in the policy that he has the authority to make exceptions; that the moratorium is one of those things that was probably addressed by himself and the facility manager, and probably Henry Morris; that the information about the moratorium was disseminated in the morning meeting; that he heard Morris testify herein that he never authorized any change in rules or enforcement of disciplinary policies; that Morris was the top man at the plant but he did not have a decision in the moratorium; that the moratorium was the idea of Tom Ross, who is the vice president of human resources; that Morris was obviously aware of the moratorium; that he did not ever tell Morris about the moratorium and he did not know if Ross ever told Morris about the moratorium; that the attendance books went back to the departments in the first quarter of 1995; that Chris Council and Fred McDonald were discharged before the moratorium; that he had the authority to recommend discipline for supervisors, who did not work for him; that he made such recommendations but he did not do it in writing and no supervisor was disciplined based on his recommendation; that he made recommendations regarding Kill Floor Supervisors Kerry Coleman, Tom Staggs, and Terry Smith, all of whom enforced discipline but with whom there was a question of timeliness and accuracy; that by timeliness he meant that when the superintendent brought it to the supervisor's attention that he was not enforcing the discipline, the supervisor went back and corrected it; that when the Respondent changed to the no fault system, numerous employees had questions regarding how their points were tabulated and about the accuracy of the points; that human resources did not just look at the card but rather secondary sources were looked at; that he did not know if they did that for Fred McDonald; that human resources did not fire Fred McDonald; that Fred McDonald was fired by his supervisor; that he trusted that it was the case that Fred McDonald was fired by his supervisor after the human resource department sent him a notification to fire Fred McDonald; that it is his testimony that since the supervisor was the one to give Fred McDonald the news he was the one who fired Fred McDonald; that while he was concerned about whether the records were correct he did not look at Fred McDonald's because he had other responsibilities, and he had staff members deal with some of the questionable terminations that employees brought to human resources; that Fred McDonald brought it directly to his attention; that when human resources sent the notice to terminate Fred McDonald to Supervisor Kerry Coleman the supervisor had a choice, namely the supervisor could have considered giving Fred McDonald a last-chance letter, or the supervisor could have come to human resources and questioned Fred McDonald's attendance calendar and reviewed the record; that Coleman would have had to go through human resources on the last chance agreement; that if Coleman told McDonald that he had no choice but to fire him Coleman probably would have been lying since he did have a choice; that he never issued a memorandum instructing all supervisors to properly enforce the attendance policy after auditing the departments; that he never sent superintendents a memorandum pointing out the deficiencies his department found during the audits; that he recognized Charging Party's Exhibits 17, 18, and 19 as employee warning reports kept in the ordinary course of business at the human resources department when he worked there in June 1993; that Charging Party's Exhibit 17 is a written warning or disciplinary action report on Henry Drake dated "6/11/93" referring to a violation of the same date[50]; that Drake worked on the cut floor in the packaging area; that Charging Party's Exhibit 18 is a oral warning or disciplinary action report on Henry Drake dated "6/22/93" referring to a violation of the same date[51]; that Charging Party's Exhibit 19 is a written warning or disciplinary action report on Henry Drake dated "6/23/93" referring to a violation of the same date[52]; that Charging Party's Exhibit 20 is the absentee calendar, with problems listed on the backside, for Michael Young[53]; that the point system was in effect from October 1994 through 1995; that he was the only one who could grant excused absences under the point system and he was not lenient if he was aware of a pattern of absences; that under the point system if an employee had more than twelve points he was supposed to be discharged; that it appears from Michael Young's absentee report (CP Exh. 20(b)), that he had 18 points as of May 22, 1995, and that every month from August 22, 1994, through April 3, 1995, he was absent at least once a month or more and some of them were no call/no shows; that even after 18 points Young was counseled and given another chance, on "06–07–95" to stay on the job (CP Exh. 21); that Charging Party's Exhibit 21 does not indicate any extenuating circumstances; that it appears that Young was allowed to keep his job because he wanted his job; that an employee is terminated if they have no call/no show after 3 days; that according to Charging Party's Exhibit 22 Young was terminated for more than 3 days no show ("5 days no show"); and that the revisions in the attendance policy covered by Respondent's Exhibit 115 included allowing employees to be able to work absence points off, and no call/no show changed from one point to two points.

The Respondent's plant manager, Larry Johnson, testified that he heard of a moratorium on attendance discharges but he could not remember exactly when; that there were a couple of periods where the Respondent was losing so many people at Tar Heel it "just kind of ignored, just totally ignored the attendance program" (Tr. 5553): that he could not remember what year but he did remember that it happened more than once; and that he complained to human resources, as he had always complained, that he did not have enough qualified people and he suggested that maybe no rules were better than rules.

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[50] The management remarks on the form read: "Out due to car accident, will return Wednesday."

[51] The management remarks on this form read as follows:

> Review of the record shows that on 16 different occasions he has been out or late. This is an oral warning, any further occasions can and will result in stringent disciplinary action.

[52] The management remarks section of the form reads as follows:

> Review of the record shows that on 17 different occasions he was out or late, today he called in and said he would be late. This is a written warning, any further violations can and will result in more stringent discipline.

CP Exhs. 17, 18, and 19 were all signed by Harry Grauling. In June 1993 the excused/unexcused policy was in effect.

[53] It covers a period from "8–22–94" to "7–26–95."

The Respondent's former supervisor, Kerry Coleman, testified that he was a supervisor on the kill floor from 1992 to late 1995; that Fred McDonald worked for him at one time; that he thought that McDonald was terminated because of his attendance; that it was his understanding that sometimes by the time employees were terminated they had in excess of 12 points because of delays in the paperwork, but he could not cite a specific instance of this; that he signed the Respondent's Exhibit 148 which is a disciplinary record for Frederick McDonald dated "12–19–94"; that the write up was for exceeding twelve points and he was terminated because of it; that he presented the form to McDonald; that he placed the line in the box which indicates that McDonald refused to sign the form; that the date of the violation on Respondent's Exhibit 148 is "12–06–94"; that he forwarded the attendance roll to the human resources department every day and he could not explain the delay in the discipline; that a lot of the employees complained that under the point system the numbers were not correct; and that he believed that someone in human resources was responsible for Fred McDonald's termination.

Lee Mount, the Respondent's director of human resources, testified on cross-examination that payroll keep records like Respondent's Exhibit 171 for each and every employee back to the beginning of the plant; that employees questioned the number of points they had under the 12 point no-fault system and occasionally one of the human resource clerks went to payroll to retrieve these documents to check it; and that the document shows the in punch and out punch.

Analysis

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, McDonald engaged in protected union activity, the Respondent knew that McDonald engaged in protected union activity and the record contains more than substantial evidence of antiunion animus. The motivation factor for McDonald's termination was directly related to his protected union activity. Gilliard and other supervisors were in the audience at the union rally where the Reverend Jesse Jackson spoke. McDonald also spoke at that rally. After the rally, Hargrove told McDonald that he saw him on television.

Has the Respondent proven that it would have taken the same action even if McDonald was not engaged in protected activity? Did the Respondent have a business justification for terminating McDonald? The Respondent claims that McDonald was terminated because he accumulated 12 attendance points. Gilliard admitted that a number of employees questioned the points they were given and his department reviewed the points with employees. McDonald questioned his points and, according to Gilliard's testimony, he told McDonald that he would get back to him on this matter. At one point Gilliard testified that he was not sure if he did get back to McDonald, that he did not recall asking for a printout for McDonald from payroll, and he did not recall reviewing the cards. Subsequently Gilliard testified that he did not look at McDonald's records, even though McDonald brought it directly to his attention, because he had other responsibilities. The reason Gilliard never got back to McDonald was that Gilliard knew that McDonald did not have the 12 points. Gilliard was not a credible witness.

At pages 116–118 of its brief the Respondent argues as follows:

> Employees were sent a summary of their points as of October 10, 1994. Ex. CP-10. Mr. McDonald's summary listed a total of **5** points. Ex. GC-3.
>
> The first violation [after the October 10, 1994 summary] was on October 17, 1994 . . . . Ex. R-7. This raised his point total to 6 points. . . . .
>
> On November 29, 1994, McDonald was again tardy or absent. [This would have given McDonald 7 points.] . . . .
>
> Mr. McDonald was tardy or absent on December 5, 1994. Ex. R-9. On December 8, 1994 he received a written warning Step 4(**9** points). Ex. R-9. . . . . [It would appear that this would have been McDonald's 8th point. The Respondent does not explain how McDonald received two points for what appears to be one occurrence ("tardy or absent"). But for the sake of argument we will proceed with the Respondent's 9 points.]
>
> On December 6, 1994, Mr. McDonald was once again either absent or tardy. Ex. R-148. This occurrence put him over the 12-point maximum set forth in Respondent's attendance policy. Accordingly, his employment was terminated. . . . . [So, according to the Respondent, in the span of one day McDonald went from 9 points to "over the 12-point maximum." How he managed to get three or more ("over the 12-point maximum") points in one day is not explained by the Respondent. It is noted that the policy indicates that 12 points results in termination.]
>
> Surely Mr. McDonald was aware of each time he was late or absent. His conduct alone put his job in jeopardy. [Emphasis added.]

McDonald's conduct, his protected union activity, put his job in jeopardy. As demonstrated by Respondent's Exhibits 171 and 172, the Respondent had the capability to prove what days McDonald was absent or tardy. Gilliard chose not to do this with McDonald. Gilliard chose not to do this at the hearing herein. Gilliard made this choice because the records would have shown that the Respondent was not justified in taking the action it did against McDonald. The Respondent has not shown that it would have taken the same action against McDonald even if he had not engaged in protected union activity.[54] The

[54] Although it is not necessary to go into disparate treatment, it is noted that the Respondent allowed employees to exceed the maximum and not be terminated. The Respondent's apparent assertion regarding what role alleged moratoriums may have played in this are entitled to no weight. There was no documentation, and the Respondent's witnesses contradicted each other with respect to this apparent assertion.

Respondent violated Section 8(a)(3) of the Act by terminating Fred McDonald on December 22, 1994.[55]

While on brief the Respondent more than once argues that Fred McDonald was only given a written warning about the hog cutting down incident, its own witness, Supervisor Coleman testified that it was Superintendent Gebbie's idea to suspend McDonald. Perhaps unwittingly (or maybe even wittingly) the Respondent's attorneys are indicating what would have been the most discipline which could have been justified for McDonald's saying to Coleman "because I wanted to." Coleman did not deny that Nelson Drake told him "fuck you" and Drake was not suspended. The *Wright Line*, supra, requirements and their application to McDonald are set forth above. The Respondent treated McDonald disparately. The Respondent did not prove that it would have taken the same action even if McDonald had not engaged in protected activity. As concluded above, the Respondent violated Section 8(a)(3) and (1) of the Act by suspending McDonald for 3 days on September 20, 1994.

(b) Larry Charles Jones

Larry Charles Jones was hired by Respondent on April 19, 1993, he worked in the loin and bone department and his supervisor was Marty Hast. Jones testified that in July 1993 he filled out a union authorization card; that he got about 15 other employees to fill out union authorization cards; that he passed out handbills outside Respondent's gate, and beginning in July 1993 and up through the union election in 1994 he wore union "Vote Yes" stickers and literature on his work hat and he wore a union T-shirt; that Supervisors Hast and Bill Bishop saw him handbill at the employee entrance; that in early July 1994 Bishop approached him and said that someone had told him that he had been tearing company literature off the wall and he told Bishop that he did not do that because he knew that was against company rules; that in mid-July 1994, while in an office, Bishop asked him why he was wearing a union T-shirt at work and he told Bishop that it was for the same reason Bishop wore a "Vote No" T-shirt to work; that during the conversation about the union T-shirt Bishop told him that the Union could not do anything for the employees but cause the plant to shut down and cause the employees to lose wages; that Hast and a couple of employees were passing when Bishop made these statements; that in mid-August 1994, before the election, Supervisor Hast approached him while he was working on the line and asked him if he wanted a "Vote No" sticker to put on his helmet, and he told Hast that he did not want one because he had a union sticker on his helmet, which he was wearing at the time; that on August 20, 1994, he and some other employees were in Bishop's office and Bishop said that the employees should not get involved with the Union because the Union could not do anything for the employees and if the Union could do so much for the employees they should get the Union to put it in writing; that he responded to Bishop, "[W]hy is it that he Company is going to do so much and they won't put it in writing"; that when Bishop saw him wearing his union T-shirt Bishop told him that he disappointed him; that around the first of January 1995 he went outside the gate and handbilled for the Union; that on January 25, 1995, he was concerned about the fact that the Company had been getting rid of a lot of people with the points system so he asked Hast if he could go and check on his points; that when he asked the secretary in the front office how many points he had he was told he had 14.5 points; that he questioned the number of points because he had received a bonus check for only having 2.5 points as of October 1994; that the secretary resolved that he was at work on 2 of the days for which he was given points; that the secretary removed those points but she added 2 points for absences in June 1994; that in October 1994 he received a bonus of 1 week's pay for having only 2 points under the attendance policy[56]; that in late 1994 or early 1995 he was not suspended; that he believed that in January 1995 he may have had 6 or 7 points; that he could not recall ever being written up in 1994 for tardiness but he was absent sometimes; that after he spoke with the secretary he told Hast that the secretary said that he had 14.5 points; that Hast told him that he would check into it but at that time he had to turn in his stuff; that after turning in his equipment he left the premises; that when he went back to pick up his last paycheck on the Thursday after January 25, 1995, Hast told him that he never had a chance to look into his points; and that at the time of his discharge he was not given any kind of discharge papers or documents explaining why he was discharged.

On cross-examination Jones testified that during 1993 he received a substantial number of disciplinary warnings and suspensions for attendance; that he received an oral warning for absenteeism in June 1994; that he handbilled 40 or 50 times outside Respondent's entrance for the Union in 1993; that he had the conversation with Bishop about tearing down company literature in mid-July, with Hast and a couple of other employees present; that the conversation about him wearing a union T-shirt occurred in mid-August right before the election in an office with Bishop; that he could not recall how many times he handbilled at Respondent's entrance in January 1995, and he did not see Hast or Bishop when he handbilled; that he checked his points because he noticed that a lot of people were being terminated for absenteeism and tardiness; that it was his understanding that if an employe had 12 points, the employee was discharged; and that he signed Respondent's Exhibit 10.[57] On

[55] The General Counsel's motion to conform the pleadings to the evidence is granted. Par. 12 of the 1995 complaint is amended to show December 22, 1994, as the termination date of Fred McDonald.

[56] Jones' understanding of the policy was that if the employee was tardy, he would first get a verbal warning, then he would get a written warning, then he would get a 1-day suspension, then a 2-day suspension, then a 3-day suspension, then a 5-day suspension.

[57] This exhibit is a "*DISCIPLINARY RECORD*." The specified date of the violation is "10–17–94" and the date of the disciplinary action is "11–12–94." Regarding the nature of the violation, both tardiness and absenteeism are checked off. The following appears under "*MANAGEMENT REMARKS*": "*INFRACTION* 10–17–94. this is a written counseling, any further tardiness or absences will result in a written warning step 2." The last portion of the printed form contains, among other things, the following:

ACTION TO BE TAKEN

Because of the above described [sic] vop;atopm. The employee is being given:

redirect Jones testified that when he handbilled in January 1995 he did it outside the employees' entrance and supervisors use that same entrance.

In his April 28, 1995 letter to the Union (R. Exh. 11), the Regional Director for Region 11 indicated, inter alia, that Jones was terminated for accumulating 12 points under the Employer's attendance policy, there was no evidence that this policy was applied in a discriminatory or disparate manner, and, therefore, it cannot be established that the termination violated Section 8(a)(3) of the Act. The Regional Director refused to issue a complaint. The letter goes on to indicate that an appeal may be filed with the General Counsel of the National Labor Relations Board (the Board). It appears that such an appeal was filed and the Regional Director's determination was reversed.

The Repondent's former supervisor, Bill Bishop, testified that in 1994 he was assistant superintendent in conversion; that at the time he supervised approximately 70 employees; that employee Larry Jones boned sirloins for him on the boneless line; that he spoke to Jones about his attendance, about the sirloins not being as clean as they should be, and about him being "just . . . a little slower than what he needed to be"; that Jones wore a union T-shirt most of the time and Jones discussed the Union with him on a couple of occasions, and he understood that Jones was a union supporter; that another employee complained to him that Jones was tearing posted company literature off of the walls upstairs in the hallway going to the cafeteria; that he asked Jones about it, Jones denied it, and he did not discipline Jones over this matter; that during one of his discussions with Jones before the 1994 Board election he told Jones that he should have the Union put in writing what it said it could do for the employees and Jones replied that the Company should put something in writing also; and that he did not play any role in Jones' termination. On cross-examination Bishop testified that he could not remember if he put anything on paper regarding Jones' attendance or work performance; that he believed that there were some kill floor employees who exceeded the 12 points and were not terminated; and that he believed that he had gone to the kill floor before Jones was terminated and he did not know why Jones was terminated.

Marty Hast testified that the Respondent distributed "Vote No" stickers to employees; that they got crew leaders to ask the people if they wanted one or not; that he did not provide stickers to any employee; that he did not ever ask any employee if they wanted stickers; that he did not have the crew leaders report back the names of employees who wanted or did not want stickers; that he was not aware of having a conversation with one of the employees he supervised, Larry Jones, about "Vote No" stickers; that he did not ever ask Larry Jones if he wanted a "Vote No" sticker because supervisors were not allowed to identify who was prounion and who was not; that he did not recall being present during a conversation with Jones and Bishop concerning the Union; that he did not recall hearing Bishop question Jones about wearing union T-shirts; that Jones was a marginal employee in that he had performance and attendance problems; that sometime after the Respondent opened the Tar Heel plant it instituted a 12-point attendance policy under which an employee would be terminated if he or she accumulated more than the allowable number of points; that he thought that the policy was instituted sometime around the time of the union election; that there were problems with the policy in that there was confusion, incorrect documentation, a lot of paperwork, and delays in recording paperwork which noted absenteeism or tardiness; that Jones was terminated for absenteeism; that he signed Respondent's Exhibit 10 which is disciplinary record for Jones for missing some time; that Respondent's Exhibit 91 is Larry Jones' termination form; that he signed Jones' termination form, which was prepared by human resources; that the document indicates that Jones had 14.5 points and was terminated for exceeding the maximum amount of cumulative points; that Jones did not believe that he had 14.5 points and he refused to sign the termination form; that he did not "specifically remember . . . [Jones] saying, will you look into this for me . . . [.] He may have, yes"; that he may have marked Jones absent or tardy when he was not in fact absent or tardy but to his knowledge he did not; that he often looked into employees' point totals and he found inaccuracies going both ways which resulted in either adding points to or taking points off employees' record; that Jones made it known to him that he was a union supporter in that he was boisterous in his opinions but his termination was absolutely not related in any way to his support for the Union; and that he may have checked the accuracy of Jones' attendance card utilizing the Kronos system, where employees used an ID badge to punch in and out, but "I honestly can't recall any specific instances."

On cross-examination Hast testified that there was much confusion about the 12-point policy; that there were occasions when human resources made mistakes with respect to the 12-point system; that he was aware of between 4 and 50 mistakes and it was significant; that "[w]e found mistakes when we sat down and reviewed people's records" and it was a real problem; that many of his employees asked him to check the records; that he instructed crew leaders to distribute "Vote No" stickers and T- shirts; that crew leaders are not part of management and he believed that they voted in the Board election; that he was not aware of any crew leader refusing to pass out either "Vote No" stickers or T-shirts; that both of his crew leaders probably placed the "Vote No" stickers on their hardhats; that at the time of Jones' termination the Respondent had a progressive disciplinary procedure; that he did not know if there was a written warning or final warning issued to Jones; that while he was the only person in management who signed Jones' termination form, he did not make the decision to terminate Jones; that Jones refused to sign the termination form because he did not believe that he had that many points; that he did not remember speaking to anyone in human resources or going to the Kronos system to try to clear this conflict up himself even though he knew there could be mistakes; that Charging Party's Exhibits 9 and 10, dated September 30, 1994, and October 22, 1994, respectively, explain the 12-point attendance

_____ Written Counseling
_____ Written Warning __ Step 2 (3 points) __ Step 3 (6 points) __ Step 4 (9 points)
_____ Final Written Warning __ Step 5 (11 points)
_____ Termination __ 12 Points

policy[58]; that initially under the 12-point system if an employee was not working at the beginning of the shift it was documented in a daily log that was submitted to human resources on a daily basis; that he pulled his crew leaders, Shawn Parker, Diane Coleman, and maybe Penny Pate, off the line and asked them who would mind handing out the "Vote No" stickers; that he tried not to be present when the crew leaders distributed the "Vote No" stickers because "I didn't want to try to influence the people one way or the other"; and that he could not remember exactly when Jones missed work.

When called by the Respondent, Gilliard testified that he recalled former employee Larry Jones who worked in conversion; that Respondent's Exhibit 147 is the back side or the second page of an attendance calendar on Larry Jones[59]; that Larry Jones was one of the few employees that he reviewed the attendance calendar of for a pattern of absences because his supervisor, Marty Hast, brought it to his attention that Larry Jones had "a pattern of being out" either on Fridays or Mondays; and that at the time the Company had a policy (R. Exh. 115), against patterns of absences.[60] On cross-examination Gilliard testified that it is possible that Larry Jones was discharged during the moratorium; that Larry Jones was terminated because there was a pattern of absences and his points; that he did not know the reason that Larry Jones was terminated but Larry Jones' situation was brought to him because there was a pattern and Jones had the number of points necessary to be terminated; that he was not personally involved in the termination of Larry Jones and he did not know the reason why Larry Jones was terminated; that he did review Larry Jones attendance card and he did not know at what stage he made a recommendation regarding Larry Jones; and that Larry Jones was the only employee with a pattern of absences that he could specifically recall but he looked into less than ten other situations involving patterns of absences.

Lee Mount, as custodian of records, sponsored, as here pertinent, (1) Respondent's Exhibit 172, which is a time and attendance record for Larry Jones for the period April 25, 1993, through February 12, 1995; (2) Respondent's Exhibit 238, which is a personnel transaction form referring to the hiring of Larry Jones dated "4–22–93"; (3) Respondent's Exhibit 239, which is a personnel transaction form referring to the transfer of Jones, effective July 26, 1993, from the second to first because of transportation problems; (4) Respondent's Exhibit 240, which is a personnel transaction form referring to job title for Jones dated August 6, 1993; (5) Respondent's Exhibit 241, which is a "8–26– 93" disciplinary form regarding an oral warning to Jones for being late, and which form has a signature on the employee signature line; (6) Respondent's Exhibit 242, which is a "10–18–93" disciplinary form regarding a written warning to Jones for absenteeism and tardiness, and which form has a signature on the employee signature line; (7) Respondent's Exhibit 243, which is a "10–27–93" disciplinary record regarding a written warning to Jones for absenteeism and tardiness, and which form has a signature on the employee signature line; (8) Respondent's Exhibit 244, which is a "10–29–93" disciplinary record regarding a note to Jones' supervisors to get a doctor's note from him to make sure that he was actually sick when he was absent "10–29–93," and which form has a signature on the employee signature line; (9) Respondent's Exhibit 245, which is a "11–3–93" disciplinary record regarding a written warning to Jones for being late from returning to the line from break, and which form has a signature on the employee signature line; (10) Respondent's Exhibit 246, which is a "11–8–93" disciplinary record regarding a written warning and 1-day suspension to Jones for being out sick with a doctor's note (an unexcused absence), and which form has a signature on the employee signature line; (11) Respondent's Exhibit 247, which is a "11–09–93" disciplinary record regarding a written warning and 3-day suspension to Jones for being tardy (unexcused tardiness), and which form has a signature on the employee signature line; (12) Respondent's Exhibit 248, which is a "1–12–94" disciplinary record regarding a written warning and 5-day suspension to Jones for being absent (an unexcused absence), and which form does not have a signature on the employee signature line; (13) Respondent's Exhibit 249, which is a "4–19–94" disciplinary record regarding a oral warning to Jones for having 20 pairs of cotton gloves in his locker, and which form does not have a signature on the employee signature line; (14) Respondent's Exhibit 250, which is a "4–26–94" disciplinary record regarding an oral warning to Jones for failure to follow lead man's instructions, and which form does not have a signature on the employee signature line; (15) Respondent's Exhibit 251, which is a "6–14–94" disciplinary record regarding a written warning to Jones for being out sick (an unexcused absence), and which form has a signature on the employee signature line; (16) Respondent's Exhibit 252, which is a "7–2–94" disciplinary record regarding a written warning, step 1 (1st) occasion, to Jones for being tardy returning from break, and which form has a signature on the employee signature line; (17) Respondent's Exhibit 253, which is a "7–25–94" disciplinary record regarding a written warning (step 1) to Jones for being out sick (unexcused absence), and which form has a signature on the employee signature line; (18) Respondent's Exhibit 254, which is a "9–2–94" disciplinary record regarding a written warning (step 2) to Jones for being out sick without a doctor's note (an unexcused absence), and which form does not have a signature on the employee signature line; (19) Respondent's Exhibit 255, which is a "9–12–94" disciplinary record regarding an excused absence of Jones for his trip to Kentucky to be with his daughter who had emergency surgery, and which form has a signature on the employee signature line; (20) Respondent's Exhibit 256, which is a "11–30–94" disciplinary record regarding a written counseling to Jones for being "late from 2 break," and which form does not have a signature on the employee signature line; (21) Respondent's Exhibit 257, which is a "12–1–94" disciplinary record regarding a written counseling to Jones for being late from break, and

[58] Under the policy employees are allowed 12 points per year. CP Exh. 9 explains that the new policy has five steps.

[59] This side has the date and a short description of the absence or the tardiness.

[60] Par. 5 of R. Exh. 115 reads as follows:

> Nothing herein prevents the Company from investigating and possibly disciplining an employee (up to and including discharge) who develops a record of . . . repetitive absences such as Fridays, Saturdays, and Mondays.

which form does not have a signature on the employee signature line; (22) Respondent's Exhibit 258, which is a "12–30–94" disciplinary record regarding a written warning to Jones for being late returning from second break, and which form does not have a signature on the employee signature line; (23) Respondent's Exhibit 259, which is a personnel transaction form, dated January 25, 1995, regarding Jones' termination for "ACCUMULATED TOO MANY POINTS"; (24) Respondent's Exhibit 260 which is Jones' application for employment dated "4–17–93," which is signed; (25) Respondent's Exhibit 261, which is a drug testing consent agreement for Jones with a signature on the employee line; (26) Respondent's Exhibit 262 which is a North Carolina Employee Withholding Allowance Certificate for Jones, and which has a signature on the employee line; (27) Respondent's Exhibit 263, which is an Internal Revenue Service Employee Withholding Allowance Certificate for Jones, and which has a signature on the employee line; (28) Respondent's Exhibit 264, which is a health care premium payment plan for Jones, and which has a signature; (29) Respondent's Exhibit 265, which is an attendance sheet for Jones covering June 1, 1993, to April 26, 1994; and (30) Respondent's Exhibit 266, which is an attendance sheet for Jones covering June 3, 1994, to January 24, 1995. On cross-examination Mount testified that there are differences in the entries on Respondent's Exhibits 147 and 266 which are copies of the same absentee or problem list.

On rebuttal Larry Jones testified that the signature on Respondent's Exhibits 241–247, 251–253, and 255 are not his signature; that it is his signature on Respondent's Exhibit 260, which is his application for employment dated "4–17–93"; that he believed that he signed the employment application; that his wife helped him fill out the employment application and then he signed it himself; that he recognizes his wife's handwriting but he could not recall whether his wife might have signed his name for him on the application; that he believed that the day he filled out the employment application he had a cut or something and his wife filled out the application for him and he believed that she signed it; that he did sign Respondent's Exhibits 261, 262, and 264; and that he signed his North Carolina driver's license (GC Exh. 66). On cross-examination Jones testified that he signed Respondent's Exhibit 267, which is the signature page of an affidavit he gave to the Board dated March 8, 1995; that he was written up during the time he worked for the Respondent but he could not recall signing any of the write-ups; and that he did not recall getting any warnings while he worked at the Respondent. On redirect Jones testified that he did have an absence and tardy problems while he worked at the Tar Heel plant but he did not remember them specifically.

Analysis

On brief the General Counsel contends that the Respondent failed to show by a preponderance of the evidence that it would have discharged Jones absent his protected concerted activity; that the documentary evidence proffered by Respondent to justify Jones' discharge is suspect, as they contain significant omissions and unexplained deletions and alterations; that Jones had no recollection of some of the infractions for which he was discharged and which the Respondent relied upon to support its discharge; that Hast testified that Jones made it known that the was a union supporter and he was boisterous on his opinions; that the Respondent has not reconciled why it strictly applied its alleged no fault attendance policy to a known union supporter, such as Jones, while simultaneously retaining employees James Merritt and Brian Mitchell who accrued more points than Jones (GC Exhs. 36(a) and (b), and 37); that the Respondent has not explained why Jones, like other employees, was not given the special consideration Division Manager Harold Allen described for employees who exceeded the allotted number of points; that while Hast testified that the implementation of the points system generated confusion and documentation problems, he often found inaccuracies, he often looked into employees' totals to verify whether the records were accurate, he could not recall whether he verified Larry Jones' record even though he recalled that Jones did not believe that he had 14.5 points, and Jones may have asked him to look into the records; that Jones' discharge was pretextual; that a comparison of Respondent's Exhibits 147 and 26, which are copies of the same attendance calendar, reveals that although the two summaries are nearly identical, a number of deletions and entries appear on Respondent's Exhibit 266 which are not reflected on Respondent's 147, and the point totals are different; that Respondent failed to produce a majority of the underlying disciplinary records which are reflected in the both Respondent's Exhibits 147 and 266[61]; and that Bishop testified that there were employees whose attendance points totals exceeded 12 but were still retained.

The Respondent on brief argues that Hast notified Gilliard of Jones' pattern of absenteeism, namely missing work or arriving late to work on Mondays; that Jones surpassed the level of absences that warranted termination; that in view of the fact that the Respondent's start time in the morning was 5:30 a.m., Jones was not assessed points for many days on which he was tardy; and that Respondent's Exhibit 172 indicates that in the months of November and December 1994 Jones was tardy virtually every day he reported to work, yet his attendance card only reflects a handful of these occurrences.

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, Larry Jones engaged in union activity and the Respondent was aware of this. The record contains substantial evidence of antiunion animus. I do not believe that the Respondent has shown that it would have taken the same action even if Jones had not engaged in protected activity. In the disciplinary record of termination which Hast signed (R. Exh. 91), the following appears under the "MANAGEMENT REMARKS" section: "YOUR

[61] The General Counsel points out that the Respondent did not produce underlying documents for the following dates which would verify the incidents: August 15, October 24 and 31, November 8, 9, 14, 17, 21, 25, and 29, and December 19 and 20, 1994, and January 16, 1995.

INFRACTION ON 01–24–95 RESULTED IN EXCEEDING THE MAXIMUM AMOUNT OF CUMULATIVE POINTS. DUE TO COMPANY POLICY, YOUR EMPLOYMENT IS BEING TERMINATED. (14.5 POINTS.)"[62] Originally, the Respondent introduced Respondent's Exhibit 147 which, as here pertinent, had the following 17 handwritten entries:

6–13–94 absent—sick unexcused.—written warning		1
8–15–94—personal necessity.		1
8–29–94—sick unexcused.		1
10–24–94 late reason unknown		1
10–31–94 absent car trouble		1
11–9–94 Late (–4)		1/2
11–8–94 Late (–4)		1/2
11–14–94 absent car trouble	6.0 #3	1
11–29–94 Absent 7.0 #3		1
11–17–94 Late (–4) less than 4 hours	7.5	1/2
11–21–94 Absent—personal	8.5	1
11–25–94 Late (–4)	9.0 #4	1
12–19–94 (–4 late)		1/2
12–20–94 (–4 late)	10.0	1/2
1–16–95 absent—sick—	11.0	1
1–24–95 absent—informed superior	14.5	1

A comparison of Respondent's Exhibit 147 with Respondent's Exhibit 172, the printout of Jones' timecard entries, raises questions about errors on Respondent's Exhibit 147. At the continued hearing on July 19, 1999, the Respondent introduced Respondent's Exhibit 266 which is a copy of Respondent's 147 with some changes. More specifically (a) "no time" is written on the entries for "10–24–94" and "10–31–94," "no check" is written for the entry for "11–9–94," and "not late" is written for this entry, and the entries for "11–8–94" and "11–25–94," (b) the points for November 8, 9, and 25, 1994, have been deleted on the lines of these entries but the total, namely, "14.5" has not been modified, (c) "5:50 am" is added to the entry for "12–20–94", and (d) "Terminate" has been added after the entries and at the bottom of the page on the lines under "Charge For;" the following appears: "12–27–94 Late (checked in at 9:59 am) 1/2." Apparently the Respondent is conceding that 3 of the 17 entries it relied on to discharge Jones are in error. There are three other entries which concern me. The first is the entry for "12–20–94." As noted above, "5:50 am" has been added to this entry as it originally appeared on Respondent's Exhibit 147. The Respondent in footnote 32 at page 114 of its brief, takes the position that "Respondent's start time in the morning was 5:30 a.m. [Tr. 5459.]" This record cite refers to Larry Johnson's testimony regarding an employee other than Larry Jones. And it is not clear that this reference to "start time" means that all employees on the first shift are required to clock in by 5:30 a.m. for (a) former assistant hog buyer, Ralph Wofford, who worked at the involved plant from the time it opened until November 1995 testified that the kill floor starts at 6 a.m., (b) Supervisor Lenwood Shirley testified that Keith Ludlum, who worked the 6 a.m. first shift in livestock was supposed to report at 5:55 a.m., and (c) the Respondent points out in footnote 33 at page 115 of its brief that Jones' workweek was Monday through Saturday and it is noted that, as indicated in Respondent's Exhibit 172, he clocked in at 5:52 a.m. on "12/17/94," a Saturday, and was not charged with being late.[63] As indicated in Respondent's Exhibit 172, on "12/20/94" Jones clocked in at 5:50 a.m. Nonetheless he was charged 1/2 point for being late. When one tries to verify the entries for "10–24–94" and "10–31–94" by looking at Respondent's Exhibit 172 one is met with "no data in report period." In other words, there are no entries on the printout for a two-week period and "10–24–94" and "10–31–94" fall in this missing period. Certainly one would be able to verify the handwritten entries on Respondent's Exhibit 147 by looking at the involved "DISCIPLINARY RECORDS" and determine why Jones was charged one point for being late on "10–24–94" and whether indeed he was absent on "10–31–94." Is the one point a mistake in that it should have been only 1/2 a point? Or did he come to work more than 4 hours late? Is the entire entry for "10–24–94" a mistake like those for "11–8–94," "11–9–94," "11–25–94," and most likely for "12–20–94?" If there is no way to verify the entry for "10–31–94," is it possible that it too is an error. The Respondent has in effect conceded that 3 of the 17 entries on Respondent's Exhibit 147 are errors. In my opinion the entry for "12–20–94" is an error. That would mean that 4 out of 17 or almost 25 percent of the pertinent entries on Respondent's Exhibit 147 are in error. One would think that the Respondent would have introduced the "DISCIPLINARY RECORDS" for all of the 17 entries. As pointed out by the General Counsel, the Respondent did not introduce the "DISCIPLINARY RECORDS" for 13 of the 17 entries. In these circumstances, I must draw an adverse inference that the Respondent does not have "DISCIPLINARY RECORDS" to support the entries for "10–24–94" and "10–31–94." In view of the other mistakes on Respondent's Exhibit 147, I do not see how a reasonable person would have relied on it alone without checking the underlying documentation. If the points for the above-described unreliable entries were to be deleted, Jones would have had 10.5 points according to Respondent's Exhibit 147, which is what the Respondent supposedly was relying on when it terminated Jones.[64] So there were obvious and valid questions regarding the points being given to Jones. Jones' request was for an investigation was reasonable. Why was it denied? Not only had Hast granted similar requests of other employees, but the Respondent, as pointed out by the

[62] The "ACTION TO BE TAKEN" portion of the form reads as follows:

ACTION TO BE TAKEN

Because of the above described [sic] vop;atopm. The employee is being given:

_____ Written Counseling
_____ Written Warning __ Step 2 (3 points) __ Step 3 (6 points) __ Step 4 (9 points)
_____ Final Written Warning __ Step 5 (11 points)
_____XX_____ Termination XX 12 Points

[63] It is noted that Jones did not work in livestock or on the kill floor but rather in conversion.

[64] The entry "12–27–94 Late (checked in 9:59 am) 1/2" on R. Exh. 266 was not on R. Exh. 147 and, therefore, would not apparently have been considered in the termination. If someone wants to consider it nonetheless it would raise the points to 11, still below the 12 needed to terminate.

General Counsel, did not terminate other employees who had a much worse absentee record than Jones. Jones was treated disparately. Gilliard testified that Jones was absent or late on Mondays and Hast told Gilliard this before Gilliard reviewed Jones' record. Hast did not corroborate Gilliard on this point and, as noted above, Gilliard is not a credible witness. Additionally, if one looks at the "DISCIPLINARY RECORD" for Jones' termination (R. Exh. 91), there is no mention of repetitive absences on Mondays. And no "DISCIPLINARY RECORD" was introduced referring to repetitive absences on Mondays. The Respondent has not shown that it had a justification for treating Jones disparately. As noted above, I do not find credible the testimony regarding any moratorium. There are no documents and the witnesses contradicted one and another regarding the timing and who knew. Additionally, the retaining of Brian Mitchell occurred contemporaneously with the termination of Jones.

Hast testified that when Larry Jones was terminated the Respondent followed a progressive discipline policy. As noted above, Jones' "DISCIPLINARY RECORD" form for his termination (R. Exh. 91), sets forth five steps before termination. Also as indicated above, there is a line to check off for each of the steps. On brief the Respondent points out that Jones testified that he did not receive all of the steps required by the Company's progressive discipline policy. Nonetheless, however erroneous Jones' understanding may have been regarding the steps, the Respondent did not introduce the "DISCIPLINARY RECORDS" showing that Jones had received each of the five steps before he was terminated.[65] Since such documents were not introduced, an adverse inference will be made that they do not exist or to the extent such documents exist, they do not support Respondent's Exhibit 147. The Respondent did not follow its own progressive disciplinary procedure when it terminated Jones.[66] The Respondent has not shown that it would have taken the same action even if the employee had not engaged in protected activity. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating Larry Jones on January 25, 1995.

[65] As noted above, the entry for "11–25–94" on R. Exhs. 147 and 266 contains "9.0 #4." If this was meant to refer to step 4, the "DISCIPLINARY RECORD" showing this step was not introduced by the Respondent. Additionally, since the entry is a mistake according to R. Exh. 172, did the document show that the step was rescinded?

[66] Interestingly, Gilliard at one point testified that if it was determined during an investigation that steps in the disciplinary program were not followed, the employee was given the benefit of the error in the procedure and a last-chance agreement was used. Here there was no investigation, even though Jones asked for one, and so Jones was precluded from receiving the benefit of any errors in the progressive discipline steps. It is noted that as Gilliard pointed out regarding Supervisor Coleman in the McDonald matter, the supervisor, notwithstanding the fact that the termination form came from human resources, could have (a) come to human resources and questioned the attendance calendar, or (b) gone through human resources on a last-chance agreement. It is noted that Ralph Wofford, who was as assistant hog buyer at the involved facility from the time it opened until November 1995, and who superised supervisors, testified that last-chance agreements were offered to all employees regarding attendance matters.

(d) Keith Ludlum

Keith Ludlum was hired by the Respondent in September 1993 to work in livestock. His supervisors were Ralph Wofford, Ross Lewis, and Tony Murchinson. Ludlum testified that he became involved in the union campaign in late December 1993 by discussing with employees how the Union could help and by getting employees to sign union authorization cards; that he usually had the employees sign the union authorization cards in the breakroom or the locker room; that in late December 1993 and in January 1994 while he was having employees sign union authorization cards, some of his supervisors saw him; that one time after work he was having three employees sign union authorization cards in the breakroom and he saw Wofford and Lewis looking through a window into the breakroom; that when he walked out after the employees signed the union authorization cards the two supervisors asked him if he was off the clock, and when he replied "yes" they told him that he needed to leave company property; that, as noted above under paragraphs 9(c), (m), (o), and (r), Supervisor Murchinson was aware of the fact that he was soliciting a signature on a union authorization card; that on one occasion when he was discussing with some employees on break in the breakroom how the Union could help them Murchinson, who was present, said that if the employees got the Union they would have to work 7 days a week; that on January 25, 1994, he told Supervisor Wofford that he needed February 2, 1994, off to go to court; that Wofford said, "[Y]eah"; that Rayford Hodge and someone he only identified as Oscar were present during this conversation; that he had been excused four or five times in the past to go to court; that the standard operating procedure was for him to ask Wofford from a few days up to a week before the court date and he would approve it and then he would call in the day he was supposed to go to court and remind Wofford that he would not be at work that day; that on those occasions he was not required to report to work in the morning; that he usually was required to be in court at 9 a.m.; that on January 27, 1994, Supervisor Lenwood Shirley told him to see Wofford upstairs in the office; that Lewis and Wofford were in the office and Lewis told him to sign a last-chance agreement (GC Exh. 12)[67]; that before he signed the last-chance agreement he looked at Wofford and said, "[R]emember I've got Court on Wednesday, February 2nd"; that Wofford "shook his head yeah"; that right after he signed the last-chance agreement he said to Wofford "that he couldn't hold it against people trying to improve their work environment"; that he signed the agreement because he thought that he was going to be terminated if he did not sign it; that on January 31, 1994, he reminded Wofford that he had to be in court on February 2, 1994, and Wofford nodded his head and said "yeah"; that on February 2, 1994, he telephoned the plant about 1 hour before he normally reported for work and spoke with Lenwood Shirley; that he asked Shirley if Wofford

[67] The agreement reads in part as follows:

1. That you report to work on time every day that you are scheduled to do so;

2. That for the next three (3) month period, you do not miss any time from work for any reason;

3. That you are not late to work or leave early for any reason.

was there and Shirley said no; that he told Shirley to remind Wofford that he had court that day and Shirley said okay; that Shirley did not say anything else during that telephone conversation; that he went to court that morning and he reported for work about 10:30 a.m.; that he gave Wofford his "excuse" from the court; that Wofford told him to accompany him; that they went to the front office and Wofford told him to wait in the lobby; that later Wofford came out and told him that he was suspended and he should telephone Harry (Grauling, who at the time was the head or human resources) the next day; that the afternoon (from 3 to 4:30 p.m.) of the day he was suspended he was in front of the plant with union representatives handbilling information to employees; that while he handbilled he saw Danny Priest, who is in charge of security, at the plant and Kevin Peak; that he did telephone the next day as instructed and he was told to come in at 3 p.m.; that when he went in Grauling told him that he had numerous suspensions and he told Grauling that he only had a 1-day suspension; that Grauling told him he was terminated and gave him his check; that he was absent from work quite a few times and he was late for work quite a few times; that he was given a 1-day suspension; and that prior to December 1993 he did talk to employees about the Union and he had a few employees sign union authorization cards if he saw them away from work.

On cross-examination Ludlum testified that company records which show that he had a hire date of August 26, 1993, were probably right; that between August 26, 1993, and February 3, 1994, he was late for work 20 or more times and he was absent 12 to 15 times; that he signed Respondent's Exhibit 13[68]; that he signed Respondent's Exhibit 15 which reflects that he was given a 1-day suspension on "11–29–93" for tardiness and absenteeism[69]; that the suspension was originally to be for 3 days and Wofford let him serve the suspension on a day he had to be in court; that he had one court date after he signed the last-chance agreement on January 27, 1994; that he normally reported to work at 5:50 a.m.; that he had to be at court in Elizabethtown, North Carolina, which is a 15-minute drive from the plant, at 9 a.m. on February 2, 1994; that when he spoke with Shirley early on the morning of February 2, 1994, Shirley did not tell him to report to work that morning and that he would be released to go to court on time; and that Shirley only said that he would tell Wofford that Ludlum would be in after court.

The Respondent's supervisor, Lenwood Shirley, testified that since he was hired in 1992 he has been a supervisor in the livestock department; that in February 1994 he supervised the unloading of live hogs and Keith Ludlum was a hog driver under his supervision; and that in February 1994

> Mr. Ludlum called in and said he couldn't be at work that particular morning or he would be late. Didn't know which way—he said he had to go to Court and he didn't know what the outcome of that would be, and I asked him to if at all possible to come on in to work and I'd let him leave early so he could go on to the Court Room. Then if Court got over in time he could come back to work. [Tr. 1802 and 1803.]

Shirley further testified that Ludlum's starting time was 6 a.m. and Ludlum telephoned work about 5 or 5:30 a.m.; and that with respect to his request that Ludlum come to work

> [w]hen I first mentioned to him about . . . coming on in and I'd let him go to Court and all he said that he stayed in Bladenberg. If I'm not mistaken it was the Bladenberg area and he said he didn't see why . . . he needed to drive all the way to Tar Heel to work an hour, hour and half and then have to go back and take a shower, whatever and then go to work. [Sic.] [Tr. 1803.]

Shirley further testified that he nevertheless requested Ludlum to come to work; that Ludlum did not show up for work at 6 a.m. that day; that he prepared a memorandum regarding this occurrence:[70] that he prepared this memorandum the same day Ludlum called in; and that he gave his handwritten memorandum to his Supervisor Ralph Wofford and explained the situation. On cross-examination Shirley testified that he was aware that Ludlum had to appear in court a number of times; that he could not rightfully say he had any recollection of Ludlum, before the incident in question, coming in to work for 2 hours and then leaving to attend his court appearance; that he showed his memorandum to his Supervisor Wofford and then it went into Ludlum's personnel file; that the memorandum is a full and accurate description of what took place in his conversation with Ludlum that morning; that he gave an "AFFIDAVIT" to the Company which is dated 6–24–94 regarding Ludlum[71]; that

[68] It is a disciplinary record with a date of violation of "11–09–93." The form indicates that the violation involved tardiness and absenteeism; that Ludlum had several unexcused absences and he was out on the involved day; that Ludlum has had several court ppearances and had presented the Company with a note from the court; and that Ludlum was being given a written warning.

[69] As here pertinent, the last portion of the form reads, in part, as follows:

> Because of the above described [sic] violation, the employee is being given:
>
> _____ An Oral Warning
> _____ A Written Warning
> _____ A Written Warning and a Disciplinary Suspension of ___ Days

The last blank originally had "3" written in. This is crossed out and a "1" has been written in above the crossed out number. In the management remarks of the form it is indicated that Ludlum was given a 1-day suspension.

[70] The typed memorandum, R. Exh. 81, reads as follows:

> FILE MEMO: KEITH LUDLUM
>
> On 2/2/94 at approximately 5:00 a.m., I received a call from Mr. Ludlum. Ludlum advised me that he was not coming in on time, he would be late, he had to go to court. I advised him to come in, then we would allow him to leave and go to court, after court he could then come back to work. *Ludlum said nothing and hung up the phone.*
>
> At starting time Ludlum was not in the department.
>
> [Emphasis added.]

Shirley signed the memorandum.

[71] The statement, GC Exh. 47, reads, in part, as follows:

> One former employee was Keith Ludlum. Keith worked another shift from 6:00 a.m. to about 3:00 p.m. He had a lot of attendance problems, and if I remember correctly, he was always having to go to court as well. Finally in late January 1994, Mr.

while his "AFFIDAVIT" indicates that he told Ludlum to come in and talk to Wofford about whether he should work before going to court, Shirley's memorandum does not mention this; that he was not aware that Ludlum spoke to Grauling about his court appearance on the date in question; that he spoke with Wofford before he drafted the memorandum regarding Ludlum; that he told Wofford who had come in and who had not come in; and that he could not remember how many people came in that day. On redirect, Shirley testified that when Ludlum called in that day he told Ludlum that "I need you to come on in so we can get started and get things going. I said then when we get going . . . I'll let you go. You know there ain't no problem with that." On recross, Shirley testified that the Respondent has two showers in the employees' locker room; and that February 2, 1994, was probably no busier than most other days. Subsequently, Shirley testified that Bladenboro, North Carolina, is about 15 miles from Tar Heel and would take about 20 minutes to drive; that the court that Ludlum went to was about 15 miles from Tar Heel and about 15 miles from Bladenboro; and that he did not recall Ludlum saying during the telephone conversation that he would have to go back home to take a shower.

The Respondent's former supervisor, Randy Gebbie, testified that in February 1994 he was a first-shift line supervisor on the kill floor at the Respondent's Tar Heel facility; that he started work at that time at 5:30 a.m.; that there was no greater demand for hogs at the beginning of the first shift then there was at the end of the first shift; and that the demand for livestock was a continuous demand.

Edward Ross Lewis, a former supervisor of the Respondent who at the time of the hearing herein was self employed, testified that he was a livestock supervisor at the Tar Heel facility for about 4 years beginning in 1992; that he never discussed union authorization cards with any employee; that Keith Ludlum was a hog driver in livestock; that he never had a conversation with Ludlum concerning the Union; that he did have conversations with Ludlum concerning tardiness and not coming to work; that he never observed Ludlum asking employees to sign union authorization cards; that there are two breakrooms in the livestock area, namely one for the woman and one for the men; that the women's breakroom has a window but it is "blacked out" so that someone outside the breakroom could not see in through the window; that men sometimes go into the women's breakroom because it has a table and a microwave, and women sometimes go into the men's breakroom because it has vending machines; that the men's breakroom has a window; that the walkway from A side to B side of the livestock area goes by both livestock breakrooms; that he has seen Ludlum inside the mens' breakroom as he passed by the room; that he never saw Ludlum in the breakroom with union authorization cards in front of him; that he did not recall seeing women in the breakroom with Ludlum; that he never had a conversation with Ludlum during which he told Ludlum he was not allowed to ask employees to sign union authorization cards on company property; that he never discussed authorization cards in any manner with Ludlum; that Ludlum was terminated for tardiness and not coming to work; that Ludlum had attendance problems; and that he signed Ludlum's last-chance agreement (GC Exh. 12), and he attended the meeting at which Ludlum signed the agreement.

On cross-examination Lewis testified that he did not recall seeing any union literature in the breakroom; that Ralph Wofford was present at Ludlum's last chance meeting but he could not recall if Harry Grauling was present; that he received Ludlum's last-chance agreement from human resources; that he spoke with Ludlum several times about not coming to work; that Ludlum was tardy quite often; that the Respondent wanted to give Ludlum another chance because it takes a special type of person to drive pigs; that some of Ludlum's attendance problems involved court appearances and Ludlum had asked him to be excused for a court appearance; that if Ludlum had a subpoena, he would honor what Ludlum said; that at the time of Ludlum's termination, Wofford was an assistant hog buyer and a supervisor; that Wofford was over him and Lenwood Shirley; that a court appearance would probably be an excused absence unless it was abused; that Ludlum drove the hogs from the holding pens up the aisle to where they were killed; that Ludlum probably also worked in the back where the hogs come off the trucks; that there is one aisle in livestock for each of the two lines and 12 to 14 people work in the livestock area on each side; that working around hogs gets nasty in that there is manure, the employees are "supplied with coveralls and all that stuff but it can . . . get messy"; that the employees get dirty; that when the hogs come off the truck they get excited and they purge their bowels and urinate; that Ludlum was a good employee and he had no complaints about Ludlum's work; that the hogs were tattooed with a hammer with four numbers on it; and that he was not sure of the circumstances of Ludlum's termination after his last-chance agreement but he believed that Ludlum was absent or tardy and it was unexcused. On redirect, Lewis testified that the Respondent supplied, as here pertinent, rubber boots and gloves to its livestock employees if they wanted them. On recross, Lewis testified that employees could also use rain jackets and pants but a lot of the employees did not wear them because they would get hot. Lewis further testified that earplugs were mandatory in livestock; that when he wore earplugs he could not hear someone speaking at a conver-

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Ludlum was told that he had to sign a "last chance agreement," where he agreed not to miss any more days and to follow all the company rules. He still had several court dates to attend after that, and I believe that an incident, which ended up with him getting fired, happened about a week, later, in early February, 1994. I remember on a certain day, Keith called in about 5:00 a.m. and told me he wasn't coming in to work because he had court at 9:00 a.m. He said I'm supposed to come in to work today, but they already know I got court. There's no sense in me coming in for a couple hours and then I'll have to leave." I told him he needed to come on in and talk to Ralph Wofford about it. After I said that, I think Keith just hung up. Keith's normal reporting time is 5:55 a.m. Our *normal policy* is that when people have to miss work for various appointments, including court appearances, they come in and work as long as they can before they go to court. Keith *has followed this policy before* for his previous court dates and knew the procedure. I told him he should come in and report on time and that we would let him go to court in time to make his appearance. He didn't seem too happy with that. He never showed up that morning when he was supposed to. [Emphasis added.]

sational tone; and that at 6 a.m. when the shift starts they have to have a pig on every "shackle."

Ralph Wofford testified that he was an assistant hog buyer at the involved facility from the time it opened until November 1995 when he left to become marketing and live haul manager for E.G. Pervis Farms in Speech, North Carolina; that between 1991 and 1995 he managed the Respondent's livestock area; that Ludlum drove hogs at the involved facility to the kill on first shift; that he supervised Ludlum's two supervisors, namely Lenwood Shirley and Ross Lewis; that he knew that Ludlum was a union supporter; that he saw Ludlum giving out union authorization cards in the livestock breakroom or outside this breakroom; that on one occasion when he saw Ludlum giving out union authorization cards he asked Ludlum if his shift was over and when Ludlum replied it was he told Ludlum the he needed to be getting home; that the company policy with respect to off-duty employees was that management always got them to leave because there had been some vandalism in the breakroom after hours; that Ludlum had an attendance problem and was given a last-chance letter (GC Exh. 12); that Ludlum was discharged after the last-chance letter when "[w]e asked him [Ludlum] to come in (at his normal starting time at 6 a.m.) and help us out and get started and he could take a shower and go on to what he was supposed to do, and he agreed to it" but then did not come in until after his court date; that he did not personally speak to Ludlum about coming in to work before the last court date but he overheard Lenwood Shirley telling Ludlum the day before the last court date to come in before he went to court; that he "was sitting there when he called him"; that he could not "remember if he called him or talked to him"; that the next morning Ludlum called in and said the he was not coming in before the court date; and that when Ludlum did come to work later he was terminated.

On cross-examination Wofford testified that last-chance agreements were offered to all employees regarding attendance matters; that he could not recall any other employee that he gave a last-chance agreement to when he was a supervisor at the Respondent; that in an affidavit he gave with a date of "6–24–94" he indicated that in the past Ludlum sometimes took the whole day off for a court appearance; that, according to the affidavit, "I told him]Ludlum] that he had to come in that day [on February 2] because we were short of help"[72]; that it was his decision to terminate Ludlum; that there is no rule prohibiting employees from gathering for 2 or 3 minutes before they shower at the end of the shift; that when he spoke to Ludlum when he was handing out union authorization cards there were other employees present; that he had no reason to suspect that Ludlum was engaged in any kind of vandalism; that the attendance policy that Respondent had in place at the time Ludlum worked at the Respondent consisted of an oral warning, a written warning, a final written and then a last-chance agreement; that, according to his affidavit, he saw Ludlum handing out union authorization cards in January 1994; that he did not recall whether the policy requiring employees to leave after their shift was over and they were off the clock was in writing; that he did not recall how or when he first heard about the policy; that he did not know who issued the policy; that he did not know how long this policy was enforced; that he did not know of any employee who was disciplined under this policy; that no where in his June 24, 1994 affidavit does he mention this vandalism policy; and that in the affidavit he indicated that he told Ludlum to leave because he was supposed to have left since his shift was over.

Lee Mount testified that as the Respondent's director of human resources he oversees the documents in Respondent's personnel files, and he sponsored Respondent's Exhibit 16 which is disciplinary record for Keith Ludlum dated January 11, 1994. The following is typed in the "*MANAGEMENT REMARKS*" section: "THIS IS A THREE DAY SUSPENSION FOR NO CALL/NO SHOW. ANY CONTINUED TARDI-NESS AND ABSENTEES WILL BE DEALT WITH MORE STRINGENT DISCIPLINARY ACTION, AND POSSIBLE TERMINATION. THANK YOU." The following handwritten note then appears in this section: "Excused prior per Ross Lewis—Supervisor. 3d Rescinded." There is no employee signature on the document. Mount also sponsored Respondent's Exhibits 168 and 169, which are dated February 2 and 3, 1994, respectively, and which are memoranda of Harry Grauling regarding the reason for Keith Ludlum's termination. Grauling did not testify and while the documents were received as made in the regular course, much of what is contained in the documents is obviously beyond the personal knowledge of Grauling and is not something normally found in a business record. As was pointed out at the trial, these memoranda will not be considered a substitute for live testimony subject to cross-examination regarding the matters covered therein which, as noted above, were obviously beyond the personal knowledge of Grauling. Mount also sponsored (1) Respondent's Exhibit 170 which is an attendance history for Ludlum from "08–26–93" to "02–02–94" and indicates that as of February 3, 1994, Ludlum had a total of 23 instances of absence or lateness and (2) Respondent's Exhibit 171 which is a time and attendance record for Keith Ludlum for August 26, 1993, through January 23, 1994.

Analysis

The General Counsel on brief contends that on the prior occasions when Ludlum went to court he was not directed to re-

[72] The pertinent portion of the affidavit reads as follows:

> However, I certainly did not give him [Ludlum] permission to be off work the whole morning in order to attend Court. As I recall his Court time was at 9:00 a.m. His shift started at 5:55 a.m. I was short on help in the department. I told him the day before when he was supposed to go to Court. Usually employees come into work for as long as they can and then we release them for things like . . . Court dates, or whatever, and they are to report back to work.
>
> In the past Mr. Ludlum had sometimes taken a whole day off for a Court appearance at 9:30 a.m., but I had told him that he had to come in that day because we were short of help. I made it very clear that the beginning of the shift is our most important time of the day. The kill floor starts at 6:00 a.m. and we have to get the hogs moving during the first part of out [sic] shift.
>
> Even though I told Keith Ludlum to come to work before going to Court the next day he still called in—Shirley the next morning to tell him he wouldn't be at work that morning.

port to work before his scheduled court appearance but rather was directed to come to work after court; that Ludlum testified that court appearances generally were scheduled for 9 a.m.; that Ludlum was not asked by Shirley to come to work for a couple of hours before his court appearance on February 2, 1994; that the record evidence established that Ludlum was not required to report to the plant before court appearances; that Wofford's cross-examination demonstrates his lack of recall and his inability to testify truthfully; that Wofford's testimony that either he or Shirley told Ludlum on February 1, 1994, that he must report to work before court on the morning of February 2, 1994, is inconsistent with the testimony of Shirley since Shirley testified that he only spoke about this subject with Ludlum on February 2, 1994, when Ludlum called in before going to court; that on cross-examination Shirley exhibited a self-serving lack of recall; that Shirley contradicted his own testimony regarding Ludlum's alleged response to Shirley's alleged request that he report to work before his court appearance;[73] that in its haste to discharge Ludlum, the Respondent simply contrived a scenario to suggest that Ludlum was directed to report for work before court and refused to do so; that the testimony of Wofford and Shirley should not be deemed trustworthy since they have given conflicting explanations and Shirley's affidavit contradicts his direct testimony; that the Respondent failed to proffer any evidence whatsoever that would substantiate the allegation that the Respondent was shorthanded in the livestock area on February 2, 1994; and that the Respondent's alleged reasons regarding the discharge of Ludlum should be deemed pretextual and a violation of the Act.

The Respondent on brief argues that "Mr. Ludlum advised Mr. Shirley that he would not be coming into work prior to attending court that morning—*something Ludlum claims had been his practice on other dates when he was scheduled to appear in court*. [Tr. 1802]," Respondent's brief page 106 (emphasis added); and that "[t]hie was not the first time that Ludlum was asked to come to work prior to a court appearance. [Tr. 3771.]"

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, it has been shown that Ludlum engaged in union activity, the Respondent was aware of his activities and the record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against Ludlum even if he was not engaged in protected activity. Wofford and Shirley contradicted each other and they contradicted themselves.[74] Both lied under oath about material facts. Neither is a credible witness. And on brief the Respondent argues that "Mr. Ludlum advised Mr. Shirley that he would not be coming into work prior to attending court that morning—something Ludlum claims had been his practice on other dates when he was scheduled to appear in court. [Tr. 1802.]" The only testimony at transcript page 1802 which the Respondent could be referring to reads as follows:

> Mr. Ludlum called in and said he couldn't be at work that particular morning or he would be late. Didn't know which way—he said he had to go to Court and he didn't know what the outcome of that would be, and I asked him to if at all possible to come on in to work and I'd let him leave early so he could go on to the Court Room. Then if Court got over in time he could come back to work. [Tr. 1802–1803.]

The portion of the record cited by the Respondent on brief to support its argument is not Ludlum's testimony but rather the testimony of Shirley. Nowhere in the quoted language is it indicated that Ludlum "claims" that it had been his practice to come to work before court. The Respondent's argument is disingenuous at best. Ludlum never "claimed" that it was his practice to come to work before going to court. And neither Shirley nor Wofford testified that Ludlum "claimed" that it was his practice to come to work before going to court. Both Shirley and Wofford claimed that prior to February 2, 1994, Ludlum came to work before going to court. But as found above, Shirley and Wofford are not credible. In view of the

[73] The following portion of the transcript, found a pp. 1822–1823, is cited:

> JUDGE WEST: Okay. Did he [Ludlum] say something to you to the effect that considering the driving time and the fact that he would have to go back home and shower and change and then go to Court that he didn't think it was reasonable?
>
> THE WITNESS: He didn't think it was worth his time, yes sir.
>
> JUDGE WEST: Okay. He did mention during that conversation the fact that he believed it was going to be necessary after leaving work to drive back home to shower or to change befoe going to Court, didn't he?
>
> THE WITNESS: I don't recollect, sir. I don't remember him saying anything about having to go back home.
>
> JUDGE WEST: Okay, so you don't recall him [Ludlum] saying anything bout having to go back home to take a shower?
>
> THE WITNESS: No, sir.

[74] Shirley's "2/2/94" memorandum indicates that when he advised Ludlum to come in "Ludlum said nothing." Shirley testified that Ludlum said, "[H]e didn't see why . . . he needed to drive all the way to Tar Heel to work an hour, hour and half [sic] and then have to go back and take s shower, whatever and then go to work." When subsequently asked, "Did . . . Ludlum say something to you to the effect that considering the driving time and the fact that he would have to go back home and shower and change and then go to Court that he didn't think it was reasonable." Shirley testified, "[H]e [Ludlum] didn't think it was worth his time." Shirley later testified that he did not recall Ludlum saying during he [sic] telephone conversation that he would have to go back home to take a shower. Shirley's above-described affidavit indicates that he told Ludlum that he would have to come in and talk to Wofford about not coming in before Court. This assertion is not included in Shirley's memorandum or in his testimony. Wofford testified that he was present on February 1, 1994, the day before the court appearance, when Shirley told Ludlum to come in the next day before he went to court. Wooford's affidavit indicates that he ("I . . . .") told Ludlum that he had to come in before going to court. Shirley does not corroborate Wofford. And if one or the other told Ludlum on February 1, 1994, to come to work before going to court on February 2, 1994, and Shirley was aware of this, it is not clear why Shirley would have had to ask Ludlum for the first time on February 2, 1994.

fact that Shirley and Wofford were contradicting each other and themselves, one would have expected that the Respondent would have cited an allegedly unimpeachable document or documents to support its position that on prior occasions Ludlum clocked in before court, then clocked out to go to court, and then clocked back in again after court.[75] As the Respondent's director of human resources, Lee Mount, testified, there are payroll records for each and every employee back to the beginning of the plant. Indeed the Respondent's Exhibit 171 is a printout of the archive full card listing for Ludlum from "8/26/93" to "2/1/94." This exhibit lists the times that Ludlum punched in and punched out. Nowhere in the exhibit is it indicated that Ludlum punched in twice and out twice on any day. Nowhere in the exhibit is it indicated that Ludlum was given credit for total hours which are less than the punch in, punch out times on the exhibit. Prior to February 2, 1994, Ludlum did not come to work before going to court. And on neither February 1 nor 2, 1994, was Ludlum asked or told to come to work prior to going to court. The Respondent engaged in a pretext. The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Keith Ludlum on February 3, 1994.

(e) Lawanna Johnson

Lawanna Johnson worked for the Respondent from November 1992 to November 1993 in the conversion department on the cut floor. She was on the employees' union organizing committee and her name was included in the letter which was sent to the Respondent noting that fact. Lawanna Johnson testified that the letter (CP Exh. 3), was posted in the plant in several locations; that her supervisor, Marty Hast, told her in the presence of other employees that he had seen her name on the letter for organizing for the Union and the Company did not want the Union in the plant; that in early 1993 she attended a meeting conducted by Henry Morris who she believed was the plant superintendent at the time; that when Morris said that the Company had an open door policy and would be willing to work with the employees on any problem she stood up and spoke out saying that "this is a bunch of bologna, a bunch of lies. They're [sic] not an open door policy. They're [sic] not going to do anything for us";[76] that she did not recall anyone else standing up and speaking out at this meeting; that shortly after the meeting Hast told her she had to do the floor twice by herself when normally there would be two men on that job; that her normal job at the time was skinning and packing ribs and she had never been assigned this cleaning job before; that in the spring of 1993 she applied for different jobs seeking higher pay but she did not get any of the jobs; that Harold Allen, who was a supervisor in the department next to hers, told her during a break that she could not get another position because everyone knew that she was for the Union[77]; that in July 1993 she did get a blade job (cutting the meat from the bones) unofficially when she switched with another lady who was having a problem with her hands, but she did not get the higher pay for the job; that when she asked about the pay Hast told her she was not qualified for the position; that Hast did tell her that he thought she was doing a good job; that she got a job on the cut floor working under Dale Smith; that she experienced problems with her hands on the blade job; that she saw the company doctor who told her that it seemed like she had carpel tunnel syndrome; that she took time off from work because her hands were swollen and ached and she had to take medication; that she also missed time from work when her husband was sick with deterioration of the lung tissue and had to be taken to the hospital; that on September 9, 1993, she attended a union cookout and she saw some of the Respondent's supervisors there but she could not recall their names; that on September 14, 1993, Cut Floor Superintendent Larry Johnson told her that he had heard that she was making racial slurs in the plant and she denied it; that around September 21, 1993, she became ill and she showed her doctor's note to her supervisor, Dale Smith, which note indicated that she was unable to return to work in any capacity from "9–21–93" through "10–10–93" (GC Exh. 13); that Smith told her that she should not return to work until her doctor had completely released her; that she saw her doctor on October 22, 1993, and he gave her a note which indicated that she would be able to return to employment on "11–1–93" (GC Exh. 14); that she brought this second doctor's note to Harry Grauling, who was the head of human resources at the time[78]; that when she returned to work on November 1, 1993, she signed a last chance agreement (GC Exh. 15); that on November 3, 1993, her husband had a breathing attack and she telephoned the Respondent to let them know that she had to take her husband to the hospital and she would contact them when she got back; that Respondent's policy was that if the employee called in before the shift they called in to the guard shack; that she did take her husband to the hospital but she could not remember whether it was the one in Fayeteville, North Carolina, or the Bladen County Hospital; that it was probably afternoon when they returned home and she went to get a prescription for her husband, asking him to telephone the Respondent and let them know that they were just getting in and there would not be any point in going to work at that time; that when she went to work the following day, November 4, 1993, she was terminated, after speaking with Larry Johnson and Grauling, for not keeping her last-chance agreement; that Larry Johnson said that he had spoken with her husband but Larry Johnson wanted to know why she had not spoken directly with him; that when she

[75] If the Respondent's system is not capable of recording more than one clock in on any 1 day one would expect some kind of notation on the payroll record so that the employee would not be paid for time he was not at work.

[76] Henry Morris testified that he did remember an employee standing up and disagreeing with a statement he had made in a speech.

[77] Allen testified that in the spring of 1993 he would have been a supervisor on the cut floor; that he did not recall an employee named Lawanna Johnson; that he did not rcall ever meeting Lawanna Johnson to discuss her request for another job; that he did not recall having any discussions with Lawanna Johnson; and that he did not and he would not ell an employee—when they did not get a job that they had bid for—that everybody knew they were for the Union and they got what they asked for.

[78] A copy introduced during the Respondent's case, after it had received Lawanna Johnson's personnel file back from the Union, has a handwritten notation in the lower right-hand corner, namely, "RECEIVED 11/1/93" with a partial signature which appears to be that of Grauling.

walked in her termination slip was already prepared; that her husband had been ill for some time; and that no one at the Respondent ever told her about the Family Medical Leave Act and she never saw anything posted about it in the plant.

On cross-examination Lawanna Johnson testified that she had never seen a woman clean the cut floor in her area or a man cleaning the floor by himself; that she did get a 5-day suspension; that she could not give the names of the supervisors who attended the union cookout and she could not indicate where in the plant they worked; that she believed that she went to the Company and told them that she was not able to return on October 11, 1993; that she was not sure who she spoke with at the Company; that she went to the Company when she received a letter of termination; that the majority of her 19 possible absences were due to the problem which was caused at the Respondent's plant, namely her hands; that she believed that the name of her husband's condition was "sarcoidosis" and he began having major problems in 1991; that on November 3, 1993, she took her husband to the hospital very early in the morning and they returned home around noon; that she returned to work on November 4, 1993; that her husband was not employed at the time; that she did not believe that she made an insurance claim for her husband's November 3, 1993 hospital visit with Respondent's insurer because she was terminated by Respondent on November 4, 1993; that she did not get an authorization number when she called in to the guard shack on November 3, 1993, and she did not recall ever getting an authorization number when she telephoned the guard shack; and that the November 3, 1993 situation with her husband was an emergency situation and she did not recall whether she considered getting a note from the hospital but on November 4, 1993, she was not asked for a note, she was not given a chance to give them anything and everything was prepared when she walked in. On redirect, Lawanna Johnson testified that, as indicated in her affidavit to the Board, she began having problems with her hands in early 1993.

The testimony of Lawanna Johnson, Gregory Spann, and Larry Johnson regarding Larry Johnson's November 1, 1993 threat to fire Lawanna Johnson if he heard her talking about the Union with other employees again is set forth above under paragraph 9(c). As found, Larry Johnson did unlawfully threaten Lawanna Johnson on November 1, 1993.

The Respondent's superintendent of the cutting division, Timothy Dale Smith, testified that in the fall of 1993 he was a supervisor on the shoulder line; that Lawanna Johnson worked in his area on the shoulder line operating a breast flap skinner; that Johnson missed numerous days; that he discussed her attendance with her numerous times; that he did not remember Johnson ever telling him that she was a union supporter; that he did not recall Johnson wearing union T-shirts, buttons, or stickers; that he did not know whether Johnson was a union supporter or not; that he was involved in Johnson's termination for too many absences; that Johnson had been counseled numerous times on attendance and she was issued a last-chance letter (GC Exh. 15); that after signing the last-chance agreement Johnson missed additional time; that Johnson was terminated for failing to comply with the terms of the last-chance agreement in that she missed a day after she signed the agreement; and that he thought that her immediate supervisor, Robert Claiborne, was the one involved in her termination. On cross-examination Smith testified that personally he has allowed employees to receive exceptions to the attendance policy if the employee had a hardship situation involving taking care of a sick child, husband, wife, parent, or grandparent; that he was aware that Lawanna Johnson had a problem with her husband's condition and she had to take him to the hospital on more than one occasion; that she was discharged for failure to comply with the last-chance agreement; and that he did not recall anyone questioning him about Lawanna Johnson's husband's health condition at the time that Lawanna Johnson was discharged. Smith did not make the decision to terminate Lawanna Johnson in November 1993, he did not have firsthand knowledge of what occurred in November 1993 which resulted in her termination, and Smith had a difficult time answering some questions on cross-examination.

The Respondent's former supervisor, Marty Hast, testified that he supervised Lawanna Johnson for a couple of years; that Lawanna Johnson made her prounion views known to him; that he never initiated any conversation with Lawanna Johnson concerning the Union; that he absolutely did not tell Lawanna Johnson that he saw her name on a union organizing letter and then comment that the Company did not want the Union; that he never saw such a letter; that he supervised the conversion department which had janitorial workers assigned to it; that Lawanna Johnson cleaned floors for him for weeks; that Lawanna Johnson complained about cleaning floors; that there was an instance when Lawanna Johnson was angry because she believed that he was making her clean the floor by herself because she was a union organizer; that while she had cleaned the floors prior to that time he was not sure if she had done it by herself prior to that time; that he assigned Lawanna Johnson to clean the floor to break up the repetition and it was an easy job; that he was pretty sure that the conversion department assigned just one employee to clean floors but he did keep two, even more sometimes if he could; that very often the job was performed by one person and it was performed by males or females; that the job has been performed alone by female janitor Kelly Hanson, who married Bill Bishop; that Lawanna Johnson asked him for a higher paying blade job; that Lawanna Johnson did perform the blade job for a while but she was not able to qualify[79] for the position and therefore she was not given the higher pay; that Johnson was off the line quite a bit because her hands were sore, which in turn—in his opinion—hindered her ability to use the steel to keep her knife sharp; that he told Lawanna Johnson that she was getting better at the blade job but she was not ready to qualify yet and if she pulled every piece that she was supposed to pull and got clean bones, then she

[79] To qualify the employee would have to "pull count" and do a good job with the finished product for a week straight. Hast explained that to "pull count" meant that if there were four people pulling blades, each employee is expected to pull one out of every four pieces of product. In other words, the employee would have to keep up the fast, difficult pace and not place an additional burden on the other employees performing this task. If the employee was able to meet the standard for a week, the employee would be paid at the higher rate retroactively for that week.

would qualify; and that Johnson's failure to qualify did not have anything to do with her support of the Union.

On cross-examination Hast testified that there were specific times when he thought Lawanna Johnson did a very good job; that Johnson's problems with her hands started when she was working on the knife; that he was not involved in Johnson's termination; that Johnson had told him that her husband had some very serious lung problems; that Johnson missed work a few times to take her husband to the hospital; that he may have discussed her husband's health problems with human resources when he excused some absences; that the point system is a no fault system; that his affidavit to the Board indicates that he not only was aware of the letter indicating Johnson's organizing role but he may have seen the letter; that he did not speak to Lawanna Johnson about the letter; and that his affidavit to the Board indicates as follows:

> I was especially cautious how I worded any discussions with Lawanna, because I saw the letter from the Union which she signed. The letter was posted at the plant. I believe I had a short conversation with Lawanna about the letter. I said something to the effect I knew she had signed a letter, and that was her right. I also said something to assure her that I wouldn't hold it against her, that I was available to talk about why I don't think the Union would be good, if she wanted to talk. I tried to be careful in what I said, because I didn't want to accuse—anything wrong.

Hast further testified on cross-examination that in 1994 before the Board election during at least one line meeting with his employees, which meetings are held one or two times a month to discuss such matters as productivity and quality issues, he told the employees that the Company did not want a Union, it did not see a need for a third party; and that Lawanna Johnson told him that her hands were swollen and he saw the swelling.

The plant manager of the Respondent's Tar Heel facility, Larry Johnson, testified that in 1993 he was the superintendent of the cut floor; that he remembered Lawanna Johnson; that he granted her request to transfer in 1993; that he did not recall ever discussing the Union with her; that he never threatened to fire Lawanna Johnson for passing out union cards or talking about the Union; that he never told Lawanna Johnson that if he heard her mention anything else about a vote on the Union he would fire her on the spot [see the allegation under par. 9(c) above]; that Lawanna Johnson had an attendance problem in that she missed a lot of work; that he signed General Counsel's Exhibit 15, which is a last chance agreement for Lawanna Johnson dated November 1, 1993; that shortly after signing the last-chance agreement Lawanna Johnson missed work again and she was terminated; that with respect to the last absence which led to her termination, he did not know why she was absent, she never called in, and no one called in on her behalf; that "at one period," he was not sure of the date, he did receive a call from a man who identified himself as her husband, and who indicated that he wanted to speak to Lawanna Johnson; that he received this telephone call about 5:30 or 6 a.m.; that during a conversation with Lawanna Johnson regarding racial comments toward Hispanics he did not tell Lawanna Johnson that she would be terminated if she supported the Union or continued to talk about the Union; and that he did not recall ever talking to Lawanna Johnson about the Union. On cross-examination Larry Johnson testified that in 1993 he did not realize that Lawanna Johnson was a union supporter; that he did not know what Lawanna Johnson said in September 1993 but she was not discharged at that time; that he knew at least as early as September 1, 1993, that Lawanna Johnson was saying that her husband had a condition that was killing him, and she had to be out for that condition; that he did not believe that he asked Lawanna Johnson on September 1, 1993, to bring a doctor's certificate with respect to her husband; and that he signed Charging Party's Exhibit 25, along with Harry Grauling, which is a written warning to Lawanna Johnson dated "10/7/93" which indicates that a disciplinary form terminating her employment would not be given but it would be held in her record.

Respondent's Exhibits 196 through 199, 201 through 205, 208 through 210, and 212 through 214 were received in evidence pursuant to a stipulation. All of the documents refer to Lawanna Johnson. They are 1993 summaries of tardiness and absences, 1992 and 1993 attendance reports, an April 1, 1993 note explaining an absence, 1992 insurance and hire forms, 1993 disciplinary records relating to absenteeism, tardiness and leaving skin on product, an October 11, 1993 letter of termination and termination form indicating "Failure to present medical certification of continued disability," a November 2, 1993 reinstatement form referring to a last-chance agreement, a November 4, 1993 memorandum to file regarding a no call no show absence,[80] a November 4, 1993 termination letter,[81] and a November 4, 1993 termination form. Lee Mount, as director of human resources and custodian of records, testified that the following Respondent's Exhibits are kept in the regular course of business and they were maintained in the file of Lawanna Johnson: Respondent's Exhs. 200[82] and 207.[83]

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[80] The memorandum reads as follows:

NOVEMBER 4, 1993

WHILE MAKING MY ROUNDS FOR ABSENTEES THIS MORNING, I WAS TOLD THAT LAWANNA JOHNSON WAS NOT HERE. AFTER TURNING IN MY REPORTS, SHE HAD NOT COME NOR HAD SHE CALLED.

CLARA SMITH
CUT FLOOR CLERK

The memorandum is signed. Clara Smith was not called by the Respondent to testify how she determined "NOR HAD SHE CALLED."

[81] The letter, which is addressed to Lawanna Johnson and which is signed by Harry Grauling, reads as follows:

> On November 1, 1993, you were reinstated back to the work force of Carolina Food Processors, under the conditions of a "last chance" agreement.
>
> Based on your failure to report your absence of November 4, 1993, your non-compliance with the last chance letter dated November 1, 1993, your employment with Carolina Food Processors is terminated by reason of being a "Generally unsatisfactory employee pertaining to excessive absenteeism/tardiness."

[82] It is an unsigned April 1, 1993 counseling summary regarding attendance. As noted above, there is a note explaining an absence on April 1, 1993, R. Exh. 197(g). It is a note from an attorney indicating that Lawanna Johnson "was at a hearing in the Bladen County District Court this day" (4–1–93").

Analysis

The General Counsel on brief contends that on November 1, 1993, hours after Lawanna Johnson met with Larry Johnson and Harry Grauling and signed a last-chance agreement, Larry Johnson threatened to fire her if he heard her talking about the Union again with employees; that Grauling made the decision to discharge Lawanna Johnson on November 4, 1993, and since he did not testify, an adverse inference should be drawn; that the Respondent attempted to cover for the absence of Grauling through the testimony of Dale Smith that he had been involved in Lawanna Johnson's discharge but after much evasion on the part of Smith, it was established on cross-examination that Smith had no firsthand knowledge of the incident leading to Lawanna Johnson's discharge, and he did not discharge her; and that the Respondent did not prove that it would have discharged Lawanna Johnson absent her activities in support of the Union.

The Respondent on brief contends that the final absence which allegedly led to the discharge of Lawanna Johnson occurred on November 4, 1993, as indicated by the company records; and that Lawanna Johnson's testimony that she did not receive an authorization number after allegedly calling into the plant on the morning in question casts serious doubt on her version of events since

> [s]everal witnesses, including other alleged 8(a)(3) discriminatees, testified that Respondent had a procedure whereby employees who called in to report their absence were given an authorization number that would verify that they had called in on a particular day. [Tr 543, 3870–3871.]

The problem with the latter argument of the Respondents is that it is not supported by the record cites of the Respondent. While the Respondent argues that other "discriminatees," testified that when they called in they are given an authorization number, the Respondent cites the testimony of only one other alleged discriminatee, Chris Council. Council was referring to a call in he made exactly 1 year after Lawanna Johnson made her call in. When Council called security on November 4, 1994, to indicate that he would not be coming to work, the standard operating procedure was to get an authorization number. Council could not recall, however, whether he was given one. The other record cite refers to the testimony of Bill Gray, who started working for the Respondent at the Tar Heel facility on June 13, 1994. He testified that he was a human resource assistant in October 1994 when the Respondent changed its attendance policy from excused/unexcused to a no fault 12-point system. With respect to the new policy, Gray testified at transcript pages 3870 and 3871 as follows:

> Part of the attendance policy was a call in procedure that you were supposed to call in an hour prior to the start of your shift.
>
> Q. Let me stop you there, Who was an employee supposed to call?
>
> A. There was a—the number to the guard shack was given out on business cards as well as I think it was in the Handbook. The 862–3024 number and they were given instructions during the new employee orientation that [if] they would be absent, late for any reason that they were to call in to that number and the person that answered the phone is the person that they need to talk to.
>
> They just need to say hey, I'm calling in and that person will ask them of course what their name is. what department they work in, who their supervisor is and why they're going to be out of work. Also ask who is calling because we did allow spouses, someone to call in for someone else basically.
>
> Then that person is issued a call in number by the security guard. That's kindly [sic] like their receipt so to speak that they called in so if there is a problem with it somewhere down the road as far as the attendance card tracking and where a supervisor has to track there ia a no call/no show and that employee cones back to work the next day and the supervisors says hey, you know I didn't hear from you. I didn't know where you were at yesterday that's two points against you.
>
> With the attendance policy that employee you know has something to fall back on in that they can cite their call in number and the log can be reviewed to clarify that.
>
> . . . .
>
> A. Well at one point because our security staffing on the front gate at the Plant was unable to . . . [receipt] all the calls coming in, and then also check employees coming in and out of the gate we moved the second shift log to the general receptionist number and all the second shift employees were instructed to call the 7675 number and speak with the person that answered the phone so all second shift employees when they called in to be late or absent they called a separate telephone number.
>
> Q. Do you remember approximately when that change took place in the call in procedure?
>
> A. I want to say it was sometime in '95. I don't remember exactly.

As can be seen, the Respondent's call in procedure has not remained unchanged since the plant opened. Obviously, Council's November 4, 1994 call in to security occurred after the October 1994 change described above by Gray. Obviously, Lawanna Johnson's November 4, 1993 call in to security occurred almost a year before the October 1994 change. Lawanna Johnson's testimony that she did call in to the guard shack the day she was absent in November 1993, she did not get an authorization number when she called in to the guard shack in November 1993, and she did not recall ever getting an authorization number when she telephoned the guard shack is credited. Lawanna Johnson was a live witness testifying at the hearing herein that she called in on the November 1993 day that she was absent. Clara Smith was not called by the Respondent to testify so we have no way of determining how she arrived at the conclusion "NOR HAD SHE CALLED" on Respondent's Exhibit 212, and we cannot make a finding as to whether this is an accurate conclusion. Since I am crediting Lawanna Johnson, obviously in my opinion Smith's conclusion is at best inaccurate.

[83] It is a file memorandum dated October 7, 1993, apparently written (typed) by Harry Grauling. Grauling did not testify at the hearing herein.

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, it has been shown that Lawanna Johnson engaged in union activity, the Respondent was aware of her activities[84] and the record contains substantial evidence of antiunion animus.

In my opinion, the Respondent has not demonstrated that it would have taken the same action against Lawanna Johnson even if she was not engaged in protected activity. As found under paragraph 9(c) above, Larry Johnson lied about threatening Lawanna Johnson on November 1, 1993, with discharge if he heard her speaking about the Union with other employees. Larry Johnson was not a credible witness. Lawanna Johnson impressed me as being a credible witness. Grauling did not testify at the hearing herein, and Timothy Dale Smith's ill-advised attempt to convince all that he was involved in the termination was, after much evasion on his part, proven to be false on cross-examination. Hast was not involved in the termination. The termination occurred just a few days after Larry Johnson threatened to terminate Lawanna Johnson, which threat was made hours after he signed her last chance agreement. Undoubtedly he was very upset with her for pushing the Union after he, in his opinion, had just given her another chance. Her November 4, 1993 absence was his first opportunity to rid the Respondent of this union activist and he took it. Lawanna Johnson's termination papers were prepared before management met with her. The termination decision was made before management met with her. There was no real investigation before the decision was reached. Lawanna Johnson's testimony that she was not given a chance to give Larry Johnson or Grauling anything and everything was prepared when she walked into the office is credited. Management knew of her husband's problem before the last-chance agreement was signed. As pointed out by the General Counsel on brief, while Timothy Smith testified about granting hardship exceptions, the Respondent's failure to grant Lawanna Johnson such an exception was never explained. Other than her union activity, no reason was shown for this disparate treatment.[85] The Respondent violated Section 8(a)(3) and (1) of the Act by terminating Lawanna Johnson on November 4, 1993.

(f) George Simpson

Respondent's former employee George Simpson testified that he was employed by the Respondent from November 1992 through February 1994; that he was first employed as a neck bone puller and his last job was a picnic trimmer; that his supervisors on the picnic trimming job were Dale Smith and Robert Claiborne; that he passed out union leaflets from late 1992 up until his termination and he tried to get employees to sign union authorization cards; that he passed out leaflets in the hallway, in the cafeteria, in the locker rooms or breakrooms and in the parking lot; that Smith, Claiborne, and the Respondent's personnel director, saw him pass out union leaflets; that when he was hired in November 1992 he attended an orientation meeting at which Sherman Gilliard was present; that during this meeting the employees present were asked if anyone had prior union experience and when he said that he had been a union shop steward in New York City, Gilliard said, "[W]e didn't want a Union in our Plant . . . we didn't need a Union taking money out of our pockets"; that in February 1993 he attended a meeting conducted by Henry Morris, who he understood was the vice president of operations for Carolina Food Processors, and when Morris said that employees could negotiate with management for themselves without having a union, he raised his hand and when he was acknowledged he said that from his personal experience employees could not negotiate with management by themselves; that about 300 employees were at the meeting along with Smith and Claiborne; that while he was supposed to wear a "cutting" glove on the hand with which he held his knife, he wore a cotton glove because he had large hands and the "cutting" glove caused his hand to get irritated and infected; that he wore the cotton glove in the presence of his supervisor, Smith, all the time; that on the morning of January 10, 1994, he told Supervisor Smith that the line was running too fast and the people on the line could not keep up and cut the meat; that later that day Smith gave the people on the line a written-oral warning "for not doing their jobs" (GC Exh. 20), which he refused to sign because he told the supervisor earlier that day that the line was running too fast[86]; that on February 10, 1994, Claiborne asked him to go to personnel and when he asked for what Claiborne told him that maybe they were going to terminate him; that he went to personnel and spoke with the personnel director who he described only as Harry; that the personnel director told him that they were going to have to cut back, saying, "I don't have anything to do with it. . . . I've been told to cut back and we're going to have to terminate you"; that when he asked the personnel director what the reason was, the personnel director said that he did not have anything to do with it, and he thought that the personnel director might have said for something or other; that he had not been working any fewer

[84] Hast knew of her union activities and he commented to her about them. Larry Johnson threatened Lawanna Johnson because of her union activities.

[85] While it is noted that Timothy Smith was not involved in Lawanna Johnson's termination, it was not shown that those who were involved were unaware of the exceptions made for hardship cases. The General Counsel's requests for adverse inferences regarding Grauling's failure to testify and with respect to the "obviously untrustworthy testimony of Timothy Dale Smith" are denied.

[86] Simpson also testified that an agent of the Board first showed him another disciplinary record, GC Exh. 21, with his name on it dated"1–10–94" which did not have a signature on the employee signature line ("*Refised*" was written above the line). The management remarks on GC Exh. 21 read as follows:

> On 1–10–94 employee was written up for poor job performance. At the end of the shift employee was told by . . . the crew leader he had to stay and trim the product they missed. George refused and left.

Simpson testified that neither Smith nor any other supervisor with the Respondent ever showed him this document; that he did not refuse to work overtime on January 10, 1994; that he was not asked to work overtime that day; and that he did not leave work early that day.

hours at that time at the plant; that he did not see any evidence that the Company was cutting back on employees[87]; that he did see new employees; that the new employees wore green hats showing that they were on a probationary period; that 90 percent of his line wore green hats when he was terminated; that he was absent from work when his mother had some strokes; that Supervisor Smith knew that his mother was ill; that on February 8, 1994, he saw General Counsel's Exhibit 22, which is a disciplinary record with the same date and which indicates that he was not wearing a cutting glove on his knife hand; that on that day a lead man went down the line to see who was wearing proper equipment and a lot of other employees on his line were issued warnings that day for not wearing proper equipment; and that this was the first time that he was ever warned for wearing the cotton glove instead of the cutting glove. Simpson further testified that he talked to employees about signing union authorization cards during his break in the break room, in the halls, in the bathroom, in the parking lot and in the cafeteria; that his Supervisors Smith and Claiborne and Larry Johnson were present when he talked to employees in the cafeteria about signing union authorization cards; that Larry Johnson and Smith saw him in the hallway; that his mother had three strokes in late 1992 and early 1993; and that he told Smith that his mother was having these strokes.

On cross-examination Simpson testified that Claiborne was a lead man who became a supervisor around February 1994; that he did not sign Respondent's Exhibit 47, he did not remember being shown the warning but he did remember getting a warning on about May 13, 1993, concerning walking off the line to go to the restroom[88]; that he did not recognize Respondent's Exhibit 48 and he did not remember getting an attendance written warning on about May 28, 1993; that he did not recognize Respondent's Exhibit 49 and the signature on the form was not his[89]; that he never saw Respondent's Exhibit 50 before it was shown to him by one of counsel for Respondent at the hearing herein and he did not receive a 1-day suspension for attendance; that he never saw Respondent's Exhibit 51 before it was shown to him by one of counsel for Respondent at the hearing herein and he did not remember receiving a 3-day suspension for absenteeism in July 1993; that the signature on the employee signature line on Respondent's Exhibit 52, a disciplinary record dated "10—2–93," is not his and he did not remember getting a written warning for absenteeism in October 1993; that he did not remember being shown Respondent's Exhibit 53 which refers to a 1-day suspension for absenteeism on December 3, 1993, and he did not remember such a suspension; that Respondent's Exhibit 54, which refers to a 1-day suspension for absenteeism, was never shown to him before the hearing herein and he did not remember being absent on December 17, 1993; that he did not bring any medical documentation regarding his mother's medical condition to the Respondent when he was absent because it was not required; that the signature on the employee signature line of Respondent's Exhibit 55 is not his signature but he did remember signing a last chance agreement; that it is possible that Respondent's Exhibit 55 is the last chance agreement he signed; that when he told Morris during the employee meeting that employees could not negotiate labor management relations with management for themselves Morris said that it was his, Simpson's, right to want a union; that, with respect to General Counsel's Exhibit 21, when he left work on January 10, 1994, there was no more work for him to do and there were no hogs hanging on the chain; that when he was told by the personnel director that he was terminated, the personnel director told him that he was told to cut back and he had nothing to do with it; and that, as indicated in his affidavit, the personnel director said that it was a possibility that he was being terminated because he missed too many days. On redirect, Simpson testified that, with respect to the warning he received for going to the restroom, he has a kidney problem; that he had asked a leadman if he could go to the restroom and the leadman denied him permission; that he had to go to the bathroom so he left the line; that he never authorized anyone to sign any document for him; that the purported employee signature on Respondent's Exhibit 49, which was initially received herein as General Counsel's Exhibit 23, is spelled "Sampson" instead of "Simpson"; that he never spelled his name "Sampson"; and that the employee signature on Respondent's 52, which was initially received herein as General Counsel's Exhibit 24, and which purports to be his signature is not his signature. Simpson further testified that the incident involving him going to the restroom after being denied permission to go occurred after he made his above-described statement to Morris in the meeting with other employees; that after he made the above-described comment in the meeting with Morris and other employees his job was changed and he was demoted and given less pay; that before the above-described Morris meeting Smith told him that he had been clocked giving 120 percent and that this would mean more money; and that when he asked the personnel director what he was being terminated for, the personnel director said that he did not have anything to do with it, they told him to cut back and he had missed too many days.[90]

The Respondent's superintendent of the cutting division, Timothy Dale Smith, testified that in the fall of 1993 he was a supervisor on the shoulder line; that George Simpson worked on the shoulder line and he was Simpson's supervisor; that Simpson had absentee, safety, and behavioral problems and he received discipline for these problems; that he filled out Respondent's Exhibit 47, dated "5–13–93," and he signed it; that Respondent's Exhibit 47 is a written warning and a 1-day sus-

[87] The person in charge of the plant at the time, Morris, testified that to his recollection he did not think that there was ever a layoff from the day "we started to the day I left." Morris was at the Tar Heel facility 2 months after it opened in October 1992 and he left the Respondent and the Tar Heel facility on June 30, 1995. Morris further testified that he never ordered a layoff.

[88] R. Exh. 47 is dated May 13, 1993, and refers to walking off the line to go to the restroom.

[89] The discipline record indicates "[e]mployee was not wearing his safety equipment and cut his finger."

[90] R. Exh. 56 is a letter dated June 22, 1994, from the Regional Director for Region 11 of the Board to the Union indicating that he was refusing to issue a complaint in Case 11–CA–16010, which counsel for the General Counsel stipulated was the correct charge number for Simpson's original unfair labor practice charge filed by the Union, since there was insufficient evidence of a violation. This determination was successfully appealed.

pension which indicates "[e]mployee cursed at a crew leader than walked off the line to go to the restroom. George has been told that if this happen[s] again he will be fired"; that the crew leader, Robert Claiborne, was waiting for other employees to come back from the restroom before he let Simpson leave the line and Claiborne tried to stop Simpson when he left the line; that he could not recall seeing Simpson sign the document and Claiborne was probably the one who had Simpson sign Respondent's Exhibit 47[91]; that he signed Respondent's Exhibit 48, which is an attendance write up dated "5–28–93"; that to the best of his recollection he was present when Simpson refused to sign Respondent's Exhibit 48; that he signed and he saw Simpson sign the document marked for identification as Respondent's Exhibit 49, dated "6–22–93," which was received as General Counsel's Exhibit 23, and which is an employee discipline record indicating "[e]mployee was not wearing his safety equipment and cut his finger"; that he signed Respondent's Exhibit 50, dated "7/6/93," which is a written warning and a disciplinary suspension of 1-day for absenteeism, and he wrote on the document "[e]mployee refused to sign" when Simpson refused to sign the document; that he signed Respondent's Exhibit 51, dated "7/23/93" which is a written warning and a disciplinary suspension of 3 days, and he met with Simpson to discuss this warning but the warning was not issued because, as he noted on the form, Simpson had a note from the doctor; that he signed and he saw Simpson sign the document marked for identification as Respondent's Exhibit 52, dated "10–22–93." which was received as General Counsel's Exhibit 24, and which is an employee discipline record—a written warning—indicating a violation of the absentee policy was issued because Simpson, after coming off a last-chance letter, missed another day; that he signed Respondent's Exhibit 53, dated "12–3–93," which is a written warning and disciplinary suspension of 1 day for an attendance violation, and on which he checked off the box indicating that the employee, Simpson, refused to sign the form; that he signed Respondent's Exhibit 54, dated "12–17–93," which is a written warning and a disciplinary suspension of 1 day for being absent on December 17, 1993, and he checked off the box indicating that the employee, Simpson, refused to sign the form; that he signed Respondent's Exhibit 55, dated "1–11–94," which is Simpson's last-chance agreement; that Simpson was terminated because the Respondent was overstaffed on the floor and five or six employees on the cutting floor were terminated; that "actual versus authorized" is "a document in which it states the line jobs that we have in our Division, and the number of people should match those line jobs, plus a ten (10) percent margin for absentee turnover"; that at the time of Simpson's termination his department had over the aforementioned 10 percent; that he was told by Mitch Bailey to bring manning within limitations which were given to him and to do this by the attendance, behavioral and safety records[92]; that he did not know whether Simpson was a union supporter; and that Simpson was moved from neck bone lifting line to picnic trim line because he could not keep up with the neck bone lifting job and he was placed on the end of the line because he was left handed and it would have been dangerous to have him anywhere else on the line.

On cross-examination Smith testified that he was not aware that Simpson had a kidney condition; that, with respect to Respondent's Exhibit 47, he did not recall asking Simpson why he had to go to the restroom right at that moment and why he refused to wait; that notwithstanding the fact that the signature on Respondent's Exhibit 49 is spelled Sampson, he was present when Simpson signed this document and he was sure that it was

[91] R. Exh. 47 was received, except for the alleged employee's remarks and the alleged employee's signature since these were not authenticated up to this point in the hearing by either Simpson or Smith.

[92] During this witness' direct testimony, the General Counsel, with the Charging Party/Petitioner joining, moved to strike his testimony regarding the documents of manpower and any instruction that he received to reduce manpower based on reports of the number of employees allowed since the Respondent did not produce, in response to the General Counsel's and the Charging Party/Petitioner's subpoenas, documents which the Respondent refers to as actual versus authorized comparison reports. Counsel for the General Counsel was directed to renew his motion at the end of cross-examination. Before commencing cross-examination one of the counsel for the General Counsel renewed his motion that any testimony derived or related to manpower reports relation to a discharge of George Simpson be stricken. Again counsel for the General counsel was directed to renew his motion at the end of cross-examination. During his cross-examination counsel for the General Counsel again renewed his motion to exclude the testimony regarding actual versus the authorized reports. Again he was directed to renew his motion at the conclusion of his cross-examination. And at the end of his cross-examination counsel for the General Counsel renewed his motion to strike secondary evidence relating to the actual versus the authorized reports. Subsequently, Smith testified that each supervisor in the cutting department receives a copy of the actual versus authorized report monthly or somewhere around monthly to verify the number of people versus the number of jobs; that he did see the actual versus authorized reports during the period involved; that he did have an overage at the time; that he had an overage before February 1994; that he could not say how much of an overage he had in February 1994; that he was aware that he was running more than 10 percent of an overage in February 1994; that it is possible, "it could be a likelihood that we may have," that he ran more than a 10-percent overage before February 1994; and that he could not say for sure whether or not he ever ran more than a 10-percent overage after February 1994. It was pointed out to Respondent that opposing counsel should be given an opportunity to review the involved records, the involved records were 5 years old and provisions could be made for only counsel to review them, and if the records were not provided to opposing counsel consideration would be given to an adverse inference, namely, that the records would not support the position that the Company is taking on this matter. Respondent indicated that an attempt would be made to would be made to find the 5-year old document or regenerate it from a computer tape; and that if it was provided to opposing counsel, proprietary information would be deleted. The Respondent requested that a ruling on counsel for the General Counsel's motion be withheld until the Respondent had a chance to find out if it could produce it. Counsel for the General Counsel then pointed out that

> during the investigation of this matter the Region [of the Board] requested these very same documents contemporaneously with their decisions. And they [Respondent] had refused to give them to us . . . [then]. The fact that they've been destroyed since it would have been done so in full knowledge that we were seeking those documents then and that we might be seeking them now.

I deferred ruling on counsel for the General Counsel's motion until the Respondent had an opportunity to find out if the document was still available. The subpoenaed material was never produced by the Respondent.

Simpson's signature; that he could not recall if Simpson told him that he had a mother who was ill at the time and he had to miss work to visit her; that he did not have the actual versus authorized reports with him when he testified herein; that he guessed that all counsel for the General Counsel had to cross-examine him on in this regard was his word that his department had exceeded the number of authorized employees during the time that he laid off Simpson; that he would have been Simpson's direct supervisor (before Claiborne became Simpson's direct supervisor) when Respondent's Exhibits 47, 48, and 49 were issued; that he saw Simpson sign Respondent's Exhibits 49 and 52; that he did not have the names of the five or six employees who were "let go" in the same time frame as Simpson with him when he testified herein and he could not recall the name of any one of them; that supervisors of the whole floor submitted names of the employees who had the worst attendance records in their departments; that Larry Johnson participated in deciding who to lay off; that he reviewed the supervisor's recommendations and then he brought them to Larry Johnson; that he looked for the number of absences, behavioral problems, safety write ups and things of that nature; that he and Larry Johnson discussed the files and decided which employees would be laid off; and that to his recollection this was the only time in his division that there was a layoff of this type.[93] On further cross-examination Smith testified that in 1993 the attendance policy was excused/unexcused; that an excused absence pertained to the military, a death in the family, or a doctor's visit; that the employee had to provide proper documentation; that in 1993 there was a progressive discipline policy in place; that under this policy the first unexcused absence resulted in an oral warning which was written and signed; that the second unexcused absence should be recorded but there would not be another oral warning; that the third unexcused absence resulted in a written warning; that the forth unexcused absence resulted in a 1-day suspension; that the fifth unexcused absence resulted in a 2- or 3-day suspension; that the sixth unexcused absence usually resulted in a last-chance letter or termination[94]; that Respondent's Exhibit 48, which is dated May 28, 1993, is a written warning which indicates that Simpson "on six different occasions . . . had attendance violations"; that Respondent's Exhibit 50, which is dated July 6, 1993, indicates that Simpson received a 1-day suspension for a violation of the attendance policy; that Respondent's Exhibit 51, which is dated July 23, 1993, indicates that Simpson received a 3-day suspension for a violation of the attendance policy; that nowhere in the Respondent's disciplinary policy does it have a provision for a 3-day suspension; that Respondent's Exhibit 52, which is dated October 22, 1993, indicates that Simpson received a written warning for a violation of the attendance policy; that nowhere in Respondent's disciplinary policy is there a provision for going from a 3-day suspension back to a written warning; and that Respondent's Exhibit 53, which is dated December 3, 1993, indicates that Simpson received a 1-day suspension for a violation of the attendance policy. On recross, Smith testified that Simpson did not receive a 3-day suspension as indicated on Respondent's Exhibit 51 because Simpson had a doctor's note and he wrote at the bottom of this discipline "Has note from doctor."

Robert Claiborne, who is the Respondent's first-shift superintendent, testified that during the 1994 union campaign and election he was a supervisor on the shoulder line on the cut floor; that he was George Simpson's supervisor; that Simpson had previously worked in a beef plant and had knife experience; that the Respondent had Simpson working at the neck bone lifting station which was the most difficult job on the involved line; that sometimes Simpson could keep up but when he started talking he could not keep up; that he spoke to Simpson a couple of times and then he moved Simpson to the picnic trim line which is an easier job; that Simpson still failed to keep up; that Simpson never did anything to make it known to him whether he was a union supporter; that Simpson was not switched to the picnic line because he was a union supporter; that the speed of the picnic trim line was not ever increased while Simpson was working on that line and it was not ever increased to retaliate against Simpson for his union support; that when he was a crew leader before the 1994 Board election, on one occasion Simpson asked him if he could go to the restroom and he told Simpson that he first had to take the place of someone else who had already asked and Simpson "got mad and used profanity and shut down and walked off the line and went anyway"; that Simpson said, "He was going to the damn bathroom anyway. He had to go"; that Simpson received a written warning (with a 1-day suspension) for the incident (R. Exh. 47); that he did not recall having a conversation with Simpson on February 10, 1994, prior to sending him down to the human resources department; that in February 1994 he was a supervisor; that he was notified by a note from that department that human resources wanted to see an employee and the note did not include the reason for the request; that he did not tell Simpson on February 10, 1994, that maybe he was going to be terminated after being asked why he was being sent to human resources because he would not tell anybody that and he has never provided a reason to any employee when asked; and that Simpson had attendance problems.

On cross-examination Claiborne testified that Simpson and other employees did not complain to him about the speed of the line; that he did not recall if they complained to his supervisor, Dale Smith; that he could not recall writing Simpson up for performance but he talked to Simpson; that he could not remember if he was involved in discharging Simpson; that he could not remember if he recommended that Simpson be discharged; that with respect to the incident covered by Respondent's Exhibit 47, he did not know that Simpson had a kidney problem; that he did not remember Simpson telling him that he had a kidney problem; that he did not remember Simpson telling him that he could not wait, he had to go to the bathroom right away and he was afraid of soiling himself; that he told Simpson that he could not go to the bathroom until the other

[93] Other layoffs involved shortages or production "and such."

[94] CP Exh. 7, which is an employee handbook of the Respondent, gives the progressive discipline on p. 5 thereof. It indicates that the first and second unexcused absences will warrant verbal warnings, the third will warrant a written warning, the fourth will warrant a 1-day suspension without pay, the fifth will warrant a 2-day suspension without pay, and the sixth will warrant suspension pending decision to discharge.

employee returned; that he did not remember if Simpson then said, "I'm going to go. I've got to go"; that this is when Simpson said, "I'm going to go the damn bathroom anyway"; that when Dale Smith went on vacation he took Smith's place as acting supervisor; that when he was acting supervisor he would, like Smith did, talk to the Superintendent if he had a problem; that there were new workers hired in his department in February 1994; that there were a lot of green hats which means the employee is a 90-day probationary employee; that he did not remember if there were people with green hats working on the jobs that Simpson was doing in February 1994; and that there were green hats in his department in February 1994.

The Respondent's plant manager, Larry Johnson, testified that George Simpson had attendance problems and he believed that there was an issue regarding working overtime; and that he did not terminate Simpson but he agreed that Simpson should be one of the one's chosen for termination. On cross-examination, Larry Johnson testified that Simpson was valuable because he had experience; that he did not remember Simpson telling him that he had been a union steward up north; that the fact that Simpson was left handed required that Simpson always be placed at the end of the line; and that he was not aware that Simpson had a kidney condition. Subsequently, Larry Johnson testified that when George Simpson was laid off permanently the Respondent was using State prisoners to work in the Tar Heel plant.

Lee Mount, the Respondent's director of human resources, testified as custodian of records that Respondent's Exhibits 192 and 193 are records kept in the regular course of business and were maintained in the personnel file of George Simpson.[95] On cross-examination Mount testified that Simpson's employee evaluation was a "predominantly good" evaluation in that Simpson was not rated poor in any category, he was rated average in only two categories, and he was rated a good employee in nine other categories; that there were only three ratings on the form, namely good, average or poor; and that Simpson's evaluation was a "good" evaluation. Mount sponsored (1) Respondent's Exhibit 216, which is Simpson's employment application, (2) Respondent's Exhibit 217, which is Simpson's North Carolina withholding allowance certificate, (3) Respondent's Exhibit 218, which is Simpson's W-4 Internal Revenue Service form, and (4) Respondent's Exhibit 219, which is an "ILLEGAL DRUG/ALCOHOL TESTING CONSENT AGREEMENT" with Simpson's signature.

Analysis

The General Counsel on brief contends that neither Claiborne nor Smith, who were well aware that Simpson wore a plain cotton glove on his knife wielding hand, previously objected but on February 8, 1994, 2 days before Respondent laid off Simpson, Claiborne issued a written warning to Simpson for failing to wear a fabric safety glove; that secondary evidence relating to "Authorized vs. Actual" must be excluded since the Respondent failed to produce the involved documents pursuant to subpoena; that an adverse inference should be drawn from the Respondent's failure to offer the allegedly relevant report into evidence; that while Human Resources Director Harry Grauling laid off Simpson telling him that he had nothing to do with the layoff but he had to cut back employees, Grauling failed to testify at the hearing herein; that while Smith claimed that Mitch Bailey ordered the layoff, Bailey did not testify at the hearing herein; that the Respondent's highest ranking official at Tar Heel at the time, Morris, testified that he did not order a layoff and he did not think that there was a layoff during the time he was at Tar Heel (October 1992–June 30, 1995); and that Claiborne corroborated Simpson that there were green hats (probationary employees) in his department in February 1994.

The Respondent on brief argues that Dale Smith had no recollection of ever discussing anything about the Union with Simpson, Smith had no recollection of Simpson ever telling him he was a union supporter, Smith did not recall seeing Simpson wearing union T-shirts or buttons, and Smith had no knowledge whether Simpson was a union supporter; that "Robert Claiborne similarly testified that he had no knowledge that Mr. Simpson supported the Union. [Tr. 2773.]"; that given Simpson's limited union activity, and the fact that neither of the supervisors involved in the decision to discharge him knew about his union activity, there is simply no basis to conclude that unlawful animus motivated the Respondent's decision to terminate Simpson's employment; and that Larry Johnson testified that he was not aware that Simpson was a union supporter.

With respect to Claiborne's cross-examination the pertinent portion of transcript page 2773 reads as follows:

> Q. And he [Simpson] told you about his experiences in the beef plant. Right?
> A. Yes, sir.
> Q. In fact, he told you that he was a Union Steward up there, didn't he?
> A. No, sir.
> Q. He never told you that?
> A. I didn't know that, no, sir.
> Q. He told you it was a Union Plant, didn't he?
> A. I never really talked to my employees *with the Union*. [Emphasis added.]

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, it has been shown that George Simpson engaged in union activity, the

[95] They are, respectively, an employee performance review dated January 1, 1993, with the best rating for all but output and attitude where he scored average, and a January 11, 1994 memorandum from Rosa Britt, RN and assistant director of human resources covering a meeting with Simpson in her office with respect to a 5-day suspension "due to insubordination due to walking off the line, when asked to work over" and a last-chance letter. R. Exh. 194 was received pursuant to a stipulation. It is a termination form for George Simpson dated February 10, 1994, which indicates as follows: "Generally Unsatisfactory Employee excessive absenteeism Violation of attendance Policy."

Respondent was aware of his activities[96] and the record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against George Simpson even if he was not engaged in protected activity. What was the Respondent's business justification for the layoff? Mitch Bailey allegedly told Smith that they had to have a lay off because of the actual verses authorized numbers. Bailey did not testify at the hearing herein so opposing counsel were not accorded the opportunity to review the actual versus authorized reports and to ask him about Smith's above-described equivocal testimony regarding running more than a 10-percent overage before and after February 1994. Why was it necessary to have a layoff in February 1994 if the Respondent was running more than a 10-percent overage before and after February 1994. Morris, who was in charge of the facility, was not even aware that a layoff occurred at that time? Why could not Simpson, et al., have been moved somewhere else in the plant? Why was there a need for a layoff of a permanent employee(s) when the Respondent had a number of probationary employees? Why if there was a business justification, did the Respondent refuse to turn over to opposing counsel the very document which allegedly was the basis of the business justification? The General Counsel has met the initial burden of establishing that protected conduct was a substantial or motivating factor in the Respondent's decision. The burden of persuasion, therefore, has shifted to the Respondent to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. The Respondent can not meet its burden of persuasion relying only on Larry Johnson, who was obviously not a credible witness, and Timothy Smith, who was evasive, equivocal and not a credible witness. This is especially so when one considers (a) that the person in charge of the plant at the time testified that he never ordered a layoff and he was not aware of the layoff, (b) Smith, himself, testified that this was the only time in his division that there was a layoff of this type,[97] (c) there were a lot of probationary employees in the involved department, (d) the Respondent still had a need to use prison labor, and (e) Claiborne's testimony that there were new workers hired in his department in February 1994. Once again, the document or documents should have been used but the Respondent did not use it or them.[98] The request of the General Counsel for an adverse inference is granted. I find that the reason the Respondent would not turn over to opposing counsel the involved documentary evidence is because it would have demonstrated that the Respondent did not have a business justification to lay off Simpson. The layoff was pretextual. The fact that the Respondent may have laid off others at the same time, in the circumstances existing here, demonstrates nothing other than how far the Respondent would go in its attempt to make the true reason for its action less obvious. Even without the adverse inference, in my opinion the Respondent has not demonstrated that it would have taken the same action against George Simpson even if he was not engaged in protected activity. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off George Simpson on February 10, 1994.

23 Paragraph 16

Paragraph 16 alleges that Respondent issued a written warning to George Simpson on January 10, 1994 "(only the warning for poor job performance)," and thereafter refused to rescind said warning.

The facts concerning this allegation are set forth above in paragraph 12 with respect to the termination of Simpson.

Analysis

As concluded above, under *Wright Line*, supra, the General Counsel has established that George Simpson engaged in union activity, the Respondent knew and there is substantial evidence of antiunion animus. The General Counsel has met the initial burden of establishing that protected conduct was a substantial motivating factor in the Respondent's decision.

Has the Respondent shown that it would have taken the same action even if the employee had not engaged in protected activity? Did the Respondent have a business justification? Although Timothy Dale Smith testified at the hearing herein, he did not attempt to supply a business justification for the involved warning. No documents were introduced to show that George Simpson and the other picnic trimmers processed fewer hogs on January 10, 1994, than on previous days. So on the one hand there is (1) Simpson's testimony that there was no justification for the warning, and (2) the fact, as noted on the document (GC Exh. 20), that he refused to sign the warning. On the other hand, there is nothing from the Respondent other than the written-oral warning signed by Timothy Dale Smith and Larry Johnson. Both Smith and Larry Johnson were not credible witnesses. The Respondent has not shown that it had a business justification for the warning. The Respondent has not shown that it would have taken the same action even if Simp-

[96] Neither Henry Morris, nor Timothy Dale Smith, nor Robert Claiborne specifically denied that they were at a meeting in February 1993 where Morris told employees that they could negotiate with management for themselves without having a union, and Simpson raised his hand, was acknowledged, and then said that from his personal experience employees could not negotiate with management by themselves. Grauling, who was the one who told Simpson that he was laid off, did not testify at the hearing herein and, therefore, he did not deny Simpson's testimony that the personnel director (actually the title is director of human resources) saw him pass out union leaflets. Simpson's unrefuted testimony that Grauling saw him pass out union leaflets is credited. While Smith and Clairborne testified about their knowledge regarding Simpson's union support, neither one specifically denied Simpson's testimony that they saw him pass out union leaflets. Simpson's testimony is credited. Smith and Clairborne saw Simpson pass out union leaflets. When considering Larry Johnson's testimony that he was not aware that Simpson was a union supporter, one must consider that Larry Johnson was not a credible witness. This testimony was elicited from Larry Johnson as a part of an offer of proof, something which the Respondent fails to point out on brief.

[97] As pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 170 F.2d 749, 754 (2d Cir. 1950):

> It is no reason for refusing to accept everything that witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

[98] As noted above, the Respondent was advised that procedural safeguards would be imposed to protect the Respondent's interests.

son had not engaged in protected activity. The fact that other team members also were disciplined does not change this conclusion. The Respondent was going after Simpson. He was the union supporter. He was the one who spoke up about employees not being able to negotiate for themselves. He was the one who spoke up about the line speed, which is a very important topic to a meat processor. And he was the one who the Respondent went after individually later that same day with the disciplinary record received as General Counsel's Exhibit 21. The crew leader who allegedly told Simpson to work beyond his normal hours on January 10, 1994, did not testify about this alleged incident. The Respondent did not introduce any documents showing that any of the employees on Simpson's team did work beyond their normal hours on January 10, 1994. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written-oral warning (GC Exh. 20), on January 10, 1994, alleging that Simpson did not do his job.

Attendance Policy

Bill Gray, who was an employee relations manager at the involved Tar Heel facility from September 1995 until May 1998, testified that the Respondent's Exhibit 115, dated "5/31/95," is the points system attendance policy; that employees were made aware of the point system policy during new employee orientation (CP Exh. 10) was posted in the plant and the points policy was also posted in the employee relations board upstairs in the main hallway; that under the point system 12 points is grounds for termination; that the employee received an oral warning for the first point and written warnings thereafter up to 11 points; that the points attendance policy was not followed in that he was aware of frequent situations where the employees had many more than 12 points, one in the 30s, and were not terminated; that with a majority of the situations the counselings had not taken place or management had to "back up and eat some days"; that there was a termination freeze starting around Christmas 1995 and continuing into early 1996[99]; that he was told about the termination freeze by Larry Johnson, or Lee Mount, or Sherman Gilliard; that the freeze occurred because the Respondent was losing so many people at that time and it was an attempt to keep people on the job; that while the Company continued to track attendance, employees were not terminated during this period; that the Company did not make an announcement to employees that it was not going to be terminating people; that the Respondent's Exhibit 116, dated June 5, 1995, is a revision of the attendance policy in that employees could work off a point (it would no longer be carried for a year) if they worked 30 calendar days without an infraction; that the Respondent's Exhibit 118 describes the alternative attendance discharge program which went into effect around February 1996 under which a supervisor could recommend that an employee not be terminated if the employee, who would not lose seniority or benefits, was willing to go into the general labor pool and take the new hire rate of pay for a 60-day probationary period; that the alternative attendance discharge program was in effect until September 30, 1996, when the Respondent abandoned the points policy and went to an excused/unexcused policy; that the Respondent's Exhibit 119 is a memorandum dated February 14, 1996, from Lee Mount to named individuals in management indicating that no hourly employee in specified departments will be terminated without a complete review of the employee's attendance and personnel records by human resources, and unless all steps in the attendance policy have been followed; that the Respondent's Exhibit 120, dated September 30, 1996, is a memorandum with attachments which indicate that there will be a change effective "today" from the attendance point system to an excused/unexcused policy and describes the new policy; that the Respondent's Exhibit 121, dated September 30, 1996, is a memorandum which refers to the transition from the point system to the new attendance program and indicates that employees with 13 or more points should be given a last-chance letter and employees with less than 13 points will have their attendance records wiped clean; that a number of employees had more than 13 points at the time of the transition; that the Respondent's Exhibit 122 is the employee handbook which was created in late 1996 or early 1997 and which contains two changes namely, the attendance policy and the job posting policy[100]; that the Respondent's Exhibit 123, dated November 6, 1996, is a memorandum regarding the "Annual Attendance Bonus"; that Respondent's Exhibit 124 refers to the 40- or 20-hour bonus; that Respondent's Exhibit 125 was posted in the plant on October 30, 1996, on the employee relations board in the main hall announcing, effective November 4, 1996, a weekly attendance bonus in the amount of $.25 an hour for all hours worked, if the employees work all of their scheduled days in the previous workweek; that the annual bonus did not continue after this hourly attendance bonus became effective; that Respondent's Exhibit 126, dated March 6, 1997, is an amendment to the excused/unexcused policy which indicates that no call/no show and leaving work early without a supervisor's permission are unexcused absences, and these changes were posted on the employee relations board; that the attendance and tardiness policy under the excused/unexcused system (R. Exh. 127), which he could not recall when it was created, was posted on the employee relations Board in the main hall; that he was aware of situations where the policy was not followed exactly as written; and that one employee, Christy Butler was absent approximately 80 days within 1 year due to her illness, her husband's illness, and transportation problems.

On cross-examination Gray testified that Christie Butler's situation occurred under the very last excused/unexcused policy and under the policy at the time her absences for her doctor

[99] This subject was brought uup with this witness with the following question and answer:

> Q. Are you aware of anyone in Management who ever instructed a supervisor or were you ever instructed to weed out Union supporters through the attendance system?
>
> A. No, I wasn't. Actually there was a point in time where we had a termination freeze and there was that holiday time frame of December as far as attendance issues.
>
> Of course we still addressed the more serious type of fighting on the job, testing positive on urinalysis, those types of things certainly, yes, there were still people terminated, but you at one point and time I was instructed that we would not terminate anyone because of the turnover problem in an attempt to keep people on the job.

[100] This exhibit is the same as GC Exh. 45.

visits were excused absences, her absences due to her husband's illness possibly could have been excused and her absences due to transportation problems were unexcused; that the steps in the corrective process had to be taken for there to be due process for the employees but if a step was missed it did not void the action; that nurse Mary Southerland was in charge of the clinic in 1997; that in 1997 the Respondent hired an average of 300 people a month for the Tar Heel facility; that a vast majority of the turnover at that point in time was due to employees voluntarily leaving; that he found out about the termination freeze which occurred around Christmas 1995 from Sherman Gilliard or Larry Johnson; that the freeze was not done in writing; that the superintendents were not given a memorandum regarding the freeze but rather it was done by word of mouth; that regarding the alternative attendance discharge program, the employee's supervisor had to recommend that the employee be given the opportunity, supervisors were not given any written guidelines on whom to recommend for this program, supervisors had complete discretion as to whom they would recommend for this program, and supervisors had no guidelines as to how to utilize that discretion; that the Respondent did not put the freeze on terminations for absenteeism in writing because it did not want employees to know about the policy; that the Respondent often sent memos out or put policies in writing that went only to managers and not to employees (i.e., R. Exhs. 117, 119, and 126); that after the attendance and tardiness policy reflected in Respondent's Exhibit 127 was in effect, there were daily attendance and tardiness reports put together by the major divisions; that he did not believe that casings and chitlings were tracked; that he reviewed these reports from their inception until he left Tar Heel (May 1998) and absenteeism ranged from 10 percent on a good day up to 27 percent but the normal range was between 10 and 15 percent per department per day; that the numbers basically stayed the same from the time he started compiling the information until he left Tar Heel; and that those managers attending daily production meetings would receive a copy of the absenteeism report. On redirect, Gray testified that in the summer of 1997 the steps in the attendance system corrective action process included for the first an oral, the second involved the first written warning, the third and forth unexcused absences involved written warnings, the fifth unexcused absence involved a final written warning, and the sixth unexcused absence resulted in termination; that it was 50/50 that an employee would be terminated upon the occurrence of the sixth unexcused absence; that in 1997 supervisors were just not completing the necessary corrective actions; and that Riley in the casings department was one of the supervisors who did a good job with filling the corrective action process and staying on top of it. On recross, Gray testified that he did not testify that employees were fired at the proper step under the policy 50 percent of the time but rather he testified that 50 percent of the time the corrective action had not been taken; that 50 percent of the employees who had six unexcused absences were not discharged because at that time they had not been properly warned and properly counseled by a supervisor as to where they stood; that he was not aware of any supervisor ever being disciplined for failing to take the proper corrective actions; that there was a problem with the supervisors on the kill and cut floors not taking corrective actions; that the enforcement of the attendance policy was not a priority at that time to them; and that he spoke with his supervisor, Lee Mount, daily and he and Mount were aware of the problem with the attendance policy and the supervisors not following through with it, and Mount did not do anything about it basically because it was not priority at the time.

Thomas Ross, the vice president of human resources for Smithfield Packing in Smithfield, Virginia, testified that one of his responsibilities is the human resource functions in other facilities; that Smithfield Packing has six facilities, including Tar Heel and four of them are unionized; that he moved to Tar Heel in March 1995 and worked at the facility on a daily basis through December 1995 to attempt to curb the tremendous turnover at the Tar Heel facility; that while he was at Tar Heel in 1995 there were in excess of 300 terminations a month; that most of the terminations were for absenteeism and some were for no call, no show, or gross misconduct; that a freeze was put on the terminations, except for gross misconduct; that the freeze commenced in late March or early April 1995 after he arrived at Tar Heel; that the purpose of the moratorium was to eliminate the terminations that were being created by absenteeism and the point system; that the human resources director at Tar Heel, Gilliard, reported to Jerry Null, the manager of the facility; that when he went to Tar Heel in 1995 he put a rehire policy into effect; that under the policy as long as the employee's departure was for a reason that was acceptable by the Company, including absenteeism, and there was a need to fill a vacancy, the former employee was eligible for rehire; that the freeze on terminations was communicated to the plant management at Tar Heel through meetings of all the superintendents and supervisors; that the employees were not informed about the freeze unless the supervisors told them and there were no instructions to inform employees of the relaxing of the rule; that he did not recall if there was anything in writing about the moratorium; that the freeze on terminations was his idea; that he attended meetings, along with General Manager Null, Plant Manager Larry Johnson, and Sherman Gilliard (for most of the meetings), where the superintendents and the supervisors were informed of the moratorium; that Null announced and explained the moratorium at these meetings; and that the freeze was put into effect in late March or the first of April 1995. On cross-examination Ross testified that to his knowledge there was only one moratorium; that he met with Null, Larry Johnson, the superintendents, and supervisors to let them know about the freeze on terminations; that there was more than one meeting since there were a couple of hundred supervisors or more and he attended eight or ten of such meetings; that at the meetings he attended the superintendents and supervisors were told that they were not to terminate anyone for any reason other than gross misconduct; that when he left in December 1995 the moratorium ceased to exist in that "[i]t just sort of got back to old habits" (Tr. 6093); that before he stayed at Tar Heel in 1995 the policy was not to rehire a terminated employee; that Gilliard told him that they did not rehire at Tar Heel; and that the rehire policy continued at the time of the hearing herein and he was not aware of any exceptions to the rehire policy.

Null testified that he attended meetings with Thomas Ross, Tar Heel superintendents, Tar Heel supervisors, and Sherman Gilliard regarding a moratorium on terminations due to attendance; and that he believed that a moratorium was put into effect in the fall of 1995 and then later that year.

Lee Mount testified that he came to the Respondent's Tar Heel facility in December 1995 and since then he has been the director of human resources; that when he started there was a no fault attendance policy, employees were subject to termination when they received twelve points and attendance was tracked in the departments; that in late 1995 or early 1996 Plant Manager Larry Johnson at a meeting with superintendents suggested establishing a moratorium on terminations unless it was something severe; that the moratorium commenced January or February 1996 and it was in effect for 2 or 3 months; that it was not uncommon for an employee to have more than 12 points and still not be terminated; that Respondent's Exhibit 119 is a letter dated February 14, 1996, that he sent to specified members of management indicating that employees from specified departments would not be terminated without the review of an assistant human resources director and that an employee would not be terminated unless all of the steps in the attendance policy had been followed[101]; that Respondent's Exhibit 120 is a memorandum he sent to managers, superintendents, and supervisors on a new attendance policy which the Respondent was getting ready to put into effect and which was a system of excused and unexcused absences; that Respondent's Exhibit 121 is a memorandum he wrote to management about how the Respondent was going to handle the transition from the point system to the new system; that employees with 13 or more points were given a last chance letter under which if the employee did not miss work for any reason during the next 30 days, their record would be cleared up and employees with 13 or less points would have their attendance record zeroed out and they would start fresh in the new program; that between 150 and 200 employees out of approximately 3800 employees were issued last-chance letters; and that Respondent's Exhibit 126 is a memorandum he issued on March 6, 1997, asking department heads and superintendents to make sure that their supervisors were counseling employees when they were absent, which memorandum was in response to a determination that there were far too many cases where employees were not receiving the counseling that they supposed to receive under the policy. On cross-examination Mount testified that under the 12-point no fault system 12 points was the line of demarcation; that many employees had 12 points when he made the transition to the excused/unexcused system but he did not know how many; that turnover was high in December 1995 and in January 1996 when Larry Johnson suggested a moratorium at a meeting with him, Jere Null, first- and second-shift superintendents, and department heads (line managers and line superintendents); that all present at this meeting agreed to the moratorium; that he believed that the moratorium was in effect for 2 or 3 months and there was not a subsequent moratorium; that the superintendents were asked to tell their supervisors about the moratorium policy on terminations due to attendance; and that no notes or minutes were taken of "either of these meetings" (Tr. 6636) and no documents were created to distribute to the superintendents or supervisors covering how the moratorium would be placed into effect.

With respect to general animus during the 1993 union campaign at Tar Heel, Gregory Spann testified that the crew leader on the cut floor, who is supervised by Larry Johnson, and the female Mexican interpreter came to the laundry room and told his three helpers to leave the room; that the crew leader and the interpreter then told him that they wanted him to write the names and badge numbers of employees on the laundry line who discussed the Union; that the crew leader and the interpreter pointed out the employees who they wanted placed on the list as the employees approached him on the line to get clean smocks, etc.; that at the end of his shift the interpreter would come and get the list; that this occurred a couple of weeks prior to the first Board election; that he did not recall the names of the people who asked him to keep the lists; that usually the crew leader and the only female interpreter were the ones who pointed out the employees who they wanted placed on the list but on a couple of occasions Larry Johnson told him which individuals should be placed on the list; and that he looked at the badge and he wrote the name down on a list.

On April 7, 1994, according to the testimony of Respondent's former employee Todd Chase, the Union had a cookout for Respondent's employees at the union trailer. Chase testified that Danny Priest together with Kevin Peak drove in front of the union office (trailer) on a well publicized cookout day; and that the following day at a local restaurant, the Log Cabin, he saw Priest who said, "[W]ell, it looked like you had a good turnout the other day, . . . did you make them sign union cards before you started, before they got to eat." On cross-examination Chase testified that the Union held 5 to 10 cookouts during the involved period at the Union's trailer office; that the view of the trailer is partially blocked from North Carolina Highway 87; that the road in front of the trailer is parallel to Highway 87; that Priest and Peak passed the union trailer on the road nearest to it which road runs parallel to Highway 87 and another road which is near the union trailer and which runs perpendicular to the road which is in front of the trailer; and that on April 7, 1994, there was quite a large gathering of Respondent's employees at the cookout. Subsequently, Chase testified that on April 7, 1994, he saw Priest and Peak drive by twice on the road immediately in front of the union trailer and twice drive up and back on the road near the union trailer which runs perpendicular to the road immediately in front of the trailer.

B. The 1998 Complaint

1. Paragraph 8(a)

Paragraph 8(a) of the complaint alleges that Respondent, through Supervisors Gary Locklear in July 1997, Larry Johnson on August 18 and 19, 1997, Bill Bishop on August 19, 1997, Billy Jackson on August 11, 1997, and Charlie Newton on August 14, 1997, and through agent Leo Riley on September 30, 1997, interrogated employees about their union sympathies.

[101] The five steps included a verbal warning, three written warnings and a final written warning.

With respect to the allegation regarding Charlie Newton on August 14, 1997, Paul Walker, who worked for Respondent from January 1993 until August 14, 1997, testified that while he was working on August 14, 1997, his supervisor, Charlie Newton, asked him if a coworker described herein only as Melvin was for the Union; that he told Newton he did not know; that then Newton said that he was making the wrong move voting for the Union and that after the Union was passed over he would not be wearing stickers on his hat; that this occurred at "2:30, end of my shift"; that Melvin did not wear union stickers or things of that nature; and that he had a prounion sticker on at the time.

Supervisor Charlie Newton testified that during the 1997 union campaign the only thing he could remember telling employees about the Union was that they should vote or others would decide for them; that he supervised Paul Walker the three different times Walker worked for the Respondent; that he helped Walker get hired the second and third times he worked for the Respondent; that during the 1994 union campaign Walker told him that he supported the Union; that in 1997 he did not recall discussing any issues related to the Union with Walker; that he never asked Walker whether other employees were union supporters; that he never asked Walker if Melvin Dove was a union supporter; that he never asked Walker to keep track of who was and was not a union supporter; that he never asked Walker or any other employee to keep lists of union supporters; that he never told Walker that the Union is not the way; that stickers are not normally allowed on helmets in the plant unless they are issued by the Company; that such stickers would include jack drivers, forklift drivers, and safety stickers; and that after the 1997 election he told his employees that they had to remove the "Vote Yes" and "Vote No" stickers, all stickers. On cross-examination Newton testified that Walker did not verbally indicate before the 1997 Board election that he was for the Union; and that during the 1997 union campaign Walker had prounion stickers on his helmet.

With respect to the allegation regarding Bill Bishop on August 19, 1997, Latonya Robinson, who worked for Respondent from April 1997 to June 25, 1998, testified that on August 19, 1997, she and about 10 other employees attended an employee meeting conducted by Supervisors Bill Bishop and Randy Hall; that at this meeting Bishop told the employees that if they voted the Union in they would turn Immigration on the Latinos, the employees would be subject to a strike, Respondent would close the plant down, while the employees are out on strike they are entitled to only $40-strike benefits, and once the employees are out on strike they will be replaced; that during this meeting Bishop asked her who she was going to vote for and she told him the Union; that at the time she was wearing a union T-shirt; that this meeting lasted an hour; that Bishop compared the situation to the House of Raeford indicating that if they voted the Union in, the only thing it could do for them is get them low pay and raises and high cost insurance; that the employees did not need anyone to come in and represent them; and that the employees were going to get a raise every September and every time the employees get a raise the Union will raise their union dues. On cross- examination, Robinson testified that Hall repeated what Bishop had said.

Margo McMillan, a former employee of the Respondent, testified that in July and August 1997 she attended two company meetings held regarding the Union; that the second such meeting was held in the Respondent's nonsmoking cafeteria, there were about eight employees present, and the meeting was conducted by Billy Jackson; that at this meeting Billy Jackson showed the employees a film, asked if anybody had any comments, and said, "Margo, I know you're from up North and you probably know about Unions"; that she answered that she had belonged to some unions before and she knew a little something about unions; that on Monday, August 18, 1997, she met with Larry Johnson and asked him to find out what was going on with her job (as covered below, she was about to be terminated); and that Johnson asked her if she was in favor of the Union and she told him yes it couldn't hurt in view of the situation she found herself in at that time. A summary of McMillan's and Larry Johnson's testimony is set forth below under paragraph 9 of the 1998 complaint.

A summary of Bill Bishop's testimony is set forth below under paragraphs 8(e) and (s) of the 1998 complaint.

The Respondent's supervisor, Billy Jackson, testified that about a month before the 1997 election he held meetings with employees to discuss issues related to the Union; that Margo McMillan, who he believed was from New York City, attended an employee meeting; that in one employee meeting he told the employees present that if they had any questions about the Union that maybe Margo could explain something to them better than he could; that he told employees that if the Union got in there would be a shop steward for each department and any problems the employees had would have to go through the steward to him or management; and that McMillan did not discuss the Union with employees in his presence. On cross-examination Jackson testified that in the meeting with the employees he said something to the effect that McMillan was from up North and she probably knew something about the Union; that he was aware that McMillan was involved with the Union; and that he was not aware that McMillan was an observer for the Union at the 1997 Board election.

A summary of the testimony of Ada Perry and Larry Johnson regarding what Larry Johnson allegedly asked her on August 19, 1997, is set forth below under paragraph 9 of the 1998 complaint.

Analysis

The General Counsel on brief contends that it is highly probable that Larry Johnson interrogated Perry about her union sentiments, and since Johnson solicited Perry's support by asking her to encourage other employees to vote against the Union, Johnson's interrogation was clearly intended to restrain and interfere with her rights as guaranteed by the Act; that it is plausible that Newton questioned Walker who openly supported the Union about Melvin Dove, whose union support was not known; and that in view of the timing of Larry Johnson's conversation with McMillan, a few days before the election, it is obvious that Johnson took the opportunity to unlawfully question McMillan about her union sympathies.

The Respondent on brief argues that Newton specifically denied ever asking Walker if Melvin Dove was a union supporter;

that Walker was an open and obvious union supporter; that "Bishop categorically denied ever asking Ms. Robinson or any other employee at the Tar Heel facility whom they would vote for in the 1997 election. [Tr.2415.]"[102]; that there is no evidence that Bishop's alleged question to Robinson was coercive in any way, particularly given Robinson's open and obvious support for the Union at the time the alleged question was posed; and that even if Larry Johnson's denial is not credited, Perry's interrogation regarding how she was going to vote in the Board election was not unlawful because it was noncoercive given Perry's open and obvious support as demonstrated by the newspaper article which quoted her saying that the Union was going to win the election.

Newton did ask Walker if Melvin was for the Union. Newton had helped Walker get hired the second and third times he worked for the Respondent. Newton apparently believed that Walker owed him. And Newton believed that Walker would be in a position to know Melvin's leanings since Walker was an open and obvious union supporter. It is one thing to ask an open and active union supporter questions about himself or herself, assuming for the sake of argument that wearing a union sticker in and of itself makes one an "active" union supporter. It is something else to ask an open and active union supporter questions about someone else who is not an open and active union supporter. Walker impressed me as being a credible witness. His testimony is credited. The testimony of Newton is not credited. Although the Respondent has not raised the question, I believe that it must be resolved whether an allegation that the Respondent unlawfully "interrogated employees about their union sympathies." covers the situation at hand. I believe that it does. It might be another matter if the language read "interrogated an employee about his or her union sympathies." The Respondent violated Section 8(a)(1) of the Act through Charlie Newton on August 14, 1997.

Latonya Robinson's testimony is credited. Bishop's equivocal denial is not credited. The Respondent called supervisor Randy Hall as a witness but he did not testify about this meeting. Consequently, Hall did not corroborate Bishop's testimony. Randy Hall did not deny that he was at this employee meeting. Bishop did not deny that Hall was at this employee meeting. Robinson's testimony is credited. Hall was at the meeting. Hall did not deny that Bishop interrogated Robinson about who she was going to vote for. Bishop did ask Robinson who she was going to vote for while she was wearing a union T-shirt. In 1997 Bishop was the superintendent and subsequently the divisional manager of the kill floor. He held company meetings with employees before the 1997 Board election. Robinson's description of what went on in the August 19, 1997 employee meeting is set forth above. Her testimony, as noted above, is credited. During the meeting, Bishop made unlawful threats. For him to then turn to a woman wearing a union T-shirt and ask her who she was going to vote for would, to say the least, tend to restrain, coerce, and interfere with the employee's rights guaranteed by the Act notwithstanding the fact that she answered that she was going to vote for the Union. *Rossmore House*, 269 NLRB 1176 (1984). The Respondent violated the Act through Bishop on August 19, 1997, by interrogating Latonya Robinson about whether she was going to vote for the Union.

Larry Johnson was not a credible witness. So unless his testimony is corroborated by a reliable witness or a reliable document, in a one-on-one situation the testimony of other witness will be credited unless it is shown that the other witness is also not credible. The testimony of Perry is credited. Contrary to the assertions of the Respondent on brief, the newspaper article did not demonstrate Perry's "open and obvious" support for the Union in the context we are dealing with. Perry was not an open and active union supporter at that time. Johnson had Perry leave the laundry room and go to the back door outside where just the two of them were present. He then said that she was a union organizer and campaigning for the Union, and she told him that she just went to see the Reverend Jackson. Perry told Larry Johnson that what was quoted in the newspaper was what she told the newspaper reporter that a guy who came up to her laundry counter had said. Perry was not an open and active union supporter at that time. Plant Manager Larry Johnson, by meeting with her out back alone, by accusing her of being a union organizer and campaigning for the Union, by telling her that she hurt him so bad and she hurt Jere Null—who was general manager and vice president and in charge of the plant—so deeply, by putting Perry on the defense while he had her out back alone, and by asking her if she was going to vote for the Union notwithstanding her protestations that she only went to see the Reverend Jackson and she was misquoted in the newspaper article, engaged in conduct which was meant to interfere with her right to support the Union. Plant Manager Larry Johnson's conduct interfered with, restrained, and coerced Perry in violation of Section 8(a)(1) of the Act.

While the Respondent concedes that Margo McMillan testified about the allegation regarding Larry Johnson and indicates that a discussion of the allegation can be found in the Respondent's response to the Union's objection number 1, no such discussion could be found. Again, Larry Johnson was not a credible witness. The testimony of McMillan is credited. The conversation involved here was a one-on-one conversation which occurred in Plant Manager Larry Johnson's office just days before the 1997 Board election and just 1 day before he asked Perry if she was going to vote for the Union. McMillan was not an open and active union supporter at that time. McMillan went to Larry Johnson seeking his help with respect to what was occurring regarding her job, as described below under paragraph 9 of the 1998 complaint. Larry Johnson took advantage of the situation. If McMillan wanted his help, he wanted to know where she stood with respect to the Union. Or perhaps the unspoken and subtle message was if you want my help, I want to be able to count on your help in the upcoming

[102] R. Br. 368. The testimony elicited by one of the attorneys for the Respondent at Tr. 2415 reads as follows:

> Q. Do you recall–I know you mentioned that you don't have a specific recollection of Latonya Robinson. Do you *recall* ever asking any employee directly who they were going to vote for in the upcoming 1997 election?
>
> A. No, sir. [Emphasis added.]

As noted, Bishop's testimony about what he allegedly said at employee meetings is summarized below under par. 8(e) of the 1998 complaint. See also par. 8(k) of the 1998 complaint below.

Board election. In either case, what plant manager did—asking McMillan if she was in favor of the Union during a discussion about whether she would be able to keep her job—interfered with McMillan's right to support a union. The question interfered with, restrained, and coerced McMillan in violation of Section 8(a)(1) of the Act.

The Respondent argues that the General Counsel did not present any evidence in support of the complaint allegation regarding Billy Jackson. McMillan's testimony regarding what Billy Jackson said to her during an employee meeting is credited. Billy Jackson, who was McMillan's immediate supervisor, admitted that at one of the employee meetings he told the employees present that if they had any questions about the Union that maybe Margo could explain something to them better than he could; and that he was aware at the time that McMillan was involved with the Union.[103] Although subpoenaed, and although directed to, the Respondent refused to turn over the videos and films which were shown to the employees during these employee meetings. So immediately after showing the employees an antiunion video which the Respondent subsequently refused to produce even though subpoenaed, Billy Jackson, in effect, attempts to get McMillan to declare or deny her support for the Union. Billy Jackson testified that he knew that McMillan was involved with the Union. But McMillan was not an open and active union supporter at that time. The obvious purpose of the meeting was to convince the employees not to support the Union, not to vote for the Union. To place McMillan in a position of having to admit or deny that she previously worked for a union employer was unlawful. To put McMillan on the spot interfered with her right to support the Union and not be placed in the position of involuntarily having to explain or defend her position. Billy Jackson's conduct interfered with, restrained and coerced McMillan in violation of Section 8(a)(1) of the Act.

2. Paragraph 8(d)[104]

Paragraph 8(d) of the complaint alleges that Respondent, through Supervisors Larry Johnson and Jere Null at a June 1997 meeting, Gary Locklear in July 1997, Johnnie Brown at a July 16, 1997 meeting, and Jere Null at August 19 and 20, 1997 meetings, threatened employees with loss of wages and benefits if the employees selected the Union as collective-bargaining representative.

The testimony of Jonathan Cook, a former employee of the Respondent, regarding what Null allegedly said to employees on August 20, 1997 is summarized below under paragraph 8(t) of the 1998 complaint.

Respondent's former employee Kenneth Ivie testified about statements allegedly made by Johnnie Brown at a July 16, 1997 employee meeting. Ivie's and Brown's testimony is summarized below under paragraph 8(g) regarding the 1998 complaint.

Respondent's former employee Rosa Garcia, who worked for Respondent from February to September 1997 in the casing department under Supervisor Robert Williams, testified that she attended an employee meeting with about 14 other employees on August 19, 1997, which was held in the training room with Jere Null and Sherman Gilliard; that Gilliard said that there were strikes in other plants and the Union caused some of the strikes at those plants, and he also said that if the Union came in, we would probably be called out on strikes; that Jere Null said that if the Union came in, the employees would lose their benefits, they would not have health insurance, and they would not get Government benefits such as unemployment compensation, welfare, and food stamps; and that Gilliard said that if the employees went on strike, they would not get anything because the Union would cause the strike and for that reason the employees would be replaced.

Null's testimony regarding his speeches to employees is summarized below under paragraph 8(e) of the 1998 complaint.

Analysis

The General Counsel on brief contends that despite Brown's denial, as here pertinent, of having made threats of loss of wages and benefits, it is submitted that his failure to state a legitimate reason for having told employees about the closure of the plant he worked at in Philadelphia, Pennsylvania, clearly shows his intent to unlawfully threaten employees; and that Null's statements to employees in the meetings immediately preceding the August 1997 Board election constituted unlawful threats in violation of Section 8(a)(1) of the Act.

The Respondent on brief argues that Brown told employees under his supervision about his personal experience with a union, and his subsequent job loss; that in no way did Brown's statements amount to a "proscribed threat" that unionization at Respondent's facility would lead to the same destiny; and that while Null did not have specific recall of exactly what he told employees at the August 19, 1997 meeting allegedly attended

[103] At Tr. 2934 Billy Jackson testified as on cross-examination follows:

Q. Let's go back here to Ms.McMillian. My understanding you had conversation—you had a meeting in August right before the election in 1997 and this was a meeting to discuss the Union. Is that correct?

A. Yes sir, I had a video which the Company had provided the supervisors with and I showed the video, and I tried to answer questions after the video to the best of my ability.

Q. And in this meeting you made a statement to Ms. McMillian that she was from up North and she probably knew about the Union. Is that correct?

A. I don't believe those were y exact words but something to that effect, yes, sir.

Q. So you—it was your opinion that she was in favor of the Union. Is that correct?

A. No sir, I didn't mean it that way.

Q. But you were aware that she was involved with the Union, weren't you?

A. Yes, sir.

Q. Didn't you go to the election?

A. No, sir.

Q. Were you aware that Ms. McMillian was an observer at the election?

A. No, sir, I was not.

Q. Did you go to the vote count on August 22, 1997?

. . . .

A. No sir, ...

[104] No evidentiary showing was made in support of the allegations in pars. 8(b) and (c) of the 1998 complaint.

by Garcia, he "specifically" denied ever telling employees that if a union came into the plant, employees would lose health benefits because the Union would take them out on strike.[105]

As noted under paragraph 8(g) below regarding the 1998 complaint, Ivie testified that during this July 16, 1997 meeting presided over by Johnnie Brown it was said that if the Union got in, the employees would not get the raise they were supposed to get in September, it would be frozen. Brown did not specifically deny making this statement. He did testify:

> I didn't tell any employee anything bad would happen to them because I couldn't tell them that because really I didn't know anything about this Union. How could I tell anybody that.

This is not a specific denial of Ivie's testimony, however. Ivie's unrefuted testimony is credited. The Respondent violated Section 8(a)(1) of the Act by threatening the employees on July 16, 1997, that they would not get the September raise if the Union got in, the raise would be frozen.

The testimony of Garcia and Cook is credited. Null's denial regarding the August 19, 1997 presentation is less than unequivocal. For the reasons set forth below under paragraph 8(e) of the 1998 complaint Null's testimony regarding his 25th hour speeches is not credited. The Respondent violated Section 8(a)(1) of the Act when Null on August 19 and 20, 1997, stated that if the Union came in, the employees would lose their wages and benefits.

3. Paragraph 8(e)

Paragraph 8(e) of the complaint alleges that Respondent, through Supervisors Larry Johnson and Jere Null at a June 1997 meeting, Gary Locklear in July 1997, Jere Null at August 19 and 20, 1997 meetings, and Bill Bishop on August 19, 1997, threatened employees with futility of selecting the Union as collective- bargaining representative.

Respondent's former employee Latonya Robinson testified that she attended an employee meeting with about 10 employees on August 19, 1997, held by Bill Bishop and Randy Hall; that during this meeting Bishop, as here pertinent, said that

> if we had the Union, they are subject to strike. We would have a strike and they would close the plant down, and that while we were on strike that we are only entitled to $40 strike benefits. They also said that once we're out there striking that we will be replaced.
>
> . . . .
>
> He [Bishop] compared us with the House of Raeford. If we vote the Union that the only thing you all can do for us is get us low pay and raises but high paying cost of insurance, and he also said we don't need nobody to come in and represent us.

As noted above, on cross-examination Robinson testified that during the 1-hour meeting Hall repeated exactly what Bishop had said.

Respondent's employee Darrell Thomas testified that on August 20, 1997, he attended an employee meeting conducted by Jere Null in the box room; that he sat in the third row from the front; that Null said that "before they would sit down and negotiate . . . with the Union, that the Company was prepared to go on strike if necessary"; that basically Null said, "[B]efore the Union would come in, he would let the Union come in, that they would go on strike, that they would take a strike"; and that the meeting lasted 45 to 50 minutes. Thomas also testified that the employees were told (a) that if the Union came in, the employees would not get their raise because if the Union got in there would be negotiations and the employees would not get their raise until negotiations were completed, and (b) if the Union did not get in, then the employees would be very happy with the raise they receive; that the day before he was told to report to the box room the next day at 3 p.m.; and that there were at least 500 people in attendance who were from the cut floor. On cross-examination Thomas testified that he was seated about 20 to 25 feet from Null during this meeting; that he did not remember if Null had any papers; and that he did not remember Null reading from anything but he may have been.

Jonathan Cook testified that he attended an August 20, 1997 employee meeting at which Jere Null "said that there will be no negotiations because the Union, all they want to do is come in and take money out of our pockets, and he said we shouldn't let them have that because they want to get rich off of us." (Tr. 279.)

Former employee Rosa Garcia testified that at an employee meeting on August 20, 1997, Jere Null said that if the Union won the election, they would not negotiate with them, and if they wouldn't negotiate with them, the Union would take the employees out on strike, and if the Union took them out on strike they would not have any health insurance.

Then-superintendent of the kill floor, Bill Bishop, testified that at the employee meetings he held in 1997 he had two different ways of discussing strikes, namely, he showed the employees a video of former union people talking about strikes that they had been involved in, and he had some specific information with respect to a strike at another plant; that he did not tell the employees that if the Union came in, the employees would go out on strike; that he believed that he discussed a plant closing but he could not recall the details; that he never said that if the Union came in, that the Tar Heel facility would close; that he did discuss strike benefits with the employees but he never told the employees what they would get from the Union if they went out on strike; that he did discuss issues related to replacement workers with the employees but he did not tell the employees that if they went out on strike they would be replaced and lose their jobs; that he discussed the House of Raeford with the employees in terms of what their benefits and wage package was before and what it was after negotiations with the UFCW; that the wages and benefits were better before the union contract was negotiated; that he did not tell the employees that if the Union got in, they would receive lower raises

[105] Null's testimony at p. 6140 of the transcript reads as follows:

> Q. Did you ever tell the employees at any of these meetings in the training room that if the Union comes in that employees will lose their health benefits because the Union will call them out on strike?
>
> A. No, I wouldn't have said that. I would have—I'm sure we informed employees that during a strike we don't pay wages, and we don't pay health benefits.

and less benefits; and that he did not tell employees that union dues would increase anytime the employees got a pay increase.

Jere Null, who is the vice president and general manager of the involved Tar Heel facility, testified that during the 1997 organizing campaign he personally attended or held approximately 25 meetings with employees; that usually about 25 employees attended the meetings but some involved more employees; that the smaller meetings typically lasted about 30 minutes; that the Respondent had videos that it showed during the meetings and there would be questions and answers afterwards; that he, along with Sherman Gilliard, Lee Mount, and Larry Johnson held the question and answer session; that he held a Saturday morning meeting with about 70 livestock employees in the small nonsmoking cafeteria; that at the meeting with the livestock employees they were asked to watch a video tape and pay close attention to it because there were a lot of things on the tape that the Respondent felt were important; that after the livestock employees watched the tape, there was a question and answer session; that he was sure that at the meeting with the livestock employees, just like at a lot of the meetings, they asked if they were going to get the September raise; that in response to questions about the September raise he would say the he could not answer that question, he could not promise it and he could not say anything about the raise since they were in the middle of a union campaign; that since the Tar Heel plant was opened in October 1992 the Respondent has always given annual pay increases around September; that during the meeting with the livestock employees he did not believe that he said that this Union was known for strikes; that there were lots of questions about strikes; that he never told employees that if they voted for the Union it was a sure recipe to go out on strike; that he did not recall Gilliard ever telling employees at a meeting on August 19, 1997, in the training room that the Union had cause strikes in other plants and if the Union won it would probably call a strike; that he never told employees at any of the meetings in the training room (1) if the Union comes in, the employees will lose their health benefits because the Union will call them out on strike, and (2) if employees are on strike, they would not get food stamps, welfare, or unemployment[106]; that he believed that the issue of food stamps or unemployment was referred to in the speech he gave the day before the election (R. Exh. 156), his 25th-hour speech; that he gave his 25th-hour speech on three different occasions in the box warehouse; that the election started at 5 or 6 p.m. on Thursday and he gave the 25th-hour speeches on Wednesday at 2 a.m. and at 2 p.m.; that he had a teleprompter and an interpreter was used for the Hispanic employees; that when he gave the speech he varied from the prepared text probably very little to none; that during the 25th-hour speeches he did not say that the Union was getting rich off employees' dues or that the Union was laughing behind the employees backs; that he never told Hispanic employees that they would be deported if they voted for the Union and he never instructed anyone else at the plant to tell Hispanic employees that they would be deported if they supported the Union; that the Company has an open door policy regarding employee problems under which employees can go up the chain of command; that during the 25th-hour speeches he did not say that the Company took the employees out of the fields as slaves; that during his 25th-hour speeches he did not tell employees that if the Union won, (1) the Company would not negotiate, (2) the Union would definitely take the employees out on strike, or (3) that automatically there would be no health insurance for employees; that while he discussed the House of Raeford in his 25th-hour speech, he did not say that with this Union the employees got a 20-percent raise but a thirty percent cutback in benefits; that during his 25th-hour speech he did not say that rather than negotiate the Company was prepared to go on strike, or that the Union was a bunch of trouble, or that the Company would take a strike before letting the Union come in, or that there would be no raise due to negotiations with the Union if it came in, or that if there was no Union, the employees would be happy with the pay raise, or that the Company would use any means necessary to prevent the Union from coming in, or that the Company has always given you raises in September and you are looking forward to it, or that before the Company would let the a Union in it would close the plant and then reopen under a new name and pay minimum wage, or if the Union got in, (1) there would be strikes, (2) the Company would not budge, (3) they will go on strike and be replaced, (4) there would be job layoffs, (5) there would be job losses, and (6) employees would lose their homes and wages; that during his 25th-hour speeches he did not say that if the plant closes, there would be no jobs, or I don't want to lose my house and cars, I bet you don't want to lose yours either, or that if employees went on strike they could lose their jobs, second shift would close, and the plant would close; and that Smithfield Packing has invested approximately $120 million in the Tar Heel facility.

On cross-examination Null testified that the 20 to 25 employee meetings he was present at during the 1997 organizing campaign did not include the three 25th-hour speeches; that a film was shown at probably all of the 20 to 25 employee meetings, that he did not recall having an employee meeting, except the 25th-hour speeches and possibly one morning maintenance meeting, where they did not show films; that at the meetings where a film was shown he introduced himself, told the employees that he had a film that he wanted them to watch and then took questions after the employees watched the film; that at the 25th-hour speeches for the most part he read from the script, committing some of it to memory at the time; that those portions which he committed to memory include portions other than that which appears on the first page of Respondent's Exhibit 156; that at practically every one of the employee meetings he was asked about the September raise, and he responded that they were in the middle of a union election and they could not say there would be or would not be a raise because they could not make promises; that in his 25th-hour speech he indicated "[w]e would have no free choice any longer to grant a September raise without first negotiating with the Union"; that he appeared in some of the films and videos which were a part of the Respondent's overall antiunion presentation to employees; that Larry Johnson appeared in one of the antiunion films or videos; that some of the films spoke about strikes, wages,

[106] Null testified that he did not recall saying this but that he could have said it.

and benefits, and plant closings from a historical perspective; that the Larry Johnson video spoke about plant closings and job loss and it very likely spoke about wages and benefits, and strikes[107]; that in his 25th-hour speeches he had an introduction which is not in Respondent's Exhibit 156 and beyond that he stuck to the text, he did not believe that he "deviated really from the text" (Tr. 6304); that Charging Party's Exhibit 27 is a version of the 25th-hour speech which contains some statements which are not in Respondent's Exhibit 156, and he could have made the statements contained in Charging Party's Exhibit 27 during the 25th hour speeches; that he believed that Respondent's Exhibit 156 was the most current draft of the speech; that the annual raise is paid usually sometime in September[108]; that on page 10 of his 25th-hour speech he indicated "[w]e would have no free choice any longer to grant a September raise without first negotiating with the union"; that he did not explain to the employees that the law guarantees that if you have been giving a raise at a particular time every year regardless if the amount of the raise changes, you have to continue giving that raise even after the Union wins the election; that Charging Party's Exhibit 36 could be the schedule for the 25th-hour speeches he gave on Wednesday, August 20, 1997[109]; that the speeches lasted around 35 minutes; and that he varied from the prepared text of the 25th-hour speech with respect to the introduction and that the gave the remainder of the speech "to the best of his reading ability and to portray something to memory and attempt to receipt [retrieve] it . . . ." (Tr. 6386.) On redirect, Null testified that the annual pay increases ranged from a low of 20- or 25-cents an hour to a high of probably 40-cents an hour; and that he plays a role in the decision regarding the amount of the pay raise and the decision is reached usually just right before the announcement is made. At the end of Null's testimony the Respondent indicated that the videos which were shown to the employees still exist but they were not going to be provided. As noted above, the motion of Charging Party/Petitioner to strike the testimony of Null denying that he made unlawful statements was taken under advisement.

Analysis

The General Counsel on brief contends that the Respondent's failure to furnish the Charging Party with copies of the films depicting strikes, plant closings, and job loss, despite being directed to do so, requires at the very minimum an adverse influence that had the Respondent produced the films in question, they would be adverse to Respondent's case; and that a finding should be made that Null's statements to employees in the meetings immediately preceding the August 1997 Board election constituted unlawful threats in violation of Section 8(a)(1) of the Act.

The Charging Party/Petitioner on brief contends that in addition to drawing an adverse inference based on the refusal to produce subpoenaed documents, the Board appropriately can strike the related-testimonial evidence given that the Employer refused to provide evidence relevant to the Board's finding on this issue, *Packaging Techniques, Inc.*, 317 NLRB 1252, 1253 (1995), citing *Bannon Mills*, 146 NLRB 611, 613 fn. 4, 633–634 (1964); *Iroquois Foundry Systems*, 327 NLRB 652, 653 (1999) (Board struck manager's testimony regarding past practice about which employer refused to produce documentary evidence).

The Respondent on brief argues that the text of Null's 25th-hour speech was received in evidence as Respondent's Exhibit 156; that Null told the employees that the Company would bargain in good faith; and that Bishop simply showed the employees the contract that UFCW Local 204 negotiated with the House of Raeford and a comparison of wages and benefits paid by the House of Raeford before and after the parties signed a union contract.

No tape recordings or videotapes of Null's 25th-hour speeches were introduced into evidence in this proceeding. So to refute any allegations of misconduct on the part of Null during the 25th-hour speeches, the Respondent relies on the printed speech and Null's testimony with respect to the speeches. At one point, Null testified that when he gave the 25th-hour speeches he varied from the prepared text probably very little to none. At another point Null testified that his 25th-hour speeches had an introduction which is not in Respondent's Exhibit 156 and beyond that he stuck to the text, he did not *believe* that he "deviated *really* from the text." (Emphasis added.) Then Null testified that Charging Party's Exhibit 27 is a version of the 25th-hour speech which contains some statements which are not in Respondent's Exhibit 156, and he could have made the statements in Charging Party's Exhibit 27 during the 25th-hour speeches. And finally, Null testified that he varied from the prepared text of the 25th-hour speech with respect to the introduction and that he gave the remainder of the speech "to the best of his reading ability and to portray something to memory and attempt to receipt [retrieve] it." Perhaps if the Respondent were not concerned about preserving deniability, it could have taken videos of the 25th-hour speeches and introduced them in evidence. The Respondent had it in its power to minimize, if not remove, any question of doubt as to what was said during the 25th-hour speeches. The Respondent is no

[107] The Charging Party/Petitioner again requested the subpoenaed films and videos, pointing out that Null testified with regard to what he said or did not say and the legality or illegality of what he said or did not say to employees is directly in issue. The Charging Party/Petitioner requested that an adverse inference be drawn if the Respondent continued in its refusal to turn over the videos and films. The Charging Party/Petitioner also moved that Null's testimony be stricken if the Respondent continued in its refusal. The Respondent then indicated that it was not going to provide them and when one of the counsel for the Respondent was specifically directed to turn over the films and videos he declined. The Charging Party/Petitioner's motion to strike all of Null's testimony was taken under advisement.

[108] CP Exh. 29 is the memorandum to employees announcing the 1995 "SEPTEMBER WAGE INCREASE," among other things. CP Exh. 30 is the memorandum to employees announcing the 1996 *"September Wage Increase,"* among other things. (Emphasis in original.) And CP Exh. 31 is the memorandum to employees announcing the 1997 "*ANNUAL RAISE*." (Emphasis in original.) The increases were $.25 an hour, $.30 an hour, $.35 an hour, respectively. The memorandum regarding the 1997 raise is dated October 2, 1997, and will be issuing adjustment checks that will back pay you beginning September 8, 1997.

[109] According to CP Exh. 36, which is titled *"24 HOUR SPEECH SCHEDULE, WEDNESDAY, AUGUST 20, 1997,"* the speech was given at 1 a.m., 1 p.m., 2, 3, and 4 p.m.

stranger to videotaping. It videotaped handbilling. And it made some antiunion videos with Null and others in them and showed them to the employees during the employee meetings before the 1997 Board election. As noted above, the Respondent took the position that it would not turn over to the Charging Party/Petitioner the videos and films that the Respondent's management had shown to the employees during numerous employee meetings even though they were in existence at the time of the hearing herein, they were subpoenaed, and the Respondent was directed to turn them over. The videos or films, as described by Null, were antiunion productions in which at least he and Larry Johnson appeared. Topics allegedly covered in the videos or films included strikes, wages, benefits, plant closings, and job loss. As noted above, Null testified extensively about what he did and did not say at the employee meetings where videos were shown. This would include what he said on the video (and arguably what someone else said on the video if Null did not point out to the employees present that this was not his position) since he did not specifically exclude it. In view of the Respondent's refusal to turn over the videos, this is secondary evidence at least with respect to what was said on the videos. Not only does the refusal to turn over the videos or films justify an adverse inference unfavorable to the Respondent, namely that unlawful statements were made in one form or another, and what was said does not support Null's testimony regarding what he did and did not tell employees (which would include what Null told employees on the videos since, as noted above, he did not specifically exclude what was said on the videos to employees when he testified about what he did or did not say at the employee meetings where a video was shown) but Null's testimony about what he did or did not say at the employee meetings where videos were shown cannot be considered in that it is secondary evidence. Therefore, the motion to strike Null's testimony is granted to the extent that he testified about what he did and did not say at the employee meetings where videos were shown to employees.

Null did not show employees a video during the 25th-hour speeches. But the videos were very relevant with respect to the 25th-hour speeches for they could have been considered in determining whether it was more probable or less probable that Null would have made unlawful statements. Null's testimony about what he told employees during his 25th-hour speeches is qualified. An adverse inference has been drawn with respect to Null making unlawful statements to the employees in the past. The Respondent had the means and the know how to use a video camera, which it used as an antiunion tool, to show exactly what Null said at his 25th-hour speeches. Videos were used to influence the employees. Videos could have been used to insulate the Respondent. The Respondent chose not to use a video for the 25th-hour speeches. The above-described testimony of Thomas, Garcia and Cook regarding what they heard during the August 20 1997 Null 25th-hour speech is credited. Null's testimony is not credited. The Respondent violated Section 8(a)(1) of the Act through Null on August 20, 1997, by threatening employees with the futility of selecting the Union as collective-bargaining representative.

With respect to Robinson's allegation about what Bishop said, it is noted that Bishop also testified that he showed antiunion videos about strikes at his meetings. Robinson did not testify about a video. Rather she testified about what Bishop said to her and about 10 other employees in a meeting with Supervisor Randy Hall present. The Respondent called Randy Hall as a witness but he did not testify about the meeting and so he did not corroborate Bishop. More importantly, Robinson testified that Hall repeated exactly what she testified Bishop said at the 1-hour meeting. Hall did not deny this. Bishop did not deny this. This testimony is, therefore, not refuted. As noted under paragraph 8(a) of the 1998 complaint above, Robinson's testimony was credited and Bishop's testimony was not credited regarding unlawfully interrogating her at an employee meeting on August 19, 1997. Bishop lied about that and he lied about this. The Respondent violated Section 8(a)(1) of the Act through Bishop on August 19, 1997, by threatening employees with the futility of selecting the Union as collective-bargaining representative.

4. Paragraph 8(f)

Paragraph 8(f) of the complaint alleges that Respondent, through Supervisors Dale Smith on July 25, 1997, Johnnie Brown at a July 16, 1997 meeting, and Jere Null at meetings on August 19 and 20, 1997, and through a notice in early to mid-August 1997, threatened employees with loss of jobs.

With respect to the notice, Paul Walker testified that on August 8, 1997, he saw a sign which indicated "vote for the Union you won't be working here"; that the printed sign, which was 8-1/2 by 11 inches, was at the end of the stairway coming into the plant; that he went to the union office and reported the sign; that while he was in the union office Jere Null telephoned him, asked him what he saw, who was his supervisor, and what department did he work in; that he believed that Null telephoned him in the union office on August 14, 1997; that on August 14, 1997, his supervisor, Charlie Newton, took him to his office and wrote him up on his shaving hogs job; that he refused to sign the writeup; and that he received criticism for his work between August 8 and 14, 1997. On cross-examination Walker testified that he had the conversation with Null on August 8, 1997, concerning a sign he saw at the plant; that he had been wearing union stickers for several weeks prior to that day; that when he started wearing union stickers he started being harassed; that the above-described sign was down the stairs by the employee entrance; that nothing on the paper indicated who had it printed or who had put it up on the wall; that there were other posters in the hall but he did not see very many; that during the above-described telephone conversation Null did ask him where he saw the sign; that he saw another copy of the "vote for the Union you won't be working here" in front of the security office as you come into the plant; and that he told Null where both copies were.

Respondent's former employee Kenneth Ivie testified about statements allegedly made by Johnnie Brown at a July 16, 1997 employee meeting. Ivie's and Brown's testimony is summarized below under paragraph 8(g) of the 1998 complaint.

The Respondent's employee Andrea Hester (married name White) testified that the day before the 1997 union election began she attended a meeting with about 400 employees in the conversion box room; that Jerry Null spoke at this meeting; and

that Null said that the employees "would not get our September raise like we normally would if the Union was to get in there. We would have layoffs. We would also have strikes like it was at other [p]lants."

The Respondent's former employee Michael McKeithan testified that at the employee meeting on August 20, 1997, Null said the if the Union was voted in and if the employees would go on strike with the Union that the people can cross the picket line come in the plant to work and the ones that was on strike after the strike was over was not guaranteed a job because they can hire people to replace them; and that Null said, "[I]f the Union is voted in here regardless this Company run the way we want it to run."

Jere Null, who as indicated above is vice president and general manager of the involved Tar Heel facility, testified that he never told employees at any meeting that he held that they would lose their jobs if the Union was voted in; that in early August 1997 he did not know an employee named Paul Walker; that he remembered being notified a couple of weeks before the August 1997 Board election by Tom Ross about a sign that the Union had complained about; that he and Ross went to the place where the sign supposedly was located, the lobby and the stairwell, but they did not find a sign containing the words "vote for the Union and you won't be working here"; that he never instructed anyone at the plant to create such a sign; and that he did not remember speaking to anyone from the Union by telephone during the 1997 campaign.

Analysis

The General Counsel on brief contends that Brown's failure to state a legitimate reason for having told employees about the closure of his plant in Philadelphia clearly shows his intent to unlawfully threatened employees; and that Null, as here pertinent, threatened employees with loss of jobs.

The Respondent at page 412 of its brief argues that:

> As stated before, Mr. Null's 25th hour speech is in evidence as Exhibit R-156. Mr. Null read this speech to employees and *did not deviate from its text*. [Tr. 6144.] At no point in this speech is there even a reference to 'layoffs.' Moreover, Mr. Null specifically denied ever telling employees that there would be layoffs if the Union were voted into Respondent's facility. [Tr. 6153.] Ms. Hester-White has fabricated this claim. [Emphasis added.]

The Respondent also contends that if Brown used Ivie as an example stating that "if Ivie got fired . . . .," this does not constitute a threat of job loss; and that nothing in Walker's testimony serves to identify the Company or any of its agents as the author of the alleged sign.

While the Respondent argues that Null "*did not deviate from its text*. [Tr. 6144]," at the page cited by the Respondent to support this argument, Null was asked, "Did you, in fact, read the speech" and he answered, "For the most part, yes. I'd devoted a lot of it to memory, but, yes, I read *pretty much* from the text." (Emphasis added.) As noted above, Null used a lot of other qualifiers in testifying about how he gave the 25th-hour speeches. And with respect to the Respondent's argument that "Mr. Null specifically denied *ever* telling employees that there would be layoffs if the Union were voted into Respondent's facility. [Tr. 6153.]" (Emphasis added.), it is noted that at the cited page in the transcript Null answered, "No," when asked, "Mr. Null during the course of any of your twenty-fifth hour speeches did you tell employees that if the Union got in there would be job layoffs at the Tar Heel facility." As noted above, the Respondent refused to turn over the videos or films and so we cannot verify whether Null "*ever*" told employee that there would be layoffs if the Union were voted in. Null might have made this statement on the videos. But at this point we are concerned with what Null said in the 25th-hour speech Hester heard. With the equivocation on the part of Null, it would not be reasonable to conclude that he only read a prepared speech. With the adverse inference, it is reasonable to conclude that Null made unlawful statements to the employees in the past. This would make it more probable rather than less probable that he engaged in similar conduct when he gave his 25th-hour speeches. I have already concluded above that Null made unlawful statements during his 25th-hour speeches. I credit Hester's and McKeithen's testimony.[110] I do not credit the testimony of Null. The Respondent violated Section 8(a)(1) of the Act through Null by threatening employees with loss of jobs on August 20, 1997.

The reason that Brown testified that he did not recall what his point was in telling the employees about what happened with his Philadelphia employer was because obviously he was making the point to the employees that jobs were lost. Brown did not want to concede this point. Brown was not a credible witness. Brown also referred to job loss when he used Ivie as an example. And Brown also referred to job loss when he said that they would close down the plant for 2 or 3 months and open it back up under another name and pay the employees $6 an hour. Under this scenario the Respondent's employees would lose their jobs as they knew them. Under this scenario there would be a question whether the company which later reopened the plant would hire the Respondent's employees. Under this scenario there would be a question whether the Respondent's employees would want to work for the differently named company for $6 an hour. The testimony of Ivie is credited. The Respondent violated Section 8(a)(1) of the Act through Brown when on July 16, 1997, he threatened employees with loss of jobs.

Since it is not indicated that the Respondent was responsible for, allowed, authored, was aware of the existence of, or allowed the notice to remain posted after it was made aware of the existence of it, the notice Walker testified about would not warrant a finding that the Respondent threatened employees with loss of jobs with this notice.

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[110] By indicating that regardless of whether the Union won the election "this Company run [sic] the way we want it to run" leaves the impression, as other witnesses indicated, that the Respondent was willing to take a strike rather than bargain. That being the case, there would have been a question as to whether any strike was an unfair labor practice strike. If it was, the employees would have been in a different position than economic strikers. The Respondent could not lawfully tell the employees that it would unlawfully force a strike, replace the striking employees, and the striking employees could only get their jobs back when an opening occurred or the permanent replacements left.

5. Paragraph 8(g)

Paragraph 8(g) of the complaint alleges that Respondent, through Supervisor Johnnie Brown at a July 16, 1997 meeting threatened employees with plant closure.

Respondent's former employee Kenneth Ivie testified that he worked for Respondent from March 1995 to September 11, 1998; that he worked on first shift and for most of the time his supervisor was Johnnie Brown; that on July 16, 1997, he attended a departmental meeting with Supervisor Brown and all of the department's hourly employees, about 33 people, in the nonsmoking cafeteria; that during this meeting Brown said that if the Company wanted to, they could close down the plant for 2 to 3 months and open it back up under another name and pay the employees "like $6.00 an hour"; that Brown also said the if the Union got in and Kenneth Ivie was fired, the Union would call a strike and everybody would be out on strike making like $30 a week; that Brown also said that he worked at a union plant and there the employees lost benefits from letting the union in; that the meeting was held in the morning right after the first break and it lasted about 30 minutes; and that during this meeting it was said that if the Union got in, the employees would not get the raise they were supposed to get in September, it would be frozen.

Johnnie Brown testified that at the time of the hearing herein he had worked for the Respondent at Tar Heel for over 6 years and he was a supervisor in the kill department; that in the summer of 1997 he supervised 30 to 37 employees in the kill department and he never discussed the Union with his employees; that he was a union member in Philadelphia, Pennsylvania, when he worked for Penn Packing Company which shut down after its employees went out on strike; that he told the employees he supervised what happened to Penn Packing Company but he did not tell employees that this is what would happen at Tar Heel if the Union won the election; that he did not tell any employee that if the Company wanted to, it could close the plant and reopen several months later at $6 an hour; that Ivie worked for him on the kill floor but he did not discuss the union campaign with Ivie; that Ivie was at the employee meeting at which he told the employees about his experience at Penn Packing Company; that at this employee meeting he did not single out Ivie and use him as an example, he did not mention Ivie's name at all, and he did not say that if Ivie got fired, the rest of the employees would go out on strike and only earn $30 a week; and that he never told employees that anything bad would happen to them if they voted for the Union.[111] On cross-examination Brown testified that he did not see Ivie with a union T-shirt on; that Ivie was in the group of employees that he told about his experience at Penn Packing Company; that he could not recall what his point was in telling the Respondent's employees about his experience with Penn Packing Company; that there were at least 30 employees at this meeting; that other topics discussed at this meeting included safety and housekeeping; that the statement he made about Penn Packing Company was the only thing he said about Unions during this whole organizing drive; that he did not ask anyone to pass out "Vote No" stickers and he was not asked to pass out such stickers or "Vote No" T-shirts; that he called this regular monthly meeting of employees; and that a couple of times a year the supervisors meet. On redirect Brown testified that the involved meeting was a safety meeting and that he was required to have safety meetings twice a month; and that at the time of the 1997 Board election, Bill Bishop was his superintendent and Bishop did not have meetings with his supervisors on a regular basis but Bishop would call a meeting of his supervisors if something bad occurred on the kill floor.

Analysis

As noted above, I did not find Brown to be a credible witness. Ivie's testimony is credited. Brown told the employees that the Respondent could close down the plant for 2 to 3 months and open it back up under another name and pay the employees $6 an hour. The Respondent violated Section 8(a)(1) of the Act through Brown by threatening employees with plant closure on July 16, 1997.

6. Paragraph 8(h)

Paragraph 8(h) of the complaint alleges that Respondent, through Supervisors Dale Smith and Ronnie Simmons on July 22, 1997, and Randy Gebbie on August 12, 1997, threatened employees with loss of pay increase if the Union were selected as collective-bargaining representative.

A summary of the testimony of the Respondent's former employee Michael McKeithan regarding what Randy Gebbie allegedly said is set forth below under Objection 6.

Randy Gebbie, who no longer is employed by the Respondent, testified that in the fall of 1997 he was the slaughter superintendent at Respondent's Tar Heel facility; that he conducted all the antiunion meetings for the kill floor employees during the 1997 union campaign; that at least twice employees asked during these meetings if they would receive a raise in September; that he never brought up the subject of a raise himself; that when the employees asked about the September raise he told them if the Union won the election, then everything would be frozen until negotiations were agreed upon, and unless the negotiating process was incredibly fast, then while it was frozen they wouldn't get a raise; and that he never mentioned the possibility of not getting a raise, except "because of the freezing of everything until the negotiating process was over." On cross-examination Gebbie testified that he put the agenda together for the antiunion meetings; and that he got the information as to what to cover in the meeting from videotapes that he reviewed and from union information.

Analysis

The Respondent on brief argues that merely informing employees that Respondent would maintain the status quo during negotiations with the union is not a violation of Section 8(a)(1) of the Act, *Uarco, Inc.*, 286 NLRB 55 (1987), where the word "frozen" was interpreted to mean only that the employer would maintain the status quo pending negotiations with the union.

[111] More specifically Brown testified at Tr. 2315, 2316 as follows:

Q. Did you ever tell employees that anything bad would happen to them if they voted for the Union?

A. No, I didn't tell any employee anyting bad would happen to them because I couldn't tell them that because really I didn't know anything about this Union. How could I tell anybody that.

In *Uarco, Inc.*, supra, then-Chairman Dotson and Member Johansen, with Member Stephens dissenting in part, reversed Administrative Law Judge Wilks who concluded, as here pertinent, that respondent's statements did not constitute threats of economic detriment; that he interpreted the use of the word "frozen" there to mean only that the Respondent would maintain the status quo pending negotiations; that the respondent there did not repeatedly allude to a record of union-forced strikes, stress the inevitability of a destructive union bargaining position, or suggest the futility of union representation for the employees; and that the company's literature taken as a whole unlawfully threatened the employees with strikes, with the futility of selection a bargaining representative, and with the loss of benefits, There the majority of the Board concluded that the company's campaign literature had no reasonable tendency to coerce and reasonable employees, equipped with the company's assurances that it would bargain with the union, would treat the documents merely as part of a vigorous election campaign.[112]

Here the word "frozen" was not used to mean that the Respondent would maintain the status quo pending negotiations. Here the Respondent was telling the employees that there would be an economic detriment if the Union won the election in that the usual September raise would be frozen and they would not get a raise in September. Here Gebbie informed the employees that notwithstanding an established past pattern of September increases, the September increase was at best a matter for negotiation if the Petitioner won but it would be forthcoming if the Petitioner lost. Taking the approach that if the Union gets in, the raise would be negotiable and that if the Union did not get in, the employees would get their raise, placed the onus on the Petitioner for the employees not receiving the usual wage increase in September. What the Respondent was telling the employees was that receiving the usual September wage increase was dependent on the results of the election. It is well settled that an employer is required to proceed with an expected wage or benefit adjustment as if the Union were not on the scene. *United Methodist Home of New Jersey*, 314 NLRB 687 (1994). A threat to do otherwise is a violation of Section 8(a)(1) of the Act. The Respondent violated Section 8(a)(1) of the Act through Gebbie on August 12, 1997, by threatening the employees with loss of a pay increase if the Union were selected as collective-bargaining representative.

7. Paragraph 8(i)

Paragraph 8(i) of the complaint alleges that Respondent, through Supervisors Larry Johnson and Billy Jackson at an August 1997 video presentation, threatened employees with the inevitability of strikes and strike violence.

The Respondent's supervisor, Billy Jackson, testified that during the 1997 organizing drive the Company provided him with videos which he showed to employees at employee meetings; and that he turned the videos back into the human relations department before the Board election.

Analysis

The Respondent on brief argues that the General Counsel did not present any evidence with respect to a video presentation.

Null testified that Larry Johnson appeared in one of the anti-union films and that some of the films spoke about strikes. Latasha Peterson also testified about showing employees a video about, as here pertinent, strike violence. As noted above, the Respondent refused to turn over the videos and films which it showed to the employees. Margo McMillan, who was a crew leader under Billy Jackson, testified that she attended employee meetings presided over by Billy Jackson; that the employees were shown films about strikes; that it was indicated in the films that if the Union came in, it would result in the employees going out on strike and people would lose their jobs; that Larry Johnson said that he belonged to a plant where the Union came in, they went on strike and he lost his job as a result of the Union coming in; and that employees saw films depicting the violence that can happen when a Union comes in. Additionally, an adverse inference was drawn that if the videos were produced they would not have supported the denials of unlawful statements by supervisors at employee meetings. A finding that unlawful statements were made at the employee meetings where the videos or films were shown is warranted. Larry Johnson, by being in the video, and Billy Jackson, by showing the video, engaged in unlawful conduct. The Respondent violated Section 8(a)(1) of the Act through Larry Johnson and Billy Jackson by showing a video which threatened the employees with the inevitability of strikes and strike violence.

8. Paragraph 8(k)

Paragraph 8(k) of the complaint alleges that Respondent, through Supervisor Bill Bishop on August 19, 1997, disparaged the Union by stating that the Union would call the Immigration and Naturalization Service to report workers if they lost the election.

The testimony of Latonya Robinson is summarized above under paragraph 8(a) of the 1998 complaint. Briefly, she testified that Bishop told the employees in the meeting that if they voted the Union in, they would turn Immigration on the Latinos.

Bill Bishop, who in 1997 was the superintendent and subsequently the divisional manager of the kill floor, testified that he had meetings with company employees in 1997 and he was asked by employees about a rumor that the Company was going to call INS (Immigration and Naturalization Service) and about Hispanics being threatened by the union organizers that if they did not sign a card, the Union was going to call INS; that he told the employees that to his knowledge there was not anything like the Company calling INS taking place, and the employees should contact human resources regarding the threats to Hispanics; and that he never told employees in any of these meetings that if the Union won the election, the Company would call the INS simultaneously. On cross-examination Bishop testified that there are four divisional managers at Tar Heel, namely the kill floor, the cut side, conversion, and shipping; that he reported to Plant Manager Larry Johnson; that in

[112] In the instant proceeding, notwithstanding the Respondent's protestations to the contrary, the Respondent did not assure the employees that it would bargain with the Union. As found above, the Respondent here did just the opposite. Additionally, here the Respondent repeatedly alluded to a record of union-forced strikes and suggested the futility of union representation for the employees.

answer to a question, he told employees that if the Union got in, the Company was not going to call INS, "nothing like that to my knowledge is taking place"; that at another employee meeting an employee said that the Hispanics were being harassed by the Union saying that they were going to call the INS on them if they did not sign a card; and that the subject of the INS came up during employee meetings in July 1997 before the 1997 Board election.

Analysis

The Respondent on brief argues that Bishop did not make this statement.

This is the same August 19, 1997 employee meeting where Bishop unlawfully interrogated Robinson about her union sympathies. This is the same August 19, 1997 employee meeting where Bishop threatened employees with the futility of selecting the Union as collective-bargaining representative. Again, Supervisor Randy Hall was there. He did not deny this. Bishop did not deny this. While Hall testified herein he did not testify about this employee meeting. Therefore, he did not corroborate Bishop. As noted above, Robinson testified that Hall repeated what Bishop said. Hall did not deny this. Bishop was not a credible witness. I credit the testimony of Robinson. The Respondent violated Section 8(a)(1) of the Act through Bishop by disparaging the Union by stating that the Union would call the INS to report workers if the Union won the election.[113]

9. Paragraph 8(m)

Paragraph 8(m) of the complaint alleges that Respondent, through Supervisors Gary Locklear and others known to Respondent on August 14–21, 1997, disparately enforced its no-solicitation and no-distribution rule in order to discourage union activities.

Respondent's former employee Jonathan Cook testified that on the first day of the 1997 union election, August 21, 1997, around breaktime, 8:45 a.m., he saw 12 to 15 employees outside the cafeteria with signs indicating "Vote No"; that he then said the right way to vote is yes; that a female employee who he knew only as Michelle then told him if he voted yes he would not have a job after the election[114]; that the same people were in that area all day long, they were there at every break; that these employees chanted "Vote No" and placed stickers on people; and that he did not notice any prounion employees in that area picketing as these people were. On cross-examination Cook testified that he saw this group of employees four times that day including standing outside of the plant at the end of the day; and that he talked to other employees in support of the Union "pretty much any part of the day."

Respondent's former employee Kenneth Ivie testified that on August 21, 1997, in the morning during first break he saw about 10 employees with "Vote No" picket signs outside the smoking cafeteria chanting vote no; that one of the signs indicated that "Jesse Jackson made 50 thousand dollars for coming to speak for the Union, what did he do for you"; that other signs indicated vote no and referred to how much money the Union made; that he saw these employees picketing and chanting during the first break at 9:20 a.m. and again at lunch break at 12:05 p.m.; that he did not see any prounion employees holding signs in this area; and that he complained to his supervisor, Johnny Brown, and Jere Null about the Reverend Jackson sign, and the antiunion picketers did not have the sign when he saw them at the next break. On cross-examination Ivie testified that he did not discuss the Union while he was on the line working because he did not want to lose his job.

Respondent's former employee Latonya Robinson testified that on August 21, 1997, she observed about five employees in the plant in front of the smoking cafeteria with signs indicating "Vote No" and "Union go home"; that she saw them at that location during her entire break which lasted 30 minutes and when she used the nearby restroom; and that she did not see any prounion employees at that location with signs. On cross-examination Robinson testified that she saw the five or so employees holding signs in the hallway outside the cafeteria on August 22, 1997, the second day of the election; and that the signs indicated "Vote No" and "Union go home."

Analysis

The Respondent on brief argues that this allegation should be dismissed since the General Counsel did not present any evidence.

Neither Jere Null nor Johnnie Brown denied that Kenneth Ivie told them about the Reverend Jackson sign carried by the antiunion employees outside the smoking cafeteria on August 21, 1997. Management was placed on notice about this activity. Notwithstanding Jonathan Cook's testimony that the same people were in the area all day long, they were there every break, and Latonya Robinson's testimony that they were there during her entire break which lasted 30 minutes and when she used the nearby restroom, it is not clear from this testimony that the individual antiunion employees engaged in this activity when they should have been working. But as pointed out by Latasha Peterson, as set forth under Objection 16 below, she engaged in this antiunion activity from about 8:30 until 10:30 a.m. on August 21, 1997. She, and undoubtedly others in the group, was doing this when she should have been working.[115] While Cook, Ivie and Robinson all testified that they did not see any prounion people in this area picketing as the antiunion employees were, there is no evidence that the prounion employees attempted to engage in this conduct at that location at that time and they were precluded from doing it by the Respondent. Nonetheless, the fact that Peterson was allowed to engage in this and other antiunion activity while on her worktime, and

[113] As noted above, the allegation reads, "if they lost the election." In other words, the Union would act in retaliation for losing the election. But the message Bishop gave to the employees is that the Hispanics should not vote for the Union because if the Union won, the Union would turn Immigration on the Latinos. Bishop was disparaging the Union by indicating that it would engage in this type of conduct.

[114] On direct, Cook testified that Michelle said if you vote no. Subsequently he changed this to her saying if you vote yes. Also he testified that Michelle was not a supervisor. It has not been demonstrated that the employee identified as Michelle was speaking on behalf of the Company.

[115] I credit the testimony of Peterson and Sherri Buffkin that at this time Peterson was paid while she was campaigning against the Union. In other words, Peterson engaged in antiunion activity during her working time.

other employees were prohibited from engaging in activities in support of the Union during their worktime, means that the Respondent disparately enforced its no-solicitation and no-distribution rule in order to discourage union activities. The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(m) of the 1998 complaint.

10. Paragraph 8(n)

Paragraph 8(n) of the complaint alleges that Respondent, through Supervisor Johnnie Brown on August 13, 1997, threatened employees with unspecified reprisals if the Union won the election.

Respondent's former employee Kenneth Ivie testified that he attended a meeting with the other employees in his department in August 14, 1997, with his Supervisor Johnnie Brown; that at this meeting Brown stated that "if the Union won the election, it would be a long, cold winter"; and that Brown did not explain what he meant by this. Johnnie Brown testified that he never told employees that if the Union got in, it would be a long cold winter; and that, as indicated above, he never told employees that anything bad would happen to them if they voted for the Union because he did not know anything about the Union.

Analysis

The Respondent on brief argues that Brown denied ever saying that "it would be a long cold winter" and Ivie's testimony is not corroborated.

As noted above, I did not find Brown to be a credible witness. Ivie's testimony is credited. While this is not the same meeting which is the subject of paragraphs 8(d), (f), and (g) of the 1998 complaint as described above, the fact that Brown was willing to and did make unlawful threats at that earlier meeting can be considered here. Brown told the employees that if the Union got in, it would be a "long cold winter." When considered in the light of the other threats made in his earlier speech, as described above, the Respondent violated Section 8(a)(1) of the Act through Brown by threatening employees on or about August 14, 1997, with unspecified reprisals.

11. Paragraph 8(p)

Paragraph 8(p) of the complaint alleges that Respondent, through Supervisor Roosevelt Stocks on August 7–21, 1997, polled employees concerning their support for the Union.

Dennis Murphy testified that approximately 2 weeks before the August 21–22, 1997 election Roosevelt Stocks, who is a supervisor in livestock, approached him in the livestock area during the first shift while he was working; that Stocks reached up to put a sticker on his hat and he told Stocks that he did not want a sticker on his hat because employees are not allowed to wear any jewelry or anything and he did not want a sticker on his hat; that Stocks left and he observed Stocks placing stickers on other employees's hats; that this did not occur during a break but rather all of the involved employees were working; that company policy prohibited the displaying of stickers on hats; that the sticker which Stocks attempted to place on his hat was nonunion with a rainbow design and different colors; and that during the 2-week period preceding the August 1997 Board election fellow employees distributed "Vote No" stickers near or in the cafeterias during breaktime. On cross-examination Murphy testified that plenty of employees in the plant wore stickers on their hats and buttons in the weeks before the election and some of the stickers were UFCW stickers which said "Vote Yes" or "Union Yes."

Stocks testified that he has been a supervisor in the livestock department since November 1995; that he distributed "Vote No" stickers; that he had the stickers on a roll and the employees asked him what he had and those who were not for the Union asked for them; that he did place stickers on employees' helmets when the employees' hands were full; that he did not give any stickers to any employee who did not request one, he did not force any employee to accept a "Vote No" sticker who did not request one, and he never placed a "Vote No" sticker on any employee's helmet who did not ask him to; *that he never asked any employee if they wanted the "Vote No" stickers*; that Dennis Murphy transferred from the cut floor to livestock; that he did not supervise Murphy; and that he never gave Murphy a "Vote No" sticker, he did not place a "Vote No" sticker on Murphy's "hat" and he did not recall seeing Murphy with a "Vote No" sticker on his helmet. On cross-examination Stocks testified that he was a supervisor in livestock in November 1996 and not 1995; that he was instructed to hand out the "Vote No" stickers to employees only if they wanted them; that he received the stickers about two months before the August 1997 election and he disposed of the ones which were not given out; that he was not told to pass the "Vote No" stickers out to everybody in his department or to write down the names of those employees who refused the stickers; that he gave stickers to anyone who wanted one and he did not limit himself to his department; that Murphy told him that he did not want a sticker; that he gave out the majority of the stickers that he had; that he gave the majority of the stickers out to people in his department; that he "knew if they took the stickers . . . they wasn't for the Union"; that he was supposed to tell his supervisor about that and he did talk to his Supervisor Gene Stallings; that he told Stallings that it was not going that well; that "they wanted to know how the stickers was [sic] going I just told them it wasn't going that well"; that he could have passed the stickers out beyond his own department but he did not; that the employees in his department who asked him for stickers were on working time; and that when he distributed the stickers in his department he gave the stickers to people who were on working time. On redirect Stocks gave the following testimony:

> Q. Did you ask Dennis Murphy if he wanted a sticker?
> A. Yes, sir.
> Q. *Did you ask Mr. Murphy if he wanted a vote no sticker?*
> A. Yes, sir.

Analysis

The Respondent on brief argues that Stocks did not give a sticker to any employee who did not first request one nor did he ever ask any employee if he wanted a "Vote No" sticker; that Stock's actions in making the "Vote No" stickers available to the employees in his department was not unlawfully polling employees' union sympathies, *Holsum Bakers of Puerto Rico*, 320 NLRB 834 (1996); and that even if Stocks did try to place

a sticker on Murphy's helmet, it is clear that this was done more as a playful gesture than as serious campaigning.

The problem with the last argument is that Stocks denied that he did try to place a sticker on Murphy's helmet. It is one thing to admit that you engaged in the conduct and then assert that you were just playing around. It is quite something else for the witness to deny the conduct and then have a attorney on brief argue that it was a playful gesture. This is a twist on the hackneyed "it did not happen—well you have shown that it happened but I was just playing around." Here the witness testifies that it did not happen and the attorney argues that which did not happen, at least according to his witness, was only a playful gesture.

The problem with the Respondent's first argument is that it refuses to acknowledge unequivocal testimony the Respondent itself subsequently elicited from its witness on redirect, namely, that he asked Murphy if he wanted a vote no sticker. And the Respondent does not treat Stock's testimony that he gave his Supervisor Gene Stallings the results of the poll. Stallings did not testify at the hearing herein and so this testimony from the Respondent's witness is not denied.

The problem with the Respondent's second argument is that there was supervisory involvement. Management, through Stocks, pressured employees into making an observable choice. Stocks tried to place a sticker on Murphy's helmet. As Stocks testified, he "knew if they took the stickers . . . they wasn't [sic] for the Union." Murphy's testimony is credited. Stocks changed his testimony regarding whether he ever asked any employee if they wanted a vote no sticker. Supervisory involvement and pressure distinguish this case from *Holsum Bakers of Puerto Rico*, supra; and *McDonalds*, 214 NLRB 879 (1974). The Respondent violated Section 8(a)(1) of the Act through Stocks by polling employees concerning their support for the Union.

12. Paragraph 8(q)

Paragraph 8(q) of the complaint alleges that Respondent, through Supervisor David Smith on August 19, 1997, made a promise of benefits and improved working conditions to discourage support for the Union.

Respondent's employee Darrell Thomas testified as follows about a conversation he had on August 19, 1997, with Supervisor David Smith:

> A He came—he called me off the line and he said—he sent a courier up there and told me that he wanted to speak to me and he called me back in the cool room.
>
> . . . .
>
> A He said that he knowed [sic] that I'm a Union supporter, but the Company needed—he needed my help—he and the Company needed my help and they needed me to stick by the Company, you know, and vote for the Company, and that he knew that I was in the process of winning a job bid and the job bid was on the opposite side of the table of what—it was a loin pulling job and it was on the opposite side of where I wanted to be, and he told me that if I stuck by the Company and helped them out with the Company that he would insure that I would be put on the side of the table that I wanted to be put on.

On cross-examination by one of Respondent's attorneys, Thomas, who at the time he testified herein was an employee of the Respondent, testified as follows:

> A Yes. Excuse me. Could we go back to the question that you just asked me about I got the job? I'm not quite sure on something there.
>
> Q You were awarded the position. You were awarded the—
>
> A What are you asking me was I awarded the position pulling on the left side which is what he agreed to give me if I voted for the Company, or did I get the job on the right side?
>
> Q Which one did you bid on?
>
> A Well I bidded [sic] on the job that wa on the right side.
>
> The promise was that I would get the job that was on the left side.
>
> Q He didn't make any promise to you.
>
> A Excuse me? Where you there?
>
> . . . .
>
> Q What job did you bid on?
>
> A I bid on the loin pulling job.
>
> Q Okay. Did you bid specifically right side or left side?
>
> A The—the—on the bid itself, it does not clarify right or left.
>
> Q That's right.
>
> A I was informed—I was informed by David Smith that the job that I had bid, the loin pulling job that I had bid on, would be on the right—it was for a position on the right side: the job—and the promise was that I would get the job on the left side. You said did I get the job, yes, I got the job on the right side after the election was won and I was put on the line, I got the job on the right side, not the one that he promised me. That's what I wanted to clarify.
>
> Q You wanted the one on the left side?
>
> A Right. And that's the one he agreed to give me.
>
> Q But, like you said you didn't agree to support the Company?
>
> A I didn't give him an answer one way or the other.
>
> Q Right.
>
> A I just left it—he said what he did, and I just left it like that.

And on redirect Thomas testified as follows:

> A Okay. it was explained—it was explained to me that when I bid on the job that it would—that the position that was open was on the right side. I had already been training pulling on the left side. And he—what he offered me was that if I voted with the Company as he put it in his words that he would insure that I would get the—that he would—as a matter of fact he explained it that he would switch someone out with me and have me pulling on the left side.
>
> That's what the offer was, the side that I—I already knew how to do and was familiar with.

David Smith, who is a supervisor on the cut floor, testified, in response to a question as to whether Thomas was for or against the Union, that during the summer of 1997 Thomas, an employee who worked under his supervision, approached him and "offered information to me that if I gave him a certain job or he would vote or he would vote against"; that Thomas wanted to be a loin puller on the left side; that at the time Thomas bid on the loin puller job there was a loin puller job on the right side; that Thomas was given the loin puller job on the right side; that in late 1998 Thomas was given the loin puller job on the left side; that he never told Thomas that he would insure that he got the left side loin puller job if he voted for the Company; and that he did not make Thomas any promises at all about what he could or could not do for him if he voted for the Company. On cross-examination Smith testified that he had this conversation with Thomas before the August 1997 Board election; that he saw Thomas wearing a union T-shirt before the August 1997 Board election; that his conversation with Thomas about the loin puller job occurred while Thomas was working on the line in the hooker position; that the loin puller job pays more than the hooker job; that Thomas asked to speak with him and Thomas said, "[I]f I could see that he can get a left side loin puller position that he will vote for the Company. He said you know he said that I'm willing to vote for the Union, but he said if you get me a left side loin position that I will be a hundred percent for the Company"; that he did not mention this conversation to anyone else at the time; that loin pullers are not switched back and forth as a matter of routine; and that if someone is hurt or the Company is shorthanded, employees can be switched from one side to the other side.

Analysis

The Respondent on brief argues that Smith's version of events is much more plausible than Thomas' in that Thomas's testimony was inconsistent while Smith's version of events was entirely consistent on both direct and cross-examination.

The Respondent does not point out exactly how Thomas's testimony was inconsistent. The conversation occurred at a time when the Respondent would have been interested in getting as many votes as it could. Also, the conversation occurred during an organizing drive where the Respondent committed a number of violations of the Act. David Smith saw Thomas wearing a union T- shirt and so it would have been reasonable for him to assume that Thomas, unless he had a reason to do otherwise, was going to vote for the Union. Although David Smith testified that switching loin pullers was not done as a matter of routine and that a person holds a job on the cut floor until they bid someplace else, he did not deny that he had the power to offer Thomas the left side and switch someone from that position to accommodate Thomas. Having someone offer to sell their vote apparently would be a rare occurrence. Indeed this is the only alleged instance in this organizing drive. That being the case, one would expect that if Thomas did offer to sell his vote, it is something that Smith would have mentioned to someone else at the time. David Smith testified that he did not. Apparently Thomas did mention the conversation to someone else which in turn led up to him testifying at the hearing herein about it. Thomas impressed me as being a credible witness. At the time of the hearing herein he was working for the Respondent as a loin puller under Supervisor David Smith. He started working for the Respondent around April 1996. Thomas explained apparent inconsistencies when he was asked about in his September 3, 1997 Board affidavit.[116] Whether David Smith actually meant to give him the left side is beside the point. And although Thomas was told about getting the job on August 22, 1997, the second day of the Board election, the timing could have taken into consideration the fact that he did not make a commitment to vote for the Company. At one point, Smith testified that he did not know whether Thomas was for or against the Union during his conversation with him about the left-side puller position. At another point, Smith testified that he saw Thomas wear a union T- shirt before the election. Then Smith gave the following testimony:

> Q And this [his conversation with Thomas about the left side puller position] is while he is wearing a Union tee shirt he told you this [that he would sell his vote for the position].
>
> A At the time he didn't have no [sic] Union tee shirt on. He just had his smock on.
>
> Q But he had been wearing a Union tee shirt?
>
> A I'm not for sure if it was during that time or before.
>
> Q You did see him wearing a Union tee shirt?
>
> A It could have been afterwards. It could have been before. I'm not for sure.
>
> Q At some point and time during the summer of 1997 you saw Mr. Thomas wearing a Union tee shirt?
>
> A I seen him wearing it. Like I said again it was in between the summer time before or either after.

Smith was not a credible witness. Thomas gave details and was concise. Smith was evasive. Thomas' testimony is credited. The Respondent violated Section 8(a)(1) of the Act through David Smith on August 19, 1997, by promising a benefit and improved working condition to discourage support for the Union.

13. Paragraph 8(r)

Paragraph 8(r) of the complaint alleges that Respondent, through Supervisor Jere Null at August 19–20, 1997 meetings, threatened that wages would be frozen if the Union were elected as collective-bargaining representative.

As noted above, the Respondent's employee Darrell Thomas testified that on August 20, 1997, he attended an employee meeting conducted by Jere Null in the box room; that he sat in the third row from the front; that Null said, as here pertinent, that (a) if the Union came in, the employees would not get their raise because if the Union got in, there would be negotiations and the employees would not get their raise until negotiations

[116] Although it was not specifically argued that there was an express or implied charge of recent fabrication under Rule 801(d)(1)(B) of the Fed.R.Evid., the Charging Party attempted to introduce Thomas' affidavit to the Board to show that his conversation with Smith was included in the affidavit However, the offer was not limited to this specific portion. The objections of the General Counsel and the Respondent were sustained and the September 3, 1997 affidavit, CP Exh. 1, was placed in the rejected exhibit file.

were completed, and (b) if the Union did not get in, then the employees would be very happy with the raise they receive.

As noted above, the Respondent's employee Andrea Hester (married name White) testified that the day before the 1997 union election began she attended a meeting with about 400 employees in the conversion box room; that Jerry Null spoke at this meeting; and that Null said that the employees "would not get our raise like we normally would if the Union was to get in there. We would have layoffs. We would also have strikes like it was at other [p]lants."

The Respondent's former employee Jonathan Cook testified that at the August 20, 1997 employee meeting Null said the employees would get their annual raises in September like they were supposed to; that Null said, "[h]aven't we always gave [sic] you your raises in September, your annual raises . . . . We know that you're looking forward to it"; and that he could not remember after that.

Lillie Jolliff, who worked for the Respondent when she testified at the hearing herein, testified that at an August 20, 1997 employee meeting Null said that "he was sure everybody wanted their raise in September but if the Union came in, he said it could be months. Even 6 months before they get a raise and they would not get the raise from the Company." (Tr. 1685.)

The testimony of Jere Null regarding, as here pertinent, what he said about wages in his speeches is summarized above in the paragraph dealing with paragraph 8(e) of the 1998 complaint.

Analysis

The Respondent on brief argues that Null specifically denied ever telling employees during his 25th-hour speeches words to the effect of "[h]asn't the Company always given you raises in September? You're looking forward to it, aren't you?"; that Null told the employees that if the Union won, the Company could not unilaterally increase wages and benefits without first negotiating with the Union; that like the comments in *Uarco,* 286 NLRB 55 (1987), Null's comments about the September pay raise, when put in their proper context, merely educate employees about the Respondent's collective-bargaining obligations; and that "frozen" under *Uarco,* supra, meant that the Respondent would maintain the status quo pending negotiations.

For the reasons specified above under paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null with respect to what he said during his 25th-hour speeches. The above-described testimony of the employees who attended the August 20, 1997 25th-hour speech is credited. The Saturday before Null gave his 25th-hour speeches he told livestock employees that there would not be a pay raise until after negotiations if the Union won the upcoming election, and that negotiations would determine what, if any, raise the employees would receive. Null's 25th-hour speeches were a continuation of this theme. As pointed out under paragraph 8(h) of the 1998 complaint above, in *Uarco, Inc.,* supra, the respondent there did not repeatedly allude to a record of union-forced strikes, stress the inevitability of a destructive union bargaining position, or suggest the futility of union representation for the employees.[117]

Also as noted above, here the word "frozen" was not used to mean that the Respondent would maintain the status quo pending negotiations. Here, the Respondent was telling the employees that there would be an economic detriment if the Union won the election in that the usual September raise would be frozen and they would not get a raise in September. Here Null informed the employees that notwithstanding an established past pattern of September increases, the September increase was at best a matter for negotiation if the Petitioner won, but it would be forthcoming if the Petitioner lost. Taking the approach that if the Union gets in, the raise would be negotiable and that if the Union did not get in, the employees would get their raise, placed the onus on the Petitioner for the employees not receiving the usual wage increase in September. The Respondent was telling the employees that receiving the usual September wage increase was dependent on the results of the election. As noted above, it is well settled that an employer is required to proceed with an expected wage or benefit adjustment as if the Union were not on the scene. *United Methodist Home of New Jersey*, 314 NLRB 687 (1994). A threat to do otherwise is a violation of Section 8(a)(1) of the Act. The Respondent violated Section 8(a)(1) of the Act through Null on August 20, 1997, by threatening the employees that wages would be frozen if the Union were elected as collective-bargaining representative.

14 Paragraph 8(s)

Paragraph 8(s) of the complaint alleges that Respondent, through Supervisors Bill Bishop on August 19, 1997, and Jere Null at August 19–20, 1997 meetings, threatened employees with job loss in the event of a strike.

Respondent's former employee Rosa Garcia testified that she attended an employee meeting on August 20, 1997, conducted by Null who was in the box room; that the whole first shift was present; that during Null's speech she was in an adjacent room with the Spanish-speaking employees who watched Null on a closed circuit television and who listened to an interpreter; that sometimes Null would refer to his notes and sometimes he would not refer to them; that the employees in the room she was in were told that if the Union won the election, they would not negotiate with them, the Union would take the employees out on strike, and the employees would not have any health insurance for themselves and their families. On cross-examination Garcia testified that while the Spanish-speaking employees saw Null's image on the closed circuit television, they did not hear his voice since the interpreter was speaking. On redirect, Garcia testified that the interpreter was reading from notes, she did not know if the interpreter was taking notes as Null spoke, and the interpreter had an ear set on. Also as indicated above, other employees testified that Null said during

[117] As noted above, in the instant proceeding, notwithstanding the Respondent's protestations to the contrary, the Respondent did not assure the employees that it would bargain with the Union. As found above, the Respondent here did just the opposite. Additionally, here the Respondent repeatedly alluded to a record of union-forced strikes and suggested the futility of union representation for the employees.

his August 20, 1997 speech that the Company would not bargain with the Union and the Respondent would take a strike.

As noted above, the Respondent's former employee Michael McKeithan testified that at the employee meeting on August 20, 1997, Null said the if the Union was voted in and if the employees would go on strike with the Union, that the people can cross the picket line come in the plant to work and the ones that was on strike after the strike was over was not guaranteed a job because they can hire people to replace them; and that Null said "if the Union is voted in here regardless this Company run the way we want it to run."

As noted above, with respect to the allegation regarding Bill Bishop on August 19, 1997, the Respondent's former employee Latonya Robinson testified that on August 19, 1997, she and about 10 other employees attended an employee meeting conducted by Supervisors Bill Bishop and Randy Hall; that at this meeting Bishop, as here pertinent, told the employees that if they voted the Union in, the employees would be subject to a strike, Respondent would close the plant down, while the employees are out on strike they are entitled to only $40-strike benefits, and once the employees are out on strike they will be replaced.

The Respondent's former supervisor Bill Bishop testified that during his meetings with employees in 1997 he discussed the issue of strikes; that there was a video that the Respondent showed of former union people talking about strikes that they had been involved in and the employees were given some specific information about a strike at another plant; that he never told employees that if the Union came into the Tar Heel facility, the employees would go out on strike; that he did tell employees about one plant which closed but he could not remember the details; that he never told the employees that if the Union got into the Tar Heel facility that it would close; that he did tell the employees that people who stayed out on the strike picket line on a specific strike which he could not remember when he testified herein were given $55 a week as strike benefits; that he did not tell the employees what they would get from the Union if they went out on strike; that he did tell the employees that during a strike at another meat packer some employees were replaced and the striking employees did not get a position with the company until the replacement workers left or a position came open; that he never told the employees that if the Union took them out on strike, they would be replaced and lose their jobs; that he did not recall ever asking any employee directly who they were going to vote for in the upcoming 1997 election; that he did tell the employees about the House of Raeford, a poultry plant in Raeford, North Carolina, where he recalled the wages and benefits were better before the UFCW negotiated a contract; that he never told employees that if the UFCW got into the Tar Heel plant, they would get lower raises or less benefits; that he never told employees that union dues would increase anytime employees got a pay increase; and that he did not, nor did he direct anyone to, discriminate against employees because they supported the Union with regard to work rules, promotions, or overtime work.

On cross-examination Bishop testified that he gave several employee meetings over a two week period; that the video had some employees from the plant, some former UFCW involved employees and Plant Manager Larry Johnson was on there talking about some of his experiences with the Union; that the people on the video talked about the problems they had experienced and their opinions; that the information given to employees was definitely problems other employees had with unions and that unions caused plant closings and strikes in specific instances; that the difference between an economic and unfair labor practice strike was in the literature regarding what had happened at other plants; that with respect to contract negotiations he told the employees that what "we have now as far as benefits and wages are up for negotiations"; and that he told the employees what employees at the House of Raeford and another specified Smithfield plant received in raises with a union contract versus no union contract, and what they were paying for union dues.

On cross-examination by the Charging Party,[118] Bishop testified that he gave other managers feedback about what was said in the meetings with the employees if he was asked about it; that he was asked a couple of times by peers in the higher level of management how he thought it was going and what are his feelings; that he told the employees that if the Union won and the employees went to the negotiating table, everything would be for negotiations; that he told the employees that based on his experience with IBP at Waterloo, Iowa, when the union was recognized until the contract was negotiated "the wages were frozen at where they was"; and that he told the employees that the Morrell plant at Wilson, North Carolina, which is now a Smithfield plant, was unionized, it closed and the UFCW was one of several different reasons it closed.

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[118] Before commencing cross-examination one of the attorneys for the Charging Party renewed her reuest for the videos Bishop showed to the employees and any documents he used in his meetings with the employees. One of the Respondent's attorneys, Barrett, argued as follows:

> With respect to the films [videos] we did not ask the question. The questions were asked by Counsel for the General Counsel. We have not attempted to elicit information from the witness regarding the films, the video tapes, and you know I don't think Mr. Bishop has characterized the content of the film with respct to legal conclusion one way or the other.

On direct examination another of the Respondent's attorneys, Joel Katz, elicited the following testimony from Bishop:

> Q. During these meetings in 1997 do you recall ever discussing the issue or the subject of strikes?
>
> A. yes, sir.
>
> Q. What if anything did you discuss about strikes?
>
> A. We kind of two different ways. There was a video that we showed of former Union people talked [sic] about some strikes that they had been involved in from their own experience, and we had some information that was given to us by the Plant about—specific information that came out of a strike at another Plant. How long they was [sic] out. What they received while they were out. That type of thing.

The Charging Party moved to strike any testimony of Bishop which reflects an innocent version of what occurred on the videos or what employees were told based on the documents that the Company gave to high-level supervisors since this material was subpoenaed and allegedly not turned over to the Charging Party. The Charging Party was told that I would take it under advisement with the understanding that the Charging Party would cite page and line number in its brief.

On recross, Bishop testified that the supervisors who held meetings with the employees were not given a packet of materials which they referenced while they spoke to employees; that he compiled his own information and created his own file for the employee meetings from newspaper clippings, contracts and the Union bylaws; that he drafted an outline for the meetings; that most of the outlines were thrown away; that the files were left in his drawer when he was terminated by the Respondent[119]; and that the only thing that he brought to the meetings with employees was a videotape.

Jere Null testified that he never told employees at any meeting that he held that they would lose their jobs if the Union was voted in. His testimony regarding his speeches is summarized above under paragraph 8(e) of the 1998 complaint.

Analysis

The Respondent on brief argues that Null did not deviate from his prepared text and Null correctly informed employees that economic strikers can be permanently replaced.

Null did deviate from the speech which was received herein as Respondent's Exhibit 156. For the reasons specified above under paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null with respect to what he said during his 25th-hour speeches. The testimony of Garcia and McKeithan regarding Null's August 20, 1997 presentation to employees is credited. Null told the employees that if the Union got in the Company was not going to bargain and it was going to force a strike. To say this and then explain the rights of economic strikers, vis-a-vis unfair practice strikers, is not only misleading but by taking this approach Null threatened employees with job loss in the event of a strike. The Respondent violated Section 8(a)(1) of the Act through Null with this conduct.

I do not credit Bishop's testimony that he never told the employees that if the Union took them out on strike, they would be replaced and lose their jobs. Bishop was not a credible witness. As found above, he engaged in other unlawful conduct during his August 19, 1997 employee meeting. A noted above, Supervisor Randy Hall was at this meeting and he testified herein but he did not corroborate Bishop. Also, Bishop showed a video to the employees about strikes, and the Respondent refused to turn over the video although it was subpoenaed and the Respondent was directed to turn it over to counsel for the Charging Party. An adverse inference has been drawn from this conduct. I credit the testimony of Latonya Robinson that Bishop said that once the employees are out on strike they will be replaced. As noted above, Robinson testified that Randy Hall repeated what Bishop said. Although Hall testified herein, he did not deny Robinson's testimony. The Respondent violated Section 8(a)(1) of the Act through Bishop by threatening employees with job loss in the event of a strike.

15. Paragraph 8(t)

Paragraph 8(t) of the complaint alleges that Respondent, through Supervisor Jere Null at August 19–20, 1997 meetings, threatened employees with plant closure in the event of a strike.

Jonathan Cook testified that he attended a meeting for employees on August 20, 1997, held by the Company in the box room; and that Jere Null spoke at this meeting,

> he said by any means necessary we will not let that Union come up in here, and he said—then he went on to start talking about well we took you out of the fields as being slaves, out of the bean fields and potato fields, and he went on to tell the women that . . . you don't want to be out there on welfare, and you know you can't live off that strike pay which is thirty bucks a week, somewhere along there that they wanted to give, and he said well . . . before we let that Union come in, we'll close this plant down for a few months, later open it—reopen it back under another name, and start everybody off at minimum wage.

On cross-examination Cook testified that he was sitting in the back of the room and he could not see whether Null was reading from papers; that he saw Null on the big screen; that possibly Null could have been reading something; and that Null did not say by any legal means but rather Null said, "[B]y any means necessary." On redirect, Cook testified that he saw Null on the big screen and he did not remember seeing Null reading a paper but Null might have had one in front of him.

Respondent's former employee Kenneth Ivie testified that he attended a Company held meeting on the afternoon of August 20, 1997, in the box warehouse[120]; that the whole first shift was

[119] Bishop testified that he was terminated by Plant Manager Larry Johnson for violating the no smoking policy which was implemented about 1 year before his termination; that about 3 months before his termination Johnson had sent out a memo to make it very clear that if you get caught smoking in a nonsmoking area, regardless of your position, you would be terminated; that to his knowledge, no one in the Tar Heel facility had been previously terminated for violating this policy; that he was not supposed to have one; that Larry Johnson told him that he had seen evidence of someone smoking in his office but he, Bishop, had not violated the policy; that he was not aware of anyone being caught with a cigarette where they were not supposed to have one; that Larry Johnson told him that he had seen evidence of someone smoking in his office but he, Biship, had not violated the policy; that he had just returned from his father passing away, he had some supervisors in his office, without thinking he lit up a cigarette, and two of the supervisors under him also lit up; that Johnson walked into the office, saw one of the supervisors with a lit cigarette and told the supervisor "that's a good way to lose your job. You know what's going to happen. Take your coat off get out of here"; that he then showed Johnson his cigarette and explained that the supervisors were just following suit; that Johnson was aware that his father had just passed away; and that the two supervisors were not terminated because he requested Johnson not to terminate them, explaining to Johnson that he initiated it and they were merely following his lead.

The Respondent's former supervisor, Marty Hast, testified that a recruiter telephoned him at his new place of employment and asked him if his employer would be interested in hiring Bishop.

The Respondent's plant manager, Larry Johnson, testified that he caught Bill Bishop two times smoking in his office and he told Bishop that he could not turn a blind eye to this again; that he walked into Bishop's office, he saw Hester Sailor smoking and he said, "[T]his is really a terrible way to lose your job"; that Bishop had a cigarette in his hand and he told Bishop to leave; that he suspended Sailor; and that up to this point he did ot recall anyone being suspended or terminated pursuant to the nonsmoking policy.

[120] According to Ivie's testimony, that morning Supervisor Randy Hall pulled him off the line, and was taking him to see Bill Bishop when Hall asked him if he made up his mind yet which way he was

there; that he was seated in the front row about 10 feet away from Null during his speech; that Null had a piece of paper that he was reading before he started speaking but Null then spoke "from the top of his head"; that Null did glance at the paper during the meeting; that Null said that before the Company came there it was tobacco fields and peanut fields and they came there and brought jobs and they were not going to let that Company go to a union without a fight; and that Null said that this particular union left a trail of violence and plant closings wherever they go and this Union was responsible for like 500 plant closings and he did not want the Tar Heel plant to be 501.

The Respondent's employee Darrell Thomas testified that he attended an employee meeting on August 20, 1997, held by Jere Null in the box room; that Null said that before the Company would sit down and negotiate with the Union, the Company was prepared to go on strike; and that during this speech Null said before the Company would let the Union come in, the Company would take a strike.

The Respondent's employee Lillie Jolliff testified that on August 20, 1997, she attended an employee meeting in the box warehouse where Jere Null spoke; that she was about 26 feet from Null when he gave his speech; that Null said that Bladen County was nothing but a farm area, the Respondent moved the plant to Bladen County to better the area, and if the plant closes, it will be nothing; that they would have no jobs in Bladen County and lots of other areas would be out of jobs if the plant closed; that Null spoke about job losses and losing your cars and houses and wages; that Null said that if the employees go out on strike, there is a possibility that the employees would lose their job or the plant would close, shorter hours, and its a possibility that the second shift would close; that Null asked the employees to take a look at the Morrell plant that closed, saying that a lot of people lost their jobs out there on strike, they lost their homes, cars, and everything; and that Null said that another plant closed in (she thought he said) Wilson, North Carolina, due to a strike and they didn't want a union in that plant, they just didn't want the Union.

Jere Null testified that he never told employees at any meeting during the 1997 campaign that the plant would close if the Union was voted in. His testimony regarding his speeches is summarized above under paragraph 8(e) of the 1998 complaint.

Analysis

The Respondent on brief argues that Null specifically denied ever telling employees, at any point during the 1997 union campaign, that the plant would close if the Union won the election; and that given that the Respondent had spent approximately $200 million on the Tar Heel plant, and the plant was only 5 years old at the time of the 1997 campaign, it is highly unlikely that the Respondent would have made such a "silly" threat.

It is not required that someone making a threat actually intend to carry out the threat. The purpose of a threat can be achieved simply by uttering a threat which then leads the hearer to believe that it can happen no matter how unreasonable it is. And with respect to the Respondent's argument on brief that "Null specifically denied ever telling employees, at any point during the 1997 Union campaign that the plant would close if the Union won the election," as noted above, Null spoke on at least one video shown to employees, the Respondent refused to turn over the subpoenaed videos, an adverse inference has been drawn that the Respondent did not turn over the videos because they would not support the testimony of Null, and Null's testimony that he never told employees during the 1997 campaign that the plant would close if the Union won the election has been stricken with respect to employee meetings where videos were shown. As found above, Null did deviate from the speech which was received herein as Respondent's Exhibit 156. For the reasons specified above under paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null with respect to what he said during his 25th-hour speeches. The above-described testimony that Null threatened plant closure during the August 20, 1997 25th-hour speech is credited. The Respondent violated Section 8(a)(1) of the Act through Null with this conduct.

16. Paragraph 8(u)

Paragraph 8(u) of the complaint alleges that Respondent, through Supervisor Danny Priest on August 22, 1997, assault-

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going to vote. Superintendent Randy Gebbie, according to Ivie's testimony, then told him that he was disappointed in him because he heard his statement on the radio, and Gebbie also told him that he was going to let each department pick a representative to speak with management at least once a month and supervisors were going to classes to learn about management because a lot of them did not know how to speak with people. Ivie testified that at one point in this meeting Gebbie told Randy Hall he could not ask Ivie how he was going to vote.

Gebbie testified that he thought that Ivie worked on the kill floor which would have been under his general direction; that he heard about radio advertisements run by the Union in conjunction with the 1997 union organizing drive; that he did not recall being told that Ivie had been featured in a union radio ad; and that he did not recall telling Ivie that he was disappointed in him because he had been featured in a union radio ad. On cross-examination Gebbie testified that in August 1997 he and Hall were slaughter superintendents; and that Hall did not have a discussion with Ivie about the Union in August 1997 in his presence.

Randy Hall testified that at the time of the Board election in 1997 he was first-shift superintendent over A line kill floor; that Kenneth Ivie was a fat puller on A line; that in his opinion Ivie was undecided as to whether to support the Union during the 1997 union campaign; that he never asked Ivie how he was going to vote in the upcoming August 1997 Board election; that during the summer of 1997 he told Ivie that the Company had nothing to do with putting graffiti on the union trailer in Tar Heel; that shortly before the Board election in 1997 he asked Ivie to come off the line to see Bill Bishop; that Bishop had asked him to get Ivie and he spoke to Ivie's supervisor, Johnnie Brown, and he and Ivie went upstairs but Bishop was not in his office; that he did not know why Bishop wanted to see Ivie; that Supervisor Randy Gebbie had some words with Ivie but he could not recall any part of that conversation; and that he left Ivie with Gebbie and he could only remember that as he was leaving Gebbie asked Ivie something. On cross-examination, Hall testified that each time he and Ivie had discussions regarding the :Union, Ivie was undecided on which way to go; that while he recalled Gebbie asking Ivie some questions, he could not recall what Gebbie asked Ivie; and that when he brought Ivie up to see Bishop, Ivie was not wearing a union T-shirt and he did not recall seeing Ivie wear union paraphernalia.

Bill Bishop testified that he had Ivie taken off the line because Ivie wanted to talk to him in the office.

ing an employee in retaliation for employees engaging in union activities.

Justin Molito who was an organizer for the Union testified that on August 22, 1997, he was present for the vote count in the cafeteria; that when the vote count was announced he heard, "[W]e don't want any fucking Union," and "get the fucking Union out of here"; that the union organizers were essentially forced and shoved out the door; that he saw a group of approximately five very large men with Danny Priest and Jerry Null pushing toward Ray Ward, Chad Young, and a couple of other union organizers who he thought included Johnny Rodriguez; that in the hallway he was to the left of Ward and 10 to 15 feet from him; that he saw Ward get shoved a couple of times, Ward turned around and asked them to stop shoving him; that Ward was grabbing hold of his wife and trying to keep her in front of him; that a man with a white hat who was next to Null and Priest hit Ward in the back of his head; that Ward did not quite go down, he turned abound again "and the next thing that he knew was that Ward was on the ground and there was someone in a uniform macing Ward"; that he saw Rodriguez walk toward the area and he was handcuffed by another officer; that he saw Ward leave with a police officer; that he thought that Ward was handcuffed; and that he did not see Ward strike anyone or use profanity before he went down. On cross-examination Molito testified that there were four or five people between him and Ward; that he walked through the door from the cafeteria on his own power; that he was not pushed until Ward was on the ground and the mace was sprayed; that the person who he saw mace Ward was in a uniform and he was later told he was describing the head of security at the plant, someone named Danny; that Danny is white and he is pretty small, and he thought Danny was wearing a white shirt; and that Danny had a badge on. Subsequently Molito testified that the person who hit Ward was a white guy who may have had a beard and was wearing a white smock and a white helmet.

Jeffrey Greene, who at the time was an organizer for the Union, testified that on August 22, 1997, he was present in the cafeteria of the plant for the vote count; that among the people in the cafeteria where the vote count took place were some Bladen County Sheriff's Department personnel; that once it was realized that the Union had lost the election he saw Larry Johnson come over to an black employee who he knew only as Anthony, and Anthony then went across the room and confronted Chad Young; that the four or five people "in Chad's face" were cursing him, calling him everything under the sun and harassing him; that he had seen Anthony cursing the union handbillers on the handbill line and he "had got into it with Chad Young prior to that election"; that when it got to the point that there were 8 or 10 people around Chad Young he grabbed Young and pushed him out of the room; that a sheriff's deputy then grabbed Young in a protective way; that he went back into the room to get a female union representative, Roz Pellis, out of the room, and the antiunion company people "were pushing us, shoving us, spiting on us, kicking us, calling us niggers, calling us Union lovers, calling us everything under the sun"; that he got Pellis out of the room and he tried to leave the building with the other organizers; that as he walked down the hallway he had his left hand on Ray Ward's left shoulder and his right hand on Ward's wife's right shoulder; that someone behind him took a swing and hit Ray Ward on the left side of his face; that he and Ray Ward turned around to their left and asked who did it; that just as they turned Danny Priest, who was to the right of Ward yelled out "he's arrested"; that Priest was wearing a badge but he did not have a uniform on; that Priest maced Ray Shawn Ward and Supervisor James Blount grabbed Ward and slammed him to the floor; that when Ray Ward hit the floor Priest kicked him while Blount was holding him; that organizer Johnny Rodriguez asked what was going on and he was handcuffed and arrested; that Ray Ward was handcuffed and placed in a squad car; that Ray Ward did not strike or threaten anyone; that he did not see Ray Ward do anything to warrant being arrested; and that he eventually got some of the mace in his eyes and had to go to the emergency room. On cross-examination Greene testified that when Anthony confronted Young, Anthony "called him a Union asshole, get the fuck out of here, we don't need you here. We told you we're going to whup your ass at the beginning of the week and we did"; that this occurred before the official ballot had been announced, toward the end of the count; that he did not hear Anthony say anything to Young about Young having called Anthony an Uncle Tom; that he did not hear the whole exchange between Anthony and Young; and that there were eight people cursing, pushing and shoving Young in the cafeteria.

The Respondent's former manager, Sherri Buffkin, testified that Jerry Null said that all salaried employees were to be at the vote count to show company support; that after it became apparent that the Company was going to win it got boisterous; that Null initiated the pushing; and that one of the individuals pushed was Jeff Green.

The Respondent's supervisor, Billy Jackson, testified that he was instructed to go to the August 1997 Board vote count by Johnson but he did not make it in time and he was running late.

Ray Ward's testimony regarding what happened on August 22, 1997, is summarized below under paragraph 9 of the 1998 complaint relating to his termination.

The Respondent's supervisor, Johnnie Brown, testified that he was present for the vote count after the 1997 Board election; that there could have been from 100 to 200 people present; that toward the end of the count there was cheering when it became obvious that the Company was winning and when the count was finished and the Company won the cheering got louder; that during the vote count he did not hear anyone use curse words, he did not hear any racial slurs, he did not hear the "N" word used, and he did not hear company supervisors use curse words, racial slurs or the "N" word ; that he did not see any supervisors pushing or shoving; that he did not see anyone sitting at the tables get pushed or shoved; that after he exited the room where the ballot count took place and went outside the plant he saw a thin, young black man in handcuffs cursing and spitting at people; that he recognized the man to be an employee of the Respondent who worked for Charlie Newton on the gaming table at the wet end of the kill floor; that this employee "was calling some white guy a mother fucker"; and that this employee was placed in a car and driven away. On cross-examination Brown testified that during the ballot count he did not hear the Board agent who was in charge instruct the people

who were standing behind the observers to move back; that he did not remember seeing people move back away from the observers during the ballot count; that he could not remember hearing anyone complaining that they were being crowded; that the person who he saw outside the plant in handcuffs cursed at three or four white guys after he was placed in a car by police officers or deputy sheriffs; and that the employee in the police car said repeatedly to the three or four white guys on the sidewalk, "You're white mother fuckers." On recross, Brown testified that he did not recall testifying on direct that the employee in handcuffs and in the police car cursed at one white person; and that he did not know the names of the three white men who this employee was cursing at.

Bill Bishop testified that he was present at the vote count after the 1997 Board election with his wife; that he did not see anyone pushing or shoving or bumping up against the union and company observers; that he did not see pushing or shoving of any type during the count and he did not engage in such conduct; that he did not see anyone get spit on during the vote count and he did not engage in such conduct; that when the vote results were announced there was clapping and yelling but he did not hear anyone yelling racial slurs and he did not engage in such conduct; that he did not see anyone pushing or shoving or hitting another person after the vote count result was announced; and that he did not hear anyone use the "N" word. On cross-examination Bishop testified that he did not see what happened regarding Ray Ward but after the incident he saw them picking him up off the floor with handcuffs on.

Priest's testimony regarding what happened on August 22, 1997, is summarized below under paragraph 9 of the 1998 complaint relating to Ward's termination.

Analysis

For the reasons specified under paragraph 9 of the 1998 complaint relating to Ray Ward, the Respondent violated Section 8(a)(1) of the Act through Supervisor Danny Priest on August 22, 1997, assaulting an employee in retaliation for employees engaging in union activities.

16. Paragraph 8(v)

Paragraph 8(v) of the complaint alleges that Respondent, through Supervisor Danny Priest on August 22, 1997, caused the arrest of an employee in retaliation for employees engaging in union activities.

As summarized under paragraph 8(u) of the 1998 complaint above, Justin Molito and Jeffrey Greene testified regarding the August 22, 1997 arrest of Ray Ward.

Ray Ward's testimony regarding what happened on August 22, 1997, is summarized below under paragraph 9 of the 1998 complaint relating to his termination.

Priest's and the testimony of other of the Respondent's witnesses regarding what happened on August 22, 1997, is summarized below under paragraph 9 of the 1998 complaint relating to Ward's termination.

Analysis

For the reasons specified below under paragraph 9 of the 1998 complaint relating to Ray Ward, the Respondent violated Section 8(a)(1) of the Act through Supervisor Danny Priest on August 22, 1997, causing the arrest of an employee in retaliation for employees engaging in union activities.

17. Paragraph 8(w)

Paragraph 8(w) of the complaint alleges that Respondent, through Supervisor Larry Johnson on August 22, 1997, threatened the use of violence in retaliation for employees engaging in union activities.

Ray Ward's testified that on August 22, 1997, while he was in the cafeteria during the Board election vote count, when it became obvious that the Union was losing the election, he overheard Jerry Null and Larry Johnson tell a company observer, Anthony Forrest, "to go kick Chad Young's ass"; and that Forrest then went toward Young and all the pushing and shoving started.

Union organizer Jeffrey Green testified that he saw Larry Johnson with Anthony and then Anthony went across the room and confronted Chad Young.

Plant Manager Larry Johnson testified that shortly before the results of the Board election were announced he walked up to Anthony Forrest and said, "[H]ey there's that guy over there that called you an Uncle Tom. I bet he's not brave now . . . ." (Tr. 5512 and 5513); that he did not tell Anthony Forrest to go "kick Chad Young's ass"; that after he spoke with Forrest, Forrest walked over to Chad Young; and that Forrest did not punch Young or push him.

Analysis

Larry Johnson was not a credible witness. Whatever he said to Anthony Forrest caused him to go over to Chad Young and start a confrontation. Johnson admits as much. The testimony of Ray Ward is credited. By uttering the threat for all nearby to hear, Johnson was trying to make a bad situation worse. The Respondent did not call Forrest to testify. An adverse inference is drawn that Forrest's testimony would have been adverse to the Respondent. The Respondent violated Section 8(a)(1) of the Act through Supervisor Larry Johnson on August 22, 1997, threatening the use of violence in retaliation for employees engaging in union activities.[121]

18. Paragraph 9

Paragraph 9 alleges that Respondent discharged the following employees on the following dates and thereafter failed and refused to reinstate them: Margo McMillan on August 18, 1997, Ray Ward on August 25, 1997, Tara Davis on September 30, 1997, Ada Perry on January 30, 1998, and Patsy Lendon on July 14, 1997.

(a) Tara Davis

Respondent's former employee Tara Davis testified that she started working for the Respondent the last time in February 1997; that her supervisors in 1997 were Robert Williams and Leo Riley; that during 1997 she passed out union stickers and T-shirts and she signed up some people; that she passed out

[121] There is credible evidence of record, in addition to Ward's above-described testimony, that Null participated in this threat. See the summary of the testimony of James McGilberry under Objection 33 below. Null was not a credible witness so his denial is not credited. McGilberry's testimony is credited.

union stickers in the cafeteria during her breaktime and in the hall and outside when she was leaving to go home; that supervisors eat in the cafeteria and use the halls; that she wore the union T- shirt about two times a week and Williams and Riley were present when she wore the T-shirt; that on the first day of the 1997 election, August 21, 1997, a casing supervisor who she referred to only as Tom asked her how she could vote for the Union when he let her come back to his department two times; that she was an observer for the Union at the election on August 22, 1997; that she was present when the votes were counted; that after the votes were counted her husband, Ray Ward, who was also a union observer, was sprayed with mace and arrested; that on August 26, 1997, Williams asked her why her husband tried to hit a supervisor after the vote count and she told Williams that he was not there and did not know what occurred; that on September 8, 1997, her ears began hurting while at work because some of the water with hog waste in it had gotten into her ears; that she was given a pass by Williams to see the nurse in the plant (see the top portion of GC Exh. 16); that the nurse told her that she had an ear infection and had to see a doctor; that the next day she saw a doctor who prescribed medication which would cause drowsiness; that she returned to work on September 10, 1997, and she showed the nurse the medication she was taking; that the nurse asked her if the medication made her go to sleep and she told the nurse it did; that the nurse told her she had to get a note from the doctor indicating that the medication causes drowsiness; that she went to the drugstore and was given a drug precaution statement on the medication (GC Exh. 17)[122]; that on September 10, 1997, she was given a pass signed by Williams in her presence to see the nurse (see bottom one half of GC Exh. 16); that she brought the statement to the nurse who read it and wrote on the "9/10/97" pass "on medication which makes drowsy cannot work while taking this medicine"; that while she was in the nurse's presence the nurse telephoned Williams and told him that Davis could not work while taking this medicine; that she showed this note from the nurse on the bottom half of General Counsel's Exhibit 16 to Williams and she told Williams that the nurse said that she could not work because of her ears and she would be out for about 3 weeks; that Williams gave the pass back to her; that on September 15 Williams telephoned her at her mother's house and asked her why she had not been calling into work; that she told Williams that the nurse told him that she could not work for 3 weeks while she was on the medication which caused drowsiness; that when Williams said that she had been seen at the union hall she told him that while she was out sick she could go anywhere she wanted to go; that on September 26, 1997, she saw the doctor who released her to go to work (GC Exhs. 18 and 19); that she telephoned Williams and told him that while she was supposed to go to work that Monday she had been in a car accident and she would be back at work on Tuesday; that on that Monday she saw a chiropractor; that when she returned to work on September 30, 1997, Supervisor Riley asked her why she did not call in every day and she told him that he had seen the notes about drowsiness; that Riley said that he had seen her down at the union hall talking to union people and he was going to have to let her go; and that she had brought General Counsel's Exhibits 18 and 19 to work with her that day but Riley refused to take them. On cross-examination Davis testified that Williams knew that Ray Ward was her husband because he came to her department during breaktime; that she went to the doctor on September 8, 1997, regarding her ears; that she came back to work the next day and the nurse asked for something in writing regarding the medication; that she went to the doctor again and then she went to the pharmacy again and was given the possible side effects sheet; that on September 10, 1997, she showed the sheet to the nurse at the plant; that she knew that the normal procedure when employees miss work was that they were supposed to call in every day; that before she started this leave because of this medication she met with Supervisor Riley; that the nurse telephones Riley and told him about the medication; that Williams told her that she needed to call in every day but she did not call in every day; that she took the involved medication twice a day, namely in the morning and in the evening; that she did not drive a car while she was on the medication for 3 weeks; that she worked for the Respondent on three different occasions; that she was first hired in February 1993; that she was terminated for attendance in 1994; that about 1 year later she went back to work for the Respondent; that she was terminated for absenteeism in January 1996; that in February 1997 she was rehired for the third time; that when she testified at the hearing herein in October 1998 she had been married to Ray Ward for about 2 years; that when she was rehired in February 1997 she filled out an employment record[123]; that when she was hired for the third time she signed Respondent's Exhibit 38 which is a receipt for an employee handbook; that she did receive an employee handbook when she was hired the third time; and that she signed a number of disciplinary records in 1997. The last of these documents (R. Exh. 46) which is dated "8–28–97," indicates that it is a step 4 final warning. The following appears in the management remarks section:

> Baby Sick
>
> At this time Mrs. Davis stands at 6 days unexcused Mrs. Davis cannot be absent unexcused prior to 11–6–97 or will result in Termination.

Williams signed the form as supervisor and Riley signed the form as superintendent.[124] None of the prior disciplinary forms refers to Davis as "Mrs." On redirect Davis testified that when

[122] The fact sheet refers to 100 capsules of a drug named "PSEUDOCHLOR CAPSULEASA." The fact sheet has a date in it of "09/08/97" and indicates that the prescribed medication is an antihistamine and decongestant which could cause some people to become drowsy, dizzy, or less alert then they are normally.

[123] Davis indicated on the form that in case of an emergency Lois Davis, her mother, should be contacted.

[124] The Respondent was unwilling to stipulate that Riley was a supervisor taking disciplinary action against Davis. One of the Respondent's counsel indicated that Riley is not employed by Smithfield Packing or any of its subsidiaries or affiliated companies; and that Riley is employed by a different company and he is the manager of the casing department, he runs the casing department but he is not a Smithfield supervisor. Counsel for the Respondent was also unwilling to stipulate that Smithfield Packing is a joint employer in this instance.

she testified that Williams told her that she should be calling in every day she was referring to what Williams said to her on September 15, 1997.

Williams, who is a supervisor for Wolfson Casing Co. which is a Company that works with the small intestine of the hogs in the involved Tar Heel plant and has a contract with the Respondent but is not owned by the Respondent, testified that Tara Davis is an employee "with Smithfield"; that he was aware that Davis was married to Ray Ward; that Davis worked in the casing department two different times and she was terminated the first time for absenteeism[125]; that Davis received Respondent's Exhibits 41 through 46, which are disciplinary records, collectively, for unexcused absences, tardiness, and failure to wear ear plugs; that Davis was terminated the last time she worked for Wolfson Casing because

> A Okay, it was due to - she was having problems with her ear. We sent her to the Clinic and they told her she couldn't come back to work until she bring [sic] a note from the doctor.
>
> . . . .
>
> A Okay, about two days later she called me and told me that she needed to be out because of her problem with her ear. I said Tara, I said you've got to call in every day. I said why haven't you been calling in. She never said nothing [sic]. So when she returned back to work we asked her for a doctor note. She did not have a note, so she was at the point where she was getting ready to be terminated so we went ahead and let her go *because of her absentees*. [Emphasis added.]

Williams further testified that it was the company policy that employees are required to telephone in to work every day they are out; that Davis knew this because she knew the rules and "whenever the Clinic sent them a note telling them that they can't come back to work I tell them make sure you call in every day"; that Davis never had a doctor's note which gave the exact date she would be returning to work; that Davis did not leave a message on Wolfson Casing's answering machine on the 2 involved days; that when Davis returned to work she did not bring him a note; that prior to Davis returning to work, the only conversation he had with her was 2 days after she was sent home by the clinic; that he did not recall ever having a conversation with Davis regarding a car accident; that he had seen Davis at the union hall in Tar Heel whenever he went to the nearby bank on Mondays and Fridays and she would say hello; that during his conversation when Davis called him 2 days after she was sent home he did not tell her that he saw her at the union hall; that he did not know Davis was a union supporter until the last election; that Davis' union support or activities did not have anything to do with her termination; and that Davis wore union stickers on her hardhat.

On cross-examination Williams testified that the employees that Wolfson Casing used went through the Respondent's human resources department to get hired; that Wolfson Casing followed the same work rules as the Respondent; that during the Board election the employees of Wolfson Casing were eligible to vote; that Davis was eligible to vote; that he was present when Riley spoke with Davis regarding Respondent's Exhibit 41 and neither he nor Riley checked off any boxes on the form at that time, and the same is true for Respondent's Exhibit 42[126]; that it was common for employees in the casing department to get ear and eye infections from the contaminated water that could get into a person's eyes or ears; that he sent a lot of employees to the nurse in the clinic in the plant with infections; that he checked with the nurse about the health of the employees who he sent to the clinic and she would tell him; that some employees would have problems for a day or two, others would have long-term infections, and the nurse would tell him about the employees; that if the nurse got a note back from the employees' family doctor, she would contact him and tell him how long the employe would be out "sometime"; that if the doctor submitted a note indicating that the employee would be out for 3 days, a week, or 2 weeks, the nurse would tell him; that in those instances he knew the employee would be out for that period of time and he would schedule his work force accordingly; that the employee was nonetheless required to call in every day even though that would not change how he scheduled employees; that he did not see any doctor's note for Davis; that General Counsel's Exhibit 19 is not a doctor's note even though it is signed by a doctor and dated September 26, 1997, because it does not have a date on it indicating when Davis apparently can return to work[127]; that the nurse did give him General Counsel's Exhibit 19; that he did not see General Counsel's Exhibits 17 and 18 before the hearing herein; that he gave Davis the two passes included on General Counsel's Exhibit 16 and he recognized the other handwriting on the passes to be the nurse's handwriting; that the nurse told him that Davis would be on a medication for quite a while which made her drowsy, and Davis would be out for an extended period of time; that when Davis telephoned in he asked her why she did not call in every day and Davis did not tell him that he knew that the nurse said that she was going to be out; and that he, Riley, and Bill Gray, who was in Respondent's human resources department, were involved in the decision to discharge Davis; that during the 1997 campaign some employees wore "Vote No" or "Vote Yes" stickers; that before this there was no rule against wearing stickers on hardhats and after that there was no rule against wearing stickers on hardhats; that his company used the same rules as the Respondent; that the only stickers he ever saw on the hardhats were the "Vote Yes" or "Vote No" stickers; and that employees who do not call in can have their absenteeism excused if they have a doctor's note.

Leo Riley, who is the assistant manager of Wolfson Casing Co. which is located in Respondent's Tar Heel facility, testified that he interviews employees but does not hire them; that he supervises 50 employees on the day shift; that during the 1997 campaign and Board election he was a manager at Wolfson Casing Co.; that Tara Davis, who pulled casings for Wolfson

[125] R. Exh. 22 is a disciplinary record, written warning, step five, dated July 22, 1994, for an unexcused absence.

[126] Williams signed both forms.

[127] The note indicates as follows: "9–26–97 is on no meds that can make her sleepy May return to work She needs to us *muff*." (Emphasis in original.)

Casing Co. at Tar Heel, wore a "Vote Yes" sticker on her hat; that less than 20 other employees in the casing department wore "Vote Yes" stickers; that Davis worked for him two different times; that Davis was terminated the first time for absenteeism; that Davis was terminated the second time for absenteeism, for having a three day no-call no-show; that to his knowledge Davis did not bring a doctor's note for her absences in 1997; that employees are required to call in an hour before start time if they are going to be absent and if they do not, the absence is unexcused; that an employee would not have to call in if they were gave him a note in advance that said that they would be absent for a specific period of time; that Davis never provided any kind of a note which told him the dates that she would be absent; that the employees in the casing department are covered by the Respondent's work rules; that there are no exceptions to the call in rule; that when employees are "brought in" they are told what needs to be done as far as being absent is concerned; that, to his knowledge, he has never refused to accept a doctor's note from Davis; that it is policy that if an employee does not call in for 3 days they are terminated; that if an employee is absent for 3 days without calling and then comes later and brings him a doctor's note, it would cover the employee for the days that were specified in the note; that at the time of her discharge Davis brought him a doctor's note but he could not recall whether the doctor's note excused Davis' prior absences; and that Davis was not absent after she brought in the doctor's note.

On cross-examination Riley testified that Williams was one of his supervisors; that employees on the line are prone to infection from the contaminated water and he often sends them to see the nurse; that an employee can bring a doctor's note to his department or to the nurse; that if the doctor's note indicates that an employee is going to be out for a specified period, the employee does not have to call in every day; that if the nurse told him that an employee was going to be gone for 2 weeks because of their illness, the employee would still have to call in every day because the nurse telling him would not be a doctor's slip, it would not be proper medical documentation as required by the work rule; that the reason for the call-in rule is that he can staff his department and because it is a rule; that he and Bill Gray from human resources met with Davis when they terminated her; that he and Williams talked to Davis before he brought her to personnel; that the discharge document was filled out after he made the decision to discharge Davis; that he was familiar with General Counsel's Exhibits 51(a) through (h) which were in Davis' file; that he directed the secretary in his department to prepare General Counsel's Exhibits 51(a)–(f) and he did not know why the documents were not signed; that he dictated the remarks on General Counsel's Exhibit 51(d)–(f); that he never asked Williams why he did not present General Counsel's Exhibits 51(a)–(f) to Davis inasmuch as these disciplinary records dealt with Davis' no-call no-show; that the nurse told him that she sent Davis home telling her to bring back a doctor's slip; that during the entire period of time that Davis was out covered by General Counsel's Exhibit 51, the only time that he actually talked to her about her absence was when he discharged her; that from the day Davis was sent home until the day he discharged her, he never saw her and he never counseled her about the no-call, no-show policy; that he did not order anyone to call Davis while she was out during that period of time; that he did not order Williams to call Davis; that in a November 6, 1997 affidavit which the Respondent submitted to the Board it is indicated that "I remember that Mary Sutherland, the nurse, and I told Tara that she had to call in every day that she was absent when she was sick"[128]; that it is possible that he told Mary to call Tara in so that the three of them could talk; and that he would not have bothered to tell Williams to call Davis.

Bill Gray, who as noted above was an employee relations manager at the involved Tar Heel facility from September 1995 until May 1998, testified that the attendance and tardiness policy reflected in Respondent's Exhibit 127 was in effect in the months leading up to the union election in the summer of 1997; that he wrote the comments on Tara Davis' "8–28–97" disciplinary record, namely, "At this time Mrs. Davis stands at 6 days unexcused. Mrs. Davis cannot be absent unexcused prior to 11–6–97 or will result in termination" and he signed the comments; that while the point system was abandoned in 1996, the printed portion of the Respondent's Exhibit 46 form does refer to points but it was a general disciplinary record that was used for many things and the block checked was for a final warning; and that an employee was supposed to be terminated if he or she had six unexcused absences but he did not recall the specifics of Tara Davis' situation. On cross-examination Gray testified that nurse Mary Sutherland was in charge of the clinic in 1997; that one of the supervisors wrote "Baby Sick" on the Respondent's Exhibit 46, which is the disciplinary record for Tara Davis; and that an absence related to a child's illness would not be excused.

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[128] The affidavit, which was subsequently remarked as R. Exh. 93, was received in evidence with respect to this one issue. As here pertinent, the affidavit reads as follows:

> Tara Davis was employed in the casing department as a casing puller. She has some kind of medical reason why she had to be out. I remember that Mary Sutherland (the nurse) and I both told Tara that she had to call in each day that she was absent when she was sick. She had already had 6 unexcused absences as of Aug. 28, 1997 and she had been warned that another unexcused absence prior to Nov. 6, 1997 would result in her termination. Still, after the nurse and I talked Tara, she never called in and didn't come to work. She was gone for over 3 days. The policy is termination at this point.

The following occurred on cross-examination by one of the counsel for the General Counsel:

> Q. Now, what else do you remember about that meeting between you, nurse Sutherland and Tara Davis?
>
> A. That's about it.
>
> Q. That meeting never took place, did it Mr. Riley? Tell the truth, that meeting never took place.
>
> A. Yes, it did.
>
> . . . .
>
> Q. And you're just as sure about that as your [sic] are about the rest of your testimony, is that correct?
>
> A. I would say, yes.

Notwithstanding the challenge of the General Counsel to the affidavit that the Respondent apparently submitted to the Board in an attempt to persuade the Board not to pursue this matter, the Respondent did not call Nurse Mary Sutherland to corroborate Riley.

Kenneth Tatum, who is a pharmacist at a CVS Drug Store in Elizabethtown, testified that Respondent's Exhibit 153 is a statement of Tara Davis' profile of what medicine she received from September 1 to September 30, 1997; that during this period Davis received pseudo-chlor which is a decongestant and antihistamine; that he filled the prescription for 30 capsules on September 5, 1997, and the prescription called for 1 capsule twice a day; that this prescription was not refilled during this time period; that on September 5, 1997, he also filled a prescription for Davis for 40 tablets of gualfenesin, which is an expectorant, and the prescription called for two tablets twice daily (a 10-day supply); that on September 26, 1997, he filled a prescription for Davis for neo/polymyxin/hc ear suspension which is usually for an outer ear infection; that General Counsel's Exhibit 17 is a fact sheet on pseudo-chlor, which fact sheet was printed out September 8, 1997, 3 days after Davis had the prescription filled; and that the quantity indicated on General Counsel's Exhibit 17 is the quantity that was shipped to the pharmacy.

Lee Mount, as director of human resources who oversees documents maintained in employee personnel files, sponsored Respondent's Exhibits 18, 19, 20, and 23, all of which are disciplinary records involving Tara Davis dated in 1994. The employee signature does not appear on any of these disciplinary records. As custodian of records, Mount also sponsored (1) Respondent's Exhibit 173, which is a termination form for Tara Davis dated August 23, 1994, and which indicates "Employee was suspended from 8/16/94 thru 8/22/94. Employee did not return on 8/23/94. Employee was a no call no show"; (2) Respondent's Exhibit 174, which is a termination form for Tara Davis dated January 12, 1996, and which indicates "12-1/2 points. Employee refused to go under the new absent program"; (3) Respondent's Exhibits 175 and 176, which are disciplinary records for Tara Davis dated September 9, 1997, and September 15, 1997, respectively, which indicate absenteeism ("Sent home by clinic") and absenteeism, respectively, and neither of which is signed by the employee or anyone else on the designated lines[129]; and (4) Respondent's Exhibit's 177(a)–(f) which are termination forms, dated collectively in February, April, September, and October 1997, for six named employees for 3 days no-call and no-show.

Analysis

The General Counsel on brief contends that when they met with Davis on September 30, 1997, Williams and Riley refused to accept Davis' doctor's aftercare statement and certificate of absence, asked her why she did not call in every day, told her, notwithstanding that she reiterated that the company nurse had informed them that she—Davis—would be out for 3 weeks, that she had been seen talking with union people at the union office while she was out sick and they had to let her go; that Williams acknowledged that the nurse told him that Davis would be out of work for an extended period of time; that Williams admitted that he had not routinely required employees to call in every day in similar circumstances; that Riley attempted to create a pretext upon which to base the discharge of Davis; that while Riley stated that he had not seen or spoken to Davis during the period of time between the day the nurse sent her home to the day he discharged Davis, in an affidavit that the Respondent submitted to the Board he indicated, "[Davis] had some medical reason why she had to be out. I remember that Mary Sutherland (the nurse) and I both told her that she had to call in every day that she was absent when she was sick"; that after the affidavit was brought to his attention on cross-examination he assertedly recalled Sutherland and himself meeting with Davis and talking to Davis but he could not recall the "dates" and he could not recall if they talked to Davis about her ear infection; that he and Sutherland told Davis that she had to call in; and that Riley was sure the meeting took place; that Riley completely fabricated his testimony; that General Counsel's Exhibit 51 demonstrates that the Respondent attempted to create a paper trail to support its discharge of Davis but no official of the Respondent signed any of those disciplinary documents save General Counsel's Exhibit 51(g), which is the record of discharge.

The Respondent on brief argues that the Respondent's employee Tara Davis worked at the involved facility three different times and each time she was discharged for violating the Respondent's attendance policy; that there is not evidence that Davis engaged in any union activity or support except during her third term of employment; that the only exception to the daily call in requirement is when the employee provides a doctor's note indicating a "date certain" that the employee will return to work[130]; that the Respondent did not waive the requirement that Davis call in each day; and that Davis failed to even present a doctor's note covering her alleged chiropractic appointment on September 29, 1997.

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, it has been shown that Tara Davis engaged in union activity, including being an observer for the Union at the August 1997 Board election. Four of the five employees whose terminations are covered in paragraph 9 of the 1998 complaint were observers for the Union at the Board August 1997 election. The Respondent was aware of Tara Davis' activities and the record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against Tara Davis even if she was not engaged in protected activity. As the Respondent points out on brief, (a) hourly employees working for the casing department are supervised by Wolfson managers but the employees are Smithfield employees, and (b) Wolfson is neither owned nor operated by Smithfield and Wolfson supervisors and managers who run the casing department and not employed by

[129] Mount testified that it was not normal to keep disciplinary records which are not signed by a supervisor and/or superintendent in the file although he has seen it happen.

[130] The evidence of record, namely the work rules described below, do not support this assertion.

Smithfield. Davis was subject to the same rules and regulations as other Smithfield employees. According to Bill Gray, the attendance and tardiness policy reflected in Respondent's Exhibit 127 was in effect in the months leading up to the union election in the summer of 1997. As here pertinent, the policy states as follows:

> In general all absences are unexcused, but the following types of absences may be excused (appropriate documentation may be required):
>
> . . . .
>
> 3. Job related injuries
>
> . . . .
>
> 9. Absences due to non work-related illness/injury with proper documentation.
>
> . . . .
>
> An employee who fails to call in and report their absence at least one (1) hour prior to their scheduled start time will be considered as 'No Call, No Show' and their absence will be recorded as an unexcused absence, regardless of the reason.
>
> . . . .
>
> Employees who are absent for three (3) or more consecutive days without notifying the Company will be considered to have voluntarily quit, and their employment will be terminated.

Davis was confused with respect to dates of the involved occurrences. The evidence of record indicates that on Friday September 5, 1997, Davis had a prescription filled for 30 capsules of pseudo-chlor which were to be taken at the rate of one capsule twice daily.

On Monday September 8, 1997, Davis went to the Respondent's clinic and spoke with the nurse, Mary Sutherland, who then wrote on Davis' EMPLOYEE PASS, the top portion of General Counsel's Exhibit 16, "States medication make [sic] her drowsy—needs to go home—Bring back Dr's note concerning medication."

Davis then went to back to the doctor who gave her the prescription and asked him if the medication would make a person go to sleep. The doctor told her that it would. Davis went to the pharmacy with her prescription and she received a fact sheet (GC Exh. 17) which indicates that the medication may cause some people to become drowsy, dizzy, or less alert than they are normally.

On Wednesday September 10, 1997, Davis went back to the company clinic, spoke with nurse Sutherland, and gave her the fact sheet (GC Exh. 17). Sutherland looked at it and gave it back to Davis. Sutherland then wrote on Davis' EMPLOYEE PASS, the bottom portion of General Counsel's Exhibit 16, "on medication which makes her drowsy cannot work while taking this medicine." Sutherland then telephoned Williams and told him that Davis could not work while taking this medicine. Williams concedes that Sutherland told him that Davis would be on a medication for quite a while which made her drowsy, and Davis would be out for an extended period of time. Williams did not deny Davis' testimony that she showed him the above-described note from Sutherland on her September 10, 1997 pass and she told him that she would be out for about 3 weeks. Davis' testimony is credited. The nurse wanted a note concerning the medication and when Davis gave her the fact sheet from the pharmacy with the appropriate information on it Nurse Sutherland decided that "Davis cannot work while taking this medication." Obviously Nurse Sutherland, who at the time was employed by the Respondent which in turn employed Davis, concluded that the documentation was appropriate and proper.

The following Monday, September 15, 1997, Williams telephoned Davis, asked her why she had not been calling into work, and told her that she had been seen at the union hall. Davis explained to Williams that Nurse Sutherland had told him that she could not work for 3 weeks while she was on the medication which caused drowsiness. Davis' testimony about this telephone call is credited. Williams' testimony that the only conversation he had with Davis was 2 days after she was sent home by the clinic to get a note from a doctor is not credited. Two days after she was sent home by the clinic to get a note from a doctor was September 10, 1997. According to Respondent's own documentation, the bottom portion of General Counsel's Exhibit 16, Davis came to work on September 10, 1997. Indeed Williams himself signed the EMPLOYEE PASS, the bottom portion of General Counsel's Exhibit 16, for Davis to go to the clinic on September 10, 1997. Williams telephoned Davis after she was seen at the union hall while she was not at work because Nurse Sutherland decided that Davis was "on medication which makes drowsy [and Davis] cannot work while taking this medication." And the reason that Davis did not call in daily after this was because she reminded Williams that Nurse Sutherland had told him that she could not work for 3 weeks while she was on the medication which caused drowsiness. If it is argued that perhaps Williams was off by a day and he meant that Davis called in on September 11, 1997, then the inquiry would be why would Williams be questioning Davis about calling in when she was doing just that on the first day after she was sent home by the clinic because of the nurse's note on Davis' September 10, 1997 EMPLOYEE PASS.

On Friday September 26, 1997, Davis went to the doctor again and he released her to go to work (GC Exhs. 18 and 19). Davis also had a prescription filled for "neo/polymxin/hc ear susp" with instructions to instill 3–4 drops in each ear twice daily for 3 days. Also Davis telephoned Williams and told him that she was supposed to go to work that Monday but she had been in a car accident and she would be back at work on Tuesday, September 30, 1997. Williams testified that the only time he spoke with Davis during her absence was 2 days after she was sent home. That testimony was not credited. Then Williams testified that he did not recall ever having a conversation with Davis about a car accident. This is equivocal testimony. Davis' testimony is credited. She told Williams that she would be in on September 30, 1997.

On Monday, September 29, 1997, Davis saw a chiropractor.

On Tuesday, September 30, 1997, Davis returned to work. Riley asked her why she did not call in every day, she told Riley that he had seen the notes about her drowsiness, and Riley said that he had seen her down at the union hall talking to union people and he was going to have to let her go. Riley did not

deny telling Davis on September 30, 1997, during her termination meeting that he had seen her down at the union hall talking to union people and he was going to have to let her go. Apparently Riley met with Williams and Davis first. Then Riley brought Davis down to Bill Gray to have her terminated. Both Williams and Gray testified at the hearing herein. Neither denied hearing Riley tell Davis on September 30, 1997, that he saw her at the union hall talking to union people and he was going to have to let her go. Davis is credited. What bothered the Respondent was that while Davis was not working because of the medication she was taking, she was spending time at the union hall. Williams telephoned Davis on September 15, 1997, to convey this message. But Davis told him that while she was out sick she could go anywhere she wanted to go. The reason that Riley asserted in the affidavit the Respondent submitted to the Board that Nurse Sutherland told Davis sometime between September 10 and 30, 1997, that she had to call in every day was to negate Nurse Sutherland's September 10, 1997 conclusion that Davis could not work while taking the involved medication. The General Counsel correctly points out on brief that the Riley's assertion in his affidavit is a fabrication. Riley was not a credible witness. Nurse Sutherland was not called as a witness to corroborate Riley's affidavit once it was challenged on cross-examination by the General Counsel. And Nurse Sutherland was not called as a witness to deny Davis' testimony that Nurse Sutherland told Williams that Davis could not work for 3 weeks while she was on the medication which caused drowsiness. Riley took the position that if the nurse told him that an employee was going to be gone for 2 weeks because of their illness, the employee would still have to call in every day because the nurse telling him would not be a doctor's slip, it would not be proper medical documentation as required by work rule 9. But we are not dealing with just an illness here. Davis was not sent home because of an illness. Davis was sent home because of a medication. Whether one is dealing with "3. Job related injury" which does not specify "with proper documentation" but may require "appropriate documentation" or "9. Absence due to non work-related illness/injury with proper documentation," neither specifically states proper "medical" (Riley's term) documentation or a doctor's slip. The fact sheet showing the side effects of the involved medication with the appropriate information showing that this was the medication that was prescribed to Davis would obviously be appropriate and proper documentation. Davis provided the appropriate and proper documentation at the beginning of her absence with respect to the medication which caused drowsiness. So there was no need to provide documentation at the end of the absence with respect to the medication which caused drowsiness. When Davis on September 30, 1997, attempted to give Riley the doctor's *"CERTIFICATE OF ABSENCE AND/OR RESTRICTIONS FROM SCHOOL OR WORK,"* General Counsel's Exhibit 19 which is dated September 26, 1997, and which indicates, "Tara Davis was treated at Bladen Urgent Care on 9–26–97 is on no meds that can make her sleepy may return to work She needs to use *muffs*" (Emphasis in original.) Riley refused to take it, along with the *"AFTERCARE INSTRUCTIONS"* (GC Exh. 18) which is dated "9–26–97" and indicates, inter alia, "able to work with muffs." Riley did not care about documentation at that point. Riley was not a credible witness. Davis is credited. She attempted to give Riley General Counsel's Exhibits 18 and 19 and he refused to take them. Davis' termination was not based on "No Call, No Show." Davis termination was based on the fact that while she was out between September 10 and 30, 1997, she was seen at the union hall. Both Riley and Williams made a point of telling her that she was seen at the union hall. Any attempt on Davis' part to provide documentation with respect to seeing a chiropractor on September 30, 1997, would undoubtedly have met with the same fate as her attempt to give Riley General Counsel's Exhibits 18 and 19.[131] The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Tara Davis on September 30, 1997.

(b) Margo Mcmillan

The Respondent's former employee Margo McMillan testified that she worked for the Company from September 1994 to August 21, 1997; that she started as a production worker and her last job was laundry crew leader second shift; that her supervisor in her last position was Billy Jackson, who reported to General Manager Sherri Buffkin; that she was an observer for the Union at the Board election on August 21, 1997; that in July and August 1997 she attended two company meetings held regarding the Union; that the second such meeting was held in the Respondent's nonsmoking cafeteria, there were about eight employees present and the meeting was conducted by Billy Jackson; that at this meeting Billy Jackson showed the employees a film, asked if anybody had any comments, and said, "Margo, I know you're from up North and you probably know about Unions"; that she answered that she had belonged to some unions before and she knew a little something about unions; that Jackson told the employees that if the Union came in, he could not talk to the employees because he would get into trouble; that she was the crew leader for both the cut floor (sometimes referred to as the old laundry) and conversion laundries; that the laundry gave new hires cards and, like the employees who were already working at the plant, smocks, and gloves; that on August 13, 1997, Reggie Simmons, a maintenance employee, came to the laundry and told her that he was downstairs and John Hall and Robert Claiborne were coming out of a meeting and John Hall approached him and asked him if he knew McMillan and what type of person she was; that Simmons advised her to watch herself because they were watching her; that on August 14, 1997, she went to the office of Sherri Buffkin and told her about what Simmons said and asked Buffkin what was going on; that Buffkin told her that she had just had a meeting with John Hall and Helen McCoy and McMillan's name was not brought up, John Hall had complimented McMillan's work to Buffkin the previous week, and she did not know what was going on but she would find out; that later on August 14, 1997, Buffkin telephoned her and told her to come to Hall's office; that Buffkin was in Hall's office

[131] The Respondent takes the position that Davis was terminated for "over three days no call no show" (GC Exh. 51(g) which is Davis' termination form. Obviously it could not have been relying on information it did not have at the time regarding the number of days that Davis was taking the medication which caused the drowsiness.

and Hall came in; that Hall told her that it was brought to his attention that she had a bad attitude and he was going to remove her from the general population and put her in a controlled area; that Hall asked her if there was anywhere in the plant that she wanted to work; that she told Hall that she did not have a bad attitude; that Hall said that he had a written complaint about her from a former employee, and he had done a survey and hourly employees and management said that she had a bad attitude; that she offered to turn in her white hat but Hall told her to go back upstairs and do her job; that when she went back to the laundry Buffkin again telephoned her and told her to come back to Hall's office; that she went to Hall's office and met with Hall and Buffkin; that Hall said that there were some things that he was not aware about her that Buffkin made him aware of, namely, that McMillan had impeccable attendance, she made good decisions, and she had above average clerical skills; that Hall said that they had come up with a job for her to do the labels in the cage; that she asked if she could let him know tomorrow because she wanted to go home and discuss it with her family; that Hall said that would be fine and they would meet the next day[132]; that she went back to the cut floor laundry and started a petition (GC Exh. 25) to vouch for her character and attitude; that she had over 200 people in the plant sign the petition in her presence that day; that the following day, August 15, 1997, she first met with her immediate supervisor, Billy Jackson, who said that she was a good crew leader; that she asked Jackson why he was not speaking up for her; that she spoke with Larry Johnson on her way to meet with Hall and Buffkin; that she told Johnson about her August 14, 1997 meeting with Hall and Buffkin and she showed Johnson the petition; that Johnson told her to meet with Hall and Buffkin and if she did not like the outcome, she should come to see him Monday; that as she went into Hall's office she overheard Buffkin saying, "[T]hat mf'er was up in Larry's face with a paper"; that when she met with Hall and Buffkin, Hall asked her if she was going to accept the job and she told him that she did not have time to discuss it with her family; that Hall told her that she was hard headed and played hard ball; that when she showed Hall the petition he said that it did not mean anything to him because she probably went to the people that liked her; that Hall said that he was going to suspend her for 3 days; that when she asked him on what grounds he said forget the suspension; that Hall said that he did not want to believe that she was the monster that people perceived her to be and he asked her if she remembered a year ago when he came up to the laundry with a paper and she questioned his authority; that she told him that she remembered the incident but she did not question his authority; that Hall said that she questioned his authority by alerting Buffkin; that she explained that she would not be doing her job as she was told if she did not alert Buffkin; that Hall told her that she had an appointment with Lee Mount Monday to determine whether she stayed in her present position, be moved to a new one, or be terminated; that Hall told her to go home and he would pay her for the rest of the day; that Hall said that if he had his way he would have fired her on Thursday August 14, 1997; that on Monday August 18, 1997, she first met with Johnson and asked him to find out what was going on with her job; that Johnson asked her if she was in favor of the Union and she told him yes it couldn't hurt in view of the situation she found herself in at that time; that Johnson told her that he was at an antiunion meeting with Hispanics and when her name was mentioned they went wild; that she told Johnson that this was strange because the two people who gave the Hispanic antiunion meeting, Marco and Hector, told her that as far as they were concerned the Hispanic people liked her but they did have a problem with an employee named Helen McCoy[133]; that Johnson then told her that he did not want her to be late for her meeting with Lee Mount; that she then met with Mount who took her back to Johnson's office; that she waited outside while Mount and Johnson had a meeting; that Mount and Johnson came out and Mount told her that they were getting bits and pieces of what was going on and he would call her the next day and tell her what was going on; that she said that she was at the plant and she was willing to work and nobody is telling me why I can't work; that Mount told her that he would call her one way or the other tomorrow; that Mount did not call her the following day, August 19, 1997, and so she telephoned the plant on August 20, 1997; that she was given a message from Mount that he was tied up with the Union and he would get back to her one day next week; that on Thursday she went to the plant with four or five union organizers as an observer for the Union; that Manager John Hall and Supervisor Dale Smith saw her come onto the plant with the union organizers; that once inside the plant they had to wait and while she was waiting she saw Larry Johnson, Lee Mount, Danny Priest, and Jerry Null in the area; that she asked Mary Bell for her paycheck and Bell asked her if she had a clearance slip; that she told Bell that she did not know that she needed a clearance slip to pick up her paycheck; that an employee would only need a clearance slip if they were terminated or quit and they would have to clear everything off the employee card so that they can get a clearance slip; that she obtained a clearance slip (GC Exh. 26) on August 21, 1997; that when she got her check Bell asked for her I.D. card and said that she was sorry; that Bell told her that "term" (for terminated) was on the check; that she was in the plant that day from 6 p.m. until 1:30 a.m. the following day as a union observer and Johnson, Null, and supervisors from the cut floor saw her working as a union observer; that on August 22, 1997, she telephoned Billy Jackson and asked him if

[132] The petition reads as follows: "Do I have a bad attitude?" and it has two columns with the first headed with *"mean yes"* and the second headed with *nice no*." All of the approximately 230 signatures appear in the "*nine no*" column.

[133] McMillan testified that she observed McCoy working in the laundry; that McCoy had an attitude and she was rude to Hispanic people; that Mccoy would call Hispanic people wet backs, sticks, dumb, butts, and "mother fuckers"; that the managers knew about McCoy's attitude; that the day that she went to see Buffkin about what Simmons told her Buffin told her that Hall was having a meeting with McCoy regarding how she was treating Hispanic people; that Buffkin told her that Hall had warned McCoy and written her up because of the complaints lodged against her for the way she treated Hispanic people; that Mccoy had been cursing at employees for several months before she was written up; and that when she was terminated Mccoy was still employed at the plant.

she was terminated and he said that as far as he knew she was; that her ballot in the union election was not challenged; and that she subsequently received the following letter, dated August 27, 1997, from Mount (GC Exh. 27):

> The purpose of this letter is to inform you of our decision regarding your employment with Carolina Food Processors.
>
> Our investigation of the complaints lodged against you by both hourly employees and management personnel was completed *yesterday*. Based upon the written warning issued to you on June 30, 1997 and your continued negative approach with hourly employees and Supervisors, we have decided that the appropriate action was to terminate your employment effective *today*. [Emphasis added.]

McMillan further testified that she did not recall receiving a warning on June 30, 1997; that her supervisor did not issue her a written warning because of her negative behavior and attitude on June 30, 1997; that she attended the Reverend Jesse Jackson rally before the August 1997 union election; that she signed two union authorization cards; that several weeks right before the August 1997 union election the number of new employees increased anywhere from 17 to 28 per day per shift; that the normal number of new employees that came in to get equipped prior to that time was anywhere from 5 to 10; that she worked with Kim Bardeau in the cut floor laundry for 8 or 9 months; that Bardeau would call employees "stupid asses" and "mother fucker" to their faces; that when she was terminated Bardeau was still employed at the plant; that she worked with Jennette Ellison in the cut floor laundry for over 2 years; that during a confrontation with Second-Shift Supervisor Maurice Pridgett, Ellison called him a "big fat mother fucker"; that Billy Jackson wrote Ellison up for this incident; that when she was terminated Ellison was still employed at the plant; that in June or July 1997 an employee cursed Ada Perry and snatched a smock out of her hand; that when she confronted the employee and asked for her name and the name of her supervisor the employee told her to "get the fuck out of her face"; that she told the superintendent of the cut floor, Ken Fisher, and the assistant superintendent of the cut floor, Ray Locklear; that the employee involved was not fired[134]; that Sherrie Owens, who worked in the cut floor laundry under her, used profanity in addressing her a second time in 2 weeks and she reported the situation to Billy Jackson[135]; that she did not know if Owens was disciplined but Jackson told her that everything was taken care of; and that when she was terminated she believed that Owens was still working at the plant but she may have been on maternity leave.

On cross-examination McMillan testified that she was suspended for 2 days concerning an altercation with Danny Priest and a security guard (in September 1995); that she signed Respondent's Exhibit 65 which is a disciplinary record dated May 19, 1997, memorializing a verbal counseling for wearing a necklace while working; that in 1997 she did not campaign for the Union or wear any sort of union badge or button; that Sherri Buffkin and Billy Jackson knew that she was for the Union because she discussed this with them during conversations with them in June or July 1997; that she did not indicate this in her September 22, 1997 affidavit to the Board; that to her knowledge Sherri Buffkin and Billy Jackson had no knowledge that she supported the Union in the 1997 campaign; that it was true that Plant Manager Larry Johnson asked her if she was for the Union; that she saw a film with Jerry Null in it and the film referred to strikes; that her affidavit to the Board indicates, "I don't recall anything said about strikes at the Null film"; that she saw two films and both pertained to strikes[136]; that John Hall told her that he had seen a change for the better in the last couple of months and he asked her if there was anywhere else in the plant, other than laundry, that she wanted to work; that Hall told her that in his opinion she had questioned his authority in the past when she alerted her superintendent and her supervisor; that while Hall gave her a day to discuss a different position with her family, she told him when she met with him again that she did not discuss the matter with her family because she worked late the night before; that after she met with Hall and Buffkin she contacted the Union about her situation and she was asked to be an observer for the Union; that she did not recall getting any kind of warning in June 1997 over conduct; that in June 1997 Billy Jackson told her that he had complaints from management about her; that as indicated in her affidavit to the Board, the complaints were about having a bad attitude; that although she did not have her glasses at the time, she refused to sign Respondent's Exhibit 66 after Billy Jackson read it to her; that Billy Jackson said it involved complaints from management, she told Billy Jackson that she had not gotten into any hassles with anyone in management, and Billy Jackson would not or could not tell her who it came from; that she had this discussion with Billy Jackson the day she took Sherrie Owens back to Billy for cursing at her; that during the second employee meeting with Billy Jackson when he told the employees he would get into trouble if he talked to the employees when the Union came in, she told Jackson and the employees present that if the Union came in, there would be a grievance procedure and that employees, instead of complaining to a supervisor would take complaints to a shop steward; and that all of the people who signed General Counsel's Exhibit 25 signed in her presence.

On redirect, McMillan testified that sometime prior to her termination she had a conversation with Buffkin during which she told Buffkin about her views of the Union; that when she went to pick up her check on August 21, 1997, she was told she had to have a clearance slip because "term" was written in her check; that when Billy Jackson told employees that he would get into trouble if he talked to an employee regarding filing a grievance, she told Jackson and the employees present that she

[134] It was not clear from the testimony that McMillan was able to identify by name the involved employee to the two supervisors.

[135] McMillan testified that Woens called her a "bitch," a "mother fucker," and a "s.o.b."; and that Owens called her everything under the sun.

[136] The Respondent stipulated that the testimony that McMillan gave to the effect that the films she saw were about strikes is true. On direct, in response to a question from one of the union attorneys, McMillan testified that at one of the August 1997 meetings Jere Null was on film saying that the employees did not need a union, to vote no, and if the Union came in, the employees would go on strike; and that films of the violence that can happen were shown.

did not believe that was how it went and if the Union came in it would be a go between, like an arbitrator listening to both sides; and that she did not take Sherrie Owens to Billy Jackson until she used profanity at her for the second time. Subsequently McMillan testified that when Hall sent a requisition to the laundry she was under instructions to notify her supervisor or superintendent, to give management whatever they want but to leave a note in the office of her supervisor or superintendent; that on two or three occasions she did leave such a note and neither Sherri Buffkin nor Billy Jackson told her she did anything wrong; that to her knowledge Sherrie Owens "got no write up" when she turned her in to Billy Jackson; that it was indicated on one of the films that if the Union came in, strikes would result and people would lose their job; and that Larry Johnson said that he belonged to a plant, a union came in, the employees went on strike, and he lost his job as a result of the union coming in.

On recross, McMillan testified that Billy Jackson did not tell her that he had written Sherrie Owens up; and that her affidavit to the Board indicates, "Jackson said he took care of the matter with Sherry. That she got written up." Subsequently, McMillan testified that a couple of weeks before the election, "it might have been a month or two," she told Sherri Buffkin that she was in favor of the Union and it seemed like management was mad at her; and that Buffkin told her that she was her general manager and she was not mad at her. McMillan conceded that her conversation with Sherri Buffkin about her support of the Union is not mentioned in her 26-page affidavit to the Board.

The Respondent's former employee Ada Perry testified that she signed the petition Margo McMillan circulated because she had never heard McMillan "have" that kind of language toward people.

The Respondent's former manager Sherri Buffkin testified that she was familiar with the circumstances surrounding the termination of McMillan; that a few days before McMillan was terminated the Company conducted an antiunion meeting in the main conference room in the plant; that she did not attend the meeting; that at the conclusion of the meeting executive secretary Brenda Cooper telephoned her and told her that she needed to come downstairs immediately because a lawyer wanted to see her; that she went downstairs and met with one of Respondent's attorneys, Bill Barrett, near Cooper's desk in the hallway in front of accounting; that Barrett and John Hall,[137] who is plant superintendent on the third shift, were there; that after her conversation with Barrett and Hall, which took place 2 days prior to McMillan's termination, Hall called Margo downstairs to his office and she and Hall met with McMillan; that Hall told McMillan that her name had come up in these meetings and that he wanted to take her out of the general population, he did not want her in the laundry anymore; that McMillan asked why in that she did not have any problems; that Hall repeated that he wanted her out of the general population and indicated that Buffkin was offering the label cage; that McMillan said she was scared because a couple of the people in that job were gone; that Hall offered her the label cage job and McMillan said that she needed time to discuss it with her family; that Hall agreed that McMillan could give him her answer the next day; that Hall did offer a couple of other jobs but McMillan, who had carpel tunnel, could not work in the cold and that is why she came to the laundry; that she and Hall, after this first meeting with McMillan, went to Null's office; that Null told her and Hall that he did not want McMillan to have the label cage job because it was still too populated[138]; that the following day she and Hall met with McMillan; that during this second meeting, which was held in Hall's office, McMillan presented Hall with a petition (GC Exh. 25), which was signed by a number of employees who indicated that she did not have an attitude; that when Hall told McMillan that the petition was irrelevant and that his mind was made up, McMillan told Hall that she would take the job in the label cage; that Hall said that the offer was no longer any good; that Hall then referred her to Lee Mount in human resources; that anytime an employee is sent to human resources it is for termination because those were company instructions, a human resources representative had to be present; and that Hall said to her that McMillan was terminated at that point.

Subsequently, Buffkin testified that Sherrie Owens worked in the laundry for a short period of time; that there was a conflict between Owens and other employees because Owens was pregnant at the time and she refused to do her job; that there were writeups in Owens file pertaining to her refusing to do her job; that Owens was told that she would be terminated if she did not transfer; and that she spoke to Supervisor Bill Bishop and he agreed to take Owens back in conversion.

On cross-examination Buffkin testified that Supervisors Colleen Rambo and Ray Locklear have told her that many employees have complained about McMillan but when she told them to document it and she would take care of it they did nothing; that McMillan, like the other employees in the laundry, argues with coworkers in laundry; that problems regarding McMillan were brought to her attention a couple of times when McMillan worked in the laundry; that one of the problems which was brought to her attention involved John Hall telephoning her at home one night indicating that there was an emergency at the plant and he wanted rain suits from the laundry without following policy requiring that the names be recorded so that entries can be made on the employees' cards; that McMillan had told Hall the policy and indicated that she would get in trouble with her superintendent, Buffkin, if she gave him what he wanted without following policy; that Hall told her that considering his position in the plant that he should have gotten it; that when McMillan telephoned her at home later that evening she told McMillan that she was absolutely right in following policy but that the policy was going to be amended to take into consideration rank; that she told McMillan that in the future if somebody in this position or a similar position wants something she

[137] After the Respondent took the position that the conversation was privileged, counsel for the General Counsel was allowed to make an offer of proof by Buffkin regarding what was allegedly said during this conversation.

[138] Sherri Buffkin testified that about 1 week before the August 1997 Board election Null told her that the laundry was "just a hot house of Union support."

should tell them the policy, give them what they want, and then tell her about it the next day; that the other situation she referred to involved McMillan and Sherrie Owens, who was pregnant and did not want to do her job; that Owens complained about the way McMillan approached her and the tone of McMillan's voice; that McMillan's supervisor, Billy Jackson, dealt with the problem counseling both Owens and McMillan; that she did not counsel McMillan regarding the Owens matter[139]; that at one point during one of the meetings she and Hall had with McMillan, McMillan indicated that she wanted to stay in the laundry and not be a crew leader any more; and that during the second meeting with her and Hall, McMillan was not defiant but she was sobbing hysterically, she was begging and McMillan told Hall she would do anything.

The Respondent's supervisor, Billy Jackson, testified that in the summer of 1997 he supervised approximately 30 employees, including Margo McMillan, who was his second-shift crew leader in laundry; that in the summer of 1997 he worked from 6:30 a.m. until approximately 4 p.m.; that the second shift worked from 3 p.m. until 1 or 2 a.m. depending on the length of the kill and cut; that leading up to the 1997 election McMillan did not ever make it known to him whether she supported the Union or the Company; that he did not remember seeing McMillan wearing a union T-shirt; that he never saw McMillan wearing a union button; that as indicated above under paragraph 8(a) of the 1998 complaint, at an employee meeting he did direct employees' questions about unions to McMillan; that he did not have any problems with McMillan but he had received many complaints about her very poor attitude; that he filled out and signed Respondent's Exhibit 66 which is a disciplinary form dated "6–27–97," a step 2 written warning with the points crossed out on which the following management remarks appear:

> Margo is being counseled on her attitude toward her coworkers & members of management. In the last week I have had three complaints on her, such as using abusive language & having a bad attitude in general. This will not be tolerated. Any further violations such as this may result in suspension, demotion, or termination.

Billy Jackson did not deny McMillan's testimony that he refused to tell her who made the alleged complaints.[140] Billy Jackson testified further that the incident covered in Respondent's Exhibit 66 involved a laundry employee, Sherrie Owens, and he issued a written discipline to Owens also; that he discussed the complaints he received about McMillan with his supervisor Sherri Buffkin and he asked the advice of Superintendent Colleen Rambo; that Buffkin told him to document each complaint and they would be taken to human relations; that McMillan showed him a petition she was circulating within the plant and asked him if he would stand up for her and sort of speak on her behalf; that he did not speak on her behalf because he thought she was at fault with respect to a lot of the complaints; that the complaints he received regarding McMillan were not documented because people did not want to put it in writing; that he did not discuss with Buffkin anything related to McMillan's termination; that the points were crossed out on Respondent's Exhibit 66 because the Respondent had done away with the point system but it was still using the old forms; and that McMillan did not sign Respondent's Exhibit 66.

On cross-examination Billy Jackson testified that he was aware that McMillan was involved with the Union; that he did not go to the election and he was not aware that McMillan was an observer at the election; that while he received complaints about McMillan, there were also complaints about the conduct and attitude of a number of other employees in the laundry department; that he received far more complaints about McMillan than anybody else; that no one instructed him to issue the warning dated September 16, 1997, to all laundry employees; that he chose to issue the September 16, 1997 warning to laundry employees because "[i]t was getting really bad as far as the attitudes"; that he did not know if it was getting worse after McMillan was terminated because he did not recall when McMillan was terminated (McMillan was terminated before the September 16, 1997 warning was issued); that he was not involved in McMillan's termination and he did not know anything about why she was terminated; that he met with McMillan about Respondent's Exhibit 66 and he did not know who caused the confrontation between McMillan and Sherrie Owens[141]; that he did not recall issuing any other warnings of this nature to McMillan; that the laundry department is a difficult job; that sometimes the employees standing in line waiting to be served are unruly; that employees who work behind the laundry counter have also complained to him about the conduct of the employees in the line; that he has spoken to other supervisors about having their employees under better control; that he did not have any work problems with McMillan; that he had problems with the attitudes of the laundry department employees until he left that department in late 1998; that employee attitudes was a big problem that he had to contend with; that when he issued Respondent's Exhibit 66 there still was a progressive discipline policy and an employee still could have gotten several more steps before termination; that he would have gone through the progressive discipline system with an employee for mere verbal exchanges; that he was aware that some employees would try to get smocks and other equipment even if they did not have the proper ticket; that the laundry issue clerks and crew leaders had to deal with those matters;

[139] This conflicts with a portion of an "AFFIDAVIT," treated below, that Sherri Buffkin signed.

[140] Billy Jackson did not indicate at the hearing herein who made the alleged complaints.

[141] Everyone involved, including Billy Jackson, knew that Owens was not doing her job. Owens had not been placed on a light-duty restriction by her doctor. She admits that she cursed. And it was McMillan who brought Owens to Billy Jackson because of the cursing. With respect to Perry, the Respondent issued the September 16, 1997 warning to all laundry employees so that it would have some documentation in Perry's file that it could use in the future. As noted below, the Respondent did cite the warning to all laundry employees regarding the Perry termination. Billy Jackson now claims that he did not know who caused the confrontation between McMillan and Owens. Billy Jackson lied when he testified that no one instructed him to issue the warning dated September 16, 1997. In my opinion, Billy Jackson was instructed to issue the June 30 1997 warning to McMillan.

that he did have complaints about employees trying to get a smock without the right ticket; and that he had the authority to recommend that a crew leader be removed if there were problems and disruptions.

Jason Chavis, who is a crew leader for the Respondent, testified that in 1997 he worked as the first-shift crew leader in the laundry and Margo McMillan was a crew leader on the second shift.[142] On cross-examination Chavis testified that he never worked with McMillan; that he never personally observed any misconduct on the part of McMillan; that he never passed on any written complaints to any supervisor about McMillan; and that he never issued any written warning to McMillan.

Rachel Bailley, who is a crew leader for the Respondent at Tar Heel, testified that when she was a crew leader in laundry on the fist shift her time ran over into McMillan's time when McMillan was a crew leader on the second shift; that she worked with McMillan for over a year during this overlap; that while she heard McMillan curse a lot McMillan did not curse directly at employees but rather to herself loud enough for others to hear[143]; that she complained to Sherri Buffkin a lot about the way McMillan talked and carried on; that Helen McCoy had a problem with McMillan; that everybody in the laundry room curses from time to time but not as much as McMillan; and that she signed the petition McMillan circulated just before she was terminated (GC Exh. 25).[144]

On cross-examination Bailley testified that her overlap with McMillan was 1 to 2 hours and at the end of the month during inventory; that McMillan did her job; that McCoy also signed McMillan's above-described petition where is says McMillan was a nice employee; that McCoy was issued a disciplinary for her conduct; that McCoy had an attitude problem; that she did not remember ever submitting a written complaint about McMillan to Buffkin; that having a complaint put in writing "sounds like something . . . [Buffkin] would say but I don't remember that [Buffkin telling her to put complaints in writing]"; that she did not recall any written complaints about McMillan's attitude; that there was a problem in laundry going back to 1995 with laundry employees dealing with production employees who came through the line and there was a memorandum given to employees regarding the problem; that laundry employees received a warning (GC Exh. 42 dated September 16, 1997) after McMillan had been terminated; that there had always been an attitude problem among the laundry employees and it was not limited to McMillan; that if Jason Chavis became first shift-crew leader in laundry she may not have been first shift crew leader in laundry after March 1997; that after Chavis took over as first shift crew leader in laundry she no longer worked with the issue clerks in laundry and she became a locker room coordinator; that McCoy was suspended but she still works at the Respondent's Tar Heel facility; that she heard McCoy cursing at Mexican employees and she heard McCoy making little remarks to them like telling them to go back to Mexico and making derogatory statements toward Mexicans like calling them wetbacks; that when she worked as crew leader on the first shift she worked from 8 a.m. until 4 or 4:30 p.m. and when she stayed over she worked to 6 p,m. "maybe at the latest"; that she was wrong about the times if McMillan started at 6 p.m. and she was changing her testimony if the times did not work out; and that she worked a lot of time over with McMillan and she did not know what the hours were.

On redirect, Bailley testified that after the second time that she became a locker coordinator she worked with McMillan a lot of times right up until she left, "no matter what job I was doing." Subsequently, Bailley testified that when she worked as an issue clerk in laundry she did believe that production employees abused her and when she felt it was too much she would walk out the door; and that she cursed when she worked in laundry but she never directed it at anybody and she did not think that anyone heard her curse.

The Respondent's employee Sabrina Richardson testified that she worked in the kill floor laundry on the first shift in 1996; that Margo McMillan worked in the same laundry on the second shift; that her shift ended about 4:30 p.m. and McMillan's shift began at 3 p.m.; that there was an overlap in their shifts; that she would be at the counter when McMillan came in and McMillan would say, "I'm tired of this shit," and complain about the first shift not doing its job; and that in December 1996 McMillan told First-Shift Crew Leader Rachael, whose last name she could not recall, that every time that she, McMillan, came into the laundry it was never cleaned up and Rachael replied that her people cleaned up the laundry.

On cross-examination Richardson testified that she never discussed McMillan's attitude with Sherrie Buffkin or any other supervisor; that she had nothing to do with McMillan's termination and no supervisor ever talked to her about McMillan; that she was on the first shift the entire time she worked in the laundry from August 1996 until May 1997 and her shift ended at 4:30 p,m. in both laundries; that when McMillan complained when she came in McMillan was complaining about work that she believed was not done properly; and that she heard other laundry employees use curse words.

The Respondent's employee Sherrie Owens testified that she worked in the main (cut floor) laundry for about 2 months in 1997; that Margo McMillan was her crew leader when she worked in the laundry on the second shift; that McMillan had a bad attitude toward employees and while McMillan did not curse directly at employees, McMillan used "cuss" words every day; that she was pregnant when she worked in the laundry and McMillan had her doing jobs which she should not, in her opinion, have been required to do; that she asked McMillan to be excused from doing certain tasks in the laundry and McMillan refused, indicating that it was her job to do it; that she complained to McMillan's supervisor, Billy Jackson, that McMillan

[142] Chavis, who was an observer for the Company at the 1997 Board election, testified that he relayed some complaints to Billy Jackson. As noted above, Jackson was told to get complaints in writing. Chavis did not testify that he was told to get the complaints in writing. He did not introduce any written complaints. He could not even identify the people who allegedly complained.

[143] Bailley testified that one time McMillan cursed at her husband, who worked at the involved Tar Heel facility, at the laundry room counter.

[144] As noted above, the petition asked do I (McMillan) have a bad attitude and Bailley testified that she signed under the "*nice*, *no*" column; and that she wrote next to her signature "All laundry employees have attitude from time to time."

was letting certain nonlaundry employees come into the laundry room and get clothes, or gloves one day; that there is a rule prohibiting production employees from coming into the laundry room; that she complained to Jackson that after McMillan had told her to do a job other than the one she was doing at the time she said, "I'm sick of this damn shift," and McMillan overheard her and said, "[D]on't you cuss at me"; that Jackson told her that he had to write her up for "cussing" because McMillan was her crew leader; that she asked Sherri Buffkin to be transferred back to conversion and Buffkin told her that if the superintendent of conversion, Bill Bishop, said it was okay, she could go back to conversion; that until the transfer came through, Buffkin had her work in the conversion laundry; and that Buffkin told her that if she kept getting complaints about McMillan she was out the door.

On cross-examination Owens testified that the 2 months she worked in the laundry had to be in the middle of 1997; that she gave birth in November 1997 and she worked in the laundry about 3 or 4 months before that; that she received a writeup for cussing at her crew leader in laundry; that some of the employees in laundry use profanity and she uses profanity; that when she worked in the laundry she did not have any medical restrictions because of her pregnancy; that she had two "Vote No" stickers; and that when she got the job in the laundry she did not tell anyone that it was her intent to do only part of the job.

On redirect, Owens testified that McMillan started work at 5 p.m.; and that she was not sure if McMillan started earlier. On recross, Owens testified that she told Billy Jackson that some of the stuff that McMillan was asking her to do was too heavy for her to pick up and Jackson told her to ask McMillan if she could find something else for her to do but it was her job to do it; that most of the work in the laundry is much lighter than what she was doing in conversion before she transferred; and that she had not been placed on light-duty restriction by her doctor. Subsequently, Owens testified that she received the write up for telling McMillan, "I was tired of this damn shit."[145] Owens then testified that she was not addressing McMillan when she said this, she had her head down, she was talking to herself, McMillan was beside her, and McMillan heard what she said.

The Respondent's crew leader, Marlene Norton, testified that she used the cut floor laundry twice every day during the time of the Board election in 1997; that on one occasion she laid her smock on the counter and a young guy from the kill floor was rushing, he ran into her and she went "unnh"; that McMillan yelled at her, "[W]hat are you unnh about, he was up here before you were"[146]; and that she complained to Sherri Buffkin and Buffkin said she would talk to McMillan about it. On cross-examination Norton testified that she had only one complaint that she referred to management regarding McMillan; and that she did not know whether Buffkin spoke to McMillan about the one incident.

The Respondent's purchasing agent at Tar Heel, Emogene (Susie) Jackson, testified that from September 1996 until January 1997 she was a laundry clerk on the first shift (8 a.m. to 4:30 p.m.); that the crew leader on the second shift, Margo McMillan, came in at 4 p.m.; that she observed McMillan cursing at the employees coming up to the window to get supplies[147]; that McMillan said in her presence that the only reason she was placed in the laundry was the fact that she was the wife of Billy Jackson who worked for Sherrie Buffkin; that beginning in September 1996 she reported to Sherri Buffkin, one of her job responsibilities was to take phone messages for Buffkin, and while performing this function she took complaints about McMillan and passed them on to Buffkin; that she passed a written message to Buffkin that Supervisor Ray Locklear requested that Buffkin get back to him regarding his employees' complaint that McMillan was rude to them and cursed at them; that on a daily basis she took complaints from employees about McMillan and passed them on to Buffkin; that she took messages for Buffkin from October 1996 up until September 1998 and up until McMillan was terminated (August 1997) she took "probably hundreds of messages" with respect to complaints about McMillan and she passed these messages on to Buffkin; that she would write a message to Buffkin indicating what happened and she did communicate with Buffkin on what the problems were; that there were a lot of complaints on McMillan cursing and being rude toward employees; that Buffkin was McMillan's superintendent at that time; that she personally observed Buffkin speaking with McMillan about 10 to 15 times about McMillan's conduct in the laundry, namely McMillan's attitude, her cursing at employees and her behavior towards management; that Buffkin told McMillan that she needed to change or she would be reprimanded; and that McMillan would tell Buffkin that she was just doing her job and "90 percent of it was the damned employee's fault." On cross-examination Emogene Jackson testified that she did not know the exact number of complaints she took regarding McMillan but she got complaints daily on McMillan; that she took notes on the complaints she received regarding McMillan, and she passed them on to Buffkin, from when she started working in laundry in September or October 1996 until McMillan was terminated; that there have been complaints about other employees but not to the extent there were complaints on McMillan; that if Buffkin asked her to file the complaints she did; that Buffkin took all her personal files with her when she left the plant; that she received more complaints on McMillan after she, Susie Jackson, left the laundry and started working in the same office as Buffkin; and that at the direction of Buffkin, she suspended laundry clerk Helen McCoy (GC Exh. 53) on January 7, 1998, for engaging in a hostile verbal exchange with a production employee.[148]

The Respondent's employee Patricia Blount testified that from 1995 to 1996 she was the laundry crew leader on the second shift; that Margo McMillan was an employee in the laundry who worked under her; that McMillan could be very rude, she would curse at employees and she had a temper problem;

[145] It appears that the word "shift" in the transcript with respect to Owens' direct testimony is a mistake.

[146] Norton testified that she was actually first.

[147] Examples supplied include "[y]ou need to get away from the damn window" and "[y]ou need to get out of the damned way."

[148] The disciplinary action indicates that this was McCoy's second offense.

that she passed on complaints about McMillan to Sherri Buffkin, namely Lisa Walker's complaint that McMillan gave her a hard time, and the complaints of first-shift laundry room employees[149] that when she asked McMillan to come in early McMillan would be cursing and fussing because she did not think the first-shift laundry employees kept the laundry room as clean as it should be; that she explained to McMillan that the production area was getting off at the end of the first shift, there was no way the first shift could have the laundry room clean and it was the responsibility of the second shift to clean up the laundry room because the first shift was going home; and that without authorization, the first-shift employees could not work overtime to clean up the laundry. On cross-examination Patricia Blount testified that when she was leaving the laundry in 1996 she was the one who requested that McMillan replace her as crew leader; that she never wrote any of the complaints about McMillan; that Buffkin did not tell her to write complaints and give them to her; that Buffkin told her to come in early and tell her any complaints or anything that went wrong; and that her husband, Supervisor James Blount, was actively involved in supporting the Company's cause against the Union.

The Respondent's employee Jenette Ellison testified that she was second-shift laundry crew leader; that Margo McMillan was second-shift crew leader for over 1 year and, as a laundry room employee at the time, she worked with McMillan on a daily basis; that McMillan was nasty with some of the laundry room employees and production employees; that she witnessed Supervisor James Hunt speaking to McMillan about getting equipment and then speaking with someone who she could not identify but who she claimed was his superintendent, the superintendent on third shift, and Hunt told the other person on the walkie talkie "that he couldn't deal with this women" . . . . "that she was giving him a hard time getting his supplies"; and that the incident with Hunt occurred about 2 or 3 months before McMillan's departure.

On cross-examination Ellison testified that she was not aware of anybody being issued written warnings because of their conduct or because of their attitude in 1997 after McMillan left; that she did not think that she received a writeup in September 1997—"there might have been a paper that they gave everybody and I just signed it . . . . I wasn't actually written up"; that she signed General Counsel's Exhibit 58, dated September 16, 1997, which is a written warning to all laundry employees referring to bad attitudes, indicating that any further instances of this kind will result in suspension and or termination; that "[i]ts my signature [on GC Exh. 58] whenever they give out papers I sign it whether or not it's true or not if it's something that—"; that she was aware that McMillan was terminated around the time of the 1997 Board election; that the September 16, 1997 warning "was given out mostly because of Ms. McMillan"[150]; that McMillan, as crew leader, was not really concerned about the employees doing their job properly; that she signed McMillan's petition; that after McMillan was terminated she allegedly told her, Ellison's, boyfriend that she was having an affair with someone on the job and she, Ellison, did not like that; that she gave a statement to the Company about that incident; that she took McMillan's job as crew leader on the second shift; that if the first shift has the time, they clean up behind themselves, but if there time is over, the second-shift cleans up; that she thought that she was a crew leader when she signed General Counsel's Exhibit 58, the September 16, 1997 written warning to all laundry employees; that Billy Jackson gave her the September 16, 1997 written warnings to give to all second-shift employees and she asked them to read it, and if they could not, she would go over it with them and ask them to sign it; that she did not recall speaking to any other manager with regard to her signing the September 16, 1997 written warning; that she did have a basis for saying that the September 16, 1997 written warning to all laundry employees was because of McMillan; that she did not want to sign McMillan's petition indicating that McMillan had a nice attitude but she signed it anyway because she did not know if she was going to have to continue to work with McMillan; that a crew leader does not have the power to fire or to discipline but must go to a supervisor or superintendent; that she did not know that McMillan was in trouble with her job when she circulated the petition, "[w]hat Ms. McMillan did she did for a long period of time and nothing was . . . [done] about it. It just kept on going"; that the only reason she signed McMillan's petition was that she had fear for her job; that in early 1998 she spoke to Sherri Buffkin about employee Kim Bardeau using profanity; that she had spoken to Bardeau a number of times and told her that if she caught her doing it again she would ask Buffkin to write her up for it; that Bardeau was never written up for it; that she gave Bardeau an oral warning; that she only spoke to Bardeau once about her profanity; and that Bardeau was cursing, using profanity.

Subsequently, Ellison testified that she signed the September 16, 1997 written warning whether or not it was true; that she did not believe that the September 16, 1997 written warning was a valid criticism of her service and notwithstanding that she signed the written warning; that she believed that the September 16, 1997 written warning to all laundry employees was given out because of McMillan; that notwithstanding the fact that McMillan was terminated almost a full month before the September 16, 1997 written warning to all laundry employees she believed that McMillan was responsible for the written warning to all laundry employees; that she does not curse or use profanity in the plant; that she knows heavy set Second-Shift Supervisor Maurice Pritchard; that she did have a confrontation with him; that she did not call him "a big fat mother fucker"; that she thought she said something like "little piglet" because Maurice had used profanity at her and they both apologized to each other; and that she was not written up for the confrontation.

Larry Johnson, the Respondent's plant manager, testified that Sherrie Buffkin came to him on more than one occasion and indicated that she was having attitude problems with Margo McMillan in that people were complaining about the people in the laundry being rude and McMillan was one of them; that as far as a timeframe or the year "for that particular incident" he would only be "guessing"; that during the months before the 1997 Board election he held meetings with employees to talk

[149] Olukemia Lewis, Latonya Mathis, Noleen Johnson, and Selena Blount.

[150] McMillan was terminated in August 1997.

about the problems in the plant and through an interpreter he was told by Hispanic employees that Margo McMillan was given them a hard time[151]; that Margo McMillan came to his office and told him that Sherri Buffkin and John Hall were reprimanding her for no reason and she showed him a petition signed by employees which indicated that she was a good person and not a rude person; that he told her that he would look into it and if she was not satisfied with the outcome of the resolution reached by Hall and Buffkin, she should come back and see him; that he spoke with Hall and Buffkin and it was resolved that McMillan would be given a different job in the plant where she would not interact with other employees; that when he met with McMillan he did not ask how she was going to vote in the union election and he never asked her if she was a union supporter; that it was his understanding that McMillan declined the offer that was made to her and she was terminated; that he subsequently met with McMillan with Lee Mount present; that he told McMillan "that she needed to take the other job for her to keep her job" and he did not recall her response to his statement; and that he did not discuss anything about the Union during this meeting and he did not ask McMillan if she was a union supporter. On cross-examination Larry Johnson testified that he told Sherri Buffkin twice when she brought some complaints to him about McMillan that if McMillan continues to be a problem she is going to find herself fired; that as plant manager he can make recommendations and normally his recommendations are followed; that he recommended that McMillan keep her job but she be removed from the laundry; and that he did not tell John Hall or Sherri Buffkin to fire McMillan.

Jere Null testified that Margo McMillan was terminated for being abusive to employees; that he did not play a role in the decision to terminate McMillan; that John Hall told him that he was going to terminate McMillan "who he witnessed being nasty with employees" (Tr. 6190); that he told John Hall that if he had his "ducks in a row" to go ahead and terminate her; that there was no discussion of the Union with Hall at this time; that Hall did not mention anything about whether McMillan was or was not a union supporter; that he did not instruct Hall or Sherri Buffkin to fire McMillan; that he found out about a job transfer for McMillan after she was terminated, when she filed for unemployment; and that he would not have vetoed any proposal about a transfer to the label cage saying that McMillan should be fired. On cross-examination Null testified that John Hall, who was the night-shift superintendent, told him that he was getting ready to terminate McMillan; that Hall reports to Larry Johnson, the plant manager, but it would not be uncommon for Hall to tell him if Larry Johnson was not in his office; that Hall was not that comfortable at that point in time with his role of whether or not he should fire people; that transfers within a department are handled by the superintendent of the department, which would have been Sherri Buffkin for McMillan; and that he never received any specific complaints with respect to McMillan before her termination.

Lee Mount, who is the director of human resources at the Respondent's Tar Heel facility, testified that John Hall told him that he and Sherri Buffkin met with Margo McMillan and the following day McMillan told Hall that she had thought about the job transfer being offered by management and she would take the transfer to the label room, and Hall told McMillan that she had already turned it down and he was not going to offer it to her again; that he subsequently met with McMillan with Hall and Buffkin present; that they reviewed statements from people who allegedly had problems with McMillan; that the Union did not come up in his meeting with McMillan; that when he terminated McMillan he had "no idea" whether or not she was a union supporter; that he sent a termination letter to McMillan which is dated August 27, 1997; and that, since as director of human resources he oversees documents maintained in employee personnel files, he sponsored Respondent's Exhibits 63, 64, and 167.[152]

On cross-examination Mount testified that prior to the 1997 Board election he received a listing of who the observers would be for each side, he saw that Margo McMillan was one of the observers for the Union on the list and he saw her at the vote count; that McMillan was discharged a few days after the election; that he did not remember the date he met with McMillan; that John Hall told him about offering McMillan a transfer to the label cage; that he had one meeting with McMillan, and John Hall and Sherri Buffkin were present; that sometime before this meeting John Hall told him that McMillan had refused the transfer; that during his meeting with McMillan she said that she had accepted the transfer but John Hall said that it was too late; that he did not believe that it was "true at all" that McMillan told him that she had told John Hall that she had to think about the transfer and discuss it with her family and he did not remember her saying that; that about 1 week after the election he sent McMillan a discharge letter; that he reviewed some complaints by employees before terminating McMillan; that he never saw McMillan's petition (GC Exh. 25), before but he heard that "there was some list of people that she had put together"; that he was never told that some of the people who signed the petition were some of the same people whose com-

[151] Neither the Hispanic employee who allegedly brought up McMillan's name nor the interpreter testified at the hearing herein. As pointed out by opposing counsel, this was double hearsay. As with much of Larry Johnson's testimony on this subject, it was not received for the truth of the matter asserted. Additionally, earlier the Respondent was placed on notice with respect to another witness that sometimes interpreters make mistakes in their interpretation. Opposing counsel were not given the opportunity to test the veracity of this testimony. Consequently, it will be considered in terms of this is what Larry Johnson claims occurred. As noted below Larry Johnson was not a credible witness.

[152] R. Exh. 63 is a disciplinary record, dated "9/29/95," involving a 2-day suspension for McMillan because of her conduct toward a security guard and the director of security. The *"MANAGEMENT REMARKS"* section indicates that "any further incidents of this nature toward a member of management and/or another employee will result in termination." There is no employee signature on the form. R. Exh. 64, dated "12/20/95," is a notice to all laundry employees, which Mount testified that he found in McMillan's personnel file, and which advises that the top priority for all laundry employees is attending the laundry counters in reference to production employee needs. And R. Exh. 167 is a memorandum of the security guard describing the incident which resulted in the 2-day suspension covered in R. Exh. 63.

plaints he was reading; that he Hall and Buffkin decided to terminate McMillan; that he discussed the decision with Larry Johnson; that he did not know whether the complaints by employees about McMillan were written or not but they were related to him by Hall and Buffkin; that McMillan was discharged for her negative attitude toward employees in the laundry and because when she was offered an alternative she did not accept it; that he was not involved in the Ada Perry discharge, he does not handle all the disciplinary issues himself and more often it is someone else in the human resources department who handles it; that there were a lot of conflicts between the laundry department workers and other workers and it was a problem; that he looked through McMillan's file before he discharged her but he could not remember what disciplinary actions were in it and he could not tell exactly what was in McMillan's file; that Jere Null may have given him the list of names of company observers and told him to deal with it; that it seemed that he, Null, and Larry Johnson had a discussion about the list and decided who was going to be on it[153]; and that he did not testify that he, Null, and Larry Johnson made the decision with regard to company observers but rather he testified that he had input into the decision over who and who should not be observers.

On redirect, Mount testified that Respondent's Exhibits 63, 64, 65, and 66, which refer to (1) a written warning and 2-day suspension in September 1995 for McMillan because of conduct toward a security guard and the director of security[154]; (2) a December 20, 1995 notice to all laundry employees regarding their conduct; (3) a May 19, 1997 discipline (step 1 verbal counseling) for McMillan for wearing jewelry in the work areas; and (4) a June 30, 1997 discipline for attitude,[155] respectively, would have been in McMillan's personnel file and he recalled reviewing them prior to deciding to terminate McMillan.

On recross Mount, testified that he was given a list of union observers prior to the election; that McMillan's name was on the list (CP Exh. 43), and, therefore, he knew before the election that McMillan was going to be an observer for the Union; that he was pretty sure that he attended the preelection conference that the Board agent held for the observers and for company officials as to how the election would be run; and that he was not sure that he attended the meeting that the Board agent conducted.

John Hall, who was the second-shift plant superintendent during the summer of 1997, testified that he terminated Margo McMillan; that in early spring 1997 he received the first complaint about McMillan from Anita Smith, who is a kill floor supervisor on the second shift[156]; that he relayed the complaint to McMillan's superior, Sherri Buffkin, and told her to check it out; that within the next 30 days Anita Smith again complained[157]; that in the spring of 1997 he was advised of a disciplinary action by Assistant Cut Floor Superintendent Ray Locklear issued to McMillan for wearing jewelry against company policy[158]; that 2 weeks later Cut Floor Superintendent Ken Fisher told him that he went to the laundry to requisition materials from the laundry, McMillan told him that she was under instructions from her superior, Sherri Buffkin, not to issue such items without her approval, and he threatened McMillan with disciplinary action to get the equipment[159]; that twice at employee meetings during the 1997 organizing campaign unnamed employees said that McMillan was uncooperative when they went to the laundry room for service[160]; that in early August 1997 Fisher told him that he had a meeting with the employees and received complaints about "Margo" and the laundry[161]; that in 1996 Supervisor Derrick Yost called him and told him that he was at the laundry attempting to requisition raincoats and McMillan refused to give them to him without Sherri Buffkin's approval because of a mandate from Sherri Buffkin[162]; that he telephoned McMillan and told her, notwithstanding Buffkin's mandate, to issue the material to Yost; that when McMillan told him that he did not have the authority he explained the chain of command and threatened her with discipline; that after Fisher spoke with him in early August 1997, as described above, he asked Sherri Buffkin to bring McMillan's file to him; that there were some disciplinary actions in McMillan's file of a similar nature and Buffkin told him that she had spoken to McMillan before about her attitude and the way she addressed people; that 1 hour after this meeting he had another meeting with Buffkin and he told her that he wanted to

[153] The Respondent stipulated that CP Exh. 43, the list of employees who were union observers, was turned over to the Union by the Respondent pursuant to a subpoena.

[154] The "*MANAGEMENT REMARKS*' section of the disciplinary form indicates, in part, "THIS IS A FINAL WRITTEN WARNING. ANY FURTHER INCIDENTS OF THIS NATURE TOWARD A MEMBER OF MANAGEMENT AND/OR ANOTHER EMPLOYEE WILL RESULT IN TERMINATION!"

[155] As noted above, the discipline referred to a violation on "6–27–97" and McMillan's attitude toward coworkers and members of management. It also indicated that any further violations may result in suspension, demotion, or termination. This discipline is signed by Billy Jackson and Sherri Buffkin. The box for step 2–written warning is checked off. The form also has boxes for step 3–written warning, step 4—final warning, and step 5—termination.

[156] Hall's testimony in this regard was not offered for the truth of the matter asserted. He testified that Smith told him that she had several of her employees returning to her complaining about their service, the way they were treated and talked to in the laundry; and that Smith had gone to the laundry and encountered the same type of attitude and aggressive nature of McMillan. Anita Smith did not testify in this proceeding.

[157] Hall's testimony regarding this matter was not offered for the truth of the matter asserted. Hall testified that Smith said that her employees were still experiencing problems with the laundry and their treatment by McMillan was mentioned by Smith in this conversation.

[158] It was indicated that Hall's testimony on this matter was not offered for the truth of the matter asserted.

[159] Hall testified that Fisher said McMillan was very arrogant, aggressive, and not willing to cooperate. It was indicated that the testimony regarding what Fisher told Hall was not offered for the truth of the matter asserted. Fisher did not testify in this proceeding.

[160] It was indicated that this testimony was not offered for the truth of the matter asserted. Neither of the employees testified in this proceeding. One of the employees allegedly referred to "Margo."

[161] This testimony was not offered for the truth of the matter asserted.

[162] This testimony was not offered for the truth of the matter asserted. Yost did not testify at the hearing herein.

terminated McMillan; that Buffkin did not want to terminate McMillan and he agreed to allow McMillan to be transferred to a job in the label cage; that he saw Barrett in the lobby corridor at the main offices about 15 minutes before he met with Buffkin for the second time regarding McMillan; that he and Barrett spoke and Buffkin approached them and told him that she needed to speak to him; that during his conversation with Barrett, Barrett did not instruct him to fire McMillan and Barrett did not, in his presence, say, "[F]ire the bitch. I'll beat anything she or they throw at me in Court"[163]; that Barrett did not tell him that he was tired of hearing about Margo McMillan's union activities; that he did not recall how far before the election he met with Buffkin and McMillan in his office; that he told McMillan that he and other managers had received numerous complaints about her attitude, a change had to be made, and he had agreed with Buffkin to transfer her to the label cage; that McMillan said that she did not have an attitude problem and she did not curse at people; that McMillan said that she did not want the label job and asked if there were any other positions available in the plant or if she could stay in the laundry and give up her crew chief's position; that he told her that she could not stay in the laundry; that at the end of this meeting he referred McMillan to the human resources department; that in this first meeting with McMillan she did say that she wanted to talk to her family about the move to the label cage "but she never did accept as far as saying that she would you know take it and she had to go home and do that but she did mention that during the meeting, yes"; that McMillan came into his office the following day shortly after Buffkin came to his office and McMillan said that she wanted to talk to us; that McMillan had a petition signed by people who indicated that they had never had a problem with her, he told McMillan that he was not interested in the petition, McMillan said that she did not have a problem with people, he told McMillan that the discussion was closed and she should go to human resources, McMillan said that she would accept the transfer, he told McMillan that the job was not available today, McMillan became emotional and told him that she needed her job, and he told her that she had to go to human resources to receive any further directions; that he did not speak with anyone in human resources until a few days after that when Lee Mount called him and asked for a quick run down; that he told Mount that McMillan refused the job transfer, he had no other options for her and it was his intention to terminate her; that just before McMillan walked into his office with the petition Buffkin said to him, "[T]hat mother fucker [McMillan] is over at Larry Johnson's office with a petition"; that at the time he terminated McMillan he did not know that she was a union supporter; that McMillan did not say to him that she was a union supporter; that in passing he told Null about the McMillan termination directly after meeting with McMillan the second day; and that Null did not instruct him to fire McMillan.

[163] Interestingly, immediately after giving this response the proceeding was halted to allow Hall to get a drink of water. As noted below, this testimony was later stricken. The Respondent's request to leave it in the record as an offer of proof was granted.

On cross-examination Hall testified that in 1997 and 1998 in those cases not requiring immediate termination there was normally an oral warning, a written warning, suspension, and then termination; that generally when a person was terminated they would be taken to human resources by a supervisor or by security if the employee was at work; that normally if he was going to terminate an employee he would physically take the person to human resources and have a meeting at that time; that he never had discussions with Buffkin or any other supervisor about removing McMillan from her position as crew leader of the laundry before August 1997; that he could not recall any particular instance that led him to have a meeting with Buffkin regarding moving McMillan out of the laundry in August 1997; that he did not recall any meeting with Fisher in August 1997 which caused the determination to take McMillan out of the laundry; that her move out of the laundry was caused by an accumulation of complaints which had been going on for quite a long time; that he took action against McMillan because he "was tired of hearing about the complaints, tired of the problems. I felt that we needed to do something and Ms. Buffkin had not done anything on her own"; that the last complaint that he got that he could recall was in one of the union meetings which was a day or so before he talked to McMillan for the first time but he could not remember who it was who brought it to his attention, but he talked to Buffkin about it and said that they had to make a change; that he did not remember where the meeting was held; that he then told Buffkin that they had to take some action; that Buffkin tried to convince him that McMillan should not be terminated, Buffkin did not agree with terminating McMillan, and Buffkin said that she would rather move McMillan; that Buffkin said that McMillan had done what she had asked McMillan to do; that "[y]es" after his meeting with Buffkin he "*called* . . . McMillan in for *two* meetings" (emphasis added); that during the first meeting with McMillan she did indicate the she needed to discuss a transfer with her family but the last thing that McMillan said during this meeting was that she refused the job; that McMillan was not terminated during the first meeting; that McMillan came to his office the next day, she was not summoned there; that during the second meeting after he referred her to human resources McMillan said that she would take the job in the label cage; that the second meeting with McMillan took place a week or so before the Board election; that he did not recall seeing a list of observers; that he did not know who was going to be a union or company observer until the day of the election when he saw some of them; that he saw McMillan come into the plant as a union observer on the first or the second day of the Board election; that when Mount called he told Mount that McMillan had a number of complaints in her file, he had reviewed the file, he offered her a job in the label cage which she turned down, and he felt that she should be terminated; that he did not recall saying anything else to Mount; that he did not tell Mount to fire McMillan without giving Mount any reasons; that he gave an affidavit to the Company on October 22, 1997, and while he indicated in it that he told Mount to fire McMillan, he did not include in it what details he allegedly gave Mount, any complaints from Supervisor Anita Smith, or any complaints allegedly made by Supervisor Ken Fisher; that he would not have

recommended to human resources when he sent McMillan to that department after his first meeting with her that she be terminated because he "wanted to see her head soften up a little bit, so she wouldn't be so hard headed"; that he had a meeting with Barrett in August 1997 near the front offices, which is not near the accounting area; that just he and Barrett were present until Sherrie Buffkin approached; that he did not know if his meeting with Barrett occurred right after a company meeting with employees about the Union because he was not present at that meeting; and that he did not see any employees filing out before he and Barrett spoke. At this point in the cross-examination counsel for the General Counsel asked Hall if his conversation with Barrett pertained to, in any way, the employment status of McMillan.[164] Counsel for the Respondent directed Hall not to answer the question. Counsel for the General Counsel moved to strike the testimony of Hall with respect to what Barrett allegedly did not tell him regarding McMillan. The motion was granted. On cross-examination by counsel for the Union, Hall testified that an employee in the first cut floor employee meeting where he heard complaints about McMillan said that McMillan was not very nice and not very cooperative; that two other employees at that meeting then said, "[Y]eah"; that at the second employee meeting another employee said that he had some type of problem with McMillan; that he brought McMillan into his office to remove her from the laundry in August 1997 because the day before one of the managers told him that he had a complaint in one of his meetings about McMillan again; that he could not recall who the manager was who was involved in the triggering event, the complaint that was relayed the day before he met with McMillan; that the relayed complaint which triggered McMillan's removal was "the individual told me that they were still receiving complaints in the meetings with employees. That's what prompted it. It was very, very quick in passing type situation"; that to his knowledge no other employee was given the label cage job between the two meetings with McMillan and he did not place anyone in that job during that period; and that his conversation with Barrett before his second meeting with Buffkin lasted just a few minutes.

William Barrett testified that he did speak with Hall about McMillan about 2 weeks prior to the August 21, 1997 election[165]; that the conversation occurred in the late afternoon or early evening in the front office area of the Respondent's plant in Tar Heel; that he, Hall, and Sherri Buffkin were present; that he considered the conversation to be confidential; that he did not summon Buffkin or have her summoned to talk with him[166]; that prior to this conversation he knew Buffkin to be part of Respondent's management; that the purpose of the conversation was to reply to Hall's request for legal advice concerning a personnel issue involving McMillan; that in this conversation he did not say that he had just left a supervisor's meeting where McMillan's name had come up and he was sick of it; that he did not and could not instruct Hall or Buffkin or anyone at Smithfield to fire McMillan at that time or at any time; that he is not authorized as a member of management to make any personnel decisions; that while he was speaking with Hall and Buffkin on that occasion he did not in any manner direct Hall or Buffkin to fire McMillan; that he absolutely did not say, "[F]ire the bitch. I'll beat anything she or they throw at me in Court"; that he never told Hall and Buffkin that supervisors had complained about McMillan's union campaigning and they had not; that he provided legal advice in this conversation; and that Null did not join this conversation with Hall and Buffkin. On cross-examination Barrett testified that Buffkin was present for his entire conversation with Hall about McMillan[167]; that he has used profanity when angered but he did not use profanity in the conversation with Hall and Buffkin; that Null did not join him immediately after he spoke with Hall and Buffkin; that Hall initiated the conversation when they saw each other in the hallway by asking him a question; that Hall was with Buffkin at the time[168]; that during the conversation Hall did not say that McMillan worked for Buffkin; and that he did not at some point instruct Buffkin to discharge McMillan in accord with Hall's wishes.

Analysis

The General Counsel on brief contends that the Respondent failed to present any of the supervisors who allegedly complained about McMillan for testimony at the hearing; that Hall

[164] This question was asked after I ruled that in view of the fact that I allowed Hall on direct to deny that Barrett said during this meeting, "[F]ire the bitch [McMillan]. I'll beat anything she or they throw at me in Court" without allowing opposing counsel to go into the specifics of the conversation between Hall and Barrett, that opposing counsel on cross-examination should be allowed to inquire as to whether Barrett said something which a reasonable person would understand to be a directive to terminate Margo McMillan.

[165] It appears that the conversation took place on August 13, 1997, which would be 8 days prior to the time McMillan was a union observer on the first day of the Board election, August 21, 1997.

[166] As noted above, Sherri Buffkin testified that Executive Secretary Brenda Cooper telephoned her and told her that she needed to come downstairs immediately because a lawyer wanted to see her; that she went downstairs and met with one of Respondent's attorneys, Bill Barrett, near Cooper's desk in the hallway in front of accounting; and that Barrett and John Hall, who is plant superintendent on the third shift, were there. The Respondent did not call Brenda Cooper to deny this portion of Buffkin's testimony. The testimony of Sherrie Buffkin with respect to this matter is credited.

[167] Counsel for the General Counsel moved to strike the testimony of Barrett because he refused, citing attorney-client privileged communications, to testify as to whether Hall told him during the conversation with Buffkin present that he wanted to fire McMillan. The motion was taken under advisement. Barrett also refused, citing attorney-client privileged communications, to testify as to whether during the conversation with Hall and Buffkin she opposed Hall's wish to discharge McMillan, and Buffkin stated that McMillan did not have sufficient warnings to justify a discharge. The motion of counsel for the General Counsel is denied.

[168] As noted above, Sherrie Buffkin testified that she was summoned to this meeting with Barrett and Hall. Also, as noted above, Hall testified that he and Barrett spoke and Buffkin approached them and told him that she needed to speak to him. Cooper, an executive secretary, was not called by the Respondent to deny Sherri Buffkin's testimony. For the reasons indicated below, neither Barrett nor Hall are credible witnesses. Sherri Buffkin's testimony in this regard is credited.

could not recall the specific nature of the complaints, nor could he recall the names of he employees who allegedly complained about McMillan nor even where the alleged meeting was held where the alleged complaints were made; that Fisher was not called to testify; that Buffkin testified that in her opinion McMillan was terminated because of her union activity[169]; that the Respondent had no legitimate basis for terminating McMillan; that her immediate supervisor was not involved in the termination and he testified that he had no problem with McMillan's work, Buffkin pleaded to save McMillan's job, and Plant Manager Larry Johnson—to whom Hall reported—recommended that McMillan be transferred to another job; that the timing of McMillan's discharge in that it came within days of the election also demonstrates that the Respondent was motivated by antiunion considerations; and that based on the timing, the Respondent's knowledge, the antiunion animus, and the failure of the Respondent to show any legitimate basis for McMillan's discharge, a finding should be made that McMillan's discharge was in violation of the Act.

The Respondent on brief argues that on or about August 27, 1997, McMillan was terminated after Respondent had received multiple complaints about her attitude toward hourly employees, coworkers, and members of management; that even if it is determined that McMillan's discharge was unlawful—which the Respondent denies—the discharge cannot be used to overturn the election because it was simply too close in time to the election to have had any type of chilling effect on the rights of employees; and that whether true or not, the General Counsel's disparate treatment argument, namely that other laundry workers engaged in similar conduct and yet they were not terminated, is rendered moot by the fact that the Respondent was unaware that McMillan supported the Union.

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. As indicated by the Respondent on brief, McMillan was terminated by letter dated August 27, 1997. Here, it has been shown that Margo McMillan was asked on August 18, 1997, by Plant Manager Larry Johnson if she supported the Union and she told him that she did. Here it has been shown that McMillan engaged in union activity on August 21, 1997, in that she was an observer for the Union at the August 1997 Board election. As indicated above, four of the five employees whose terminations are covered in paragraph 9 of the 1998 complaint were observers for the Union at the August 1997 Board election. Billy Jackson testified that he did not go to the 1997 Board election, he did not know that McMillan was an observer for the Union at the August 1997 Board election, but he was aware that McMillan supported the Union. The Respondent was aware of McMillan's support for the Union before she was an observer for the Union at the August 1997 Board election. The record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against McMillan even if she did not support the Union and was not engaged in protected activity. The Respondent has not demonstrated that it had any business justification for discharging McMillan. Hall was called on by the Respondent to explain McMillan's discharge. McMillan's immediate supervisor, Billy Jackson, was not involved in McMillan's termination and he claimed that he did not know anything about why she was terminated. Indeed Billy Jackson testified that he would have gone through the progressive discipline policy which was in effect at the time for mere verbal exchanges. As Billy Jackson pointed out, McMillan still had several more steps before termination (after the June 30, 1997 unwarranted and unsupported warning). No explanation was given for the Respondent's failure to follow its own progressive discipline policy. Billy Jackson's manager, Sherri Buffkin, did not want to terminate McMillan. Plant Manager Larry Johnson, who was Hall's boss, recommended that McMillan be transferred. As Buffkin testified, about 1 week before the August 1997 Board election Null told her that her laundry was just a hot house of union support. Another laundry employee, Ada Perry, had gotten into the newspaper because she attended a union rally featuring the Reverend Jackson on August 14, 1997, and, according to the article spoke out in support of the Union. Plant Manager Larry Johnson told Perry that she had hurt the head man at the plant, Null, deeply. Because of Perry's notoriety, Null did not believe that it was the right time to take any action against her but he told Sherri Buffkin that when this all blew over she should terminate Perry. As indicated below, Perry was subsequently unlawfully terminated. Another of Sherri Buffkin's employees put Null on the defense during one of the antiunion employee meetings. Null was the one who refused to allow McMillan to be transferred to the label cage. That is why McMillan was told by Hall on August 15, 1997, that the offer was no longer on the table. Hall, who was not a credible witness in light of what he did here and with respect to the Perry termination, was never able to explain with specificity what event or events triggered McMillan's discharge. No other witness testified about a triggering event. No one, including Hall, even attempted to explain why the Respondent did not follow its progressive discipline policy which was in effect at the time and, as Billy Jackson indicated, would have been utilized for other employees. And contrary to the assertion of the Respondent on brief, the Respondent did know that McMillan did support the Union at the time of her discharge so her disparate treatment regarding any alleged rudeness was never justified by the Respondent. The Respondent violated Section 8(a)(3) and (1) of the Act when it terminated Margo McMillan on August 27, 1997.

(c) Ray Ward

Ray Ward testified that he is 5 feet 6 inches tall, weighs 115 pounds and was "smaller" in August 1997; that he worked for the Respondent on two occasions; that he was terminated by Respondent the first time after he had an altercation with a security guard named Danny Hester at the plant when he

[169] This testimony was given as a part of an offer of proof.

brought some papers to the plant to be filed, parked in the wrong parking lot and tried to enter the plant; that Hester did not want to let him into the building, and after he and Hester "bumped up against each other," he was arrested by the head of security, Danny Priest; that he was charged with simple assault and destroying private property; that he went to court three times and when the company did not show up, the matter was dismissed on April 24, 1996[170]; that he did not assault the guard; that after he was terminated the first time he talked with Sherman Gilliard and later telephoned him and told him that the charges were dismissed; that subsequently he met with Bill Gray, Respondent's employee relations manager, and he was rehired on October 1, 1996[171]; that during the 1997 union campaign he went to union meetings, signed cards, handbilled, wore union T-shirts, and was a union observer at the election; that on August 7, 1997, Jim Cates, who was the superintendent of the kill floor on the night shift, asked him if he would take a crew leader's job and he told Cates that he did not know if he wanted to go back to second shift; that he told Cates that he would take the job if Cates got his wife out of casings; that after Cates said, "[Y]es," he asked him if he was for the Union; that he was wearing a union T-shirt at the time; that when he responded, "[Y]es," to Cates' last question Cates walked away; that he did not get the crew leader's job and he never heard anything further about the job; that on August 22, 1997, he served as a union observer at the Board election; that he was in the cafeteria during the vote count; that when it became obvious that the Union was losing the election he overheard Jerry Null and Larry Johnson tell a person he described as Anthony, who was a company observer, "to go kick Chad Young's ass"; that Anthony then went toward Young and all the pushing and shoving started; that he stepped out of the room and waited with his wife because Union Representative Jeff Greene told him they would all leave together; that the company people who were wearing white hats and white smocks were chanting, "[W]e kicked their ass one time, we kick their ass again," and "[t]elling us to get out of the damn building, take our asses home, niggers, and things like that"; that when the Board agent said that the Union lost the election they started out of the building; that as he was going down the hall there was shoving and pushing and he looked to his left for his wife and found out she was on his right side; that he was punched in the back of his head; that he turned around and said, "[W]e leaving the building, it ain't got to be like that"; that Supervisor James Blount grabbed him and Danny Priest maced him, told him he was under arrest and kneed him in the back; that he did not strike anybody, he did not threaten anybody, and he did not curse anybody out; that he was handcuffed and carried to a police car; that he lay down and put his feet on the window of the police car because the mace was burning him; that he took his feet down and sat up when the police officer told him to take his feet down; that the police car stopped at the entrance to Jerry Null's office and he saw the sheriff and the deputy sheriffs talking to Null for 25 to 30 minutes; that he was then taken to the police station and charged; that he did not damage the police car; that he did not believe that he kicked the police car; that when he went to court he was charged with striking a deputy sheriff, striking a security guard (Priest), injury to personal property and inciting a riot; that he entered into an agreement to defer prosecution (GC Exh. 31)[172]; that when he went to work on Monday, August 25, 1997, he was told to see Jerry Null; that he met with Larry Johnson, Lee Mount from Human Resources, Bill Bishop, and Danny Priest; that Larry Johnson asked him what went on Friday, August 22, 1997; that he said that he wanted the Union and he did not strike anybody; that Johnson said that he was not upset with him for wanting a Union but he was "just tired of this Union shit and . . . [he] was ready to get his . . . [his] company back to where it belongs"; that he told them that he was not going to tell them his side of the story and he was going to let his lawyer do that; that Priest brought up what happened in 1996 regarding Ward's earlier termination; that he asked what was his status at Carolina Foods and Mount told him that he had an attitude; that Mount told him he was a good worker but they would let him know his status later; that Mount telephoned him at his house at 3 p.m. that day and told him that he was terminated; that Mount did not state a reason; and that subsequently he received a letter from Mount (GC Exh. 32), which is dated August 27, 1997, and which reads as follows:

> As per my telephone conversation with you on August 26, 1997, your employment with Carolina Food Processors was terminated because of your actions on Company property on Friday, August 22, 1997.

Ward further testified that after he was terminated he filed for unemployment, the Company did not appear at the hearing, and the hearing officer asked him about the circumstances surrounding his discharge and whether he was engaged in union activity. The appeals decision of the Employment Security Commission of North Carolina in this matter was received as General Counsel's Exhibit 33. Pertinent portions read as follows:

> FINDINGS OF FACT:
>
> . . . .
>
> 3. Due notice of the date, time and place of the Appeals Hearing, of the issue to be considered and of other

[170] GC Exhs. 28 and 29 are the dismissal notices.

[171] GC Exh. 30.

[172] The *"MOTION/AGREEMENT AND ORDER TO DEFER PROSECUTION (STRUCTURED SENTENCING)"* specifies as conditions of the agreement, unsupervised probation for 12 months, that defendant not violate any laws of the State of North Carolina and pay $80 costs. The boxes for nos. 4 and 6 are checked off. The former specifies "[t]he admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as a result of these terms and Conditions of Deferred Prosecution." And the latter specifies "[t]the District Attorney will take a voluntary dismissal with leave upon approval of this Agreement by the dismissal with leave upon approval of this Agreement by the Court." The boxes for the signature of the defendant, the lawyer for the defendant, the district attorney, and the presiding judge contain signatures. The form is dated "9–29–97." The offenses listed are assaulting a government official, injured personal property, simple assault, and inciting a riot.

important information was made to the Employer, but the Employer made no appearance at the hearing which was conducted without the participation of the Employer.

4. The claimant was discharged from this job because the Employer had no further work available for the Claimant.

5. No representative of the Employer appeared at the Appeals Hearing to state a reason for the discharge, but it appears to have been caused by alleged, 'fighting with Security Guard' (see Commission Exhibit 4, item 1).

6. Claimant did not fight with a security guard nor with any other person on August 22, 1997 not any other day and did not otherwise violate any company rule including the rule prohibiting, 'Fighting on company premises' (see Commission Exhibit 4, item 2).

MEMORANDUM OF LAW

. . . .

The employer has the responsibility to show that claimant was discharged for substantial fault or misconduct within the meaning of the law. [Both were defined in the decision.]

It is concluded from the competent evidence in the record that the evidence fails to show that claimant was discharged from the job for substantial fault or misconduct connected with the work.

DECISION:

Claimant is not disqualified for unemployment benefits.

Ray Ward testified further that during the 1997 organizing campaign the Respondent conducted antiunion meetings; that he attended an antiunion meeting and he and two other employees were asked to leave because they were "really pro-Union in the meeting"; that when the Company showed video tapes which were negative about the Union he indicated that it was false or it was an old tape; that when the Company brought up the Raeford contract he indicated that the contract did not have anything to do with the hog plant and he asked to see the "Virginia" contract but it was not provided; that while there were several meetings held he was only allowed to go to one; that Superintendent Randy Givens was at the meeting he attended; that his supervisor, Charlie Newton, told him that he did not "want to shut up" when the Company wanted him to so the Company did not want him back at the antiunion meetings; that he handed out authorization cards in the large, smoking cafeteria; that the week before the election he signed up about 100 people; that he handbilled in front of the plant; that he wore several union T-shirts and he wore them one two or three times a week; that on August 22, 1997, he was an outside observer for the Union which meant that he and a company observer went around and told departments when it was time for them to vote; that he saw some female employees with Joey Dockery and Jeff White telling employees to vote no in front of the nonsmoking cafeteria; and that the woman in charge of the group who was passing out company T-shirts on August 22, 1997, as soon as you walked into the building was Jeff White's wife.[173]

On cross-examination Ward testified that he was originally hired in 1995; that he received various disciplinary notices during his first term of employment for various infractions of company rules[174]; that when he was rehired by the Respondent in October 1996 he indicated on Respondent's Exhibit 61 that his wife Tara Ward should be contacted in case of an emergency; that his wife went by the name of Tara Davis at the Company; that the signature on Respondent's Exhibit 62 is not his handwriting and he did not recall getting a warning in May 1997 from Supervisor Charlie Newton for jumping off a platform; that it was his understanding that he was terminated in 1996 because the Company believed that he had assaulted security guard Danny Hester; that while he was a friend of the wife of James Blount he was not a friend of James Blount; that he never heard Jerry Null on August 22, 1997, say "hold it down" but he did hear Null say "to kick Chad Young's ass" that part of the agreement regarding Respondent's Exhibit 31 was that he would not sue the Bladen County sheriff's department; that when he was in the hallway on August 22, 1997, after the vote count he did not take a swing at James Blount and hit a sheriff's deputy; that he did not threaten to kill Danny Priest or his family when he was being led away down the hallway; that when he was walking down the hallway on August 22,1997, after the vote count Jeff Greene, Justin Molito, Bobby, Mike King, and his wife were near him and Chad Young and Johnny Rodriguez were in front of him; and that on August 25, 1997, Null was not at the plant when he met with Johnson, Mount, Bishop, and Priest.

Subsequently Ward testified that he signed Charging Party's Exhibit 4, which as here pertinent reads as follows:

> I hereby fully release and forever discharge the Bladen County Sheriff's Department, including but not limited to . . . [(named individuals in the department)] from all existing claims which I may have against the . . . [named individuals] for alleged conduct that occurred on or about August 22, 1997.

Ward further testified that James Blount weighs about 270 pounds, is about 5 feet 9 inches tall, is in his 40s and had a beard; that he was hit on the left side of his head behind his ear; and that when he was hit he did not go down.

As summarized under paragraph 8(u) of the 1998 complaint above, Justin Molito and Jeffrey Greene testified regarding the August 22, 1997 incident which allegedly led to the termination of Ray Ward. To the extent that the testimony of Kenneth Ivie refers to what happened regarding Ray Ward, it is summarized under Objection 33 below.

The Respondent's superintendent of the cutting division, Timothy Smith, testified that he attended the vote count in the non-smoking cafeteria; that there were between 75 and 100 people in the room; that he did not see anyone pushing or shoving, or hitting or spitting on the people who were sitting at the

[173] Initially, Ward testified that the employees had "Vote No" signs at the smoking cafeteria on August 22, 1999.

[174] See R. Exhs. 57, 58, 59, and 60, all of which are datd in 1995.

tables; that when it was announced that the Company had won the election celebration cheers broke out from the Company side; that he did not remember hearing any profanity or racial slurs; that the people left the room and proceeded down the hallway; that between the bathrooms and the laundry he saw "somebody . . . went toward the floor, like in a falling type manner"; that he did not hear any profanity or racial slurs in the hallway leading up to this incident; and that he did not see anyone in the hallway spitting on, hitting, knocking down, or bumping up against the Union "folks." On cross-examination Smith testified that profanity is common in a meatpacking house. On further cross-examination Smith denied hitting union observer Ray Ward in the back of the head on the day of the vote count in the 1997 election and he denied calling one of the union observers a "nigger." Subsequently Smith testified that he was not asked or directed to go to the vote count; and that the doors from the hallway into the nonsmoking cafeteria where the vote count took place are swinging doors which close automatically.

James Cates, who was a superintendent on the kill floor with the Respondent from May 1995 until November 1998 when he left to take a position with Iowa Beef and Pork in Iowa, testified that before the Respondent's employee Ray Ward successfully bid for a position on the first shift, he worked for him on the second shift; that in early August 1997 Ward worked on first shift kill; that he had a conversation with Ward regarding a vacant crew leader position; that he initiated the conversation speaking to Ward about signing in the bid book on the kill floor to be a crew leader on the second shift kill; that Ward seemed very interested; that he did not recall what Ward was wearing during the conversation and he could not say if he was wearing a union T-shirt; that he probably had seen Ward wear a union T-shirt; that the union views of an employee were not considered in selecting crew leaders; that Ward did not receive the crew leader position because he did not believe that Ward signed up in the bid book; that he was sure Ward knew about the bid book because Ward had won a bid on first shift prior to that and Ward would have had to have signed the bid book in order to get the job on the first shift; that he was not aware of Ward's views about the Union when he spoke to him about the crew leader's position before the August 1997 Board election; that he first became aware of Ward's union views when he heard that Ward had gotten into some trouble up in the hall after the Board election; that Ward asked him, in either the conversation about the crew leader position or in another conversation, if his wife, Tara Davis, could be moved from casings to second-shift kill; that he told Ward that he probably could move Tara Davis; that an employee who wanted to transfer had to talk to their superintendent to find out if he or she was willing to release the employee and then human resources had the final word on whether a transfer was approved; and that Ward never got back to him about the transfer for his wife. On cross-examination Cates testified that his conversation with Ward occurred before the 1997 Board election; that it could have been within a month of the election; that he was surprised when he heard Ward got into trouble after the 1997 Board election because he did not know Ward to be a violent person or confrontational; that Ward had done an outstanding job for him on second shift; and that after Ward went on first shift he did not see Ward that often, and the conversation he had with Ward about the crew leader position occurred when Ward stayed late on the second shift to work over.

Supervisor Charlie Newton testified that after the 1997 Board election he saw Ray Ward in handcuffs being carried or dragged outside by officers; and that Ward was struggling in that he was not walking voluntarily, he was kicking at the officers and he was swearing, "[y]ou white mother fuckers get your hands off me" and "[y]ou son of bitches." On cross-examination Newton testified that he did not believe that the officers were dragging Ward but rather it was like Ward was refusing to walk in that Ward was on his feet but he was kicking; that he did not see Ward actually kick any of the officers and he did not see any of the officers hit Ward; that Ward is about 5 feet 2 or 3 inches tall and weighs about 110 pounds dripping wet; and that the several officers around Ward were at least 6-feet tall and weighed around 200 pounds or more; and that not all of the officers were white.

Robert Williams, who as indicated above is a supervisor for Wolfson Casing Co. at the Respondent's Tar Heel facility, testified that his company, which is not affiliated with the Respondent, hires employees through the Respondent, "[w]e use their [Respondent's] employees to do the work"; that he was present during the ballot count for the 1997 Board election; that the room was crowded; that he did not see anybody shoving up against, spitting on, or "cussing," anyone who was sitting at a table; that when the results were announced he heard loud cheering from the supervisors and some of the company supporters; that he never heard or saw any company supporter do anything to union supporters; that he did not hear company supporters say anything to, curse, or use racial slurs against union supporters; that he did not hear the "N" word used; that after the results were announced, the head of security, Danny Priest, said that it was time to go; that in getting the union supporters to leave the cafeteria he did not see Priest or any other supervisor push or shove union supporters or spit on or curse anybody; that there were three or four company supporters or supervisors ahead of him as he left the cafeteria; that he saw Ray Ward sitting in the cafeteria during the ballot count; that he again saw Ward in the hallway after they had left the cafeteria; that Ward "ran and rushed and tried to hit one of the supervisors," James Blount; that Ward "was rushing and he had his arm up like he was going to swing it—swing to hit him"; that Ward "swung [his right arm] and tried to hit . . . Blount"; that he did not see whether Ward hit Blount; that Priest then sprayed Ward with mace or pepper spray, restrained him, and took him out of the building; that he was about 3 feet from Ward when Ward was sprayed and the spray burned his eyes; and that the union people were then escorted out of the building and then he and the company supporters, after waiting pursuant to Priest's instructions, went to the reception area and had some pictures taken.

On cross-examination Robert Williams testified that he did not know where Ray Ward was sitting in the room; that there were a lot of supervisors in the room and they were wearing their lab coats and white hats; that "[t]hey weren't [sic] no white hats, We was in there with our street clothes on. We

didn't—we wasn't in there with no lab coat or nothing"; that no one was wearing a lab coat or hat; that he was positive of that; that "[e]verybody was in street clothes like we got off work"; that Priest had two or three security guards with him in the cafeteria and there might have been some sheriff's deputies there but he did not see one until he got into the hall; that Blount is a big strong man weighing about 250 pounds; that Ward is a little guy; that Ward was 15 to 20 feet from Blount when Ward started to charge toward Blount; that Priest was to the side and closer to Ward than Blount; that he did not hear Blount say anything to Ward and he did not hear Ward say anything to Blount; that there were about two people between Ward and Blount and Ward pushed the two people out of the way; that Priest grabbed, restrained and got Ward down on the ground before Ward got to Blount; that when Ward swung at Blount was when Priest grabbed and wrestled Ward down; that Priest did not grab Ward while he was pushing the people out of the way; that he was positive that he did not see Tara Davis anywhere in the crowd; that Ward was close enough to hit Blount but he did not see whether Ward did hit Blount; that Ward's swing was up in the air, not a normal punching motion, sort of like a swimming stroke, and Ward's hand was open; that Ward was not stumbling he was "rush running" with his body angled as if he was going forward; that he could not remember if there were any police officers present when Priest restrained Ward; that Priest sprayed Ward and Ward fell to the floor saying something about his eyes; that Priest had Ward's hands behind his back and he may have put hand cuffs on Ward; that when Priest picked Ward up there was a white sheriff's deputy there; that he did not see any other sheriff's deputy around; that he did not hear Ward say anything to Priest or Priest say anything to Ward; that he did not hear any profanity from anyone; that he absolutely saw only one sheriff's deputy; and that Ward's right hand came within 6 inches of Blount.

Jason Chavis, who is a crew leader for the Respondent and who was an observer for the Company at the 1997 Board election, testified that he was present for the ballot count at the 1997 Board election and there were about 100 people in the room; that no one pushed him or spit on him; that he did not see anyone get pushed or spit on; that when the results of the vote count were announced there was cheering; that he did not hear any cursing or the "N" word being used; that after the vote count was announced he did not push, shove, spit on, or call anyone a "nigger"; that he did not see other people pushing or shoving; that a struggle involving Ray Ward started as Ward left the nonsmoking cafeteria where the vote was taken and the struggle continued for about 6 or 7 feet; that no one was pushing Ward but he was attempting to go against the flow of the crowd; that further down the hallway a fight broke out involving Ward in front of one of the windows of the laundry; that in that part of the hallway by the laundry room window Ward hit a man, they started fighting and the sheriff's department broke up the fight and grabbed Ward; that he was about 5 or 6 feet away from the fight and he was facing the back of the man Ward hit; that he did not recall whether Ward hit the man with his right hand or his left hand and he just saw Ward's arms come up; that Ward did connect with the side of the head of the man he was swinging at but he did not recall which side of the head; that Ward and the person he hit went down on the floor in a struggling match; that he did not recall what the person who Ward hit looked like; that he only saw Ward and the person he hit go down on the floor; that he remembered Danny Priest being there and Priest did try to break it up; that he saw Ward in handcuffs and struggling a little outside the building; that he was 10 feet from Ward and although Ward said something he could not recall what Ward said; and that as three sheriff's deputies were escorting Ward to the car he was twisting and turning.

On cross-examination Chavis testified that the person Ward hit in the hallway by the laundry room window was medium height, was not real big, was not real thin, was not black, and was not white that he recalled; that he could not tell if the person who Ward hit was Native American and he did not know if he was Hispanic; that he could not tell what part of the person's head Ward hit, he just saw Ward make contact with the person's head: that he was standing about 20 feet from person who Ward hit and about 21 feet from Ward; that he did not know whether the person who Ward hit went down on the floor; that he saw Ward and the person who Ward hit go down on the floor together wrestling; that he did not see a tall black sheriff's deputy get hit; that he was not aware of any mace or pepper spray being used; that he only recalled Anthony Forrest standing near him in the hallway when he witnessed the Ward incident; that he knows James Blount but he did not recall seeing him in the hallway; that James Blount is a pretty big man; that he could not see the face of the man who Ward hit so he could not say if it was or was not Blount; that the person who was hit had a baseball cap on; that he did not support the Union; that he had a "Vote No" sticker, and ate free chicken at the union hall; and that he observed Ward campaigning real hard for the Union.

The Respondent's supervisor, James Blount, testified that he was present for the vote count in the Board election of 1997 in the nonsmoking cafeteria; that there were 75 to 100 people in the room; that he was wearing his street clothes; that it is a company hygiene policy that nothing can be worn in the cafeteria but street clothes; that he did not see anyone in the cafeteria with anything on but street clothes; that he was standing about 1 foot behind Anthony Forrest, who was an observer for the Company, and Ray Ward, who was an observer for the Union; that Forrest and Ward were sitting at a table; that he had been asked by Bill Gray, who was an assistant human resource director, to keep a tally of the votes and look at contested ballots; that he did not see anyone who was sitting at the table get pushed or shoved or spit on; that he did not hit or push or spit on Ward; that he did not see Dale Smith hit or spit on Ward; that he did not hear Smith call Ward the "N" word and he did not call Ward the "N" word; that he is Black; that when the results of the election were officially announced there was loud cheering; that he did not hear any cursing, racial slurs, or the "N" word being used; that he did not use the "N" word during ballot count; that during the ballot count he did not say, "[N]igger is not the color of your skin, its the way you think, and the Union is full of niggers," and he did not hear any supervisor make this or a similar statement; that Jerry Null, the vice president of the Respondent, asked the union officials to

leave after the official results of the Board election were announced; that when the union officials did not leave, Null asked that they be escorted out; that after they left the cafeteria and were in the hallway near the laundry room, Forrest walked up to a union official, put his hand on the union official's shoulder and asked the union official, "[W]ho's the Uncle Tom now"; that Forrest and the union official exchanged words and Ray Ward, who weighs about 100 to 110 pounds, began to run toward Forrest and the union official saying, "[T]hat's my boy, that's my boy. What you all doing [sic]"; that Ward's fists were clinched up near his chest; that he told Ward not to get himself in trouble and Ward asked him several times, "[W]hat are you going to do"; that he told Ward that he was not going to do anything and then Ward took a swing at him; that he did not touch Ward in any way to provoke him and he did not use the "N" word; that he stepped back when Ward swung a left and Ward missed him and a sheriff's deputy to his left grabbed his face; that Danny Priest then sprayed Ward and Ward went to the floor; that Ward was handcuffed and then picked up; that Ward was not yanked up by his handcuffs; that he never touched Ward and he did not see anybody kick or hit Ward when he was on the floor; that Ward walked out of the building; that he did not see Ward's wife anywhere near the scene of the altercation; and that sometime in 1997 he witnessed Ward, who was handing out equipment, tell an individual who he thought was Supervisor Randy Hall that he could not tell him what to do and he was "going to kick his [Hall's] butt."

On cross-examination Blount testified that he arrived at the nonsmoking cafeteria before the ballot count began; that supervisors and managers were not asked to come, "you did it on your own"; that he has used the "N" word but he did not hear it in the election; that he has heard employees use the "N" word in the plant; that he saw the sheriff's deputies in the hallway and security in the cafeteria; that the sheriff's deputy who grabbed his face after Ward swung was black, about 5 feet 10 inches tall and average size; that he did not see Ward strike the sheriff's deputy; that either the sheriff's deputy or Priest or both handcuffed Ward; that he did not see Priest put his knee in Ward's back to hold him down; that he did not remember Ward kicking and screaming; that he did not follow Ward outside to where the vehicles are parked; that he was not contacted about criminal charges filed against Ward; that he was not "perfectly sure" that it was Randy Hall who Ward threatened with "I'll kick your butt"; that he has been told by an employee that he, the employee, was going "to kick his butt" and he has never "written one up for that"; that he does not take everything seriously; that he saw Ward with union apparel on; that he saw Ward's wife in the cafeteria during the ballot count but he did not see her in the hallway afterwards; that Ward did not tell him that he was trying to locate his wife; and that after the vote count he did not know who employee Anthony Forrest talked to. On redirect, Blount testified that Ward "threw like a overhand right—left, lefthand at me"; and that he did not see anyone push, shove, grab or hit union representatives.

Dan Hester testified that he was employed by the Respondent as a security guard in 1996 and possibly late 1995; that on the last day of his employment with the Respondent he was assigned to monitor the management parking lot which had a chain across the driveway at the gate; that employees had their own parking lot and were not supposed to park in the management lot; that when he let the chain down to let a manager in an automobile with a young lady and a young man in it pulled across the chain and stopped; that the young man said the he needed to go into the plant and he told the young man that the car did not have a management sticker so he would have to go to the employees' parking lot; that the young man said, "[F]uck you," and told the young lady to drive through; that he was not expecting visitors that day and the young man did not indicate that he was a visitor; that the car was driven into the management lot and he told the young man that he could not go into the lot; that he put the chain back up and walked behind the car; that the car stopped at the main entrance and the young man continued to curse at him; that he asked the young man if he was an employee and the young man replied, "[H]ell yes, fuck you"; that he was wearing his security guard uniform with his badge at the time; that he asked to see the young man's employee identification but the young man refused to show it to him and proceeded to walk to the main entrance of the plant, cursing at him as he walked; that he blocked the doorway to the building and told the young man that he could not go into the plant until he showed his identification; that the young man continued to curse at him and then grabbed his jacket and tried to pull him away from the doorway; that he pushed the young man in the chest, part of the jacket ripped off in the young man's hands and the young man fell to the ground; that the young man threatened, "I'm going to whip your ass old man," got up, cursed him, threatened him and than walked away, getting into an automobile and driving off; that he contacted the head of security, Danny Priest, and later identified the young man when he was being held by Priest in handcuffs at the employee entrance; that he was told that the young man was Ray Ward; that Ward continued to curse at him; that he, Ward and Priest went to the local Magistrate and he took out criminal charges on Ward; that he was never contacted again about the matter[175]; that he never abandoned the charge in any way; that in mid 1997 he asked Priest during a telephone conversation what ever happened regarding the matter and Priest said that they dismissed the case; and that his wife paid over $130 for the jacket which Ward tore. On cross-examination Hester testified that he did not telephone the district attorney in Bladen County about this matter; and that he was not aware that Ward was rehired after this incident.

Bill Gray, who was an employee relations manager at the involved Tar Heel facility from September 1995 until May 1998, testified that Ray Ward worked for the Respondent on two occasions; that Ward was fired the first time over an incident with a security guard at the Respondent's Tar Heel facility; that the superintendent on the floor that Ward had worked for his first time with the Respondent, Randy Hall, specifically asked

[175] R. Exhs. 94 and 95 were received. Both are North Carolina, Bladen County District Court subpoenas requiring Daniel Hester to appear and testify in the simple assault case of Ray Ward. The former was issued on "02/21/96" and the latter was issued on "02/22/96." It is indicated on the former "UNABLE TO MAKE SERVICE AT WORK" and it is indicated on the latter "UNABLE TO MAKE SERVICE BEFORE COURT DATE."

for Ward to be rehired; that when Ward was hired for the second time he told Ward that if he was separated from employment for any reason there would not be a third opportunity; that he attended the vote count in the nonsmoking cafeteria after the 1997 Board election; that eventually there were about 70 to 100 people in the room; that during the vote count he did not see any of the people sitting at the tables get spit on or pushed or bumped; that he did not hear any swearing or racial slurs during the vote count; that after the results were announced he heard people saying, "[W]e won the election, get out"; that after the results of the election were announced he did not push or shove or spit on anyone or call anyone a "nigger"; that he did not hear any racial slurs or see anyone pushing or shoving in the room where the vote was taken; that afterwards in the hallway as the people were leaving a union representative stopped and a sheriff's deputy was asking him to move along; that Ward, who was moving against the crowd, then "[j]umped up in the air and basically did a little—a chest bump on the Sheriff's Deputy and said, what are you going to do"; that Ward then went straight to the floor; that he did not see anyone spit on, kick, or punch Ward in the back of the head; and that he did not see any sheriff's deputy push or shove any of the union organizers. On cross-examination Gray testified that 30 to 35 people in the crowd in the hallway were wearing white hats; that he saw Ray Ward jump in the air and bump chests with his arms extended out horizontally at his side and his hands were open; that Ward then went to the ground; and that while it was a matter of discretion, very rarely under very limited conditions would the Respondent hire someone for the third time.

Timothy Hilbaurn, who is a supervisor at the Tar Heel facility, testified that he was present for the vote count on August 22, 1997; that there were approximately 50 people in the room; that he did not see anyone in white smocks in the room and it is against company policy to go into the cafeteria with smocks on; that there were a few people in the room with white hats on; that he did not see anyone in the cafeteria make contact with the observers, and no one pushed, shoved, kicked, or spit on them; that when the results of the vote were announced people were cheering but he did not hear any cursing, racial slurs, or use of the "[N]" word; that he did not see anyone get pushed or kicked as he left the cafeteria; that as he was going down the hall after leaving the cafeteria he heard a commotion and he looked and saw Ray Ward swinging at James Blount; that at the time he was a few feet from James Blount; that he saw Ward swinging at James Blount and hit a deputy sheriff; that he first saw Ward when he heard the commotion; that Ward did not hit Blount but Ward did hit the deputy in the face with a right kind of overhead swing; that while he did not see Ward making contact with the deputy he did see the deputy grab his face; that security officer Danny Priest then sprayed Ward with mace or pepper spray and Ward fell to the floor; that two deputies then picked Ward up and escorted him down the hall; and that he was not sure if Ward was handcuffed.

On cross-examination Hilbaurn testified that just after this incident, while he was in the reception area, he spoke with James Blount about the incident involving Ward; that Blount told him that Ward took a swing at him "but I also saw the swing towards him"; that Blount ducked when Ward took the swing; that he went to the vote count because he was told by a superintendent he could go if he wanted to go; that he could not remember exactly hearing somebody say get out of here after the vote count was announced; that he did not see what prompted Ward to take the swing; that he was to the left of Blount and the deputy who grabbed his face and who weighed about 250 pounds, was to the right of Blount; that the deputy used his right hand to grab the left side of his face; that the deputy grabbed his face before Priest used the spray; that the deputy who grabbed his face was not among the deputies who escorted Ward out of the building; that the deputy who grabbed his face went into the bathroom; that he did not see Ward kicking or screaming as he was escorted down the hall; that he did not see the commotion before the Ward incident; that he did not hear Ward say something about someone hitting him in the back of the head; that he did not see anyone hit Ward in the back of the head; that when Ward took the right overhead swing his hand was balled up; that Ward's swing was a hard swing; that Dale Smith was the superintendent who told him that if he wanted to, he could go to the vote count; that at the time the Company had a policy that employees were supposed to leave the plant right after their shift, supervisors do not have to go home at the end of their shift but they are supposed to leave the plant when their work is done; that he discussed the Ward incident with Supervisors Brian Adams and Raymond Smith; that he testified at the trial herein because James Blount asked him not too long before the trial herein if he saw anything; that he did not remember telling Blount the day of the Ward incident what he had witnessed; that when he went to the reception area just after the Ward incident he did not tell anybody what he had just witnessed upstairs; and that all of the individuals he recognized as deputy sheriffs the day of the Ward incident were in uniform.

Bladen County sheriff's deputy, Sergeant Steve Lesane, testified that on August 22, 1997, after the results of the vote were announced he left the Tar Heel plant building with Chad Young, he saw two people, "a small black guy and a big white guy," come out of the building in handcuffs, and they were placed in patrol cars; and that the former was screaming about the pepper spray being hot and burning. On cross-examination Lesane testified that Deputy Lasevenn Richardson brought the handcuffed small black man out of the building. A summary of Lesane's testimony regarding what he witnessed at Respondent's plant on August 21 and 22, 1997, is set forth under Objection 33 below.

Bladen County sheriff's deputy, Lasevenn Richardson, testified that on August 22, 1997, as he was escorting union representatives down the hall of the Respondent's Tar Heel plant after the result of the vote was announced, Ray Ward, who was moving in the opposite direction of the crowd, came toward him at a fast pace, with his arms swinging above his shoulders, yelling, "[L]et go of my brother"; that he was not holding or touching anyone at the time, and he merely had his arms extended moving the crowd; that he did not see Ward's wife, Tara Davis, in the hallway at the time; that Ward started pushing him; that he grabbed Ward's hands but Ward broke free and started swinging and kicking at him; that he raised his hands to protect his face and Ward hit his shoulder; that Ward was

swinging over his head; that he grabbed Ward again and tried to detain him; that as Ward continued to kick and swing Danny Priest sprayed Ward with pepper spray; that he got some pepper spray in his eyes; that both he and Ward fell to the floor; that he and Priest used his handcuffs to subdue Ward; that he and Priest lifted Ward up off the floor holding him under his arms; that he then went to the bathroom to try to flush the pepper spray out of his eyes; that he was in the bathroom for about 10 minutes; that when he came out of the bathroom he went downstairs and outside where he saw Ward in a patrol car kicking the door while laying down on the seat; and that he got into the patrol car with Deputy Gene Lambert, who was driving, and they transported Ward to the sheriff's department.

On cross-examination Richardson testified that he did not see anyone strike Ward in the back of the head; that Ward did not go toward anyone else but rather Ward came directly at him; that at the time he weighed 218 pounds; that in an October 27, 1997 affidavit he describes the Ward incident but he did not indicate that Ward hit him and he did not indicate that he fell down on the floor with Ward; that Ward never hit him in the face; that he prepared the "INCIDENT/INVESTIGATION REPORT" (GC Exh. 56) on August 22, 1997, regarding the Ward incident and the report does not indicate that Ward struck him on the arm[176]; and that Ward's case was dismissed. A summary of Richardson's testimony regarding what he witnessed at Respondent's plant on August 21 and 22, 1997, is set forth under Objection 33 below.

The Respondent's employee Patricia Blount testified that Ray Ward was assigned to the laundry for 3 or 4 months on light duty before he was terminated and he worked under her in 1996 when she was the crew leader; that Ray Ward got along with employees okay but on one occasion Randy Hall, who was the superintendent on the second-shift kill floor, wanted some chain gloves right away so the production could start; and that she overheard Hall and Ray Ward, who was working the laundry room window, exchange some words. Subsequently, Patricia Blount testified that she thought that her husband, Supervisor James Blount, was at the window when Randy Hall and Ray Ward had their verbal exchange; and that it is possible that he witnessed the incident.

Priest testified that on August 22, 1997, there was about 10 to 15 feet between the two groups, namely the company people and the union people leaving the nonsmoking cafeteria where the ballots were counted; that as they went down the hall and got to the area of the laundry and the water fountain sheriff's deputy, Lesevenn Richardson, was to his left, Deputy Terry Davis was in front of him to his right and Deputy Gene Lambert was also in front of him; that at that point the union representatives were probably 10 feet in front of him; that there was a lot of yelling and taunting; that suddenly a black male ran by him yelling and charging into the crowd and when he got to Deputy Richardson he was swinging his arms wildly in a forward over hand motion and it looked like he was trying to get over Deputy Richardson to fight somebody behind Deputy Richardson; that Deputy Richardson had his arms out holding the crowd back; that the man hit Deputy Richardson in the chest and it appeared that he also hit Deputy Richardson in the eye or the front of the face; that he pulled the man off Deputy Richardson and the man started swinging at him trying to hit him in the face; that he sprayed the man with pepper spray and the man went down to the floor; that he and Deputy Lambert handcuffed the man; that he did not kick, hit or strike the man and he did not see anyone else engage in such conduct; that Deputy Richardson had his hands on his face; that he and Deputy Lambert held the man under his arms pits and stood him up; that as they took the man down the hall he was dragging his feet, kicking, cursing, and screaming; that the man said, "Danny Priest I know who you are, I know where you live. I'm going to kill you and I'm going to kill your family"; that as they were putting the man in Deputy Lambert's patrol car he grabbed his, Priest's, shirt screaming that he was going to kill him and his family; that he pried the man's fingers off of his shirt; that the man kicked the car's window and door panel; that after the man was taken away someone told him that he man was Ray Ward, the one who hit security guard Dan Hester; that the Hester incident was about 2 years before this incident and he chased Ward down as he exited the plant to go on Highway 87 and arrested him; that Ward was terminated over the Hester incident; that on August 23, 1997, he was called and told to come to Larry Johnson's office; that Johnson, Lee Mount, and Ward were there; that Ward was telling Johnson and Mount what happened on August 22, 1997; that he was asked if Ward ever assaulted anyone at the plant and he told them that Ward had assaulted security guard Hester; that he was asked what was Ward's demeanor after the election and he told them that Ward had threatened to kill him and his family; that he was asked to make a recommendation and he said that Ward had a history and he was violent; and that Ward was terminated and he was escorted off the property. On cross-examination Priest testified that he used pepper spray on the individual in the hall on August 22, 1997; that when he sprayed the individual in the hall on August 22, 1997, he did not know that he was Ward; and that in August 1997 he supervised 24 full-time security guards and three or four part-time security guards.

The Respondent's plant manager, Larry Johnson, testified that on August 25, 1997, Ray Ward was in his office because he was about to be terminated and Ward wanted to talk to him; that Danny Priest, Bill Bishop, and Lee Mount were also in his office; that during this meeting Priest indicated that Ward was fired once before for attacking one of the Respondent's guards and that Ward threatened Priest's life; and that he turned the matter over to human resources. Subsequently, Larry Johnson testified that he did not summon Priest during the meeting with

[176] The narrative of the report reads as follows:

> MYSELF AND DANNY PRIEST WERE ESCORTING SOME UNION OFFICIALS FROM THE CAROLINA FOOD PROCESSORS SECOND FLOOR. I OBSERVED MR. WARD COMING TOWARDS ME CURSING AND WAIVING HIS ARMS WILDLY. AS I WAS CONTROLLING THE CROWD MR. WARD PUSHED ME ABOUT THE BODY TELLING ME TO GET OFF HIS BROTHER. AT THAT TIME MYSELF AND MR. PRIEST SUBDU. . .ED MR. WARD, TOOK HIM TO THE MAGISTRATE'S OFFICE . . . .

In the box on the form designated "Crime Incident(s)" Richardson indicated "Assault on Govt Official." The accompanying "ARREST REPORT" INDICATES THAT Ward weighed 110 pounds. This would mean that Richardson at the time was two pounds short of weighing twice as much as Ward weighed.

Ward and he did not recall anyone else in his presence summoning Priest.

The Respondent's director of human resources, Lee Mount, testified that he was present, along with Managers Larry Johnson, Danny Priest, and Bill Bishop, at the meeting when Ray Ward was terminated; that Ray Ward said that he was protecting his wife when asked by Johnson what happened; that Ward denied threatening Priest and his family; and that Ward was asked to step outside and the four managers decided to terminate Ward in view of the fact that Ward had previously been terminated for assaulting a security guard at a plant entrance, Ward struck someone on August 22, 1997, in the plant, and Ward threatened Priest and his family; and that General Counsel's Exhibit 32 is the termination letter he sent Ward. As director of human resources who oversees documents maintained in employee personnel files, Mount sponsored (1) Respondent's Exhibit 62, which is a disciplinary record involving an oral warning to Ray Ward dated May 2, 1997[177]; (2) Respondent's Exhibit 190, which is a termination form for Ray Ward dated February 2, 1996 which indicates "Terminated: Employee had a fight with Security guard," and (3) Respondent's Exhibit 191, which is a termination form for Ray Ward dated September 10, 1997, which indicates "Termed By H/R Fighting." On cross-examination Mount testified that prior to the 1997 Board election he received a listing of who the observers would be for each side and he guessed that he knew that Ray Ward was one of the observers for the Union if he was on the list; that during the meeting in Larry Johnson's office with him, Ward, Danny Priest, and Bill Bishop, Ward, when asked about the incident in the hall, said that he was trying to protect his wife; that he did not believe that Ward told them that someone hit him on the back of his head while he was trying to protect his wife; that he did not remember exactly what Ward told them during the meeting but Priest said that he saw Ward strike a sheriff's deputy and Ward was then maced and handcuffed; that Priest also told them that Ward had a previous incident with a security officer; and that Priest wanted Ward discharged.

Marion Roscoe Warren, who was an assistant district attorney in Bladen County in September 1997, testified that he signed Ray Ward's "MOTION/AGREEMENT AND ORDER TO DEFER PROSECUTION" (GC Exh. 31); that he did not fill out the form and "[t]he blank spots that have been filled in by pen were filled in by Counsel for Mr. Ward, Mr. Mike McGuiness"; that a "MOTION/AGREEMENT AND ORDER TO DEFER PROSECUTION" such as General Counsel's Exhibit 31 allows the state to enter into a contract with a criminal defendant that the criminal defendant will do certain things, admit certain things, and at the conclusion of the agreed upon period the State will enter a voluntary dismissal in the matter; that he did not check the box for paragraph number 4 on the first page of General Counsel's Exhibit 31 and counsel for Ward would have checked that box[178]; that here block 4 requires that there be a showing before the District Court judge that there was sufficient evidence to show that there was a criminal offense, that there was more than sufficient probable cause that the offense occurred, and that the offense has been described with sufficient particularity to satisfy the judge's own discretion that beyond a reasonable doubt the offense had occurred; that after he gave the factual basis and the defense attorney was allowed to make any additions or deletions or corrections, District Court Judge Thomas D. Aldridge went over General Counsel's Exhibit 31 with Ward and asked Ward if he agreed to enter into this deferred prosecution agreement and did he admit responsibility of the same; that the assaulting government official charge involved assaulting a law enforcement officer; that he never saw Charging Party's Exhibit 4, a general release of liability, before the day he testified at the hearing herein, and it was not related in any way to the agreement to defer prosecution (GC Exh. 31); and that while Ward's attorney, McGuiness, originally tried to negotiate in terms of releasing the sheriff's department, he did not agree with McGinnis to defer prosecution on the charges against Ward in return for the release of liability.

On cross-examination Warren testified that he believed that the injured personal property was a torn uniform or an emblem on the uniform that was torn but he did not see the shirt; that he made an oral statement of facts (a factual basis) before the district court judge and the defendant had the opportunity to rebut or change, modify, correct omissions, make deletions, or corrections to the statement of facts; that the stipulation of fact prevents any collateral attack on the events, facts, and charges as commemorated and memorialized in General Counsel's Exhibit 31, which was signed September 29, 1997; that the proceeding before the district court, is not transcribed and there is no tape recording; and that the court records consist solely of the involved documents. On redirect Warren testified that District Court Judge Aldridge gave the defendant the opportunity to rebut or change, modify, correct omissions, or make deletions, or corrections to the statement of facts and the defendant declined; that the State cannot put a criminal on probation without an adjudication of responsibility for the underlying charge; that he has had a situation where a defendant did not check box number 4, would not admit responsibility on the factual basis and it was rejected by the court; and that neither Ward nor his counsel rejected the factual basis underlying the involved charges. On recross Warren testified that he has between 95 and 190 cases a day in district court; and that as indicated in General Counsel's Exhibit 46, dated December 10, 1998, all charges were dismissed because Ward complied with the deferred prosecution order.

On rebuttal the Union called Joseph McGuiness, who as noted above is the attorney who represented Ray Ward in the 1997 Bladen County criminal matter described above and an employment compensation hearing, testified that he negotiated a deferred prosecution dismissal agreement for Ward with Assistant District Attorney Marion Warren; that he met with the

[177] What purports to be the signature of Ray Ward appears on the discipline record. The discipline involved jumping off a platform stand at the end of the shift.

[178] As noted above, that paragraph reads as follows:

> The admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as a result of these terms and Conditions of Deferred Prosecution.

sheriff of Bladen County, conveyed to him the essence of his concerns about the law enforcement activity being guided by a company official, Danny Priest, and he discussed with the sheriff a release of civil liability; that he drafted a release and he thought that he sent a draft of the release to either Warren and/or the sheriff for review and approval but he was not certain he did; that he had a second meeting with Warren after he met with the sheriff and at this meeting he and Warren discussed the release of civil liability and the principal terms of the deferred prosecution agreement; that he filled out the deferred prosecution dismissal agreement pursuant to his discussions with Warren, and he, Ward, and Warren signed the agreement; that Charging Party's Exhibit 4 is the release of liability that he drafted and discussed with Warren; that the last sentence of paragraph 4 reads, "I agree that there is valuable and binding consideration for this release"; that the consideration was that the criminal charges were going to be dismissed pursuant to the deferred prosecution in exchange for Ward's waiver as set forth in the release that he would not initiate a civil claim; that this release was part of the terms of the settlement that he reached with Warren; that he filled in the deferred prosecution form (CP Exh. 46); that he believed that the clerk of court checked box 3 in the "CONDITIONS OF AGREEMENT TO DEFER PROSECUTION" portion of the form and wrote the "80.00" and "9/29/97" in that paragraph of the form; that he did not check box 4 in the "CONDITIONS OF AGREEMENT TO DEFER PROSECUTION" portion of the form and this box was not checked when he, Ward, and Warren signed the form and it was not part of the agreement; that when he, Ward, and Warren signed the form box 2 in the "CONDITIONS OF AGREEMENT TO DEFER PROSECUTION" portion of the form was not checked off and "not violate any laws of the State of North Carolina" was not written in the space provided next to box 2; that he did not know whose handwriting that is; that when questions came up about the form at the hearing herein he went to the clerk of court's office, examined the Motion/Agreement and Order to Defer Prosecution and determined that, as set forth in General Counsel's Exhibit 31, someone had checked off boxes 2 and 4 and added the above-described note in paragraph 2; that on September 29, 1997, Charging Party's Exhibit 46 was presented to Judge Aldridge for approval; that he did not see Judge Aldridge, who was presiding, sign Charging Party's Exhibit 46, or check off boxes 2 or 4; that Judge Aldridge did not indicate that he was going to alter the terms of the agreement that had been reached; that he thought that this was the first deferred prosecution that he had handled; that he did not believe that Judge Aldridge had the authority to modify the terms of the agreement and the judge must either accept or reject the agreement or he could propose additional terms and conditions which the defendant would have an opportunity to consider; that Judge Aldridge did not propose additional terms and conditions for Ward to consider; that Ward was not given the opportunity to consider what was checked off as box 4 which suggests there was a stipulation of facts to be used against him and there was no such stipulation of facts; that Ward was not about to stipulate to any facts suggesting that he was guilty because it was inconsistent with everything that his investigation revealed; and that at no time after he, Ward and Warren executed Charging Party's Exhibit 46 was he contacted by the district attorney's office concerning revision of any term of Charging Party's Exhibit 46.

On cross-examination McGuiness testified that Charging Party's Exhibit 4 is only signed by Ward; that the date next to Ward's signature on page two of Charging Party's Exhibit 46 is an error in that it should be September 29, 1997, and not "10-29-97" as written on the Exhibit; that the unilateral release is not referenced on the deferred prosecution form[179]; that on Charging Party's 46 he did check one of the three boxes in paragraph 6 on first page (the front side) of the form; that Judge Aldridge's signature does not appear on Charging Party's Exhibit 46 because it was copied before it was submitted to Judge Aldridge; that Judge Aldridge verbally approved Charging Party's Exhibit 46 at a bench conference in open court; that at the time of the agreement Ward was placed on 12-months unsupervised probation; and that the Judge would not have had the authority to change the agreement.[180] Subsequently, McGuiness testified that the changes in Charging Party's 46, as set forth in General Counsel's Exhibit 31, amount to material differences in the agreement, particularly with respect to box 4.

On surrebuttal District Court Judge Thomas Aldridge testified that it is his handwriting in that portion of General Counsel's Exhibit 31 entitled "CONDITIONS OF AGREEMENT TO DEFER PROSECUTION" block 2, namely "not violate any laws of the State of North Carolina"; that he also checked box 2 in this same portion of the form[181]; that he wrote "9/29/97" in paragraph 3 in the same portion of the form; that he checked box 4 in the same portion of the form[182]; that on the back side of the form he wrote the date in the box under "SWORN AND SUBSCRIBED TO BEFORE ME" and signed his name in two places; that he did not write the date at the bottom of the page; that while there may be an agreement before the court approves the deferred prosecution agreement, it is not binding as far as the court is concerned until the court approves it; that his function is not to make the agreement but to simply approve an agreement that has already been agreed to; that he can either approve or reject the agreement; that when the deferred prosecution agreement was handed to him in court those portions which he added were not on the document; that he handled this deferred prosecution agreement in open court; that he would

[179] He was not sure who checked off the box for "The District attorney will" but it was checked off on CP Exh. 46. As checked off par 6 reads as follows: "The District Attorney will take a voluntary dismissal with leave upon approval of this Agreement by the Court." The box was not checked off for "The District Attorney will take a voluntary dismissal upon compliance with this agreement."

[180] McGuiness testified that in his legal opinion there was no reason why a district court judge could not have approved CP Exh. 46 without making any changes.

[181] As set forth in GC Exh. 31, this paragraph reads as follows:

> 2. That the defendant abide by the following . . . Special Conditions: not violate any laws of the State of North Carolina.

[182] As checked, par. 4, as noted above, reads as follows:

> The admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as result of these terms and Conditions of Deferred Prosecution.

have placed Ray Shawn Ward under oath and he would have asked him the appropriate questions that would pertain to the agreement; that he probably would not have asked Ward about community service or reparations because that was not part of the agreement, but he would have asked him all the other questions; that he has a standard form that he uses and he places the defendant under oath and he does it every time; that he could not testify from his own personal knowledge that Ward did anything in open court to indicate his admission of responsibility for the charged offenses prior to his, the judge's, approval of the deferred prosecution agreement; that he does not have total independent recollection of this particular case and everything that happened that day; that he could testify based on what he does in every case when a defendant is placed under oath and he does a motion and agreement for deferred prosecution; that he has never modified a deferred prosecution agreement after the defendant or his counsel has left or outside the presence of defendant and his counsel; that these are all done in open court in the presence of the defendant, his counsel, and the assistant district attorney, and nothing is done on one of these unless he is clear that the defendant understands what the arrangement is; that he would not have signed Ward's deferred prosecution any other time except in open court; that he never saw Charging Party's Exhibit 4 other than the day before he testified herein (He testified herein on March 12, 1999.) when it was shown to him by one of counsel for the Respondent; and that the deferred prosecution agreement, in order to defer prosecution, is based on the defendant's admission of some responsibility for the crimes listed, he always makes sure that box 4 is a part of the agreement, "I mean I'll ask the parties, is this part of it, is there admission of responsibility."

On cross-examination Judge Aldridge testified that the court has no power to unilaterally alter the deferred prosecution agreement; that he has altered such an agreement but only in open court after discussing any alteration with the defendant, his lawyer and the district attorney and only after consent or agreement in open court; that this is the only way he has authority to alter the agreement; that he would not and he could not alter such an agreement unilaterally; that on September 29, 1997, he had 80 to 150 cases before him; that it is possible that there is an original or a document that is intended to be an original and extra copies because the attorneys would not expect him to alter a document without their permission; that when he makes changes on such an agreement he will give it back to the parties or he will state what the changes are and ask them, in open court, if that is, in fact, something they consent and agree to; that he has no independent recollection of what he did in the Ward case on September 29, 1997; that it is possible that Ward signed the agreement before it was handed up to the bench; that he does not know whether Charging Party's Exhibit 4 was discussed by the parties during their pretrial negotiations; that the sheriff is not usually part of a deferred prosecution agreement; that notifying the sheriff is not something that is normally done as a part of a deferred prosecution agreement[183]; that with respect to the additions to the agreement which are in his handwriting or printing, he did not have any independent recollection when he testified herein; that his testimony at the hearing herein is predicated primarily on the deferred prosecution agreement; that regarding blocks 2 and 4, he does not have the authority to make those condition without the consent of the parties, he does not have the authority to check box 4 without the consent of the parties; that it is probably true since there is a block on the form for paragraph 4 on the first page (or front side) of the form this means that it is subject to negotiation; and that he would assume that an agreement can be made without block 4 on the first page being checked and he could approve the agreement.

On redirect Judge Aldridge testified that he has approved a deferred prosecution agreement without box 4 being checked off but only if the other document that the district attorney's office uses that indicates that there is an admission of responsibility is included with the deferred prosecution agreement; that he has never approved a deferred prosecution agreement without written evidence of the defendant's admission of responsibility; and that his testimony regarding deferred prosecution agreements is also based on his habit and practice as a district court judge.

On recross Judge Aldridge testified that district court proceedings are not recorded; that to be enforceable an agreement needs to be in writing; that even though block 4 on the first page of the deferred agreement is checked off, if Ward violated some condition of this agreement the State would still have to present live evidence of the commission of a crime and the identity of the defendant just like any other trial; that the district attorney would have to have a stipulation of fact on the record in writing or they would have to put on witnesses; and that when a case has been dismissed pursuant to a deferred prosecution agreement because the terms of the agreement have been fulfilled, the deferred prosecution agreement could not be used to impeach the credibility of the defendant who signed the agreement since it is not a conviction, it is the same as not guilty, it is not something that can be used to impeach.

On further redirect Judge Aldridge testified that if Ward had committed another violation of the laws of North Carolina and was tried, he would treat Ward's admission of responsibility in the subsequent trial as a statement against interest such as a confession.

On further recross Judge Aldridge testified that under the hypothetical if Ward were tried before a jury, the jury could give whatever weight they wanted to the deferred prosecution agreement. Subsequently, Judge Aldridge testified that legally he could have approved Charging Party's 46 without making any modifications or additions.

Analysis

The General Counsel on brief contends that Plant Manager Larry Johnson's inflammatory words to Forrest during a very volatile situation had the foreseeable effect that they were intended to have, namely to start a violent conflict with the Union; that when Green and Union Representative Johnny Rodri-

[183] After the signature of McGuiness on p. 2 or the back side of the deferred prosecution agreement (on both GC Exhibit 31 and CP Exh. 46) in the box designated "Signature of Lawyer for Defendant" the following appears "(Shiff notified)."

guez asked why Ward was being arrested Rodriguez was also arrested; that the testimony of Respondent's witnesses who testified about the incident leading up to the Ward arrest is inconsistent and often conflicting; that Sheriff's Deputy Lambert was not called to corroborate Priest's testimony that Ward threatened to kill Priest and his family; that after winning the election the Respondent wanted to send a strong message to its employees "by cutting off one of the heads of the campaign effort" (p. 164 of the brief of counsel for the General Counsel); that the Respondent created a hostile environment which fostered violence at the election and then the Respondent attempted to capitalize on it; that the Respondent did not conduct an investigation to determine the truth surrounding the incident; and that the Respondent's failure to take similar action against employee and company observer Anthony Forrest for his violent encounter with Union Representative Chad Young graphically demonstrates that Ward's union activity was at least a motivating factor in Respondent's decision.

The Union on brief argues that the Respondent had 24 full-time and 3 or 4 part time security guards, and there was no need to have the Bladen County sheriff's deputies at the Respondent's facility on August 22, 1997; that there was no legitimate law enforcement reason for the deputies to be present at the plant on the second day of the election; that Deputy Lesane testified that no hostilities had been reported when he was assigned to the plant; that the Company presented no evidence of a breach of the peace; that Deputy Lesane testified that the only other times the sheriff's department had been called to the plant was when a crime had been committed or there was an automobile accident, and no such thing had been reported to the sheriff's department on August 22, 1997; that as the Board held in *Bib Mfg. Co.,* 82 NLRB 338, 342 (1949), "[t]o interfere with lawful and peaceful activities protected by the Act on the assumption that union activities are inherently dangerous to the peace of the community negates the principles upon which the Act rests"; that the improper purpose of the police presence is evidenced by Priest's attempts to deny his control over the force present at the Respondent's Tar Heel plant and to misrepresent the extent of the police presence, both of which were proven false by the testimony of the sheriff's deputies present at the Tar Heel facility; that the attack on Ward was the culmination of the Company's flagrant, continuing pattern of unlawful conduct; that Larry Johnson's words to Forrest are evidence of the violent atmosphere that filled the plant that day; that the Company's attack on the union observers and representatives, which was led by General Manager Null, was well orchestrated and clothed with the power of the State; that employees simply cannot exercise free choice in such an atmosphere; that contrary to the assertions of Priest, Bladen County Sheriff's Deputy Lesane testified that he and 8 to 10 deputies stayed in the Respondent's parking lot all afternoon on August 22, 1997, and Priest gave them instructions as to what their duties were that day; that Deputy Richardson made no mention in his affidavit that he had previously worked for the Respondent as a security guard under Priest; that the contradictions and inconsistencies in the testimony of the Respondent's witnesses about what happened regarding Ward are in no way minor in that they go to the very heart of the major elements of the Company's story and provide strong evidence that the Company invented the story, *Monfort of Colorado,* 284 NLRB 1429, 1473 (1987); that if the testimony of the Company's witnesses is to be believed, one has to accept as fact that Ward, who weighed about 110 pounds, for no apparent reason attacked Deputy Richardson, who weighed 220 pounds, and Blount, who weighed 270 pounds; that such a scenario, where Ward and his friends were overwhelmingly outnumbered, simply defies logic; and that Ward did not admit the charges when he entered into the deferred prosecution agreement since there is a dispute as to whether Ward agreed to the checking off of box 4 on the form by Judge Aldridge, and as Judge Aldridge testified, legally he could have approved the agreement without box 4 being checked and without making any changes to the form as it was submitted to him for his approval.

The Respondent on brief contends that Ward had worked at the Tar Heel facility on two different occasions and both times he was discharged for committing unprovoked physical assaults while on company property; that while the "General Counsel would have us believe that there was a conspiracy to orchestrate Mr. Ward's arrest and subsequent termination . . . . they offered no motive for why Respondent would have singled out Mr. Ward for such treatment" (p. 269 of the Respondent's brief); that Ward admitted responsibility in his deferred prosecution agreement; and that the Respondent's honest belief that Ward was responsible for the altercation after the vote count provides an absolute defense to Ward's charge of discrimination absent evidence that Ward did not, in fact, engage in such misconduct, *Westinghouse Electric Corp.,* 296 NLRB 1166, 1173–1174 (1989); that there is no such evidence; that although it may be unclear who or what prompted Ward's behavior, it is clear that Ward struck Deputy Richardson several times in the chest and arms; and that contrary to the General Counsel's position, the Respondent had a legitimate, nondiscriminatory reason for its decision to discharge Ward.

As noted above, under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Ward engaged in union activity and the Respondent was aware of Ward's union activity. Among other things, Ward handbilled for the Union, wore union T-shirts, and was an observer for the Union at the August 1997 Board election. Also he had about 100 people sign union authorization cards in the large smoking cafeteria in the Tar Heel plant the week before the August 1997 Board election. Supervisor Randy Givens did not deny that he was at an employee antiunion meeting where Ward was asked to leave because of his outspoken support of the Union. And Supervisor Charlie Newton did not deny telling Ward that he did not want to "shut up" when the Company wanted him to so the Company did not want him back at the antiunion meetings. The record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against Ward even if he did

not support the Union and was not engaged in protected activity. The Respondent has not demonstrated that it had any business justification for discharging Ward.

Null orchestrated what occurred on August 22, 1997. Priest was not a credible witness and his testimony the he never discussed bringing sheriff's deputies onto the property on August 22, 1997, with anyone in management before it occurred is not credited. It is noted that at one point Priest did testify that Null told him on August 21, 1997, to call the sheriff's department after Null spoke with Union Representative Chad Young and Reverend Jackson. Null was not a credible witness. Null's testimony that he did not know in advance of the vote count that there was going to be sheriff's deputies there is not credited. According to the credible testimony of Sheriff's deputy, Sergeant Lesane, he and about 8 to 10 sheriff's deputies were stationed in the parking lot in uniform, with sidearms, and on duty at Smithfield's Tar Heel facility from between about noon or 1 p.m. to about 4:30 p.m.[184] Null not only knew that they were there, Null was responsible for them being there. Null wanted to make a point that the Tar Heel plant was his plant, the Union was going to pay a price for its attempt to organize the employees who worked there, and employees who supported the Union would have a old fashioned example of what can occur when they try to bring in a Union. Null told Union Representative Chad Young that "I want to make sure you're there for a real ass-whipping, we're going to beat you at least—by more than two to one. And we've got something special in mind for you . . . ."[185] Null's claim that he was only speaking about the vote when he wanted to make sure that Young was at the vote count is not credited. Null was not a credible witness. Null knew in advance that there was going to be an incident or incidents after the vote count because the Respondent was going to create them and then use the sheriff's department as an enforcer. The Respondent then used Anthony Forrest to create a situation in the voting area by, in effect, telling him to go get Young.

Priest, who testified that he knew who Joey Dockery was because he escorted Dockery off the property when Dockery was terminated, incredibly testified that he did not know who Ward was on August 22, 1997, at the time he arrested and handcuffed him. Priest was the same individual who in 1996 had engaged in a motor vehicle chase of Ward as Ward exited the plant to go on North Carolina Highway 87. Priest was the same individual who arrested Ward and placed him in handcuffs after the chase. Priest was the same individual who then took Ward and Hester to the local magistrate where criminal charges were taken out on Ward.[186] As they were walking down the hallway on August 22, 1997, after the vote count, Priest, contrary to his testimony, knew exactly who Ward was. Priest knew that Ward was vulnerable because of his past conduct. Priest or someone else apparently believed that if Priest could convince a fact finder that Priest did not know who Ward was at the time of the incident, then Ward's past conduct could not have been a consideration in setting Ward up. I credit the testimony of Ward, Molito and Green with respect to what happened to Ward on August 22, 1997, in the hallway at the Tar Heel plant after the vote count. As counsel for the General Counsel and the Union point out on brief, the testimony of the Respondent's witnesses is contradictory and inconsistent. Priest was not a credible witness. Priest did testify that there were three sheriff's deputies in the hall with him at the time of the Ward incident, namely Richardson to Priest's left and Davis and Lambert in front of him. Of these three, the only one to testify at the hearing herein was Richardson, who worked for the Respondent under Priest at one time.[187] Undoubtedly, it will be argued that Richardson was in the best position to see and hear what was going on. But if the accounts of the Respondent's witnesses are to be believed, the incident was not over in a split second. According to the collective testimony of Respondent's witnesses, Ward was trying to punch and/or kick three different men namely Richardson, Blount, and Priest, before he was arrested and placed in handcuffs.

Another thing concerns me. Richardson testified that after he got in the patrol car with Ward and Deputy Lambert, who was driving, they went to the sheriff's department. Richardson left something very important out. More specifically, Richardson left out the fact that after he got into the passenger's seat of the patrol car, he Lambert and Ward did not go directly to the sheriff's department. Rather, they drove to entrance to Null's office. Null did not deny Ward's testimony that Null then talked with representatives of the sheriff's department for 25 to 30 minutes. Deputy Lambert did not testify to deny that this

[184] Smithfield was able to have up to 10 sheriff's deputies, sitting in a parking lot at Smithfield for about 4 hours so that they could be at the beck and call of Smithfield. Apparently the only thing that the deputies did during that period (before they entered the plant toward the end of the vote count about 4:30 p.m.) was that Sergeant Lesane entered the plant at the behest of Priest and searched a union representative's bag. It is noted that in CP Exh. 35, an open letter to employees and friends of the Respondent which Null "created" and which was published in the newspapers in Bladen and Robinson Counties, it is indicated that the Respondent "is the No. 1 taxpayer in Bladen County."

[185] See the summary of evidence under objection 33 below.

[186] As noted above, the charges were subsequently dismissed. I credit the testimony of Hester regarding what happened in 1996 with Ward. I found Hester to be a credible witness. Obviously at the time of the Hester/Ward incident, the latter mistakenly believed that the much older gentleman, who did not appear to weigh that much, would be easy to push out of the way.

[187] It is noted that at Tr. 4303 sheriff's deputy, Sergeant Lesane, gave the following testimony:

> Q. So, you clearly recall Lasavin Richardson taking him [Ward} out?
> A. yes, sir.
> Q. Deputy Lasavin Richardson?
> A. Right.
> Q. Describe Deputy Richardson.
> A. About five nine, two fifty (250), white male, short hair.

And it is noted that at Tr. 4438 Deputy Richardson gave the following testimony:

> Q. Mr. Richardson, for the record, can you height and race? Your height?
> A. five nine.
> Q. And what's your race?
> A. Black African American.

No motion was made to correct the record with respect to this matter.

meeting took place. And although Deputy Richardson testified that "[w]e went to the Sheriff's Department," he did not specifically deny that the meeting with Null took place. If Deputy Richardson had been assaulted by Ward, it apparently would not have been Null's prerogative to decide whether Ward should be charged. And if Deputy Richardson was going to defer to Null on that call, it would not have taken 25 to 30 minutes to give a "thumbs up" or "thumbs down." Was the group deciding what the approach was going to be? Someone was going to have to file an official report.

Two things must be considered with respect to the Respondent's argument that Ward admitted in the deferred prosecution agreement responsibility for the involved charges. First, the deferred prosecution agreement was entered into on September 29, 1997. Ward was discharged on August 25, 1997. Obviously, whatever occurred with respect to the deferred prosecution agreement could not have been considered in the Respondent's termination of Ward for the agreement was not even in existence when Ward was terminated. Second, if I have to chose between someone who has specific recall about a matter versus someone who does not have specific recall but approaches his testimony in terms of his habit or a routine, then, on that basis alone, I would have to choose the witness with specific recall unless it was demonstrated that there was some other reason not to rely on his testimony.[188] Moreover, as the judge who handled the matter testified, legally he could have approved the agreement (CP Exh. 46) without any modifications or additions. With the caseload that the involved court handles, it is understandable how one could assume that something happened because that was the routine. That, however, is an assumption that I cannot make in the face of testimony of a reliable witness who specifically recalled that it did not happen.[189] The testimony of Ward's attorney, McGuiness, is credited. His client did not agree, as here pertinent, to have the box relating to an admission of responsibility checked off.

The Respondent undoubtedly will argue that there was no need for an investigation of the Ward incident because a member of management was there when it happened. In my opinion, no investigation was undertaken because management knew exactly what was happening. They orchestrated it.[190] The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Ray Ward on August 25, 1997.

(d) Ada Perry

Former Respondent's employee Ada Perry testified that she worked at the involved facility from December 20, 1993, to January 30, 1998; that there are two laundries, namely the cut and kill floor or old laundry and the conversion or new laundry; that before the union organizing drive in 1997 she worked primarily in the conversion laundry and after the 1997 union election she moved to the old laundry; that she was not involved with the Union during the 1994 organizing drive; that in 1997 she did not become involved with the Union until August 14, 1997, when she attended a rally at the union hall at which Reverend Jesse Jackson was speaking; that there were between 100 and 150 people present and a newspaper reporter from the Fayetteville Observer spoke with her; that on August 19, 1997, Larry Johnson came to the conversion laundry room window and told her that he wanted to talk to her in the back; that she went to the back door outside with Johnson; that no one else was present when she spoke with Johnson in this area; and that she had the following conversation with Johnson:

> He asked me, he says I can't believe it. You hurt me so bad, I can't believe it. I said, what are you talking about? You're a Union organizer and you campaign for the Union. I said, No, Larry, I just went to see Jesse Jackson. He said, you're all over the front page. It's right downstairs in Jerry . . . [Null's] office. Ada, they've got you on the front page stating it. I said, No, Larry, I told that news reporter that a guy come up to my counter and said they had. He said, no, I was the one that did it.
>
> . . . .
>
> [Johnson] said, are you going to vote yes? I said, that's everybody's decision, like Democrat or Republican, that's everybody's decision. He said, please don't vote yes. Will you please vote no? I said we'll that's up—everybody's right, you're taking their rights away. He said, will you please just tell everybody to vote no when they come up here to the window? I said, Larry, I don't get in other people's business. He said, well, Jerry . . . [Null] is so hurt—no, correct—correct it. He said,—I said, why me—are you asking me out of all these people down here? He said because the whole plant looks up to you. We don't stand a chance. And I said well, ain't I getting more money if I'm so important? He said, go down and see Jerry. He said, he'll make it good, go see Jerry. You've hurt him so deeply, go see Jerry. [Tr. 1284–1285.]

Perry further testified that on August 21, 1997, she was a union observer at the union election and when Jerry Null saw her he turned real red and left; that after the 1997 union election she was told to work in the old laundry room; that she engaged employees on the line waiting for smocks and gloves in discus-

[188] Initially Assistant District Attorney Marion Warren testified that counsel for Ward *would have* checked box 4. Counsel for Ward did not check box 4 and the box was not checked when Warren executed the deferred prosecution form (CP Exh. 46). The involved district court judge testified that he altered the agreement (after Warren signed it) and that he would only do this in open court after discussing the alteration with the defendant, his lawyer and the district attorney, and only after consent and agreement in open court. Warren did not testify that is what occurred. Warren testified that box 4 *would have* been checked off before the agreement was given to the judge. It was not. This and other conflicts between the testimony of Warren and the involved judge cause me to find that Warren's testimony is not reliable regarding what was said in open court. I conclude that Warren was testifying in terms of what he believes *would* have happened rather than in terms of exactly what did happen.

[189] The fact that one of the dates on the second page was changed with what appears to be Ward's attorney's blue felt tip pen means only that it was changed after a copy of what was received herein as CP Exh. 46 was made. It could have been changed after the copy was made but before the district court judge considered the matter. We do not know.

[190] Priest was not a credible witness. No one corroborated his testimony that Ward threatened to kill him and his family. Priest's testimony is not credited. Ward's denial is credited.

sions sometimes; that such discussions sometimes could be described as "picking" or, in other words, teasing which sometimes included her asking the employee involved whether he wanted her to come across the counter; that she is 61 years old and was known as "grandma" in the plant; that she also "picked" with superintendents and supervisors and all of them had seen her "picking"; that all of the laundry employees had to sign General Counsel's Exhibit 42 which is dated September 16, 1997, and which is a written warning to all laundry employees from Billy Jackson indicating that it had been brought to his attention that the attitudes of laundry employees toward other employees had been less than professional, and that further instances would result in suspension and or termination; that she asked Sherri Buffkin if her "picking" was a problem and Buffkin indicated that there had not been any complaints about her; that sometimes an employee, who was in a hurry, would ask her to throw a smock to him; that when laundry employees were standing away from the counter taking smocks out of bags they throw the smocks to the employees on the other side of the counter; that she threw smocks in the presence of supervisors; that to her knowledge no employee ever got offended by her throwing a smock to the employee; that on January 26, 1998, she telephoned Buffkin and told her that "the lines and the Mexican and Black was pushing and threatening to stomp asses and all this . . . [and she told Buffkin that] we needed somebody out there to watch the line, because . . . [the laundry employees] can't correct them"; that on January 27, 1998, she asked Billy Jackson and told him that somebody needed to monitor the lines and Jackson told her that it was taken care of; that on January 27, 1998, the following occurred:

> I worked the counter. Three guys came up, after Cut and Kill Floor and everybody had went down, from the Freezer. I was back here getting up dirty smocks and bagging them. I said,you all want a smock? Said, yes. I said, where's your ticket? They put it on the counter. They said, throw it. I threw it. Another guy over here, I said, you got your ticket? He put it on the counter and he done like that (clap hands), and I threw it. Then he reached up there like he was going to take it back. I said . . . you don't want Grandma to come across that counter. And they all just rolled and left.
>
> But John Hall was standing right over there to my right, and he didn't say anything. So, I just went back to working at my job. I knew he was there.

Perry further testified that on January 28, 1998, she worked in the conversion laundry, which is small, and she did not see John Hall that day; that on January 29, 1998, when she reported for work Billy Jackson took her to John Hall's office where she and Hall had the following conversation, in the presence of Jackson and Olga Anderson from human resources:

> He said, you know I observed you the other night? Them three guys wrote a complaint on you. I said, they did? He said, yes, threatening to do bodily harm, that you insulted them. I said, well, it's strange to me, they all laughed. Then he said, well, one of them didn't. One of them wrote a complaint. I said, well, where is the complaint? Just don't you worry about, he wrote it. I said okay.
>
> He told Olga to write me up, threatening to do bodily harm, and get me to sign it.

Perry further testified that she is 5-feet 3-inches tall and weighs about 145 pounds; that the three male employees in question were about 27 to 30 years old, about 6-feet-2 inches tall and looked like they had been lifting weights; that she did not sign the disciplinary record, indicating instead, " I'll let my lawyer handle it[191]; that she did not threaten employees on January 27, 28, or 29, 1998; that she was suspended on January 29, 1998; that when she went in to pick up her paycheck the following day she met with John Hall, with Sherri Buffkin and Olga Anderson present, and Hall said that they had reviewed her case and they were terminating her for threatening to do bodily harm and they had a witness[192]; that she was told by the employees that they did not sign a complaint alleging that she threatened to do bodily harm and they told her that "he" went all over the floor asking people to write something up on her; that she never communicated any threats to any hourly employees; that while the termination document indicates that she was observed on January 28 and 29, 1998, she did not see Hall observing her in either of these days, she saw him observe her on January 27, 1998, and she did not work on January 29, 1998; that the conduct she engaged in on January 27, 1998, was the same conduct she always engaged in; that when she said on January 27, 1998, "[Y]ou don't want me to come across the counter," the employees just laughed and left; and that she attended Margo McMillan's unemployment hearing and testified on her behalf before January 30, 1998.

Subsequently, Perry testified that she began working in the laundry department in August 1995; that she worked on the second shift; that when she met with Hall on January 29, 1998, she reminded Billy Jackson, who was present, that she had asked him in the past whether anyone complained about her picking; that in July or August 1997 she reported a female employee to Margo McMillan when the employee knocked some smocks on the floor and cursed her; that the employee refused

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[191] CG Exh. 43. The management remarks portion of the form reads as follows:

> Ms. Ada Perry is being suspended pending further investigation into complaints that she is rude to laundry customers (Employees). Allegations have been made that Ms. Perry yells at employees, threatens them and throws supplies (specifically Smocks) across the counter. Ms. Perry was issued a written warning by Billy Jackson 9/16/97 in reference to the importance of being professional and having a positive attitude with laundry customers. The 9/16/97 warning stated that employees who fail to provide a positive support service to laundry customers will receive disciplinary action up to and including termination. In addition Company policy further states that horseplay, communicating threats and contributing to unsanitary conditions are serious offenses that may result in termination.

[192] Perry's termination document (GC Exh. 44) reads in part as follows:

> Employee is being terminated due to communicating threats to hourly employees, and horseplay. Mrs. Perry was observed doing this on two separate occasions 1–28–98, 1–29–98.

The form indicates that the last day worked was "1/30/98." The box for reviews and appeals is signed, in addition to one other person, by Sherri Buffkin and Olga Anderson, and both dated their signature "2–2–98." The form indicates that it was prepared on February 2, 1998.

to give her name to McMillan who reported the incident; that the employee was suspended; that she heard Helen McCoy sometimes refuse to give something to Mexican employees when they needed it and McCoy would tell the Mexicans "to go back to damn Mexico"; that she reported McCoy's conduct; that McCoy was still working at the involved plant; and that before she took Margo McMillan's crew-leader position Jenette Ellison would curse out employees who came to the laundry room.

On cross-examination Perry testified that on August 14, 1997, she told a newspaper reporter at the rally, when he asked if the Union was going to get in, that a man came up to her laundry counter and said, "[W]e got it this time"; that it was mistakenly reported that she said that "we got it this time"; that a supervisor in the blood plasma department named Sam (Perry could not recall his last name.) told her the day after the 1997 election to watch her back because John Hall was after her[193]; that she was aware that the Company had problems with laundry employees throwing smocks and other items at production workers; that when she was moved from the conversion laundry to the old laundry she thought that she was being punished and she asked if anyone had complained about her "picking"; that she was not told by Billy Jackson or Sherri Buffkin that she was being moved from the conversion laundry because there had been complaints about her; that no manager ever told her to stop talking to people the way she did; that her "picking" depended on what the employee said to her; that she never cursed at an employee; that she never actually jumped across the counter and onto the floor and chased somebody; that she did go across the counter to show that she could do it and she told her supervisor about it; that when the female employee grabbed a smock from the bottom of the pile of the smocks which she was holding and knocked smocks on the floor, she told the employee as she started to leave "well, we'll see as of tonight if you've got a job"; that the female employee came back and said "you motherfucker, what do you think you can do"; that she then told McMillan who asked the employee for her name[194]; that during the meeting of January 29, 1998, she did say to Billy Jackson you've always told me that there was no problem with this and she said the same thing to Sherri Buffkin during the meeting on January 30, 1998; that Jackson said nothing in response and Buffkin turned her head; and that John Hall did all of the talking at these meetings. Subsequently, Perry testified that at 8 p.m. approximately 1250 cut floor employees exchanged equipment (smocks, gloves, etc.) at the laundry and at 9 p.m. approximately 1250 kill floor employees exchanged equipment at the laundry; that the laundry had 30 minutes (the employees' breaktime) to service these employees; that at the conversion laundry there would have been approximately 2000 employees to be serviced; and that the conversion laundry had two employees.

The Respondent's former manager, Sherri Buffkin, testified that Ada Perry, who was referred to as "Granny," was an issue clerk in the laundry; that Perry had a crew leader who reported to Billy Jackson who in turn reported to her; that she was familiar with Perry's work habits; that Granny was a character in that she joked or picked with people; that people enjoyed picking with Granny; that there were never any complaints from employees regarding Granny's picking; that on several occasions she heard Granny tell people, "[D]on't make me go over the counter at you"; that neither she nor the employees took this as a threat; that other supervisors, including Billy Jackson, had engaged in picking with Granny; that after McMillan's termination she went to Larry Johnson and told him he was going to have a problem because there was nothing in her file; that Johnson told her that he wanted a letter put in every laundry employees' file stating that this was a service production area, that such things weren't going to be tolerated, and that if this type of behavior happened they would be terminated, which was supposed to cover everything; that such a letter was issued to the laundry employees; that she found out about Perry's union activity the day after the Reverend Jackson's rally when a newspaper was shown to her in Larry Johnson's office; that in addition to her and Johnson, Null, and Hall were present; that Hall told Johnson that Granny's days of running to Johnson were over; that just before she was terminated Perry spoke to her about a problem on the laundry room line regarding production employees; that she told Perry that she could not come back out there that night and she would speak to John Hall about it; that Hall told her he would look into it; that a couple of days later Hall told her that he observed Granny in the laundry and she was the problem; that Hall said that Granny was instigating a fight; that she thought it was hilarious to think that Granny was instigating a fight with someone from the kill floor and she told Hall she did not believe it; that a couple of days later Perry was terminated at a meeting attended by Perry, Hall, Olga Anderson, who is a human resources representative, and herself; that Hall took charge of the meeting saying that this was a decision he made after investigating the matter and he was standing behind it; that there was no investigation because

[193] Samuel Butler testified that he works at the involved Tar Heel facility; that he is the supervisor of the second shift for Addison Foods, which is a subsidiary of the Respondent, and which processes inedible and edible products; that he had the same job in the summer of 1997, which is in the blood plasma area; that he knows John Hall; that he knows Ada Perry and he spoke with her occasionally in the laundry and in the cafeteria; that he did not recall ever discussing anything about the union election with Perry; that he did not think that he ever discussed Hall with Perry; that he did not rcall warning Perry, after the union election, to watch her back; that he did not recall telling Perry that Hall had it in for her; and that Hall never mentioned any employee to him. On cross-examination Butler testified that Addison Foods is an inside Company which buys product from the Respondent; that he was not sure whether the Respondent had financial control over Addison Foods; and that Addison Food's employees are contract labor from the Respondent. Subsequently, Butler testified that in the period preceding the 1997 Board election he attended meetings with supervisors of the Respondent and "it seems like" Hall was at those meetings.

[194] Perry testified that originally the female employee did not geet suspended and Marion Brown, who apparently signed Perry's termination form under reviews and approvals, told her that they were both in the wrong, she was not going to do anything to either one of them, and "motherfucker" was just a matter of speech; that she called Raleigh and asked if they had to put up with that; and that whoever she spoke with in Raleigh said, "[N]o," and the next day the girl was called in and sent her home for 4 days.

Hall never asked for her opinion or if she had any problems with Perry, and he never asked her anything; that Hall told Perry that she was terminated for threatening to go across the counter and instigating a fight; that after Perry left she told Hall that Perry would call the President of the United States and the Governor; that Hall then "said he didn't give a damn who she called. Maybe she could go work for the Union then . . . ."; that in August 1997, about 1 week before the 1997 election, she attended an antiunion meeting at which employee LaTanya Mathis stated her opinion; that after the meeting Jerry Null told her, in the presence of her assistant Susie Jackson,[195] that he wanted Selena Blount, LaTanya Mathis, and Ada Perry terminated but he wanted her to wait 4 or 5 months "till all of this blew over"; and that Null then told her that her laundry was "just a hot house of Union support."

Subsequently, Buffkin testified that Helen McCoy worked in the laundry for at least 3 years and she supervised McCoy the entire time; that there were reports that McCoy was particularly abusive to Hispanic employees in that she would not give them items to exchange when they came upstairs and things of that nature; that she remembered that as of the time that Perry was discharged, January 1998, she issued McCoy a discipline, Hall issued McCoy a discipline apparently after McMillan was terminated, and at one time McCoy was suspended with a writeup by Cindy Jackson; that the meeting at which Latanya Mathis spoke up was a mandatory meeting at which the employees watched a video which Jerry Null was in and the employees were asked for their opinions; that Mathis said that it was rather pathetic that the only time the Company gave the employees any kind of consideration was when there was a threat of a union election, after the election—just like the first time—the Company would have nothing to do with the employees, nothing was done to help, and the Company makes all these promises and stops; that Mathis then point blank asked Jerry Null if she was going to lose her job for speaking up like that; and that immediately after this meeting Null indicated that he wanted Mathis fired.

On cross-examination Sherri Buffkin testified that starting in August 1995 Perry worked in the old laundry and in mid-1997 she moved to the conversion laundry; that the majority of complaints about Perry were that Granny would tell employees that they were not holding up their end of the job or that they were giving stuff away; that the laundry employees, including Perry, were spoken to as a group regarding attitude and behavior and she never spoke to Perry individually about these matters; that she personally has terminated production employees for being rude to people in the laundry; that she terminated employee Joyce Strong for being rude to her, and this occurred about the time Perry was discharged[196]; that she fired employee Rita Brown around the time that Ada Perry was terminated; that Brown, who is a huge woman physically threatened to come across the counter and punch her laundry crew leader, Jason Chavis, who is a very small man; that at the time she testified herein Selena Blount still worked at the Tar Heel facility because she refused to terminate her; that Latanya Mathis had been terminated through human resources for refusing to stay over and work after she agreed to; that at that point she was not directly operating under Null's instructions; and that she took Mathis to human resources after the crew leader informed her that Mathis agreed to stay and did not.

The Respondent's supervisor, Billy Jackson, testified that he was Ada Perry's supervisor for about 2 years; that during that 2 years he "guessed" that he received a few complaints about Perry using abusive language and throwing smocks at employees as they came up to the laundry; that he reported these complaints to his Supervisor Sherrie Buffkin; that he issued a written warning to all laundry employees on September 16, 1997, including Perry, about unprofessional attitudes (GC Exh. 42); that the warning was issued because they were having so many complaints about the laundry; and that he did not write up Perry's suspension (R. Exh. 43), and he did not meet with her to issue this discipline but he signed it "basically because my Manager [Buffkin] gave it to me to sign to let me know what was going on with Mrs. Perry." On cross-examination Billy Jackson testified that he did not have anything to do with Perry's suspension; that he could not recall ever having issued any other warnings to Perry other than the one he issued to all laundry employees (GC Exh. 42); that he did not recall ever receiving any written complaints about Perry's conduct; that in dealing with employees, he believed that Perry acted "in a good hearted nature . . . . but the employees did not take it good hearted"; that he did not recall Perry ever receiving discipline for telling employees "don't let me jump over this counter at you"; that several times he had been told that Perry said this but he never heard her say it; that he was not asked for his opinion as to whether Perry should be terminated and he was her direct supervisor; that no one asked him what kind of work record Perry had before she was terminated; that he could not recall any specific complaints about Perry's work; that he did not have any work problems with Perry; that he had problems with the attitudes of the laundry department employees until he left that department in late 1998; and that employee attitudes was a big problem that he had to contend with. Subsequently, Billy Jackson testified that with respect to General Counsel's Exhibit 42, the form he gave to all laundry employees, he held a group meeting and he did not discuss this discipline individually with Perry; that he would describe Perry as a character; that she is sometimes referred to as Granny; that if Perry did threaten to come over the counter and she did it in a way that he did not think she was serious he—considering he is 6 feet 3 inches tall, in his mid-30s and weighs about 245 pounds—would not view it as a threat; and that, with respect to whether employees complained to him about laundry employees throwing smocks, "[i]t could be, yes, but I know Ada—complained Ada was doing it but I think Ada was trying more or less doing it out of a good natured way but I don't think it was perceived by the employees . . . . she is trying to joke around with them and play and a lot—some appreciated it I "guess" and a lot of them didn't."

Jason Chavis, who is a crew leader for the Respondent, testified that in 1997 he was the crew leader in the laundry on the

[195] After Buffkin's termination, Susie Jackson was promoted to purchasing agent.

[196] According to Sherri Buffkin's testimony, Strong, who is black, told her that "she was going to kick my cracker ass." Sherri Buffkin is white.

first shift; that Ada Perry worked in the laundry on the second shift; that he observed Perry working and Perry would yell at the employees and throw clean gloves and smocks at them; that he received complaints about Perry's attitude but he could not identify who allegedly made the complaints; that he reported the alleged complaints to his supervisor, Billy Jackson, and his superintendent, Sherrie Buffkin[197]; and that Buffkin told him that Perry "was strictly with the Union." On cross-examination Chavis testified that he did not issue any written warnings to Perry; that he did not receive any written complaints on Perry from employees[198]; that production employees on the line at the laundry rooms want to get their supplies as quickly as possible because they are using up their breaktime waiting in line; and that when the smocks are already stacked on the counter the employees just take one without the laundry clerk handing them one so as to speed up the process.

Rachel Bailley, who is a crew leader for the Respondent at Tar Heel, testified that Ada Perry cursed a lot in the laundry room; that she saw Perry throw smocks; that she "thought" that she complained to her supervisors about Perry.[199] On cross-examination Bailley testified that she did not think that Perry was a threatening employee to anyone; and that just before Perry was terminated there were problems with production employees being rude and unruly toward laundry employees while on the line at the laundry counter, and laundry employees complained about this. On redirect Bailley testified that after the second time that she became a locker coordinator she worked with Perry right up until she left, "no matter what job I was doing." Subsequently, Bailley testified that as crew leader she could recommend that an employee in laundry be considered for termination but she never did.

The Respondent's employee Sabrina Richardson testified that she worked with Ada Perry when a second-shift employee did not come to work and Perry had to work on the second shift; that while she never heard Perry use "cuss" words or abusive language towards others, she saw Perry throw smocks at others; that employees are not supposed to throw smocks; that when she attended her first meeting when she first got into the laundry Sherrie Buffkin held the meeting and it was indicated that the employees should not throw smocks; that she threw a smock one time when an employee threw a smock wet with water in her face and she threw it back at him; that she reported the incident to Buffkin who told her that she was not supposed to throw smocks and asked her for the name of the employee which she did not have; that she estimated that 1000 people come through the laundry in a given day; and that there is no reason to throw smocks because they are piled up on the counter. On cross-examination Richardson testified that smocks are not always lined up on the counter; that sometimes the employees actually have to hand out the smocks; that she has seen employees throw smocks up on the counter just to keep the line moving; that most of the employees in laundry are in their twenties or thirties and Perry is older and referred to as "granny"; that Perry was a "very jokey type person" and nobody ever felt intimidated by Perry; that Perry was a good person to work with and she did not have any problems working with Perry; that she had no complaints about Perry; and that she had nothing to do with Perry's termination and no supervisor ever talked to her about Perry.

The Respondent's purchasing agent at Tar Heel, Emogene (Susie) Jackson, testified that from September 1996 until January 1997 she was a laundry clerk on the first shift (8 a.m. to 4:30 p.m.); that beginning in September 1996 she reported to Sherrie Buffkin, one of her job responsibilities was to take phone messages for Buffkin, and in performing this function she took complaints about employees and passed them on to Buffkin; that one message she took was about Ada Perry referring to the Mexicans who worked in the plant as "wetbacks and stuff and calling them names"; that she gave this message to Buffkin; that she was present when Buffkin told John Hall to go to the laundry on the second shift and check out what was going on; that Buffkin and Hall discussed the fact that they had been receiving complaints about Perry throwing smocks and using abusive language to the employees; that about 2 days after Buffkin asked Hall to observe what was going on at the laundry she was present when Hall told Buffkin that he observed Perry using abusive language, throwing smocks at employees, yelling at employees, and threatening to come across the counter; and that she overheard Buffkin tell Hall to fire Perry because she had a write up in her file and she knew she was not supposed to be doing this. On cross-examination Emogene Jackson testified that she worked with Perry from 1 until 3 p.m. and then she would go over to the other laundry; that during the "rushes" thousands of employees would come down the hall and the employees were either on break or going home; that the employees were in a hurry to get their equipment and some of them would try to rush the laundry employees; that some of the employees waiting would be pushing in line and trying to break ahead of other employees; that Perry had to tell the employees to stay in line and she heard Perry make statements like, "[y]ou can get your ass to the back of the line"; that Perry is an elderly woman; that she never felt threatened by Perry and employees were not threatened by her but some were upset with Perry; that Perry kidded around, "picked," with over half of the employees; that some of the employees who came up to get smocks used curse words all of the time and some cursed the laundry clerks who were handing out the smocks and equipment; that she told Perry about the complaints about her and she made notes on Perry's side of the story; and that she was present when John Hall and Buffkin were discussing discharging Perry and Buffkin told Hall to fire Perry.

Olga Anderson, who is a human resources manager at the Respondent's Tar Heel facility, testified that she discharged Ada Perry; that on January 28, 1998, about midday, she received a telephone call from Sherri Buffkin who was a supervisor over the laundry and sanitation department; that Buffkin told her that she was bringing Perry down to human resources

[197] As noted above, Billy Jackson testified that Buffkin told him to get complaints in writing. Chavis did not testify that Jackson told him this. Chavis did not testify that when he observed objectionable conduct on the part of Perry that, as a crew leader, he told her not to continue the objectionable conduct.

[198] The transcript refers to warnings but it is clear from the context that it was understood that the question referred to complaints.

[199] Bailley claimed that other employees complained to her about Perry but she could not identify even one of the alleged complainants.

and she wanted the employee to be terminated; that when she asked Buffkin why Buffkin told her that the night before during the Second-Shift Superintendent John Hall was upset with Perry because she got into an argument with an employee and she jumped over the counter of the laundry department; that she asked Buffkin to bring the file down so she could review the file; that Buffkin brought Perry and Perry's file to her; that Buffkin told her that she had counseled Perry several times for being rude and threatening employees and she had been hearing a lot of complaints about Perry; that Buffkin said that she was tired of counseling Perry and she wanted Perry terminated; that she made the decision herself to terminate Perry; that when she reviewed the file she saw General Counsel's Exhibit 42, which was the memorandum ("written warning") to all laundry employees dated September 16, 1997, from Billy Jackson indicating that the attitudes of laundry employees toward other of the Respondent's employees had been less than professional and any further instances of this kind will result in suspension and or termination; that she asked Perry what happened the night before and Perry said that she was playing with the employees, just joking around, and some of the employees would play with her; that she told Perry that there was a complaint that she had threatened an employee, went over the laundry room counter, and "*grabbed*" (emphasis added) an employee after throwing a smock on the floor; that Perry said the it was play and she did not mean anything wrong; that she told Perry that she would be suspended pending her investigation; that when Perry was in her office the next day, January 29, 1998, she showed Perry General Counsel's Exhibit 43 which is a "DISCIPLINARY RECORD" dated "1/29/98 which she, Billy Jackson, Sherrie Buffkin, and John Hall signed; and that Perry refused to sign the "DISCIPLINARY RECORD" on which she, Anderson, wrote:

> Ms Ada Perry is being suspended pending further investigation into complaints that she is rude to laundry customers (Employees). Allegations have been made that Ms. Perry yells at employees, threatens them and throws supplies (specifically smocks) across the counter. Ms. Perry was issued a written warning by Billy Jackson 9/16/97 in reference to the importance of being professional and having a positive attitude with laundry customers. The 9/16/97 warning stated that employees who fails [sic] to provide a positive support service to laundry customers will receive disciplinary action up to and including termination. In addition Company policy further states that horseplay, communicating threats, and contributing to unsanitary conditions are serious offenses that may result in termination.

Anderson further testified that Sherrie Buffkin, Billy Jackson, and John Hall were present at the January 29, 1998 meeting she had with Perry; that no one told her what to write on the form; that she decided to terminate Perry; that no one told her to fire Perry; that when she met with Perry on January 29, 1998, she told Perry that she had decided to terminate her for threatening employees, for working an unsanitary situation and for horse play; that during the January 29, 1998 meeting Perry told John Hall the she did not recall seeing him in the laundry and Hall said that he was there because he "was upset over the laundry regarding having a lot of complaints about how you was handling or treating the employees so I went there to observe you and the employees in the laundry"; that she told Perry that she decided to terminate her based on her file because she had a previous incident where she "*grabbed*" (emphasis added) an employee before on the second-shift cut and because she was counseled by Billy Jackson the supervisor before; that there was a writeup in Perry's file about an incident with a second cut employee where Perry went over the counter and "grabbed" an employee; that she saw a copy of this writeup prior to deciding to terminate Perry; that General Counsel's Exhibit 44 is the termination form for Perry which she signed; that Buffkin wrote the remarks on the termination form, viz., "Employee is being terminated due to communicating threats to hourly employees, and horseplay. Mrs. Perry was observed doing this on two separate occasions 1–28–98, 1–29–98"; and that Marion Brown, is also a human resource manager, signed the termination form even though she was not present at the January 29, 1998 termination meeting with Perry because Brown "was the person in charge to review all terminations." Perry was suspended on January 28, 1998, and she was terminated in January 29, 1998.

On cross-examination Anderson testified that whether the procedure for termination is followed, namely an employee receives an oral warning, a written warning, is suspended, and then is terminated, depends on the situation; that there was a writeup where Perry "*grabbed employees*" (emphasis added); that there was a statement by Ray Locklear regarding this alleged prior incident of grabbing in Perry's file when she reviewed the file and that incident occurred in 1998[200]; that Perry was suspended on January 28, 1998, and not on January 29, 1998; that General Counsel's Exhibit 42, which indicates "Ms. Ada Perry is being suspended" is dated "1/29/98"; that the Respondent does not have any document showing her being suspended on January 28, 1998; that she used the prior incident of Perry "*grabbing*" an employee as the basis of her termination of Perry; that she talked to John Hall on the day she suspended Perry, January 29, 1998, and he told her that he went to observe Perry because he received a lot of complaints from hourly employees about how Perry was treating them; that Hall did not tell her that he observed the line as a result of Buffkin asking him to observe the line and Buffkin did not tell her this; that Hall "said she [Perry] went and jumped over the counter and *grabbed* an employee" (Tr. 4671, emphasis added); that she did not talk to the involved employee; that Hall did not tell her the name of the involved employee and she did not recall if she asked for it; that she understood that Perry, who is elderly, was referred to in the plant as "Granny"; that Billy Jackson wrote up the incident with the second cut floor employee who worked in Ray Locklear's department; that the write up was written by Sherri Buffkin; that there was a statement in Perry's file by Locklear; that there was a statement from the superintendent

[200] This statement regarding Perry previously grabbing an employee was not in Perry's file when Anderson testified herein. As noted above, Billy Jackson's September 16, 1997 memorandum indicates that further instances of unprofessional conduct by a laundry employee will result in suspension and or termination. It was not shown that Perry was suspended for this alleged prior incident of "*grabbing*."

and a statement from the employee regarding what happened and the discipline record by Sherrie Buffkin; that the incident would have taken place probably before the union campaign in 1997[201]; that she could not recall if Perry was suspended for the alleged prior incident of "*grabbing*"; that Hall indicated that "she [Perry] jumped over the counter and "*grabbed*" an employee" (Tr. 4682), emphasis added); that Hall did not direct her to terminate Perry "I made that decision myself"; that she did not confer with Lee Mount, the head or her department and she did not confer with Larry Johnson; that she did not see any documents in Perry's file regarding the alleged counselings by Sherri Buffkin; that while she did not specifically write that Perry jumped over the counter in General Counsel's Exhibit 43, the January 29, 1998 suspension, she did write "horseplay"; that she did not mention the alleged prior '*grabbing*" incident documents in the January 29, 1998 suspension document while she does mention the Billy Jackson September 16, 1997 memorandum to all laundry employees in Perry's January 29, 1998 suspension document; that she first met with Perry on Wednesday January 28, 1998; that she met with Perry for the second time on Thursday, January 29, 1998, and she terminated her during this meeting; that Perry did not work her shift on January 28, 1998, since she was suspended before 2 p.m. that day; that if General Counsel's Exhibit 42 were the only document in Perry's file she probably would not have terminated Perry but rather she would have suspended Perry; that with respect to the alleged "*grabbing*" she was looking at a very serious repeat offense, namely one employee grabbing another employee after being warned not to engage in such conduct but she did not include this in General Counsel's Exhibit 43; that she did not recall that Perry "*grabbed*" an employee the very week of her discharge, "I said she [Perry] jumped over the counter and went to an employee. I didn't say "*grabbed*" an employee" (Tr. 4704, emphasis added)[202]; that while she signed Perry's termination, General Counsel's Exhibit 44, she did not know how Perry could have been "observed doing this (engaging in misconduct) on two separate occasions 1–28–98, 1–29–98" as indicated on the termination form; and that in January 1998 John Hall was the second-shift plant superintendent and so he had authority over the whole plant for the second shift; and that Hall could tell her to fire an employee but he did not tell her to fire Perry. Counsel for General Counsel moved to strike Anderson's testimony in view of the Respondent's failure to turn over, pursuant to a subpoena, the documents referring to the alleged first instance of Perry "grabbing" an employee. Also the matter of an adverse inference was brought up. The matter was taken under advisement.

The Respondent's employee Jenette Ellison testified that as second shift crew leader in laundry (She took McMillan's position a few months after McMillan was terminated.) she had the opportunity to see Ada Perry interact with other employees; that Perry talked a lot and sometimes she would get nasty and she would start hollering and screaming; that she told supervisor Billy Jackson and Superintendent Sherri Buffkin that she was having problems with Perry having disagreements with employees at the counter and getting loud; that on one occasion Perry called for her because she had a problem when a male employee from the cut floor came to the laundry to get a smock and gloves; that she gave the employee a smock ticket and gloves and Perry told her that she did not have the right to do that and Perry said that she was going to call Buffkin regarding the matter; that she did witness Perry throw smocks and gloves at an employee but she did not report it to anyone in management; that it is the policy in laundry that the production employees can throw smocks and gloves at the laundry employees but the laundry employees cannot throw them back; and that the laundry employees have to report it and she told Perry when the incident happened that she needed to identify whoever had done it so something could be done about it. On cross-examination Ellison testified that she saw Perry throw some gloves (not smocks); that the incident involved an employee exchanging bloody gloves, he threw the gloves, they hit Perry, and Perry threw them back; that when she told Sherrie Buffkin that she was having problems with Perry, Buffkin told her to put it in writing; that in November 1997 she did put some complaints in writing and gave them to Billy Jackson and Sherrie Buffkin[203]; and that she did not know that Perry was a union supporter at the time of her termination.

The Respondent's plant manager, Larry Johnson, testified that numerous times Sherri Buffkin came to his office and told him that Ada Perry was causing problems up in the laundry with the employees in that she was rude; that he did not play a role in the decision to terminate Ada Perry; that he believed that Perry was a union supporter because there was a quote in a newspaper a couple of weeks before the 1997 Board election that sounded like she was supporting the Union; that he discussed the newspaper article with Perry in that he went to her work station in the laundry in conversion and told her that he was very disappointed in what he read in the newspaper; that Perry then said, "[T]hey misquoted me. . . . All I was over there to see Jesse Jackson"; that he did not ask Perry if she was going to vote for the Union; that he told Perry a lot that everyone in the plant looked up to her but he did not think that he told her this on the day he told her that he was disappointed in her; that he did not beg her to tell the other employees to vote no; that he did not tell Perry that Jerry Null was disappointed in

[201] As noted above, Anderson originally testified that the incident took place in 1998.

[202] Contrary to Anderson's assertion, as noted above she did originally testify "*grabbed*" an employee.

[203] R. Exh. 144. The fact that she allegedly gave Supervisor Billy Jackson and Superintendent Sherri Buffkin her written complaints was not corroborated by either. Additionally, the document was not included in the documents turned over to counsel for the Charging Party Pursuant to subpoena for the personnel records of Ada Perry. Counsel for the Respondent indicated that the document was only being offered under Rule 801(d)(1)(B) to the extent that it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication. Ellison testified that she may have kept the original and gave Billy Jackson and Buffkin a copy; that she thought she gave the original to Jackson and Buffkin; and that she was not sure if she had the original or if Jackson and Buffkin had the original. The receipt of the R. Exh. 144 was limited to the specific rebuttal of any expressed or implied charge of recent fabrication regarding written complaints referring to Perry. The remainder of R. Exh. 144 was placed in the rejected exhibit file.

her and he did not tell her that she should go talk to Jerry Null because he was hurt by the article in the newspaper; that he talked with Perry almost daily either during his rounds or in his office after work; that it was Perry's idea to have a smoking area in the plant; that he did not recall any conversations with Hall about Perry's discharge after the fact; that he did not recall ever telling anyone that he was happy that Perry had been discharged; and that he did not remember telling Hall "good" in response to finding out that Perry was going to be discharged. On cross-examination Larry Johnson testified that other supervisors did not tease him about Perry; that he did tell Perry that he was disappointed in what he saw in the newspaper and he was serious when he said this; that the quote in the newspaper made him believe that Perry supported the Union; that Perry may have said that she was misquoted in the newspaper article; that Charging Party's Exhibit 23 is probably the article he read quoting Ada Perry[204]; and that the article quotes Ada Perry as saying, "[w]e're gonna win,honey. We got it."

Jere Null testified that he believed that Ada Perry was terminated for horseplay; that he did not play any role in the decision to terminate Perry; that when the Respondent was going to make the Tar Heel plant a smoke free plant Perry politely and professionally advised him that a lot of employees were going to be upset; that it was decided that the Tar Heel plant would have a couple of smoking areas; that he did not really know if Perry was a union supporter but he did recall that she was in a newspaper article about a union rally and one could infer; that she was quoted in the newspaper article as saying, "[W]e're going to win this time"; that he did not speak to Perry about her name being in the paper, and he did not tell anyone that he was disappointed in Perry because her name was in the paper; that he did not give instructions to fire Perry; that he did not tell Sherri Buffkin to fire Perry but wait 4 or 5 months; that he did not recall hearing John Hall teasing Larry Johnson about Perry being in the newspaper, and he did not hear John Hall say to Larry Johnson that Granny's days of running to Larry for help are over; that he believed that Sherri Buffkin fired Latonya Mathis; that he did not "recall" Latonya Mathis ever making anticompany remarks at any meeting that he held with employees prior to the 1997 election; that he did not give Sherri Buffkin instruction to fire Latonya Mathis, and he never said that he wanted Selena Blount, Ada Perry, and Latonya Mathis fired but wait 4 or 5 months; that he believed that Selena Blount was employed by the Respondent when he testified at the hearing herein, and he did not believe that she was ever terminated between 1997 and when he testified herein; that he never told anyone to fire Selena Blount; that he did not "recall" ever reprimanding Sherri Buffkin and telling her that the laundry was a hot house of union activity; and that there were nonunion problems in the laundry in the summer of 1997 so the likelihood of his discussing laundry problems with Sherrie Buffkin was probably pretty likely. On cross-examination Null testified that he never received any specific complaints with respect to Perry before her termination; and that he did not remember talking with John Hall or anybody else about Ada Perry.

John Hall testified that Ada Perry was terminated by human resources initiated by him; that in January 1998 Sherri Buffkin told him that she was receiving complaints about the way second-shift laundry and production employees were treating each other and she asked him to get involved[205]; that the second or third week in January 1998 he went to the laundry during the kill floor break and observed what went on from the corridor; that during the first time he observed the operation of the laundry he observe Ada Perry being very loud and throwing smocks and gloves to employees; that Perry was loud when she asked production employees what they needed and what they were there to get; that two other people were working in the laundry with Perry, namely a crew leader who was doing paperwork and a young fellow who was keeping the bins full; that only Perry was working the counter; that the process by which an employee gets a smock entails giving the laundry employee a ticket and the old smock and the laundry employee gives the production employee a clean smock and another smock ticket; that the production employee can get three smocks each day (one at the beginning of the shift and one at each of the two breaks); that it is not appropriate company procedure to throw smocks to or at employees; that it is not appropriate to throw anything across the laundry; that he observed the laundry for about 30 minutes the first night; that the following day he observed the operation in the laundry by going into the laundry; that he said hello to Perry; that the same three individuals were working in the laundry that evening; that he observed for about 30 minutes and saw a kill floor male employee place his smock ticket on the counter and Perry picked it up; that Perry then went over to get a clean smock, returned to the counter and asked the employee for his smock ticket; that the employee told her that he had already given it to her and she loudly told him that he did not; that Perry gave the smock to the kill floor employee and said to him that she would come across the counter and get him; that the kill floor employee shrugged his shoulders, his eyebrows moved downward, his cheeks moved upwards, he shook his head and he walked off; that neither the kill floor employee nor Perry was laughing; that the 22-to 25-year-old male kill floor employee was about 6 feet 4 inches tall and Perry is about 5 feet 4 inches tall; that he was not concerned for the safety of the kill floor employee but rather for the safety of Perry because verbal conflicts often result in physical conflicts; that most of the time Perry placed materials on the counter as she was supposed to but "two times I'm certain that she threw the smock up on the counter. She also retrieved a dirty smock from the counter and threw it across the clean smock bin into the dirty bin" (Tr. 7143); that the following day he called and later met with Buffkin about Perry[206]; that he reviewed Perry's

[204] The article is titled *Food union calls on Jackson to Unify support.* And the subheading is "Workers push hard to win vote." The parties stipulated that the article was published on either August 15 or 16, 1997.

[205] Hall testified that Buffkin told him that some specific complaints had come from laundry employees about Perry and the way she dealt with production employees. It was indicated that this testimony was not offered for the truth of the matter asserted.

[206] Hall testified that he asked Buffkin about problems she had with Perry and Buffkin said that she had received complaints from fellow employees about Granny's attitude and the way she treated them and talked to them, she had spoken to Granny about it before, and it was

file and told Buffkin that they had to make a change in that Perry's conduct was not acceptable with respect to hygiene, safety and the way she dealt with employees; that Buffkin agreed; that they referred the matter to human resources and there was a meeting the next day in the office of Olga Anderson, a human resources representative; that he, Susie Jackson, Perry, and Anderson were present; that he told Anderson about the problem and what he wanted to do about it; that he told Anderson that in his opinion Granny "communicated a threat" (Tr. 7149) to the 5 foot 4, 25 year old male the day before and she mishandled smocks; that he told Anderson that he believed that they had grounds for termination but he wanted her input and he wanted her to review the file; that after the meeting with Granny, Anderson agreed; that during the meeting with Granny he asked her if she saw him and she said yes; that the laundry is not a loud part of the plant; that he told Granny what he had observed and Granny said that her actions were picking, playing, she did not mean anything by it, she was not serious, she was not going across the counter and get him, and she had no intentions of hurting anyone; that he told Granny that he believed her but he felt that someone could get mad at her and she had been warned previously by Buffkin[207]; that Perry said that she was aware of the hygiene and safety policies; that he told Perry that she was suspended and "that it was his absolute intention to terminate her for her actions" (Tr. 7152); that the discipline in this meeting was reduced to writing by Buffkin (GC Exh. 43); that Perry refused to sign the discipline; that he believed that the handwriting under "*MANAGEMENT REMARKS*" was Buffkin's not because he saw her write it or he recognizes her handwriting but rather because he "instructed her [Buffkin] to write this up and here it is—it appears in front of me so I assume she wrote it" (Tr. 7166); that two laundry employees had complained directly to him about Perry namely Helen McCoy and a crew leader by the name of Jenette[208]; that he told Buffkin about both of these complaints; that when he initiated termination proceedings involving Perry he had no idea whether Perry was a union supporter or a company supporter; that he did see a newspaper that had her picture in it and it was related to "some type of activity she was at but I didn't read it so I'm not sure what it was. I remember seeing her picture in the paper" (Tr. 7161); that he saw Perry's picture in the newspaper in August 1997; that he did not mention this newspaper article to Larry Johnson and he did not tell Larry Johnson that Granny's days of running to him for help were over; that he never discussed Perry with Null and Null did not tell him to terminate Perry; that he knows Sam Butler but he never told him that he wanted Perry fired or that he had it in for her; that when he told Buffkin about what he observed Perry doing on the 2 nights he observed her, Buffkin did not say that she was surprised or that she was dumbfounded; that after he met with Perry in human resources he told Larry Johnson that he could expect a visit from Perry and he told Johnson why; that Johnson agreed with Perry's termination but he did not say "good."

On cross-examination Hall testified that he was not sure if the newspaper article which had Perry's picture dealt with the 1997 Board election; that he did not take a look at the article; that he did not discuss this article with any supervisor; that he did not recall discussing the article with Larry Johnson; that when Buffkin asked him to check on the problems regarding laundry employees and production employees in the laundry he "believed" that Buffkin said that there was a complaint about Perry but he did not "recall" Buffkin saying that Perry had made a complaint about the production employees who come to the laundry; that he had received complaints in the past about laundry employees being rude to production employees and he was aware that for years there had been a problem; that on the second night that he observed the laundry, all of the laundry employees present knew that he was there; that in the position he took the second night he observed the laundry he could see all that transpired between Perry and the young male kill floor employee; that he believed that the smock ticket that the young man placed on the counter was white; that Perry placed the smock in the young male kill floor employee's hand and said, "I will come across this counter and get you. Don't make me come across this counter and get you" (Tr. 7193); that the young male kill floor employee did not say anything when Granny spoke about coming across the counter; that he did not try to contact the young male kill floor employee to determine if he took what Granny said seriously; that he told Granny that he did not take what she said to be a threat; that he did not recall the specifics of any complaint in Perry's file, other than the September 16, 1997 notice to all laundry employees; that he did not recall Buffkin saying during his meeting with her that she did not agree that Perry should be fired; that he was sure that Susie Jackson (and not Buffkin or Billy Jackson, who was Perry's direct supervisor) was at the meeting with Anderson and Perry; that he did not know when Buffkin wrote General Counsel's Exhibit 43; that Susie Jackson or anybody, except himself, could have written General Counsel's Exhibit 43; that once he made a recommendation to human resources to terminate Perry she would be terminated unless someone else finds something else that he did not know about and contests the termination recommendation; that he attended one meeting with Olga Anderson about Perry; that he Anderson, Perry, and Susie Jackson were present and Sherrie Buffkin was not present; that the second night he observed the laundry he was 10 or 12 feet behind Perry and to her right; that he testified under oath at Perry's unemployment compensation hearing before the Em-

documented. It was indicated that this testimony was not offered for the truth of the matter asserted.

[207] Hall testified that Granny agreed that she had talked to Buffkin. It was indicated that this testimony was not offered for the truth of the matter asserted.

[208] Hall could not remember her last name. Assertedly, McCoy told him in December 1997 that Granny was disrespectful to her and fellow employees, there would be problems with Granny if she did not agree with a directive or work to be done, and Granny would go to Larry Johnson or other senior managers if the people did not comply with what she wanted. And assertedly Crew Leader Jenette told him in December 1997 after he had spoken with McCoy that Perry had a problem doing what she was told to do even when it was a part of her job duties, Perry was constantly in arguments and confrontations with laundry employees, Perry would berbally bully the employees by threatening them with his name, Larry Johnson's name, or other senior manager's names, and Perry refused to follow a specific order she gave Perry. It was indicated that Hall's testimony regarding what these two individuals told him was not offered for the truth of the matter asserted.

ployment Security Commission of North Carolina on June 4, 1998,[209] (1) that he did not recall any disciplinary record in Perry's file other than the warning that every laundry employee received, and (2) that the sum total of what Perry was fired for was his observation on the 2 days that he was in or near the laundry; that a shrug means the person does not understand, a frown can mean all sorts of things, and shaking one's head from side to side can mean a lot of different things; that Perry did not move to go over the counter; that his conclusion that Perry made a threat was based solely on what she said; that General Counsel's Exhibit 44, Perry's termination form, refers to "threats" when there was only one threat communicated and the form does not indicate that there was any issue of an unsanitary condition; that he signed General Counsel's Exhibit 43, the disciplinary record regarding the meeting he, Anderson, and Susie Jackson[210] had with Perry but he could not recall when he signed it and it does not refer to Perry being suspended for communicating threats to an employee; and that the only warning mentioned in General Counsel's Exhibit 43 is the September 16, 1997 warning to all laundry employees.

On redirect Hall testified that he did not prepare General Counsel's Exhibit 44, Perry's termination or 303 form, his handwriting does not appear anywhere on the form, he did not sign the form, and he did not recognize whose handwriting it is in the area of the form which has been used to give the reasons for Perry's termination; and that he concluded from the physical activity of the 25 year old, 6 foot 4 inch male kill floor employee to whom Granny allegedly conveyed a threat, that he did not understand why she was dealing with him that way.

Subsequently, Hall testified that with respect to General Counsel's Exhibit 43, he instructed Sherri Buffkin to write it up and he was not more specific; that he did not see Perry give the 25 year old, 6 foot 4 inch male kill floor employee to whom Granny allegedly conveyed a threat a ticket with his clean smock; that when an employee turns a smock in with a ticket the employee is supposed to get a clean smock and a ticket back; that if an employee does not have a ticket the employee could be charged $4r or $5 for a smock; that the ticket is very meaningful to the employee; that he did not know if the 25 year old, 6 foot 4 inch male kill floor employee to whom Granny allegedly conveyed a threat said anything about not getting a ticket back; that if Perry did not have a ticket from him most likely she would not have been able to give him a ticket back; that the only time he could recall speaking to Anderson about Perry was at the meeting he attended with Anderson, Perry, and Susie Jackson; that the only reason he gave directly to Anderson for Perry's termination would have been given during Perry's suspension meeting; that he told Anderson that he wanted to terminate Perry and Anderson agreed with him but he did recall giving Anderson a direct order to fire Perry; that he told Anderson that he wanted to fire Perry just before he left the meeting with her; that he did not tell Anderson during Perry's suspension meeting that Perry actually jumped over the counter and grabbed the employee and that is not what he saw that night that he observed Perry; that according to the paperwork Perry was suspended on January 29, 1998, and terminated on January 30, 1998; that he observed Perry for the second time in the laundry on January 28, 1998, going by the dates given; and that if that were the case, the allegation on General Counsel's Exhibit that Perry engaged in misconduct on January 29, 1998, would appear to be incorrect.

On further redirect Hall testified that when an employee turns in a card to get a smock at the time involved they were given back another card which was no different than the card which they gave the laundry employee to get a smock.

Analysis

The General Counsel on brief contends that in view of the Respondent's intense hostility toward the Union it is improbable and unlikely that Hall was unaware of Perry's union involvement, especially since she was one of the most popular and influential employees in the plant; that the Respondent's failure to involve Perry's immediate supervisor, Billy Jackson, in its decision to terminate her is evidence of its unlawful motive; that Billy Jackson testified that he would not consider it a threat if Perry said the she would come across the counter at him, and by any objective standard, the involved facts hardly rise to the level of threatening conduct by Perry; and that supervisors Billy Jackson and Sherri Buffkin were aware of the way Perry approached her job and they did not discipline her for her approach.

The Respondent on brief argues that Perry was discharged for communicating a threat to another employee and for horseplay in the laundry; that Anderson made the decision to discharge Perry and at no time was she instructed to discharge Perry; that since the discharge occurred 5 months after Perry was a union observer, the evidence is insufficient to establish a causal relationship between Perry's union activity and her discharge—regardless of whether the Respondent's reasons for discharging Perry were reasonable; that Butler "categorically" denied that he ever told Perry that she should "watch her back" or that Hall "had it in for her"[211]; and that of the 34 union observers listed in Charging Party's Exhibits 42 and 43, only 4 are alleged 8(a)(3) discriminatees.

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Perry engaged

[209] The parties stipulated that the hearing was held on June 4 and July 16, 1998.

[210] Notwithstanding that Hall testified that Susie Jackson, and not Buffkin attended this meeting, it is noted that Buffkin along with Billy Jackson, Hall, and Anderson, signed the form, that Buffkin testified that she attended this meeting, that Anderson and Perry testified that Buffkin attended this meeting, and that Susie Jackson did not corroborate Hall on this point.

[211] More than once the Respondent has misleadingly used this term in its brief. Categorical means without qualifications or conditions, absolute, positive, direct, or explicit. As noted above, Butler testified that he "did not recall" warning perry, after the union election, to watch her back and he "did not recall" telling Perry that Hall had it in for her. Such testimony can hardly be described as a categorical denial.

in union activity and the Respondent was aware of Perry's union activity. I found Perry to be a highly credible witness. Larry Johnson was not a credible witness. I credit Perry's testimony that Larry Johnson on August 19, 1997, accused her of being a union organizer and campaigning for the Union. As noted above, I found that, after taking Perry to the back door outside and putting Perry on the defense about the newspaper article and picture, Plant Manager Johnson unlawfully interrogated her. Plant Manager Johnson then told Perry that she hurt Null deeply. Also, I credit the testimony of Perry that while she was an observer for the Union at the August 1997 Board election Null saw her, he turned real red, and he left. Null was not a credible witness. I credit the testimony of Buffkin that Null told her that he wanted Perry and two other named employees terminated in 4 to 5 months after the election after "all of this blew over."[212] One of the other two was terminated for a lawful reason and Buffkin refused to terminate the other named employee. I also credit the testimony of Perry that supervisor Butler told her to watch her back because John Hall was after her. Butler's testimony was equivocal, phrased in terms of he "did not recall." Also, Butler had the opportunity to reach his conclusion that Hall was after Perry in that he attended supervisory meetings before the 1997 Board election and, according to Butler, "it seems like" Hall was at those meetings. Hall was not a credible witness. His denial regarding Butler is not credited. Hall did not deny that he said something either at a supervisory meeting or in Butler's presence which Butler was in a position to hear, and which would lead a reasonable person to conclude that Hall had it in for Perry. Hall's testimony that he saw Perry's picture in the newspaper but he did not read the article and he did not know that Perry was a Union supporter is incredible. As noted above, Buffkin's testified that she found out about Perry's union activity the day after the Reverend Jackson's rally, which would have been August 15, 1997, when a newspaper was shown to her in Larry Johnson's office; that in addition to her and Johnson, Null and Hall were present; and that Hall told Johnson that Granny's days of running to Johnson were over. This testimony of Buffkin is credited.[213] Plant Manager Larry Johnson conceded that he told Perry a lot that everyone in the plant looked up to her. The record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against Perry even if she did not support the Union and was not engaged in protected activity. The Respondent has not demonstrated that it had any business justification for discharging Perry. The Respondent on brief argues that Anderson made the decision to discharge Perry and at no time was she instructed to discharge Perry. As noted above, Hall testified that Perry was terminated by human resources initiated by him; and he testified under oath at Perry's unemployment compensation hearing before the Employment Security Commission of North Carolina on June 4, 1998, (1) that he did not recall any disciplinary record in Perry's file other than the warning that every laundry employee received, and (2) that the sum total of what Perry was fired for was his observation on the 2 days that he was in or near the laundry. Also as noted above, Hall testified that he told Anderson that he wanted to terminate Perry and Anderson agreed with him but he did not recall giving Anderson a direct order to fire Perry; and that he did not tell Anderson that Perry jumped over the counter and grabbed an employee, and that is not what he saw the night that he observed Perry. Anderson testified that she decided to fire Perry and no one told her to fire Perry. What was Anderson's understanding of the situation and what was her reason(s) for terminating Perry? At page 4654 of the transcript Anderson testified on direct as follows:

> I explained to . . . [Perry] that there was a complaint where she had upset her [sic], threatening an employee and go through the counter of the laundry jump over it and grabbed the employee after throwing a smock in [sic] the floor . . . .

While testifying for some time after transcript page 4655, where she described what she told Perry during her first meeting with her, Anderson realized that there was a problem with her testimony and on cross-examination at page 4704 of the transcript Anderson testified as follows:

> Q. And you said on direct that she [Perry] grabbed the employee in the incident that occurred that very week of her discharge. Isn't that correct?
>
> A. I don't recall. I said she jumped over the counter and went to an employee. I didn't say grabbed an employee. Anderson originally did say Perry "grabbed" an employee.

In fact Anderson premised her termination of Perry on the assertion that Perry "*grabbed*" an employee after previously receiving a written warning for "grabbing" another employee. Anderson went so far as to testify that she told Perry that she decided to terminate her because in reviewing Perry's file, she saw a writeup for a previous incident where Perry had "grabbed" an employee on the second-shift cut; that there was a statement by Ray Locklear regarding the prior 1998 incident of "grabbing" in Perry's file; that she used the prior incident of Perry "grabbing" an employee as the basis for her termination of Perry; that Hall "said she [Perry] went and jumped over the counter and *grabbed* an employee" (Tr. 4671, emphasis added); that Billy Jackson wrote up the incident with the second cut floor employee who worked in Ray Locklear's department; that the writeup was written by Sherrie Buffkin; that there was a statement in Perry's file by Locklear; that there was a statement from the superintendent and a statement from the employee regarding what happened and the discipline record by Sherrie

[212] Buffkin testified that Susie Jackson was present for this conversation. Buffkin gave this testimony after she and Susie Jackson had a falling out. Susie Jackson did not deny being at this meeting and hearing Null tell Buffkin that he wanted her to fire Perry and two other employees in 4 or 5 months after "all of this blew over."

[213] Many of the people in the pictures in the newspaper, CP Exh. 23, are wearing union T-shirts. The testimony of Johnson that other supervisors did not tease him about Perry, the testimony of Null that he did not recall hearing Hall teasing Johnson about Perry being in the newspaper and he did not hear Hall tell Johnson that Granny's days of running to him for help, and the testimony of Hall that he did not mention the newspaper article to Johnson and he did not tell Johnson that Granny's days of running to him for help were over is not credited. None of these three were credible witnesses. All three of these individuals engaged in unlawful activity in violation of the Act.

Buffkin; that the incident would have taken place probably before the union campaign in 1997; that she could not recall if Perry was suspended for the alleged prior incident of "*grabbing*"; that Hall indicated that "she [Perry] jumped over the counter and "*grabbed*" an employee" (Tr. 4682, emphasis added); and that with respect to the "*grabbing*," she was looking at a very serious repeat offense, namely one employee grabbing another employee after being warned not to engage in such conduct. As noted above, counsel for the General Counsel moved to strike Anderson's testimony in view of the Respondent's failure to turn over, pursuant to a subpoena, the documents referring to the alleged first instance of Perry "*grabbing*" an employee. Under the circumstances existing here, I believe that the better approach is to let the testimony stand but draw an adverse inference that there are no documents to support Anderson's testimony with respect to alleged first instance of Perry jumping over the counter and grabbing an employee. There were no such documents in Perry's file at the time of the trial herein. It should be noted that neither Billy Jackson, nor Buffkin, nor Hall corroborated Anderson regarding any documents referring to a first instance of Perry jumping over the counter and grabbing an employee.[214] The only document in Perry's file was General Counsel's Exhibit 42, which was the warning to all laundry employees. Anderson testified that if only General Counsel's Exhibit 42 was in Perry's file, she probably would not have terminated Perry but rather she would have suspended her. Anderson had no discretion in the matter of the termination of Perry; Hall directed Anderson to terminate Perry and Anderson did as she was told. As noted above, Hall told Perry that he had a written complaint from one of the three men she "picked" with on January 27, 1998. Hall refused to show Perry the complaint. During the trial herein, Hall conceded that the only complaint that he reviewed was the warning to all laundry employees. Perry's testimony is credited. Hall lied to Perry. There was no written complaint from one of the employees who "Granny" was "picking" with on January 27, 1998. Indeed Hall conceded that he never even spoke to the individual who he at first claimed was threatened. Hall was lying when he told Perry that there was a written complaint. Hall was lying when he testified at the trial herein. Just as Hall took his directions from Null and withdrew the offer to Margo McMillan to transfer to the label cage, so to Hall took his directions from Null in unlawfully terminating Ada Perry. The Respondent has not met its burden of persuasion in that it has not demonstrated that it would have taken the same action against Perry even if she did not support the Union and was not engaged in protected activity. The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Ada Perry on January 30, 1998.

(e) Patsy Lendon

Respondent's former employee Patsy Lendon testified that she was employed by the Respondent for 4.5 years; that in 1993 and 1994 Eddie Faircloth was her supervisor; that in 1995 Ray Garcia was her supervisor; that in 1996 and 1997 Shane Potts was her supervisor; that during the 1993–1994 union campaign she passed out union flyers at the employee entrance of the involved plant, solicited employees in the cafeteria in the plant on her break or before her shift started to sign union authorization cards, and wore union T-shirts or union insignia in the plant; that during the 1997 union campaign she gave union flyers to her supervisor, Potts, three or four times and to her coworkers on the line, and she solicited approximately 30 employees to sign union authorization cards; that on June 25, 1997, she went on break about 8:30 p.m.; that she took her break in the livestock breakroom with employees Lisa Perrine, a guy named Kenny and some other guy whose name she could not remember; that there were several other employees in the break room along with two crew leaders, namely Lonnie Galloway and Shawn Troy; that everyone in the breakroom was black; and that the following then occurred:

> When I got into the break room one of the guys asked if we had taken literature when we came into the plant that day. The Union campaign was going on and they were passing out flyers. When the guy asked had we all see[n] the materials I said, yes, I got some Union cards if anybody is interested in signing some. There were a couple of guys that was there, I passed at least five cards. I was getting ready to collect some of the ones that were being filled out when Lonnie Galloway made a statement to me. He said, you need to get your ass out of my department and leave my people alone.
>
> . . . .
>
> I turned to him and kind of casually said, oh, that's a dumb-ass nigger, don't pay him no mind.
>
> . . . .
>
> There was a few laughing and he kind of tilted his head down, but he didn't show any anger. He didn't act like he was upset by it.
>
> . . . .
>
> Lisa said to the other crew leader, which [sic] was another girl that accompanied me, she said, Shawn, Patsy . . . [is] pulling your chain. Shawn says, Pat ... [is] not pulling my chain, said, I earned my white hat, I been here like four and a half years. I said, oh, Shawn, I didn't know you had a white hat. He said, yes, he said, I earned my white hat. I said, well, you ain't scared to sign a Union card. You ain't scared of the white man are you? He said, no. So, I gave him a card and he was filling it out. Lonnie said, I worked hard for my white hat, too. I said, yes, kissing a white man's ass. They all were still laughing about it. Nobody seemed upset. Nobody was disturbed by the conversation we were having.

Lendon further testified that during her more than 4 years at the involved plant she heard the word "nigger" used all the time, "[i]t's just common language for black people to talk to black people in that manner"; that the word "nigger" is just slang language that blacks commonly use and the word was commonly used throughout the plant; that she did not believe that it was a racial slur and she is 48 years old and never thought for 1 minute that she was saying anything that would offend anybody that was black; that on July 14, 1997, her supervisor told her that Gene Stallings, the superintendent of

[214] Ray Locklear did not testify at the hearing herein.

livestock, wanted to see her in his office; that she met with Stallings and Potts; that Stallings told her that he had two statements that he wanted her to look at; that she read Galloway's statement and she admitted that she had called Galloway "a dumb ass niger" but the rest of the statement was a lie; that then Stallings said that he had a statement that would prove that I made a racial slur towards his crew leader and that I didn't have a job working there anymore: that she told Stallings that she had worked for the Company for 4-1/2 years, she had a witness who could vouch what she said and she did not say anything out of the ordinary that would offend anybody; that she asked Stallings if he was just going to take somebody's word; that Stallings said that she needed to leave as far as he was concerned she did not have a job there anymore; that Potts said that he did not have any problems with the way she worked—she was a good worker—but she should not have said what she said; that neither Stallings nor Potts asked her who the witness was or for her side of the story; that she did not have any disciplinary or attendance problems while she worked at the involved plant and, indeed, she received two bonuses for good attendance; and that she mentioned her good work record to Stallings and Potts during the meeting when she was fired.

On cross-examination Lendon testified that she began her employment with the Respondent in November 1992; that in 1994 the Respondent rehired her boyfriend at her request; that in 1995 Larry Johnson granted her request to be transferred to the box room when she had a work related injury; that she would not use the term "nigger" with someone that she did not deal with every day or someone who she had never seen before; that she works on the kill floor but her pay department is livestock and the livestock breakroom is the breakroom that she normally uses; that kill floor and livestock employees were in the livestock breakroom at the time in question; that Galloway is a crew leader in livestock; that she had seen Galloway a lot before June 25, 1997, and they had talked before; that when she referred to Galloway as a "dumb-ass nigger" neither he nor she was laughing; that she did not finish reading the statement of Pamela Williams because it was a bunch of lies and Williams was not in the breakroom at the time of the June 25, 1997 incident with Galloway; that after she met with Stallings and Potts she met with Lee Mount, the human resources manager; that she tried to explain her side of what happened but Mount said he did not have time since he was expecting a phone call and he did not have time to keep going over it; that when she told Mount that she had been an employee at the involved plant for 4-1/2 years and had never been involved with any other incident Mount said that he would not tolerate her behavior; that she then met with Plant Manager Larry Johnson who told her that her termination had nothing to do with the Union and listened to her side of what happened; and that Johnson told her that she would be eligible to be rehired in 6 months.

On redirect Lendon testified that when she met with Johnson after she was told that she was terminated, Johnson told her that if she had come to him before they had taken any action he might have been able to help her but he would not admit that if anybody ever asked him; that Johnson said that the decision was final before she talked to him; that neither Mount nor Johnson showed her any kind of policy; and that Mount did not explain to her why she was being discharged instead of being suspended and her discharge papers were already prepared when she got there.

Subsequently Lendon testified that when she met with Johnson on July 14, 1997, he said that he had two statements that said that she was a union representative; that she told Johnson that since the employees did not have a union, she could not be a union representative; and that the livestock breakroom is about 10 feet by 12 feet.

On recross Lendon testified that she asked Johnson to see the policy; that Johnson told her that one of the two statements indicated that she was a union representative; and that she did not read any of the statement which was not Galloway's at her discharge meeting. Subsequently, Lendon testified that when she walked into Johnson's office he spoke first and the first statement he made was "I don't want you to think that this has anything to do with your Union activities." On further cross-examination Lendon testified at the time she was terminated by the Respondent she wore a livestock yellow hardhat with a plaque on the back of the hat which just had her last name; that she did not have a name tag on the front of her hardhat; that the name tag did not say "Patsy fatometer"' and that she was sure about that.

Shane Potts testified that he is a supervisor in the livestock and kill floor; that in the summer of 1997 he was a supervisor in the fatometer livestock, Patsy Lendon worked second-shift livestock on the fatometer and he was her supervisor; that he understood Lendon to be a union supporter; that he played a role in Lendon's termination; that employee Pamela Williams told him that she had a confrontation with Lendon about signing a union card and Lendon told her that she was an "ignorant Nigger"; that he told Williams that if she wanted to pursue it, he needed a written statement from her; that Williams prepared a written statement (R. Exh. 74); that it was brought to his attention that two other employees, Lonnie Galloway and Sean Troy, had a confrontation with Lendon also; that he did not speak directly with Galloway or Troy about the incident involving Lendon but he reviewed the statements Galloway and Troy prepared (R. Exhs. 88 and 89, respectively), about the incident; that he took the statements of the three employees to Lee Mount in human resources and they discussed the situation; that he also discussed the situation with Janet Edwards and Gene Stallings, who was the superintendent of livestock; that he and Stallings spoke with Lendon when she returned from her vacation; that Lendon denied all three statements, she said that she did not know who Williams was, and she said that she did not say the racial slurs toward Galloway or Troy; that while he filled out the termination form for Lendon (R. Exh. 90)[215] before he met with Lendon, "[a] full decision had not been made at that time because we still had not met with her at that time"; that he could have rescinded the paper work; that human resources had the final word on whether to terminate Lendon;

[215] Under "EXPLAIN VIOLATION" on the form, Potts wrote as follows:

> PATSY LENDON ON JUNE 25TH DIRECTED A RACIAL SLUR AND STATEMENT TOWARDS PAMELA WILLIAMS–THAT'S [sic] WHAT BEING AN IGNORANT NIGGER IS ALL ABOUT ALL ABOUT ALL WAYS [sic] WORRYING ABOUT YOURSELF NEVER YOUR PEOPLE.

that during his meeting with Lendon he said that she was a good worker, she was dependable; that Lendon was terminated "[b]ecause . . . she used racial slurs toward another *employee*" and that is a terminable offense (emphasis added); that it is a terminable offense because he "believe[d] it's in the Company Handbook" and "[i]t's also—confront another employee as far as fighting I mean anything like that is a terminable offense according to Human Resources"; and that he did not, nor was he instructed to, discriminate against known or suspected union supporters in terms of the enforcement of work rules, promotions, job bids, or overtime.

On cross-examination Potts testified that Williams told him and Edwards, who was Williams' supervisor, at the same time about Lendon; that Edwards told him that there were two more situations where employees had confrontations with Lendon and she brought Respondent's Exhibits 88 and 89 to him; that he, Stallings and Mount decided to have him fill out Lendon's termination form before they spoke with Lendon; that he did not make the final decision to terminate Lendon and he did not recommend that she be fired before he spoke to her; that he did not recall exactly how he came into possession of Williams' statement; that while he did not recommend that Lendon be fired he did fill out the termination form and he checked off "TERMINATION" on the form; that while the Respondent has progressive discipline, he did not give Lendon an oral, written, or final warning; that Mount in human resources would have to be the person who made the final decision to terminate Lendon; that he decided to terminate Lendon because she broke a rule in the handbook; that "I don't know the rule in the Handbook, but I know the policy that the Company has that no racial slurs will be used toward any other employee. It's a provocation in the Plant"; that while there is a line on the termination form for checking off "WORK RULE VIOLATION" he did not check it off but rather he handwrote another line, namely "OTHER"; that he did not know why he made up another line; that there are a lot of African American employees in the plant and they often call each other "Nigger" jokingly or as a common greeting; that while he is not saying he never heard this word used in the plant, he is saying that in terms of punishing someone for using the term, he never heard it in the plant towards another employee; that neither Williams, nor Galloway, nor Troy had worked for him at the time of Lendon's termination; that Mount told him to fill the termination form out; that there was no fight and none of the three employee statements contained a statement about provoking a fight; that he did not know where in the company policies there is a policy against racial terms; and that he did not know whether the employee handbook contained anything about racial slurs.

Sherman Gilliard testified that the Company has a written policy regarding the use of racial slurs in that it mentions harassment "and that could be defined as deep as you want to go"; that he would have to take a look at the handbook to reference such written policy; that the work rules are probably not specific as to racial slurs but that is conduct which is unacceptable in the workplace; that the policy includes the uttering of racial slurs or epithets; and that the policy is enforced across the board.[216]

The Respondent's former manager, Sherri Buffkin, testified that on August 22, 1997, she attended the vote count and she heard racial statements after it was apparent that the Company had won; that she heard black supervisor, James Blount, say "get out nigger" in the room where the count occurred; that as far as she knew James Blount was still employed at the involved plant; that during the summer of 1998 she witnessed a confrontation in front of the old laundry between two female cut floor employees who work for James Blount; that one of the employees said, "[Y]ou nigger, bitch, I'm going to kick your ass"; that she telephoned the cut floor and asked for a big male supervisor to come to the laundry; that she told the supervisor who came, Bryan Adams, exactly what was said; that she subsequently saw both of the females who were involved in the confrontation and James Blount's wife, who works for her, told her that the employee did not get suspended or written up; that she is not familiar with the Company's policy on racial statements, slurs; that she has never seen a written policy on the use of racial slurs; that the practice in the plant regarding the use of racial slurs is subjective and pretty much left to the supervisor and if you hear it, you say something and tell them not to do it again; that she has heard employees use racial slurs and she never issued any written warnings or disciplined employees for this; that the use of racial slurs and profanity is just part of the process of this hog slaughtering plant; that she has heard supervisors use racial slurs, including Larry Johnson, Jerry Null, Lee Mount, and supervisors on the floor, namely, Tillman Britt, James Blount, and Bill Bishop; and that the employees she has heard use racial slurs were not disciplined for using racial slurs. Buffkin further testified as follows:

> I say eighty percent of my laundry employees they're all women and the majority of them are black and I've heard them call each other nigger and I just was curious and asked them why do you do that. I mean I had a good working relationship with them and it wasn't offensive and I asked them and I said that's fine. Between you its fine. Now you can't do it pointing to me but it's subjective.

Subsequently Buffkin testified that after she attended a meeting where Richard Brown was demoted from crew leader to hourly employee Lee Mount, who is white and was human resources director, said, "[T]he damn nigger thinks everybody owes him something"; and that while she was a supervisor or a superintendent at the involved plant she was not told to discipline any employee for using racial slurs. Buffkin further testified that while she was a manager from 1994 to 1998 she heard the word "nigger" used commonly, "it's a daily practice just like profanity. Its a hog slaughtering plant."

The Respondent's superintendent of the cutting division, Timothy Smith, testified on cross-examination that the "N"

[216] Gilliard further testified that while he heard a number of witnesses testify about the racial slurs, including the word "nigger," which allegedly were used at the August 22, 1997 ballot count, no supervisors were disciplined and he did not hear any racial slurs in the involved room that day; and that he was not human resource director at the time and he was not aware of any racial complaints.

word is used by hourlies, but it is not something that is commonly used and as far as himself or his management team, it is not used; that he has never used the "N" word and he had never heard any manager use this word; that he has heard employees use it playing, jokingly, and sometimes seriously; and that two blacks jokingly use it with each other and there is no reason for concern unless it is used in a tone which is offensive to the person that it is being delivered to.

The Respondent's crew leader, Shawn Troy, testified that in the summer of 1997 he worked on the third shift in livestock; that on June 25, 1997, when he came to work he walked into the breakroom to clock in and he saw Lonnie Galloway, Patsy Lendon, Pamela Williams, and Lisa Perrine in there; that Galloway was not smiling or laughing; that he heard Lendon say, "[A]ll the white hats in the livestock are the white man's flunky, the white man's ass kisser"; that one of the females present then said, "Shawn, Patsy is pulling your chain. I said she's not pulling my chain, I've been here for five years and I earned my white hat and I walked upstairs to do my paperwork"; that before this incident Lendon had offered him a union authorization card to sign; that one night when he came to work he was told that "Galloway had complaints about the name that Patsy Lendon had called her [sic] and she [Janet Edwards] asked me what did I hear that night and I told her. [T]hen she told me to write it on paper and turn it into her; that within minutes of this request he drafted Respondent's Exhibit 89[217]; and that he gave the statement to Janet Edwards. On cross-examination Troy testified that Edwards is his direct supervisor; that the incident in the breakroom occurred about 8:45 p.m.; that Lendon said either "white man's flunky" or "white man's ass kisser"; that in some areas of the plant people use rough language all the time and some of it is done jokingly; that Janet Edwards first asked him about the incident on July 7, 1997, when she asked him to write a statement; that his statement does not include "white man's flunky"; that Janet Edwards did not tell him to use "white man's ass kisser" rather than "white man's flunky"; that he did not file a complaint about what Lendon said and he overlooks "that kind of stuff"; that he did not believe that Lendon was referring to him but what she said concerned him because he wore a white hat; that he was "done with it" (the incident in the breakroom) until he was asked to make a statement; and that livestock employees are allowed to go into the livestock breakroom on their break period. Subsequently Troy testified that since the fatometer department is part of livestock there would not have been any reason for Lendon not to be allowed in the livestock breakroom at the time of the incident; and that white out is available in the office where he drafted the statement and he has used it in the past.

The Respondent's supervisor, James Blount, testified that when he has heard his employees use the word "nigger" it was not in an angry way, the employees would be joking saying it to each other; that he did not write the employees up because they were joking; that use of the word "nigger" is not in the company policy book and no one ever told him to terminate an employee if he heard them use the word "nigger"; that abusive conduct is referred to in company policy; that he is black; and that he has used the "N" word himself but he has not used it toward anyone in the plant and he has not used that word in the plant.

The Respondent's employee Pamela Williams testified that in summer of 1997 she knew that Patsy Lendon was passing out union literature and trying to enlist support for the Union; that one morning in the summer of 1997 she was in the breakroom in the livestock area when Lendon entered the room; that Lendon asked her if she was going to vote for the Union and she told Lendon that it was none of her business; that she and Lendon then had a verbal confrontation during which Lendon said, "[T]hat's what's wrong with all you niggers, you always worried about yourself"; that she reported the incident to Superintendent Doug Tatum who told her that she "needed to calm down" and to write a statement on what occurred; that she wrote a statement (R. Exh. 74), no one told her what to write, and she gave the statement to Tatum; and that the only reason that she knew that Patsy was her name at the time was that Lendon wore a yellow bunk cap with "Patsy" on the front and "Fat-O-Meter" on the bottom.

On cross-examination Williams testified that the incident with Lendon happened on June 25; that the breakroom involved in the incident was not the breakroom she normally uses; that when she went into the involved breakroom Lonnie Galloway, Shawn Troy, Debra Prince, and Regina Ban, inter alia, were in the room; that subsequently Lendon came into the breakroom and the employees began debating about the Union with some for it and some against it; that Lendon then asked her if she wanted a union authorization card and she told Lendon that she was not interested; that Lendon asked her why she was not interested and she told Lendon that it was none of her business; that it was then that "we got into a little conversation about that's what's wrong with black people, always thinking about theirself [sic]"; that Lendon said, "[T]hat's what's wrong with black folks, they always worry about theirself [sic]"; that she believed that Lendon "didn't say black folks, she said that's what's wrong with niggers, everybody out for theirself [sic]"; that in her statement she indicated that Lendon said, "[T]hat's

[217] This exhibit reads as follows:

To whom this may concern:

On or about June 25th 1997, *Pasty [sic] (a fat-o-meter worker)* [At this point in the document there is a space with what appears to be a word which has been deleted with correction fluid since the part of the line below the word has also been deleted.] she was in the livestock breakroom about the time that I arrived at work, I didn't hear the whole situation because she was there whenever I arrived at work. The only thing I really heard [sic] her say was that all white *hat's* workers are white men ass kissers, and somebody in the break room [sic] replied that Sean she's pulling your chain & I replied that she's not pulling my [At this point in the document there is a space with what appears to be a word which has been deleted with correction fluid since part of the line below the word has also been deleted.] chain because I've been here [sic] for 4 years and some odds months and I worked for this hat. That's all I said and then I went upstairs." [Emphasis added.]

Troy signed the statement and the following appears below his signature: "7–7–97." One of the Respondent's attorneys indicated that he did not have the original. Troy testified that he could not recall whether he deleted something from these two spaces and he might have "whited it out" but he could not remember.

what being a nigger is all about" and she penciled in "ignorant" when she reviewed the statement; that her first complaint to a supervisor occurred on June 26 when she told Janet Edwards; that she then told Tatum about the incident; that she wrote the statement the same day that she spoke to Tatum; that the statement (R. Exh. 74) is dated July 7; that she believed that she went to Tatum and he did not come to her and ask her to write a statement; that she did not believe that 2 weeks after she spoke with Janet Edwards, Tatum came to her and asked her to write the statement; that Janet Edwards might have asked her to write the statement and it was possibly just before she wrote the statement; that she had kept going back to livestock and complaining and Edwards told her that if she was that "concerned about it to go ahead and write a statement and they will see what they can do"; that she complained to Edwards twice about the incident; that she believed that she complained to Edwards the second time on July 7; that she was not sure if on July 7 Edwards asked her to write a statement; that she was not sure whether she wrote the statement on her own; that she was not sure if Edwards asked her to write the statement; that "when I wrote the statement she [Edwards] took me upstairs to the office. She asked me to make sure the statement was correct as I could remember it. Then I gave it to Doug"; that she believed that Edwards was present when she gave the statement to Tatum; that she wrote the statement down in the scale house and before she signed it she re-read it; that when she was writing the statement Lonnie Galloway was not near her "he had went back to work"; that she was sure that Lendon called her an "ignorant nigger"; that Debra Prince said, "[T]o let it go, it was just silly"; that when she gave the statement to Tatum he said that "she probably didn't mean no harm or nothing"; that some blacks in the plant do address each other with "what's up nigger, and stuff like that"; that after she turned in the statement, no one else interviewed her about what happened; that during the winter of 1997 she was called to human resources and asked if her statement was accurate; that she was not sure whether during her verbal exchange with Lendon she might have talked about who was going to pay her bills two times; that on June 25 she worked in the head room and her supervisor was Raheed; that she did not tell Raheed about the incident with Lendon; and that she believed that the normal procedure in the plant is to tell your direct supervisor and then go through the chain of command. On recross Williams testified that she transferred back to livestock from the head room but she was not sure of the date; and that she was not sure if she had transferred at the time she signed the statement, July 7, and she was not sure if Lonnie Galloway was her crew leader and Janet Edwards was her supervisor when she signed the statement.

The Respondent's crew leader, Lonnie Galoway,[218] testified that he works in the livestock department and Janet Edwards is his supervisor; that in the summer of 1997 he worked in the livestock department and he had a confrontation with Patsy Lendon; that he was in the breakroom on his break when Lendon came in with some union cards and was trying to get the employees to sign them; that Lendon approached him and he told her that he did not want any part of the Union; that Lendon said to him, "[T]hat's how they get them white hats by kissing a . . . white man's ass"; that he was the only one in the room with a white hat on; that he started to leave the breakroom and Lendon called him "a white man negro"; that as he left the breakroom she looked at him and said, "[D]umb ass, ignorant, black bastard"; that he then went to his supervisor and the superintendent of the second shift, namely, Janet Edwards and Douglas Tatum, respectively, and told them what happened; that he was very upset because he had never been called a "white man black negro" before at Smithfield and Edwards and Tatum told him to calm down and write a statement; that after Lendon made the statement to him she laughed and all the other employees who were sitting in the breakroom were laughing, they thought it was funny; that the Respondent's Exhibit 88 is the statement he gave concerning the confrontation with Lendon, it is his handwriting, those are his words, and no one told him what to write in that document; that he referred to himself by name in the statement to keep from putting his and her; that there is nothing in the statement about Lendon calling him a "negro" because he does not like to write that bad word; that he told Edwards and Tatum "everything that was said in the break room exactly . . . [,] [e]very word"; that he told Edwards and Tatum that Lendon said he "was kissing white man ass to get the white hat and called me a white man negro and a dumb ass, ignorant, black bastard"; that Edwards and Tatum told him to write a statement but they did not tell him to write all that in the statement; that he wrote the statement on June 25, 1997; that the date next to his signature on the statement is July 7, 1997, because Tatum got in touch with him and asked him if he signed the statement, and when he checked the statement he saw that it was unsigned so he signed it and used the date of the day when he signed it; that the employees do not use the "N" word in his department and he has never heard this word used in his department; that his feelings were hurt when he was called that name; and that he had never met Lendon before June 25, 1997. The Respondent's Exhibit 88 reads as follows:

> To whom it may concern:
>
> On June the 25th of 1997, Pasty [sic] (a fat-o-meter worker), came to Livestock on both of her breaks to talk to several workers about the Union, to try to get them to sign up for it. The crew leader, Lonnie Gallway [sic], told her that she was not suppose[d] to do this in Livestock. Pasty's [sic] reply was that all white hat's [sic] were white man ass kisser's [sic] and that he (Lonnie) was a black bastard. At this time Lonnie told Pasty [sic] that it would be best for her to return back to her work area.

The statement has a signature, viz., "Lonnie Galloway" and under the signature the following appears: "7–7–97."

On cross-examination Galloway testified that on June 25, 1997, he, Lendon, Kenny Holmes, Kenny Melvin, Pamela Williams, Shawn Troy, and Lisa (He did not know her last name.) were in the livestock breakroom; that he was in the breakroom when Lendon and Lisa came in; that Lendon had a handful of union authorization cards and when he told her that he did not

[218] According to the transcript, this is how he answered when he was asked to spell his name at the outset of his testimony. It is noted below that this is not how he spelled his name when he allegedly signed a document described below.

want any part of the Union she got upset and started using "them words"; that Lendon had not approached other employees and asked them if they wanted to sign union authorization cards before she approached him; that he told Lendon, "[D]on't approach no employees with a Union card unless she got permission"; that he told Lendon that she could not approach employees with union authorization cards in the breakroom without supervisory permission; that he told Lendon to get permission from a supervisor regarding the union cards or go back to her working ares; that he did not tell Lendon to go back to her working area before she started telling him what she thought he was; that on June 25, 1997, he told Edwards and Tatum that this lady down there called me bad names, she said, "[A]ll the white hats kissing white man's ass that's how we earn them hats"; that he referred to her as "this lady" because he did not know her; that Edwards then asked him what else did she call him; that he then said, "[S]he called me a white man negro. I told her as I was walking out the door she called me a dumb, ignorant ass black bastard and that's what really hurt my feelings. I could have dealt with the other part"; that he did not tell Edwards that Lendon had union cards in her hands or that he told Lendon that she should not be passing out union cards in the breakroom; that he told Edwards that he told Lendon to leave the breakroom and go back to her working area; that he wrote the statement on June 25, 1997, after speaking with Edwards and Tatum; that on June 25, 1997, he left the statement on a desk which is no where near the office of Edwards or Tatum; that he next saw the statement a week later and he realized that he had not signed it; that Superintendent Gene Stallings, who was in charge of livestock brought it to his attention that he had not signed the statement; that he signed it when Stallings and Tatum brought it to his attention; that he did not write the statement on July 7, 1997; that Lendon used the bad words before he told her to leave; that when he told Edwards about the incident and described the woman involved, Edwards telephoned Shane Potts and got Lendon's name; that a couple of days after the incident Shawn Troy did not come up to him and ask him if he was still mad; that he did not discuss the incident with Shawn Troy; that neither Pam Williams nor Shawn Troy come up to him and asked him what happened; that after Lendon said two of the bad words she gave union authorization cards to two of the employees in the breakroom; that he told Edwards that he refused to write the word "nigger" on the statement; that he refused to write the word "black" in the statement (As noted above, the statement does contain the word "black."); that he told Edwards the color of the woman, how tall she was, that she wore a yellow hat, and that it was not Lisa or Pam; that before June 25, 1997, he saw Lendon working in fat-o-meter but he did not know her name; that even though his statement indicates "on both of her breaks" he did not know that Lendon was on her break; and that in livestock the employees "know the rules, and if they get caught using that kind of language they either get suspended or get fired." On redirect Galloway testified that Lendon had a hardhat on when she came into the breakroom on June 25, 1997, the hat had a little name tag sticking in the center, and all he saw was a "P" on it. Subsequently, Galloway testified that he did not know how to spell the word "bastard" (even though he assertedly wrote it in his statement); that he did not dictate the statement to someone else; and that he could not spell the word "suppose" even though it is spelled correctly in the statement that he assertedly wrote.

Jennette Ellison, who is the Respondent's second-shift crew leader in the laundry, testified, as noted above, on cross-examination by the one of the Charging Party's counsel that in early 1998 she spoke to Sherrie Buffkin about employee Kim Bardeau using profanity; that she had spoken to Bardeau a number of times and told her that if she caught her doing it again she would ask Buffkin to write her up for it; that Bardeau was never written up for it; that she gave Bardeau an oral warning; that she only spoke to Bardeau once about her profanity; and that Bardeau was cursing, using profanity. Subsequently, Ellison testified that she does not curse or use profanity in the plant; that she knows heavy set Second-Shift Supervisor Maurice Pritchard; that she did have a confrontation with him; that she did not call him "a big fat mother fucker"; that she thought she said something like "little piglet" because Maurice had used profanity at her and they both apologized to each other; and that she was not written up for the confrontation.

The Respondent's plant manager, Larry Johnson, testified that he knew that Patsy Lendon was a union supporter in 1993 and he talked with her at that time about an alleged complaint regarding the solicitation of a signature on a union authorization card; that he lost his temper somewhat when he spoke with Lendon in 1993 telling her that he could not have her threatening any of his employees and he wanted her to stop and if she did not, he was going to terminate her; that he did not tell Lendon that he was going to terminate her because she was a union supporter; that Lendon came to his office on the day she was terminated in 1997 and told him that she had been terminated for making racial slurs and threats to employees; that he did not play any role in the decision to terminate Lendon; that he told Lendon that if the people who complained came to him or went to human resources and indicated that they did not feel offended by her use of the "N" word, then he possibly could help her out; that none of the complainants came to him and withdrew their complaints; that Lendon told him that she used the "N" word but that it was okay because she was talking to another person in the same race; that he read the statements (R. Exhs. 74, 88, and 89) to Lendon from the three employees who complained; that during this meeting he did not say anything to Lendon about the Union and he did not say, "I don't want you to think this is about your Union activity" (Tr. 5495); that he has never uttered a racial slur in front of employees or in the plant; and that he used the "N" word when he talked to Patsy Lendon and when he had a discussion with some supervisors about a talk show where the word was used pretty frequently. On cross-examination Larry Johnson testified that in January 1994 he told Patsy Lendon, "I don't care about your Union, I don't want to hear about your Union, I'm not going to have you threatening people over this Union. If I can prove that your are threatening people I will have your job"; that he suspected that Lendon was a union supporter in 1997; that employees at the involved facility have used words such as "bitch" and "nigger"; that he did not know whether there is or is not a policy on using the word "nigger"; and that he concluded from the fact that the

three employees took the time to write their statements and go to human resources and make a complaint that the three must have taken it in a harmful way.

Thomas Ross, the vice president of human resources at Smithfield Packing Company in Smithfield, testified that with respect to racial slurs by supervisors, company policy would provide disciplinary action ranging from suspension without pay or even discharge if it was serious enough. On cross-examination Ross testified that the company policy which forbids the use of racial slurs applies to supervisors and rank-and-file employees in all departments; and that an employee could very well have just been given a reprimand. Subsequently, Ross testified that he did not know whether the company policy forbidding the use of racial slurs is a written company policy in its handbook; and that when he was referring to company policy he was not referring to a written company policy but rather to an "unspoken policy . . . . [i]ts not allowed in any of our facilities" (Tr. 6119).

Jere Null testified that the Company does not permit the use of racial slurs in the workplace; that the Respondent has a policy prohibiting abusive language and in his opinion racial slurs "falls in there" (Tr. 6200); that during the time he has worked at Tar Heel he has never directed a racial slur at any worker or member of management; and that he did not recall ever uttering a racial slur in the presence of Sherri Buffkin. On cross-examination Null testified that the Respondent has terminated people for using a racial slur; that he did not recall ever not terminating a person for using a racial slur; and that former employee Tammy Lewis, who is a white, was terminated for calling a black female the "N" word.

Lee Mount, who has been the Respondent's director of human resources since December 1995, testified that he met Patsy Lendon one time in June or July 1997, a week after an incident in the livestock breakroom took place; that he saw the statements of three employees regarding Lendon's conduct in the breakroom (R. Exhs. 74, 88, and 89) sometime after the incident took place in June 25, 1997; that Shane Potts, Lendon's supervisor, was present at the meeting with Lendon; that during the meeting eventually Lendon admitted that she used the "N" word but she said that this was the way black people talked to each other; that Lendon did not express any remorse over using the "N" word; that he and Potts decided to terminate Lendon for a violation of policy and they told her at the end of the meeting that she was terminated; that prior to Lendon he terminated three employees for using racial slurs in the plant, namely Tammy Inman, Mable Carter, and Diane Atkinson; that Respondent's Exhibits 158, 159, and 160 refer to Atkinson's termination on October 17, 1996, for insubordination and telling her supervisor, Johnny Brown, "I'm tired of you niggers telling me what to do"[219]; that Atkinson and Brown are black; that Mable Carter was terminated on September 9, 1996, for creating a disturbance on the line a second time which really slowed production down and using a racial slur directed toward another employee during the same incident; that Carter had created a disturbance on the line before this incident and she "was warned that if it happened again she would be subject to termination" (Tr. 6450); that Respondent's Exhibits 161, 162, 163, and 164 refer to the incident, Carter's termination and subsequent action with respect thereto; that Tammy Inman, who is white, was discharged on May 8, 1997, for fighting on the job with another white woman and using a racial slur, namely, calling the woman a "nigger lover"; that Respondent's Exhibits 165 and 166 are the termination form and his memorandum regarding the termination, respectively[220]; that he absolutely did not say in front of Sherri Buffkin that Crew Leader Richard Brown was a "damn nigger . . . [who] thinks everybody owes him something"; that he has never directed a racial slur at any employee or member of management in the Tar Heel facility; that Respondent's Exhibit 178 is a document kept in the regular course of business and maintained in Lendon's personnel file[221]; that Respondent's Exhibit 179 is a document kept in the regular course of business and maintained in Lendon's personnel file[222]; that Respondent's Exhibits 180(a) through (n) are documents kept in the regular course of business and maintained in the personnel file of Lendon[223]; that Respondent's Exhibits 181(a) through (m) are documents kept in the regular course of business and maintained in the personnel file of Lendon[224]; that Respondent's Exhibits 182(a), (b), and (c) are documents kept in the regular course of business and maintained in the personnel file of Lendon[225]; that Respondent's Exhibits 183(a), (b), and (c) are documents kept in the regular course of business and maintained in the personnel file of Lendon[226]; and that Respondent's Exhibits 184(a), (b), (c), and

[219] The statement regarding what happened, R. Exh. 158, indicates that during a meeting in Lee Mount's office after Atkinson was suspended, she was "very uncooperative and continued to threaten Lee and myself that she would have our jobs and she did not want to discuss the issue." Mount testified that he thought that Superintendent Kevin Beck drafted the statement. Beck and Supervisor Johnny Brown signed the statement.

[220] It is noted that while on p. 2 of the memorandum Mount indicates that "Tammy . . . struck Jennifer in the fact and pushed her," on the first page of his memorandum Mount indicates "[a}t some point Kim hit Jennifer in the face with her fist and then pushed Jennifer."

[221] It is a list of her excused and unexcused absences between "10–02–96" amd "6–6–97."

[222] Her termination form, effective July 14, 1997, reads "Insubordination and directing a racial statement towards a crew leader and an hourly employee."

[223] They are attendance reports and disciplinary actions for 1992 and 1993. When asked about the relevance, one of the counsel for Respondent indicated that the Resondent wanted to create a complete record and Lendon specifically testified that she did not have any attendance or disciplinary problems at work.

[224] All but two are disciplinary records for Lendon for absenteeism and tardiness in 1994. One is a 1994 written counseling for absenteeism and the last is a disciplinary record for carelessness for excessive restroom visits.

[225] Respectively, they are a 1995 disciplinary record involving absenteeism and tardiness, a 1993 attendance report indicating that Lendon called in and came in late, and a 1995 disciplinary record (step 2 written warning) for absenteeism.

[226] Respectively, they are a 1996 disciplinary warning covering an oral warning for not attending a scheduled safety meeting, a 1996 disciplinary warning covering an oral warning for being late returning from first break and missing approximately 60 hogs, and a 1996 acknowledgment that she, along with others, had received a typed statement of certain rules.

(d) are documents kept in the regular course of business and maintained in the personnel file of Lendon.[227]

On cross-examination Mount testified that he took an active role in terminating Patsy Lendon; that he did not know whether he looked at documents or complaints prior to discharging Lendon but he spoke with Supervisors Shane Potts and Lenwood Shirley; that Potts was Lendon's supervisor; that he did not think that he discussed the Lendon incident with Lonnie Galloway, or Pamela Williams, or Shawn Troy; that Lendon was insubordinate to Crew Leader Galloway; that insubordination was secondary to Lendon's use of a racial statement; that insubordination is the first word on Respondent's Exhibit 179, the termination form; that he read Respondent's Exhibits 74, 88, and 89, the three statements about the Lendon incident, but he did not know if he read them before he terminated Lendon; that on the termination form for Diane Atkinson (R. Exh. 159), "Termed For Insubordination" appears first and it is printed in a light color ink; that "cursed her supervisor" is written in cursive in a darker pen[228]; that he was involved in the discharge of Atkinson and he realized that when she used a racial slur she was on the clock, on the work floor, refusing a direct order from a supervisor, and being insubordinate; that he did not consider the Atkinson case when he decided to terminate Lendon; that he was involved in the discharge of Mabel Carter; that Carter created a disturbance on the work floor and called another woman a "black bitch"; that before the incident over which she was terminated, Carter had used abusive language on several occasions in the past and had been warned about it but he did not believe it was racial; that discharge is not the only punishment for uttering a racial slur at the involved Tar Heel plant in that an employee could be warned or suspended; that he conducted the investigation of the Tammy Inman incident; that Inman assaulted another employee and used a racial slur; that he did not look through the Inman file prior to discharging Lendon; and that he did not know how many times Carter had used abusive language before the incident over which she was terminated and he did not know whether the other occasions referred to in Respondent's Exhibit 162 included any racial slurs.

On redirect Mount testified that Lendon's termination form (R. Exh. 179) was prepared after her termination and, therefore, he did not review this document before he decided to terminate her. Subsequently, Mount testified that on Inman's termination form when he received it it had "Fighting on the job" as the reason for termination and he added "used racial slur" on the form when he reviewed in on May 8, 1997; and that at the time of Lendon's discharge he interpreted there being a prohibition regarding racial slurs as falling under one of the work rules but he could not recite it from memory; and that the policy that he interprets to cover racial slurs specifies sanctions.

[227] They are three 1997 disciplinary records for being absent, and tardy twice, respectively, and the last document is a copy of two counseling 1997 records (both are fourth written warnings) for absences.

[228] The entry "cursed her supervisor" unlike everything else on the form, is written on a slant.

Analysis

The General Counsel on brief contends that "although the word 'nigger' may in many circumstances carry a derogatory racial connotation, in the context of Lendon's conversation with Gallaway [sic], Lendon used the term in the nature of political discourse" (p. 115 of counsel for General Counsel's brief); that Lendon used slang to emphasize her arguments in support of the Union and to inform the assembled employees that management officials could not lawfully interfere with the efforts to solicit on behalf of the Union; and that in 1993 Plant Manager Larry Johnson accused Lawanna Johnson of having uttered racial or ethnic slurs toward Hispanic employees and he counseled her that that "shouldn't be allowed" but he did not write Lawanna Johnson up over that matter.

The Respondent on brief argues that it introduced, through its employee handbook (R. Exh. 122) specific company policies prohibiting racial harassment and the use of abusive language toward others; that the handbook classifies the use of abusive language as a 'serious offense' subjecting violators to termination; that the General Counsel has presented no credible evidence of any procompany employee whom Respondent failed to terminate for conduct similar to that which resulted in Lendon's discharge; that the use of racial slurs in an antagonistic fashion is an "automatic dischargeable offense" (p. 342 of the Respondent's brief); that General Counsel has not credibly pointed to a single incident involving racial slurs, of which Respondent was aware, which went unpunished; that the Respondent has shown a legitimate, nondiscriminatory reason for its decision to discharge Lendon; and that the discharges of Atkinson, Carter, and Inman conclusively demonstrate that the Respondent would have terminated Lendon for her conduct even in the absence of her union activity.[229]

As noted above, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that the protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Lendon engaged in union activity and the Respondent was aware of Lendon's union activity. Indeed, Lendon was engaged in union activity at the time of the involved incident. The record contains substantial evidence of antiunion animus.

In my opinion the Respondent has not demonstrated that it would have taken the same action against Lendon even if she did not support the Union and was not engaged in protected activity. The Respondent has not demonstrated that it had any business justification for discharging Lendon. The Respondent at page 342 of its brief argues that "[t]he use of racial slurs in an antagonistic fashion is an automatic dischargeable offense." The Respondent cites Respondent's Exhibit 122, which is its employee handbook. At pages 43–45 there are three categories

[229] The Respondent also requests reconsideration of my ruling allowing the above-described amendment with respect to the termination of Lendon. In my opinion, the Respondent has not demonstrated that there are any grounds for reversing that ruling. The ruling stands.

of "DISCIPLINARY PROCEDURES." They read, as here pertinent, as follows:

> Minor Offenses—Violations of the following rules may result in a verbal/written warning or suspension:
>
> . . . .
>
> Serious Offenses—Violations of the following rules may result in a written warning, suspension or termination:
>
> 1. Using abusive language toward an employee, management personnel, customer, or company represent-tative on company property.
>
> . . . .
>
> Very Serious Offenses—Violations of the following rules may result in suspension or termination. Violation of offenses underlined will result in termination.
>
> 1. *Fighting on company premises.*
>
> . . . .
>
> 4. Communicating threats.
>
> . . . .
>
> 13. Insubordination to company management personnel.
>
> . . . .
>
> It is important for you to remember that these lists of offenses are only guidelines for discipline. The Company may choose to impose no discipline or a higher level of discipline depending upon the Company's evaluation of the circumstances surrounding an offense and the effect of the offense upon the Company's work environment.

On the one hand, the Respondent argues that "[t]he use of racial slurs in an antagonistic fashion is an automatic dischargeable offense." On the other hand, the employee handbook cited by the Respondent, as here pertinent, places "[u]sing abusive language toward an employee . . . on company property" in the middle category between "Minor Offenses" and "Very Serious Offenses," and the Handbook indicates that a "Serious Offense . . . may result in a written warning, suspension, or termination." Additionally, as noted above, the Respondent included a paragraph in the handbook giving it discretion to decide the discipline notwithstanding its specified guidelines. Under these circumstances, it does not appear that the involved offense "is an automatic dischargeable offense." As noted above, "13, Insubordination to company management personnel" is not underlined so it is not automatic that it would "result in termination." Moreover, elsewhere in this proceeding the Respondent argued correctly that crew leaders are not supervisors. Crew leaders certainly cannot be described as "company management personnel." Indeed they were eligible to vote as employees in the Board election. The burden of proof is on the party claiming supervisory status. It has not been shown that crew leaders are supervisors. So if by arguing that "[t]he use of racial slurs in an antagonistic fashion is an automatic dischargeable offense . . . " the Respondent is arguing that such conduct will automatically "result in termination," its own document does not support this argument. As noted above, the "abusive language" rule could also have resulted in a written warning or suspension.

Taking the three examples that the Respondent cites, it is noted that Inman assaulted another employee and used a racial slur. As noted above, "*[f]ighting on company premises*" is a "[v]iolation of offenses underlined will result in termination." Inman's termination form, Respondent's "Exh. 165, reads: "Fighting on the job" A different handwriting was used to add "—used Racial Slur." Atkinson had a confrontation on the work floor with her supervisor while she was working, after disregarding his directive to stay in her work area so that she would not get hurt. Atkinson got hurt and then used a racial slur at the supervisor when he reiterated his directive that he did not want her to leave her work area. Atkinson subsequently threatened Director of Human Resources Lee Mount and Superintendent Kevin Beck that she would have their jobs and, according to Respondent's Exhibit 158, the only remorse she showed was over what her lawyer was going to do to Director of Human Resources Lee Mount and Superintendent Kevin Beck. As noted above, "[i]nsubordination to company management personnel" is a "[v]ery Serious Offense." Atkinson refused to follow her supervisor's directive and as a result she was injured on the work floor. Atkinson then proceeded to threaten management officials. "Communicating a threat," another "[v]ery Serious Offense . . ." was not listed on the termination form (R. Exh. 159), but "Term . . . for Insubordination" is. Also the following slanted writing was added to the form "cursed her supervisor." Carter created a disturbance on the Picnic line by blocking another employee's path as she tried to return to her work station, and Carter directed a racial slur at the employee. Respondent's Exhibit 161 indicates, "Ms. Carter was terminated for causing a disturbance on the line *again*." (Emphasis added.) As Mount testified, the first time she created a disturbance which slowed down production several months prior to the final incident, Carter "was warned that if something like this happened again, she would be subject to termination." Carter's termination form read, "Reason for Termination Conduct" The following was added in a different handwriting "using abusive language toward another employee/on several occasions/after being warned."

All three of the examples cited by the Respondent are clearly more serious than Lendon's involved conduct. All three of the employees engaged in conduct which aside from the racial slurs would have, and did indeed, justify their termination. Atkinson's and Carter's conduct occurred on the work floor while they were expected to be working. While the disciplinary procedures do not differentiate worktime from breaktime, what occurred with Lendon should be placed in its proper context. The employees in the break room with Lendon were having a discourse (Williams described it as a debate.) about the pros and cons of bringing a union into the plant. All of the employees were on break. Lendon's testimony about what happened between her and Galloway is credited. Galloway was not a credible witness. He continued to lie under oath even after it became painfully obvious to everyone else in the room that, contrary to his testimony, he did not draft his statement. Galloway could not even correctly spell some of the simple words in the statement. The statement was drafted in the third person and did not even spell his name correctly, indicating that he did

not even read over the statement carefully before signing it.[230] Lendon did not direct a racial slur at Galloway until after he told her to "get your ass out of my department and leave my people alone." As Crew Leader Troy testified, since the fatometer department is part of livestock, there would not have been any reason for Lendon not to be allowed in the livestock breakroom at the time of the incident. Legally Lendon had the right to solicit signatures in the breakroom when she and the other employees in the breakroom were on break. If Galloway had been a supervisor, it would have been a violation of the Act for him to preclude her from soliciting signatures on union authorization cards in the breakroom when she and the other employees present were on break. It was at this point in time that Lendon said, "[O]h, that's a dumbass nigger, don't pay him no mind." Galloway testified that this was the part that really hurt his feelings and that he could have dealt with the other part. Shawn Troy, the other crew leader who walked in on the verbal exchange, only heard the other part, namely, a reference to earning a white hat by "kissing a white man's ass." Troy did not file a complaint about what Lendon said and he testified that he overlooks that kind of stuff.

At different points in her testimony Williams testified that Lendon said, "[B]lack people" or "black folks" and then she testified that in her statement she indicated that Lendon said, "[N]igger." Williams testified that she penciled in "ignorant" when she reviewed the statement. One would think that in view of Williams' changing testimony, that the Respondent, which has the burden of persuasion, would have called one of the other employees present to corroborate Williams' testimony that Lendon said "nigger" and not "black people" or "black folks" in her conversation with Williams. Perhaps the Respondent was hesitant to call Debra Prince for, as Williams testified, Prince told her "to let it go, it was just silly." Did Lendon say "black people or folks" and Prince thought the whole thing was silly? As noted above, Williams also testified that when she gave the statement to Superintendent Tatem he said that Lendon "probably didn't mean no harm or nothing." Since Lendon used the word "nigger" with Galloway, it is more probable rather than less probable that she would use this word with Williams also. But with Galloway, Lendon was provoked.[231] And more than once Williams changed her testimony with respect to whether Lendon said "niggers" or "black folks" or "black people." And when she corrected herself Williams first said that she believed that Lendon did not say "black folks" but said "niggers." Later Williams testified she was sure that Lendon called her "an ignorant nigger." When one considers this equivocal testimony in conjunction with the Williams' testimony that she was not sure whether she wrote the statement on her own, one must, in my opinion, conclude that Williams was not a reliable witness.

As noted above, the Respondent argues on brief that the General Counsel has presented no credible evidence of any procompany employee whom Respondent failed to terminate for conduct similar to that which resulted in Lendon's discharge; and that the General Counsel has not credibly pointed to a single incident involving racial slurs, of which Respondent was aware, which went unpunished. Also as noted above, the General Counsel, on brief correctly points out that in 1993 Plant Manager Larry Johnson accused Lawanna Johnson of having uttered racial or ethnic slurs toward Hispanic employees and he counseled her that that "shouldn't be allowed" but he did not write Lawanna Johnson up over that matter. A disparate treatment showing does not require that the other employee be a company supporter.

The Respondent cites *Certainteed Corp.*, 282 NLRB 1101 (1987). That case is distinguishable. There the white alleged discriminatee received a prior warning about the use of racial slurs and, notwithstanding the prior warning, the employee wrote "Nigger . . ." on a company document which he knew was going to be seen by other company personnel. There it was found that the discipline that the employee received for writing a racial slur on a company document, a final permanent written warning, meant that if he engaged in any future racial slurs, he would be discharged. Here Lendon was lawfully engaged in union activity in a breakroom while she and the other employees present were on break and she was told to "get her ass out of the room" and leave the other employees alone. Here Lendon did not receive a prior warning about the use of racial slurs. And here Lendon did not receive a final permanent written warning. Lendon was terminated. At page 1120 in *Certainteed Corp.*, supra, the judge wrote "[t]hat it was racial slurs that the Company was attempting to prevent by the [permanent] warning is demonstrated by the fact that the Company did not preclude [the employee] from bidding on future job positions nor did it otherwise jeopardize his future with the Company so long as he refrained from using racial slurs." The case the Respondent cites demonstrates what the Respondent here was attempting to prevent, and it was not racial slurs. As noted above, the Respondent argues on brief that the use of racial slurs in an antagonistic fashion is an "automatic dischargeable offense." The Respondent does not have a specific rule about racial slurs. And if the Respondent wants to use the abusive language rule, then Lendon could have received a written warning as did the employee in *Certainteed Corp.*, supra. Galloway, who told Lendon "to get her ass out of his department" was not disciplined for using abusive language. Perhaps the Respondent accepted the fact that such language was common in a hog processing plant. No matter how inappropriate such usage is, by all credible accounts, use of the word "nigger" is also common, as here pertinent, between African Americans in this hog processing plant. The Respondent has not demonstrated that it would have taken the same action against Lendon even if she did not support the Union and was not engaged in protected activity. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Patsy Lendon on July 14, 1997.

[230] To demonstrate that he could read, Galloway read the statement out loud at the trial herein.

[231] Galloway testified that Lendon used the "bad words" before he told her to leave. Galloway was neither a credible nor sophisticated witness. He, himself would not have appreciated the significance of the timing of his telling Lendon to "get your ass out of my department and leave my people alone." Galloway used this abusive language before Lendon "used the bad words."

C. The Respondent's Statistical Report

The Respondent called Joan Gustafson Haworth, Ph.D. who sponsored the Respondent's Exhibit 141, which is titled "Report on Analysis of Terminations, Discharges Related to Absence, And Warnings at Smithfield Packing Company Tar Heel, North Carolina, 1993 Through 1997." Haworth, who is an expert in statistics, prepared the six-page report with the assistance of her staff. The following appears on pages 3 and 4 of the report:

> If there had been an intent to terminate union supporters we would have expected to find a greater number of terminations, as a percentage of the active workforce, than the average termination rate around the months in which the union election occurred. When the termination rates in a three-month period, centered on the election month in 1994 and in 1997, are compared to the termination rates in other three month periods, the termination rates around the times of the election are *lower*, rather than higher. A similar analysis for termination rates in a five-month period centered on the election month gives a similar result. I conclude that there was no increase in the number of terminations during either election period. This result is inconsistent with an intent to terminate union supporters when they were identified during election periods. [Emphasis in original and footnotes omitted.]

The report and the conclusions drawn therefrom by this witness are, at best, naive. In this case we are dealing with specific situations. Most of this witness' prior work which she has testified about in other proceedings involved fair employment issues relating to age, gender or race. In the past she has been able to identify appropriate control groups. As to whether any of her testimony speaks to facts that are beyond the common knowledge of an ordinary person, the witness testified that to show a pattern or a lack of a pattern, she collected data, examined it and summarized it in ways that the normal person might not do unless guided. At one point, one of the attorneys for the Respondent indicated that the witness was going to testify about a statistical analysis of the Company's attendance policies and enforcement and application thereof, and she was not going to testify about the ultimate issue as to whether any of the individual alleged discriminatees were discriminated against on the basis of their alleged union activity. This witness testified that while the Respondent had objective absentee and tardiness standards, she could not testify that the Respondent applied the standards in an objective manner.[232] Consequently, one cannot know, taking a statistical approach, that there was no discrimination or favoritism. The report has many problems. Allegedly it was based on a random sampling. But it was not even possible to test the validity of that assertion by a review of the files she used and a review of the files she did not use in view of the fact that concededly the Respondent did not maintain its files in any order which would allow one to check whether the sampling was indeed random. And when asked whether her staff took the time to first organize the Respondent's files before allegedly picking random samples, the witness replied in the negative.[233] This witness testified that her report could not explain whether a single individual was terminated as a result of their union activity but it could indicate "that there was not a policy that was put into place looking for Union supporters and terminated [sic]them." In my opinion, the report could not indicate even that. No purpose would be served with this very long record by summarizing all of the shortcomings of the report and the testimony based thereon. As is pointed out by the Union on brief, where the General Counsel's case is not based on statistical evidence, a Respondent's statistical defense is not directly responsive to the nonstatistical evidence of specific discriminatory intent revealed by the prima facie case of the General Counsel. *Monfort of Colorado*, 298 NLRB 73, 83 (1990) The report was received in evidence. However, upon further consideration, it is my opinion that the study is flawed and it is not relevant. I am not giving the report or conclusions based on the report any weight.

III. OBJECTIONS TO THE AUGUST 1997 ELECTION AND CONDUCT AFFECTING THE ELECTION [234]

A. Objection 1

During the critical period, the Employer interrogated employees regarding their and other employees' union sympathies.

Former employee Latonya Robinson testified that on August 21, 1997, while she was working, she overheard Jeff White, who told her that he was "the spokesperson for the non-Union," ask Larry Johnson if he could speak to her; that she heard Johnson say yes: that White had just asked her if she was going to vote for the Union and she replied that she was; and that when she had this conversation, Johnson was standing about 5 feet away and Tom Staggs was standing next to Johnson. White did not testify at the trial herein. Johnson did not specifically deny this testimony of Robinson. Robinson's testimony regarding Bill Bishop is set forth above under paragraph 8(a) of the 1998 complaint.

The Petitioner cites the testimony of Dennis Murphy with respect to Supervisor Stocks' attempt to give him a nonunion sticker. A summary of the testimony is set forth above under paragraph 8(p).

A summary of Ada Perry's testimony regarding questions she was asked is set forth above under paragraph 9 of the 1998 complaint.

Former employee Latasha Peterson's testimony regarding interrogation is set forth under objection 16 below.

[232] This witness testified that the Company's 12-point absentee policy was sometimes followed and sometimes not followed: and that "from my reading of the policy that it says if you have twelve points the policy provides for you to be terminated. It doesn't absolutely require it. There were obviously from the data were exceptions to that rule." Tr. 4817.

[233] This witness testified that it did occur to her that she should first organize the files but she satisified herself that there was another way to determine whether she had a representative sample for each year, namely she compared the results of the sample to the extract from the yearend payroll file which the Respondent supplied to her.

[234] Many of the objections refer to alleged conduct which is also covered by allegations in the 1998 complaint. To that of the complaint, as set forth above.

Paul Walker's testimony is set forth above under paragraph 8(a) of the 1998 complaint.

Analysis

Objection 1 is sustained. It has already been concluded above that the Respondent unlawfully interrogated Latonya Robinson, Dennis Murphy, Ada Perry, and Paul Walker. Latonya Robinson's uncontroverted testimony about White asking her, in the presence of Larry Johnson, if she was going to vote for the Union is credited. Latasha Peterson's testimony about interrogating employees and turning over lists to Lee Mount is credited. Neither Lee Mount nor Clarissa (Robinson) Pruitt were credible witnesses. Pruitt's paycheck increased dramatically during the last 2 weeks of the campaign, almost doubling for the pay period ending "8–28–97." Pruitt's explanation that she could have worked some overtime during the week of the 1997 Board election must be viewed in the light of the fact that she would have had to work a great deal of overtime during the pay periods ending "8–21–97" and "8–28–97" to earn the money she was paid. Indeed Charging Party's Exhibit 11 alleges that Pruitt worked 72 hours during the pay period ending "8–28–97." On the one hand, Pruitt testified that Brown reviewed the statement Pruitt gave on the radio. On the other hand, Mount testified that he Jere Null and Larry Johnson wrote the script used by Peterson and Pruitt on the radio and then turned the project over to Marion Brown. As demonstrated with his testimony regarding the termination of Margo McMillan, Mount was not a credible witness. He claimed that he did not know that McMillan was a union supporter when he terminated her. Then on cross-examination he conceded that he reviewed a list of election observers before the 1997 Board election and McMillan was on the list as a union observer, and he saw McMillan at the vote count.

B. Objection 2

During the critical period, the Employer informed employees of the futility of selecting the Union as collective-bargaining representative.

Analysis

Objection 2 is sustained. It has already been concluded above under paragraph 8(e) of the 1998 complaint that the Respondent unlawfully threatened employees with the futility of selecting the Union as collective-bargaining representative.

C. Objection 3

During the critical period, the Employer threatened to more strictly enforce employment rules if employees selected the Union as bargaining representative.

During the testimony of Paul Walker the Union argued that Walker was treated more harshly after he told Jere Null that there was an antiunion message on the wall. A summary of Walker's testimony is set forth above under paragraph 8(f) of the 1998 complaint.

The Respondent's supervisor, Robert Claiborne, who was third-shift superintendent at the time, testified that the Respondent had work rules during the 1997 campaign; that the work rules were enforced the same during the campaign as they were every day; that he never told employees that he would be more strict during the election than before the election; and that he never gave orders to supervisors to be more strict either before or during the campaign.

Analysis

Objection 3 is overruled. There is no evidence of record demonstrating that the Employer actually *threatened* to more strictly enforce employment rules if employees selected the Union as bargaining representative.

D. Objection 4

During the critical period, the Employer threatened to close plant if employees selected the Union as representative.

Chad Young, who is the executive assistant to the Union's Regional Director out of Chicago, Illinois, testified that he was involved in the 1997 union organizing campaign at the involved facility; that the Union and the Respondent had an agreement with respect to certain things; that pursuant to the agreement he complained to Tom Ross, the vice president of the Respondent, when an employee from the shipping department at the involved plant complained that Null said in a meeting that if the Union got in they would close the plant; that he met with Ross, Null and the employee together and Ross instructed Null to tell the employees who were at the meeting that the plant would not close and that the statement should have never been made; and that he did not recall Null denying that he made the statement in the first place.

Ross testified that Young complained to him that he was receiving complaints from the Respondent's employees that supervisors were harassing them; that there were no specifics and no names were brought out, everything was in generalities; that he looked into it and he found no violations; that he told Null to make sure in his conversations with his managers and supervisors to make sure that they did not violate the law in talking to people; that he had about six or eight meetings with Young with three or four in the Tar Heel plant; that Young complained that at some of in the meetings supervisors, including Null, had with the employees the supervisors said that they would close the plant down if the employees support the Union but he "found no validity in that" (Tr. 6058); that he had the employees that Young named when he came to the plant called into the conference room at the Tar Heel plant along with the supervisors; and that he and Young first met with the employees to see how valid their claims were. On cross-examination Ross testified that Null attended one of the meetings in the conference room with Young; that "the one with Jere Null was not necessarily a complaint filed by an employee. I think this was just a meeting with Chad Young, Jere Null and myself" (Tr. 6077); that Null met with groups of employees about the campaign and election and some employees who Young brought to him claimed that Null threatened employees in the meeting with plant closure; that Null "denies" this; that he would ask employees in the meeting did this really happen and he was told, "[n]o, I didn't hear it, if it did"; that for example he went to the shipping dock by himself to follow up on a complaint and he met with a group of 25 employees at one time; that he did not meet with the shipping group as a result of Young complaining about comments allegedly attributed to Null but rather he met with the shipping group as a result of an individual coming to

him personally; that Young referred to a maintenance employee and two employees from the cut floor; that Young was there when he met with the employees, the employees went back to work, and that was it; that he went to the shipping dock by himself to meet with that group of employees because he thought "it had to do with some things that were said, supposedly, by Jere Null or Larry Johnson . . . . [i]n meetings" (Tr. 6096); that he could not remember what the complaint was about; and that he asked the shipping department employees if they had a meeting with any of the supervisors or Jere Null and if anything out of the way was said to which the employees responded, "[Y]es" and "[N]o," respectively. On redirect Ross testified that with respect to the one maintenance employee and the two cut floor employees who he and Young met with, the three employees did not "rebut" or confirm Young's version of things; that he told the employees that he would look into it and he talked with the supervisors and made an attempt to follow through on any promises he made to the employees that they received complaints from; and that he did not get back to Young after he spoke to the supervisors. On recross Ross testified that he did not remember who the supervisors were that he talked to.

Null gave the following testimony at page 6130 of the transcript:

> Q. At any meeting whatsoever throughout the course of the entire 1997 campaign did you ever tell employees the plant would close if the Union was voted in?
>
> A. Absolutely not.

Analysis

Objection 4 is sustained. It has already been concluded above under paragraphs 8(g) and (t) of the 1998 complaint that the Respondent unlawfully threatened employees with the plant closure and plant closure in the event of a strike, respectively.[235]

E. Objection 5

During the critical period, the Employer threatened to reduce wages or eliminate benefits if employees selected the Union as bargaining representative.

Analysis

Objection 5 is sustained. It has already been concluded above under paragraph 8(d) of the 1998 complaint that the Respondent unlawfully threatened employees with loss of wages and benefits if the employees selected the Union as collective-bargaining representative.

F. Objection 6

During the critical period, the Employer threatened to deny or delay employees' annual (September) wage increase if employees selected the Union as bargaining representative.

Dennis Murphy testified that the Saturday before the August 1997 election he attended a meeting with the more than 30 other first and second-shift employees from livestock; that the meeting was held in the small cafeteria and Plant Manager Jere Null spoke; that the first-shift superintendent of livestock was there along with the supervisor in livestock; that Null said that there "wouldn't be a raise if the Union was to win until negotiations would be—the rate would be up in the air. . .—until whatever settlement came from the Union like that; that over the 6 years that he has been at Respondent he has received a raise every September; and that in 1997 before the company meetings about the Union there was a meeting in the large cafeteria and the employees were told that the raise was to come. On cross-examination Murphy testified that during the 6 years he received different amounts in his pay raise each year.

Null's testimony regarding what he said at the employee meetings is summarized above under paragraph 8(e) of the 1998 complaint.

The Respondent's former employee Michael McKeithan testified that on August 12, 1997, he attended, at the direction of his supervisor through a crew leader, an antiunion meeting given by Superintendent Randy Gebbie; and that during the 25-minute meeting Gebbie told the approximately 25 employees in attendance that they would not receive the raise that Smithfield supposedly gave them in September "and that was coming up" if the Union was voted in. On cross-examination McKeithan testified that Gebbie's

> first comment was we was [sic] not getting the raise. Then he turned around and made the statement because when he said that everybody had you know a few comments to make. Then he said oh, well there will be negotiations with the Union. That can hold up six months to two years.
>
> . . . .
>
> He said as you see now what the Union has done for the House of Raeford look what it got them and he passed put a little bunch of papers stating he was going off this little paper showing what some Unions have done, how many [p]lants closed like [p]lants closing down because of the Union.

Gebbie testified that he told employees that "if the Union won the election then everything would be frozen until negotiations were agreed upon, and unless . . . [the] negotiating process was incredibly fast then while it was frozen they wouldn't get a raise." (Tr. 1828.)

See also Objection 14 below.

Analysis

Objection 6 is sustained. It has already been concluded above under paragraph 8(r) of the 1998 complaint that the Respondent unlawfully threatened that wages would be frozen if the Union was selected as collective-bargaining representative. For the reasons specified above in paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null regarding what he said in his speeches to employees. And Gebbie's approach was unlawful for the reasons specified above in paragraph 8(r) of the 1998 complaint. The testimony of Murphy, McKeithen, and Sherrie Buffkin (as set forth in Objection 14 regarding raises) is credited. The testimony of the other employee witnesses has already been credited above in paragraphs 8(g) and (r) of the 1998 complaint.

[235] It should be noted that the motion to strike certain of Null's testimony was granted because of the Respondent's refusal to turn over the videos or films.

G. Objection 7

During the critical period, the Employer threatened employees with the inevitability of strikes and plant closure.

Jonathan Cook testified that around mid-August 1997 he was picked by his supervisors to go to a meeting conducted by Jeff White, former employee Joey Dockery and someone who he identified only as "Kool-Aid"; that there were about 25 to 30 employees from each department, cut floor, kill floor, conversion, and the production areas attended this meeting; and that the employees were shown a movie and the three people who conducted the meeting explained to the employees how they did not need a Union, and how the union brings strikes.

See also Objection 14 below.

Analysis

Objection 7 is sustained. The testimony of Cook regarding the above-described mid-August 1997 employee meeting is credited. Neither White nor Dockery nor "Kool-Aid" testified at the trial herein. As noted under Objection 14 below, the testimony of Sherrie Buffkin and the employees specified in that objection is credited. Also, as concluded above under paragraphs 8(g), (s), and (t), the Respondent violated the Act with respect to what was said about strikes and plant closure.

H. Objection 8

During the critical period, "the Employer threatened . . . [to] discharge employees for signing Union cards."

Analysis

Objection 8 is overruled. No evidence was presented in support of this objection.

I. Objection 9

During the critical period, the Employer discouraged employees from soliciting union cards or wearing union stickers.

The testimony of Paul Walker and Charlie Newton regarding their conversation with respect to union stickers on hardhats is summarized above under paragraph 8(a) of the 1998 complaint.

The testimony regarding the termination of Patsy Lendon for conduct which occurred while she was soliciting signatures on union authorization cards is set forth above under paragraph 9 of the 1998 complaint.

Analysis

Objection 9 is sustained. As concluded above under paragraph 8(a) of the 1998 complaint, Walker's testimony is credited and Newton's is not. As Newton conceded, during the 1997 union campaign Walker had prounion stickers on his helmet.[236] Newton discouraged the wearing of such stickers when he told Walker on August 14, 1997 that after the Union was passed over he would not be wearing stickers on his hat.

As concluded above, when Lendon lawfully attempted to solicit signatures on union authorization cards while she was on her break in a breakroom with other employees in the breakroom who were on break, she was told by Crew Leader Galloway to "get her ass out of his department." Lendon was then unlawfully, disparately terminated for her verbal response to this abusive language. The Employer discouraged Lendon from soliciting union authorization cards.

J. Objection 10

During the critical period, the Employer threatened employees with job loss and discharged/constructively discharged union supporters.

See also Objection 14 below.

Analysis

Objection 10 is sustained to the extent that it alleges that the Employer threatened employees with job loss and discharged a Union supporter (Patsy Lendon). It has already been concluded above under paragraph 8(f) of the 1998 complaint that the Respondent unlawfully threatened employees with loss of jobs. For the reasons specified above in paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null regarding what he said in his speeches to employees. The testimony of Kenneth Ivie referred to above under paragraphs 8(f)and (g) of the 1998 complaint is credited. The testimony of Supervisor Johnnie Brown referred to above under paragraphs 8(f)and (g) of the 1998 complaint is not credited. The testimony of Andrea Hester as set forth above under paragraph 8(f) of the 1998 complaint is credited.

K. Objection 11

During the critical period, the Employer threatened employees and area businesses that union representation will cause loss of wages, jobs, business, and/or plant closure.

Gilliard, when called by the Respondent, testified on cross-examination that he left Tar Heel and later returned to Tar Heel in July 1997 to assist in the Respondent's efforts to remain union free; that in that capacity he may have prepared documents to warn the community about the threat to the local economy or economic development regarding unionism; that he was not involved in the preparation of the Charging Party's Exhibits 14 and 15;[237] that he recognized Charging Party's Exhibit 16;[238] that he spoke at this meeting which was held in

[236] As pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), [i]t is no reason for refusing to accept everything that a witness says because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[237] The former reads:

Good Evening . . .

I'm _____, I am calling to invite you to a diner [sic]. . . a group of concerned citizens are hosting Thursday night, 7:30 p.m. at the Barn. The purpose of the meeting and diner [sic] is to heighten the awareness of an upcoming Union election at our largest employer, Carolina Food Processors. Out [sic] hope is to mobilize the community to be aware of how this upcoming election can threaten our local economy and economic development in Bladen and surrounding counties. We have chosen you as one of the many citizens that can make a difference.

The latter reads:

BLADEN COUNTY NEEDS
JOBS!
NOT UNIONS
Vote NO Aug. 21–22
Citizens For Economic Growth

[238] It reads as follows:

August 1997; that people from the community were invited to attend and some the Respondent's employees, Ray Ward and his wife, Tara Davis, were there; that his message was that bringing the Union in could threaten jobs; that he saw Charging Party's Exhibit 15 and 16 at the Tar Heel plant sometime before he testified herein;[239] that his only involvement and knowledge of the Citizens for Economic Growth was that he was asked to speak by Jerry Null; that he was given the latitude to organize his own speech for this committee meeting; that he did not give an economic basis in his speech; and that Brenda is the administrative assistant to Jerry Null and Larry Johnson. Subsequently Gilliard testified that he saw Ray Ward and Tara Davis, who he recognized to be employees of the Respondent at the time, in the audience before he gave his speech; and that there was another employee of the Respondent in the audience.

On cross-examination by one of the counsel for the Union Null testified that Charging Party's Exhibit 34 was a letter dated July 28, 1997, that he sent to community leaders and suppliers, among others;[240] and that he created Charging Party's Exhibit 35 which is an open letter to employees and friends of the Respondent published in newspapers in Bladen and Robeson Counties, North Carolina, on or about August 14, 1997.

Analysis

Objection 11 is overruled. While the Employer argues that this objection recapitulates Objections 4, 5, 6, 7, and 10, in my opinion what the objection speaks to is the Employer's efforts to make a public appeal to area businesses and to employees. The conclusions reached with respect to this objection do not reflect in any way on the conclusions already reached with respect to Objections 4, 5, 6, 7, and 10. The evidence in support of this objection, as summarized above, does not demonstrate that the Employer threatened employees and area businesses that union representation "will" cause loss of wages, jobs, business and plant closure. The Employer's appeals were phrased in terms of "can," or "could." And indicating "jobs are at stake" is not the same as indicating that "jobs will be lost." In these circumstances, economic justifications were not required.

L. Objection 12

During the critical period, the Employer threatened and engaged in more strict enforcement of company rules against union supporters.

See the summary of the testimony of Paul Walker set forth above under Objection 3.

Sherri Buffkin started working for the Respondent in September 1992 and she was terminated on September 23, 1998. She testified that she started in box makeup in the warehouse; that she was moved to crew leader in early 1993; that in 1994 she became supervisor over the warehouse and laundry on three shifts; that in 1995 she became production aupport manager responsible for the warehouse, laundry, sanitation, buildings, grounds and receiving on three shifts, and she did all the purchasing with the exception of maintenance items and the hogs; that she had two supervisors, Billy and Susie Jackson, reporting to her; that her husband is a maintenance worker in the conversion section of the Respondent's plant; that during the union campaign at the involved plant in 1997 she attended meetings held by the company officials with company supervisors; that these meetings were held daily in the 2 months before the 1997 election and they were held in the main conference room, in the training room, and in the show room; that the meetings were held by Jerry Null, Larry Johnson, and Lee Mount; that in such meetings in July and August 1997 Johnson and Null mainly gave the instructions to the supervisors; that with respect to employees, those supervisors and managers in attendance were told by Johnson and Null at a number of meetings that they could no longer give the leniency and lead way that they had given previously and to make sure employees knew that if the Union came in management would not do the things that it had done previously to help them such as being late and excusing it without writeups; that she noticed that there was a change in the enforcement of company rules in that management became strict and followed policy to the letter; that previously if an employee had a child who was sick they were given an excused absence but after the change, while the employee would still be allowed to take an absence, it was unexcused; that General Counsel's Exhibit 45 was the employee handbook which was in effect in 1997; that she was familiar with the Company's attendance policy in 1997; and that in early 1997 she terminated employee Cora Fink after she missed 25 days of work over a 3-month period and received at least three final warnings from human resources.

Supervisor Donald Worley testified that he enforced the work rules less strictly during the 1997 union campaign and after the election he had a meeting with his employees and informed them that "now that the Union is over you know trying to get things running back to normal"; that after the election he did not take away any priviledges from the employees, or change any work rules, or change the way he enforced the work rules, or pick on any union supporters, or deny union supporters any overtime, or deny employees permission to use the bathroom; and that during his post election employee meeting he

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Bud
Mac
Sherman

BRENDA—

I NEED YOU TO TYPE THIS AND FAX TO MAC CAMPBELL. I'LL CALL AND EXPLAIN:

"Good Evening Mr. Or Mrs."

(*We*) This is _____, a group of Concerned Citizens have mobilized to bring awareness and education to the upcoming Union Election at Carolina Food Processors August 21 & 22. We're hosting a dinner Thursday night, 7:30 at the Barn. We're attempting to contact citizens of Bladen to discuss how this union attempt could affect our local economy and economic development.

[239] The Respondent conceded that CP Exh. 14, along with CP Exhs. 15 and 16, were turned over to the Charging Party pursuant to a subpoena.

[240] Null wrote, in part, as follows:

I am writing you because a wrong decision—a vote for the union—could have a very adverse effect not only on our employees, but on producers, suppliers, as well as related industry, industrial development, the community and the general public. Jobs are at stake.

did not say "we kissed ass to keep the Union out and we ain't doing it no more."

See the summary of the testimony of Supervisor Robert Claiborne set forth above under Objection 3.

The Respondent's supervisor, Billy Jackson, testified that the Respondent had work rules during the 1997 organizing drive. He then answered, "[N]o sir," to each of the following questions of the Respondent's counsel:

> Did you ever enforce work rules more strictly or differently against folks who you thought or knew were supporting the Union?
>
> Did you ever tell anyone working under you to enforce work rules more strictly against anyone who you thought was supporting the Union?
>
> Were you ever instructed by any of your supervisors to enforce work rules more strictly against folks who you thought were supporting the Union?
>
> Did you ever deny overtime to someone who you thought wa [sic] a Union supporter?

Some of the Respondent's supervisors responded, "No," to the Respondent's counsels' questions as to whether they ever, collectively, enforced work rules more strictly against unnamed union supporters or denied them job benefits or denied them a job or ever fired them because of their union support. They include Lenwood Shirley, Randy Gebbie, James Hargrove, James Blount, and Emogene (Susie) Jackson. The Respondent's superintendent of the cutting division, Timothy Dale Smith, testified that the Respondent's attendance policy, or work rules, or the application or enforcement of the company rules, did not change in the middle of the 1997 union campaign. The Respondent's plant manager, Larry Johnson, testified that during the 1997 campaign he did not, and he did not instruct his supervisors to, enforce work rules more strictly against union supporters or to deny overtime to union supporters. Jere Null testified that he never told his supervisors to enforce rules more harshly against people the Respondent suspected to be union supporters or that rules would be more strictly enforced against employees during the union campaign, or to deny overtime to people they knew or suspected to be union supporters. Lee Mount testified that during the course of the 1997 organizing campaign he did not tell anyone to enforce rules more strictly against people who were or were not suspected of being union supporters or to deny overtime to these people. John Hall testified that during the 1997 organizing campaign he was not instructed to enforce the work rules more strictly against or to deny overtime to people he thought were union supporters.

Joel Katz answered, "No," to the following questions:

> [D]id you ever tell Ms. Sherry Buffkin, individually or as part of a group of managers, [1] not to give leniency to employees under Company rules . . . . [2] to inform employees that if the Union won, then the Company rules would be applied strictly . . . . [3] to have . . . meetings with employees to ask them their sentiments as to whether they were for the Company or for the Union . . . . [4] to go to employees and tell employees that the Union couldn't do anything for them . . . . [5] to go to employees and mention the threat of a strike, the threat of violence, or the threat of not being able to support their families . . . . [6] not to help employees with leniency . . . . [7] to follow Company policy regarding points to the letter . . . . [8] to give overtime only to those employees who were pro-Company . . . . [and] [9] to target [certain individuals] in order to change their sentiments towards the Company.[[241]]

On cross-examination Barrett testified that he never advised Buffkin to watch her employees regarding possible concerted activities; that he did not speak to Buffkin at any time during the 1997 organizing campaign except for his conversation with Hall when Buffkin was present; that he never told Buffkin, either individually or as a part of a group of managers, (a) that if she heard employees speaking about the UFCW, that she should listen in, (b) that if employees were getting together and speaking she should break the group up, and (c) to take down the names of employees who wore any kind of union insignia while at work;[242] that he never told Buffkin or anyone not to give leniency to employees; and that he did not tell Buffkin anything either individually or as a part of a group of managers, regarding how to allocate overtime.

Analysis

The Petitioner on brief contends that Buffkin informed employees she supervised of the intended changes in rule enforcement if the Union were elected; that during the 2 months before the 1997 Board election the Employer disparately enforced work rules regarding talking about the Union and engaging in solicitation on worktime; that as testified to by Kenneth Ivie, the Employer told employees that they were not allowed to talk about the Union on worktime; that at the same time the Employer expressly authorized antiunion employees to go throughout the plant on worktime to promote the Company's antiunion views; and that during the 1997 organizing drive the Employer fired Patsy Lendon for soliciting union support during her break, but paid Latasha Peterson and Clarissa Pruitt for campaigning for the Company on worktime.

The Employer, on brief, argues that Buffkin's testimony is uncorroborated; that there is evidence of record that the Company became more strict about things such as bathroom breaks after the election; that a number of supervisors testified that they were not instructed to more strictly enforce company rules and procedures during the union campaign; and that Buffkin's testimony should be discredited.

Objection 12 is sustained. The Employer authorized antiunion employees to go throughout the plant on worktime to

[241] Barrett replies, "Never," or "Absolutely not" or "No" when asked these same questions (the group was expanded to also include supervisors, "or policies" was added to the first question, and the word "absence" was added before the word "points" in question 7) on direct. This testimony of Barrett and Katz was elicited in response to an offer of proof by one of th counsel for the Charging Party of certain of the testimony of Sherri Buffkin regarding what Barrett and Katz told her when she was a manager with the Respondent.

[242] Counsel for the General Counsel moved to strike Barrett's testimony in view of the fact that he refused, citing attorney-client privilege or attorney work product privilege, to answer the following question: "Did you ever instruct Sherry Buffkin, either singularly or [as] part of a group of managers, to engage employees who wore union stickers or other insignia in debate about the union." (Tr. 7492.) The motion was taken under advisement. The motion is denied.

promote the Company's antiunion views. During the 1997 organizing drive the Employer fired Patsy Lendon for soliciting union support during her break in a nonworking area. And during the last 2 weeks of the 1997 organizing drive the Employer paid Latasha Peterson and Clarissa Robinson Pruitt for campaigning for the Company on worktime. The Employer engaged in the conduct described in Objection 12.

M. Objection 13

During the critical period, the Employer threatened employees that Immigration and Naturalization Service (INS) will be called if the Union wins the election.

The testimony of Latonya Robinson and Bill Bishop regarding what he said about INS is set forth above under paragraph 8(k) of the 1998 complaint.

Latonya Robinson also testified that during his 25th-hour speech Jere Null told the Latino workers that if they voted the Union in, the Union was going to turn it over to immigration.

The Respondent's Exhibit 156, a copy of the 25th-hour speech Null allegedly gave, reads, as here pertinent, "[t]hey have told Latin people if they voted against the union, they will be deported. That's a lie." Null testified that he never told Hispanic employees that they would be deported if they voted for the Union.

Analysis

Objection 13 is sustained. It has already been concluded above under paragraph 8(k) of the 1998 complaint that the Respondent disparaged the Union by stating that the Union would call the INS to report workers if the Union won the election. For the reasons specified above in paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null regarding what he said in his speeches to employees. The testimony of Latonya Robinson that Null said that if they voted the Union in, the Union was going to turn it over to immigration is credited.

N. Objection 14

During the captive audience meetings on or about Wednesday, August 20, 1997, the day before the beginning of the election, the Employer threatened employees that if the Union won the election the Company would take a strike rather than negotiate, threatened the inevitability of strikes and job loss, and made other objectionable statements.

The Respondent's former manager, Sherri Buffkin, testified that on August 20, 1997, General Manager Jerry Null held two or three huge employee meetings in the warehouse to cover all shifts; that she attended two of the meetings; that Null spoke from a podium and a sound system was utilized at these meetings; that Null spoke for over 40 minutes; and that

> Jerry Null spoke to us about—I mean it was a wide range. He spoke of strikes of what would happen if a strike come in and people wouldn't work and the violence that would ensue. He spoke of - everyone - all hourly employees in October got a raise and he stated that every employee there that if the Union vote came in and the Union was voted in that it would automatically be stopped. That it was out of his hands. His hands were tied. It would have to go to a contract and then negotiations.

On cross-examination Sherri Buffkin testified that she was over 150 feet from Null while he gave the speech; and that "Null had a speech prepared by the attorney."

The Respondent's former employee Latasha Peterson testified that on August 20, 1997, she attended two meetings presided over by Jerry Null in the box warehouse; that the entire plant either went to the first or the second meeting; that Null said, "[T]hat it was going to be strikes. That the Company was not going to budge. That if they signed Union cards that they would have to be on strike and when they go out on strike that he was going to replace their job. Replace someone else in their job"; and that Null also said that "you couldn't get your unemployment and you was not going to get working mothers out there was on welfare before they was not going to get welfare." On cross-examination Peterson testified that she was fired by the Respondent: and that Olga Anderson, who is in human resources, told her that it was for threatening another employee, Jesse Brooks. On cross- examination Peterson testified that during the two Null speeches she was about 150 feet away from him; and that there was a teleprompter in the corner.

The Respondent's employee Andrea Hester (married name White) testified that the day before the 1997 union election began she attended a meeting with about 400 employees in the conversion box room; that Jerry Null spoke at this meeting; and that Null said that the employees "would not get our raise like we normally would if the Union was to get in there. We would have layoffs. We would also have strikes like it was at other [p]lants."

The Respondent's employee Lillie Jolliff testified that on August 20, 1997, she attended an antiunion meeting in the box room; that her supervisor sent her; that there were several hundred employees present; that Jerry Null, who was up on a platform, spoke and his picture was showing on a screen behind him; that Null did not always stay behind the podium but rather he stepped to the side and then returned to the podium; that when he spoke Null was looking at the employees and he was not looking down; that she was about 26 feet from Null; that Null "spoke about job losses and losing your cars and houses, wages . . . . [h]e spoke about job losses, losing your home and your wages"; that Null also spoke about going out on strikes; that Null said that Bladen County was nothing but a farm area and we moved this plant here to better the area. If this plant closes it will be nothing"; that Null said that if the plant closes it would mean "that we have no jobs in Bladen County and lots of other areas would be out of a job if the [p]lant closed"; that Null said that "for sure I don't want to lose my house . . . . my house and my cars and stuff like that . . . . I don't want to lose mine and I'm sure that you don't want to lose yours" and that was when everybody started moaning that they can't afford to lose their houses; that Null told the employees that if they went out on strike there was a possibility that "you would lose your job on strike or either the Plant would close, shorter hours, and it's a possibility that second shift would close"; that Null also said that "he was sure everybody wanted their raise in September but if the Union come [sic] in he said it would be months. Even 6 months before they get a raise and they would not get the raise from the Company"; and that with respect to plant closing, Null "asked us to take a look at John Morrell it's a

[p]lant that closed. A lot of people lost their jobs out there on strike. They lost their homes. They lost their cars. They lost everything during the strike and another [p]lant had closed in Wilson, North Carolina . . . I think it was Wilson . . . . [t]hey just didn't want a Union." On cross-examination Jolliff testified that Null's speech lasted about 35 minutes.

The Respondent's former employee Michael McKeithan testified that on August 20, 1997, he attended a mandatory anti-union meeting given by Jerry Null; that several hundred employees attended that meeting; that as Null gave his speech he moved away from the podium; that Null looked at the audience and he did not look down; that he was about 40 feet from Null while he was giving he speech; and that Null

> talked about the Union. Basically how many [p]lants the Union closed down. If Carolina Food—if the Union is voted in and if we would go on a strike with the Union that the people can cross the picket line come in the [p]lant to work and the ones that was on strike after the strike was over you was [sic] not guaranteed a job because they can hire people to replace you.
>
> Then he talked about—his other statement was as the Union as you can tell, as you can see not it's like the House of Raeford. You see what the Union has done for the House of Raeford what business have they got. Then he turned around at the end of his statement and his exact words was [sic] if the Union is voted in here regardless this Company run the way we want it to run. That was his last words and he stepped to the left side of the podium and stated it just like that.

The testimony of Null regarding his 1997 employee speeches is summarized above under paragraph 8(e) of the 1998 complaint.

Analysis

Objection 14 is sustained. For the reasons specified above under paragraph 8(e) of the 1998 complaint, I do not credit the testimony of Null regarding what he said during his August 20, 1997 employee speeches. The above-described testimony of Buffkin and the employees at the August 20, 1997, Null speeches is credited.

O. Objection 15

The Employer told employees that voting was mandatory and employees had to sign ballots.

Analysis

Objection 15 is overruled. No evidence was presented in support of this objection.

P. Objection 16

Beginning August 18, 1997, and continuing through both election days, the Employer authorized employees to go through the plant, including near the polling area, coercing and threatening employees with antiunion messages.

The testimony of Jonathan Cook, Kenneth Ivie, and Latonya Robinson regarding conduct which is the subject of this objection is set forth above under paragraph 8(m) of the 1998 complaint.

The Respondent's former employee Tara Davis testified that about 9:30 a.m. on August 21, 1997, she saw Jay Ray, who she described as a crew leader, with about 10 employees in the hallway in front of the smoking cafeteria with signs which indicated "Vote No" and "The Union Lies"; that Ray and the employees with him had T-shirts on and they were saying "vote no" and "the Union lies"; and that later that morning she saw them when she was on her break and they were in the same area and they were doing the same things they were doing before.

The Respondent's former superintendent, Sherri Buffkin, testified that two of her employees, Clarissa Robinson (Pruitt) and Latasha Stanley Peterson, before the 1997 election did not report to work but rather campaigned for the Company, which included going to radio stations; that she had no contact with their payroll during this period; that this went on in excess of 2 weeks before the election; that other employees did Robinson's and Peterson's jobs while they were out campaigning; that Robinson and Peterson would go to different meetings in the plant and write lists of who spoke in support of the Union in the meetings and show the lists to her and then bring the lists to Lee Mount; and that she saw three such lists. Subsequently, Buffkin testified that Lee Mount directed her to release Robinson and Peterson; that she personally knew of five employees who the Company selected to do campaigning; and that the two from her department did not do the campaigning just on break-time but rather they should have been at work and they were not at work. On cross-examination Sherri Buffkin testified that Robinson's and Peterson's campaigning began in earnest in early August 1997; that she did sign Respondent's Exhibit 77 which is a payroll sheet for Latasha Stanley (Peterson) for "08/04" to "08/08"; and that the document is not reflective of the hours that Latasha Stanley worked that week.

The Respondent's former employee Latasha Peterson testified that she worked at the involved facility from March 27, 1996, to February 22, 1998; that in July and August 1997 her supervisor was Susie Jackson and she worked in the sanitation department doing housekeeping work; that about 3 weeks before the 1997 election she was talking with Sherri Buffkin, Susie Jackson and Billy Jackson in the cafeteria during a break and Susie Jackson was talking about how the UFCW was going to go on strike and how the employees could keep them out; that she and Clarissa Robinson asked Susie Jackson what they could do to keep the Union out and she told them to speak with Lee Mount, who was the head of human resources; that Mount told them that whatever they needed he would give it to them, whatever supplies they needed; that while she and Robinson were meeting with Mount they were supposed to be working but they were not written up for not being at work for that 1 hour; that Susie Jackson knew they were meeting with Mount and the purpose of the meeting; that the following day she and Robinson were directed to see Mount in his office; that she and Robinson were given anti-union literature, contracts UFCW had at other plants and stickers to give to employees; that she and Robinson began to talk to other employees; that Mount told them that he wanted to know the reaction of the employees; that when she talked to employees she made a list of who supported the Union and who was against the Union and she gave the list to Mount; that she met Joey Dockery and Jeff White, who were

former employees of the Respondent who worked in the antiunion campaign; that the following day Mount arranged meetings with the employees who were on the list of employees who supported the Union, which list she submitted to Mount and she, Dockery, White and Robinson ran these meetings; that a video was shown at these meetings which dealt with violent strikes, negotiating contracts, and bargaining; that employees asked questions; that when employees spoke up she would keep track and turn that information over to Mount; that these meetings, which normally consisted of about 12 employees, were held until the day of the election; that while she was participating in these meetings she was on the clock but she never reported to sanitation; that one morning Mount told her and Robinson that the Union was handbilling outside, Mount told Bill Gray to get some posters, and Mount told her and Robinson that he wanted them to picket; that she and Robinson held picket signs, which they made up, by the smoking cafeteria from about 8:30 to 10:30 a.m., yelling, "Vote No," "We don't need the UFCW," "We can be our own Union," and "All they do is take our money"; that other picketers were saying, "[Y]ou can't pay your child support because you're going to go on strike"; that the day they carried picket signs the Reverend Jesse Jackson was outside; that Mount arranged for her to speak on a radio station in Elizabethtown about the union campaign; that when she went to the radio station she was on the clock; that prior to the time she became involved in the antiunion campaign she "brought home" about $230; that during the antiunion campaign she received one check for $574 and another check for $374; that she did not do her sanitation work for the $574 check but she did work on the campaign; that Jeff White told her she could talk to the people on the line about 1 week before the employee meetings and the election; that she asked the employees on the working line what way they were going to vote and while the employees would not tell Jeff White in the meetings which way they were going to vote, they would tell him on the line when she was present; and that Jeff White told her to convince the union supporters that they should vote for the Company. On cross-examination Peterson testified that she kept a list of employees who supported the Union.

The Respondent's employee Clarisa Pruitt (formerly Robinson) testified that during the 1997 organizing campaign she worked in the sanitation department; that she spoke to Lee Mount in human resources and she volunteered to distribute antiunion literature and stickers from her supply cart while she was in certain areas cleaning; that she engaged in this activity for a couple of weeks just before the 1997 Board election; that she never did campaigning instead of working and she continued to perform all of her regular job duties during this time period; that she never talked to any employee while they were working in a production area; that she did not picket outside the cafeteria, and she did not chant "Vote No" on the day of the election; that she made two antiunion radio broadcasts after she got off work; that during the time she was campaigning her pay rate was approximately $7 an hour and it increased when the employees in the plant received a raise; that she did not receive a raise or bonus because of her campaigning work and she was not promoted after the election; that she did not keep track of or lists of prounion employees or give such names to Mount; that she was not told by the Respondent to try to convince employees to vote for the Company; and that she never saw Peterson give names to company officials. On cross-examination Pruitt testified that during the week of the 1997 Board election she did not distribute literature outside the cafeteria; that she spoke against the Union during the radio broadcast; that she was an election observer for the Company during the 1997 Board election; that she could have worked some overtime during the week of the 1997 Board election; that she began passing out literature a couple of weeks before the Board election; that Mount told her that it would be fine for her to distribute procompany literature from her cart; that Mount arranged for her to make the radio broadcast and Marion Brown, who works in human resources, took her to the radio station; that Brown reviewed the statement she gave on radio; that she went to a radio station in Fayetteville and another one in Elizabethtown; that Marion Brown also took her and Latasha Peterson to the radio station in Elizabethtown; that Brown waited for them and drove them back to the plant; that she received the annual raise after the 1997 Board election; that she received another annual raise in October 1998; and that in August 1997 for a 40-hour week she made a little over $200 a week. The Charging Party's Exhibit 11 shows that Pruitt's net pay for "7–24–97" was $266.14, for "7–31–97" it was $241.13, for "8–14–97" it was $151.94, for "8–21–97" it was $326.69, and for "8–28–97" it was $498.34.[243]

Arnold Michael Dowless, who is a former employee of the Respondent, testified that he was a company observer on August 21, 1997, at the involved Board election; that he did not see anyone outside the nonsmoking cafeteria on August 21, 1997 campaigning, holding up picket signs; that he did not see any signs that said, "Vote No," or "Vote for the Company"; and that he did not hear anyone chanting outside the nonsmoking cafeteria that the employees should vote for the Company or vote no. Dowless entered the nonsmoking cafeteria at approximately 4:30 p.m. on August 21, 1997, he left the nonsmoking cafeteria at about 10:30 p.m. to take a break, and he returned to the nonsmoking cafeteria briefly at about 11:05 p.m.

Lee Mount testified that in July 1997 Latasha Peterson and Clarisa Robinson came to his office and asked him what they could do to help the Company win the election; that he never told Peterson or Robinson to keep lists of union or company supporters and they never gave him such lists; and that he did not (1) offer Peterson or Robinson extra pay for supporting the Company, (2) order them to report to his office at specific times of the day to give him updates on how the campaign was going, (3) tell them that they would not have to perform their regular work duties during the course of them getting out their antiunion message, and (4) tell them to create antiunion signs; and that he did not ask Peterson to report to him which employees were union supporters. On cross-examination Mount testified that he, Jere Null, and Larry Johnson decided to have a radio promotion because the Union used the radio to get its message out; that they wrote a script and Marion Brown, who worked

[243] Her gross pay for the last two dates was $415.48 and $683.89, respectively and the exhibit shows that she worked 72 hours for the pay period with the date of August 28, 1997.

for him in a management position in human resources, took over the project and got Peterson and Robinson, who she drove back and forth to the radio stations, to read the scripts on the radio; that he was aware that Peterson and Robinson had signs in the plant with antiunion messages on them; that they asked him if they could make some signs and have a demonstration, he said okay, and he did not tell them where they could stand; and that he did not know that Peterson and Robinson gave out company stickers and insignia. Subsequently Mount testified that during the period just before the 1997 Board election Peterson and Robinson did not receive anything over and above their normal pay from the Respondent; and that they received their normal rate for all hours worked.

Analysis

The Respondent on brief argues that nothing in Davis' testimony supports the Union's contention that the Respondent authorized or knew about the antiunion activity of employees outside the smoking cafeteria on August 21, 1997; that noticeably absent from Peterson's testimony about this incident is any indication that she or any other employee was "authorized" or instructed by anyone in the Respondent's management to engage in picketing during worktime; that there is no evidence that the statements made by the employees with Peterson were made on behalf of the Company or with the Company's knowledge or permission; that there is no evidence that anyone other than Peterson heard the statement about not being able to pay child support because "you're going to go out on strike"; and that aside from Peterson's "wild" contention, there is utterly no evidence in the record that Mount "authorized" Peterson or any other employee to parade through the plant's work areas spreading antiunion messages during working time.

Objection 16 is sustained. As noted above under paragraph 8(m) of the 1998 complaint, neither Jere Null nor Johnnie Brown denied that Kenneth Ivie told them about the Reverend Jackson sign carried by the antiunion employees outside the smoking cafeteria on August 21, 1997. Management was placed on notice about the antiunion activity outside the smoking cafeteria on August 21, 1997. Peterson's testimony that Mount told her and Robinson that he wanted them to picket on August 21, 1997, is credited. Not only was management placed on notice, management knew about the antiunion picketing before it began. Also, Peterson's testimony about her and Robinson's antiunion activities from, as here pertinent, August 18 through 22, 1997, is credited. Buffkin's testimony about Peterson and Robinson being paid but not doing their regular work during this period is credited. Peterson and Robinson, along with Joey Dockery and Jeff White, ran employee meetings where videos dealing with violent strikes were shown to employees. As noted above, the Respondent refused to turn over the videos and an adverse inference was drawn. Additionally, the testimony of Peterson that one of the statements made by the picketers on August 21 1997, was about not being able to pay child support because "you're going to go out on strike" is credited.

Q. Objection 17

The Employer's personnel were permitted to openly engage in electioneering near and in the polling area.

The Respondent's employee Darrell Thomas testified that on August 21, 1997, while he was an observer for the Union he saw Danny Priest, who is the head of security at the Tar Heel plant, come into the voting room a couple of times, have "a few words" with the mechanics or guards, and leave.

The Respondent's former employee Tara Davis testified that on August 22, 1997, while she was an observer for the Union, she saw Joey Dockery in the room where the voting took place, the nonsmoking cafeteria, talking to supervisors; that Sherman Gilliard came into the voting area or the cafeteria; that while she was in the voting area she saw Jay Ray, a crew leader, holding up a sign to tell the employees when to come in and what tables to go to to vote; and that the sign said "time to vote now" and Ray covered up the "w" on the sign as employees came in to vote. On cross-examination Davis testified that she saw Gilliard in the voting area during the election about six times for 20 to 30 minutes at a time and he talked to Jay Ray and Joey Dockery.

Margo McMillan testified that on August 21, 1997, while she was an observer at the Board election, she saw Joey Dockery in the back where the voting was going on and speaking to employees who were on the line to vote; and that she could hear Dockery talking but she could not hear what was being said.[244]

The Respondent's former employee Latasha Peterson testified that on the day of the election she was in the lobby telling employees to vote no.

The Respondent's employee Andrea Hester testified that about the time she went to vote in the August 1997 union election she saw "Vote No" poster-sized sign near the cut floor laundry which is on the way to the nonsmoking cafeteria where the voting took place. It is noted that Objection 17 refers to "Employer personnel."

Analysis

The Petitioner on brief contends that Joey Dockery and Jeff White were hired as consultants and used to convey antiunion messages to employees; that conversations between parties and voters or observers and voters are prohibited while employees are in the voting room waiting to vote, *General Dynamics Corp.,* 181 NLRB 874 (1970); and that an employer engages in objectional conduct by displaying an antiunion poster to employees waiting in line to vote, *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 566–567 (1995).

The Respondent on brief argues that upon information and belief the sign provided to Jay Ray reads "Time to vote" and not "Time to Vote now"; that even if Ray did cover up the "w" on the sign, this would not constitute interference with an election for the mere appearance of a "Vote No" sticker or button in the polling area is not sufficient to set aside an election; that McMillan gave no indication of how long Dockery engaged in these alleged conversations, how many persons he allegedly spoke to, and whether she ever reported this activity to the Board agents supervising the election; that it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred, *Cumberland*

[244] Darrell Thomas testified that he saw Dockery sitting and talking with other observers. And Ada perry testified that she saw Joey Dockery talking to employees who were waiting in line to vote.

Nursing & Convalescent Center, 248 NLRB 322, 323 (1980); that "[w]ith regard to electioneering by parties to the election, the Board will set aside elections where it is found that prolonged conversations occurred between representatives of any party to the election and voters waiting to cast ballots, 'without inquiry into the nature of the conversation,'" *Perdue Farms*, 323 NLRB 345, 354 (1997) [quoting *Milchem, Inc.*, 170 NLRB 362, 363 (1968)]; that "*Milchem* applies only to prolonged conversations between agents of a party to the election and employees who are waiting in line ot cast their ballots," *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995); and that Perry did not testify about what Dockery allegedly said to the employees waiting to vote, she did not indicate how long the activity lasted, nor did she testify about the number of employees with whom Dockery spoke.

Objection 17 is sustained. Tara Davis' testimony that she saw Company Official Sherman Gilliard in the voting area during the 1997 Board election about six times for 20 to 30 minutes at a time, and he talked to company observers Jay Ray and Joey Dockery is not refuted. Gilliard was the director or human resources at Tar Heel from March 1994 to January 1996 when he became director of public relations. He left Tar Heel in March 1997 to go to Smithfield's Wilson, North Carolina facility. And he returned to Tar Heel in July 1997 to assist in the campaign against the Union. As noted above, Gilliard spoke on behalf of the Respondent to at least one outside group, with some of the Respondent's employees in the audience, against the unionization of the Company. Clearly, Gilliard was viewed as a spokesman for the Company. Gilliard was a company official. The voting was held in the nonsmoking cafeteria. The area was clearly demarcated. Gilliard did not testify that there were exigent circumstances requiring that he speak to Dockery or Ray in the voting area. Both Dockery and Ray were eligible to vote in the 1997 Board election. And these two company observers themselves engaged in questionable conduct while in the voting area. Dockery, who was an agent[245] of the Company and should not have even been an observer because of the role he played during the campaign, spoke with employees on line waiting to vote. And Ray took a sign, covered the "w" in the word "now," and held up the sign indicating "time to vote no" for the employees coming in to vote to see.[246] Neither Dockery nor Ray testified at the trial herein. Out of record assertions regarding information and belief with respect to what the Board sign allegedly indicates are just that; out of record assertions based on information and belief. Such assertions are not entitled to any weight. The proper time for the Respondent to rebut the testimony about what the sign indicated was at the trial. No evidence was introduced at the trial herein with respect to the Respondent's assertion on brief regarding the sign. Absent any evidence of record to the contrary, it is found that the sign stated just what the uncontroverted testimony of Davis indicates it stated. And although Gilliard and Priest testified at the trial herein, they did not even attempt to explain why it was necessary for them to come into the room set aside for voting. Indeed, Priest testified that he did not go into the voting area while voting was going on. Priest was not a credible witness.

R. Objection 18

The Employer failed to release and/or timely release union observers; observers were prevented from observing contrary to the election agreement and union observers were not properly instructed how to challenge voters.

Jonathan Cook testified that he was scheduled to work at the election as an observer for the Union; and that he was never released to be an observer but he did not know exactly what happened.

Employee Darrell Thomas testified that he was scheduled to be a union observer on August 21, 1997, from 6 p.m. to 1:25 a.m.; that he had been told at a union meeting that approximately 30 minutes before he was to report as an observer he would be released from the line by the Company; that no one came to get him but he was released for break at approximately 5:30 p.m. and he went to the voting area on his own; and that he arrived at the voting area about 5:40 p.m. On cross-examination Thomas testified that the Board agents gave the observers instructions on what they wanted the observers to do; and that the Board agents told the observers that the Board agents were in charge of the election.

Analysis

Objection 18 is overruled. The evidence of record fails to establish the allegations made in this objection.

S. Objection 19

The Employer used nonbargaining unit personnel and nonemployees as election observers.

Employee Darrell Thomas testified that on August 21, 1997, while he was a union observer in the voting area, he saw Joseph Dockery, who was not an employee of the Company, sitting at a table in the voting area working as a company observer; and that sometimes he saw Dockery in the area of the voting booths and in the area where the ballot box was.

Sherman Gilliard testified that Joey Dockery was not working at the plant as an hourly employee when he was an observer for the Company during the 1997 election.

On cross-examination by one of the counsel for the Union Null testified that Jeff White was fired by the Respondent about 1994;[247] that White and Joey Dockery were paid by the Re-

[245] The Respondent's attorney, Joel Katz, testified that he "believed" that dockery was an agent. In fn. 20 at p. 61 of its brief, the Respondent takes the position that Joey dockery and Jeff White were "agents of management."

[246] The Respondent's argument that Ray's conduct is analogous to the wearing of a "Vote No" sticker or button fails to take into consideration the difference between active and passive. Wearing paraphernalia is an expression of the wearer's personal opinion. Holding up a sign which was used to give directions to the employees waiting in line to vote is an active act. For an observer to modify and then misuse such a sign to interfere with the exercise of employees' free choice is repugnant. An employee standing in line waiting to cast his or her vote should be able to reflect on the decision they are about to make. They should not be subjected to electioneering through the misuse of an unauthorized modified sign that was originally meant to serve an official purpose.

[247] The 1995 complaint herein formerly alleged that White was unlawfully discharged in 1995. The same complaint formerly alleged

spondent in August 1997 but neither was an hourly employee of the Respondent at that time;[248] that White and Dockery consulted with the Respondent on strategies for winning the election; that White participated in meetings; that White did not speak on behalf of management at the meetings with employees but rather he answered about his own experiences as did Joey Dockery; that White was an observer for the Company at the 1997 Board election; that the moneys paid to Jeff White and Joey Dockery were consulting fees; that while Dockery was paid for his services he did not believe that the payment covered being an observer for the Company, but there was no written agreement with Dockery covering his services; and that Dockery and White would have received the payments for consulting whether they or not they had been observers for the Company.

Analysis

The Petitioner on brief contends that Board policy requires that election observers not be persons closely identified with the employer and the Board will set aside an election where such persons act as employer observers, *Reno Hilton,* 319 NLRB 1154, 1191 (1995); that the Board in *Reno Hilton,* supra, held that the employer engaged in objectionable conduct by using as observers employees who had been excused from their normal duties and allowed to campaign as surrogates for the employer during worktime; that the Board has held that a nonsupervisory employee who handled an antiunion meeting for the employer acted as an employer agent and therefore it was improper for him to function as the employer's election observer, *B-P Custom Building Products,* 251 NLRB 1337, 1338 (1980); and that in *Sunward Materials,* 304 NLRB 780, 781 (1991), the Board set aside an election because the employer used a person closely identified with management as a company observer.

The Respondent on brief argues that while Jeffrey White and Joey Dockery served as election observers for the Company at various times on both days of the 1997 Board election, the Petitioner's objection is without merit because up until the commencement of the hearing herein, when they were amended out of the 1995 complaint herein, both White and Dockery were alleged 8(a)(3) discriminatees; and that as alleged 8(a)(3) discriminatees White and Dockery had every right to not only observe but also to vote in the 1997 election, *Kellwood Co.,* 299 NLRB 1026, 1029 (1990).

As pointed out by the Board in *Kellwood Co.,* supra:

> It is well established that an employee who has been discharged, and whose discharge is the subject of an unfair labor practice charge, may serve as an observer at an election. . . . . Discharged employees are entitled to be considered employees of the employer for the purposes of serving as observers at an election pending the resolution of the charges against the employer. [Footnote and citations omitted.]

But the situation with White and Dockery was quite different than the situation one would normally find with a discharged employee. White and Dockery were hired by the Company during the 1997 organizing drive as "consultants." The Respondent's attorney, Barrett, testified that he was not totally acquainted with what they were paid to do specifically. Dockery and White ran antiunion meetings for the Company at the plant during worktime. The employees attended these meetings during the time they normally would have been working. White and Dockery showed antiunion videos and spoke to the employees. These are the same videos that the Respondent refused to turn over although they were subpoenaed. At the direction of White, Latasha Peterson spoke to people on a work line about 1 week before the election, asking them which way they were going to vote and telling them, at the behest of White, that they should vote for the Company. White, himself, unlawfully interrogated Latonya Robinson while she was working. White, in Robinson's presence, asked Plant Manager Larry Johnson if he could speak to her. Johnson was 5 feet away when White unlawfully interrogated her. White and Dockery, neither of whom testified at the trial herein to deny the allegations about their conduct, were not your normal discharged employees. They were agents of the Company.[249] Employees could reasonably believe that they spoke on behalf of the Company. It was improper for them to function as Respondent's election observers in light of their status as agents of the Employer. *B-P Custom Building Products,* supra. Because of the roles they played for the Company, Latasha Peterson and Clarissa Robinson Pruitt also should not have been used by the Company as observers. The objection is sustained.

T. Objection 20

Supervisory and nonbargaining unit employees, ineligible employees including those hired after the cutoff date, and nonemployees voted one or more times during the election.

Darrell Thomas testified that during the voting period he observed people coming to vote who were not part of the production area, namely, nursing assistants in the clinic, and a secretary from his department (cut floor, department 1144).

The Respondent's former employee Margo McMillan testified that on August 21, 1999, she was an observer for the Union at the election; that it was her job to check the I.D.s of people who wanted to vote in the union election; that some of the people who came to vote wore green hats and when she asked them their date of hire they could not remember it and one of them told her he had been in the plant for 3 days; that two ladies from the clinic came to vote at her table; that Joey Dockery came to her table and told her that she would not find his name on the list but he came to vote; that Dockery did vote; and that during this evening she observed Dockery talking to different people on line to vote. On cross-examination McMillan testified that she referred the probationary employees to a Board agent who asked the employees their date of hire and some of these employees were not allowed to vote, some voted subject

that Joseph Dockery was unlawfully discharged in 1993. Both of the allegations were amended out of the complaint during the hearing herein.

[248] Copies of the checks covering the payments were received as CP Exhs. 37–40.

[249] As noted, the Respondent in fn. 20 at p. 61 of its brief, takes the position that Dockery and White "were agents of management."

to challenge and the individual who had only been employed for 3 days was not allowed to vote.

Respondent's former employee Ada Perry testified that when she was a union observer on August 21, 1997, she saw a supervisor who she thought was from shipping vote, apparently by challenged ballot; and that a clinic doctor was allowed to vote after she told him he could not.

The Respondent's former employee Latasha Peterson testified that supervisors voted at her table and she did not challenge their ballot;[250] and that the union observer at her table did not challenge the supervisors' ballots because he did not know they were supervisors since first-shift supervisors voted during the second shift and the second-shift employee did not know the first-shift supervisors. On cross-examination Peterson testified that 12 or 13 supervisors came through her line; that she was an observer on August 21 and 22, 1997; that the supervisors allegedly voted on August 21, 1997; that she could not recall their names but she worked with them and she knew the supervisors on the first shift; that some of the supervisors were in conversion and some were in maintenance; and that the supervisor's names were on the voting list.

The Respondent's employee Andrea Hester testified that a female employee she identified only as Brenda, who started working at the involved plant not too long before the August 1997 union election and was still on probation, voted in the election; and that she saw front office people, who were wearing yellow hats at the time, voting. On cross-examination Hester testified that she did not know the names of the front office people but the job was receptionist.

Analysis

Objection 20 is overruled. The testimony summarized above under this objection demonstrates that, with the exception of certain of Peterson's testimony, the matters raised were or should have been handled by the Board agents present at the election. With respect to the testimony of Peterson, she did not provide sufficient information regarding her assertion that supervisors voted. Additionally, as pointed out by the Employer, if as testified to by Peterson, the supervisor's names were on the voting list, one would have expected that the list would have been introduced with the names highlighted in some fashion.

U. Objection 21

Employees were permitted to vote without identification and/or proper identification.

Respondent's former employee Latonya Robinson testified that when she went to vote on August 22, 1997, in the nonsmoking cafeteria she did not have to show identification, the employees just called out their names; and that after she called out her name at the desk "they looked on the sheet of paper and checkmarked it off."[251]

Darrell Thomas testified that as an observer he was told by a Board agent that the employee had to give his name and show his badge in order to be able to vote; and that a lot of employees did not have any identification. On cross-examination Thomas conceded that in his affidavit to the Board he estimated the number to be 10; that when an individual did not have an I.D. or if the person's name was already crossed out, the Board agent handled the matter; and that he looked to the Board agent to solve any problems that he did not know what to do with.

The Respondent's former employee Tara Davis testified that on August 22, 1997, while she was an observer for the Union, some people did not have their badges and they let them vote anyway.

Analysis

Objection 21 is overruled. Again, these are matters which were or should have been handled by the Board agents present during the election.

V. Objection 22

Certain employees were accompanied into the voting booths or required to vote in the open.

Objection 22 is overruled. No evidence was presented in support of this objection.

W. Objection 23

Employees were prevented from voting or required to vote subject to challenge because their names had been previously crossed off the voting list.

Employee Dennis Murphy testified that when he went to the cafeteria to vote on August 22, 1997, he was told that his name had been marked off as having already voted; that the line was shut down so that the employees could vote; that when he gave his badge in order to vote he was told he had already voted and he told them he had not voted yet; and that he was told to place his ballot in a different box which was full because he had a hard time getting his ballot in the box.

Former employee Kenneth Ivie testified that when he went to vote on August 22, 1997, he was told by Joey Dockery, who he describes as a company representative, that he could not vote because his name had already been crossed out; that he was allowed to vote but his vote was challenged and placed in the challenged ballot box; that Dockery and Jeff White were in the polling area and they had badges on for the Company; that Dockery was a company observer; and that he saw Dockery in the polling area every time he entered the area that day. On cross-examination Ivie testified that the fact that his name was crossed off was brought to the attention of a Board agent and the agent said he could vote and the Company had to challenge the ballot.

[250] Peterson also testified that she followed Jeff White's instruction to her to challenge employees who she knew to be union supporters. On cross-examination Peterson testified that she challenged about 40 kill floor employees pursuant to White's instruction; that even though their names were on the voting list she challenged them on the grounds that they assertedly were supervisors.

[251] Robinson also testified that when she was released to vote she saw "a lot of employees with white hats switched over to green hats." On cross-examination Robinson testified that the people who changed hats were all crew leaders, she did not know if there were any supervisors in the group but the individuals she recognized were crew leaders.

Former employee Rosa Garcia testified that she was an observer for the Union during the 1997 Board election; that she checked whether the name and address of the employee waiting to vote was on a list she had, and if it was, she gave the employee a ballot; that on two or three occasions the employee's name had already been crossed out on the list when the employee came up; and that a Board agent in the room would be told of the problem.

The Respondent's former employee Tara Davis testified that on August 22, 1997, while she was an observer for the Union, she became aware of the fact that some of the employees' names were not on the list of people who could vote.

The Respondent's former employee Margo McMillan testified that on August 21, 1999, she was an observer for the Union at the election; that it was her job to check the I.D.s of people who wanted to vote in the union election against a list of names she was given to make sure that they could vote; and that the names of some of the employees who presented identification were not on the list of those eligible to vote and they were not allowed to vote without challenge.

Respondent's former employee Ada Perry testified that she was a union observer on August 21, 1997; that there were some employees in her line who had their I.D, badges and who she knew worked at the involved plant for 3 to 5 years but they had to cast a challenged ballot because their name was not on the list.

Charging Party's Exhibit 44 is the release schedule for the Respondent's employees to vote in the 1997 Board election.

Analysis

Objection 23 is overruled. These are matters which were or should have been handled by the Board agents present during the election. Also, the testimony is vague and the numbers are not sufficient to effect the outcome of the election.

X. Objection 24

The Employer held captive audience meetings within 24 hours of the election.

Objection 24 is overruled. No evidence was presented in support of this objection.

Y. Objection 25

During the critical period, the Employer's security and other personnel together with local police personnel engaged in surveillance during handbilling at the plant.

Chad Young testified that on August 21, 1997, he and other union representatives handbilled at the guardshack on the Respondent's property beginning at about 5:30 a.m.; that the guardshack is located about one-half of the way between the plant and North Carolina Highway 87 which goes by the plant or approximately 100 feet from the highway; that the Union and the Respondent had an agreement that for 2 days of the week, "two full days covering all shifts," the Union was allowed to handbill at the above-described guardshack area; that the guard from the guardshack told the union representatives that they had to leave that area; that Plant Manager Jerry Null told the union representatives that they had to leave the guardshack area; that after the first shift was in the plant, the union representatives and the Reverend Jesse Jackson, who arrived at the guardshack sometime that morning, left the area of the involved guardshack; that when the union represenatives returned to handbill the second shift at 12:15 p.m. they were told by the head of security at Respondent's involved plant, Danny Priest, that they had already exercised their right to handbill in that area that week for the two days and the Respondent had a video; that he went into the plant to view the video; that the video showed that it was taken of the handbilling on the prior Monday and he told Null that the union representatives were there only for 30 to 40 minutes that day and he pulled them back because he did not want to use up the 2 days; that Null told him that the union representatives would not be allowed to handbill at the guardshack; that when he went back to handbill near the highway he noticed that the yellow line up to which they could handbill had been moved closer to the highway; that upon his return to the area of handbilling he noticed that Priest had a video camera, a camcorder; that Priest was videotaping the crowd, the handbilling, the people coming in, and the yellow line; that this occurred from 1 to 1:30 p.m.; that other people from the Company had video cameras and they were taping; and that the Reverend Jesse Jackson was there the whole time he was handbilling. On cross-examination Young testified that before August 21, 1997, he did not see anybody during the 1997 campaign out at the driveway with a video camera but he was not there every time the union handbilled. Subsequently, Young testified that the video he viewed on August 21, 1997, of the handbilling which occurred the prior Monday appeared to have been taken by the Respondent from inside the guardshack, and he never saw anybody handhold a video camera during the 1997 campaign up until August 21, 1997.

The Respondent's former employee Latonya Robinson testified that on August 21, 1997, when she left the plant at 2:30 p.m. she saw Danny Priest with sheriff's deputies, security guards, and union people at the front entrance to the Tar Heel plant; that the union activists were on the left side of her car and a security guard was on the right side of her car "rushing . . . [her] through"; and that the union people and the sheriff's deputies with Priest were "quite a way away from each other." Obviously, Robinson testified about the conditions as she saw them at 2:30 p.m. and not at any other time that afternoon.

Sheriff's deputy, Steven Lesane, testified that he was at the involved Tar Heel plant on the day that the Reverend Jesse Jackson handbilled, August 21, 1997; that there were four to six deputies plus security guards present when Reverend Jackson handbilled at the entrance to the plant on the afternoon of August 21, 1997; that sheriff's deputies and guards were there when the employees were being offered union literature but they were across the driveway from one and another; and that at one point he was standing close to Reverend Jackson while he was giving out handbills.

The Respondent's former superintendent, Sherri Buffkin, testified that during the 1997 union campaign Danny Priest, the head of the Respondent's security, told her and one of her employees that the Company recorded license plate numbers to ascertain whether the people were supposed to be on the Respondent's premises. The employee, identified only as Joseph, was trying to determine how the Union was able to get his address.

Priest testified that he did not recall being out at the hand billing line on the afternoon of August 21, 1997; that he drove past the hand bill line that afternoon going back and forth to the truck gate; that he probably drove past the handbillers and he "would think" that he drove past them once; and that he probably would have seen them for 5 minutes.

Analysis

The Petitioner on brief contends that under *Carry Cos. of Illinois*, 311 NLRB 1058, 1072–1073 (1993), deliberate surveillance of union handbilling on election day is objectionable conduct which warrants the setting aside of the election and violates Section 8(a)(1) of the Act if the employer conspicuously observes handbilling for the entire period of activity and in such close proximity that it inhibits the activity; that as pointed out by the judge in *Arthur Briggs, Inc.*, 265 NLRB 299, 310 (1982), surveillance, coming as it did on the very eve of the election, had to have the most serious negative impact upon the free expression of union sentiment among employees as they entered the workplace that critical day; that videotaping employees as they accept handbills has also been found to be unlawful surveillance, *Opryland Hotel*, 323 NLRB 723, 731 (1997), and *F. W. Woolworth Co.*, 310 NLRB 1197 (1950); that deputy sheriffs and company security guards were posted near the handbill line and remained posted there during the entire time that the union representatives distributed literature; that the presence of the deputy sheriffs with the security guards highlighted the coercive effect of the surveillance; that the Company is responsible for the presence of the deputy sheriffs because Priest controlled the deputy sheriffs; that sheriff's deputy, Sergeant Lesane, testified that he and other sheriff's deputies intermingled with the people surrounding the handbill line and Priest was present; that Priest testified that he could not remember being at the handbill line on the afternoon of August 21, 1997, and Priest did not directly deny videotaping; that the Company provided no reasonable explanation for the police presence that morning or afternoon; that sheriff's deputy, Sergeant Lesane, testified that no hostilities had been reported when he was called to the plant; and that videotaping employees engaged in Section 7 activity in the mere belief that something might happen does not justify the Company's conduct when balanced against the tendency of that conduct to interfere with employees' rights to engage in concerted activity, *F. W. Woolworth Co.*, supra.

The Employer on brief argues that the mere presence of local police or company security guards does not, on its own, amount to unlawful surveillance under the Act, *Springfield Hospital*, 281 NLRB 643, 677–678 (1986); that the Board has long held that union organizers and the employees that they seek to organize have no cause to complain that their union activities are being observed where such activities are done openly at the employer's premises, *Brown Transport Corp.*, 294 NLRB 969, 971 (1989); and that "Mr. Priest testified that the only video camera that captured Union organizer presence on Company property during the 1997 campaign was mounted at the guard house located at the employee entrance to Respondent's facility." (Tr. 5153.)[252]

Objection 25 is sustained. Contrary to the assertion of the Employer on brief, Priest did not testify at page 5153 of the transcript that "the only video camera that captured Union organizer presence on Company property during the 1997 campaign was mounted at the guard house located at the employee entrance to Respondent's facility." Perhaps the Respondent is taking the position that by implication, since this was the only video shown to Young, this was the only camera. Young testified that on the afternoon of August 21, 1997, Priest videotaped the crowd, the handbilling, the people coming in and the yellow line with a handheld video camera. Technically the people who were handbilling were supposed to be on the highway side of the yellow line. This apparently would mean that the people being videotaped were not on company property and therefore they would not have been videotaped by the camera located at the guard shack. Priest equivocally denied being present at the hand billing line on the afternoon of August 21, 1997, except for driving past one time on his way to or from the truck gate. Priest never specifically denied videotaping the people on the highway side of the yellow line on the afternoon of August 21, 1997. And Priest did not specifically deny that sheriff's deputies, along with guards, were present while the Union distributed literature to the employees on the afternoon of August 21, 1997. This was the first of 2 days of voting. While an argument could be made regarding the difference of opinion with respect to the agreement to let handbillers on the Company's property 2 days a week and the Respondent calling the sheriff's department on the morning of August 21, 1997, because the Respondent allegedly believed that the handbillers were trespassing in that they had allegedly already been on the property twice that week,[253] there was no reason supplied by the Company for why the sheriff's deputies were present on the afternoon of August 21, 1997. There were no hostilities. The handbillers left the property of the Respondent on the morning of August 21, 1997. There was no attempt to go back over the yellow line on the afternoon of August 21, 1997. There was no obvious reason for the sheriff's deputies to be present at the involved Tar Heel facility on the afternoon of August 21, 1997.

Judge Brandon in *Brown Transport Corp.*, supra at 971 and 972, which is cited by the Employer in its brief, indicated as follows:

> The Board has long adhered to the principle that union organizers and the employees they seek to organize have no cause to complain that the employer of the employees has observed their activities where such activities are openly conducted at the employer's premises. . . . .

[252] The R. Br. 454.

[253] As noted above, Young testified that he told Null that on the Monday before August 21, 1997, the union representatives were there only for 30 to 40 minutes and Yound pulled them back because he did not want to use up the 2 days. R. Exh. 154 specifies that four union representatives would be allowed on the Employer's property "twice each week for the length of time it takes to end each shift." This term was agreed to in R. Exh. 155.

> Notwithstanding the foregoing, where an employer's observation of open union activity is shown not to be casual in nature, based upon trespassory concerns, or concerns over safety of ingress or egress, but rather upon a deliberate attempt to interfere with the legitimate union activity of employees (as in the cases where the observation is coupled with overt action extending beyond the employer's premises or demonstrating that the observation is specifically calculated to disrupt the union activity) such observation will be found to be unlawful surveillance in violation of Section 8(a)(1). [Citations omitted.]

In *F. W. Woolworth Co.,* supra the Board concluded as follows:

> As the judge recognized, the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. . . . Here, the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that 'something "might" happen does not justify Respondent's conduct when balanced against the tendency of the conduct to interfere with employees' rights to engage in concerted activity.' . . . .
>
> When an employer's surveillance activity constitutes more than 'mere observation,' the Board has found a violation of the Act. . . . Photographing and videotaping clearly constitute more than 'mere observation' because such pictorial recordkeeping tends to create fear among employees of future reprisals. [Citations omitted.]

Priest did not specifically deny that he videotaped the handbilling on the afternoon of August 21, 1997. The attempt of the Employer to explain away this by citing transcript page 5153 only served to highlight this. Priest was not a credible witness. His equivocal testimony regarding only driving by the handbilling line once while on his way to and/or from the truck gate is not credited. Young's testimony that Priest did videotape the handbilling on the afternoon of August 21, 1997, is credited. Priest attempted to create an atmosphere of fear and intimidation, and the fact that he kept the sheriff's deputies present, in addition to his security guards, during the entire time the handbilling took place during the afternoon of the first day of voting confirms this.

Z. Objection 26

During 2-week period before August 21, 1997 election, the Employer's personnel showed and directed Latino employees how to vote at booths installed for the election.

Objection 26 is overruled. No evidence was presented in support of this objection.

AA. Objection 27

During the critical period, the Employer disseminated literature which created the impression that the National Labor Relations Board (Board) favored the Company in the election.

Page three of Charging Party's Exhibit 26, which is an eight page booklet titled "YOU AND THE N.L.R.B. ELECTION," is a drawing, as here pertinent, of a man sitting behind a desk wearing a round badge on his right lapel with "NLRB" printed on it. In his right hand the man is holding up a "BALLOT" with "YES" and "NO" boxes on it, and latter is checked off. On the desk are two stacks, one to the right of the man and one to the left. The top piece on the right stack is headed "BALLOT" with "YES" and "NO" boxes on it and the former is checked off. The top piece on the left stack is headed "BALLOT" with "YES" and "NO" boxes on it and the latter is checked off. It appears that there are six pieces in the left stack and three pieces in the right stack. This exhibit was among those documents turned over by the Respondent to the Union. There is no evidence of record that this booklet was ever given to the employees by the Respondent.

Analysis

Objection 27 is overruled. There is no evidence that any part of Charging Party's Exhibit 26 was ever given to or shown to employees.

BB. Objection 28

The Employer failed to provide Petitioner with an accurate Excelsior list.

Objection 28 is overruled. No evidence was presented in support of this objection.

CC. Objection 29

During the critical period, the Employer denied the Union access to communicate with prisoners working at the plant.

Objection 29 is overruled. No evidence was presented in support of this objection.

DD. Objection 30

During the critical period, the atmosphere of racial threats and intimidation discouraged employees from supporting and voting for the Union.

Objection 30 is overruled. No evidence was presented in support of this objection.

EE. Objection 31

During the critical period, the Employer polled employees regarding their union sympathies.

The Respondent's employee Lillie Jolliff testified that the week before the August 1997 union election her supervisor, Don Worley, walked down the work line and put "Vote No" stickers on the back of the employees' hats; that she told him that he should not be doing that; that she told him that he should not place a sticker on her hat and he nonetheless tried to put one on her hat; that she saw Worley place stickers on the hats of about 10 employees; and that she saw two supervisors, namely Jim Cates and an unnamed supervisor, place stickers on the hats of employees on B line. On cross-examination Jolliff testified that some of the employees who Worley tried to put "Vote No" stickers on their hats would duck their heads, "they

really did not want it on there . . . .";[254] and that she did not hear what, if any, conversation occurred between the supervisors and the employees.

Donald Worley testified that he is supervisor of the head room on the kill floor; that during the union campaign in 1997 he was a supervisor on the main kill; that he handed out "Vote No" stickers during the 1997 campaign; that he sat the stickers on his work station and when employees came to him and asked for them he handed the stickers to the employees; that ne did not give the stickers to employees who did not ask for them; that he did not approach any employee and ask them if they wanted a sticker; that he did place a sticker on an employees' hat because the employees asked him to when their hands were dirty, wet, bloody, they had gloves on or for other different reasons; that the employees would see him walking by and ask him to come over; that he never placed a vote no sticker on an employee's helmet who did not ask for one; that Lillie Jolliff was an employee of his during the 1997 campaign; that he never had any conversation with Jolliffe regarding the "Vote No" stickers; and that Jolliff did not ask him to stop placing stickers on employees' hats.

Analysis

Objection 31 is sustained. Jolliffe impressed me as being a credible witness. Although Cates testified at the trial herein, he did not deny Jolliff's testimony about his placing stickers on the hats of employees. Worley initially tried to convey the impression that he kept the stickers at his station and the employees came to him. Then Worley testified that employees would see him walking by and ask him to come over. This apparently means that Worley did not keep the stickers at his work station. Jolliff's testimony is credited. Worley's is not. Worley walked down the work line and put "Vote No" stickers on the back of ten employees' hats. Jolliffe told Worley that he should not be doing that and he should not place a sticker on her hat. By engaging in this conduct, the Employer's supervisors were unlawfully conducting a poll.

FF. Objection 32

During the election, ballot boxes were left unguarded during a blackout in the course of a power failure and at other times.

Darrell Thomas testified that on August 21, 1997, he saw Joey Dockery in the area of the ballot box; that on the evening of August 21, 1997, the lights went out for 5 to 6 minutes at the Tar Heel plant; and that the lights have gone off before during thunderstorms.

Ada Perry testified that on August 21, 1997, she saw Joey Dockery behind the partition where the ballot box was located and she heard a Board agent tell Dockery after the lights came back on that he had to leave that area.

Margo McMillan testified that she was in the voting area on August 21, 1997, when the lights went out sometime between 9:30 and 10 p.m.; that when the lights went out she heard a female, who she thought was the Board agent sitting two seats away, holler "anybody watching the ballot box"; and that there were over 100 employees in the room when the lights went out.

Latasha Peterson testified that during the 1997 Board election she saw Joey Dockery in the back with the ballot box; that Dockery was sitting in a chair which was located next to the table on which that ballot box was located; that on the first day of the election she was a company observer; that when she became tired she asked Jeff White to have Joey Dockery sit in for her but he told her she would have to wait for about 45 minutes; that about 45 minutes later the lights shut off; that when the lights went out she heard Jeff White say, "[G]et the box"; that when the lights came back on about 10–15 minutes later Dockery was hovering over the ballot box with his arms extended; that after the election she resumed her regular job functions and when she went out to clean by the generators she saw Mike Dowless, who is "over the generators"; that she asked Dowless who cut off the lights and he said, "I did. Didn't we win"; that the first day of the election she went to see Lee Mount about 3 p.m. on August 21, 1997, and she saw Dowless with Jerry Null, Lee Mount, Jeff White, and Joey Dockery in Larry Johnson's or Jerry Null's office; and that she stood there for 10 minutes waiting to see Mount and then she left.

The Respondent's employee Lillie Jolliff testified that when she voted in the union election on August 21, 1997, Joey Dockery was sitting back near the ballot box; that when she asked Dockery why he was back there he said that he had a right to be there; that she told him that she did not agree and she was going "to let them know about this"; that she did tell the Union about Dockery being hack by the ballot box; that she did not say anything to the Board agents present "[b]ecause they . . . wouldn't talk to you really"; that about 5 minutes after she returned to the line after voting the lights went out; that it was not thundering and lightning outside at the time like it is most of the time when the lights go out; and that the generator did not click on like it usually does and the lights were off for about 5 to 10 minutes.

The Respondent's employee Clarissa Pruitt testified that she did not remember having a conversation with Mike Dowless on the day after the election and she did not have any conversations with him concerning the election; and that Dowless did not tell her that he was responsible for the lights going out on the night of the election.

Fran Leerkes, who is the director of engineering and maintenance at the involved facility, testified that the Respondent's electric power is supplied by Four County Electric Membership Corporation (Four County), which is a utility co-op and transmitter of electricity; that the Respondent also has its own generators; that on August 21 there was a power service interruption between 10 and 10:30 p.m. and the generators started

[254] One of counsel for the Employer unsuccessfully moved to strike this testimony as nonresponsive to his question whether she heard or saw Worley have conversation with any of the other employees. While usually conversation is a verbal exchange, there are times when a nonverbal communication must be recognized to be a part of the conversation, i.e., shaking one's head from side to side in response to a question. Here, it is reasonable to conclude that by ducking their heads the employees were in effect saying I do not want a "Vote No" sticker on my hat. Consequently, even though the supervisors were not asking "do you support the Union," by taking the action they did they were able to, at least with respect to some of the employees, conclude that they supported the Union.

automatically; that it usually takes about 4 minutes for the generators to start, get sequenced and come on line; that with a lot of the equipment in the plant once power is lost it takes time to cool down and restart; and that to his knowledge no one at the plant turned the power off on the evening of August 21, 1997. On cross-examination Leerkes testified that on August 21 Four County did not give the Respondent advance notice of the power outage; that if the Respondent does receive advance notice that a switch over to the generators will be made, the Respondent will have an operator there to watch all the generators; and that the Respondent lost about five minutes of production with the outage. Subsequently, Leerkes testified that on August 21 Mike Dowless and another unnamed gentleman were responsible for maintaining the generators; that it is possible to shut down the electricity at the plant but it is very involved, it is not just a matter of throwing just one switch, and he did not know how long it would take.

Joseph Johnson III, who is the vice president of engineering and operations for Four County, testified that the electrical distribution cooperative has residential and commercial customers including the Respondent; that the Respondent's Exhibit 139 is his letter to Leerkes explaining the outage which commenced on the evening of August 21, 1997;[255] that SCADA is a control and monitoring system used to monitor breakers, substation breakers when there is a transfer of power from one voltage to the other; that Four County can also control the breakers through its central computer in its operations system; that the Respondent's Exhibit 139 includes five pages and is a print out of the system's perpetual log; that the power outage at the plant on August 21, 1997, was caused by the fact that Carolina Power and Light (CP&L) dropped their 230KV transmission to Four County's Powell point of delivery bulk substation which feeds probably one-third to one-quarter of its system; that the last page of the Respondent's Exhibit 139 is a copy of a fax from CP&L explaining, "[a]t 10:13 PM on August 21, 1997, the Cumberland—Whiteville 230kV line locked out due to a broken structure caused by heavy winds. Four County EMC's Powell point-of-delivery was affected. Total Minutes out was 126"; that the Respondent is a owner/member of Four County; and that based on his experience in the electrical power industry and the above-described log no one from Smithfield turned the power off to the Tar Heel plant on the night of August 21, 1997.

Arnold Michael Dowless, who formerly was an employee of the Respondent,[256] testified that in August 1997 he operated and maintained the generators and the switch gear at the Respondent's Tar Heel facility; that he was not the person responsible for deciding to turn the generators on and off; that if the plant unexpectedly lost power, it would take 5 to 10 minutes to get everything back to its original state using the generators; that on August 21, 1997, he was a company observer at the election; that during the evening of August 21, 1997, he took a break from his observing duties and was in the smoking cafeteria having a cup of coffee when the power went out; that he went to the generator building to make sure the power went back on; that it took him 15 minutes to get to the generator building; that when he got to the generator building he checked to make sure that everything was on line, all breakers closed and everything synchronized; that he then called Four County and told them that the plant went on emergency and he needed a reason to put in his logbook; that the generators were already on line when he got to the generator building; that he then returned to the nonsmoking cafeteria and told the Federal Government representative that he could not continue as an observer because he had to monitor the generators and be there when Four County came to make repairs to their substation; that he was at the plant until 2 a.m. on August 22, 1997; that Latasha Peterson was on the clean up crew for the generator building up until a month before the 1997 Board election when he had her transferred back to the plant because she made personal telephone calls and wrote letters during work hours; that neither Peterson nor Clarisa Robinson was working in the generator area on the Monday following the 1997 Board election, he did not have a conversation with either one of them on that day, neither one of them asked him who cut the lights out during the election, and he did not tell either one of them or anyone else that he did it "[d]idn't we win"; that he has never been in Larry Johnson's office; and that he did go into the front office area, to Michael King's office to turn in his EPA report at the end of the month, to the clinic, and to the conference room for his instructions on being an observer during the 1997 Board election. On cross-examination Dowless testified that it was about 10:30 p.m. on August 21, 1997 when he went to the smoking cafeteria for a break; that the night of August 21, 1997, the lights were out for 2 minutes; and that it would take about 15 minutes for personnel at the plant to shut down the power at the plant and it would require an additional 25 to 30 minutes to shut down the involved Four County substation and all this would require a total of four people. Subsequently, Dowless testified that he logged in that a blown fuse in the substation caused the outage originally at 10:32 p.m. on August 21, 1997.

The Respondent's plant manager, Larry Johnson, testified that he never instructed an employee to turn the power off in the plant.

Jere Null testified that he did not give Mike Dowless or any employee any instructions to turn off the power in the plant during the election.

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[255] As here pertinent, the letter indicates as follows:

According to our Supervisory Control and Data Acquisition (SCADA) events recorder, events during the days of August 21 and August 22, 1997 concerning the Powell 230K Substation point of delivery and the Scruggs Service Substation serving your facility unfolded as follows:

. . . .

22:13:10 CP&L 230K service to the Powell Substation interrupted.

22:13:16 South generator room utility breaker opened.

22:13:18 North generator room utility breaker opened.

22:14:35 North genset breaker closed; genset supplying service power.

22:14:40 South genset breaker closed: genset supplying service power.

[256] He left on April 15, 1998, to take a job in Florida.

Lee Mount testified that he never instructed Dowless or anyone to turn the power off in the plant during the course of the 1997 Board election. Mount sponsored Respondent's Exhibit 189 which is a copy of a portion of a page from a 1997 (volume 89, no. 69) newspaper, the Bladen Journal. The page contains an article titled "Four County outage caused by loss of power supply" which indicates as follows:

> The majority of Four County customers in Bladen County were without power for nearly two hours last Thursday night due to loss of a 230,000 KV transmission feed from Carolina Power & Light Company.
>
> According to Four County Officials, the alarm sounded at Four County's control center in Burgaw at around 10:30 p.m., signaling a service interruption at their Powell substation near Bladensboro.
>
> The station serves communities of Clarkton, Tar Heel, Lisbon, and areas around Elizabethtown.
>
> Service was restored just after midnight.

Analysis

Neither White nor Dockery testified at the hearing herein so Peterson's testimony about White saying, "[G]et the box" and Dockery hovering over the ballot box with his arms outstretched when the lights came back on is uncontroverted. On brief the Employer argues that Peterson's testimony about Dockery "hovering" over the box when the lights came back on is uncorroborated. As noted above, Perry testified that after the lights came back on, Dockery was behind the partition where the ballot box was located, and she heard a gray haired male Board agent tell Dockery that he had to leave that area.

As pointed out by the Board in *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992):

> In order to set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a "reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

There were observers present when the lights went out. If the Board agents had been placed on notice at that time that there was a concern about tampering with the ballot box while the lights were out, the agents could have determined whether the circumstances warranted taking those measures which would have allowed a comparison of the number of ballots cast up to that point in time with the number of voters who participated in the election up to that point in time. But it has not been shown that either the observers or Jolliff, who before the blackout saw Dockery in the area of the ballot box, complained to the Board agents present. And the petitioner has not presented any evidence that anyone actually tampered with the ballot box. Also, it could be argued that *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968), which is cited by the Petitioner, can be distinguished in that there the ballot box became "unattended" for as much as 5 minutes when an altercation which developed during the voting period outside the polling place drew the attending officials away from the ballot box, while in the instant case there was no showing that the Board agents were not present in the room with the ballot box for the duration of the blackout.

But there is no escaping the fact that the testimony that Dockery was hovering over the box when the lights came on is uncontroverted. Dockery did not testify. While it has not been shown that the Respondent caused the blackout, the Respondent did hire Dockery as a consultant and he was acting as the Respondent's agent.[257] Indeed, as concluded above, Dockery should not have been in the room as an observer. So the Respondent cannot claim that it is totally without fault in this incident. The Employer argues that if Dockery was hovering over the ballot box when the lights came back on, "[p]resumably even an NLRB agent would have seen it." (R. Br. 467.) But none of the Board agents present at this election testified at the trial herein. So we really do not know what the Board agent(s) saw or did not see. Approximately 6 years ago I had a case in which the Board agent in charge of the election did testify and explain the steps he took to supervise the ballot box. In that case the Board agent was able to demonstrate that the number of ballots cast equalled the number of voters who participated in the election. *T. K. Harvin & Sons*, 316 NLRB 510 (1995). As noted above, one could question whether the observers placed the Board agents on notice of their concerns about Dockery's access to the ballot box during the blackout. But notice is not the real issue. No Board agent testified that he or she had control of the ballot box during the blackout. No Board agent testified that when the lights came back on Dockery was not hovering over the box with his arms extended. In view of the fact that the testimony that Dockery was hovering over the ballot box with his arms outstretched when the lights came back on is uncontroverted, I have to conclude that was the situation. That being the case, no notice from the observers to the Board agents would be necessary. The Board agents present are charged with the control of the ballot box. No one should be telling them about what is happening with the ballot box. At the moment the lights went off, the primary function of the Board agents present was the protection of the ballot box. Yet I have uncontroverted testimony before me that when the lights came back on an agent of the Respondent was hovering over the ballot box. As the Board indicated in *Austill Waxed Paper Co.*, supra:

> Under the particular facts of this case, we do not agree with the Regional Director's conclusion that Employer's Objection 2, which raises the issue of the ballot box being left unsealed and unattended for from 2 to 5 minutes, should be overruled. This objection, which goes to the very heart of the conduct of an election—maintaining the integrity of the ballot box—is not, in our opinion, the proper subject for litigation on an ad hoc basis. We do not believe that we should speculate on whether something did not did not occur while the ballot box was left wholly unattended. The Board, through its entire history, had gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process;

[257] As noted above, the Respondent in fn. 20 at p. 61 of its brief, takes the position that Joey Dockery and Jeff White "were agents of management."

> and where a situation exists, which, from its very nature, casts a doubt or cloud over the integrity of the llot box itself, the practice has been, without hesitation, to set aside the election.
>
> It is our belief that the leaving of the ballot box unsealed and unattended for possibly as much as 5 minutes is a condition that relates directly to the integrity of the ballot box. It is the Board's responsibility to certify the validity of its own balloting procedures, and, if it cannot, as here, we believe that in the interest of maintaining our high standards, there is no alternative but to set the election aside and direct a second election. [Footnotes omitted.]

The Employer raises some practical questions regarding whether any meaningful tampering could have occurred during the blackout. But as noted in *Austill Waxed Paper Co.*, supra, the Board has indicated "[w]e do not believe that we should speculate on whether something did not did not occur while the ballot box was left wholly unattended." On the one hand, there is no evidence that the Board agents left the voting room during the blackout. On the other hand, there is no evidence that if the Board agents remained in the room, they properly supervised the control of the ballot box. But as noted above, we do have uncontroverted testimony that when the lights came back on an agent of the Respondent was hovering over the ballot box with his arms outstretched. This suggests that the Board agents present did not have total control of the ballot box. In these circumstances, Objection 32 is sustained to the extent it alleges that a ballot box was left unguarded during a blackout in the course of a power failure.

GG. Objection 33

The Employer's general manager and other management personnel along with local police intimidated and threatened violence against employees and nonemployee union representatives throughout the critical period and assaulted them immediately following the vote count.

Respondent's former employee Kenneth Ivie testified that he served as an election observer for the Union on August 22, 1997; that he was there for the vote count; that as they were getting ready to count the ballots the cafeteria doors were opened and about 12 people with the Union came along with about 60 people in white hats and white coats who are supervisors and superintendents; that the people came up behind his chair and pinned his chest against the table; that a Board agent told Null to ask some of his people to back off, to give the observers some room; that before the first count was completed he got slapped on the back of the neck; that he turned around and asked who hit him; that he had knees in his back and moisture on the back of his neck; that he saw Larry Johnson and told him that he needed to do something about what was going on because it did not make any sense; that when it became obvious that the Company won the election there was cheering by the supervisors, superintendents, the people who work downstairs in the office, all management people; that he heard name calling, namely "nigger," but he could not tell who was saying this; that when some of the people said something about the name calling, a supervisor from the cut floor said that "a nigger is not the color of your skin, its the way you think, and the Union . . . is full of niggers"; that when he was leaving the cafeteria with the union representatives he was pushed down the hall by management people some of whom were chanting "get out, get the f— out"; that he saw employee Ray Ward getting pulled in front of the drinking fountain by the laundry room by James Blount, who is a supervisor; that it appeared that Blount was attempting to shield Ward when others were hitting him in the head; and that he did not see Ward handcuffed but he did see him being taken to the police car. On cross-examination Ivie testified that James Blount, a black supervisor, spoke to one of the supervisors who was name calling and that is when the individual clarified what he meant; that he called to Larry Johnson and said, "Larry, you hear what they are saying"; and that Larry Johnson looked at him like he was acknowledging him but he did not say anything to the people.

The Respondent's former employee Tara Davis testified that on August 22, 1997, she was an observer for the Union; that when the vote was being counted a "whole bunch of supervisors came into the room."

Chad Young testified that on August 21, 1997, when he went to the guard shack at the Respondent's involved plant to handbill in the morning, as described above under paragraph 25 of the objections, there were four or five Bladen County deputy sheriffs near the guardshack; that Priest was also present; that when Null told the union representatives and the Reverend Jesse Jackson that they had to leave that area, about 8 to 10 more deputy sheriff's cars arrived in the area; that at that point Null invited him to the vote count the next day saying, "I want to make sure you're there for a real ass-whipping, We're going to beat you at least—by more than two to one. And we've got something special in mind for you"; that later that morning a couple of more deputy sheriff's cars came into the area and the occupants had on flack jackets and some had shotguns out; that the deputy sheriffs were out of their cars talking to Priest; that when they handbilled in the afternoon out by the highway there were about 12 deputy sheriffs present; that in the afternoon Null approached him and told him that he again personally wanted to invite him to the vote count "to a real ass-whipping"; that he introduced one of the deputy sheriffs to Reverend Jesse Jackson; that on August 22, 1997, he went to the vote count about 3:30 p.m, and there were deputy sheriffs at the door of the plant; that Null advised him that the agreement was to have 10 union representatives at the vote count and the Company was going to have 10 representatives at the vote count; that in the plant on his way to the polling place he saw a "Vote No" sign on a wall in an enclosed bulletin board; that when he arrived at the polling place he saw between 25 and 50 company people there; that he asked the head Board agent present, Tony Scott, why the Company could have so many people in the room when the Union was limited to 10 representatives; that Scott asked Null and Tom Ross, the vice president of the Respondent, about the situation and Null told Scott that "it was his plant, they were going to have as many as they wanted, there'd be more" and Null winked at him; that he went outside to get the rest of the union representatives; that Priest came out and told them that they better get in there because the room was filling up; that he brought the remaining seven or eight union representatives to the cafeteria; that when he got to the room it

was filling up fast with company people; that he asked Scott if mob rule was going to take over; that twice Scott asked him to have Brian Murphy, the president of Local 204 not stand by Joey Dockery and intimidate him; that he complied with Scott's request; that during the vote count approximately 15 big (well over 6 feet tall and wide) men in brand new frocks and brand new hard hats came into the room, spoke with Null and then assembled at the perimeter of the vote room; that prior to the official vote count, he observed a company observer tell his wife to leave the table and leave the room; that then he saw the only door he knew of in and out of the cafeteria being shut by one of the "big" men; that when the unofficial vote count was given, chanting, namely, "Union go home" started but Null stopped it and said wait for my signal; that a couple of minutes later the official vote count was announced; that Null then yelled, "Union scum, go home" and all hell broke loose; that he stood up to sign the election tally sheet and he told Null that the Union was not going anywhere, it would be back at the plant Monday morning handbilling; that someone grabbed him from behind and punches were thrown at him and at other union representatives; that he was grabbed in a choke hold; that Roger Hammit, a union representative from Kansas City, tried to help him and he was punched; that he heard racial slurs, namely, "nigger lovers go home"; that he broke free and helped a female union representative, Roz Pellis who yelled his name, get out of the room; that the deputy sheriff who he introduced to Reverend Jackson earlier that day helped him out of the room; that on his way out of the plant he asked the "sheriff" why the people who were throwing punches were not arrested for assault and the response he received was "for me to get my ass out of there or I'd be arrested"; that he saw Johnny Rodriguez, a union representative out of Dallas, Texas, being led out by deputy sheriffs in handcuffs; that he saw the Respondent's former employee and union observer Ray Ward being dragged out of the plant in handcuffs with his eyes swollen shut; and that when he was standing outside the plant security and deputy sheriffs were telling him to get off the Respondent's property and they escorted him off. On cross-examination Young testified that when he was handbilling on August 21, 1997, he did not call a black employee of the Respondent an "Uncle Tom" and he did not see handbillers hanging on employees' cars as they drove by; that he was put in at least two choke holds in the cafeteria; and that of the 17 or 18 union representatives present for the vote count 3 or 4 were females.

A summary of Justin Molito's testimony regarding what occurred after the vote count in the plant on August 22, 1997, is set forth above under paragraph 8(u) of the 1998 complaint. Molito testified further that the antiunion chanting stopped in the hall just before the reception area when Null raised his hands above his head, telling the people to stop; and that the door between this area of the hallway and the reception area was closed and the organizers had to open it to go to the reception area.

A summary of Jeffrey Greene's testimony regarding what occurred after the vote count in the plant on August 22, 1997, is set forth above under paragraph 8(u) of the 1998 complaint.

Ray Ward's testimony regarding what occurred on August 22, 1997, is summarized above under paragraph 9 of the 1998 complaint.

Former union organizer, James McGilberry, testified that he was present during the vote count on August 22, 1997; that Jerry Null was standing about 2 to 3 feet from him during the vote count; that toward the end of the ballot count when it was clear that the Company had won he overheard Null say to company observer Anthony Foster,[258] after pointing at Union Representative Chad Young, "[t]hat's the guy there that has called you a house nigger, so now is your time to get him"; that Anthony Foster went over to Chad Young and started a confrontation with him; that when the Company knew that they had a sure victory management called the union people "MF, AHs" and told them "get the H out of here"; and that the room erupted and there was pushing and shoving.

A summary of Johnnie Brown's testimony regarding what occurred after the vote count in the plant on August 22, 1997, is set forth above under paragraph 8(u) of the 1998 complaint.

A summary of Bill Bishop's testimony regarding what occurred after the vote count in the plant on August 22, 1997, is set forth above under paragraph 8(u) of the 1998 complaint.

The Repondent's supervisor, Robert Claiborne, testified that during the 1997 union campaign and election he was the third-shift plant superintendent; that he was present for the August 1997 ballot count; that there were a couple of hundred people in the room; that he never saw anyone in the crowd shoving anyone who was sitting at the a table or push up against, spit on, or "cuss" at people sitting in the chairs; that when the results were tabulated there was clapping and there was a cheer that the Company had won; that he did not hear any comments directed at union people, or cursing, or racial slurs, or the "N" word; and that as the people left the room he was not aware of any actions directed at the union supporters.

A summary of James Blount's testimony regarding what occurred at the 1997 Board election ballot count is set forth above under paragraph 9 of the 1998 complaint regarding the termination of Ray Ward.

The Respondent's switchboard operator at its Tar Heel facility, Roxanne Garris, testified that on August 21, 1997, she overheard the Respondent's sirector of aecurity, Danny Priest, tell union representatives in the reception area of the plant that he had to search their bags for weapons or anything like that, pursuant to xompany policy, before taking them into the plant; that at one point Priest said he had to search their belongings; and that the union representatives were taken into the plant by Priest even though at least one did not let Priest search his bag before leaving the reception area.

The Respondent's employee Willerdane Bryan testified that a week before the 1997 Board election some people who were in front of the plant when he entered hit his car when he did not stop to take literature; that no damage was done to his car the first time this happened; that a couple of days before the 1997 Board election people again beat on his car when he entered the plant property; that the car had some dents and paint was

[258] Both Larry Johnson and Jere Null testified that the surname is Forrest.

knocked off; and that the people who hit his car as he entered the Respondent's property were wearing prounion T-shirts. On cross-examination Bryan testified that he did not believe that there was enough damage to his 1996 Grand Am to have it repaired.

Bladen County sheriff's deputy, Sergeant Steven Lesane, testified that during the 1997 union organizing drive he went to the Respondent's Tar Heel facility on a day that Reverend Jesse Jackson came to the facility; that when he arrived at the facility Reverend Jackson was not there but there were four or five sheriff's deputies present; that he did not recall that any of the sheriff's deputies were wearing raid vests (a bullet proof vest worn on the outside of their uniform for special assignments vis-a-vis a normal bullet proof vests worn under the shirt); that he did not see any sheriff's deputies with their shotguns that day; that at some point that day (he could not recall how long after he arrived at the plant) the people from the Union came back and Reverend Jackson was with them; that subsequently he did not see any of the deputies put on their raid jackets or break out their shotguns; that he was also at the Respondent's Tar Heel plant the day of the 1997 vote count for the Board election; that he was originally in the management parking lot at the Tar Heel plant on August 22, 1997, and Danny Priest called him into the reception area where he searched the bag of a man who was with the Union; that he then returned to the parking lot and about 3 or 4 hours later, or about 4:30 p.m., Larry Ashley, who is a sergeant on the Respondent's security force, told the deputies that the voting was finished and he asked them to come upstairs and wait near the cafeteria before the results were announced; that after the results were announced Ashley summoned them to the small cafeteria where people were cursing, yelling back and forth at one another; that Priest told him that they needed to get the people separated to keep it from getting out of hand; that he could not recall what curse words were used but he did recall that he did not hear any racial slurs; that when he first entered the room he came up on someone who he only knew as Chad, who was with the Union; that Chad, who he did not recall meeting before, and Priest were arguing; that he told Chad that they had to leave; that while he was in the small cafeteria he did not see any fighting, pushing or shoving, kicking or punching, or anyone getting spit on; that he patted Chad on the shoulder and he walked out with Chad; and that after he left the building with Chad he saw two people, "a small black guy and a big white guy," come out of the building in handcuffs and they were placed in patrol cars; and that the former was screaming about the pepper spray being hot and burning. On cross-examination Lesane testified that Danny Priest has been a reserve deputy with the Bladen County sheriff's department for a number of years; that there were up to 8 or 10 deputies at the Respondent's Tar Heel plant in the parking lot from noon or 1 p.m. to about 4:30 p.m. on August 22, 1997, and Priest told them that their objective was to keep the people separate and try to deter violence if things got out of hand; that when he went to the small cafeteria after the vote result was announced he did hear people telling the Union to get out; that there was a lot of profanity going on in the small cafeteria; and that Deputy Lesevenn Richardson brought the handcuffed small black man out of the building. On redirect Lesane testified that on August 21, 1997, the security guards at the Tar Heel plant were not wearing flak jackets or carrying shotguns and he had never seen the Respondent's security guards do either.

Bladen County sheriff's deputy, Lasevenn Richardson, testified that he was assigned to the Respondent's Tar Heel plant on the day Reverend Jesse Jackson was there; that he was not wearing a flak jacket that day and he did not see any of the other approximately 10 sheriff's deputies present wearing flak jackets; that he did not see any of the deputies with their shotguns out that day; that the security guards present did not wear flak jackets and did not have shotguns; that on August 22, 1997, he was present at the Respondent's Tar Heel plant to handle security for the vote count; that he arrived at the plant at 3:30 p.m. and later Danny Priest called the sheriff's deputies upstairs at about 4 p.m. when they were getting ready to announce the results of the vote; that he was stationed outside the nonsmoking cafeteria and he saw people coming out of the cafeteria; that he heard isolated cursing; that he did not witness any physical confrontations, kicking, anybody being spit on, anybody being shoved, any racial slurs, or the "N" word being used; and that as the people left the cafeteria he held his arms out to clear the way for union representatives. On cross-examination Richardson testified that he was assigned to the Tar Heel plant on August 22, 1997, to keep the peace; that Priest told him to escort union representatives out of the plant; that Priest told the sheriff's deputies to come upstairs from the reception area when the results of the election were about to be announced; and that in 1993 to 1994 he worked for the Respondent at Tar Heel as a security guard.

Priest testified that for the summer of 1997 union organizing campaign the Respondent and the Union had an arrangement whereby the Union was allowed to come onto the Respondent's property near the employee entrance and handbill in front of the guard booth 2 days a week; that on August 21, 1997, Plant General Manager Jerry Null telephoned his house at about 6:30 a.m. and told him to come to the plant; that when he arrived at the plant at about 6:45 a.m. the Reverend Jesse Jackson and between 15 to 20 union representatives were by the guard booth in violation of the agreement since the union representatives had already been at the guard booth 2 days that week; that Null spoke to the Reverend Jackson and Chad Young and then came back and told him that they were not going to leave and he wanted him to call the sheriff's department; that he called the sheriff's department and two or three officers came to the plant; that it could not have been as many as 12; that the sheriff's deputies were wearing their regular uniforms, and they were not carrying shotguns when they got out of their vehicles or wearing flak jackets; that the union people then moved to the road and the deputies left; that later that day a videotape was shown to Young in the conference room at the plant to demonstrate that the union handbillers had already been at the guard booth 2 days that week before August 21, 1997; that neither he nor any of his guards, to his knowledge, went into the election area while voting was going on; that with respect to August 22, 1997, he was told to maintain control; that when four or five union representatives arrived at the plant on August 22, 1997, about 10 a.m. he told one of them who had a bag that under

company policy all bags have be searched; that the man refused to let him search the bag; that he called the sheriff's department and in a few minutes a Deputy Sergeant Steve Lesane arrived; that Sergeant Lesane looked in the bag and said it was fine; that he was present on August 22, 1997, for the ballot count; that when he arrived for the ballot count there were 150 to 200 people in the room and a few more came into the room after he did; that he moved around in the room during the ballot count; that while the ballots were being counted he saw Brian Murphy lean over and bump company observer Joey Dockery in the back of the head; that some of the supervisors spoke to Murphy about it and the ballot count stopped temporarily; that he heard some name calling and taunting between the union organizers and company employees; that he did not hear any racial slurs; that when the results were announced he saw Chad Young and some employees and supervisors were yelling back and forth; that Chad Young and "a black guy, an employee, . . . were arguing like the devil"; that he told them that they had to leave, that he did not think that anyone was touching Chad Young at the time other than his own people who were trying to get him to leave; that he stepped out in the hall and he called Captain Raison of the sheriff's department to send up a couple of deputies; that when he went outside no one had Chad Young in a choke hold; that the sheriff's deputies separated the crowd as they left the nonsmoking cafeteria; that one of the deputies told Chad Young that he had to go; that there was a lot of bickering, yelling and cursing back and forth between Young and "some black guy that was an employee there" but he did not see them get involved physically with one and another; and that they got the 15 to 20 union organizers to leave the room and he and the sheriff's deputies were between the union people and the company people as they went down the hall. Priest's testimony about what happened with Ward is summarized above under paragraph 9 of the 1998 complaint.

On cross-examination Priest testified that he did not recall having any deputy sheriffs at the Respondent's Tar Heel facility on August 21, 1997, the first day of the Board election; that on August 22, 1997, there were two or three deputy sheriffs at the Respondent's facility at about 7 a.m. and then they left; that the sheriff's deputy came to the plant about 10:30 a.m. to search the bag of a union representative; that deputy sheriffs were not posted in the Respondent's parking lot on the afternoon of August 22, 1997, awaiting his call; that toward the end of the ballot count he left the nonsmoking cafeteria, walked down the hall, and spoke to Deputy Sheriff Raison telling him that they had to stop the count and there was bumping and pushing; that he asked Captain Raison what he thought they should do and then he told Captain Raison that it was not necessary to come into the voting area at that time; that when the results were announced he called the deputy sheriffs and told them to come up; that it was decided earlier to have some deputies in the hall to make sure that there was no trouble; that in the nonsmoking cafeteria he saw one of the union people pulling on Young's arm to get him to leave; that he did not see any pushing in particular; that profanity was being used in the room; that he did not have a clue as to whether the person Young was arguing with was an employee of the Respondent; that in an affidavit he gave to the Company on October 14, 1997, he indicated that there was pushing, shoving, yelling and cursing in the vote count area; that there was yelling by the company people in the nonsmoking cafeteria on August 22, 1997, but "I don't know if they were cursing or not to be honest"; that he heard some cursing on the part of company people; and that Dockery was not an employee of the Respondent when he was an observer for the Company.

On redirect Priest testified that he did not see a company person put Young in a choke hold or hit, kick, push, shove, spit on, or anything of the like. On recross Priest testified that in his affidavit to the Company he did not limit the pushing and shoving to the Brian Murphy and Chad Young incidents. Subsequently, Priest testified that he knew Dockery because when he was terminated by the Respondent he was asked to escort Dockery off the property; and that he never discussed bringing sheriff's deputies onto the property with anyone in management before it occurred.

The Respondent's plant manager, Larry Johnson, testified that during the 1997 campaign there was an agreement between the Company and the Union allowing union organizers on company property at the employee vehicle entry gate 2 days a week;[259] that on one occasion the Reverend Jesse Jackson came with the union representatives to the employee vehicle entry gate; that he met Reverend Jackson, and Jerry Null informed the Reverend Jackson that since the Union had been on the company property twice that week already, the fact that the Union was on the Company's property a third time that week was a violation of the agreement; that employee Anthony Forrest was present with the management representatives and Union Representative Chad Young called him an "Uncle Tom"; that Null told Young that "we're going to kick your butt tomorrow in the election" (Tr. 5509); that he attended the vote count after the 1997 Board election; that during the course of the vote count he did not see any pushing, or shoving, or spitting on union organizers, and he did not hear any racial slurs; that shortly before the results were announced he walked up to Anthony Forrest and said, "[H]ey there's that guy over there that called you an Uncle Tom. I bet he's not brave now" (Tr. 5512 and 5513); that he did not tell Anthony Forrest to go "kick Chad Young's ass"; that after he spoke with Forrest, Forrest walked over to Chad Young; that Forrest did not punch Young or push him: and that after the results of the election were announced, he did not see any pushing or shoving, or any punching, or spitting, and he did not hear any racial slurs being uttered.

Thomas Ross testified that he attended the 1997 ballot count at the Board election; that there were more than 100 people in the room; that he saw the president of the Local, Bryan Murphy, standing directly behind an exemployee of the Respondent, Joey Dockery, punching him in the back and aggravating him during the count; that Murphy was told to stop; that he did

[259] Joseph Luter III, who is the chairman and CEO of Smithfield Foods—which is the parent company of Smithfield Packing Company, sponsored two exhibits, namely R. Exhs. 154, dated June 30, 1997, and 155, dated July 8, 1997, which is an agreement between the Company and the union representatives would be allowed on company property near the plant exits twice each week to pass out literature and discuss issues with the employees.

not see any other physical contact going on in the room during the ballot count itself; that he did not see any pushing or shoving until people were headed for the door; that he did not hear any racial remarks or anyone use the "N" word; and that he did not see any employees or supervisors for the company assault, attack, push or shove any union representative. On cross-examination Ross testified that a lot of people in the room where the ballots were counted still had on their white hardhats; that Murphy was tapping Dockery on the back; that he did not say that Murphy punched Dockery (see above); that Murphy tapped Dockery in the back with his fingers and he told Barrett, who told Chad Young, who spoke to Murphy; that he did not recall the Board agent during the ballot count telling the people watching the count to back up a little bit; that he saw Murphy's fingers touching Dockery; that there were about 200 hundred people in the room; and that the people who had white bump caps on would also have had white coats on.

Jere Null testified that he was aware of the agreement between Barry and Luter (R. Exhs. 154 and 155); that under the agreement union representatives were allowed in a designated area on the Respondent's property twice a week; that on August 21, 1997, union representatives came onto company property even though they had already been on company property twice that week; that he spoke to Union Representative Chad Young, who was in the group, along with the Reverend Jesse Jackson, who were on company property; that after telling Young that the union people had to leave company property, he and Larry Johnson, who was with him, along with employee Anthony Forrest, began to leave; that he told Young that bringing Reverend Jackson there at that point in time demonstrated that he was desperate because he knew that he was "going to get your ass whipped"; that Forrest also said to Young that he was "going to get his ass whipped"; that Young then said "shut up you Uncle Tom"; that as he, Johnson and Forrest left the area in his car he saw two sheriff deputies at the end of the drive; that the deputies were not wearing flak jackets or carrying shotguns and he has never seen a deputy wearing a flak jacket; that he attended the 1997 Board election vote count in the nonsmoking cafeteria; that there were over 100 people in the room; that he complained to Board Agent Anthony Scott that Bryan Murphy was leaning on the back of company observer Joey Dockery; that he did not see anyone else bumping into or pushing or spitting on or slapping observers; that he did not hear any racial slurs or the "N" word during the vote count; that he did not tell Anthony Forrest at the vote count, while pointing at Chad Young, "that's the guy that called you a house nigger, now is the time to go get him"; that when the results were announced he did not chant "Union scum, go home" nor did he hear anyone else chant this; that after the results were announced there were some sheriff's deputies in the nonsmoking cafeteria; that he did not hire any big guys to come and rough up the union representatives; that there were no noncompany big guys in the nonsmoking cafeteria for the purpose of beating up union representatives; that after the results were announced he did not hear any racial slurs and he did not hear the "N" word "being thrown back and forth" (Tr. 6174), he did not see any of the Union people getting punched, kicked, or tackled; that something happened with Chad Young and he saw two union guys holding Young back and *what might be called a scuffle was over as quick as it started*; that he did not see any company employee have Chad Young in a choke hold; that he did not see anybody kick Chad Young, or spit on him, or push him, or drag him; that in the hallway there was some kind of a problem in front of the group which he did not see and when he got up to the front he saw sheriff's deputies taking a black man out of the building in handcuffs; that he did not know exactly when the sheriff's deputies came into the nonsmoking cafeteria where the ballots were counted; that he did not know in advance of the vote count that there was going to be sheriffs deputies there; that he did not call the sheriff's deputies; that the Respondent offered a $25,000 reward for information leading to the arrest and conviction of anyone responsible for spray painting "Nigger go home" on the union trailer in Tar Heel on the night of August 13–14, 1997 (R. Exh. 157); that he did not order anyone from the Company to spray paint that on the union trailer; and that the Company never paid the reward and he did not think that it was ever determined exactly who did it. On cross-examination Null testified that he had no involvement with respect to the sheriff's department arriving at the plant on August 22, 1997; that after the fact Danny Priest told him that he summoned the sheriff's department to the plant; and that during the ballot count a couple of times the Board agents asked the crowd to move back and give everybody a little room. Subsequently, Null testified that he did not recall a Board agent telling him on August 22, 1997, during the ballot count that the room was becoming very crowded and unruly; and the he did not think a Board agent specifically addressed him directly anytime during the vote count.

Lee Mount testified that he attended the Board election ballot count on August 22, 1997; that he did not see any of the observers being spit on, or slapped in the back of the head, or being pushed; that he did see Brian Murphy leaning on Joey Dockery for about 15 minutes and whispering in his ear; that during the course of the vote count he did not hear anyone utter racial slurs, or use the "N" word; that during the course of the vote count he did not see anyone in the crowd get spit on, or slapped in the head, or pushed or shoved; that one of the union representatives did bump up against him and their shoulders touched; that when the vote results were announced he did not hear anyone uttering racial slurs and he did not see anyone getting spit on, or punched, or kicked; and that after the vote count there was a celebration at an establishment in Elizabethtown and he and his wife sat with Latasha Peterson and Clarisa Robinson but he did not tell them to go back to the plant and pick on Ada Perry. On redirect Mount testified that while he testified that he saw people close to the people sitting at the tables, he did not see any observers getting shoved into the tables.

Analysis

The Petitioner on brief contends that the Respondent's control of the police on the site on election day is objectionable, *Pharmaseal Laboratories*, 152 NLRB 1212, 1215 (1965); that an employer cannot use a police agency during a campaign when no legitimate police function is served thereby, *Bibb Mfg.*, 82 NLRB 338, 342 (1949); that the evidence establishes

that the Respondent controlled the Bladen County sheriff's department, and used it to create an atmosphere of fear and confusion on election day; that there was no legitimate law enforcement reason for the deputies presence at the plant on the second day of the election; that as pointed out by the Board in *Bib Mfg.*, supra at 342 "[t]o interfere with lawful and peaceful activities protected by the Act on the assumption that union activities are inherently dangerous to the peace of the community negates the principles upon which the Act rests"; that the improper purpose of the police presence is further evidenced by Priest's attempts to deny his control over the force—which were proved false by the deputies—and to misrepresent the extent of the police presence; that the Company's attack on the union observers and representatives, which was led by Null, was well orchestrated and clothed with the power of the State; and that employees simply cannot exercise free choice in such an atmosphere.

The Respondent on brief argues that conduct which occurred after the votes were counted is outside the critical period; that Young was the only witness the Union presented to support its contention that the Respondent intimidated and threatened violence against employees and nonemployee union organizers; that the only alleged intimidation and threats occurred on August 21, 1997; that there is no evidence that the statements Null allegedly made to Young on August 21, 1997, were disseminated to any employee; that while the situation after the vote count may have been regrettable, it was well contained by company security and Bladen County sheriff's deputies; and that what took place after the election results had been announced precludes this conduct from being considered objectionable as it occurred outside the critical period and, thus, could not have affected the vote of any employee.

As concluded above, the Respondent's use of the sheriff's deputies during the handbilling on the afternoon of August 21, 1997, was an intimidation tactic meant to instill fear in the Respondent's employees. At the same time Priest used a video camera to intimidate employees. And having up to 10 sheriff's deputies in the Respondent's management parking lot in front of the plant for up to 4 hours on the afternoon of August 22, 1997, doing nothing, except having one deputy come into the plant to inspect a bag, was an intimidation tactic. Null's threat to Young on August 21, 1997, was objectionable and the fact that Null had the threat carried out is relevant. As concluded above, Null orchestrated what happened on August 22, 1997. Things occurred on his cue. They were done intentionally and what occurred in the nonsmoking cafeteria, after the vote count, was planned in advance of the vote count. Objection 33 is sustained to the extent it refers to conduct which occurred "during" (as opposed to "throughout") the critical period.

HH. Objection 34

The above and other objectionable conduct destroyed the laboratory conditions necessary for a fair representation election.

The Respondent's employee Lillie Jolliff testified that about 2 or 3 weeks before the vote in the August 1997 union election, televisions were placed in the large cafeteria so that employees could watch tapes; and that the televisions were removed about 1 week after the Company won the election. On cross-examination Jolliff testified that there were two televisions in the cafeteria before the election.

Supervisor Donald Worley testified that he heard that there were televisions in the cafeteria during the 1997 campaign but he seldom went in there and he did not see them; and that after the election he was in the cafeteria and he did not see televisions.

Analysis

The Petitioner on brief contends that the Employer promised and/or granted benefits to dissuade union support; that Assistant Superintendent Randy Gebbie told employee Kenneth Ivie that the Company was going to make changes which he could not identify but the Company would pick an employee from each department to meet with management once a month and supervisors would be given classes on how to communicate with employees; that Supervisor Davis Smith promised employee Darrell Thomas that he would assign him to pull loins on the side of the table that he wanted if Thomas stuck with the Company; that Plant Manager Larry Johnson told Ada Perry to see Null for more money; that the Respondent paid Latasha Peterson and Clarissa (Robinson) Pruitt for their antiunion activities; that supervisors were urged to be more courteous and not complain about production during the campaign; that the Respondent added televisions to the cafeteria during the organizing drive and removed them within a week following the 1997 Board election; that the Respondent was more lenient in allowing employees to use the bathroom during the campaign and following the election returned to a policy restricting bathroom use; and that the Respondent allowed employees to wear stickers on their persons during the organizing campaign, but ordered them removed following the election.

The Respondent on brief argues that Section 102.69 of the Board's rules and regulations requires an objecting party to "pinpoint its allegations of misconduct with reasonable clarity"; and that the use of a "catch all" objection does not adequately pinpoint allegations of misconduct with the required clarity, *Airstream, Inc.*, 288 NLRB 220, 229 (1988), and, therefore, this objection must be overruled.

Objection 34 is overruled to the extent that it is an attempt to use a "catch all" objection to cover matters not arguably pertinent to the other objections. Certain of the matters specified by the Union on brief as being covered by Objection 34 have already been treated, i.e., Smith promising benefits and improved working conditions to Thomas to discourage support for the Union, and the wearing of union paraphernalia. It does not appear that the televisions which were placed temporarily in the large cafeteria were meant explicitly or implicitly to be a promise or a granted benefit to dissuade support for the Union. Jolliffe testified that they were placed in the cafeteria so that employees could watch tapes. The only videotapes referred to in the record were the antiunion videotapes which were shown to employees. The testimony regarding the televisions is vague and it does not establish that they were a promised or granted benefit which was withdrawn after the election.

In view of the seriousness of the conduct which is the subject of the objections sustained above and which occurred during

the critical period, in view of the fact that much of the misconduct was engaged in by the highest ranking on site company officials, and in view of the fact that most, if not all, of the Respondent's employees collectively were exposed to the Respondent's objectionable conduct, in my opinion the Respondent's conduct affected the results of the August 1997 Board election. Accordingly, I believe that the August 1997 Board election should be set aside and a new election be conducted.[260] It should also be noted that the sustaining of Objection 32, in and of itself, is sufficient to set the August 1997 Board election aside.

IV. THE TWO "AFFIDAVITS" OF SHERRI BUFFKIN

The Respondent's attorneys had Sherri Buffkin sign two "AFFIDAVITS." They were received herein as Respondent's Exhibits 75 and 76. The former is dated October 22, 1997, and the latter is dated "4–15–98."

During his cross-examination of Sherri Buffkin, one of the Respondent's attorneys, Joel Katz, questioned her about Respondent's Exhibits 75 and 76. The first sentence of paragraph 5 of Respondent's Exhibit 75 reads "Billy Jackson and I verbally counseled with Margo [McMillan] about her attitude." On cross-examination Sherri Buffkin testified that this is not a true statement. Katz pointed out to Buffkin during cross-examination herein that the first thing that this "AFFIDAVIT" indicates is "NOW COMES Sherri Buffkin, who, pursuant to 28 U.S.C. 1746, and under penalty of perjury, swears the following" and the next-to-last paragraph reads, "I have read this affidavit consisting of 2 pages, including this page, and I declare under penalty of perjury that the following is true and correct."

The fourth sentence of paragraph 5 of Respondent's Exhibit 75 reads: "[n]o matter what happened, Margo [McMillan] blamed it on other people." On cross-examination Sherri Buffkin testified that this is not a true statement. Katz pointed out to Sherri Buffkin on cross-examination herein that this was a statement she swore to under penalty of perjury.

The first sentence of paragraph 6 of Respondent's Exhibit 75 reads: "Margo [McMillan] picked fights with just about anybody who came up to the laundry." On cross-examination Sherri Buffkin testified that this is not a true statement. Katz pointed out to Sherri Buffkin on cross-examination herein that this was a statement she declared under penalty of perjury.

The second sentence of paragraph 6 of Respondent's Exhibit 75 reads: "She [McMillan] should have been terminated before she actually was, but I felt sorry for her." On cross-examination Sherri Buffkin testified that she does not believe that. Katz pointed out to Sherri Buffkin on cross-examination herein that this was a statement she declared under penalty of perjury that the statement was true and correct.

The ninth sentence of paragraph 6 of Respondent's Exhibit 75 reads: "John Hall and I talked with her [McMillan], but she not only kept refusing, but also listed a number of other jobs that she would not take, which basically ruled out the entire plant." On cross-examination Sherri Buffkin testified that it is not true that McMillan named a number of jobs that basically ruled out any other job in the entire plant but rather it ruled out cold areas. Katz pointed out to Sherri Buffkin on cross-examination herein that this was a statement she signed under penalty of perjury.

The 13th sentence of paragraph 6 of Respondent's Exhibit 75 reads: "She [McMillan] said she still [at the second meeting of Hall, Buffkin and McMillan] refused to take it [the label cage job], and she wanted to work in the laundry." On cross-examination Sherri Buffkin testified that it is not true that McMillan refused to take the label cage job, McMillan stated that she would rather go to laundry. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

Sherri Buffkin testified that with respect to Respondent's Exhibits 75 and 76 she gave someone a verbal statement, the statement was typed, she looked it over and she signed it; that she gave the verbal statement for Respondent's Exhibit 76 to one of Respondent's attorneys, Bill Barrett; that she was not real sure who she gave the verbal statement to for Respondent's Exhibit 75 but she believed it may have been the same; and that if she was not mistaken Respondent's Exhibit 75 may have been the one from the female attorney who came out but she could not swear to it, she was not real positive.

The second sentence of paragraph 4 of Respondent's Exhibit 76 reads: "The complaints were generally about the rude way she [Ada Perry] spoke to everyone, coworkers in the laundry, employees needing to use the laundry." On cross-examination Sherri Buffkin testified that it is not true that there were complaints about the way Perry spoke to people. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.[261]

The fifth sentence of paragraph 4 of Respondent's Exhibit 76 reads: "[l]ike Margo [McMillan], Ada was one of the worst in the laundry." On cross-examination Sherri Buffkin testified that this statement is not true. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The eighth sentence of paragraph 4 of Respondent's Exhibit 76 reads: "[i]t is not true that I told Ada [Perry] there had been no complaints about her." On cross-examination Sherri Buffkin testified that this statement is not true. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The first sentence of paragraph 5 of Respondent's Exhibit 76 reads: "[a]fter Ada [Perry] move[d] to the conversion laundry, where she had no one looking over her shoulder, things got really bad." On cross-examination Sherri Buffkin testified that

[260] The notice of election should include language informing the employees that the August 21 and 22, 1997 election was set aside because the Board found that certain conduct by the Respondent interfered with the employees' free choice. *Monfort of Colorado,* 298 NLRB 73 (1990), enfd. 965 F.2d 1538 (9th Cir. 1992).

[261] R. Exh. 76 includes "NOW COMES Sherri Buffkin who pursuant to 28 U.S.C. Sec. 1746 declares under penalty of perjury that the following is true and correct" on the first page thereof, and on the last page thereof the following appears: "I have read this statement of 6 pages including this page and I swear under penalty of perjury that it is true and correct."

this statement is not true. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The second sentence of paragraph 5 of Respondent's Exhibit 76 reads: "She [Perry] treated everyone badly, was uncooperative, threw smocks and gloves at employees instead of placing them on the counter, hollered and cursed at people and constantly threatened to slap, hit or come across the counter at employees." On cross-examination Sherri Buffkin testified that Perry did throw smocks and gloves at employees, she did holler at people, she did constantly threaten to slap, hit, or come across the counter at employees, but otherwise this statement is not true. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The third and fourth sentences of paragraph 5 of Respondent's Exhibit 76 read: "[w]hen we would talk to her [Perry] about this, she would try to defend herself with the comment that 'this is how I am; I pick at people; everyone knows me.' I always told her that was unacceptable." On cross- examination Sherri Buffkin testified that while Granny has said, "[T]his is how I am. I pick at people. Everyone knows me.", it is not true that she ever told Granny that was unacceptable and this was "a statement that Bill Barrett said . . . . [t]hat's the statement that Bill made that I signed, yes. sir." Buffkin testified that there are 4800 people in the plant and while the majority of them know Ada Perry she would not say that all of them knew Perry. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

In response to my questions during Katz' cross-examination, Sherri Buffkin testified that she signed Respondent's Exhibits 75 and 76 knowing they contained false statements "[b]ecause I had a job. I had a family and I know that you don't go against Larry Johnson or what I've been instructed to do by them. That's exactly where the statement come[s] from."

The second sentence of paragraph 6 of Respondent's Exhibit 76 reads: "[b]y about November 1997, her [Perry's] conduct remained so bead [sic], and we continued getting so many complaints from conversion employee [sic] that we transferred Ada involuntarily from the conversion laundry back to the 'old' laundry where she would have more people watching her." On cross-examination Sherri Buffkin testified that "[t]he reason she [Perry] was transferred [was] because the people couldn't get along with Helen [McCoy] and it was easier for Granny to work there because she didn't have the problems Helen did." Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The fourth and fifth sentences of paragraph 6 of Respondent's Exhibit 76 read: "[e]very week I told her [Perry] she could not go back. Despite the transfer [to the old laundry], Ada's conduct did not improve." On cross-examination Sherri Buffkin testified that Ada's conduct was not a problem after she was transferred to the old laundry. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The first sentence of paragraph 8 of Respondent's Exhibit 76 reads: "[o]n about January 28 and 29, Second-Shift Plant Superintendent John Hall observed Ada at length engage in the rude, abusive, argumentative conduct for which she had been repeatedly warned." On cross-examination Sherri Buffkin testified that she did not know if Hall observed Perry engage in rude, abusive, argumentative conduct and Hall told her that he had observed Ada saying that she was going to come across the counter at somebody. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The first two sentences of paragraph 9 of Respondent's Exhibit 76 read: "[t]he next day, John Hall, myself and HR representative Marion Brown met with Ada to let her know she was terminated. We discussed at length with Ada what John had observed her doing on the two previous nights." On cross-examination Sherri Buffkin testified that Olga Anderson and not Marion Brown was present at this meeting, and the second sentence in this paragraph is not true in that Hall told Perry that she was terminated for instigating a fight, for threatening somebody. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The third, fourth, and fifth sentences of paragraph 9 of Respondent's Exhibit 76 read: "[o]ne specific comment she had made was something like, 'don't make me come across the counter at you.' Ada tried to respond by stating that she meant nothing by it, that she was just 'that way; Sherri, you know that's how I am.' I told her that she had been told she was responsible for her own actions, that she had been told to quit doing it." On cross-examination Sherri Buffkin testified that the fifth sentence is not true in that when Granny said, "[Y]ou know how I am Sherri. Do you have a problem" she told Granny, "I never had a problem. It was not my decision." Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The last sentence of paragraph 9 of Respondent's Exhibit 76 reads: "[n]either I nor any other manager enforced rules of conduct more strictly against Ada Perry; if anything, her abusive conduct was tolerated for too long." On cross-examination Sherri Buffkin testified that she did not enforce rules of conduct with respect to Perry because there was no reason to, "there was nothing there." Also Sherri Buffkin testified that Perry's termination was not warranted. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The fourth sentence of paragraph 10 of Respondent's Exhibit 76 reads: "[w]e did not warn, discipline or terminate Ada because of any support for the union she may have had or shown." On cross-examination Sherri Buffkin testified that it is not true that Perry's termination or any other discipline she may have gotten had absolutely nothing to do with any union activities. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

The fifth sentence of paragraph 10 of Respondent's Exhibit 76 reads: "[s]he [Perry] had ample warning to mend her ways,

but chose not to." On cross-examination Sherri Buffkin testified that Perry did not have plenty of warning and there was no need to warn Perry. Katz pointed out to Sherri Buffkin on cross-examination herein that this is a statement in her "AFFIDAVIT" that she signed under penalty of perjury.

Respondent's Exhibits 75 and 76 were offered and received and then in response to my further questions during Katz' cross-examination, Sherri Buffkin testified that "Bill [Barrett] and I were sitting in Jerry's office at a round table. What I would say was in turn [sic] to this so there are partial truths in it but its turned to represent what the Company wanted to represent"; that "Mr. Barrett knew that I had not counseled Ada personally. When I made the statement to Mr. Barrett that I had counseled as a group he knew that this—that I had not spoken to her personally";[262] and that Barrett was aware that she had not counseled Perry individually because he told her that she needed to state that she did counsel Perry individually.

Katz then asked Sherri Buffkin ,"[t]he affidavit doesn't state you counseled Ada [Perry] individually, does it." Sherri Buffkin then gave the following testimony:

> A. It says here on Page 2, Paragraph 4 . . . I talked to Ada [Perry] many times about her attitude and behavior and counseled her for it. Mr. Barrett asked me—the conversation held between Mr. Barrett and I was that I had counseled everyone in group meetings on a monthly basis.

Then in response to my question "[a]re there any other portions of Respondent's 76 that you discussed with Mr. Barrett—discussed the fact that they were not accurate," Sherri Buffkin testified that the first sentence of paragraph 4 of Respondent's 76 reads: "[t]here have always ben [sic] complaints about Ada, but before she went to the conversion laundry, most of them were from her coworkers such as Jenette Ellison (crew leader), Rachel Billy [Bailey] and Helen McCoy." Buffkin testified that "[t]he reason for this is because these are the three that Mr. Barrett could get to write statements about Ada Perry. The only three when he asked everybody in there but nobody would say anything"; that with respect to the next to last sentence in paragraph 4 of the Respondent's Exhibit 76, namely, "[i]t is not true that I told Ada there had been no complaints about her" this "wasn't discussed between Bill [Barrett] and I"; that in paragraph 5 of Respondent's Exhibit 76 where it indicates "threw smocks and gloves" Mr. Barrett and I went over this and I told him then—he asked everybody all laundry workers threw smocks to expedite the procedure"; and that the Company

> had 4,800 people or 2,000 people coming up at one time and there are three people in laundry to service these people. It's a mad house and it's going constantly. He and I discussed this. She did not throw smocks at people. She threw them across the counter to expedite the procedure to get people out.

Sherri Buffkin further testified that the sixth and seventh sentences of paragraph 5 in Respondent's Exhibit 76 which read "[t]his is a big plant, with new people coming in all the time. NOT EVERYONE KNEW HER" (upper case in original), "wasn't even my statement at all. This was completely and totally Mr. Barrett's statement. This didn't ever come out of my mouth"; that while she told Barrett that Larry Johnson told her to put a warning ln the files stating that it is a customer service, paragraph 6 of Respondent's Exhibit 76 is not her statement at all and she explained to Barrett that she did not send Perry back to the conversion laundry because she was doing her job in the old laundry and people could not get along with Helen McCoy who was on the other side, and it was easier for her to remain over there; that the first two sentences of paragraph 8 on page 4 of Respondent's Exhibit 76 "like I said I don't—this wasn't me. I was not there. I don't know. This is what he [Barrett] told me Hall said";[263] that she did not have this conversation with Hall; that specifying Marion Brown in paragraph 9 of Respondent's Exhibit 76 was an honest mistake; that when Respondent's Exhibit 76 was drafted Barrett was aware that she did not tell Perry during her termination meeting "I told her that she had been told she was responsible for her own action." (See the fifth sentence of par. 9.); that while the ninth sentence of paragraph 9 of Respondent's Exhibit 76 reads "[s]he had even been involuntarily transferred because of her actions", the transfer was not because of that; that the last sentence of paragraph 10 of Respondent's Exhibit 76, namely "[i]f her normal personality is to pick at people and argue with them and abuse them, then as we told her, that personality is not good enough" was "Mr. Barrett's statement. This was not my statement. This was his ending to the conclusion of the statement therefore not my words"; that with respect to the "as we told her" in that sentence, she did not tell Perry, it never came up, Barrett was aware of the fact that she did not tell Perry, and he was aware when the statement was drafted; that while she had meetings in general with all of her employees, Barrett "narrowed it down to one employee to mean specifically this employee"; that when he narrowed it down it was not accurate, and Barrett appreciated the fact that it was not true; and that when she and Barrett left Perry's unemployment hearing, where she had indicated that she had not counseled Perry individually but only in a group, Barrett told her that she should have stated that she had counseled her individually and "[t]hat's where this come [sic]from. This was from an unemployment hearing."

In response to further cross-examination by Katz, Sherri Buffkin further testified that she was division manager when she signed Respondent's Exhibit 76; that she did not make any changes to the "AFFIDAVIT"; and that she swore under penalty of perjury that it was true and correct.

On redirect Sherri Buffkin testified that the seventh sentence of paragraph 5 of Respondent's Exhibit 76, namely "NOT EVERYONE KNEW HER [Perry]" was a statement Barrett made up and put in when they were discussing it; that as demonstrated by General Counsel's Exhibit 43, Olga Anderson, and not Marion Brown, was the human resources representative in the Perry termination; that the 14th sentence of paragraph 6 of

[262] The sixth sentence of par. 4 of R. Exh. 76 reads: "I talked to Ada many times about her attitude and behavior and counseled her for it."

[263] As noted above, the first sentence of par. 8 of R. Exh. 76 reads "[o}n about January 28 and 29, Second-Shift Plant Superintendent John Hall observed Ada at length engage in the rude, abusive, argumentative conduct for which she had been repeatedly warned." And the next sentence which is the last full sentence on this page reads: "He also made sure that Ada saw that he had been watching her."

Respondent's 75, namely "[i]t was like she dared him to tell her what to do" was a direct statement from Bill Barrett after she told Barrett that McMillan "kept saying she wanted to go back upstairs. She wanted to go to laundry. She wanted to go up there. She did not—she didn't want to take that job because she was happy where she was"; that when Barrett "said well it was like she dared him to do it. I said I wouldn't say that. Well that's what you're saying. That was Mr. Barrett's statement. That was not my statement"; that she worked for the Respondent when she gave Respondent's Exhibits 75 and 76; that with respect to Respondent's Exhibit 75 she was called down to the office to give a statement, Barrett and she sat down, and Barrett proceeded to type on a lap top what they were discussing; that she did tell Barrett that there were statements in Respondent's Exhibit 75 which were not correct and the statement stayed in then; that with respect to the last sentence in paragraph 2 of Respondent's 75, namely "People who had problems with Margo would often talk to me," the only people who had problems with Marge McMillan were (a) Billy Jackson who told her that McMillan had a problem with Sherrie Owens, (b) John Hall, who telephoned her at home, and (c) Superintendent Ray Locklear was upset because McMillan had jewelry on, and this is what she told Barrett before he drafted "People who had problems with Margo would often talk to me"; that regarding that portion of the first sentence of paragraph 3 of Respondent's 75, namely "she [McMillan] was a frequent source of conflict with many people," the conflicts arose because McMillan was correctly enforcing company policy and notwithstanding the fact that she explained this to Barrett he did not put that down the way she explained it; that she and Barrett discussed the conflict twice, that is the way he put it down, and she did not contradict him; that she told Barrett that everybody in the laundry argued over the pettiest mess and Barrett put down "[s]he [McMillan] also argued with coworkers in the laundry" (see the third sentence of par. 3 of R. Exh. 75); that she explained what happened in the Hall-McMillan incident and in the whole of paragraph 3 of Respondent's 75 Barrett did not write down exactly what she said to him; that the Ray Locklear warning involved jewelry but there is nothing in paragraph 3 of Respondent's 75 about jewelry;[264] that she did not tell Barrett that "[s]ome employees in the laundry transferred or quit because they would not work with Margo [McMillan]" (see the first sentence of par. 4 of R. Exh. 75), but rather Billy Jackson made this statement; that regarding the next sentence in Respondent's Exhibit 75, namely "Sherrie Owens transferred," Sherrie Owens did transfer because she was about to be terminated for not doing her job and she went over this with Barrett; that with respect to the next sentence of Respondent's Exhibit 75, namely "Ken Phillips actually quit his job because he could not work with Margo," she did not make this statement to Barrett and Ken Phillips left because he got another job, she did not know where he went and "we tried to locate him"; that Billy Jackson, who is McMillan's supervisor, told Barrett in her presence that Ken Phillips quit because he got another job; that regarding the first sentence of paragraph 5 of Respondent's Exhibit 75, namely "Billy Jackson and I verbally counseled with Margo about her attitude," she did not discuss this with Barrett but she could understand how he might have mistakenly assumed this fact since she did sign, along with Billy Jackson, a disciplinary record—Respondent's Exhibit 66; that with respect to the third sentence in paragraph 5 of Respondent's Exhibit 75, namely "[s]he [McMillan] improved only for about a week," she did not make this statement to Barrett but rather she told Barrett that there was a remarkable difference in McMillan's attitude; that Billy Jackson was not there during the entire time that she gave this statement to Barrett and "actually if I'm not mistaken Mr. Barrett typed this one [R. Exh. 76 and] [h]e wrote this one [R. Exh. 75] and Billy was called in and it was all on different legal pads . . . . and then a lady attorney came back and had this and I signed it [R. Exh. 75] later"; that regarding the fourth sentence of paragraph 5 of Respondent's Exhibit 75, namely "[n]o matter what happened, Margo blamed it on other people," she did not make this statement; that the first sentence in paragraph 6 of Respondent's Exhibit 75, namely "Margo picked fights with just about anybody who came up to the laundry," is not accurate because McMillan did not pick fights; that McMillan had one altercation that she was aware of and she told Barrett about it; that in that one altercation McMillan came to her about a woman on the kill floor who was giving her a problem; that she spoke with the woman and the woman's supervisor, Hester Sailor, and asked the supervisor to keep the woman away from the laundry; that she explained this all to Barrett and he went and got a statement from Hester because Hester did not like Margo; that Barrett did not write paragraph 6 as she stated it; that to the extent Respondent's Exhibits 75 and 76 conflict with the testimony she gave at the hearing herein on November 4, 1998, everything she testified on November 4, 1998, would be the truth; and that she signed Respondent's Exhibits 75 and 76:

> [b]ecause I had a job. Mr. Bill Barrett himself told me to fire Margo. Larry Johnson and Jerry Null said to fire Ada [Perry] or Jerry Null personally. Larry was pissed off.
>
> I'm not about to go against the Company General Manager and the Vice President. I mean I'll tell them and I have told them when my opinion disagrees with them and I think I'm wrong—I think they're wrong but I'm not about to lose my job for something like that. I'm sorry.

Sherri Buffkin further testified on redirect that she knew at the time she signed Respondent's Exhibits 75 and 76 that they were not correct and "[i]t's something I have to live with"; that she signed Respondent's Exhibits 75 and 76 to maintain her job; that Barrett was aware of the fact that statements in these two "AFFIDAVITS" were not accurate; that by testifying at the hearing herein she realized that she was putting herself and her husband at risk; and that she testified at the hearing herein:

> [b]ecause I was not comfortable with this at the time and I want to sleep at night. I have nothing to lose. I'm not gaining anything from this. I'm not getting anything out of this except to ease my conscience and be able to sleep at night for what has gone on here. I know what happened and it wasn't right.

[264] Sherri Buffkin testified in terms of earrings where as R. exh. 65, Ray Locklear's disciplinary record regarding the incident, refers to a necklace.

On recross Sherri Buffkin testified that Barrett took the notes for Respondent's Exhibit 75 and another female attorney came back and typed this; that she did not remember how long before she signed Respondent's Exhibit 75 on October 22, 1997, that Barrett took the notes; that she remembered that she

> went and sat in the office and he took the statement. He called Bill—Billy Jackson downstairs and then he had to leave. Then within a week or so a lady come [sic] back. I'm not sure of the time frame. A lady came back and called me in to what is now—Melrose's Office and handed me the statement. It was already typed up.
>
> . . . .
>
> A. I'm not aware of the time frame. I'm aware Bill and I sat down. I'm aware of where we were. I'm aware that he came downstairs but I'm not aware of that [when Barrett took the notes].
>
> Q. And you're positive that Bill was the one who took this statement?
>
> A. Joel, to be—I'm sorry. Mr. Katz, I don't mean—don't take this any way but I've spoken with you concerning this.
>
> I've spoken with Bill Barrett concerning this, and I've spoken with the lady attorney that came back. This one [R. Exh. 76] I specifically remember Bill Barrett and I sitting in Daniel's office at the little round table.
>
> . . . .
>
> A. This one [R. Exh. 75] I couldn't be completely if it was you or him. He took notes. Somebody else—
>
> . . . .
>
> A. Someone else. It may have been you Joel. I don't remember but the notes that were taken from this is what occurred here.
>
> Q. Notes that you are saying Mr. Barrett took at some time but you have no idea when. Is that right?
>
> A. No sir, I don't. Mr. Barrett took notes and you took notes and the woman attorney gave me the paper.
>
> Q. Okay, so now you're saying that I took notes but you just made a very specific allegations about Mr. Barrett, have you not?
>
> A. Yes, sir, I sure have.
>
> Q. But now you're saying you really don't remember who prepared this statement?
>
> A. No, sir, I'm saying I very specifically remember speaking to Bill Barrett. There is no doubt in my mind about that. I remember Bill Barrett and I being in the accounting industrial engineer office when he called Billy Jackson downstairs. As far as the rest of it goes I'm not certain. That I remember distinctly. I mean there is no doubt.
>
> Q. And today notwithstanding the fact that on two different documents you swore under penalty of perjury that you were telling the truth. Today is actually the day you're saying you're telling the truth because you couldn't sleep at night. Is that right?
>
> A. That is true.
>
> Q. Okay, it has absolutely nothing to do with the fact that you were fired from the Company, does it?
>
> A. No, sir . . . .

In asking Sherri Buffkin about the above-described portions of the statements Respondent had her sign, Katz pointed out to her at least 14 times with respect to Respondent's Exhibit 75 and at least 25 times with respect to Respondent's Exhibit 76 that the statements were given under penalty of perjury. Sherri Buffkin admits that the "AFFIDAVITS" collectively contain numerous false material statements. In other words, Sherri Buffkin admits that she made a number of false material statements under penalty of perjury. As noted above, Sherri Buffkin also testified that not only did Attorney Bill Barrett know this but that some of the false statements originated with Barrett. If Sherri Buffkin committed perjury with her "AFFIDAVITS" and Barrett was the originator of some of the false material statements, then there is a question as to whether Barrett suborned perjury.[265]

Sherri Buffkin was fired by the Respondent on September 23, 1998. She testified on cross-examination that she was fired because she took a Motrin at work and because of the fact that, with permission, she had given away two umbrellas to employees that were from vendors; that Larry Johnson telephoned her house and told her that as of that day she no longer had a job; that Johnson told her that she had a choice in that she could either resign due to personal business, personal matters, or she could be terminated; that she told Johnson that he had taken the option away from her, this was not a resignation, and if he wanted to terminate her then he must do so; that Johnson said that is what he would do; that she asked Johnson for his reasons; that Johnson said, "[T]here are none"; that she asked Johnson what he was going to put on the termination and he

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[265] It is noted that both R. Exhs. 75 an 76 refer to 28 U.S.C. § 1746. The statute making "penalty of perjury" provisions applicable to matters required or permitted to be supported by sworn declaration authorizes use of unsworn declarations under penalty of perjury, rather than sworn declarations under oath.

Another Sec. 18 U.S.C. § 1622, reads as follows:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years or both.

The Respondent, by having R. Exhs. 75 and 76 received in evidence in the circumstances extant here, waived any attorney-client privilege with respect to the two affidavits. No one compelled the Respondent to introduce the two "AFFIDAVITS." The Respondent itself chose to introduce the two "AFFIDAVITS" in its tactical attempt to impeach the credibility of Sherri Buffkin. Since these two exhibits place in issue questions of perjury, subornation of perjury, and knowingly introducing false statements of material facts, they would fall under the crime fraud exception, separate and apart from the Act. Additionally, the Union points out on brief that making false statements to a Federal agency, including the Board, is a felony, 28 U.S.C. § 1001. A lawyer may not falsify material evidence or aid in its creation or preservation if he knows, or it is obvious that the evidence is false. And a lawyer may not offer material evidence the he knows to be false. If a lawyer has offered material evidence that he knows to be false, the lawyer is responsible for taking reasonable remedial measures. This also places in issue the question of whether Katz knew that R. Exhs. 75 and 76 contained false material statements and nonetheless went ahead and had them received in evidence. If Katz knew, then there would be a question of whether he violated any laws or any ethical rules of the Bar to which he is admitted.

said it would be blank; that she then asked Johnson what is the cause; and that Johnson responded, "[W]ell at this point Sherri, between you and I, I no longer trust you, yes, sir, in answer to your question."

The Respondent's purchasing agent at Tar Heel, Emogene (Susie) Jackson, testified that from September 1996 until September 1998 her supervisor was Sherri Buffkin; that she did not play any role in Buffkin's discharge, she did not recommend that Buffkin be discharged, and no one in the Company asked her if she thought Buffkin should be discharged; that she does basically the same job Buffkin did before she was terminated; that Buffkin was suspended for about a week before she was terminated; that during her suspension Buffkin telephoned her at work and at home; that when Buffkin telephoned her at home Buffkin said that she was not returning to work, she was going to file for unemployment and that

> she was going to say that Bill Barrett made her file those—fire the other employees, recommended that she fire Ms. Perry and Ms. McMillan, that she was going to tell that Larry Johnson fired her even though she was going to quit, she was going to tell that Larry Johnson fired her, that she would go over there and she would cry and she would lie like shit and say that she begged for her job, she had a daughter to support, and he told her to get out.

Emogene (Susie) Jackson further testified that this was the first time that Buffkin mentioned Barrett's name in conjunction with the discharge of either McMillan or Perry; that Buffkin packed up all of her belongings in the office and took them out the door when she left on suspension, which was prior to the time she was actually terminated; that Buffkin got the job of purchasing agent by undermining her predecessor by hiding supplies so that the plant would run out of supplies, and by falsifying documents and then going to management and telling them that her predecessor was not doing her job; that she has known Buffkin for about 8 years, their families socialize outside work, and she babysat Buffkin's child on average 2 weekends a month; that on a weekly basis Buffkin asked her to cover for her when she would leave work; that in late May 1998 she accompanied Buffkin on her way up the stairway to the purchasing office when Buffkin reported to work and Buffkin was complaining about a back ache; that 1-1/2 later Buffkin went home and telephoned her that evening at home and Buffkin said that she was going to be on leave for awhile since she had lifted some boxes in the label cage and pulled a muscle in her back; that Buffkin did not hurt her back on the job lifting boxes since Buffkin did not leave the office that morning until she went downstairs to go home; that she found out that Buffkin filed for worker's compensation benefits because the nurse in the clinic, Susan Cole, telephoned her and asked her if she was present when Buffkin hurt her back; that Cole told her that Buffkin had filed a worker's compensation claim, they do an investigation and they had to ask her some questions; that she told Cole that Buffkin did not hurt her back in the label cage because Buffkin was complaining that morning; that later Safety Manager Mike Hartley asked her if Buffkin hurt her back in the label cage and she told Hartley that Buffkin had not; that after Buffkin was terminated Buffkin telephoned her at work and Buffkin said, among other things, "I'm going to sue the Company, I'm going to lie on Larry Johnson, I'm going to lie on anyone that had anything to do with the dismissal of Ada Perry, Margo McMillan, and she was going to sue the Company on those grounds"; that during this conversation Buffkin also said that she was going to get Bill Barrett, John Hall, and Larry Johnson; that in her second conversation with Buffkin after Buffkin had been terminated Buffkin said that "we could join together and turn the testimony that she had previously given for the Union about Margo [McMillan] and Ada [Perry], and said that we could sue the Company and get a lump sum of money out of it"; that in her last conversation with Buffkin after her termination Buffkin, who had telephoned her at work, said, "[i]ts your damn fault. You set me up to get my job"; that she told Buffkin that she, Buffkin, had fired one clerk and suspended another clerk, and the clerk she had suspended went down and made all these allegations which led to Buffkin's suspension;[266] that the clerk who made the allegations about Buffkin was Patricia Blount, who is the wife of Supervisor James Blount, and the clerk who was terminated was Amy Chavis, who is the wife of Crew Leader Jason Chavis, and they were disciplined because when Buffkin returned to work from a week off she determined that these two employees had used the company telephone for personal telephone calls; and that she told Buffkin that she did not have anything to do with Patricia Blount going downstairs and making the statements that she did.

On cross-examination Emogene Jackson testified that Buffkin asked her to report to work on a weekend and Buffkin "went over the entire plant and took up supplies and hid them in the laundry room and told Rachel to tell no one they were there so come Monday morning she wouldn't run out"; that while she did not help Buffkin hide the supplies (tape) she was with Buffkin when Buffkin hid them; that Buffkin did this to undermine her predecessor, Michele Rawl; that on another weekend she was with Buffkin when Buffkin had some of her warehouse employees, including Andrew Mitchell, take hand towels out of the warehouse and hide them so come Monday morning Rawl would be out of that supply; that she kept her mouth shut about the supply incidents because she was afraid that she and her husband, who also worked for Buffkin, would lose their jobs; that with respect to hiding the tape "I may have carried some of them but she [Buffkin] specifically took them herself to the laundry and hid them"; that Buffkin changed the numbers on physical inventory before she sent them to Smithfield, Virginia, which would show that Rawl was carrying too many supplies in the plant, and although there would be a fabricated shortage of tape, Rawl would not order more tape because the inflated inventory figures showed there was a supply of tape in the plant; that she never complained about Buffkin changing the numbers; that Rawl was sent back to Smithfield Virginia sometime in 1997; that Buffkin was vindicative, she would lie, cheat, and steal, she would sabotage coworkers, and she would slander managers, including Jerry Null, when they

[266] It was indicated by counsel for the Respondent that this was offered as what Emogene Jackson said to Buffkin during this telephone conversation and was not being offered for the trth of the matter asserted.

questioned her actions; that up until the time Buffkin was terminated she and Buffkin were close friends who took care of each other's children and whose families socialized together; that Buffkin filed for workers compensation about a month or so before she was suspended;[267] that she told Buffkin that she was questioned about Buffkin's workers compensation claim and Buffkin dropped the claim; that Buffkin told her that Susan Cole asked her to come into the plant to take a urinalysis test; that she was not worried about Buffkin being vindictive with respect to the information she gave Cole because Cole was a member of management, Cole asked her not to say anything, and they were not going to tell Buffkin what she told them; and that after Buffkin dropped the workers compensation claim Mike Hartley, the corporate safety manager, asked her the same questions about Buffkin's alleged injury that Susan Cole had asked her.

The Respondent's employee Patricia Blount testified that Sherri Buffkin was her supervisor when she, Blount, was a crew leader in the laundry room and when she was a purchasing clerk from May to September 1998; that she gave her prescription Motrin for headaches to Buffkin when she asked for it; that one day when she did not have her prescription Motrin at work Buffkin told her that it was her job security; that the Respondent has family day, which is an annual picnic for employees at which employees receive gifts and prizes; that Buffkin was in charge of sending out letters to vendors soliciting gifts and prizes for family day; that in September 1998 Buffkin took two Slimline telephones given to the Respondent for family day and she gave one of them to Rachella Dawson who was one of the employees who worked under her; that she saw Buffkin also take two cordless telephones; that Buffkin said that she was going to take one home and give the other one away; that in September 1998 she and the other clerk who worked with Buffkin, Amy Chavis, told Buffkin that she was giving everybody stuff and she had not given them anything; that Buffkin gave them each a golf umbrella; that as memorialized by Charging Party's Exhibit 13, she was suspended for 3 days on September 14, 1998, for using the company telephone for personal use;[268] that when she left the plant after she was suspended she went to the Texaco station and telephoned Smithfield, Virginia and spoke to Buffkin's boss, Elaine Abicht; that she told Abicht about the family day gifts and about having to page Buffkin when she was not in the office to let her know that Abicht had telephoned; that Abicht asked for her home telephone number and said that she was going to speak with Buffkin; that on September 15, 1998, she telephoned the plant and asked to speak with Larry Johnson; that the following day she met with Johnson and Jerry Null and she told them about the family day gifts, about the phone calls and how they always had to cover; that "he" asked her if she still had the umbrella and she got the golf umbrella from her car and gave it to "him"; that she told Johnson and Null about the medication; that she told Johnson about when she did not bring in the medicine and Buffkin told her it was her job security; and that she told Johnson that she did not know if Buffkin said that in a playing manner or if she was "for real."

On cross-examination Patricia Blount testified that she was upset with her suspension; that she was using the company telephone for personal telephone calls and she, along with others. had been verbally warned about that; that after Buffkin gave the verbal warning she told her that she could use the company telephone to call her doctor and she did not have a problem with her using the company phone for personal calls but she should not stay on the phone for a long period of time; that she told Larry Johnson in her meeting with him on September 16, 1998, what Buffkin told her about personal phone calls after the verbal warning; that when the prescription Motrin no longer worked she was given a prescription for a stronger medication; that when Buffkin asked her, Buffkin said that she needed something for her headache and she did not want Tylenol; that she did not report Buffkin asking for a prescription medication because "[s]he was my supervisor" and "[s]he was over me so there was nobody I could have went to"; that when she was suspended she knew to telephone Abicht and Johnson so at that time she knew that there were people above Buffkin; that when she told Larry Johnson about the prescription medication he asked her did not she know that she should not be giving out her medication but he did not write her up for it; that she told Johnson that she continued to give Buffkin her medication because Buffkin was her supervisor; that when she received the golf umbrella she did not have a problem with receiving a gift that was meant for the employees at family day; that it was only after she was suspended that she mentioned it to managers higher than Buffkin; that during the verbal counseling about using the company phone for other than for company business, she was told she could not use the phone without prior authorization;[269] and that her suspension meeting with Buffkin and a representative of human resources lasted 10 to 15 minutes.

On redirect Patricia Blount testified that she was suspended on the Monday Buffkin came back from vacation. Subsequently, Patricia Blount testified that she thought Buffkin pulled the telephone records which showed that she made three telephone calls when Buffkin was on vacation; that one of the calls was long distance; that two of the calls were to her doctor's office and one of the calls was to her house; that she knew that if she disagreed with the action being taken by a human resources manager or representative that she had the right to appeal in the human resources department;[270] that there was no reason that she did not call someone in the human resources

[267] Earlier, Emogene Jackson testified that Buffkin made the filing in May 1998. Buffkin was terminated in September 1998.

[268] The "*MANAGEMENT REMARKS*" section of the disciplinary record reads as follows:

> Employee was counseled about use of company phone. Employee and the entire department was advised by the Department Manager not to use Company phone for personal use, without authorization. Employee violated this rule and therefore was suspended for 3 days.

The box for final warning was checked. And the form was signed by Buffkin, Patricia Blount, and a human resources representative.

[269] Patricia Blount did not testify that she said during her suspension meeting that after the oral warning Buffkin told her she could use the phone for personal calls as long as she did not stay on the line for a long period of time.

[270] It is noted that this witness worked as a clerk in human resources for 2 years.

department as opposed to calling Smithfield, Virginia, and then Larry Johnson; that she called Abicht because she had told her and Amy that if they had any problems they should call her; and that Abicht did not suggest or recommend that she speak with Larry Johnson.[271]

The Respondent's plant manager, Larry Johnson, testified that he terminated Sherri Buffkin because he felt that as the plant manager and her boss on site that he could no longer trust her, what she told him; that he decided that she was not truthful because she called in one Friday in 1996 indicating that her daughter was sick and she needed to stay home; that Susie Jackson called him and told him that Buffkin was not at home but rather she went with her daughter to the beauty parlor; that he sent security guard Larry Ashley to the beauty parlor and he later reported to him that Buffkin and her daughter were getting their hair done; that he decided that he could not trust Buffkin anymore because in the fall of 1998 Buffkin left work and went home; that the next day he called Buffkin at home and informed her that it was company policy that if someone gets hurt on the job, an accident report had to be filled out and the person had to submit to a urine analysis; that Buffkin said that she would and she told him that she hurt herself at work in the label cage picking up boxes of labels; that Buffkin did not come in that day; that the safety director for Corporate spoke to him the following day indicating that Buffkin needed to fill out the accident report; that Buffkin did not fill out the accident report and when she returned to work she did not pursue any workers' compensation claim; that many times he was unable to get Buffkin in her department and he would find her in the smoking cafeteria with her Supervisors Billy and Susie Jackson and the crew leader at all different hours of the day; that in the spring of 1998 he told Buffkin to start setting scheduled breaks; that in 1998 Buffkin asked him if she could come in late on a Monday and he told Buffkin that he wanted her to report as normal for the first shift; that Buffkin left a message at his home over the weekend that she needed to speak with him; that they did not speak over the weekend and Buffkin reported 20 to 30 minutes late that Monday, and she told him that she had been at a NASCAR race and she got a speeding ticket trying to get back to work on time; that after Patricia Blount was suspended for misuse of the Company's telephone she telephoned him indicating that she wanted to meet with him and Jerry Null; that this occurred about two weeks before Buffkin's discharge; that Patricia Blount told them that Buffkin had been asking her for prescription medication for a period of time and once when she did not have it at work, Buffkin told her that it was her job security to bring that medicine every day; that Patricia Blount also told them that she noticed that telephones in a box in the office were gone and she asked Buffkin about it; that Buffkin told her that she had given the telephone to employee Rachella because she did not have one at home and Buffkin needed to be able to telephone her at home; that Patricia Blount asked Buffkin for something since Rachella got a telephone; that Patricia Blount received a golf type umbrella from Buffkin and Patricia Blount brought the umbrella to the meeting with her; that the phone and the umbrella came from vendors; that it was a pretty normal practice for vendors to send in all types of paraphernalia such as cups, T-shirts, hats, flags and posters, and "Sherri was allowed to hand those out to employees or how she felt it was necessary to hand those out" (Tr. 5539); that the phone and the umbrella were items which were sent in for family day gifts according to Patricia Blount and Sherri Buffkin; that every year for family day the Respondent has a picnic for all the employees at the plant and it gives out free gifts through a raffle type system; that vendor Landon Strapping told him, after he terminated Sherri Buffkin, that the phone was meant for family day; that Elaine Abicht came from Smithfield Packing in Virginia to Tar Heel and he, Abicht and Null held a meeting with Buffkin in Null's office; that Buffkin said that she had gifts for family day and she gave an umbrella to Patricia Blount, an umbrella to Amy Chavis, and a telephone to Rachella; that Buffkin said that the prescription was Motrin; that Buffkin was told she was suspended for a week; that later he, along with Null and Abicht, saw Buffkin in a restaurant, Bigman's, eating lunch; that he was later told by someone else who was in the restaurant, Respondent's employee Gigi Demeanor, that after he left Buffkin referred to Abicht as a "bitch" and said that if Larry Johnson "wanted for her to take a drug test, she would be glad to as long as I'd go to the nurse's station and take one with her" (Tr. 5547);[272] that he never met and he did not recall ever speaking to Jerry Dew; that during her week of suspension he telephoned Sherri Buffkin and told her that he felt that she had done a good job for the Company as a purchasing agent but he felt that he could not trust her in what she was telling him and he was going to let her go; and that he told Buffkin that he would be glad to write her another letter of recommendation like the one he did before because she was a good purchasing agent.[273]

On cross-examination Larry Johnson testified that around Christmas time vendors gave not only purchasing agents but upper management gifts; that he believed that there was a company policy which required that prior permission from the person's immediate boss be obtained before the gift is accepted; that he, along with Bill Bishop and Noel Messerole, accepted a 3-day fishing trip to Florida where the vendor paid for the whole trip; that he received prior permission; that the gratuities that were issued to Sherri Buffkin were of relatively little value and they did not come anywhere near the level of a fishing trip; that at the meeting when Sherri Buffkin was suspended he wanted to terminate her, and Jerry Null and Elaine Abicht told him that he had one vote and they needed to give her one more chance; and that he subsequently terminated Buffkin.

Subsequently, Larry Johnson testified that his knowledge regarding the possible misuse of items by Sherri Buffkin is limited to two umbrellas and one telephone; that the two umbrellas went to employees other than Buffkin and to his knowledge the one telephone went to an employee and not to Superintendent

[271] Patricia Blount testified that although Abicht said that she would telephone her if she had any questions, Abicht did not telephone her after she called Abicht in Smithfield, Virginia.

[272] Demeanor did not corroborate Johnson.

[273] Johnson testified that about 6 months before this he wrote a letter of recommendation for Buffkin when she had a job opportunity in South Carolina and she wanted to "start clean"; and that he wrote the letter of recommendation to "get her out of my hair."

Buffkin; that it was not, in his opinion, a situation where Buffkin took something for herself;[274] that when Susie Jackson called him about Buffkin going to the beauty parlor with her daughter, Susie Jackson, did not seek any assurance from him that this would not get back to Buffkin and that subject was never specifically discussed during that telephone call; that he believed that Patricia Blount carried the umbrella into the office with her when she came into the meeting; that before the meeting he had asked her husband, James Blount, to have her bring the umbrella with her to the meeting; and that while he heard through the grapevine about tape being hid, he was never able to substantiate the story and he did not believe that Susie Jackson worked for Sherrie Buffkin during Michele Rawl's tenure.

Jerry Dew, who is the sales manager for Carolina Graphic Press, testified that the company he works for manufactures food and drug labels; that his father owns the company, which employs about 22 employees; that Smithfield Packing Tar Heel Division was one of his customers in early 1998; that in January and February 1998 the Respondent accounted for about 40 percent of his company's business and if the account had been lost, his company would have had to lay off one-third of its employees; that he dealt with Sherri Buffkin as the Respondent's purchasing agent for a little over 3 years; that he visited Buffkin at the Tar Heel facility once a week on average and he spoke with her over the telephone three or four times a week; that Buffkin was the only person at Tar Heel responsible for determining whether his product was purchased or not; that he has had the opportunity to observe Buffkin interact with others when he was in the plant on the average once a week; that his visits to the Tar Heel plant averaged 3 to 4 hours; and that he believes that Buffkin is an untruthful person and his testimony regarding Buffkin's character for veracity is based on "the way . . . [Sherrie Buffkin] pressured our Company into giving gifts and money to herself to benefit from."[275] On cross-examination Dew testified that in the early part of 1996 he was in the Tar Heel plant meeting with Sherrie Buffkin 3 or 4 days a week; that he met with Buffkin in her office and in the warehouse; and that in 1997 he went to the Tar Heel facility one time a week and he met with Buffkin in her office for 3 to 4 hours.

Thomas Ross testified that he signed Respondent's Exhibit 1(a) which is an affidavit indicating that Smithfield Packing did not waive its privilege as to communications between its attorney and Sherri Buffkin.

Jere Null testified that Sherri Buffkin was terminated in September 1998; that Buffkin suspended Patricia Blount and Amy Chavis for excessive use of the telephone; that he had a meeting with Elaine Abicht, Larry Johnson, and Patricia Blount; that during this meeting Patricia Blount told them that Sherri Buffkin had taken two telephones which had come in for family day, keeping one for herself and giving one to an employee; that Sherri Buffkin gave her and Amy Chavis umbrellas which had come in for family day after they asked for something; that Sherri Buffkin had taken Patricia Blount's prescription pain killers and told Blount that the medication was her job security; that after Blount left the meeting, he, Abicht, and Johnson discussed the situation and then the three met with Sherrie Buffkin; that Buffkin said the she did not take two telephones but she had given one telephone to an employee who did not have a telephone at her house; that Buffkin admitted giving away the two umbrellas and she admitted taking what she described as prescription strength Motrin but she did not think either was a big deal; that Larry Johnson then told Sherri Buffkin that he was tired of the problems in her office with the turnover and he was skeptical about her truthfulness regarding the incident where she originally said she had a workers' compensation injury; that he reminded Buffkin that he had told her that she had to run her office in a professional manner and she had not always done that; that he told Buffkin that when she disciplines someone like Patricia Blount she does not want to take it because she feels like Buffkin was not living by the same rules; that they suspended Buffkin for 1 week although Larry Johnson wanted to fire Buffkin for taking gifts from the Company; that after meeting with Buffkin he, Abicht, and Larry Johnson went for lunch to Bigman Barbecue in Tar Heel; that while they were eating Buffkin came in with Susie Jackson; that subsequently, he was told by Gigi Demeanor and Roxanne Garris, who were in Bigman Barbecue with Sherrie Buffkin after, he, Abicht, and Larry Johnson left, that Buffkin "became very animated and was laughing and animated toward us as we walked through the parking lot" and Garris said that Buffkin was "very pissed off";[276] that later that day or the next day he asked Susie Jackson and another woman (identified only as Patty) who worked in Buffkin's office if Buffkin came back to the office after he met with her; that Susie Jackson and the other woman told him that Buffkin claimed that she had called Abicht a "bitch" and that with respect to Larry Johnson telling her that he ought to make her take a drug test, Buffkin said that she "told him that we can both go down and piss right now and we can piss in front of each other as far as she was concerned";[277] that this did not happen in the meeting he, Abicht, and Larry Johnson had with Buffkin but that is what he was told Buffkin said happened when she later spoke with the people in her office; that the Company has a policy regarding gifts from vendors, namely tell your boss and get it cleared; and that he did not authorize her to accept NASCAR tickets, hotel accommodations, cash, rental cars, or plane tickets from a vendor.

On cross-examination Null testified that Buffkin came to him once, indicating that she was having trouble running her department because some clerks had quit and she did not know what to do; that on this occasion he told Buffkin that her office was chaotic and that she needed to start leading by example and start running the office more professionally; that he did not think she did a very good job managing but she was an excellent purchasing agent; that he was aware that Buffkin was continually promoted during her tenure with the Respondent; that he accepted a fishing trip and tickets to a race in Charlotte,

[274] At this point in his testimony Johnson did not refer to any race tickets.

[275] This testimony is not credited. In addition to an insufficient foundation under Rule 608(a) of the Fed.R.Evid., Dew was not a credible witness. He was caught lying a number of times while testifying at the trial herein.

[276] Neither Demeanor nor Garris corroborated Null.

[277] Neither Susie Jackson nor "Patty" corroborated Null.

North Carolina, from vendors; that he told Blount that she knew it was wrong to take the umbrella but he did not discipline her or Chavis for it; that company policy is do not accept a gift from a vendor without informing your boss, except for inconsequential gifts with a value up to $25; that he was not sure of the specifics because Buffkin did not work for him, she worked for purchasing and he believed that purchasing had a policy among the people in that division regarding what they could and could not do; that he did not know if the policy was in writing but he believed that he saw it some time ago; that the Respondent valued the cordless phone at $80 to $90 and $45 to $50 for each golf umbrella; that *he did not recall* attending a meeting in 1997 at which both John Hall and Sherri Buffkin were present;[278] that accepting de minimus gifts such as dinners from vendors is acceptable but larger things are not; that a dinner could cost $50; that the umbrellas were not a gift in that they were a contribution for family day; that he does not know the cost of the telephones or the umbrellas; and that it has been the unwritten policy of the Tar Heel plant that if someone wanted to accept something of greater value than $25, they needed to let their boss know.

On further cross-examination Sherri Buffkin testified that she took prescription Motrin from Patricia Blount once and from Amy Chavis once; that just before the 1997 Board election Jere Null gave her a prescription nerve pill but she did not take it; that she reported to Elaine Albicht in Smithfield, Virginia, and also to Null and Larry Johnson; that Smithfield did not have a policy requiring her to report gifts from vendors but she did report them to Null and Larry Johnson and sometimes to Albicht; that she did not report meals; that in 1997 John Nelson was at Smithfield and he required that anything over $25 had to be reported; that when Nelson left Smithfield Null told her that they could accept gifts again from vendors; that although Null said nothing about a reporting requirement, she continued to report gifts, telling Null and Larry Johnson even when she handed out T-shirts and caps to employees; that she has accepted basketball, football, and NASCAR tickets, wine, liquor, a jacket, a shirt, and motel rooms in Daytona, Florida, and Talladega, Alabama (for NASCAR races in February and April 1998), from vendors; that Jerry Dew of Carolina Graphics paid for the motel room; that Randy Alexander of Cry-O-Vac paid for the 2 nights at Daytona and the two race tickets were his personal tickets; that Jerry Dew paid for 2 nights at the Sheraton in Daytona; that she reported the gifts of the motel rooms and the Daytona race tickets to Null; that she may have received two cordless telephones from Chris Cardon of Landon Strapping for family day; that she did not keep one of the cordless phones that came in for family day for herself and she did not give one away to an employee; that she did receive plane tickets to a NASCAR race but they were not paid for by a vendor in that Dew's wife works for Delta Airlines and Dew told her that he gave her three of his wife's employee free trip tickets; that originally Dew gave her two airline tickets but when he found out that she had four tickets to the Talladega race, he offered her a third ticket so she could take her daughter, along with her husband; that she reported the airline tickets to Null; that she did not initially include the airline tickets in her original response regarding what gifts she received because it had "slipped her mind"; that she received $50 at Christmas for dinner at the Lone Star in the place of a gift certificate; that just before she was going on vacation the week before she was suspended in September 1998, Dew offered her cash and she refused his offer; that she did not know how much cash was involved; that Dew constantly comes to the plant and he offers trips to Cancun, ski weekends, fishing trips to the beach for a weekend, but she turned him down; that when he offered her cash she told him that it was out of the question, it was inappropriate; that she received a $25 gift certificate to Lone Star and a gift basket at Christmas; that she reported all the gifts to Null and Larry Johnson; that she never led a vendor to believe that the Respondent's business with that vendor depended upon the provision of the gifts or item that they gave to her; that in the beginning of 1998 she had a conversation with Paul Toy about attending a NASCAR race at Rockingham, North Carolina, in October and Toy gave her three tickets to the race, the same as the year before; that she reported the tickets to Null and Johnson; that she told Toy that her parents were going to attend the Rockingham race and he asked her if they had tickets; that Toy did not tell her that he was not sure that he would be able to get approval for extra tickets to the Rockingham race; that she did not suggest to Toy that he submit an expense report to his company for the extra tickets as a donation to Smithfield's family day; that she reported the two tickets for her parents; that she made no secret of the fact that vendors were paying for parts of her trip to Daytona in February 1998 because she did not believe that there was anything wrong with it but Larry Johnson told her that she did not need to broadcast it and they should keep it to themselves; that Randy Alexander of Cry-O-Vac has about 16 personal tickets to the Daytona race that he gives away every year; that the hotel stay in Orlando was paid for by Randy Alexander and Dew paid for the hotel in Daytona; that Dew repeatedly offered her a trip to Cancun, Mexico, until he took the trip himself and did not like it because people were getting mugged and robbed; that before Dew offered her hotel accommodations in Daytona, she did not tell him that a competing label manufacturer was going to be tested in the plant; that she could not fly back from the 1998 Talladaga race because Larry Johnson wanted her back at work Monday morning so she had to rent a car, and she received a speeding ticket on the way home; that she did not demand that Dew pay her $600 in cash for her rental car and speeding ticket; and that the rental car cost her $231, and she did not have to pay for the speeding ticket because Danny Priest went to the district attorney and got her into a driver's class at Bladen Community College.

On redirect, Buffkin testified that General Counsel's Exhibit 63 is her certificate for the driver's course; that she gave a cheap $5 phone sent in for family day, and not a cordless telephone, to a sanitation crew leader, Rachella Dawson; that Amy Chavis and Patricia Blount asked her for an umbrella and she gave them two umbrellas which had come in for family day;

[278] If he had not, Billy Jackson could have similarly testified the he did not (as opposed to "did not recall") attend a meeting with Bill Barrett and Sherri Buffkin in 1997. Such testimony would not have involved any attorney-client privilege.

that she replaced the two umbrellas she gave away with umbrellas from Cry-O-Vac and they were furnished for family day; that she told Null about the April 1998 Talladega trip at the beginning of the year; that the Talladega race ticket cost between $65 and $85; that she told Null that Dew obtained free airline tickets for her through his wife; that the trip to Daytona was in February 1998 and she told Null about receiving tickets for it from Randy Alexander; that it was commonplace for her to receive NASCAR trips and basketball and football tickets; that she was present when Null received a shotgun from a vendor; that in 1996 she told Null and Larry Johnson that her predecessor, Michele Rawl, received $300 cash the month of her birthday from Jim Grant of vendor Tee-Pack, and to her knowledge Rawl was not disciplined for this; that when she reported the $300 gift to Null and Johnson they told her not to worry about it; that when she became purchasing agent she replaced Tee-Pack with Cry-O-Vac to get better service and better pricing; that Dew's company could deliver to the plant in 1 hour and 10 minutes and gave better pricing and better service than a competitor; that John Nelson required that anything over $25 had to be reported but that was before she was in purchasing; and that after Nelson left Null told her that there was no requirement to report gifts over $25.

On recross Buffkin testified that even though after Nelson left Smithfield there was no rule about reporting gifts from vendors, she always reported them "because . . . [she] had that type of relationship with Jere Null"; that she replaced the two umbrellas she gave to Patricia Blount and Amy Chavis because Larry Johnson told her the day before she was suspended that he did not appreciate her giving away the two umbrellas because they were for employees; that previously Larry Johnson told her that she could give away small items to employees; and that she had been doing this for 3 years. Subsequently, Buffkin testified that the day she returned from her vacation in September 1998 she was told by Larry Johnson to fire Amy Chavis and suspend Patricia Blount; and that the replacement umbrellas were received by Federal Express from John Wills at Cry-O-Vac on September 18, 1998.

Paul Toy, who is a salesman with vendor National Starch and Chemical Corporation, which supplies glue to the involved Tar Heel facility, testified that the Tar Heel plant is one of his accounts; and that he dealt with Sherri Buffkin for the approximately 3 years that she was the purchasing agent or assistant purchasing agent.

Dew further testified that in February 1998, Carolina Graphics paid for 2 nights at a hotel in Daytona in February 1998 for Sherri Buffkin; that Respondent's Exhibit 220 is the corporate receipt for the charge at the Daytona Hilton for February 16 and 17, 1998; and that the stay was charged over the telephone.

Joel Katz testified that he met with Sherri Buffkin before she signed the affidavit received herein as Respondent's Exhibit 75; that this meeting occurred on October 22, 1997; that Margie Case, another attorney in his firm, drafted the affidavit; that he was certain that Sherri Buffkin read at least part of the affidavit in his presence because she pointed out to him that her name was misspelled in the affidavit and he corrected the misspellings and had her initial the corrections; that when he gave Buffkin the affidavit he told her that he wanted her to take a look at it, make sure that it was one hundred percent accurate and sign it; that Buffkin took a look at it and almost immediately pointed out the misspelling of her name in the affidavit, which was before she appeared to read through the rest of it; that after the spelling of her name was corrected, Buffkin took the affidavit back and appeared to read it for a few minutes; that when she reached the end of the affidavit he asked Buffkin how does it look, she said, "great," he asked her if she wanted to make any changes, and she said no and signed the affidavit; that other than the correction of her name, Buffkin did not say that she believed anything in this affidavit was incorrect or untrue; that Barrett did not participate with him in Buffkin's signing of this affidavit; and that he brought the signed affidavit back to Margie Case. On cross-examination Katz testified that regarding Respondent's Exhibit 75, his instructions were simply to bring the affidavit to Sherri Buffkin and have her sign it; and that Buffkin appeared to read the affidavit 2 to 4 minutes before signing it.[279]

Margie Case testified that she was the attorney who took Respondent's Exhibit 75 and Barrett did not participate in the taking of this affidavit; that she met alone with and interviewed Sherri Buffkin at the Respondent's facility in Tar Heel on October 8 or 9, 1997, in connection with the preparation of this affidavit; that the affidavit was typed on October 9, 1997, according to Respondent's Exhibit 225, which is a computer document profile; that she dictated Respondent's Exhibit 75 to her secretary at the firm after she interviewed Buffkin and she included specified sentences in the affidavit "[b]ecause that's what she [Buffkin] told me" (Tr. 7360);[280] that she did not re-

[279] The Union moved to strike Katz' testimony after he refused to testify with respect to what was told in his presence to employees who were observers for the Company just before the election by the Respondent. Later, Barrett, after testifying that "you can get into an LMRDA problem if, as a lawyer, you meet with employees during an election," testified that all he did with the company observers was to go through the same instructions to observers that the Board agents use at an election. If that is all that occurred, why was Katz instructed by another of Respondent's counsel not to answer the question because it called for an attorney-client privileged communication? The Union's motion to strike the testimony of Katz, which was taken under advisement at the trial herein and is renewed on brief, is denied.

[280] Case cited (a) the last sentence of par. 2, namely "People who had problems with Margo [McMillan] would often talk to me," (b) the first sentence of par. 3, namely "when Margo McMillan worked for Carolina Food Processors, she was a frequent source of conflict with many people," (c) the third sentence in par 3, namely "She also argued with co-workers in the laundry," (d) the last sentence in par. 3, namely "She had been warned before by Ray Locklear and by Billy Jackson, her supervisor," (e) par. 4, namely "Some employees in the laundry transferred or quit because they could not work with Margo. Sherrie Owens transferred. Ken Phillips actually quit his because he could not work with Margo," (f) the third and fourth sentences (counsel for the Respondent referred to it as the second and third sentences) of par. 5, namely "She improved only for about a week. No matter what happened, Margo blamed it on other people," (g) the first and second sentences of par. 6, namely "Margo picked fights with just about anybody who came in the laundry. She should have been terminated before she actually was, but I felt sorry for her," and (h) sentences 13–16 of par. 6, namely "She said she still refused to take it, and she wanted to work in the laundry. It was like she dared him to tell her what to do. John told

call Buffkin telling her that the laundry was full of woman and they all would argue over the pettiest mess; that Buffkin did not tell her that Sherry Owens actually transferred because she was about to get terminated for not doing her job; that Buffkin did not tell her that Ken Phillips actually quit his job because he got another job; that Buffkin did not tell her that McMillan had made a remarkable difference in her attitude after being counseled as distinct from the reference in the affidavit to improving for only about a week; that she gave the affidavit to Katz to have it signed; that Buffkin never told her that anything in the draft affidavit was untrue or incorrect; and that Respondent's Exhibit 226 is her notes of her interview with Buffkin. On cross-examination Case testified that she did not know whether or not Barrett spoke to Sherri Buffkin at any time other than when she interviewed Buffkin about the McMillan termination; that she did not keep a dictation tape; that Buffkin told her things which are not in her notes; and that she did not recall any conversation with Barrett about Smithfield Packing following her interview of Buffkin but before she gave the affidavit to Katz to have executed. Case's notes of her interview of Buffkin in preparation for the affidavit are as follows:

> Re: Margo McMillan
>
> Box Warehous Mngr
> **Sherry Bufkins**
>
> McMillan caused conflict w/ everybody. Twice was called @ home re John Hall McMillan. Emergency in plant. Needed immed. rain suits & she wanted to argue.
>
> Hestor Saylor superv. on kill floor, argued abt how she talked to kill floor ees.
>
> McMillan's job—ees come in w/ cards—issue whatever card says. You drop off dirty one today & get a card. Present card tomorrow & present clean one.
>
> Ray Locklear, cut floor supt., warned her not jewelry. Then she comes back and criticizes supervisors about it.
>
> Termed due to bad attitude. I'm too soft hearted or I would have fired her before. She's a parent & I felt sorry for her. I tried to move her where it wouldn't have been as many people. She was used to environment. Not hot Same environment as before. She refused. *Suspended before offered new job*.
>
> She was to be termed to begin w/> but *Bufkins* felt sorry for her.
>
> A list of ees transferred & *some quit* because they couldn't work w/ her.
>
> Sherrie Owens transferred—see her note. [Emphasis added.]

The list referred to in Case's notes was not introduced in this proceeding. As noted above, Case testified that from these 24 lines of notes[281] and assertedly from other information Buffkin allegedly gave her during their meeting, which information was not made part of the notes or recorded in any way, she drafted the following 66 line[282] "affidavit":

> 1. My name is *Sherri Bufkin*. I am employed at Carolina Food Processors in Tar Heel, North Carolina, which is a pork processing plant. I am the Production Support Manager. My duties include managing the sanitation crew, the laundry, the warehouse receiving area and grounds, and the purchasing of all supplies, except for maintenance and hogs.
>
> 2. I supervised Billy Jackson, who was the direct superior of Margo McMillan when she worked at Carolina Food Processors. Billy is warehouse and laundry supervisor. Margo worked in the laundry as the crew leader on the second shift. Employees come to the laundry with their dirty clothes at the end of the day and receive a card. At the beginning of work the next day, they present the card, and they receive clean items. People who had problems with Margo would often talk to me.
>
> 3. When Margo McMillan worked for Carolina Food Processors, she was a frequent source of conflict with many people. Many employees complained to their supervisors about her, and I heard the complaints from the supervisors. She also argued with her co-workers in the laundry. I remember receiving two calls at home concerning problems with her. On one of these occasions, John Hall, who was the plant superintendent on second shift, had an emergency in the plant. He needed rain suits immediately for certain employees to be able to take care of a problem. She wanted to argue with him about cards, and about his authority, while production was down and there were major problems. She had been warned *before* by Ray Locklear and by Billy Jackson, her supervisor.
>
> 4. Some employees in the laundry transferred or quit because they could not work with Margo. Sherrie Owens transferred. Ken Phillips actually quit his job because he could not work with Margo.
>
> 5. Billy Jackson and I verbally counseled with Margo about her attitude. Billy gave Margo a written warning for her attitude on June 27, 1997. She improved only for about a week. No matter what happened, Margo blamed it on other people.
>
> 6. Margo picked fights with just about anybody who came up to the laundry. She should have been terminated before she actually was, but I felt sorry for her. She is a parent and I did not want to be responsible for firing her. Also, she had worked at the company for a long time and I didn't want to see her lose the job. John Hall and I finally tried to move her to the warehouse, in the label area,

her to go to HR. Margo then said she would take the warehouse job, but John told her he wasn't offering it today."

[281] The 24 lines are the typed version. Her handwritten notes cover 28 lines. But obviously for purposes of comparison we should be dealing with oranges compared to oranges.

[282] The 65 lines do not include anything other than the material in the numbered paragraphs of the body of the "affidavit." Again, for purposes of comparison, the same type is used herein. It is noted that the type used in the original "affidavit" is smaller and therefore there are fewer lines. The spacing between the paragraph number and the beginning of the paragraph, namely five spaces, was retained for accuracy. As noted above, the "affidavit" begins with "NOW COMES Sherrie Bufkin, who, pursuant to 28 U.S.C. 1746, and under penalty of perjury, swears to the following."

> where she would not have had to deal with quite so many people, and where she would be used to the environment. She flatly refused. She said she wanted to stay in the laundry and not be a crew leader any more. I felt she would be better off changing to get away from such a public area as the laundry, but she simply would not take the new job. John Hall and I talked with her, but she not only kept refusing, but also listed a number of other jobs that she would not take, which basically ruled out the entire plant. At that point, John told her that he and I did not know what job she could have, so she should just go to the Human Relations (HR) office. She went upstairs and started to get people to sign a petition saying she didn't have a bad attitude. The next day she came back and talked to John and me again about the warehouse job. She said she still refused to take it, and she wanted to work in the laundry. It was like she dared him to tell her what to do. John told her to go to HR. Margo then said that she would take the warehouse job, but John told her he wasn't offering it today. He said she already turned it down yesterday. She started to cry. I wasn't involved after that. [Emphasis added.]

It is noted that while Sherri Buffkin's name was misspelled in the "affidavit" as originally typed, it was not misspelled the same way as in Case's notes.[283] On the one hand, it is also noted that while *"Suspended before offered new job"* (emphasis added) appears in Case's notes, it does not appear in the "affidavit." On the other hand, there are many, many facts in the "affidavit" which do not appear in Case's notes. Focusing on just one of those alleged facts for purposes of illustration, it is noted that the third (and last) sentence of the "affidavit" indicates "Ken Phillips actually quit his job because he could not work with Margo." The only possible reference to this in Case's notes is the following sentence: "A list of ees transferred **& some quit** because they couldn't work w/ her." (Emphasis added.) As noted above, a list was not introduced herein. And it seems questionable whether such a list would cover those who quit in addition to those who transferred. As noted above, Case testified that one of the sentences in the "affidavit," viz, "Ken Phillips actually quit his job because he could not work with Margo" was included in the "affidavit" because that it what Buffkin told her. Case also testified, as noted above, that Buffkin did not tell her that Ken Phillips actually quit his job because he got another job. As noted above, what Buffkin testified is that Billy Jackson (not Sherri Buffkin), who was McMillan's supervisor, told Barrett (not Case) in her (Buffkin's) presence that Ken Phillips quit because he got another job. While Billy Jackson testified at the hearing herein, he did not deny he was present with Barrett when Barrett met with Sherri Buffkin. He could have testified about whether he was present without there being any question of a violation of attorney-client privilege. He did not so testify. Additionally, Billy Jackson could have testified why Ken Phillips quit without getting into any question of attorney-client privilege. Consequently, since Billy Jackson did not deny his presence at the Barrett, Buffkin, Billy Jackson meeting and Billy Jackson did not deny that Ken Phillips quit because he got another job, Buffkin's testimony about Billy Jackson being present during a portion of her meeting with Barrett for the taking of information for the "affidavit" regarding McMillan, Respondent's Exhibit 75, is credited. Her above-described testimony about what Billy Jackson told Barrett is also credited.

William Barrett testified that he did not meet with Sherri Buffkin about the contents of the affidavit received as Respondent's Exhibit 75 before she executed it and he did not participate in the preparation of or the execution of that affidavit by Buffkin; that he did not have any contact with Buffkin at or near the time this affidavit (R. Exh. 75), was prepared or executed; that the first time he recalls seeing the name Ada Perry was when an unfair labor practice charge was filed in early February 1998; that he contacted the involved Board's Regional Office and received a summary of the allegations, Respondent's Exhibit 236; that he had no knowledge of Perry before she was discharged; that he participated in the preparation of the affidavit received herein as Respondent's Exhibit 76; that he met with Buffkin in her office to take her statement in preparing Respondent's Exhibit 76, and the meeting occurred on the date the affidavit was prepared and signed, April 15, 1998; that when he met with Buffkin on April 15, 1998, he had a laptop and a portable printer; that the information in the affidavit (R. Exh. 76), came from Buffkin and he typed the affidavit as he was speaking with her; that Buffkin never did or said anything to indicate that she did not believe that the affidavit (R. Exh. 76), was inaccurate or untrue; that he included specified sentences in Respondent's Exhibit 76 because that is what Buffkin told him;[284] that Buffkin never told him that Perry actually remained in the old laundry because she was doing her job there and people could not get along with Helen McCoy, who was on the other side; that during his conversation with Buffkin on April 15, 1998, they did discuss what she and Hall told him about Hall's observations of Perry on January 28 and 29, 1998, and he, Barrett, had no independent knowledge of this; that when he took Buffkin's statement she told him that the reason Perry was warned, disciplined, and ultimately terminated was because of her rude and argumentative type of conduct; that he printed the affidavit during his meeting with Buffkin, she read it in his presence, she made no changes in it since they had made the changes on the computer screen, and she executed the affidavit (R. Exh. 76); that he told Buffkin that the statement was under oath and he told her to read it carefully and they could handwrite in any changes and initial them; that Buffkin did not indicate that she wanted to make any changes and she signed the affidavit (R. Exh. 76), in his presence; that he believes that everything in the affidavit is correct based on what he and Buffkin had discussed; that he represented Smithfield in connection with Perry's claim for unemployment benefits before the North Carolina Employment Securities Commis-

[283] All but one of the misspellings in the "affidavit," as noted above, were later corrected.

[284] The specified sentences in R. Exh. 76 are the first, second, fifth, sixth, seventh, eighth, and ninth (last) sentences in par. 4; the first, second, third, fourth, sixth, and fifth (last) sentences of par. 6; the first and second sentences of par. 8; the fourth, fifth, eighth, and tenth (last) sentences of par. 9; and the fourth and fifth, and sixth (last) sentences of par. 10.

sion and Buffkin testified at the hearing in that proceeding; that Buffkin did not do or say anything to indicate to him that any testimony she gave during that hearing concerning Perry's unemployment claim was untrue or inaccurate; and that after the unemployment hearing, or at any other time, he did not tell Buffkin that she should have stated that she counseled Perry individually because that is how Buffkin testified, namely Buffkin testified that she had counseled Perry individually. On cross-examination Barrett testified that he probably discussed Respondent's Exhibit 75 with Case but he did not have a specific recollection of it; that prior to Case's interview of Buffkin for Respondent's Exhibit 75 he did not advise Case as to what questions to ask; that he did not see Respondent's Exhibit 75 between the time Case took the affidavit and the time that Buffkin executed it; and that during Perry's unemployment hearing Buffkin testified that on a couple of occasions she had spoken to Perry alone and he was not making a distinction between speaking to and counseling.

On rebuttal Sherri Buffkin testified that she never provided Dew with the receipt for the rental car she used to return from her above-described trip to Talladaga; that she received the speeding ticket (GC Exh. 65), on Monday morning on her way to work;[285] that this was the ticket that Danny Priest interceded on her behalf on; that Dew never gave her $600 in cash for her trip to Talladaga; that she did not give Dew a copy of the above-described speeding ticket; that she never hid or intentionally misplaced any supplies or materials while working for the Respondent; that she never told Susie Jackson to lie for her; that she never threatened the termination of Dew's business if he did not give her cash or gifts; that she never told Dew that the Talladega trip cost $600 and she needed to be reimbursed for that; that she never told Susie Jackson to tell Dew that he needed to pay the $600 or she was going to terminate his business; that she never told Dew that he could just give her cash for family day; that she never told Paul Toy or any other vendor that he could write off the tickets to race events as a family day gift to the plant and she has no say with respect to anyone else's expenses;[286] that Susie Jackson never passed on to her any written complaints regarding Margo McMillan; that she never told Susie Jackson that she would lie to get back at the Company because she had a daughter to support; and that Charging Party's Exhibit 48 is a copy of the fax Dew sent her in his handwriting referring to the hotel reservations (with the reservation numbers) for February 16 and 17 at the Daytona Beach Hilton, and for April 26 and 27 in Birmingham, Alabama, at the Sheraton, and airline reservations for the "25th" and "28th" with flight numbers and times, seat numbers and "266.00."[287] Buffkin testified that when they arrived at the Sheraton in Birmingham they had no record of the reservation and she had to pay to stay elsewhere.

On surrebuttal Susie Jackson testified, as part of an offer of proof, that Sherri Buffkin had two of her clerks, Amy Chavis and Patricia Blount, telephoned Dew on a daily basis for a month. Subsequently Susie Jackson testified that she moved into the office with Buffkin around mid-1997; that at that time Dew came into the office maybe once or twice a week and he would just drop in, drop off his orders, speak, and leave and then sometimes he would maybe stay an hour at a time; that Dew discussed the fact that he had gone to Cancun, Mexico, on occasions; that she did not tell Larry Johnson about what she believed to be some of the misconduct on the part of Sherri Buffkin because she was concerned about her job and her husband's job; that she did tell Larry Johnson that Sherri Buffkin took sick leave and went with her daughter to the beauty parlor but she was not concerned about losing her job over that because Larry Johnson telephoned her and asked her directly where Buffkin was and she told Johnson because he told her that it was between her and him; that unless management called her and asked her a direct question she did not get into Sherry Buffkin's dealings; that Larry Johnson gave her an assurance during this conversation that she would not have to worry about her job; and that when Larry Johnson called her he told her that it was just between her and him, no one else would know where he got his information but he needed to know where Sherri Buffkin was at.

On surrebuttal Jerry Dew testified, as part of an offer of proof, that he did not have any business dealings with Patricia Blount and he had no contact with Amy Chavis; that he had not talked with Patricia Blount or Amy Chavis by telephone; and that he did not receive any telephone messages other than the one from Susie Jackson regarding any alleged demand on the part of Sherry Buffkin after the aforementioned Talladaga trip.

Analysis

In *Larsdale, Inc.*, 310 NLRB 1317, 1333 (1993), Judge Phillip McLeod concluded, as here pertinent, as follows:

> [Margie] Case is an experienced labor lawyer. Yet when I asked her about her familiarity with unilateral settlements, she denied any familiarity with this section of the Rules and Regulations. I found Case totally incredible on this issue.

[285] The citation was issued for doing 72 miles per hour in a 55 mile per hour zone onNorth Carolina Highway 131 near Dublin, North Carolina, on Monday, April 27, 1998, at 7:50 a.m., and the citation ended up costing $83 for improper equipment—speedometer. Buffkin testified that the 1997 Chrysler described in the citation was her own car and that she received the ticket 3 miles from the Tar Heel plant.

[286] Paul Toy's testimony on this matter was given in an offer of proof. Previously, when Larry Johnson, who made the decision to terminate Buffkin, was asked at the end of his testimony about his knowledge regarding possible misuses of items submitted for the Respondent's family day he limited it to two umbrellas and one telephone. Additionally, as noted above, Johnson agreed that the family day gifts which were used for something other than family day were given to employees and that it was not a situation where Buffkin took something for herself. In these circumstances, even though Johnson made a previous reference to Paul Toy and two tickets, it did not appear, in view of Johnson's above-described testimony, that family day gifts other than the two umbrellas and the one telephone were considered in Buffkin's termination. It is noted that while Johnson testified that Toy told him that two of the tickets were for family day, Toy, in the aforementioned offer of proof, testified that he did not write the two tickets off on his expense account as family day gifts because he did not think they were going to family day and that would just make it worse for him in his company. Toy's testimony is not being taken out of the offer of proof. And if Toy's testimony about the extra tickets was taken out of the offer of proof, I would not credit it.

[287] The name of the airline does not appear on this sheet.

> Robert Valois, her cocounsel, at least had the grace to admit he knew the Union had the right to file objections, while professing no knowledge of what the Regional Director would do if such objections were found to be meritorious. Valois started his career as a field examiner with the Board. After working for the Board for a number of years and obtaining his law degree, Valois entered the private practice of law, where he specialized in labor law. I find it simply incredible not only one, but two experienced labor lawyers from the same firm claim to be unfamiliar with a charging party's appeal rights in cases of unilateral settlement.

The Board reversed some of the findings of Judge McLeod but the Board did not specifically reverse his findings about Case's credibility. In my opinion, Case intentionally lied under oath at the trial herein about a material and very serious matter.[288] She tried to leave herself some "wiggle" room by testifying that she did not recall any conversations with Barrett about Smithfield Packing following her interview of Buffkin but before she gave the affidavit to Katz to have signed.

Barrett also eventually left himself some "wiggle" room when he testified that he probably discussed Respondent's Exhibit 75 with Case but he did not have specific recollection of it. (Tr. 7500.) I do not credit Barrett's testimony about the two "AFFIDAVITS." And if Sherri Buffkin's testimony is credited, there is a question of whether Barrett, who formerly was a Board attorney, suborned perjury or otherwise violated Federal statutes involving criminal penalties.

With respect to the two "AFFIDAVITS," I find Sherri Buffkin's testimony to be credible. Because of the seriousness of the situation, a great deal of leeway was given to the Respondent regarding Sherri Buffkin's credibility.

Susie Jackson was not a credible witness. She testified about how she remained silent about certain alleged wrongdoing on the part of Sherri Buffkin because Susie Jackson was afraid that she and her husband would lose their jobs. And according to her testimony, when she did tell Plant Manager Larry Johnson that Sherri Buffkin took sick leave and went with her daughter to the beauty parlor, she—Susie Jackson—was not concerned about losing her job because (1) Larry Johnson telephoned her and asked her directly where Buffkin was, (2) she told Larry Johnson because he told her that it was between her and him, (3) Larry Johnson gave her an assurance during this conversation that she would not have to worry about her job, and (4) when Larry Johnson called her he told her that it was just between her and him, no one else would know where he got his information but he needed to know where Buffkin was at. But Larry Johnson testified (1) Susie Jackson called him to tell him that Sherri Buffkin was not home but rather she went with her daughter to the beauty parlor, and (2) when Susie Jackson called him about Buffkin going to the beauty parlor with her daughter, Susie Jackson did not seek any assurance from him that this would not get back to Buffkin, and that subject was not specifically discussed during that telephone call. Larry Johnson was not a credible witness but he had no reason to be lying about Susie Jackson's telephone call. In assisting the Respondent with respect to its ill-conceived and poorly executed attempt to undermine Sherri Buffkin's credibility, Susie Jackson, as part of an offer of proof, testified that Sherri Buffkin had Amy Chavis and Patricia Blount telephone Dew on a daily basis for a month. But when Dew subsequently testified as part of an offer of proof, he testified that he had not talked with Amy Chavis or Patricia Blount by telephone and that he did not receive any telephone messages other than the one from Susie Jackson.[289] When this matter was first brought up on cross-examination, one of the counsel for the General Counsel told Dew, "[y]ou don't need to look at Opposing counsel." Dew was blindsided. He was not prepared for this question. Susie Jackson lied under oath a number of times. And Dew lied under oath a number of times. I would not rely on the testimony of Susie Jackson or Dew unless it was corroborated by a reliable witness or reliable document.

Patricia Blount, along with Any Chavis, asked Sherri Buffkin for an item from the family day gifts and she received a golf umbrella. Then Larry Johnson told Sherri Buffkin to suspend Patricia Blount for misuse of the company telephone while Buffkin was on vacation. Though Patricia Blount worked as a clerk in human resources at one time and knew that she had the right to appeal her suspension to human resources, she did not. Instead, she allegedly telephones Larry Johnson.[290] Patricia Blount testified that there was no reason why she telephoned Johnson, as here pertinent, as opposed to going to the human resources department. According to Patricia Blount's testimony, she then meets with Null and Johnson. Johnson agrees that just the three of them are at this meeting. Null does

[288] A comparison of Case's alleged notes of her interview with Buffkin, with the "AFFIDAVIT" in question demonstrates that there are many, many details in the "AFFIDAVIT" that are not in the notes. Buffkin's testimony about how this information was compiled for this "AFFIDAVIT" is credited. As noted above, Billy Jackson met with Buffkin and Barrett and provided a portion of the details in the "AFFIDAVIT." Case now claims she alone drafted the "AFFIDAVIT" based on information Buffkin gave her. As noted above, Billy Jackson could have denied being at a meeting with Barrett and Buffkin in 1997 without getting into any question of privileged communications. Billy Jackson did not deny that he was at a meeting with Buffkin and Barrett in 1997. Billy Jackson did not testify as to why Ken Phillips quit. Billy Jackson could have testified as to why Ken Phillips quit. As long as Billy Jackson did not testify in terms of what he told Barrett or what Barrett (or some other of the Respondent's attorneys) told him, there would not have been any question of privileged communication.

[289] Neither Amy Chavis nor Patricia Blount corroborated Susie Jackson's testimony regarding these alleged telephone calls. Testimony in offers of proof is cited only with respect to the credibility of the witness. Nothing substantive has been taken out of any offer of proof in this proceeding. To be very specific, the General Counsel's offer of proof regarding what Barrett may or may not have said about Margo McMillan to Sherri Buffkin has not been considered. The allegation remains as part of an offer of proof and nothing more. The same approach has been taken regarding all other offers of proof in this proceeding. Nothing substantive has been taken out of an offer of proof in this proceeding. Some of the testimony of Susie Jackson, Dew, and Toy in offers of proof is cited only to show that, in my opinion, each one of these individuals lied under oath as a part of the Respondent's effort to undermine the credibility of Sherri Buffkin.

[290] Her testimony about first calling Albicht is not corroborated in that Albicht did not testify at the trial herein. Also, Patricia Blount testified that Albicht did not tell her to telephone Larry Johnson.

not agree because he places Albicht at this meeting. According to Patricia Blount's testimony she tells Null and Johnson, among other things, about Sherri Buffkin taking (a) two slimline telephones and giving one to Rachella Dawson, and (b) two cordless telephones, with Buffkin saying that she was going to take one home and give the other one away. Null, who alone has Albicht at this meeting, has Patricia Blount telling them that Buffkin took two cordless telephones keeping one for herself and giving one to an employee. Larry Johnson testifies in terms of one telephone and it goes to an employee so that Buffkin did not take anything for herself. This is all very strange. One must wonder whether there was a meeting with Null, Johnson, and Patricia Blount present. Although previously Johnson told Buffkin that she had the discretion to give to employees limited value items given by vendors to Smithfield, Johnson apparently takes the position that the two umbrellas and the one telephone were different because they were earmarked to be given to employees for family day. So notwithstanding the fact that Buffkin did not keep any of the three items that Johnson referred to, he wanted to terminate Buffkin but he was overruled and she was suspended. Patricia Blount did take the umbrella for herself. Consequently, in accord with the treatment of Buffkin, Patricia Blount was disciplined for taking and keeping the umbrella? Strangely, Patricia Blount was not disciplined at all for her alleged transgression. Why not? Perhaps because for some reason Johnson and Null did not view what Patricia Blount did to be a transgression. Null and Johnson, as found above, were not credible witnesses.[291] To the extent that Buffkin admitted certain of the testimony of Patricia Blount, Blount's testimony is credited. Otherwise, Patricia Blount's testimony is not credited unless it is corroborated by reliable documentary evidence or the reliable testimony of another witness.

It is recommended that the Board refer the above-described conduct of Barrett and Case to the General Counsel for appropriate action.[292]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 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. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) On more than one occasion in 1994 threatening its employees with plant closure if they selected the Union as their collective-bargaining representative.

(b) Threatening its employees in 1993 and 1994 with discharge because of their support for the Union.

(c) Threatening an employee in 1993 with discipline for engaging in union activity.

(d) Interrogating an employee in 1994 about his union sentiments.

(e) Informing its employees in 1994 that it would be futile to select the Union as their bargaining representative.

(f) Promulgating an unlawful no-solicitation rule in 1993 and 1994 in order to dissuade its employees support for the Union.

(g) Maintaining and continuing to maintain an overly broad no-solicitation and no-distribution rule regarding Respondent's premises in order to discourage its employees' union support.

(h) Applying its no-solicitation and/or its no-distribution rule on more than one occasion in 1994 in a disparate manner in order to dissuade its employees' support for the Union.

(i) Creating the impression in 1994 among its employees that their union activities were being surveilled.

(j) Engaging in surveillance in 1993 and 1994 of its employees in order to dissuade their support for the Union.

(k) Interfering with its employees' rights through verbal assaults in 1993 in order to dissuade their support for the Union.

(l) Attempting to confiscate union literature from its employees in 1993 in order to dissuade their support for the Union.

(m) Intimidating and coercing its employees in 1993 while union literature was being distributed to its employees in order to dissuade their support for the Union.

(n) Confiscating union literature from its employees in 1993 and 1994 in order to dissuade their support for the Union.

(o) Threatening its employees in 1994 with withholding a pay raise should the Union be selected as their collective-bargaining representative.

(p) Harassing an employee in 1994 because of his support for the Union.

(q) Intimidating and coercing a known union supporter to solicit its employees to abandon support for the Union.

(r) Threatening an employee in 1994 that selecting the Union as their collective-bargaining representative would cause trouble between the Respondent and its employees.

(s) Promulgating a rule in 1994 prohibiting its employees from wearing union or nonunion insignia or paraphernalia of any type while on its premises.

(t) Interrogating its employees in 1997 about their union sympathies.

(u) Threatening employees in 1997 with loss of wages and benefits if the employees selected the Union as collective-bargaining representative.

(v) Threatening employees in 1997 with futility of selecting the Union as collective-bargaining representative.

(w) Threatening employees in 1997 with loss of jobs.

(x) Threatening employees in 1997 with plant closure.

(y) Threatening employees in 1997 with loss of a pay increase if the Union were selected as collective-bargaining representative.

[291] As noted above, Johnson testified about what Demeanor allegedly told him. Null also testified that he talked to Demeanor. But according to Null, she did not tell him what she told Johnson. Null allegedly heard about what Buffkin allegedly said from someone else. None of the employees who allegedly told these two individuals about what Sherri Buffkin allegedly said corroborated Johnson or Null. In addition to finding that Null and Johnson are not credible witnesses, I specifically do not credit their testimony with respect to what they were allegedly told that Buffkin allegedly said the day she was suspended.

[292] Whether Katz knowingly introduced false statements at the trial herein should also be considered.

(z) Threatening employees in 1997 with the inevitability of strikes and strike violence.

(aa) Disparaging the Union in 1997 by stating that the Union would call INS to report workers if the Union won the election.

(bb) Threatening employees in 1997 with unspecified reprisals if the Union won the election.

(cc) Polling employees in 1997 concerning their support for the Union.

(dd) Making a promise of benefits and improved working conditions in 1997 to discourage support for the Union.

(ee) Threatening in 1997 that wages would be frozen if the Union were elected as collective-bargaining representative.

(ff) Threatening employees in 1997 with job loss in the event of a strike.

(gg) Threatening employees in 1997 with plant closure in the event of a strike.

(hh) Assaulting an employee in 1997 in retaliation for employees engaging in union activities.

(ii) Causing the arrest of an employee in 1997 in retaliation for employees engaging in union activities.

(jj) Threatening the use of violence in 1997 in retaliation for employees engaging in union activities.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) On September 20, 1994, suspending Fred McDonald and thereafter failing and refusing to rescind the suspension.

(b) On November 4, 1993, discharging and thereafter failing and refusing to reinstate Lawanna Johnson.

(c) On February 3, 1994, discharging and thereafter failing and refusing to reinstate Keith Ludlum.

(d) On February 10, 1994, discharging and thereafter failing and refusing to reinstate George Simpson.

(e) On November 5, 1994, discharging and thereafter failing and refusing to reinstate Chris Council.

(f) On December 22, 1994, discharging and thereafter failing and refusing to reinstate Fred McDonald.

(g) On January 25, 1995, discharging and thereafter failing and refusing to reinstate Larry Jones.

(h) On January 10, 1994, issuing a written warning to George Simpson alleging that he did not do his job.

(i) On July 14, 1997, discharging and thereafter failing and refusing to reinstate Patsy Lendon.

(j) On August 25, 1997, discharging and thereafter failing and refusing to reinstate Ray Shawn Ward.

(k) On August 27, 1997, discharging and thereafter failing and refusing to reinstate Margo McMillan.

(l) On September 30, 1997, discharging and thereafter failing and refusing to reinstate Tara Davis.

(m) On January 30, 1998, discharging and thereafter failing and refusing to reinstate Ada Perry.

5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act in any other manner.

By the conduct cited by the Petitioner in those of its objections which have been sustained herein, Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on August 21 and 22, 1997, in Case 11–RC–6221.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully issued a written warning to George Simpson on January 10, 1994, the Respondent will be ordered to rescind the warning.

Having found that the Respondent unlawfully terminated the employment of Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, I shall order the Respondent to offer to Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry immediate and full reinstatement to their former positions of employment discharging, if necessary, any replacements hired to fill their positions or, if they no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights or privileges previously enjoyed.

Having found that Respondent unlawfully suspended Fred McDonald on September 20, 1994, the Respondent will be ordered to rescind said suspension.

The Respondent shall be ordered to make whole the employees described in the next two preceding paragraphs for all losses suffered by them as a result of the unlawful discrimination against them. For those of the above-described employees who were unlawfully terminated, the losses will be computed from the date of discrimination against them to the date that the Respondent offers them reinstatement less their net earnings during that period. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall order the Respondent to remove from its records any reference to the unlawful actions against its employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, and in writing notify them that the Respondent's unlawful conduct will not be used as a basis for further personnel action.

A broad cease-and-desist Order is warranted because the Respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979).

The Union contends on brief that the record evidence shows that the Company's unfair labor practices and objectionable conduct were so numerous, pervasive and outrages that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found and that a new election should be held by mail ballot, or, in the alternative, off the Respondent's premises. *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), enfd. in relevant part 97 F.3d 65, 74

(4th Cir. 1996). More specifically, at pages 88 and 89 of its brief, the Union requests the following remedies:

(1) in addition to posting copies of the Notice sought by the General Counsel, the Company should publish the notice in its internal newsletter, and mail copies of the notice to all its current employees who work at the Tar Heel facility, and to all employees on the Company's payroll since July 1993, when the Company began its unlawful conduct, and in addition, post, mail, and publish in the same manner a Spanish language translation of the Notice; all such notices, whether mailed, posted or published should be signed personally by Jere Null, the General Manager;

(2) the Company convene during work time all employees at the Company's Tar Heel facility, by shifts, departments, or otherwise, and have Jere Null read the Notice to the employees, or at Jere Null's option, permit a Board agent to read the Notice. If Jere Null chooses to have a Board agent read the notice, Null shall be present while the notice is read. In either event the Notice must also be read in Spanish;

(3) the Company publish in local newspapers of general circulation a copy of the above Notice 2 times a week for a period of 4 weeks and publish in all Spanish local newspapers a copy of the Spanish language trans-lation; if there exists no local Spanish publication in the area covered by the local newspapers, then a Spanish translation of the Notice shall be published in the local newspaper;

(4) the Company's Chief Executive Officer read the Board's notice at the next meeting of the Company's stockholders;

(5) the Notice be published in the Company's 10K report;

(6) the Company supply the Union, upon request made within 1 year of the date of the Board's order, the names and addressees of its current unit employees;

(7) upon request, the Company grant the Union and its representatives reasonable access to the Company's bulletin boards and all places where notices to employees are customarily posted;

(8) upon reasonable notice, the Company grant the Union reasonable access to the Company's Tar Heel facility in nonwork areas including cafeterias, rest areas, and parking lots, during employees' nonwork time;

(9) allow 2 Union representatives to be present whenever the Company discusses unionization with a gathering of its employees and give the Union equal time and facilities to respond to any address made by the Company to its employees on the question of union representation;

(10) the Company afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which the Union is a participant in a time frame of not more than 10 working days before, but not less than 48 hours before such election.

(11) that the provisions of the immediately preceding numbered paragraphs (6) through (10) apply for a period of 2 years from the date of the posting of the notice provided by the Board's Order or until the Regional Director has issued an appropriate certification following a fair and free election.

The Union further contends that the Respondent's anticipated argument that special notice and access requirements are not appropriate here because prior to this case it had not been found guilty of any unfair labor practices at the Tar Heel facility has no merit as the Board has found, with Court approval, "an employer who strikes the first blow hard enough may not need to strike another." *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981) cert. denied 454 U.S. 837 (1981).

Where, as here, an employer initiates physical violence at or near the polling place just after the election results are announced, and it engages in egregious and pervasive unfair labor practices and objectionable conduct, the reasons for favoring conducting a new election on the Respondent's premises have been substantially undermined. A new election should be conducted off premises at a neutral site the Regional Director deems appropriate. In Charging Party's Exhibit 35, which is an open letter of Jere Null which was published in the newspapers in Bladen and Robeson Counties, it is indicated "[w]e are the No. 1 taxpayer in Bladen County." As indicated above, the Respondent was able to have up to 10 Bladen County sheriff's deputies sitting in its parking lot on August 22, 1997, the final election day, for up to 4 hours awaiting the Respondent's instructions. In choosing the neutral site for the new election, the Regional Director should consider a site outside of Bladen County. If this causes too much of a hardship for employees, than perhaps mail ballots would be the only reasonable approach in the circumstances of this case. Any objections on the part of the Respondent to such an approach must be viewed in terms of the fact that the egregious conduct engaged in by the Respondent goes to the very heart of the election process. The Respondent intentionally created the situation. Others should not be made to suffer the consequences.

The notice and access provisions sought by the Union, except those described in paragraphs numbered (4) and (5), have been shown to be necessary, with minor modifications, in the circumstances of this case.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended[293]

ORDER

The Respondent, The Smithfield Packing Company, Inc., Tar Heel Division, Tar Heel, North Carolina, its agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening its employees with plant closure if they selected the Union as their collective-bargaining representative.

[293] 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.

(b) Threatening its employees with discharge because of their support for the Union.

(c) Threatening an employee with discipline for engaging in union activity.

(d) Interrogating an employee about his union sentiments.

(e) Informing its employees that it would be futile to select the Union as their bargaining representative.

(f) Promulgating an unlawful no-solicitation rule in order to dissuade its employees' support for the Union.

(g) Maintaining and continuing to maintain an overly broad no-solicitation and no-distribution rule regarding Respondent's premises in order to discourage its employees' union support.

(h) Applying its no-solicitation and/or its no-distribution rule on more than one occasion in a disparate manner in order to dissuade its employees' support for the Union.

(i) Creating the impression among its employees that their union activities were being surveiled.

(j) Engaging in surveillance of its employees in order to dissuade their support for the Union.

(k) Interfering with its employees' rights through verbal assaults in order to dissuade their support for the Union.

(l) Attempting to confiscate union literature from its employees in order to dissuade their support for the Union.

(m) Intimidating and coercing its employees while union literature was being distributed to its employees in order to dissuade their support for the Union.

(n) Confiscating union literature from its employees in order to dissuade their support for the Union.

(o) Threatening its employees with withholding a pay raise should the Union be selected as their collective-bargaining representative.

(p) Harassing an employee because of his support for the Union.

(q) Intimidating and coercing a known union supporter to solicit its employees to abandon support for the Union.

(r) Threatening an employee that selecting the Union as their collective-bargaining representative would cause trouble between the Respondent and its employees.

(s) Promulgating a rule prohibiting its employees from wearing union or nonunion insignia or paraphernalia of any type while on its premises.

(t) Interrogating its employees about their union sympathies.

(u) Threatening employees with loss of wages and benefits if the employees selected the Union as collective-bargaining representative.

(v) Threatening employees with the futility of selecting the Union as collective-bargaining representative.

(w) Threatening employees with loss of jobs.

(x) Threatening employees with plant closure.

(y) Threatening employees with loss of a pay increase if the Union were selected as collective-bargaining representative.

(z) Threatening employees with the inevitability of strikes and strike violence.

(aa) Disparaging the Union by stating that the Union would call INS to report workers if the Union won the election.

(bb) Threatening employees with unspecified reprisals if the Union won the election.

(cc) Polling employees concerning their support for the Union.

(dd) Making a promise of benefits and improved working conditions to discourage support for the Union.

(ee) Threatening that wages would be frozen if the Union were elected as collective-bargaining representative.

(ff) Threatening employees with job loss in the event of a strike.

(gg) Threatening employees with plant closure in the event of a strike.

(hh) Assaulting an employee in retaliation for employees engaging in union activities.

(ii) Causing the arrest of an employee in retaliation for employees engaging in union activities.

(jj) Threatening the use of violence in retaliation for employees engaging in union activities.

(kk) Discouraging membership in the Union by discharging, suspending, warning, or otherwise disciplining employees because of their union or other protected activities.

(ll) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, rescind the written warning unlawfully issued to George Simpson on January 10, 1994.

(b) Within 14 days from the date of this Order, offer to Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry immediate and full reinstatement to their former positions of employment discharging, if necessary, any replacements hired to fill their positions or, if they no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, rescind the unlawful suspension of Fred McDonald on September 20, 1994.

(d) Make whole employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against its employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, and within 3 days thereafter notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Within 14 days from the date of this Order, rescind its unlawful rules described above in paragraphs 3(f) and (g) of the conclusions of law and publish notices to employees that such rules have been rescinded and what the lawful rule is, in con-

spicuous places including all places where notices to employees are customarily posted.

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

(h) Within 14 days after service by the Region, post at its Tar Heel, North Carolina facility copies of the attached notice marked "Appendix."[294] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Jere Null, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Mail copies of the notice to all its present employees and to all employees on the Respondent's payroll since July 3, 1993, on or about when the Respondent began its unlawful conduct.

(j) Publish the attached notice marked "Appendix" in any internal newsletter the Respondent may distribute to employees.

(k) Post, mail, and publish in the same manner a Spanish language translation of the Board notice. All such notices, whether mailed, posted, or published, are to be signed personally by Jere Null.

(l) Convene all employees during working time at the Respondent's Tar Heel, North Carolina facility by shifts, departments, or otherwise, and have Jere Null read the notice to employees, or at Jere Null's option, permit a Board agent to read the notice. If Jere Null chooses to have a Board agent read the notice, he shall be present while the notice is read. In either event, the notice must also be read in Spanish. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose or reading such notice by Jere Null.

(m) Publish in local newspapers of general circulation a copy of the attached notice marked "Appendix" two times a week for a period of 4 weeks and publish in all local Spanish newspapers a copy of the Spanish language translation of the notice; if, however, there exists no local Spanish publication in an area covered by one of the local newspapers, then a Spanish translation of the notice shall also be published in the local newspaper.

(n) Supply the Union, upon request made within 1 year of the date of this Decision and Order, the full names and addresses of its current unit employees employed at its Tar Heel, North Carolina plant.

(o) On request, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted in its Tar Heel, North Carolina plant.

(p) On request, grant the Union reasonable access to the Respondent's Tar Heel, North Carolina facility in nonwork areas during employees' nonwork times.

(q) Give the Union notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees at its Tar Heel, North Carolina facility on the question of union representation.

(r) Afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled involving the Respondent's employees at its Tar Heel, North Carolina facility in which the Union is a participant in a time frame of not more than 10 working days before, but not less than 48 hours before, such election. Paragraphs 2(n) through (r) of this Order shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

(s) 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 complaints be dismissed insofar as they allege violations of the Act not specifically found.

IT IS FURTHER RECOMMENDED that Petitioner's Objections to the election held by the Board in Case 11–RC–6221 be sustained to the extent found in this decision, that the results of said election be set aside, and that said case be remanded to the Regional Director for Region 11 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative and with a notice of election consistent with the findings herein.

Dated, Washington, D.C. December 15, 2000.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with plant closure if you select United Food and Commercial Workers Union Local 204, AFL–CIO, CLC as your collective-bargaining representative.

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

WE WILL NOT threaten you with discharge because of your support for the United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT threaten you with discipline for engaging in union activity.

WE WILL NOT interrogate you about your union sentiments.

WE WILL NOT inform you that it would be futile to select United Food nd Commercial Workers Union Local 204, AFL–CIO, CLC as your bargaining representative.

WE WILL NOT promulgate an unlawful no-solicitation rule in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT maintain and continue to maintain an overly broad no- solicitation and no-distribution rule regarding our premises in order to discourage your union support.

WE WILL NOT apply our no-solicitation and/or our no-distribution rule in a disparate manner in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT create the impression among you that your union activities are being surveiled.

WE WILL NOT engage in surveillance of you in order to dissuade your support for the United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT interfere with your rights through verbal assaults in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT attempt to confiscate union literature from you in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT intimidate and coerce you while union literature is being distributed to you in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT confiscate union literature from you in order to dissuade your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT threaten you with withholding a pay raise should United Food and Commercial Workers Union Local 204, AFL–CIO, CLC be selected as your collective-bargaining representative.

WE WILL NOT harass you because of your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT intimidate and coerce you to solicit your fellow employees to abandon support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT threaten you that selecting United Food and Commercial Workers Union Local 204, AFL–CIO, CLC as your collective-bargaining representative would cause trouble between us and you.

WE WILL NOT promulgate a rule prohibiting you from wearing union or nonunion insignia or paraphernalia of any type while on our premises.

WE WILL NOT interrogate you about your union sympathies.

WE WILL NOT threaten you with loss of wages and benefits if you select United Food and Commercial Workers Union Local 204, AFL–CIO, CLC as collective-bargaining representative.

WE WILL NOT threaten you with the futility of selecting United Food and Commercial Workers Union Local 204, AFL–CIO, CLC as your collective-bargaining representative.

WE WILL NOT threaten you with loss of jobs.

WE WILL NOT threaten you with plant closure.

WE WILL NOT threaten you with loss of a pay increase if United Food and Commercial Workers Union Local 204, AFL–CIO, CLC were selected as collective-bargaining representative.

WE WILL NOT threaten you with the inevitability of strikes and strike violence.

WE WILL NOT disparage United Food and Commercial Workers Union Local 204, AFL–CIO, CLC by stating that it would call INS to report workers if United Food and Commercial Workers Union Local 204, AFL–CIO, CLC won the election.

WE WILL NOT threaten you with unspecified reprisals if United Food and Commercial Workers Union Local 204, AFL–CIO, CLC won the election.

WE WILL NOT poll you concerning your support for United Food and Commercial Workers Union Local 204, AFL–CIO, CLC.

WE WILL NOT make a promise of benefits and improved working conditions to discourage support for the Union.

WE WILL NOT threaten that wages would be frozen if United Food and Commercial Workers Union Local 204, AFL–CIO, CLC were elected as collective-bargaining representative.

WE WILL NOT threaten you with job loss in the event of a strike.

WE WILL NOT threaten you with plant closure in the event of a strike.

WE WILL NOT assault you in retaliation for your engaging in union activities.

WE WILL NOT cause your arrest in retaliation for your engaging in union activities.

WE WILL NOT threaten the use of violence in retaliation for your engaging in union activities.

WE WILL NOT discourage membership in United Food and Commercial Workers Union Local 204, AFL–CIO, CLC by discharging, suspending, warning, or otherwise disciplining you because of your union or other protected activities.

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

WE WILL rescind the written warning unlawfully issued to George Simpson on January 10, 1994.

WE WILL within 14 days of the Board's Order, offer to Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry immediate and full reinstatement to their former positions of employment discharging, if necessary, any replacements hired to fill their positions or, if they no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights or privileges previously enjoyed.

WE WILL within 14 days of the Board's Order, rescind the unlawful suspension of Fred McDonald on September 20, 1994.

WE WILL NOT make employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions against our employees Lawanna Johnson, Keith Ludlum, George Simpson, Chris Council, Fred McDonald, Larry Jones, Patsy Lendon, Ray Shawn Ward, Margo McMillan, Tara Davis, and Ada Perry, and within 3 days thereafter notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL within 14 days from the date of the Board's Order, rescind our no solicitation no distribution rules found to be unlawful and publish notices to you—in addition to this notice—that such rules have been rescinded and what the lawful rule is, in conspicuous places including all places where notices to you are customarily posted.

WE WILL supply the Union, upon request made within 1 year of the date of this Decision and Order, the full names and addresses of our current unit employees employed at our Tar Heel, North Carolina plant.

WE WILL, immediately on request, for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, grant United Food and Commercial Workers Union Local 204, AFL–CIO, CLC and its representatives reasonable access to (1) our bulletin boards and all places where notices to employees are customarily posted in our Tar Heel, North Carolina plant, and (2) our Tar Heel, North Carolina facility in nonwork areas during employees' nonwork times.

WE WILL give United Food and Commercial Workers Union Local 204, AFL–CIO, CLC notice of, and equal time and facilities for it to respond to, any address made by us to you at our Tar Heel, North Carolina facility on the question of union representation.

WE WILL afford United Food and Commercial Workers Union Local 204, AFL–CIO, CLC the right to deliver a 30-minute speech to you on working time prior to any Board election which may be scheduled involving you in which United Food and Commercial Workers Union Local 204, AFL–CIO, CLC is a participant in a time frame of not more than 10 working days before, but not less than 48 hours before, such election.

WE WILL mail copies of this notice to our present employees and to all employees on our payroll since July 3, 1993.

WE WILL convene during working time all unit employees at our Tar Heel, North Carolina facility, and have Jere Null read this notice to you or, at our option, permit a Board agent, in the presence of Jere Null, to read this notice to you. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice by Jere Null.

THE SMITHFIELD PACKING COMPANY, INC.