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BP Amoco Chemical–Chocolate Bayou *and* Paper, Allied-Industrial, Chemical & Energy Workers, International Union, Local 4–449. Cases 16–CA–20258, 16–CA–20361, and 16–RC–10189

September 29, 2007

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 8, 2001, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief to the briefs of the General Counsel and the Charging Party.

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

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

These consolidated cases concern two separate sets of events in 1999 and 2000: (1) the Respondent's termination of 37 employees on about August 26, 1999, as part of a postmerger reduction in force, and (2) a subsequent representation election in a unit of the Respondent's employees on April 25 and 26, 2000.

The complaint alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by selecting employees for discharge based on their support for the Union. The judge recommended dismissal of the 8(a)(1) and (3) allegations because each of the alleged discriminatees had signed a valid waiver of all claims relating to the terminations in exchange for severance benefits. The General Counsel and the Charging Party excepted to the judge's recommendation, arguing that the waivers signed by the 37 employees should not be given effect. For the reasons set forth below, we agree with the judge and dismiss the 8(a)(1) and (3) allegations.

The complaint also alleged that the Respondent violated Section 8(a)(1) of the Act through several communications with employees shortly before the election. We adopt the judge's findings that the Respondent, through statements of Supervisors John Harvey and Bob Bradshaw, and through statements contained in three election campaign flyers, violated Section 8(a)(1) by threatening employees with loss of benefits if they selected the Union. We also find that statements of Human Relations Manager Bill Weiche violated the Act.[2] Further, we agree with the judge that these actions, as well as other statements made by Labor Relations Consultant Paul Clark, constituted objectionable conduct.[3] We therefore set aside the election results and direct a second election.

I. THE REDUCTION IN FORCE

Facts

In early 1999, following the merger of British Petroleum and Amoco Corporation, and a company directive to improve productivity by 35 percent, the Respondent decided to significantly reduce its work force. After an extensive review and feed back process to evaluate which jobs and employees would be cut, the Respondent, on August 25 and 26, 1999, notified approximately 145 out of a unit of 775 employees that their employment would be terminated. This group included the 37 alleged discriminatees. There was no active union organizing campaign during this period.[4]

Each employee notified of his or her termination received a severance package that included an "Employee Termination Agreement." The termination agreement provided in pertinent part:

> In exchange, Employee . . . forever releases and waives any claim or liability against the Company, as of the date this Agreement is signed . . . arising out of or in any way related to his or her employment with the Company, including, but not limited to, the termination of his or her employment with the Company . . . including, but not limited to, any claims under the U.S. Age Discrimination in Employment Act . . . and any claims under any other federal, state, provincial, or local enactment or rule of law or equity.

[1] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[2] The judge failed to find that Weiche's statements violated the Act due to the an inadvertent error discussed at fn. 14, infra. We correct this error and find the violation.

[3] The General Counsel excepts to the judge's failure to cite and discuss the testimony of employee Thomas Garland to support the allegations that Supervisor Randy Kay unlawfully interrogated and threatened employees with discharge. We find that the record and decision show that the judge fully considered Garland's testimony and decided to discredit it. The General Counsel, in essence, excepts to the judge's credibility findings regarding Garland. 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.

[4] The Union had campaigned for representation in 1997 and again in 2000.

The agreement stated that the employee had 45 days to sign the agreement and 7 days to cancel the agreement thereafter. The termination agreement also provided for substantial additional severance pay (beyond the 60-days pay provided to all terminated employees), as well as medical and education benefits. Only employees who signed the termination agreement received these enhanced benefits. The Respondent encouraged affected employees to attend off-site informational meetings regarding the severance benefits. At these meetings, the Respondent's representative reviewed the termination agreement in detail and encouraged employees to consult attorneys before signing the agreement.

The parties stipulated that each of the 37 alleged discriminatees signed a termination agreement, was aware of its content, was advised of its meaning, and was encouraged to seek legal advice for clarification. According to 27 of the alleged discriminatees who testified at the hearing, most did consult with an attorney or a union representative before signing the agreement. In addition, most of those witnesses took advantage of the added medical benefits and all accepted the extra severance payment.

Analysis

The issue presented is whether the 37 alleged discriminatees waived their right to file charges with the Board—or have charges filed on their behalf—when they executed the termination agreements in exchange for enhanced severance benefits. We agree with the judge that the agreements effected such a waiver and bar the asserted claims for relief under the Act.[5]

The Board has found, under circumstances similar to those presented here, that it would effectuate the purposes and policies of the Act to give effect to broadly worded waiver and release agreements signed by employees in exchange for enhanced severance benefits.[6] Such agreements serve "'an important public interest in encouraging the parties' achievement of a mutually accepted settlement agreement without litigation.'"[7]

In assessing the validity of such a release, the Board applies the same standard used to assess whether to give effect to a private non-Board settlement agreement. *Hughes Christensen Co.*, supra, 317 NLRB at 634, citing *Independent Stave Co.*, supra, 287 NLRB at 743. The *Independent Stave* factors include: (1) whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violating the Act or has previously breached settlement agreements.[8]

We find that termination agreements signed by the alleged discriminatees meet the standards set forth in *Independent Stave*. First, although both the Charging Party Union and the General Counsel oppose the agreement, there is no dispute that the alleged discriminatees voluntarily agreed to be bound. Not only did each of them sign the agreement, but, as the parties stipulated, they were aware of the content, advised of the meaning, and knew that they were waiving and releasing claims against the Respondent. We thus reject the General Counsel's contention that the employees did not intend to be bound.[9]

Second, the termination agreements were reasonable in light of the violations alleged and the litigation risks pre-

[5] Our dissenting colleague contends that the settlement agreements impact the Union's ability to organize the work force and that, essentially, the Union has an independent right to pursue charges. The Union has not made this argument to the Board. Further, the Union does not represent these employees, nor was it even attempting to organize these employees when the agreements were executed. In these circumstances, we would not give the Union veto power over private agreements between individual unrepresented employees and their employer.

[6] *Hughes Christensen Co.*, 317 NLRB 633, 635 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir., 1996); see also *First National Supermarkets*, 302 NLRB 727 (1991); *Phillips Pipe Line Co.*, 302 NLRB 732, 732–733 (1991).

[7] *Hughes Christensen Co.,* supra (quoting *Independent Stave Co*., 287 NLRB at 742).

[8] Our dissenting colleague contends that we should not apply *Independent Stave* where no unfair labor practice charges had been filed as of the time the parties executed their release agreement. Board law does not so limit *Independent Stave's* applicability. S*ee Septix Waste,* 346 NLRB No. 50, slip op. at 2 (2006) (stating "the mere fact that charges had not yet been filed at the time of the settlement is not a reason to reject it").

Nor does *Clark Distribution Systems,* 336 NLRB 747 (2001), support our colleague's position that private settlement agreements should not be given effect where no charges have been filed. In *Clark*, the Board considered the stage of litigation under the second part of the *Independent Stave* analysis, which concerns the risk of litigation. There, the unfair labor practice case was still in the investigative stage, and there was no way to assess the likelihood that the alleged discriminatees would prevail in litigation. Here, in contrast, we have addressed several weaknesses in the General Counsel's case. Further, signatories to the agreement were invited to and did consult attorneys who could assess the merits of filing unfair labor practice charges. In sum, the issue of whether charges have been filed may be relevant to part of the *Independent Stave* analysis, but the absence of charges is not dispositive.

[9] Our dissenting colleague stresses that the Union and the General Counsel both opposed giving the agreements effect. Although this fact is a consideration under this one factor, it should not be elevated to primary status. See *Hughes Christensen Co.,* supra at 317 NLRB at 634 (effect given to waiver and release agreements signed by discriminatees and Respondent, but opposed by union and General Counsel.)

sented. At the time the agreements were signed, no charges had been filed, and the prospect of litigation was not obvious. Moreover, there was significant risk that a charge alleging discriminatory selection would not be meritorious. Little or no union activity was occurring at the time of the downsizing, and the record does not show that all of the alleged discriminatees had engaged in protected activity or that the Respondent was aware of it. Moreover, the selection process was a careful and lengthy one supported by business justifications. When the General Counsel ultimately presented 27 of the alleged discriminatees at the hearing, many of them were not openly supportive of the position of the General Counsel or Union. Indeed, the General Counsel acknowledged weaknesses in the case, conceding that "[w]e do not have a smoking gun" and that many of the alleged discriminatees had work histories which were "less than pristine." Thus, the termination agreements and attendant enhanced benefits were a reasonable adjustment in light of the litigation risks.

Third, there is no evidence that the agreements were fraudulent, that the alleged discriminatees signed them under duress or threat of coercion, or that they attempted to revoke the agreements. In fact, the Respondent encouraged the alleged discriminatees to consult attorneys, provided them sufficient time to carefully review and assess the agreements, and provided them with the opportunity to revoke the agreements within a reasonable period after execution.

Finally, the Respondent does not have a history of violating the Act or of failing to comply with settlement agreements.[10]

In urging that the termination agreements should not be honored, the General Counsel relies on *Weldun Internationa, Inc.*[11] Specifically, the General Counsel contends that the employees in *Weldun*, like the employees here, were not represented by a union, whereas the employees in *Hughes Christensen*, where the waivers barred their claims, were represented. However, as the judge observed, the Board in *Weldun International* did not change or limit its policy of according effect to waivers and release agreements based on whether an employee was represented by a union. Further, while the Respondent's employees were not officially represented by the Union, many signed the termination agreements after consulting union representatives or counsel.[12]

Based on our evaluation of the *Independent Stave* factors, and consistent with our prior decisions, we find, under the circumstances presented, that it will effectuate the purposes and policies of the Act to give effect to the termination agreements. Therefore, we adopt the judge's decision to dismiss the 8(a)(1) and (3) allegations regarding the terminations of the 37 named employees.

II. PREELECTION CONDUCT

Facts

The Union filed a Petition for Representation on March 10, 2000,[13] and an election was held on April 25–26. The Respondent conducted several mandatory employee meetings during the period from mid-March to early April. Area Supervisors John Harvey and Bob Bradshaw led the meetings, which were held separately for different groups of approximately 10 employees. During these meetings, Harvey told the employees that, if the Union came in, represented employees "would begin with essentially zero" and negotiations would "start from zero—a blank page." Bradshaw also used the "blank page" language. Neither supervisor explained to the employees what the phrase "blank page" meant.

On April 13 and 14, Labor Relations Consultant Paul Clark and Human Resource Manager Bill Weiche conducted another round of employee meetings, most of which were mandatory. The employees were again divided into groups of approximately 10. Clark admitted that at each meeting he told the employees that negotiations would start with a "clean sheet," a "blank sheet," or "start from scratch." According to Clark, he tried to

[10] We recognize that the Respondent violated Sec. 8(a)(1) in the instant case. See the discussion infra. The unlawful conduct, however, occurred in the Spring of 2000, well after the terminations and settlements of August 1999.

[11] 321 NLRB 733 fn. 6 (1996), enf. in part 165 F.3d 28 (6th Cir. 1998).

[12] In *Webco Industries*, 334 NLRB 608, 610–611 (2001), enfd. mem. 90 Fed. Appx. 276 (10th Cir. 2003), decided after the submission of exceptions and briefs in this case, the Board found that a discriminatee did not waive his right to obtain relief under the Act by signing a severance agreement in which he purported to release the respondent from legal claims. After evaluating the validity of the agreement involved under the *Independent Stave* factors, the majority found that the Charging Party's and General Counsel's opposition to the settlement agreement, as well as the respondent's history of serious violations of the Act, were sufficient to thwart that agreement's effectiveness. In contrast, the record here does not establish that the Respondent has had a history of violating the Act.

Likewise, the instant case is distinguishable from *Clark Distribution Systems*, supra at 748–749, and *Metro Networks*, 336 NLRB 63, 66 (2001). In both of those cases, the Board found that the employer-offered waiver and release agreements were unlawful because they included clauses prohibiting the signatory employee from voluntarily providing evidence to the Board in its investigation of charges that concerned other employees. Here, as in *Hughes Christensen*, the termination agreements have no such limitation and only preclude the claims of the employees who entered into the agreements.

[13] All dates hereafter are 2000 unless otherwise indicated.

convey two points during his speeches to the employees: first, that neither party could guarantee what sort of agreement would result from collective bargaining; and second, an overview of certain aspects of labor law, which included references to instances in which collective bargaining allegedly resulted in a net loss to employees. Clark, who had participated in contract negotiations at the Respondent's Whiting Chemical refinery, also asserted that the employees suffered losses in those negotiations. During at least one of these meetings, Weiche also told employees that negotiations between the company and the Union would start at zero, a blank page.[14]

Throughout March and April, the Respondent also distributed several election campaign flyers to employees. Certain flyers contained language similar to that used in the mandatory meetings. Three separate flyers read in pertinent part as follows:

> (1) "More Facts about Union Representation"—Q. Will we lose the raise and bonus we're supposed to receive this month and in April? A. No, but it could be your last bonus and who knows about future raises. You see, if you vote in the Union, the company would negotiate from a blank piece of paper. The company starts at "0". Recent bonuses, recent wage increases, and even the base wage rate will be irrelevant to the bargaining process . . . .
>
> (2) "How are the folks at Whiting Chemicals feeling today? YOU DECIDE"
>
> . . .
>
> Facts: During that period of time [the 10 months of bargaining for a contract], because the contract was still being negotiated, the workers did not receive their normal 1998 wage increase.
>
> (3) "Attention Chocolate Bayou Employees—What will happen if Chocolate Bayou employees get the same deal that Whiting Chemical got last year with PACE?" (1) LOSE THE RAISE YOU WILL GET NEXT YEAR. Whiting PACE representative employees received no raise from February 1997 to March 1999 because the new labor contract was under negotiations until the very end of 1998. The normal cycle (February 1998) was skipped because there was no agreement with the Union on wages at that time; the equivalent at CBW [Chocolate Bayou Works] would be no raise from April 2000 to May 2002. (2) LOSE THE $1.00 AN HOUR ADVANTAGE YOU NOW HAVE OVER PACE EMPLOYEES AT TEXAS CITY REFINERY AND CHEMICALS. Prior to voting in PACE, Whiting Chemical employees earned $1.13 an hour more than PACE Whiting Refinery employees. That $1.13 an hour advantage was lost by the end of bargaining with PACE . . . .

Analysis

The Board has observed that employer statements to employees during an organizing campaign to the effect that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s]," which carry with them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election."[15] Contemporaneous threats or unfair labor practices may lend additional coercive meaning to the employer's remarks.[16] Such statements are unlawful and objectionable when, in context, "'they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore.'"[17] On the other hand, such statements are permissible when they merely describe the bargaining process and/or are made in direct response to union promises.[18] Similarly, statements that employees could lose benefits as a result of bargaining have been found lawful where they "merely [state] what could lawfully happen during the give and take of bargaining."[19]

Section 8(c) of the Act provides that expressions of views or opinions that contain no threat of reprisal or force or promise of benefit are not unlawful. This includes employer communications to employees during election campaigns concerning the employer's general views about, and opposition to, unionism or a particular union. Similarly, employers may make statements to

[14] In his decision, the judge inadvertently stated that employee Kent James testified that Paul Clark made these statements during the meetings. In fact, James attributed the statements to Bill Weiche.

[15] *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003) enfd. in relevant part 400 F.3d 920 (D.C. Cir. 2005). See also *Consolidated Biscuit Co.*, 346 NLRB No. 101, slip op. at 1 fn. 5 and at 36 (2006).

Chairman Battista, who dissented in *Federated Logistics*, finds the facts of that case distinguishable from the instant case. In *Federated*, the specific language used by that respondent conveyed only that the respondent's bargaining position would begin low, thereby properly placing wages and benefits within the context of collective bargaining. 340 NLRB at 260. In contrast here, the Respondent would reasonably be understood as conveying the message that employees would lose wage levels and benefits that they already had.

[16] Id. at 256.

[17] *Webco Industries*, 327 NLRB 172 fn.4 (1998) enfd. 217 F.3d 1306 (10th Cir., 2000), quoting *Plastronics Inc.*, 233 NLRB 155, 156 (1977); see also *Coach & Equipment Sales Corp*, 228 NLRB 440 (1977).

[18] *Clark Equipment Co.*, 278 NLRB 498, 499–500 (1986); *Ludwig Motor Corp.*, 222 NLRB 635 (1976).

[19] *Flexsteel Industries*, 311 NLRB 257 (1993).

their employees that predict economic consequences of unionization, so long as the prediction is "carefully phrased on the basis of objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control."[20] A respondent who does not have an objective basis for such predictions may violate Section 8(a)(1).[21]

Here, as detailed above, the Respondent told all of its employees, through flyers and at mandatory meetings, that if the Union got in, negotiations would start with a blank page, from a clean sheet, from zero, and/or from scratch. The Respondent repeated this message to the employees with little elaboration concerning the risks and the give and take associated with the bargaining process. Additionally, there is no evidence indicating that the statements were made in response to assertions by the Union during the election campaign.

The campaign flyers only reaffirmed the message conveyed during the mandatory meetings. The "more facts" flyer warned employees that if they voted in the Union, an upcoming scheduled bonus "could be your last," because the Respondent "would negotiate from a blank piece of paper." Like the meeting statements, the flyer implied that the Respondent would unilaterally reduce wages and bonuses at the inception of negotiations, and failed to clarify that employment terms may change due to the normal give and take of bargaining. The Respondent also distributed the "How are the folks at Whiting Chemicals feeling today?" and the "ATTENTION CHOCOLATE BAYOU EMPLOYEES" flyers to each employee shortly before the election. Both flyers implied that bargaining would result in the same alleged losses that occurred during negotiations with the same Union at the Respondent's Whiting Chemical facility.[22] At the mid-April meetings, Labor Consultant and Negotiator Paul Clark made similar statements, without an objective basis, predicting that with a union present, employees would lose scheduled wage increases during negotiations and would ultimately receive lower wages than they currently enjoyed. The only reasonable inference for employees to draw from Clark's statements was that the Union's presence at Whiting caused the reductions in benefits.

The comments by Clark did more than simply state that employees at Chocolate Bayou *could* suffer the same fate of those at Whiting. Clark recounted the fact that negotiations at Whiting had resulted in a loss of employee benefits, and he specifically tied this to the fact that negotiations at Chocolate Bayou would start at zero. Clark was the chief negotiator at Whiting and would be the chief negotiator here. In these circumstances, an employee would reasonably fear that negotiations here would wind up like those at Whiting.

In sum, the Respondent conveyed two general messages: (1) if the Union were selected, the employees would actually lose benefits at the start of negotiations and the Union would be forced to bargain to get them back; and (2) the negotiations would likely end as the Respondent asserted that they had at its Whiting facility, with the employees worse off than they had been without the Union. The Respondent did not tie these statements to economic realities or the give and take of bargaining, and did not show that it had an objective basis for its predictions.

Based on the foregoing, we find that the Respondent violated Section 8(a)(1) through the statements of John Harvey, Bob Bradshaw, and Bill Weiche, and its three campaign flyers. These statements, along with those of Paul Clark, also constituted objectionable conduct and materially affected the outcome of the election.[23]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that BP Amoco Chemical–Chocolate Bayou, Austin, Texas, its officers, agents, successors and assigns, shall take the action set forth in the Order as modified.

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

DIRECTION OF SECOND ELECTION

IT IS DIRECTED that Case 16–RC–10189 be severed from Cases 16–CA–20258 and 16–CA–20361, that the election conducted on April 25 & 26, 2000, be set aside, and that a new election be conducted.

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

[20] *NLRB. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

[21] See *Contempora Fabrics, Inc.*, 344 NLRB 851, (2005).

[22] As the judge found, the "How are the folks at Whiting" flyer misled employees by creating the impression that giving up a customary wage increase is a "lawful and ineluctable consequence" of engaging in bargaining.

[23] While Clark's were not alleged in the complaint to be unlawful, they fall within the scope of the objections.

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 the Paper, Allied-Industrial, Chemical & Energy Workers, International Union, Local 4–449.

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 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. September 29, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

At issue here is whether private severance agreements entered into between the Respondent and individual employees, who were discharged as part of a reduction-in-force, should foreclose (1) access to the Board by a Union subsequently seeking to challenge the discharges as a violation of the Act and (2) the General Counsel from proceeding in the public interest to prosecute alleged unfair labor practices. Contrary to the majority, I would find that the General Counsel should be permitted to proceed with his complaint alleging that the selection of employees for the reduction-in-force was based on union considerations, in violation of Section 8(a)(3).[1]

In exchange for enhanced severance benefits, 37 employees agreed to release and waive any claims against the Respondent related to their termination from employment. When the agreements were presented to employees, no Board proceedings had been initiated to contest the layoffs. The unfair labor practice charges filed by the Union challenging the selection of employees for layoff were not filed until after all 37 of the alleged discriminatees had individually agreed to the severance agreements. Although the Union was consulted by some of the employees before signing the severance agreements, the Union itself was not a party to those agreements. Nor did the Regional Director join or approve the severance agreements. To the contrary, the Union and the General Counsel oppose the private non-Board settlement agreements.

The majority analyzes whether to give effect to these waiver and release agreements under the framework used to assess whether to give effect to private non-Board settlement agreements. See *Hughes Christensen, Co.,* 317 NLRB 633, 634 (1995), citing *Independent Stave Co.,* 287 NLRB at 743. In my view, the *Independent Stave* framework should not be applied where the allegations of the complaint were not yet the subject of an unfair labor practice charge when the settlement was executed. *Septix Waste,* 346 NLRB No. 50, slip op. at 4 (2006) (dissenting opinion). As I argued in that case, *Independent Stave* "applies only to private agreements that purport to resolve existing disputes that have become the subject of unfair labor practice charges or complaints." That is not the case here.[2]

[1] I concur with the majority's findings that the Respondent engaged in a number of 8(a)(1) violations occurring in 2000, and that the Respondent engaged in objectionable conduct requiring the representation election held that year be set aside.

[2] In *Clark Distribution Systems, Inc.,* 336 NLRB 747 (2001), the Board, applying *Independent Stave,* refused to give effect to a private settlement agreement. The Board explained that the unfair labor practice case was still in the investigative stage when employees signed the waiver and release agreement. The *Clark* Board distinguished *Hughes Christensen,* supra, where the Board gave effect to the waiver and release agreement. In that case, the unfair labor practice charges had been dismissed at the time the discriminatees entered into the waiver and release agreement. Although the Board applied the *Independent Stave* framework in both cases, they are different from the present case, where no charges had yet been filed when the waiver and release agreements were executed.

The majority incorrectly distinguishes *Clark* on the ground that the agreements were found unlawful because they prohibited the signatory employee from providing evidence to the Board in its investigation of

But even assuming that the *Independent Stave* framework covers these severance agreements, application of those factors does not support the majority's position.

As to the first *Independent Stave* factor (who has agreed to be bound by the agreement and the position of the General Counsel), it is clear that the General Counsel, who is not a party to these private agreements, opposes giving effect to them here. The Board has traditionally given considerable weight to opposition by the General Counsel. See *Frontier Foundries,* 312 NLRB 73, 74 (1993). Further, the Charging Party Union, which was also not a party to these settlement agreements, opposes giving them effect. The Union engaged in efforts to organize the Respondent's work force both before and after this reduction in force. Obviously, an organizing campaign could be directly harmed by a discriminatory layoff selection. It follows that the harm done by the discharges, if unlawful, is not limited to the specific individuals laid off. Although each of the alleged discriminatees executed a copy of the severance agreement, each made an individual decision likely influenced by the sudden economic distress faced. These individual decisions should not bar the General Counsel from proceeding in the public interest to seek an adjudication of the legality of the Respondent's conduct, as well as an appropriate remedy.[3]

As to the second *Independent Stave* factor (whether the settlement is reasonable in light of litigation risks), the fact that the agreements were entered into before the filing of any unfair labor practice charge also militates against giving them preclusive effect.[4] See fn. 2 supra. The majority's conclusion that the prospects of litigation over the selection process were risky rests on an after-the-fact analysis that could not have been part of the employees' consideration in executing the agreements before charges were even filed. At bottom, the majority's assessment is really no more than the general proposition that all litigation entails risk.[5]

With respect to the final two factors, there is no specific evidence of fraud or duress, and there is no contention that the Respondent engaged in previous misconduct. Nonetheless, on balance, application of the *Independent Stave* analysis should not bar the Union from filing a charge over the selection for layoff, or foreclose the General Counsel from attacking the legality of the layoff selection process. The majority decision in this case, as in *Septix Waste,* "incorrectly shifts the focus of analysis away from the right of access to the Board and the responsibility of the Board to act in the public interest, even in the face of non-Board private agreements."[6] Of course, were the Board to find that the selection for the mass layoffs was unlawful, any benefits received pursuant to the severance agreements would be taken into account in a compliance proceeding. See *Weldun International,* supra, 321 NLRB at 734 fn. 6.

Dated, Washington, D.C. September 29, 2007

Wilma B. Liebman, Member

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.

charges involving other employees. Although that is true, that finding did not enter into the Board's separate analysis of whether to treat these agreements as barring litigation of the discharge allegations. The majority also cites *Metro Networks,* 336 NLRB 63, 66 (2001). But the Board in that case was not faced with the issue of whether an executed settlement agreement bars litigation.

[3] See *Weldun International,* 321 NLRB 733 (1996), enfd. memo. 165 F.3d 28 (6th Cir. 1998), where the Board refused to bar litigation of discriminatory layoff allegations because of settlement agreements reached with some of the employees named in the complaint. As in this case, the union did not negotiate the settlements and was not a party to them. Further, the agreements were not presented to, or approved by, the General Counsel, who opposed them. Finally, there, as here, "the settlements deal only with the backpay portion of the remedy and do not impact on the finding of a violation." Id. at 754. The majority does not distinguish this precedent.

[4] See *Webco Industries,* supra, 334 NLRB 608, 611 (2001), enfd. mem. 90 Fed. Appx. 276 (10th Cir. 2003) (fact that the employee (Martin) signed the severance agreement before the union got involved by filing a charge (which it did the next day) is "further reason to find that the agreement does not preclude us from affording relief to Martin.").

[5] Although the agreements provide for the payment of severance benefits to the 37 laid off employees, it provides no relief to cover the adverse effects the allegedly unlawful mass layoff may have had on the remaining employees. Thus, there is no provision for a cease-and-desist order, which would serve as a deterrent to such unlawful conduct in the future. The settlement does not even provide for the posting of a notice advising the employees of their right to be protected against discriminatory conduct. These deficiencies also militate against finding that the settlement terms were reasonable in light of the litigation risks.

[6] 346 NLRB No. 50, slip op. at 4.

Choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that if they select a union to represent them, negotiations with the Union would start from zero and/or with a blank page.

WE WILL NOT threaten our employees, either directly or by implication, with loss of benefits should they select a union to represent them.

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

BP AMOCO – CHOCOLATE BAYOU

Robert G. Levy, II, Esq., for the General Counsel.
Richard A. Schwartz, Esq. (Schwartz, Junell, Campbell & Oathout, LLP), of Houston, Texas, for the Respondent.
Bernard L. Middleton, Esq. (Provost & Umphrey), of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF CASES

KELTNER W. LOCKE, Administrative Law Judge. These consolidated cases focus on two different events.

The first event concerns a "downsizing" of the work force after British Petroleum and Amoco merged to form BP Amoco Chemical (the Respondent). On about August 26, 1999, Respondent terminated the employment of 37 workers associated with its Chocolate Bayou facilities in Texas. The General Counsel of the National Labor Relations Board (the General Counsel or the government) has alleged that in deciding which employees to discharge, Respondent chose those who supported Paper, Allied–Industrial, Chemical and Energy Workers International Union, Local 4–449 (the Union) rather than workers with less skill or experience who did not support the Union. I recommend that these allegations be dismissed because each of the 37 employees signed a valid waiver in return for severance benefits not otherwise available.

The second event is the election conducted by the Board on April 25 and 26, 2000. The General Counsel has alleged that during a 2½ month period before this election, Respondent's supervisors and agents made a number of statements to employees which implicitly threatened them with loss of benefits should they select a union to represent them. I find that the General Counsel has established that Respondent made the threats alleged in paragraphs 9 and 11 of the complaint and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Additionally, I recommend that the Board set aside the election conducted on April 25 & 26, 2000, sever Case 16–RC–10189 from Cases 16–CA–20258 and 16–CA–20361, and direct that a new election be conducted.

I. PROCEDURAL HISTORY

The unfair labor practice cases began on January 13, 2000, when the Union filed the original charge against Respondent in Case 16–CA–20258. The Union amended this charge on February 12 and 22, 2000 and April 24, 2000. On April 11, 2000, the Union filed a charge against Respondent in Case 16–CA–20361.

After an investigation, the Acting Regional Director of Region 16 of the Board issued a complaint and notice of hearing in Case 16–CA–20361 on May 31, 2000. On the same day, the Acting Regional Director also issued an Order consolidating this unfair labor practice case with the representation case, 16–RC–10189.

The representation case began on March 10, 2000, when the Union filed a petition, in Case 16–RC–10189, to represent certain of Respondent's employees. The Board conducted an election on April 25 and 26, 2000. In this election, 100 employees voted in favor of the Union, 179 voted against it, and 31 cast challenged ballots.

On May 3, 2000, the Union filed objections to the conduct of the election. On May 31, 2000, the Acting Regional Director issued an order directing hearing, order consolidating cases and notice of hearing which consolidated Cases 16–RC–10189 and 16–CA–20361 for hearing before an administrative law judge.

On June 2, 2000, the Acting Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 16–CA–20361 and 16–CA–20258. (This pleading is in evidence as GC Exh. 1(x).)

On June 21, 2000, the Acting Regional Director issued an order directing hearing, order consolidating cases and consolidated complaint, and notice of hearing in Cases 16–RC–10189, 16–CA–20361, and 16–CA–20258. (This pleading is in evidence as GC. Exh. 1(z). Although the caption of this pleading indicates that it includes a "Consolidated Complaint," the unfair labor practice allegations appear in GC Exh. 1(x), which I shall refer to simply as the "Complaint.")

Respondent filed a consolidated answer (the Answer) on July 7, 2000.

On August 21, 2000, the hearing began before me in Houston, Texas. The hearing continued on August 22–25, August 28–31, September 5–8, and October 25–26, 2000. After the hearing closed, the General Counsel and Respondent submitted briefs.

II. UNCONTESTED ALLEGATIONS

In its answer, Respondent has admitted the allegations in complaint paragraphs 1(a), (b), (c), (d), (e), 2, 3, 4, 5, and 10. I find that the General Counsel has proven these allegations. More specifically, I find that the unfair labor practice charges were filed and served as alleged, that Respondent operates a chemical processing plant in Alvin, Texas, and that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent's answer also has admitted that certain of the individuals named in complaint paragraph 6 are its supervisors and agents. Additionally, at hearing, Respondent stipulated that all persons employed by Respondent and having the title "working team leader" are supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act. The record also establishes that individuals previously desig-

nated "foreman" assumed the new title of "working team leader" when Respondent revised its management structure.

At hearing, the General Counsel amended the complaint to allege that a number of other individuals were Respondent's supervisors and agents. Respondent admitted these allegations on the record.

Based on Respondent's admissions and its stipulation during the hearing, I find that, at all material times, the following individuals were supervisors and agents of Respondent, within the meaning of Section 2(11) and (13) of the Act:

NAMES	TITLES
Bob Bradshaw	Area Supervisor
Jimmy Burkhart	Foreman
Johnny Burrecia	Foreman (Working Team Leader)
John J. Deason	Maintenance Foreman
Robert DeLozier	Working Team Leader
Pete Dennis	Unit Engineer
Tim Franklin	Supervisor
Rex Griffith	Working Team Leader
Phil Johnson	Supervisor
Randy Kay	Shift Superintendent
O.J. Lowe	Foreman
Darrell Mason	Foreman
Bobby Monk	Night Superintendent
Raymond Petri	Foreman
Davis Schmidt	Process Supervisor
James Sego	Human resource Manager

The record also establishes that General Manager Michael Poehl is Respondent's supervisor and agent within the meaning of Section 2(11) and (13) of the Act. Although the complaint alleges that Human Resources Representative Stacey Griswold is Respondent's supervisor and agent, Respondent has not specifically admitted that she possesses the authority required by Section 2(11) and (13), and the evidence is insufficient to support that conclusion.

Respondent also admitted portions of certain other complaint paragraphs. It is not necessary to discuss such admissions here, rather than later in the decision when they become relevant to specific issues.

III. ALLEGED UNFAIR LABOR PRACTICES

At the outset, it should be noted that this discussion will address the unfair labor practice allegations in the order they appear in the complaint, not in chronological order. The first unfair labor practice allegations in the complaint concern events during the Union's organizing drive during February, March, and April 2000. These complaint paragraphs allege that Respondent's representatives made statements which violated Section 8(a)(1) of the Act.

Following the customary practice of grouping the allegations by the subsection of the Act involved, the complaint next alleges that Respondent violated Section 8(a)(3) of the Act (as well as Section 8(a)(1)) by severing 37 employees in August 1999. In keeping with the order these allegations appear in the complaint, I will examine them after discussing the allegations pertaining to events in 2000.

1. Complaint paragraph 7(a)

Complaint paragraph 7(a) alleges that on or about February 18, 2000, Respondent, by Rex Griffith, threatened an employee with discharge in the event the Union proved unsuccessful at Respondent. (The complaint actually refers to a Rex Griffin, but from the record it is clear that the supervisor's name is Rex Griffith.) In its answer, Respondent denied this allegation.

Manufacturing technician Jerry Robinson testified that on February 18, 2000, which happened to be his birthday, he had a conversation with Rex Griffith, who was then his immediate supervisor. This conversation took place in one of Respondent's control rooms and, according to Robinson, only he and Griffith were present.

On direct examination, Robinson testified that Griffith "told me that if the union didn't go through, that—I would be fired." According to Robinson, he replied by telling Griffith, "Yes, you're probably right."

Griffith denied making this statement. Therefore, I must determine which testimony should be credited.

On cross–examination, Robinson was unable to provide enough detail to make his version of events convincing. He could recall no facts which would provide a plausible predicate to Griffith's allegedly unlawful statement. Robinson testified that Griffith made the comment about the union after returning from a meeting. However, Robinson could not be more specific:

> Q. As you sit here today, I take it, you cannot remember what was said immediately preceding that?
> A. Other than I asked him what — was there anything, any poop, at the — scoop or poop at the meeting.
>
> Q. Okay. And what did he say?
> A. Then he said no, there wasn't nothing going on.
>
> Q. And then what happened?
> A. And then he — the union got brought up. And —
>
> Q. How did the union get brought up?
> A. I have — I don't recall whether it was myself or he told me what he said.

Robinson's testimony does not provide any context for the statement he attributes to Griffith. Additionally, Robinson's inability to recall who brought up the Union casts doubt on the completeness of his memory. Absent corroboration, Robinson's vague testimony about the alleged statement is not persuasive, and I do not credit it. Rather, I credit Griffith's denial.

Therefore, I find that the government has not proven the allegations raised by complaint paragraph 7(a). I recommend that the Board dismiss these allegations.

2. Complaint paragraph 7(b)

Complaint paragraph 7(b) alleges that on or about March 21, 2000, Respondent, by Rex Griffith, threatened an employee with discharge if he was absent from work in response to a subpoena from the National Labor Relations Board or if he made any mistake on his job. In its answer, Respondent denies this allegation.

Employee Jerry Robinson testified that he had received a subpoena to testify in a representation case hearing. (The Region scheduled this hearing after the Union filed its petition in Case 16–RC–10189. Initially, the Acting Regional Director scheduled the hearing for March 20, 2000, but later rescheduled it for March 21, 2000. However, the parties reached an election agreement which made a hearing unnecessary.)

Before the time of the hearing, Robinson learned that it had been cancelled and he would not have to testify, so he went to work instead. After Robinson arrived at work, his immediate supervisor, Rex Griffith, asked him if he had received a subpoena. Robinson replied that he had. According to Robinson, Griffith then said that he had received a phone call and that if Robinson had not shown up for work that morning, there would have been serious consequences and Robinson would have been fired. Griffith denied making any of the statements which Robinson attributed to him.

A difference between Robinson's testimony on direct examination and his testimony on cross–examination suggests a problem in reliability. Robinson's testimony on direct examination indicates that Griffith brought up the subject of the subpoena:

> A. Well, I come in to work that morning. And he asked me – – after I had been there a little bit, a few minutes or so, he asked me if I had — about the subpoena, if I had been served a subpoena. And I told him yes.
>
> . . .
>
> Q. Okay. Mr. Griffith is talking to you about whether you had been subpoenaed. Would you pick up at that point and continue with your memory of the conversation?
> A. Yes. He had asked me if I had been subpoenaed, and I told him yes. And he had had a phone call and—he said he had had a phone call that morning and that if I hadn't been at work that morning—that day, there would be serious consequences and I'd be fired.

However, on cross–examination, Robinson admitted that he did not remember which of them first mentioned the subpoena:

> Q. So my question is: Did you bring up the issue of a subpoena, or did Mr. Griffith bring up the subpoena?
> A. Well, when he asked me about being there —
>
> Q. Yes, sir?
> A. — and — I don't recall.
>
> Q. All right.
> A. I don't recall if he mentioned it or if I did.
>
> Q. And so he didn't say anything to you to the effect that, you know, If you honor this subpoena, you're going to be in trouble, did he, sir?
> A. I guess if I hadn't been at work that morning, I'd have been in trouble.
>
> Q. That wasn't my question. Did Mr. Griffith say to you, You know if you honor this subpoena, you're going to be in trouble — those words?
> A. He didn't say if I — no. He didn't say it in that words.

Based upon Robinson's testimony on cross–examination, I cannot conclude that Griffith made any comment linking Robinson's compliance with the subpoena with possible adverse employment action. Reading Robinson's testimony on direct and cross–examination together, at most, it signifies that Griffith told Robinson that he would have been fired if he had failed to show up for work.

For a simple reason, the statement that Robinson would have been discharged if he had not reported for work cannot be equated with a statement that he would have been fired if he had obeyed the subpoena: The hearing had been cancelled because the Employer and Union had entered into an election agreement making the hearing unnecessary.

In other words, if Robinson had been absent from work that day, it would not have been because he had been attending an NLRB hearing. Any absence would have been for some reason not protected by the Act.

Therefore, even should I credit Robinson's testimony, I would conclude that the statement he attributed to Griffith would not violate the Act. However, I do not credit Robinson; because of the difference between his testimony on direct examination and on cross–examination, I do not consider it sufficiently reliable.

In sum, I find that the government has not proven the allegations raised by complaint paragraph 7(b), and I recommend that these allegations be dismissed.

3. Complaint paragraph 8(a)

Complaint paragraph 8(a) alleges that on or about March 23, 2000, Respondent, by Shift Superintendent Randy Kay, interrogated an employee concerning why he was a supporter of the Union. Respondent denies this allegation.

To prove this allegation, the General Counsel relies on the testimony of employee Thomas Garland. For clarity, it is helpful to describe the events leading up to Garland's conversation with Kay. These events involve a confrontation between Garland and his immediate supervisor, Robert DeLozier. This confrontation resulted in DeLozier and Garland appearing before DeLozier's supervisor, Shift Superintendent Randy Lee Kay.

DeLozier is a "working team leader" in the Olefins #2 unit. Every day at the start of the shift, he conducts a safety meeting with the employees he supervises.

At one of these safety meetings, in late March 2000, DeLozier told the employees that a car had been vandalized in the parking lot, and that union supporters had been responsible. The record does not establish DeLozier's exact words, but it appears that he was referring to an incident in which someone put a prounion sticker on a car belonging to an employee who opposed the Union.

Shortly after the safety meeting, DeLozier and one of his employees, William "Bo" Hale, were in the control room area and having a discussion. Although the record is not free from doubt, it appears that Hale, who supported the Union, had become concerned that someone had painted a "Vote No" sign on a wall inside the Respondent's facility.

As DeLozier and Hale discussed this matter, another employee, Thomas Garland, approached them. He began ques-

tioning DeLozier about the reported instance of vandalism which DeLozier had mentioned during the safety meeting.

Apart from his employment with Respondent, Garland held a second job as a police detective. Hale described Garland's policeman–like demeanor in the following testimony, which I credit:

> Q. And I think the words you used was "kind of like a detective." He's a police officer; it was kind of like that.
> A. Yes. Basically, actually he is a detective, and that's the way — to me, it was a questioning similar to the way a detective would on any crime scene; wants facts, information.
>
> Q. How a detective might interrogate a witness.
> A. Sure.
>
> Q. Okay. And in that respect, was it your impression that Mr. Delozier felt like his credibility was being called into question?
> A. I feel that may have been the case. Even though Robert [DeLozier] was going on strictly information that was given to him —
>
> Q. Yes.
> A. — because Robert wasn't one that initiated the information about the sticker incident, and we can understand his view. All he had was what he was told, and he was relaying information to us.

At some point, Garland's pointed questions began to irritate DeLozier, who told Garland to leave. Various witnesses differ considerably in estimating how long Garland remained after DeLozier told him to leave. Additionally, the witnesses give varying accounts concerning how many times DeLozier told Garland to leave before Garland obeyed that instruction.

One witness, employee Randal Lee Dillman, testified that DeLozier told Garland to go outside at least four times, "I would say more like five or six." Another witness, William Hale, estimated that DeLozier told Garland three times to leave. DeLozier then became angry.

As DeLozier admitted in his testimony, he told Garland to "shut the fuck up and just get the fuck outside and wash down." ("Wash down" refers to hosing down the concrete, a routine job duty.)

Garland's testimony suggests that DeLozier resorted to swearing without first telling Garland more civilly to leave. For the following reasons, I do not credit Garland's testimony to the extent it conflicts with other witnesses.

As noted above, the two witnesses not directly involved in the confrontation between Garland and DeLozier both testified that DeLozier told Garland to leave several times before using vulgarity. Both of these witnesses were employees called by the General Counsel. I believe their accounts, which substantially corroborate each other, are more reliable than Garland's uncorroborated version.

Additionally, I believe that Garland had some tendency to dramatize his testimony. For example, Garland testified that after DeLozier told him to "get the fuck outside," Garland raised his hands "in this manner, like a surrender manner." No other witness suggested that Garland made some sort of "surrender" gesture.

In sum, I find that before losing his temper and using vulgarity, DeLozier had told Garland to leave at least three times, and that Garland had not heeded this instruction. Then, as DeLozier admitted, he told Garland to "get the fuck outside."

After this encounter, DeLozier drove Garland to a building containing the offices of Shift Superintendent Randy Kay and Human Resources Representative Stacey Griswold.

DeLozier and Garland met with Kay in the office of Griswold, who also was present. The witnesses differ in describing which person spoke first, but it is clear that both DeLozier and Garland explained to Kay what had happened.

Both DeLozier and Kay testified that Kay told Garland he did not condone DeLozier's use of bad language. Garland did not recall Kay making such a statement. Because the accounts of DeLozier and Kay corroborate each other, I credit them rather than Garland's uncorroborated testimony.

Based upon this corroboration, as well as my observations of the witnesses, I credit Kay's description of this meeting. According to Kay, after he told Garland that he did not condone the vulgar language DeLozier had used, he then focused on Garland's duty to follow his supervisor's instructions:

> Q. And how did you explain that to him?
> A. Well, insubordination — what I told him was along with what I told Robert [DeLozier], I told Tom [Garland] as well that insubordination—I couldn't tolerate that either. You know, if you're asked to do something, you need to do it, and made he understood that insubordination — which he did. He admitted he understood what insubordination was and what the consequences could be if he continued to be insubordinate. And I told him that I would do my job if I had to, up to and including taking him to the gate, you know, if he didn't do his job.
> Q. What was his response to that?
> A. He didn't have any problem — he told me, said, You will have no more problem out of me. He understood what the boundaries were. I wanted to make sure he understood the boundaries.

Unlike Kay's testimony, Garland's account suggests that after the discussion concerning insubordination, the topic of conversation shifted to the reported instance of vandalism and then to the Union. Garland also testified that before he left this meeting, he assured Kay and Human Resources Representative Griswold that "they're not going to have any other problems involving me with union matters. That I'm not going to bring the issue up, and that I was going to do my job and that's it."

However, neither Kay nor DeLozier corroborated Garland's version and, as noted above, DeLozier credibly testified that the subject of the Union did not come up in this meeting. For the reasons discussed above, I believe that Kay's testimony, supported by DeLozier's, is more reliable than the uncorroborated testimony of Garland.

(Ms. Griswold did not give testimony concerning this meeting. Early in the hearing, during the General Counsel's case in chief, she testified briefly concerning a possible violation of the order sequestering witnesses, but did not testify concerning the

allegations in the Complaint. Six days after she had given this brief testimony, while Ms. Griswold was attending the hearing, she learned that her 16–year–old son had been killed in an automobile accident. At this point, the General Counsel was still presenting the government's case. Later, when Respondent presented its defense, it did not call Ms. Griswold to testify. Considering these unusual circumstances, I draw no inference from Respondent's failure to call Ms. Griswold, or her failure to testify concerning the meeting with Kay, DeLozier, and Garland.)

As discussed above, it concerned me that Garland's testimony often lacked corroboration while conflicting testimony did receive support from other witnesses. It also concerned me that Garland's testimony sometimes seemed more dramatic than necessary, suggesting that partisanship may have affected recollection. For all these reasons, I have not credited Garland's version. However, even should I have credited it, I would still conclude that this testimony fell short of establishing that Shift Superintendent Kay had interrogated Garland concerning his union activities, as alleged in the complaint.

According to Garland, the subject of the Union came up in two ways during his meeting with Kay, Griswold, and DeLozier. First, Garland's testimony indicated that they discussed the reported vandalism of a car by union supporters, that is, the incident mentioned by DeLozier in the safety meeting. Even if credited, Garland's testimony concerning this discussion would not establish that he had been interrogated unlawfully about union activities.

Second, Garland's testimony indicates that at the close of this meeting, he promised Kay and Griswold that they would not have "any other problems involving me with union matters. That I'm not going to bring the issue up, and that I was going to do my job and that's it." The testimony does not establish that Kay, Griswold, or DeLozier asked Garland for such a promise. In fact, Garland's testimony does not indicate that Kay, Griswold, or DeLozier made any comment to suggest that they considered Garland's union activities to be a problem. In these circumstances, I cannot find that an unlawful interrogation took place.

Garland left the meeting and waited outside while Kay and Griswold spoke with DeLozier. Credible evidence establishes that Kay gave DeLozier a "coaching" (oral reprimand) for using vulgar language. As DeLozier and Garland drove back to their work area, DeLozier apologized for losing his temper, and said he should never have talked to Garland in the way he did.

Later that evening, Shift Superintendent Kay visited the work area and spoke privately with Garland. In his testimony, which I credit, Kay described this conversation:

> A. Well, what we discussed is when Tom come to work there, he was a very sharp, very polite person, very professional person. And so I had a lot of respect for that and him, and I wanted to understand why it was that he was so, I guess, being confrontational and having so many issues with Robert and different — So I asked him what was the problem, that when he came to work there everything was so good that is so bad now, such a bad place to work, from some of the things that he had said. He said that really he was concerned because of the severances and the way they were done and that he didn't want to be faced with the same thing 15 years down the road when he got to be the age of some of the people that got severed.

In Garland's version, Kay told Garland that he understood DeLozier had apologized, said that it took "a big man" to admit he was wrong, and noted that DeLozier was a new supervisor who didn't yet know how to talk to people. Significantly, neither Kay's testimony, which I credit, nor Garland's indicates that Kay questioned Garland concerning union activities during this conversation.

In sum, I conclude that neither Kay nor any other management representative questioned Garland about his, or other employees' union activities or sympathies. Therefore, I find that the government has not established the allegations raised by complaint Paragraph 8(a), and I recommend that these allegations be dismissed.

4. Complaint paragraph 8(b)

Complaint paragraph 8(b) alleges that on or about March 23, 2000, Respondent, by Randy Kay, implicitly threatened an employee with discharge by making reference to another employee who had challenged a supervisor during a meeting and who was no longer in the employ of Respondent. Respondent denies this allegation.

No credited evidence supports this allegation. Therefore, I recommend that it be dismissed.

5. Complaint paragraph 9 and Objections 1, 2, 11, 12, & 14

Complaint paragraph 9 alleges that on or about March 29, 2000, Respondent, by John Harvey and Bob Bradshaw, conducted a meeting wherein employees were told that negotiations would start from zero with a blank page. Respondent's answer admitted that Harvey and Bradshaw conducted a meeting with employees on or about this date, but denied that they told employees that negotiations would start from zero with a blank page.

In March and April 2000, the Respondent convened meetings of employees to present its views about the Union. The record establishes, without contradiction, that at some of these meetings, each employee received a copy of the union constitution and bylaws, and then Harvey and Bradshaw pointed out portions of these documents pertaining to fines and assessments against union members.

Process Operator Kent James described one of these meetings, in early April, which he attended with about 9 other employees. James testified that Harvey told the employees that if the Union came in, employees represented by the Union "would begin with essentially zero." Harvey further explained that negotiations would "start from zero, a blank page."

Harvey did not testify. Bradshaw did testify; he admitted using the phrase "blank page" in discussing possible negotiations with the Union: "As best as I can recall, I made the comment that in my opinion, I would start with a blank page. If it was my company, I would start with a blank page."

On cross–examination, Bradshaw testified that he never defined what he meant by "blank page." However, Bradshaw's intent in making this statement does not matter. Instead, the

Board considers how the phrase reasonably would be understood by the employees, considering the entire context.

This total context must include statements made by other representatives of Respondent during the time period leading up to the election. It is reasonable to conclude that where Respondent is voicing a similar message through different spokesmen, the employees will not consider the statements in isolation but instead will understand them together.

Bradshaw and Harvey conducted their meeting with employees as part of Respondent's efforts to counter the union organizing drive. Even if Bradshaw did not define what he meant by the term "blank page," if other management spokesmen used a similar term in a way which gave it meaning, employees reasonably would assume that Bradshaw had used the same words to mean the same thing.

To determine whether employees heard more than one management spokesman use a term such as "blank page," I return to the testimony of employee Kent James. Based upon my observations of his demeanor, I find that his testimony is reliable and credit it.

James not only attended the meeting at which Bradshaw used the term "blank page," he also attended another employee meeting at which another management spokesman used similar words. This other management spokesman was Paul L. Clark, a labor relations consultant. Significantly, Clark admitted telling employees that negotiations between the Respondent and Union would begin with a "clean piece of paper," a phrase I conclude is very similar to Bradshaw's "blank page."

Employees who heard both Bradshaw and Clark reasonably would understand Bradshaw's "blank page" to convey the same message as Clark's "clean piece of paper." Such employees reasonably would attribute to Bradshaw's "blank page" the meaning elaborated by Clark when he talked about negotiations starting with a "clean piece of paper."

Clark testified that before the election at Respondent's Chocolate Bayou facilities, he conducted meetings with employees to present the company's position about unionization. On April 13 and 14, 2000, Clark conducted a total of about 30 such meetings with the Chocolate Bayou employees. (These meetings therefore took place slightly less than two weeks before the election.) Therefore, I find it very likely that the employees who heard Bradshaw also heard Clark.

Clark testified that he wanted to let employees know that if the Union came in "the company would start with a clean piece of paper." Clark specifically admitted telling employees that the management negotiators would start with a "clean sheet" or a "blank sheet" of paper. Clark also recalled telling the employees that negotiations would "start from scratch."

Other testimony by Clark makes clear the context of his statement that management negotiators would start with a "clean sheet" or a "blank sheet" of paper. Specifically, Clark explained that his speeches to employees conveyed two points, the first being that neither the company nor the union could guarantee what sort of contract would result from collective–bargaining. Clark described his second point in these words:

> The other thing was to tell them about, uh, give them a little overview of our labor law in this country and then cited some specific NLRB decisions that, uh, I think five were used that specifically pointed out that, uh, in those five cases I guess employees had ended up with less than they had before they were unionized and before the union negotiated them a new contract. *After they got the contract they had less*. [Emphasis added.]

The record as a whole shows that Clark was voicing a theme that Respondent repeated to employees in other ways. For example, Respondent distributed to employees a flyer entitled "More Facts About Union Representation" which stated, in part, as follows:

> There is a risk that you could end up with less pay than you have now. That's what happened to the Whiting Chemical employees who were earning $1 an hour more than the unionized PACE employees at the Refinery across the street. That $1 an hour advantage for the Whiting Chemical employees *disappeared* at the bargaining table; now they earn the same as the PACE–represented refinery employees. [Emphasis in original.] (GC Exh. 6(a).)

The Respondent distributed to employees another flyer, entitled "How are the folks at Whiting Chemicals Feeling Today? YOU DECIDE." This document similarly stated that employees at the Whiting Chemical refinery lost $1 in wages after choosing the Union to represent them. Then, it made the following additional statement:

> Fact: Before the union was voted in, workers could progress to the top hourly rate in three years. In the contract bargained by the union, it now takes five years to move to the top rate. (Emphasis in original) (GC Exh. 8.)

Another flyer distributed to employees was entitled "WHAT WILL HAPPEN IF CHOCOLATE BAYOU EMPLOYEES GET THE SAME DEAL THAT WHITING CHEMICAL GOT LAST YEAR WITH PACE." This flyer referred to the wage reduction experienced by the Whiting Chemical employees, and also raised the possibility that employees could lose a pay raise. The flyer explained that Whiting Chemical employees had lost such a raise "because the new labor contract was under negotiations until the very end of 1998." (GC Exh. 8)

The evidence clearly establishes that Respondent's campaign against the union focused on a single message, that employees risked losing wages they already enjoyed if they chose to be represented by the Union. Respondent delivered this message in various ways, including by statements of its supervisors, Harvey and Bradshaw, to groups of employees brought together to receive that message.

In such a context, employees reasonably would understand the statements that negotiators would begin with a "blank page" or "clean piece of paper" as a message that they would lose benefits if they selected the Union.

In *Webco Industries*, 327 NLRB 172 (1998), the Board found that the employer had unlawfully coerced employees when it told them that if they chose the union to represent them, negotiations would start at "ground zero." In context, the Board held, "we find that employees would reasonably believe that they would lose everything, or start at entry levels, and

have to negotiate for the wages, vacations, holidays, and insurance they already had."

Considering the Respondent's consistent theme in opposing the union drive, its statements that employees "would begin with essentially zero" or that negotiations would start with a "blank page" reasonably would convey a message similar to that communicated by the "ground zero" statement in *Webco Industries*. It would be difficult for employees to interpret such statements in any other way after hearing the Respondent's labor relations consultant tell them that negotiations would start "from scratch."

I conclude that Respondent clearly interfered with, restrained, and coerced employees in the exercise of Section 7 rights, and recommend that the Board find that Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9.

The complaint does not specifically allege that the statements made by Clark on April 13 and 14, 2000, also violated Section 8(a)(1). It appears clear that certain of Clark's statements, notably the statements regarding negotiating from a "clean sheet" or "blank piece of paper" and "bargaining from scratch," unlawfully interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. However, because the complaint does not allege Clark's statements to be violative, and because any remedy would be cumulative, I do not recommend that the Board find them to be a separate 8(a)(1) violation.

On the other hand, Clark's comments to employees clearly fall within the scope of union Objections 1, 2, 11, 12, and 14. Because I find that Clark's statements would have been found violative if alleged in the complaint, and because Clark made these statements during the critical period, I conclude that they are, per se, objectionable. Therefore, I recommend that the Board set aside the election conducted on April 25 and 26, 2000, and direct that a new election be conducted.

6. Complaint paragraphs 11(a) – 11(c)

Complaint paragraph 11 alleges that during the period of March 21, until April 25, 2000, Respondent caused various documents to be distributed to the bargaining unit employees as follows:

> (a) [A document entitled] "How are the folks at Whiting Chemicals feeling today?" Wherein, inter alia, it was stated "Facts: During that period of time, because the contract was still being negotiated, the workers did not receive their normal 1998 wage increase," which implicitly threatened employees with a loss of benefits.
>
> (b) A document entitled "More Facts About Union Representation." Wherein, inter alia, it was stated "Will we lose the raises and bonuses we are suppose to receive this month and in April?" Answer: "No, but it could be your last bonus and who knows about future raises. You see, if you vote in the Union, the Company would negotiate from a blank piece of paper. The Company starts at zero. Recent bonuses, recent wage increases, and even the base wage rate will be irrelevant to the bargaining process..." which implicitly threatened employees with a loss of benefits.
>
> (c) A document entitled "Attention Chocolate Bayou Employees." Wherein, inter alia, it was stated "What will happen if the Chocolate Bayou employees get the same deal that Whiting Chemical got last year with PACE?" Answer: "(1) Lose the raise you will get next year. Whiting PACE representative employees received no raise from February 1997 to March 1999 because the new labor contract was under negotiations until the end of 1998. The normal cycle (February 1998) was skipped because their [sic] was no agreement with the Union on wages at that time; the equivalent at CBW (Chocolate Bayou Works) would be no raise from April 2000 to May 2002. (2) Lost the $1.00 an hour advantage you now have over PACE employees at Texas City Refinery and Chemicals. Prior to voting in PACE, Whiting Chemical employees earned $1.13 an hour more than PACE Whiting Refinery employees. The $1.13 an hour advantage was lost by the end of bargaining with PACE. . . ", which implicitly threatened employees with a loss of benefits.

In its answer, Respondent admitted distributing documents with the titles described in complaint paragraph 11, but stated "that those documents speak for themselves." Respondent otherwise denied the allegations in complaint paragraphs 11(a) and (c). The documents to which these complaint subparagraphs refer are in evidence as General Counsel's Exhibits 7 and 8, respectively.

The document referred to in complaint paragraph 11(b), which is entitled "More Facts About Union Representation," is in evidence as General Counsel's Exhibit 6(b). (To avoid confusion, it should be noted that the record includes more than one document captioned "More Facts About Union Representation." I have already referred to one of these documents, GC Exh. 6(a), while discussing the allegations in complaint paragraph 9. However, GC Exh. 6(b), not 6(a), is the document referred to in complaint paragraph 11(b).)

a. Complaint paragraph 11(a)

With respect to complaint paragraph 11(a), the record clearly establishes that Respondent distributed General Counsel's Exhibit 7 to its employees. This flyer states that in 1998, employees at the Whiting Chemical Plant voted to be represented by PACE, and that bargaining for an initial contract lasted for 10 months through the end of 1998. Referring to the 10 months in which negotiations took place, the flyer states:

> Fact: During that period of time, because the contract was still being negotiated, the workers did not receive their normal 1998 wage increase. [Emphasis in original.]

The record does not contain any evidence which would establish that the statement quoted above is either true or false. The Respondent's labor relations consultant, Paul L. Clark, was a member of Whiting Chemical's negotiating team which bargained with PACE. Clark testified that over a 10–month period, the parties met 54 times before a contract was ratified. However, Clark's testimony did not address whether, during that period, the employer failed to grant its bargaining unit employees a raise that they otherwise would have received.

In the absence of any evidence establishing that the statement quoted above is false, I will find it is true. Respondent argues that if the statement is true, it cannot interfere with, restrain, or coerce employees in the exercise of Section 7 rights. I do not believe that is an accurate summary of the Board's case law.

In *Quamco, Inc.*, 325 NLRB 222 (1997), during a union organizing campaign the employer displayed a "wall of shame" depicting, with pictures of tombstones, union–represented plants which had closed. Finding the display unlawful, the Board noted that the respondent had "offered no explanation of the basis for its assertion that the [union] was to blame for the closing of the other plants" or "any objective facts as the basis for a belief that, for reasons beyond its control, selection of the [union] as the employees' bargaining representative might well cause the Eldorado plant to suffer the same fate. . .In the absence of such an explanation, based on objective facts, and noting particularly that top employer officials were otherwise threatening closure, the message conveyed to employees was not that economic realities might lead the plant to close, but that the Respondent might retaliate against them and close the plant merely because they chose union representation."

In the present case, the Respondent's flyer did offer some explanation. It tied the failure to grant the workers a "normal raise" to the fact that negotiations were still continuing at the time the workers ordinarily would have received such a raise.

However, this explanation does not help Respondent. Although this explanation may have contained no factual errors, I conclude that it did mislead employees as to the law.

In general terms (but with some risk of oversimplification), the law may be summarized as follows: After employees select a union to represent them, their employer has a duty to maintain the status quo, that is, to continue the terms and conditions of employment which existed at the time the union attained the support of a majority of the bargaining unit employees. If the employer had established a practice of granting an across-the-board wage increase to employees at a particular time of year, this practice is part of the status quo, and must be continued. If such an employer fails to grant employees the customary wage increase as scheduled, and the union has not agreed to defer such an increase pending bargaining, then the employer has made an unlawful unilateral change in terms and conditions of employment. *Rural/Metro Medical Services*, 327 NLRB 49 (1998); *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998).

Respondent's flyer does not suggest that the union had agreed that Whiting Chemical could forego granting the "normal" wage increases. Rather, it creates the impression that giving up a customary wage increase is a lawful and ineluctable consequence of engaging in collective bargaining. That implication clearly is false.

In other words, the Respondent's flyer is coercive not because it makes a false statement of fact; the Whiting Chemical employees may, in fact, have foregone a wage increase, either because their union waived it or because their employer unlawfully denied it. However, the Respondent's flyer makes a misleading statement of law, by implying that sacrificing a scheduled wage increase is the natural consequence of union representation.

The misleading statement conveys the possibility of a lost-wage increase by implication rather than through clear and unequivocal language. In other words, there is a possibility that the words in question could be interpreted in more than one way. Therefore, I must determine whether employees reasonably would understand the message to be a threat that they would risk the loss of a regularly–scheduled pay raise if they selected the Union to represent them.

In making such a determination, I apply an objective standard, deciding how the words in question reasonably would be understood. However, I do not consider the particular words in the abstract; instead, I must recognize that employees would be more likely to interpret these particular words in a way which is consistent with Respondent's other statements on the same subject.

In context, the Respondent's flyer clearly conveyed a threat that employees would lose a wage increase if they chose union representation. As discussed above, the Respondent's entire campaign against the Union involved repeatedly telling employees that "bad things can happen during contract bargaining." Indeed, those very words, "bad things can happen during contract bargaining," appeared on Respondent's flyer as a summary of its message.

Also as discussed above, the Respondent's labor relations consultant, Paul Clark, conducted 30 meetings with groups of employees who would be voting in the election, and these meetings took place less than 2 weeks before the election. Clark admitted he told these employees about five cases in which "employees had ended up with less than they had before they were unionized and before the union negotiated them a new contract."

In other words, Respondent took considerable pains to inform employees that they risked losing wages if they chose a union to bargain collectively on their behalf. Applying an objective standard, I find that employees reasonably would understand the flyer's statement, that Whiting Chemical "workers did not receive their normal 1998 wage increase" as a threat that they would lose benefits if they selected the Union.

As such, this threat interferes with, restrains, and coerces employees in the exercise of Section 7 rights. I recommend that the Board find that the statement described in complaint paragraph 11(a) violates Section 8(a)(1) of the Act.

In Objection 2, the Union has alleged that Respondent told its employees that the Whiting [Chemical] employees lost benefits when they selected the Union as their bargaining representative. In Objection 41, the Union has alleged that on or about April 7, Respondent told its employees that they would lose their April 2000 through May 2002 wage increases if they selected the Union as their collective-bargaining representative. The Union further contends that the conduct alleged in Objections 2 and 41 warrants setting aside the election.

A statement which threatens employees in violation of Section 8(a)(1) also constitutes objectionable conduct. These statements took place during the critical period. Therefore, I recommend that the election be set aside.

b. Complaint paragraph 11(b)

The record establishes that Respondent distributed to employees a flyer that stated, "if you vote in the Union, the Company would negotiate from a blank piece of paper. The Company starts at zero. Recent bonuses, recent wage increases, and even the base wage rate will be irrelevant to the bargaining process. . . ."

For the reasons stated above with respect to complaint paragraph 9, I conclude that this statement interfered with, restrained, and coerced employees in the exercise of Section 7 rights. Additionally, I conclude that the statement is objectionable.

Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act. Further, I recommend that the Board set aside the election and conduct a new one.

c. Complaint paragraph 11(c)

Respondent's flyer, quoted in complaint paragraph 11(c), is in evidence as General Counsel's Exhibit 8. The record establishes, without contradiction, that Respondent made the statements alleged in complaint subparagraph 11(c).

However, there is a slight difference between the language of the flyer itself and the language attributed to it in complaint subparagraph 11(c). The flyer itself does not include the word "Answer" following the question "WHAT WILL HAPPEN IF CHOCOLATE BAYOU EMPLOYEES GET THE SAME DEAL THAT WHITING CHEMICAL GOT LAST YEAR WITH PACE?" But even without the word "Answer," it is clear that the text of the flyer answers the question posed in capital letters.

Moreover, it is clear that the flyer's answer conveys a threat of adverse consequences should employees chose a union to represent them in collective bargaining. Respondent repeatedly conveyed to employees the message that they could lose benefits during the collective–bargaining process. Indeed, in talks to employees, Respondent's labor relations consultant made a point of citing five cases in which employees at different companies suffered such losses. Reasonably, employees would understand General Counsel's Exhibit 8 to convey the same message.

It is true that the flyer does not flatly warn employees that they *would* get the same deal as Whiting Chemical employees, but only states what would happen *if* the employees got this same deal. However, Respondent's campaign against the Union left little reason for employees to believe that there was much uncertainty in the word "if."

The employees had little reason to believe that the word "if" referred to events beyond the control of the Respondent. To the contrary, Respondent's other statements gave employees reason to believe that Respondent would try to make this particular "if" come true.

Specifically, the Respondent's labor relations consultant, Paul Clark, told groups of employees about the results of the bargaining at Whiting Chemical. Clark testified that he told the workers, "we started with a clean piece of paper there. . . ." He also told them that Respondent, going into negotiations for a "brand new contract," was not "going to put anything on the table that would guarantee anybody anything" except as required by law.

In the same meetings, Clark also told employees about possible adverse consequences of a strike, and stated that historically, if a union called a strike, the Respondent would not allow employees to work even if they wished to cross the picket line to do so. I find that based on Clark's statements, employees reasonably would believe that Respondent would take every bit as hard a position negotiating at the Chocolate Bayou facilities as the management had taken with the Union at Whiting Chemical.

Thus, Respondent's repeated statements to employees clearly conveyed the message that they might well fare as poorly in bargaining as the Whiting Chemical employees. Having fostered this discouraging expectation, Respondent can hardly claim that the conditional phrase—"if Chocolate Bayou employees get the same deal that Whiting Chemical got last year . . . "—made its flyer merely idle speculation concerning unlikely outcomes.

Respondent's flyer specifically raised the possibility that employees could "LOSE THE RAISE YOU WILL GET NEXT YEAR" (capitalization in original). For the same reasons discussed above with respect to complaint paragraph 11(a), I conclude that this statement unlawfully interferes with, restrains, and coerces employees in the exercise of Section 7 rights.

Respondent's flyer also raised the possibility that employees would "LOSE THE $1.00 HOUR ADVANTAGE YOU NOW HAVE OVER PACE EMPLOYEES AT TEXAS CITY REFINERY AND CHEMICALS" (Capitalization in original).

As discussed above, Respondent conveyed to employees the message that it would engage in hard bargaining. Indeed, Respondent's labor relations consultant, Paul Clark, admitted telling employees that, except as required by law, "we aren't going to put anything on the table ahead of time that would guarantee anybody anything. . . ." When Respondent's representatives went further, and told employees that bargaining would start with a blank sheet of paper, the message became even clearer: Respondent would come to the bargaining table intent upon taking away some of the benefits employees already enjoyed.

In this context, employees reasonably would not understand the message in General Counsel's Exhibit 8 to be simply that, because of factors outside Respondent's control, they stood to lose benefits at the bargaining table. Therefore, I conclude that the statements in Respondent's Exhibit 8 threaten employees with loss of wages and benefits, and violate Section 8(a)(1) of the Act.

The Union has alleged that these statements also constitute objectionable conduct. (Objections 1, 2, 11, 12, and 14) Such statements are inherently objectionable and were made during the critical period. I recommend that the Board set aside the election.

7. Complaint paragraphs 12–13, 15–18

These complaint paragraphs concern the termination of 37 employees on about August 26, 1999, in a "downsizing" following the merger of BP and Amoco. The complaint paragraphs may be summarized as follows.

Complaint paragraph 12 alleges that during calendar year 1999, Respondent decided to reduce its work force "and sought that employees respond to a severance questionnaire as to whether they would agree to voluntary severance." Respondent admitted that during 1999, it decided to reduce the Chocolate Bayou work force, but otherwise denied the allegations in complaint paragraph 12.

Complaint paragraph 13 alleges that commencing about May 1999, Respondent caused its supervisory personnel to review the qualifications of employees working for Respondent. Respondent admitted "that it initiated a process by which all employees were assessed by supervisory personnel" but otherwise denied the allegations in complaint paragraph 13.

Complaint paragraph 15 alleges that commencing about August 26, 1999, Respondent announced to employees who had been selected for severance that they were in fact severed from the employment of Respondent. Complaint paragraph 20 alleges that doing so violated Section 8(a)(1) and (3) of the Act. Respondent admitted the allegations in complaint paragraph 15, but denied that this conduct violated the Act.

Complaint paragraph 16 alleges that "Each employee was told that in order to receive any benefits it was mandatory that they sign a waiver concerning any current or prospective cause of action against Respondent." Respondent admitted "that each severed employee received an employee termination agreement which contained a waiver, the terms of which are set forth in the document itself." Otherwise, Respondent denied the allegations in complaint paragraph 16.

Complaint paragraph 17 names 37 employees and alleges that on or about August 26, 1999, Respondent selected these employees for severance based on their support and/or advocacy for the Union. Complaint paragraph 27 alleges that the selection of employees for severance was based upon union considerations and was inherently destructive of the employees' Section 7 rights. Respondent denied these allegations.

The record establishes without contradiction that, following the merger of BP and Amoco, Respondent decided to reduce the number of employees at its Chocolate Bayou facilities. The general manager of these facilities, Michael Poehl, credibly testified that he received instructions to improve productivity by 35 percent. He created a team of 11 managers and supervisors (the PIC team) to figure out how to reach that goal.

This team decided how many jobs could be cut in each of the units. A subcommittee of this team determined what criteria would be used to select the employees who would stay, and those who would be severed. The selection criteria sought to identify the employees most likely to perform well under a new management philosophy adopted after the merger, which placed additional importance on employees taking more responsibility and working together well as a team.

After receiving the PIC team's recommendations, management decided to evaluate its work force with respect to the following 12 factors: Safety, leadership, team work & team oriented, work habits, dependability, flexibility toward change, integrity & trust, accepts accountability, communication skills, technical ability, problem solving, decision making.

Respondent developed an evaluation form which listed each of these criteria and allowed the rater to give the employee a score from 4 (best) to 1 (worst) for each. Respondent distributed the form to its supervisors and had them sit in committees to rate their employees.

Typically, each evaluating committee consisted of all the first-line supervisors who reported to a particular manager immediately above them. In other words, a committee consisted of all the supervisors within a particular manager's "span of control." This manager also attended the committee meeting, but functioned as a recordkeeper rather than as a decision maker.

Each evaluating committee assessed the employees supervised by the various committee members. Therefore, in each instance, the employee's immediate supervisor was one of the evaluators. Usually, because of fluctuating work schedules, more than one committee member had, on occasion, supervised any particular employee being evaluated.

When evaluating an employee, each committee member assigned the employee a score for each of the 12 criteria. Then, the committee members discussed their ratings to reach a consensus. On the relatively rare occasions when the committee members could not reach such a consensus, they voted to determine what rating the employee would receive.

The committee members reported these scores to their manager, who tabulated them on a spreadsheet. Generally, the committee members then destroyed the rating forms they had used as working documents while reaching consensus, leaving the manager's spreadsheet as the only record of their deliberations. Although the evidence does not establish that the committee members had received instructions to destroy their working papers, this practice appears to have been uniform among all the rating committees.

The managers who prepared the spreadsheets then attended higher–level committee meetings at which they were the raters, and their supervisor the recordkeeper. At the conclusion of these meetings, the raters destroyed their working papers, leaving the recordkeeper's spreadsheet as the sole document containing the ratings reflecting the committee's consensus.

These spreadsheets did not assign different weights to each of the 12 criteria. Instead, the spreadsheets simply listed the ratings each employee received in each of the 12 categories. However, at a high level in this selection process, Respondent's "leadership team" assigned more weight to some criteria than to others, and multiplied each of the unweighted scores by a factor reflecting the relative importance of the particular criterion. (The "leadership team" consists of the general manager and all the department managers at Respondent's Chocolate Bayou facilities.)

The "leadership team" then decided which employees should be discharged during Respondent's reduction in force. The record indicates that in making these decisions, the members of the "leadership team" used the employee ratings as guidance, but did not consider themselves bound by those ratings. Thus, General Manager Michael Poehl testified

> What we tried to do was do a balance across the different units. For example, if someone's net score was 48 and another person's net score was 47 even after it had been weighted, we tried to make a decision which one was the best

> suited for the new organization based upon our knowledge of those people, because the exact science of that is within one point.

The "leadership team" decided to discharge the 37 employees named in complaint paragraph 17. Respondent's supervisors notified each of the selected employees individually and did not allow the employee to perform any work after receiving this notification. All notifications took place on or around August 26, 1999.

a. Respondent's waiver argument

Respondent contends that these complaint allegations should be dismissed because each of the 37 employees signed a termination agreement waiving his or her right to assert any legal claim in connection with the discharge.

When Respondent notified each of the 37 employees that his or her employment had been terminated, Respondent also gave the employee a package which included an "employee termination agreement." Respondent also invited each employee to attend a meeting, away from the Chocolate Bayou facilities, concerning the severance benefits. At the meeting, Respondent's representative explained the employee termination agreement and advised the employees to consult a lawyer if they had questions about it.

Respondent's severance procedure gave each employee 45 days to decide whether or not to sign the employee termination agreement. After signing, the employee had an additional 7–day "grace period" in which he or she could cancel the agreement.

Whether or not an employee signed the employee termination agreement, the employee received 60 days' pay, in accordance with the Worker Adjustment and Retraining Notification Act, 29 U.S.C. Chapter 23. An employee who signed the termination agreement received additional benefits, including severance pay. Not uncommonly, under the termination agreement, an employee might receive more than $40,000 in severance pay, and sometimes more than $50,000. The severance package also included education and medical benefits. Only employees who signed the termination agreement received such benefits.

In return for these benefits, an employee who signed the termination agreement waived certain legal rights. Specifically, the agreement stated, in part, as follows:

> In exchange, Employee, on behalf of himself or herself, his or her heirs, executors, administrators, personal representatives, and assigns, agrees and promises not to commence any lawsuit against the Company and, without any reservations whatsoever, forever releases and waives any claim or liability against the Company, as of the date this Agreement is signed and executed by Employee, arising out of or in any way related to his or her employment with the Company, including, but not limited to, the termination of his or her employment with the Company, or in anticipation of continued or future employment with the Company, including, but not limited to, any and all claims under the laws of any jurisdiction, foreign or domestic, including any republic, dominion, state, province, kingdom, empire, colony, territory, or dependency, including, but not limited to, any claims under the U.S. Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, Section 1981 of the Civil Rights Act of 1866, as amended, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, the Family and Medical Leave Act of 1993, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Rehabilitation Act of 1973, the Equal Pay Act of 1963, and any claims under any other federal, state, provincial, or local enactment or rule of law or equity, including claims based on principles of contract and tort law and claims for attorneys' fees or expenses, but excluding any claims for unemployment compensation or workers' compensation administered by a state government to which Employee is presently or may become entitled. The Company and Employee agree that this Agreement is intended to and shall preclude any claim that Employee's termination from employment was in retaliation for exercising any right to which he or she is entitled under the provisions of an employee benefit plan, or for the purpose of interfering with the attainment of any right to which he or she may become entitled under such a plan or under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in violation of Section 510 of ERISA, 29 USC Sec. 1140, but nothing in this Agreement is intended to or shall be construed as barring any other employee claims under Section 502 of ERISA, 29 USC Sec. 1132.

All of the 37 employees named in complaint paragraph 17 signed such termination agreements. Respondent contends that by doing so, they waived their rights to reinstatement and backpay in this proceeding. Respondent has moved to dismiss the unlawful discharge allegations based on the Board's precedent in *Hughes Christensen Co.*, 317 NLRB 633 (1995).

In *Hughes Christensen*, three employees signed severance agreements with waiver and release language quite similar to that in the present case. In return, their employer gave them enhanced benefits which they would not have received otherwise.

Reversing the administrative law judge, the Board found that it would effectuate the purposes and policies of the Act to give effect to these waiver and release agreements. Therefore, it dismissed a complaint alleging that the employees had been discharged unlawfully.

In *Hughes Christensen*, the Board stated that, in deciding whether it would be appropriate to give effect to such a waiver and release agreement, it would apply the same standards it uses to determine whether a "non–Board settlement" should preclude litigation of issues addressed in the settlement. (In a "non–Board settlement," a charging party and respondent enter into an agreement whereby the respondent agrees to take certain remedial action and the charging party, in turn, agrees to request withdrawal of the unfair labor practice charge.)

The Board articulated these standards in *Independent Stave Co.*, 287 NLRB 740 (1987). Specifically, in determining whether to give effect to a "non–Board settlement," the Board considers all the surrounding circumstances including, but not limited to, (1) whether the parties have agreed to be bound, and

the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or has breached past settlement agreements. The Board recognized in *Independent Stave Co.* that there is an "important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation." 287 NLRB at 742.

Respondent contends that the facts in the present case satisfy the *Independent Stave* standards. Therefore, it argues, the Board should give effect to the waiver and release agreements signed by the 37 alleged discriminatees.

The General Counsel disagrees. However, this disagreement goes beyond the question of whether the *Independent Stave* standards have been met. Rather, the General Counsel argues that the *Hughes Christensen* precedent itself should not be applied to the present facts.

Relying on *Weldun, International*, 321 NLRB 733 (1996), the General Counsel contends that *Hughes Christensen* should be distinguished because in that case, the employees had the benefit of union representation, whereas in this case, as in *Weldun*, no labor organization has been certified or recognized as the bargaining representative.

The Board panel which decided *Weldun* did not give a lengthy explanation for distinguishing the *Hughes Christensen* precedent. In a footnote, it provided the following rationale:

> The Respondent also argues that, even assuming the illegality of the layoffs is established, no remedies should be granted to five of the discriminatees because, before the complaint in this case had issued, they had entered into private settlement agreements with the Respondent in which they had waived all legal rights arising from their employment with the Respondent in exchange for increased severance pay. We leave to the compliance stage of these proceedings the determination of the effect that the amounts received shall have on these employees' backpay awards. In so limiting the inquiry, we note that these settlement agreements are distinguishable from those at issue in *Hughes Christensen Co.*, 317 NLRB 633 (1995), in which the three discriminatees in question had been members of the union committee negotiating over the implementation of a plant relocation and downsizing. At a time when their unfair labor practice charges alleging discriminatory denial of transfers had been dismissed as lacking in merit by the Regional Director and an appeal to the General Counsel was pending, the three employees had entered agreements waiving any claims arising from their employment in exchange for enhanced severance payments. Member Fox, who did not participate in *Hughes Christensen*, takes no position on the correctness of that decision.

321 NLRB 733 at fn. 6.

From the quoted language in *Weldun,* it is not clear that the Board intended to limit the *Hughes Christensen* precedent to situations in which the alleged discriminatees were represented by a union. Such an interpretation would significantly restrict the application of the *Hughes Christensen* principle, but the Board panel in *Weldun* did not explicitly state that it intended such a limitation.

Typically, when the Board announces a significant change in an established principle, it does so in a decision which provides guidance as to how the changed policy will be applied. Giving effect to a waiver and release agreement is such an established principle. See, e.g., *First National Supermarkets*, 302 NLRB 727 (1991), and *Phillips Pipe Line Co.*, 302 NLRB 732 (1991). In *Hughes Christensen*, the Board simply clarified the standards for applying the principle.

To follow the General Counsel's argument, I believe, would require me to reject a clear line of Board precedent based only upon a brief footnote which does not clearly and unequivocally mandate such a course. Additionally, rejecting *Hughes Christensen* would compel me to speculate about how the Board would analyze the present situation, rather than follow a clear framework expressly adopted for such analysis.

Moreover, it appears clear that if the Board panel had applied the *Hughes Christensen* criteria in the *Weldun* case, it would have reached the same result. Specifically, the *Hughes Christensen* criteria require the trier of fact to consider whether the waiver and release agreements are reasonable in light of the violation alleged, and whether Respondent has a history of violating the Act. In *Weldun*, the respondent had engaged in such egregious misconduct that the Board issued a *Gissel* bargaining order. In such circumstances, the waiver and release agreements clearly would not be reasonable.

However, the facts in the present case are dramatically different from the facts in *Weldun*. At the time Respondent terminated the employment of the 37 individuals, no union engaged in an active organizing campaign at the Chocolate Bayou facilities. The Union had mounted such a campaign in 1997, and would mount one again in 2000, but 1999 marked a relatively dormant period in the Union's organizing efforts.

The General Counsel has neither sought a bargaining order in the present case nor alleged that Respondent has committed the hallmark violations which would make such a bargaining order appropriate. In these circumstances, I conclude that *Hughes Christensen*, rather than *Weldun*, is more on point. Therefore, following *Hughes Christensen*, I will apply the *Independent Stave* criteria.

First, I must consider whether the parties have agreed to be bound, and the position taken by the General Counsel. In this case, as in *Hughes Christensen*, the Charging Party has not agreed to be bound by the waivers. Both the Charging Party and General Counsel oppose giving the waivers effect. In *Hughes Christensen*, the Board noted that the charging party's opposition should be taken into account, but found it outweighed by other factors.

As I understand the *Hughes Christensen* test, I should consider not only whether the Charging Party and General Counsel have agreed to be bound by the waiver agreements, but also whether the employees affected by the agreements, the alleged discriminatees named in the complaint, agreed to be bound. At hearing, the parties stipulated that each of the 37 alleged discriminatees signed a termination agreement. The parties further stipulated that these 37 employees read the agreement before

signing it, and knew that it said they were waiving and releasing any claims against the Respondent for any reason related to their employment with Respondent, including but not limited to the termination of employment.

Nonetheless, the General Counsel contends that the signatures of these employees should not be taken as proof that they intended to be bound by the agreement. Moreover, some of the employees testified that they signed the agreement without intending to be bound by it. However, I do not find such testimony persuasive.

The parties have stipulated that each of the 37 employees had 45 days to consider the agreement, as well as a 7–day "grace period" in which to revoke the agreement after signing it. Additionally, the record establishes that Respondent's representatives told these discharged employees that, if they had questions about the termination agreement, they should seek legal advice.

Many of the employees did seek advice either from an attorney or from a union official. Some of them may have received advice which was not correct. For example, employee Gordon Lucas testified that he sought advice from a union official named Sanders, who encouraged Lucas to sign the agreement. According to Lucas, Sanders told him that "we would take care of that when we got to the litigation about the Union situation, about the illegal—supposedly illegal severance, and we would address any rights signed away—supposedly signed away with the waiver then."

Some of the 37 employees may have decided that, notwithstanding the language in the termination agreement, it would not really waive their rights. For example, employee Gary Sproul testified that "I didn't believe that this document would hold water because they're telling me they were taking away my rights when I hadn't done anything wrong."

However, the record contains no evidence indicating that any of Respondent's representatives ever told employees that the agreement was invalid or otherwise did not mean what the words said. The employees who formed such an opinion did so after consulting others, such as a union official (in the case of Lucas) or an attorney (in the case of Sproul).

Significantly, there is no evidence that any of the employees failed to receive the benefits promised by the termination agreement or declined to accept such benefits. Sproul, for example, testified that he did take the severance pay which, in his case, amounted to more than $49,000.

If there is a conflict between the words of a witness, suggesting that he did not intend to be bound by the agreement, and the actions of the witness, accepting the payment specified in the agreement, the actions speak more credibly than the words. Both the witness's signature on the agreement, and the witness's later act of accepting the benefits provided by the agreement, undermine a later facile assertion that the witness never intended to abide by its terms. I do not credit such testimony. Rather, I find that all 37 employees intended to be bound by the agreements they signed.

The General Counsel also argues that the employees who signed the agreement were under economic duress and therefore, their decision to sign the agreement was not truly voluntary.

Some of the 37 employees testified that they signed the termination agreement because they needed the money. For example, employee Mark Thomas Schanzer testified that he signed the waiver because he had a wife and family to support. Similarly, Raul Fernandez testified that he signed the agreement because he was going through a divorce and had child support to pay.

The General Counsel and Charging Party argue that because the alleged discriminatees had financial problems, they signed the waivers under duress. However, almost every person who signs an agreement to give up something in return for money has some need for the money. Ordinarily, such a need does not make the agreement invalid, if it is otherwise uncoerced. The record does not establish such coercion.

In sum, I find that the 37 employees agreed to be bound by the waivers they signed. I conclude that the first *Independent Stave* factor favors giving effect to the waiver agreements.

The second *Independent Stave* criterion concerns whether the agreement is reasonable in light of the violations alleged, the risks inherent in the litigation, and the stage of the litigation. There was a significant risk that the General Counsel could not prove that Respondent selected the 37 employees for discharge unlawfully. At hearing, the General Counsel conceded, "We do not have a smoking gun." Many of the alleged discriminatees had work histories which the General Counsel's brief described as "less than pristine." Moreover, the record does not establish that one fourth of the alleged discriminatees had engaged in protected activity. Thus, the risks were considerable.

With respect to the stage of the litigation, no litigation was pending at the time Respondent discharged the 37 employees in August 1999. The Union did not file the initial charge in this case until January 13, 2000. That charge did not allege that the severance of the 37 employees in August 1999 violated the Act. Indeed, this allegation did not appear specifically even in subsequent charges and amended charges filed by the Union. Moreover, the General Counsel's original complaint, issued May 31, 2000, did not allege that Respondent had violated the Act by discharging the 37 employees in August 1999. This allegation did not appear until issuance of the consolidated complaint on June 21, 2000.

In sum, at the time the 37 employees signed the termination agreements, there was no litigation at all involving their discharges. There was even less prospect for litigation on this issue than existed in *Hughes Christensen*, in which the alleged discriminatees had signed waivers after a charge concerning their terminations had been dismissed and appealed.

In sum, I conclude that the second *Independent Stave* factor favors giving effect to the termination agreements. These agreements appear reasonable in light of the violations alleged, the risks inherent in the litigation, and the stage of the litigation.

The third *Independent Stave* factor concerns whether there has been any fraud, coercion, or duress by any party in reaching the settlement. No party has alleged that the agreements were fraudulent, and the record provides no basis for such a claim.

The General Counsel and Charging Party do assert that the 37 employees experienced coercion and duress because they had lost their jobs and therefore had strong economic incentives to agree to the termination agreements. Even assuming that

coercion and duress may be established on such a basis, the record does not do so in this case. The record does not establish that any of these employees was destitute, and to the contrary, it does suggest that many of the employees had accumulated substantial savings. There is no basis to conclude that financial exigencies deprived any of these employees of freedom of choice in this matter.

In other respects, the record does not establish coercion or duress. As noted above, Respondent gave each employee 45 days to consider the agreement and advised each employee to seek independent legal advice to answer any questions about the document. Moreover, after signing, employees had an additional week in which to revoke the agreement.

In sum, I conclude that the third *Independent Stave* factor favors giving effect to the termination agreements.

The final *Independent Stave* criterion concerns whether the Respondent has a history of violations of the Act or has breached past settlement agreements. Respondent entered into a settlement agreement in a 1997 case which apparently arose during the Union's organizing campaign in that year.

The Union contends that Respondent did not post the required notice to employees, and therefore did not comply with the terms of that settlement. However, the Regional Office closed this case after the notice–posting period, and at hearing, the General Counsel stated that the government was not trying to reopen it. Moreover, the record contains credible evidence that Respondent did post the notice in the manner required by the Board.

The evidence does not establish that Respondent has a history of failing to comply with settlement agreements. Moreover, I do not believe the settlement, in itself, may be considered evidence of a prior violation. See Rule 408, Federal Rules of Evidence.

In sum, the record does not provide a basis for concluding that Respondent has violated the Act or failed to comply with settlement agreements. Therefore, I find that the fourth *Independent Stave* criterion favors giving effect to the termination agreements.

All four of the specific criteria enumerated in *Independent Stave* and *Hughes Christensen* favor giving effect to the termination agreements. As stated in *Phillips Pipe Line Co.*, above, "the critical issue is whether execution of the release restrains or coerces employees in the exercise of protected rights." Considering the entire circumstances surrounding execution of the termination agreements, I cannot conclude that they restrained or coerced employees in the exercise of protected rights. Therefore, I recommend that the Board give effect to these agreements, and dismiss the complaint allegations regarding the discharge of these 37 employees.

b. Alternative determination on the merits

In case the Board disagrees with my conclusion that the termination agreements should be given effect, I will now examine these allegations on their merits. Initially, it should be noted that the complaint does not allege that Respondent violated the Act by deciding to reduce its work force. Additionally, the complaint does not allege that Respondent violated the Act by having its supervisors and human relation's personnel review the qualifications of employees. However, the complaint does allege that the following three actions violated Sections 8(a)(3) and (1) of the Act:

1. Selection of particular employees for severance. (The Complaint alleges that this selection violated the Act in two separate ways: (a) The selection of employees was based upon their support and/or advocacy for the Union and (b) the selection was based upon union considerations and was inherently destructive of the employees' Section 7 rights.)
2. Announcing to each of the selected employees that he or she had been severed from the employment of Respondent.
3. Telling each selected employee that, to receive any benefits, the employee must sign a waiver concerning any current or prospective cause of action against the Respondent.

To determine whether Respondent has discriminated unlawfully against the 37 employees selected for severance, I will use the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* framework, the government must first prove these four elements: (1) That the alleged discriminatees engaged in activity protected by the Act, (2) That the Respondent knew about such activities, (3) That the alleged discriminatees suffered an adverse employment event, and (4) That there is a nexus or link between the employees' protected activities and the adverse employment event.

If the government establishes these four elements, it creates, in effect, a rebuttable presumption that the alleged discrimination was unlawful. Respondent may rebut this presumption by proving that it would have taken the same action even in the absence of any protected activity.

At the first step of the *Wright Line* analysis, I will examine whether the government has established that the 37 alleged discriminatees have engaged in protected activities. The General Counsel did not call all 37 alleged discriminatees as witnesses, but 27 of them did testify. Their testimony regarding protected activities, and Respondent's knowledge of those activities, may be summarized as follows.

Employee Mark Thomas Schanzer, one of the 37 alleged discriminatees, supported the Union during its 1997 organizing campaign at Respondent's Chocolate Bayou facility. Schanzer wore a union emblem on his hat, and solicited employees to sign authorization cards.

Another of the alleged discriminatees, Raul Fernandez, served on the Union's organizing committee during its 1997 campaign. Fernandez solicited employees to sign authorization cards, and also passed out union flyers, buttons, and hats. On one occasion, Fernandez advocated the Union in a discussion with his immediate supervisor.

Employee Gary Sproul attended the Union's initial organizing meeting in 1997. Sproul also solicited employees to sign a union petition. He wore a union baseball cap to work and displayed a union sticker on his lunchbox.

Another of the alleged discriminatees, Gordon Lucas, encouraged employees to support the Union. He wore a union button and placed pro-union stickers on his hardhat, locker, and lunchbox. In 1997, his wife, Kathleen Lucas, was one of Re-

spondent's process technicians. She openly supported the Union and solicited employees to sign cards. She testified that her supervisor cautioned her to be careful what she said and to "watch her back."

During the 1997 organizing drive, employee Harry (Dwight) Cahanin advocated the Union in conversations with other workers. He also passed out union literature, and wore "Vote Yes" stickers on his hardhat and lunchbox.

Employee Darrell Hoppe spoke out in favor of the Union during a 1997 employee meeting at which a management representative opposed unionization. Hoppe also talked with other employees about the Union, attended union meetings, and displayed a prounion sticker on his hardhat.

During the 1997 organizing campaign, employees Larry Utterback and Charles Kennedy signed union cards and talked with other employees about the Union.

Employee Raymond Butcher wore a union pin during the 1997 campaign and spoke with other employees about the Union. On more than one occasion, he talked about the Union with his immediate supervisor.

Richard Kerwin and another alleged discriminatee, Claude Johnson, talked with employees about joining the Union during the 1997 campaign, and Johnson solicited employees to sign union cards. Two years later, in 1999, Johnson continued to advocate unionization. Referring to his 1999 activities, Johnson described himself as a "grass roots organizer," but although he had blank union cards in 1999, he did not ask any employees to sign them.

Lowell Banis attended union meetings in 1997. He also signed an authorization card and discussed the Union with other employees. On one occasion that year, he voiced his support for the Union in the presence of supervisors.

During the 1997 organizing drive, employee Ysidro G. Sauceda signed a union card, advocated the Union in conversations with other employees, wore a union hat, and displayed a union sticker on his lunchbox. On some days, he and other employees would wear a particular color to work to express their support for the Union.

Technician Barbara Bruyere wore a union pin on her lab coat during the 1997 organizing drive. During monthly employee meetings, she spoke out in favor of the Union in the presence of supervisors.

Employee Charles Tousek signed an authorization card during the 1997 campaign, and wore a union button on his hardhat. Process technician Anita Nash also supported the Union in 1997 and wore a union sticker on her hardhat.

During the 1997 campaign, employee Bradley Payne discussed the Union with other employees. The record does not establish that management knew about Payne's union advocacy in 1997, but Payne credibly testified that he had also been a union supporter during another organizing drive early in the 1990s.

Payne also testified that during this earlier campaign, his supervisor asked him to identify other employees who supported the Union. (The supervisor, Howard Kilpatrick, testified but did not address this particular matter. However, Kilpatrick denied knowing that Payne supported the Union.)

Employee Albert Ochoa solicited employees to sign authorization cards during the 1997 campaign. Ochoa began work at the Chocolate Bayou facility in 1974, and had been active on behalf of the Union since 1976.

David Latimer attended union meetings, passed out buttons, and solicited employees to sign authorization cards during the 1997 campaign. He also displayed union insignia on his hat and locker.

During the 1997 campaign, employee Robert Douglas Richardson supported the Union. When he saw a supervisor putting up an antiunion notice on the bulletin board, he asked the supervisor if he could put up a prounion notice, but the supervisor denied him permission to do so. In 1999, Richard continued to advocate the Union in discussions with other employees.

Lab technician Oscar Chavana joined the Union in 1997, spoke to other employees about the Union, and wore a union button on his lab coat. Chavana testified that during the 1997 campaign, a foreman asked him why he supported the Union.

Employee Antonio Leyva testified that he spoke out in favor of the Union during a meeting at which the plant manager spoke against it. Leyva was not sure when this meeting took place but believed that it was later than 1997. However, the person Leyva identified as plant manager held that position in 1997 but not in 1999. Therefore, I conclude that the meeting in question took place some time before 1999.

In 1997, employee Roy Lundberg attended union meetings and solicited employees to sign authorization cards. He wore a union cap. According to Lundberg, on one occasion in 1997 his supervisor asked him how the union campaign was going. Lundberg had been an active union supporter in earlier campaigns. Additionally, Lundberg continued to advocate the Union in discussions with employees in 1999.

During the 1997 campaign, employee Willie Urick advocated the Union and displayed union insignia, including a sticker on his locker. On one occasion, Urick advocated the Union in a discussion with a supervisor who opposed unionization. Urick continued to support the Union in 1998.

As already noted, not all of the alleged discriminatees testified, and the government has not demonstrated that all 37 of the alleged discriminatees engaged in union activities. However, the absence of evidence of protected activity is not necessarily fatal to the government's case, because the complaint alleges that Respondent discriminated against these 37 employees for two separate reasons. These allegations appear in complaint paragraphs 17 and 18.

Complaint paragraph 17 alleges that Respondent selected the employees for layoff based upon their union support or advocacy. The record does not establish that 10 of the alleged discriminatees engaged in any union support or advocacy. Therefore, under the theory advanced in complaint paragraph 17, the government has failed to satisfy the first step of the *Wright Line* framework with respect to these 10 employees.

On the other hand, complaint paragraph 18 alleges that Respondent selected the 37 employees for severance "based upon union considerations." Under this theory, it is not necessary to show that all of these employees engaged in protected activities.

If Respondent discharged the entire group to discourage employees from engaging in union activities it violated the Section 7 rights of every employee in the group, regardless of whether that particular employee engaged in union activity. The evidence clearly shows that at least 27 of the 37 employees did engage in some form of protected union activity. I conclude that, under the theory alleged in complaint paragraph 18, that evidence is sufficient to meet the government's burden of proving protected activities.

In sum, I find that under the theory alleged in complaint paragraph 18, the government has satisfied the first *Wright Line* requirement for all 37 of the alleged discriminatees.

At the second step of the *Wright Line* analysis, the government must show that Respondent knew about the employees' protected activities. Most of the 27 employees who engaged in protected activity did so openly. Many of them displayed union insignia either on their clothing or equipment. Some spoke out in favor of the Union when supervisors were present.

Under the theory alleged in complaint paragraph 18, it is not necessary for the General Counsel to show that Respondent had knowledge that all 37 employees had engaged in union activities. Under this theory, it suffices to show that Respondent knew that some employees were engaged in union activities, because such knowledge might provoke the selection of all 37 employees for discharge to discourage such activity. Therefore, I find that the government has satisfied its burden of showing that Respondent was aware of the employees' protected activities.

At the third *Wright Line* step, the General Counsel must establish that the alleged discriminatees suffered an adverse employment event. Respondent discharged all 37 of the discriminatees, and discharge is certainly an adverse employment event. The government has satisfied the third *Wright Line* requirement.

Finally, the government must prove a nexus or link between the protected activities and the adverse employment event The government seeks to establish such a link in three ways. First it contends that Respondent's conduct is so inherently destructive of employee rights that it carries its own indicia of unlawful intent. Second, the General Counsel argues that the Respondent's method of selecting employees for discharge was a pretext to hide discrimination against Union adherents. An unlawful motive may be inferred from the pretextual character of this process. Third, the General Counsel relies upon statements attributed to Respondent's supervisors and agents. These statements, the government argues, establish Respondent's intent do rid itself of employees who supported the Union.

1. The "inherently destructive"argument

The General Counsel's posthearing brief cites *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), in which the Supreme Court, relying upon its earlier decision in *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221 (1963), held that some employer conduct is so destructive of employee rights that it bears "its own indicia of intent." In such cases, the employer has a duty to show that it had a substantial and legitimate business justification for its conduct. For the following reasons, I do not believe it is appropriate to apply this principle in the present case.

In *Great Dane Trailers*, the respondent paid vacation benefits to employees who were working on a certain date, but not to employees who continued to strike on that date. The destruction this action caused to employee rights was obvious: Employees who supported the union were denied a benefit which other employees received.

On its face, the respondent's action in *Great Dane Trailers* singled out those who were engaging in a protected activity. The company's announcement that strikers would not receive a vacation benefit clearly associated the adverse employment action with the protected activity. This action manifested unmistakable antiunion animus because it focused on the group of employees engaged in protected activity, and penalized those employees for that activity.

In the present case, however, there was no strike. No pickets drew a demarcation line between those employees who supported and those who did not support the Union. In other words, the union adherents did not stand out as a separate, easily identified group coextensive with the employees selected for the reduction–in–force.

Additionally, Respondent selected the employees for discharge using a process which, ostensibly at least, did not consider whether or not an employee favored the Union. Unlike the vacation policy in *Great Dane Trailers*, the selection process here was neutral on its face. Unlawful discrimination resulted not from the application of the selection process, but from a secret subversion of it.

Specifically, other evidence, discussed below, indicates that higher management may have tampered with the selection process to discriminate unlawfully. However, that fact becomes apparent only through extrinsic evidence and not from the nature of the selection process itself. Under these circumstances, I do not believe that an inference of unlawful intent, pursuant to the *Great Dane Trailers* principle, is warranted.

2. The pretext argument

The General Counsel offers various criticisms of the selection process. To some extent, however, these criticisms focus on whether the selection process was fair, rather than whether it discriminated on the basis of protected activity.

For example, the General Counsel's brief focuses, in part, on employee Mark Schanzer, one of the 37 alleged discriminatees. Respondent may have formed a negative opinion of Schanzer's attitude after a 1996 incident in which Schanzer installed the wrong replacement part on a piece of equipment. The General Counsel's brief relates that

> Schanzer had used the part numbers correctly, but the item had been incorrectly labeled by someone under [manager] Cavazos' supervision. Cavazos attempted to see that Schanzer received the blame for the "improper installation." Schanzer went through channels and demonstrated that it was Cavazos' fault that the part had been improperly labeled. . . .

In other words, management may have formed a negative opinion of Schanzer because, as the General Counsel's brief states, he tried to demonstrate that an error had been his supervisor's fault rather than his own. The government argues that Respondent took this "bad attitude" into account when it placed

Schanzer among the 37 employees discharged in August 1999. Thus, the General Counsel's brief states that when Schanzer went to the plant manager for an explanation

> He was told the reason that he had been terminated was because "Schanzer always had to be right" (Tr. 323) In short, Schanzer did not fit in Respondent's "union–free policy."

The government's argument goes one step too far. Even should I conclude that Respondent discharged Schanzer because he had tried to prove himself right and his supervisor wrong, I cannot equate this motivation with a desire to enforce a "union–free policy." To the contrary, if Respondent discharged Schanzer because management believed Schanzer had made a mistake and refused to admit it, such a reason would be a defense to the allegation that Respondent had acted with unlawful intent.

In another challenge to the impartiality of the rating system, the General Counsel argues that the process resulted in the discharge of employees who were performing satisfactorily. Specifically, the government contends that many of the discharged employees had worked for Respondent a long time, and that this length of service demonstrated that their work had been acceptable. If the Respondent discharged satisfactory employees, the General Counsel reasons, it must have done so for an unlawful purpose.

The government's argument could be persuasive if the Respondent had claimed that it discharged the 37 employees because of unsatisfactory work. In that case, a showing that the Respondent had accepted the employees' performance for a long time would reveal the claimed reason to be pretextual.

However, in this case, Respondent makes no such claim. It discharged the 37 employees as part of a reduction–in–force, and, General Manager Poehl testified, "unfortunately in that process you get rid of some really good people. The people that were let go were not bad employees, and that's the painful part of the job."

In another argument related to length of service, the government contends that management rated employees in a manner which assured the retention of employees who had been employed by Respondent for only three years or less. "Needless to say," the General Counsel's brief notes, "those with limited tenure had not evidenced support for the Union."

However, the Union conducted an organizing campaign in 1997, and thus, employees with only 2 years' experience would have had an opportunity to wear union insignia, or otherwise evidence their support for the Union during that campaign. Moreover, the record provides no basis for an assumption that newer employees would be less likely to favor a union. Thus, even if the evidence established that the selection process favored newer employees (and the record is unclear on this point), such a showing does not demonstrate discrimination on the basis of union sympathy.

The General Counsel also seeks to prove the selection process pretextual by arguing that the rating criteria do not serve the Respondent's interest. For example, the General Counsel's brief states that "Strangely, Respondent attempted to minimize whether a person was on its fire brigade or not as it related to severance."

To accept the General Counsel's argument, I must assume that it is unreasonable for the Respondent not to place a high value on an employee's fire brigade experience. However, the law does not allow me to substitute my judgment for that of an employer in deciding which selection criteria to adopt, so long as those criteria do not discriminate on the basis of union membership or protected activity.

In a related argument, the government questions why Respondent created a new procedure for evaluating employees rather than relying on the periodic employee appraisals already in their personnel files. Respondent answers that the previous appraisal system did not result in criteria being applied uniformly to all employees, and it designed a new rating process to achieve such uniformity. Additionally, after the two petroleum companies merged, it decided to adopt a new management approach in which individual employees would assume greater responsibility for identifying and solving problems. The old appraisal system did not focus on those employee attributes which would predict success under the new style of management.

Respondent has provided lawful reasons for designing a new rating system rather than relying on the existing employee appraisals. In these circumstances, Respondent's adoption of the new selection process does not evidence unlawful intent.

The General Counsel raises another argument concerning the Respondent's selection process: Respondent's supervisors involved in this process destroyed their worksheets. The government urges that unlawful intent be inferred from this destruction of documents.

To analyze this argument, it is helpful to begin with a brief summary of the rating process, which required each employee to receive a rating of 1 to 4 in each of 12 defined areas. This process began when groups of foremen met with their immediate supervisor and reached "consensus" ratings for each employee. After their supervisor recorded the consensus ratings, the foremen destroyed the worksheets they had been using to reach such a consensus.

At the next level, after the raters agreed upon scores for each employee, the supervisor recorded them on a spreadsheet and then the raters, or their supervisor, shredded the worksheets they had used in reaching a consensus. The supervisor then sent the spreadsheet to higher management (the leadership team) which decided which employees to retain and which to sever.

Destruction of the raters' worksheets had the following effect: No documents exist reflecting the opinions which the individual raters had formed about particular employees. The General Counsel urges that this shredding of the worksheets suggests an unlawful motive. However, I do not agree.

Sometimes, the law requires an employer to keep certain records. For example, the Fair Labor Standards Act requires an employer to retain records relating to hours worked. See 29 U.S.C. Section 211(c). When an employer has a duty to keep records, the destruction of those records certainly may create an inference that the employer had something to conceal.

But in the present case, no law required Respondent to keep the worksheets from the various committee meetings. It would not be proper to infer a sinister motive from the destruction of

these documents, when the Respondent had no legal duty to retain them.

Additionally, the supervisors who participated in the evaluating committees had no incentive to keep their preliminary worksheets, which had no further relevance to the selection process. Their task had been to reach a consensus, and once they achieved such a consensus, the sheets recording their initial opinions lost whatever utility they once may have had.

Moreover, no participant in these evaluations would have a personal reason to keep the worksheets. It appears unlikely that any supervisor would want a souvenir of the time he spent in these meetings, and, unlike baseball cards or postage stamps, the worksheets could not be expected to appreciate over time. They were as valuable as last week's grocery list. Therefore, I infer no sinister purpose from the fact that the worksheets were destroyed.

3. Statements attributed to Respondent

The General Counsel also argues that statements attributable to Respondent establish its unlawful intent. The complaint alleges certain of these statements to violate Section 8(a)(1) of the Act. Additionally, the record contains evidence concerning other statements which, although not alleged as independent violations, may indicate unlawful motivation.

Although I have found that Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 9 and 11, I do not conclude that these violations provide evidence that unlawful animus motivated Respondent's decision to discharge 37 employees or that it affected its selection of the individual employees to be discharged. Respondent's representatives made these unlawful statements from 7 to 8 months after it severed the employment of the 37 alleged discriminatees. Thus, the statements do not demonstrate the presence of unlawful motivation at the earlier time the Respondent decided to reduce its work force and chose the 37 employees for severance.

Moreover, the unlawful statements do not include any threats that Respondent would discharge employees who supported the Union. Rather, the statements threaten that Respondent would reduce employee wages and benefits through its conduct at the bargaining table. In these circumstances, I do not find that the unlawful statements establish a link between union activity and the discharge of the 37 employees more than half a year earlier.

As evidence to support its objections to the election, the Union introduced a number of flyers which Respondent distributed to its employees during the 2000 organizing campaign. Although some of these documents urge employees to vote against the Union, they do not contain statements which would indicate that Respondent had been unlawfully motivated when it discharged the 37 employees in August 1999.

Additionally, the Union introduced some flyers distributed by a group of employees opposed to unionization. Even if the statements in these documents could be attributed to Respondent, they would not establish that animus entered into Respondent's earlier decision to discharge the 37 employees or into the selection of the employees for discharge.

Finally, the record contains testimony about statements attributed to two supervisors, Foreman Chato Rangel and Night Superintendent Bobby Monk. I will begin by discussing the statement attributed to Rangel.

Employee Larry Utterback supported the Union during its 1997 organizing campaign. In August 1999, he was one of the 37 employees discharged during Respondent's reduction in force.

According to Utterback, some time in the summer of 1999, he had a conversation with another employee, Chuck Kennedy. His foreman, Chato Rangel, was in a cubicle about 10 feet away.

Utterback testified that this conversation took place after he had filled out a questionnaire asking whether or not he would be willing to volunteer for severance. According to Utterback, he told Kennedy that without a union, the Respondent would not go by seniority in selecting the employees to be terminated. Then, Utterback said,

> Rangel walked out and said, "Let me give you a little friendly advice, Larry," that, "When it comes time for the nut cutting, they're going to be looking at guys like you who are pro–union; And that's going to be — I can tell you for a fact that that's going to be part of what they're going to be looking at when they get rid of people, among other things."

Although the General Counsel called Kennedy to the stand immediately after Utterback, he did not corroborate Utterback's testimony. Rangel did not testify.

The complaint does not allege that Rangel was Respondent's supervisor or agent. However, for the following reasons, it appears likely that Rangel possessed such authority.

At the time of the conversation Utterback described, Rangel was Utterback's foremen. Although the parties did not stipulate that all foremen possessed supervisory authority under Section 2(11) of the Act, they did stipulate that all "working team leaders" possessed such authority. Additionally, the record indicates that when Respondent changed its management structure, the foremen became working team leaders. Therefore, I conclude that when Rangel made the statement described by Utterback, he was Respondent's supervisor and agent within the meaning of Sections 2(11) and (13) of the Act.

Respondent had sufficient opportunity to call Rangel as a witness. Utterback gave the testimony about Rangel on August 24, 2000. Respondent did not begin presenting its case until September 6, 2000, and the hearing did not close until October 26, 2000.

In these circumstances, I believe the failure of Rangel to testify has more significance than the failure of Kennedy to corroborate Utterback's testimony. Therefore, I credit this testimony, which is uncontradicted.

Rangel's "nut cutting" statement certainly constitutes evidence that at some level, antiunion animus tainted the selection process. Significantly, a statement by a higher level manager also supports such a conclusion. This manager is Night Superintendent Bobby Monk. (From the record, it is not clear whether the night superintendent's name is "Monk" or "Monck." For consistency, I will use the former, although I am not sure this spelling is correct.)

David Latimer, one of the 37 employees discharged around August 26, 1999, testified that he had a conversation with

Monk about 2 ½ weeks before that date, and that another employee, Marvin Jackson, was present. Because of the significance of Latimer's testimony, I will quote it verbatim:

> Q. Okay. Now, the night superintendent — we've heard some testimony from others — when a person at night occupies that position, what is their area of responsibility?
> A. The whole plant. He is acting plant manager.
> Q. Okay. Please continue. Mr. Monk comes up — comes in. What happens then?
> A. We are talking about it, and Marvin Jackson said probably because of my absenteeism and my time of being on drug rehab, I'll probably be on the list.
> Q. Yes, sir.
> A. And I told Bobby — I said, probably my union activities and my accident's going to put me on it.
> Q. Now, you're speaking to who when you say that, sir?
> A. Bobby Monk.
> Q. All right, sir. Please continue.
> A. And we were questioning him about the list, and he said, There has been a new list made up because the old list had too many minorities on it.
> Q. Yes, sir. Does he say anything further?
> A. And I looked at Bobby, which was standing by me, and I said, Is union activities going to be considered on this, and he said, That is probably the top priority on the list.

The other employee present, Marvin Jackson, did not testify. Therefore, Latimer's account is uncorroborated. However, Monk also did not testify. Therefore, Latimer's account is uncontradicted.

To some extent, I have reservations about the reliability of Latimer's testimony. Another employee witness, Lowell Banis, testified that on another occasion, Monk stated that Respondent was making up a new severance list because of "too many minorities" on the original list. However, Banis did not quote Monk as saying anything about employees' union activities.

It appears likely that Monk did state that Respondent was making up a new severance list because of "too many minorities" on the original list. General Manager Poehl testified that after the members of the "leadership team" decided which employees to sever, they subjected this list to an "impact analysis" to make sure that it did not discriminate unlawfully. Monk easily could have described such "impact analysis" in terms of revising the list of employees to be severed.

Additionally, management's motivation for conducting such an "impact analysis" appears clear. If the severance list contained a disproportionate number of such employees, it might create the appearance of discrimination prohibited by federal and state civil rights laws. Certainly, an employer would wish to avoid creating such an appearance. (It should be noted that Respondent's counsel characterized the "impact analysis" as an examination of the age of the employees selected for severance, but the record leaves open the possibility that the "impact analysis" concerned both the age and the race of the selected employees.)

If Respondent wished to avoid the appearance of unlawful discrimination based upon race or age, it seems likely that Respondent also would wish to avoid the appearance of unlawful discrimination based upon union activity. But Latimer's testimony suggests that, in virtually one breath, Monk indicated that Respondent was being careful not to violate one employment law but, conversely, was intent upon violating another employment law.

Apart from the implausibility of such a statement, there is another reason to doubt Latimer's testimony. Latimer first quoted Monk as saying "There has been a new list made up because the old list had too many minorities on it." Only after prompting by the General Counsel did Latimer add that Monk made a comment about union activities.

For these reasons, it seems quite possible that Monk only told Latimer the same thing he told Banis, namely, that Respondent was making up a new severance list because of "too many minorities" on the first one. Latimer may have embellished his testimony by attributing to Monk words he never spoke.

Latimer was one of the 37 employees terminated during the reduction in force, and bitterness over this event may have influenced his testimony. Additionally, Latimer described himself as "one of the major people" in the Union's organizing campaign. His close identification with a party may also have affected his recollection.

Notwithstanding my doubts about Latimer's testimony, it remains uncontradicted, and the record provides no clear basis for discrediting it. Latimer gave this testimony on August 29, 2000 and, as already noted, Respondent did not begin its case until September 6, 2000. It had sufficient opportunity to call Night Superintendent Monk to the stand to dispute Latimer's version of the facts. It did not do so.

In these circumstances, principle requires me to credit Latimer's testimony. Monk's failure to deny the allegation is an objective fact which must outweigh my subjective doubts about Latimer's veracity. Crediting Latimer, I find that Monk made the statement Latimer attributed to him.

The evidence does not establish that Monk took part in the ranking process at the highest level. He was not a member of that ultimate committee.

However, Monk did hold a position of considerable authority. As night superintendent, he ranked just below the plant manager. Monk's statement that management was making up a new list because of "too many minorities" indicates that he knew about the "impact analysis" ordered by top management. The "impact analysis" was a highly sensitive topic and even at the hearing, Respondent did not wish to disclose many details about it. Monk's reference to it suggests that he knew how the "leadership team" was selecting the employees to be discharged.

Moreover, Respondent has admitted that Monk is its supervisor and agent. Monk's statement—that union activities would "probably be the top priority" in making up the severance list—constitutes an admission binding upon Respondent.

Monk made this statement several weeks before Respondent terminated the 37 workers. Although his statement indicates that Respondent wished to tailor the reduction in force to discourage support for the Union, one question remains: Could it do so?

Respondent had designed a selection process nearly impervious to such manipulation. At each level, the raters reached consensus through group discussions. It would be difficult for any one person to bias this process against union adherents without revealing such an intent to the other raters. The record discloses no such attempt.

Additionally, no evidence indicates that any of these raters took union activity or affinity into account. To the contrary, the raters consistently and credibly testified that during their meetings, no one brought up the Union, and union considerations did not affect their decisions.

Based on such testimony, I find that the supervisors and managers who assigned ratings to employees limited their consideration to the 12 factors listed on the form they used as an "assessment tool." Therefore, the ratings they assigned to employees were untainted by impermissible considerations.

If the rating process had ended at this point, I would conclude that Respondent's senior management merely intended to give union considerations a "top priority" but could not do so because the rating procedure was tamperproof. However, the record establishes that the otherwise tamperproof procedure had an Achilles heel, a vulnerable spot at which it was subject to covert manipulation.

At lower levels of the selection process, the raters assessed each employee's strengths in a dozen defined areas, but they were not concerned with the relative importance of these 12 factors. The ratings they assigned were not "weighted" to favor any one criterion over another.

However, Respondent's "leadership team" took these raw ratings and "weighted" them so that some of the 12 assessment factors would be considered more important than others. The record does not reflect exactly what weight the "leadership team" assigned to each score, or how uniformly these senior managers applied the weighting factors. If management intended to manipulate the evaluations to select union adherents for discharge, it could have done so at this stage.

Even apart from the "weighting" process, Respondent's top management had the opportunity to depart from the ratings given employees at lower levels in the process. General Manager Poehl's testimony indicates that the "leadership team" treated the employee ratings merely as recommendations, and that the "leadership team" itself made the final decisions regarding who should be discharged and who should be retained:

> And what was brought to our final leadership team for review, which is when we made our final analysis of who's going to stay and who's going to go, was this unit by unit list of how you're going to hit the staffing levels that came out of the PIC recommendations. Okay? And then what we tried to do at the leadership team level was use our experience and our — I guess our knowledge of the different areas to say, Would it be better if we have employee A in olefins who's on the severance list go over to polymers and hold down a polymer job and sever employee B, who is going to be staying, because we were trying to draft for this new dimensions, these new skills. We were trying to — if we were a sports team if we're drafting for speed and you had a faster person on defense, we're going to put the faster person on offense and cut the slower person. So that was kind of the intent.

Clearly, General Manager Poehl's testimony indicates that the "leadership team" made the "final analysis of who's going to stay and who's going to go" and regarded the employee ratings merely as guidance. Thus, at another point, Poehl testified that the "leadership team" was "driving the decisions."

At lower levels, raters had to follow the "assessment tool," which limited their consideration to 12 listed factors having nothing to do with union activity. However, the "leadership team" was under no such constraint. Therefore, management had the opportunity to discriminate on the basis of union considerations, if it wished to do so.

In sum, based upon the credited testimony of Utterback and Latimer, I find that two of Respondent's supervisors made statements indicating that management intended to discriminate against union adherents when it selected the employees to be discharged. The evidence also establishes that Respondent's selection procedure gave management the opportunity to carry out this intention.

Therefore, I conclude that the General Counsel has satisfied the fourth *Wright Line* criterion. The government has proven a sufficient link between employees' union activity and the adverse employment action.

By establishing the four *Wright Line* elements, the General Counsel has created, in effect, a presumption that Respondent has discriminated unlawfully. Respondent bears the burden of rebutting that presumption. In this case, it is necessary to discuss how that presumption affects Respondent's burden of proof.

Respondent contends that for each of the 37 individuals, the record must establish a link between protected activities and the adverse employment event. Under Respondent's theory, it could not be presumed that Respondent unlawfully discharged 10 of the alleged discriminatees, because the record does not establish that these 10 engaged in protected activities. This theory would require Respondent to rebut the presumption of discrimination only for those employees who engaged in protected activities reflected in the record.

On the other hand, the General Counsel contends that once the government has shown that animus tainted the selection process, then it must be presumed that unlawful considerations affected all of the employment decisions, with the burden on Respondent to prove otherwise. I agree. Once pollution has entered a river, no fish can be presumed untouched.

Additionally, as already noted, the complaint alleges, in part, that the selection of employees for discharge was "based upon union considerations." This theory does not require the government to prove that Respondent discharged a particular employee in retaliation for that same employee's union activities. Rather, the discharge will be unlawful if it is part of a scheme to discourage employees from joining or supporting the Union.

Therefore, Respondent must bear the burden of showing that antiunion animus did not affect the rating it gave to any particular employee. For each of the 37 employees, Respondent bears the burden of demonstrating that it would have discharged that individual in any event, even in the absence of union activity.

Respondent's witnesses gave considerable testimony regarding the shortcomings of the 37 alleged discriminatees. Although the General Counsel objected to such testimony, arguing that Respondent failed to establish that the decision–makers knew about such shortcomings or took them into account, I overruled these objections. Evidence pertaining to an alleged discriminatee's work problems is indeed relevant, but standing by itself, such evidence is not sufficient to carry Respondent's burden of proof.

The Board's decision in *Lampi LLC*, 327 NLRB 222 (1998), describes how a respondent may rebut the presumption arising from proof of the four *Wright Line* elements. The Board stated that to rebut the presumption, a respondent must do more than show that it had reasons that could warrant the discharge of the employee in question. It must establish by a preponderance of the evidence that it would have done so even in the absence of protected activities. After stating this principle, the Board discussed the type of evidence the respondent would have to present:

> In assessing whether the Respondent has established this defense. . .we do not rely on our views of what conduct should merit discharge. Rather *we look to the Respondent's own documentation* regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline. [Emphasis added.]

In one respect, the *Lampi* decision may not be entirely apposite. In that case, the respondent claimed it had discharged an employee for misconduct and the Board required the respondent to document this claim. By comparison, in the present case, Respondent does not assert that it discharged the 37 employees for misconduct or work–related deficiencies. Rather, it terminated their employment because it was reducing its work force.

Nonetheless, the *Lampi* decision articulates a principle which does apply to the present case. Respondent must demonstrate by a preponderance of the evidence that it would have selected the same employees for discharge in any event.

In the present case, the Respondent has not presented specific and detailed evidence pertaining to the most crucial part of the employee selection process, the final stage at which the "leadership team" decided which employees would be discharged and which would be retained. Such evidence is vital because any unlawful discrimination took place at this level.

The general manager's testimony, quoted above, indicates that the "leadership team" was not bound by the specific scores which the raters had assigned to employees. Instead, the "leadership team" might conclude that an employee tentatively marked for termination could fill a need if assigned to a different job. For example, the general manager testified, the leadership team addressed such questions as "Would it be better if we have employee A in olefins who's on the severance list go over to polymers and hold down a polymer job and sever employee B?"

In a case such as *Lampi*, involving a discharge for misconduct, the respondent can meet its rebuttal burden by documenting that in the past, it had discharged similar employees for the same offense and that those other employees had not engaged in protected activities. By comparison, the present case involves a reduction in force which apparently was unique. It entailed the termination of satisfactory employees on the basis that other employees were better.

The record does not indicate that Respondent had ever made choices like these in the past. If that is correct, Respondent cannot meet its burden by showing that previously, it had selected similar employees for severance in the absence of union activity. Therefore, Respondent must carry its burden of proof in a different manner.

Returning to the general manager's illustration, quoted above, if Respondent did remove Employee "A" from the severance list and substitute Employee "B" because management considered it better for the company to do so, then Respondent must present evidence to show that it had legitimate and substantial business reasons for making this choice. Absent such evidence, Respondent has failed to rebut the presumption that it selected Employee "A" over Employee "B" because of union considerations.

The evidence falls short of documenting such choices. Therefore, I conclude that Respondent has not rebutted, by a preponderance of the evidence, the presumption that it discriminated unlawfully against the 37 employees.

One additional 8(a)(3) allegation requires further discussion: Complaint paragraph 16 alleges that each severed employee "was told that in order to receive any benefits it was mandatory that they sign a waiver concerning any current or prospective cause of action against Respondent" and complaint paragraph 20 alleges that this action violated Section 8(a)(1) and (3) of the Act.

First, it should be noted that the evidence does not establish the literal facts alleged in complaint paragraph 16. Specifically, the record does not show that Respondent told any employee that to receive *any* benefits, the employee had to sign a waiver. To the contrary, the record clearly establishes that all severed employees received 60 days' pay without having to sign a waiver. Moreover, the credited evidence does not indicate that Respondent misled any employee into believing that he or she had to sign a waiver to receive this 60 days' pay.

Rather, Respondent informed employees that they had to sign the waivers to receive additional benefits apart from the 60 days' pay. Therefore, I conclude that the government has not proven the allegation specifically raised by complaint paragraph 16, namely, that Respondent told employees that, to receive any benefits, they had to sign a waiver.

Possibly, the General Counsel intends complaint paragraph 16 to be read more broadly. In that event, complaint paragraph 16 must be understood to allege that it was unlawful for Respondent to ask an employee to waive his legal rights in return for the additional benefits which Respondent offered as consideration.

However, the government has not specifically advanced such a theory. The General Counsel's brief does not argue that Respondent violated Section 8(a)(1) and (3) by offering a discharged employee valuable consideration in return for a waiver of his legal rights. Similarly, the General Counsel has cited no case authority to support such a proposition. I conclude that

Respondent did not violate the Act by engaging in the conduct alleged in complaint paragraph 16.

As already discussed, I have recommended that the Board give effect to these waivers under its *Hughes Christensen* precedent. However, should the Board distinguish or modify *Hughes Christensen*, I recommend, alternatively, that it find that Respondent unlawfully selected for discharge the 37 employees named in complaint paragraph 17 and thereby violated Section 8(a)(1) and (3) of the Act. Further, I recommend that the Board dismiss the allegations raised by complaint paragraph 16.

IV. OBJECTIONS TO CONDUCT OF THE ELECTION

Objections 1, 2, 11, 12, 14, and 41, which coincide with unfair labor practice allegations in the complaint, have been addressed above, in connection with the unfair labor practice allegations. Based upon my conclusion that Respondent violated Section 8(a)(1) of the Act as alleged in certain complaint paragraphs corresponding to these objections, I have recommended that the Board set aside the election and direct that a new one be conducted.

The Union has raised additional objections concerning other actions not alleged to violate Section 8 of the Act. At hearing, after the Union had presented its evidence regarding the objections it had raised, Respondent moved to dismiss many of them. The Union opposed this motion.

In arguing the matter orally, the Union named the witnesses it relied upon but did not cite particular testimony as supporting particular objections. Instead, the Union's attorney stated, in part, as follows:

> [T]he Charging Party certainly would insist on the right to brief these issues to Your Honor, in view of the fact that it involves not only a lot of testimony, but a lot of documents as well. And I don't purport to be able to sit here and delineate each and every bit of evidence on each and every one of these objections without omitting some what I think would be very essential arguments and evidence. And accordingly, I'd really respectfully request that I be allowed to brief the whole thing in brief, rather than try to respond to Respondent's oral motion at this point.

Considering that the Union filed 55 objections, some of them having more than one part, it appeared that detailed briefs on these issues would be helpful. Therefore, I informed counsel that I would appreciate, "as far as possible, your identifying all the evidence with respect to each allegation individually in the brief." The Charging Party's attorney agreed to do so.

Again at the close of the hearing, in setting the deadline for filing briefs, I asked counsel to address each of the objections individually in their briefs. At the Union's request, I granted 35 days for filing briefs, the maximum time allowed under Section 102.42 of the Board's Rules. Before the deadline for filing briefs, the Union requested additional time, and received a 12–day extension.

In a subsequent letter, received the day before the extended deadline, the Union's attorney stated that due to unforeseen circumstances, the Union was not able to file a brief. This letter, dated December 8, 2000, further stated that the Union

> hereby adopts the position of Counsel for the General Counsel with respect to all of the ULP [unfair labor practice] conduct set forth in the Consolidated Complaint. . .including each of those complaint allegations, which *are coextensive* with the Union–Petitioner's Objections filed in related case 16–RC–10189. The Union submits that the finding of violations with respect to those ULP allegations, which *are coextensive* with Petitioner's Objections, will also constitute grounds for setting aside the election herein. [Emphasis added.]

Although the Union's letter referred to its objections as being "coextensive" with the unfair labor practice allegations, a number of objections were not. For example, the Union's final objection, listed under the heading "other objections," clearly concerns matters beyond the scope of the conduct alleged in the complaint.

This final objection alleges, in part, that Respondent entered into a settlement agreement in a previous case, that Respondent failed to comply with the notice posting requirements arising from that settlement, and that Respondent's failure to post the notice left these prior unfair labor practices unremedied, tainting the election which was conducted on April 25 and 26, 2000. At hearing, the General Counsel stated that the prior case had been closed for some time and that the government was not trying to reopen it. Thus, the Union's final objection concerns conduct not alleged in the complaint.

Additionally, some other objections concern conduct which does not appear to be the same as the conduct alleged to constitute unfair labor practices. For example, Objection 54 alleges that the Employer posted a large "vote no" sign at the entrance to the polling place. No allegation in the Complaint concerns this alleged conduct.

Similarly, the conduct described in Objection 3 falls outside the scope of the complaint. That objection alleges that the Employer created the impression of surveillance by requiring prounion employees to attend certain captive audience meetings but requiring uncommitted and antiunion employees to attend other captive audience meetings.

If the Union had wished to explain and argue its objections which were not coextensive with the unfair labor practice allegations, it had sufficient opportunity to do so, both orally at the hearing, and in a posthearing brief. In the absence of such explanation and argument, and in view of the Union's December 8, 2000 letter, I must conclude that the Union now places its reliance solely on those objections which are coextensive with the unfair labor practice allegations.

As already discussed above, I have found that Respondent violated the Act as alleged in complaint paragraphs 9, 11(a), (b) and (c). In connection with those findings, I have also found merit to Objections 1, 2, 11, 12, 14, and 41, and am recommending that the Board set aside the election and direct a new one. The consideration of other objections would not change this outcome and, in view of the position taken in the Union's December 8, 2000 letter, is unnecessary.

V. SUMMARY

The evidence establishes that Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 9, 11(a),

(b) and (c). These violations also constitute objectionable conduct which warrant an order setting aside the election conducted on April 25 and 26, 2000, and directing a new one.

Based on the Board's decision in *Hughes Christensen Co.*, 317 NLRB 633 (1995), I recommend that the Board give effect to the waivers executed by the 37 employees named in complaint paragraph 17. Because I conclude that these waiver agreements comply with the standards articulated in *Independent Stave Co.*, 287 NLRB 740 (1987), I recommend that the Board dismiss the allegations that Respondent discharged these employees in violation of Section 8(a)(1) and (3) of the Act.

Because the Board may disagree with my application of *Hughes Christensen Co.*, I have included in this Decision alternative findings on the issues raised in complaint paragraphs 15, 16, 17, and 18. In these alternative findings, I concluded that Respondent violated the Act as alleged in complaint paragraphs 15, 17, and 18 but did not violate the Act as alleged in complaint paragraph 16. These alternative findings would constitute a decision on the merits which is unnecessary if the Board affirms my application of the *Hughes Christensen Co.* precedent. Therefore, I have not included in the Conclusions of Law, Remedy, Order and Notice provisions any matters based upon the alternative findings.

CONCLUSIONS OF LAW

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

2. The Union, Paper, Allied–Industrial, Chemical & Energy Workers International Union, Local 4–449, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the conduct alleged in complaint paragraphs 9 and 11, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

5. Respondent engaged in conduct which affected and interfered with the outcome of the election held on August 18, 1999, requiring that the election be set aside.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix A.

Additionally, I recommend that the Board sever Case 16–RC–10189 from the unfair labor practice cases, set aside the election conducted on April 25 & 26, 2000, and direct that a new election be conducted.

ORDER

The Respondent, BP Amoco Chemical – Chocolate Bayou, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Telling employees that if they selected a union to represent them, negotiations with the union would start from zero and/or with a blank page.

(b) Threatening employees, directly or by implication, with a loss of benefits should they select a union to represent them.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Within 14 days after service by the Region, post at its facilities in Alvin, Texas (Chocolate Bayou), copies of the attached notice marked "Appendix A."[1] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 21, 2000.

(b) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 8, 2001

APPENDIX A

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

> Section 7 of the National Labor Relations Act gives employees the following rights:
>
> To form, join, or assist labor organizations;
>
> To bargain collectively through representatives of their own choosing;
>
> To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;
>
> To refrain from any or all such activities.

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

WE WILL NOT threaten our employees, either directly or by implication, with a loss of benefits should they select a union to represent them.

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

BP AMOCO CHEMICAL