Ron Junkert, a Sole Proprietor *and* Sheet Metal Workers' International Association, Local Union No. 162, AFL–CIO

Ron Junkert, a Sole Proprietor d/b/a Airtex and Airtex Air Conditioning and Heating, Inc. *and* Sheet Metal Workers' International Association, Local Union No. 162, AFL–CIO. Cases 20–CA–23728, 20–CA–23814, 20–CA–24042, and 20–RC–16665

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 22, 1992, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed limited exceptions, the Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

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

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

The General Counsel filed limited exceptions concerning the judge's failure to list in his Conclusions of Law, Order, and proposed notice findings that he made concerning certain violations of Section 8(a)(1) and (3) of the Act, and his failure to recommend the appropriate remedy.

We agree with the General Counsel's exceptions. Thus, the Respondent discriminated against employee Bruce Dew not only by laying him off in June 1991, but also by changing his working conditions after the November 1990 election.[3] The Respondent demoted Dew from his position as leadman, denied him the opportunity to work on December 31, and decreased his hours of employment. Prior to the election, the Respondent made informal payments to Dew to reimburse him for medical insurance expenses of his spouse's policy. As a consequence of Dew's reduced hours after the election, the Respondent ceased making these payments. Further, the Respondent took away Dew's shop keys, restricted his access to the shop and his writing of purchase orders, and denied him the use of a jackhammer. In addition, on March 22, 1991, the Respondent issued Dew a written disciplinary warning for giving insufficient advance notice of absence 3 days earlier when Dew called in at starting time to report becoming sick at that time. The judge found that the evidence established a prima facie case of discrimination against Dew as to these matters, that Junkert's ''maltreatment'' of Dew ''was unlawfully motivated,'' and that the Respondent had not met its burden of defense.[4] The Respondent does not except to these findings, and we adopt them. We shall also address the changes in working conditions in the Remedy, Order, and notice below.[5]

Finally, we agree with the judge that the imposition of a *Gissel*[6] bargaining order is an appropriate remedy in this case. Here, six employees constituted the entire bargaining unit and the owner and president of the shop engaged in direct, highly coercive, overt unfair labor practices both before and after the election. Included in this misconduct were certain ''hallmark'' violations.[7] President and Owner Ron Junkert not only threatened supporters of the Union with the loss of their jobs, but also threatened that he would close the

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

[2] We agree with the judge's finding that the Respondent's president and owner, Ron Junkert, threatened employees that it would be futile to select the Union as their bargaining representative during his restaurant conversation with employees Bruce Dew and Ken Ewert on September 14, 1990. We note that the statement at issue did not stand alone. Junkert also threatened Dew with job loss, together with specific offers of a supervisory position and the blandishment ''things could be better'' if Dew eschewed his support for the Union. Junkert thereby browbeat Dew, the leading union adherent, in a face-to-face encounter in the presence of another employee. In this context, Junkert's statement that he had only to negotiate with the Union, not sign a contract, and negotiations could last a year, was not a mere statement of the law as argued by the Respondent. Rather, in this context, it was coercive and, indeed, a threat that employee support for the Union would be futile. See *Scotch & Sirloin Restaurant*, 269 NLRB 436, 439 (1984). We adopt the judge's finding that the Respondent's unilateral implementation of a health insurance plan in June 1991 violated both Sec. 8(a)(1) and Sec. 8(a)(5) of the Act (see sec. C,3, and the remedy section of the judge's decision) for the reasons stated by the judge. We also note in addition, should the revised tally of ballots show that the Union won the election, that an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 702 (1974).

[3] The General Counsel, in his exceptions, alludes to the fact that, after the election, the Respondent harassed Bruce Dew and subjected him to more onerous working conditions because of his support for the Union. This conduct is encompassed within our finding that the Respondent changed Dew's working conditions because of his support for the Union.

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] We find it unnecessary to amend the judge's conclusions of law because our remedy, Order, and notice encompass all issues.

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

[7] *NLRB v. Jamaica Towing*, 632 F.2d 208, 212 (2d Cir. 1980).

doors of the plant before signing an agreement with the Union. Junkert compounded this preelection misconduct by repeating the threats of job loss after the election and discriminating against the leading union adherent, Bruce Dew. Junkert discriminatorily changed Dew's working conditions, issued him a disciplinary notice, and then laid him off from work. This conduct by the highest level of ownership and management ''justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force.''[8] This is especially so here where the bargaining unit was small and the shop's owner himself committed the hallmark violations.[9]

REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5), we shall recommend that it be ordered to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

The Respondent shall rescind the changes in the working conditions of Bruce Dew, rescind the disciplinary notice issued to Bruce Dew on March 22, 1991, notify him that this has been done, and offer Bruce Dew immediate and full reinstatement to his former job.

The Respondent shall make whole Dew for any loss of earnings and other benefits he may have suffered as a result of the unlawful changes in his working conditions and unlawful layoff by paying him an amount equal to any losses incurred by the unlawful changes, including but not limited to expenses Dew incurred when the Respondent discontinued reimbursing Dew for his health insurance costs, and an amount equal to that he would have earned from the layoff dates to the date of his reinstatement or offer of reinstatement, less net interim earnings, if any, with backpay and interest as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent began a campaign of unfair labor practices designed to destroy the Union's majority status on September 14, it shall be ordered to recognize and bargain on request with the Union as the exclusive bargaining representative of the bargaining unit employees retroactive to that date.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Ron Junkert, a Sole Proprietor d/b/a Airtex, Rancho Cordova, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the working conditions of employees; issuing disciplinary notices to employees; and laying off employees because they engaged in union activities.

(b) Granting insurance or other benefits to discourage employee union activities or changing such benefits without bargaining with the Union.

(c) Refusing to bargain collectively with the Union by engaging in a campaign of unfair labor practices designed to destroy the Union's status as bargaining representative of its employees.

(d) Threatening employees with loss of employment, discharge, or going out of business in order to discourage union activities.

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

(f) Promising employees better benefits if they did not support the Union.

(g) Questioning employees about their union activities or the union activities of other employees.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed by Section 7 of the Act.

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

(a) Rescind the changes in the working conditions of Bruce Dew.

(b) Rescind the disciplinary notice issued to Bruce Dew on March 22, 1991.

(c) Offer Bruce Dew immediate and full reinstatement to the position that he would have occupied if he had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that he would have been performing, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(d) Make whole Bruce Dew for any loss of pay or other benefits he may have suffered as a result of the

[8] Id. at 213.

[9] Our decision is not inconsistent with the Ninth Circuit Court of Appeals' decision in *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979), as argued by the Respondent in its exceptions. In that case, the court refused to enforce a *Gissel* bargaining order largely because all three employees in the bargaining unit resigned for reasons unrelated to the employer's unfair labor practices before the hearing, and the administrative law judge did not assess whether a fair rerun election was possible. Here, two of the original six bargaining unit employees remained in the Respondent's employ at the time of the hearing. Moreover, the judge, here, carefully analyzed the misconduct at issue, demonstrating that it indeed ''may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.'' *NLRB v. Jamaica Towing*, supra at 213. We also note that the Ninth Circuit has enforced bargaining orders in circumstances where not one of the authorization card signers remained in the work force at the time of court enforcement. See *NLRB v. Cam Industries*, 666 F.2d 411, 413 fn. 4 (9th Cir. 1982).

unlawful discrimination against him, including any expenses Dew incurred when the Respondent discontinued reimbursing Dew for his health insurance costs, in the manner set forth above in the remedy section.

(e) Remove from his file any reference to the unlawful disciplinary notice and layoff and notify Dew in writing that this has been done and that these unlawful personnel actions will not be used against him in any way.

(f) On request, recognize and bargain collectively with the Union as the exclusive collective-bargaining representative from September 14, 1990, with respect to its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time manufacturing, fabrication, assembly, handling, erection, installation, repair and service employees employed by the Respondent at its Rancho Cordova, California facility; excluding all office clerical employees, guards, and supervisors as defined by the Act.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(h) Post at its offices and shop in Ranch Cordova, California, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 its employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the ballot of Ken Ewert be opened and counted, and that a revised tally of ballots issue in Case 20–RC–16665.

IT IS FURTHER ORDERED that should the revised tally of ballots show that a majority of votes has been cast for the Union, then the Regional Director for Region 20 shall issue a certification of representative. If the revised tally shows that a majority has not been cast for the Union, the election shall be set aside.

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

APPENDIX

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

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

WE WILL NOT change the working conditions of employees, issue disciplinary notice to employees, or layoff employees because they engaged in union activities.

WE WILL NOT promise benefits nor grant benefits in order to cause employees to become disaffected with the Union.

WE WILL NOT change benefits without first bargaining in good faith with the Union.

WE WILL NOT refuse to bargain collectively with the Union by engaging in a campaign of unfair labor practices designed to destroy the Union's status as bargaining representative of our employees.

WE WILL NOT threaten employees with loss of employment, discharge, or going out of business or other reprisals in order to discourage union activities.

WE WILL NOT threaten employees that it would be futile to select the Union as their bargaining representative.

WE WILL NOT question employees about their union activities or the union activities of other employees.

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

WE WILL rescind the changes in working conditions of Bruce Dew and rescind the disciplinary notice issued to him on March 22, 1991.

WE WILL offer Bruce Dew immediate and full reinstatement to the position that he would have occupied if he had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that Dew would have been performing, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make whole Bruce Dew for any loss of pay or other benefits he may have suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the disciplinary notice issued to and layoff of Bruce Dew and notify him in writing that this has been done and that these personnel actions will not be used against him in any way.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive collective-bargaining representative from September 14, 1990, with respect to our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time manufacturing, fabrication, assembly, handling, erection, installation, repair and service employees employed by us at our Rancho Cordova, California facility; excluding all office clerical employees, guards, and supervisors as defined by the Act.

RON JUNKERT, A SOLE PROPRIETOR D/B/A AIRTEX

David J. Dolloff, Esq., for the General Counsel.
Robert L. Rediger, Esq. (Thierman, Cook, Brown & Prager), of Sacramento, California, for the Respondent.
Mark S. Renner, Esq. (Wylie, McBride Jessinger, Sure & Platten), of San Jose, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on September 26 and 27 and October 2, 3, and 4, 1991. On November 23, 1990, Sheet Metal Workers' International Association, Local Union No. 162, AFL–CIO, (the Union) filed a charge in Case 20–CA–23728 alleging that Ron Junkert, d/b/a Airtex (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On January 1, 1991, the Union filed a charge in Case 20–CA–23814 against Respondent alleging violations of Section 8(a)(3) and (1) of the Act. On June 4, 1991, the Union filed the charge in Case 20–CA–24042. On June 31, 1991, the Regional Director for Region 20 of the National Labor Relations Board issued three complaints and notices of hearing against Respondent, alleging that Respondent violated Section 8(a)(5)(3), and (1) of the Act. Respondent filed timely answers to the complaints, denying all wrongdoing. For purposes of this case the three complaints will be treated as one consolidated complaint.

On September 12, 1990, the Union filed a petition with Region 20 in Case 20–RC–16665. An election was held on November 2, 1990. The election resulted in a tally of ballots showing three votes for the Union, two votes against and one challenged ballot. Further, the Union filed timely objections to the election. The issues raised by the objections and challenged ballot have been consolidated for hearing with the unfair labor practice cases.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent, a California corporation, has been engaged in business as a heating and air-conditioning contractor in Rancho Cordova, California. During the 12 months prior to issuance of the complaints, Respondent purchased and received at its Rancho Cordova facility goods, products, and materials valued in excess of $50,000 directly from sources located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated and, I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In August 1990, the Union began its organizing campaign at Respondent's facility. On September 5, the Union contacted Ron Junkert to set up a meeting. Junkert later canceled the meeting. On September 6, Union Representatives John Tripp and Randy Meusling went to Respondent's offices to request recognition. The union representatives left a message with the receptionist, Junkert's mother, that they had signed union authorization cards from all the employees and that they wanted to discuss voluntary recognition. Junkert admitted receiving this message. The Union obtained a fifth authorization card, shortly thereafter. On September 12, the Union filed its representation petition with Region 20 in Case 20–RC–16665. Respondent received the petition on September 14. There were 5 or 6 employees in the bargaining unit at that time.[1]

The General Counsel contends that the Union represented a majority of the employees in the bargaining unit based on the five union authorization cards obtained by the Union prior to September 12. The cards state as follows:

> I, the undersigned, hereby authorize the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, or an affiliated Local Union thereof, to represent me for purposes of Collective Bargaining, and in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other conditions of employment. This authorization shall apply for any Employer by whom I am employed, unless revoked by me through written notice to the Local Union.

At jobsite meetings, union agents explained that the purpose of the union authorization card was to give the union authority to represent the employees in collective bargaining and that the Union would file a petition with the Board if it became necessary.

Respondent contends that John Tripp, union agent, told the employees that ''the cards would be used only to get an election.'' First, I credit Bruce Dew that Tripp told the employ-

[1] All full-time and regular part-time manufacturing, fabrication, assembly, handling, erection, installation, repair, and service employees employed by Respondent at its Rancho Cordova, California facility; excluding all office clerical employees, guards, and supervisors as defined by the Act.

ees that the cards were to obtain authority to represent the employees and to present to the Board in support of a petition if voluntary recognition could not be obtained. Second, I find no clear or unambiguous testimony that Tripp said the cards would only be used for an election. Four employees indicated on cross-examination that an election was mentioned or explained but did not clearly testify that the sole or only purpose of the card was for an election. The employees did not understand the significance of Respondent counsel's use of the word only. One employee, Steve Barbieri, testified that the word only was utilized by Tripp. Barbieri later testified that the word only was not used. In some manner each employee witness indicated that he knew that card was for union representation.

Respondent also objects to the authorization card of former employee Jim Marr because Marr did not testify. Marr's card was properly authenticated by the testimony of union agent Randy Muesling. I find that by establishing that Marr signed the unambiguous card and returned it to Muesling, the General Counsel has established that Marr designated the Union as his collective-bargaining representative. I find that the card may be used to establish the Union's card majority without requiring Marr to corroborate Muesling's testimony. This is not hearsay as Respondent contends because Marr's credibility is not at issue; the truth of the matter asserted by the cards is not at issue. What is at issue is whether Marr designated the Union to represent him. Marr's signing the card, containing the language above, and returning it to Muesling is probative evidence of that point.

On September 14, 1990, Respondent received a copy of the representation petition from Region 20. That afternoon, Junkert called employee Bruce Dew to set up a meeting for that evening.[2] Junkert told Dew that he was going to make the employee an offer that he could not refuse. Dew was working at an out of town job and did not return to Respondent's shop until 7:30 p.m.

Dew, Junkert, and Ken Ewert, service leadman[3] went to a restaurant/bar. Junkert told Dew that he wanted Dew to supervise half of the sheet metal jobs and that Ewert had already agreed to supervise the other half. Dew said he was not interested in being a supervisor. He said that if Junkert hired qualified workers, that Junkert would not need supervisors to ''pick apart the jobs.'' Junkert asked if, by qualified workers, Dew meant union men. Junkert said that they both worked for the same unionized employer and knew that all the employees were not good workers. Dew said that he would not cover for an employee just because he had signed a union card. Junkert answered that he could not believe that everybody signed union cards. Dew told Junkert that he had signed a union card. Junkert stood up and said, ''if you wanted to join the [expletive] union then why don't you quit and go back to the [expletive] union and leave my company alone.'' Junkert then left the table for a few minutes.

When Junkert returned he asked whether Dew would help out by being a supervisor. Dew again refused the offer. Junkert said that he had been advised by his attorney that he couldn't make any promises, but that things could be better. Junkert said that he had been advised that even if everybody voted for the Union, that he still did not have to sign a contract. Junkert stated ''all I have to do is negotiate.'' Junkert added that negotiations could take about a year.

Junkert testified that he did call Dew several times that date but denied saying anything about an offer Dew could not refuse. According to Junkert he invited Dew for a drink to thank him for handling a problem at the Chico jobsite. Junkert admitted that during the conversation Dew turned down an offer to be a foreman. He further admitted that Dew suggested he could get better employees if he were a union contractor. Junkert disagreed with that contention. Junkert denied telling Dew to quit or leave the Company. Junkert testified that he told Dew that he did not have to sign a union contract, all he had to do was negotiate in good faith.[4]

A week or two after offering Dew a supervisory position, Junkert approached Dew and told him that Ewert ''had it with this Union crap and he's suing.'' Later that day, Dew went to Junkert's office and asked who Ewert was going to sue. Dew explained that he was the only one of the employees with any assets and that he wanted to knew whether he was going to be sued. Junkert answered that Ewert would sue whoever started the union campaign. Approximately 1 week later, Junkert again said that Ewert was going to sue. Dew answered that Ewert had no claim against him but that it would still cost Dew money to defend a lawsuit.

Junkert admitted telling Dew that Ewert was upset and was threatening to sue someone. According to Junkert, Dew asked whom Ewert was going to sue and Junkert answered that he didn't know. Junkert denies having any other conversation about the subject.

In late October, Junkert visited Dew at a jobsite in Sacramento. Junkert said that he believed that Steve Barbieri would be the only employee voting for the Union in the upcoming election. Junkert said that after the election he would know how many employees voted for the Union. He said he would look Steve in the eyes and be able to tell which way he voted. Junkert said if Steve voted for the Union ''he would be treated as such.'' Dew replied that it wasn't right that Barbieri had to pay for voting for the Union. Dew said, ''as far as you know, I'm voting for the Union.'' Junkert got upset and left.

Junkert testified that he recalled telling Dew that he was confident that he would win the election. He admitted that Dew said that as far as Junkert knew, Dew was going to vote for the Union. However, Junkert could not recall what precipitated this statement. Junkert denied making the statements concerning Barbieri.

Employee Shawn Bennett testified that during his job interview in September 1990, Junkert advised him that Re-

[2] While Junkert admits that Respondent received a copy of the petition on September 14, he claims that he personally did not see the petition until some later date. I do not credit this implausible testimony. Rather, based on the events of September 14, I draw the inference that Junkert invited Dew for a drink in response to receipt of the petition. In any event Junkert knew of the Union's earlier claim of authorization cards from every employee.

[3] The Union challenged Ewert's ballot at the election on the ground that he was a statutory supervisor. The General Counsel alleged in the complaint that Ewert was a statutory supervisor. Respondent denies that Ewert was a statutory supervisor and contends that he is an employee eligible to vote in the election. For the reasons set forth infra, I find that Ewert was not a statutory supervisor.

[4] Based substantially on demeanor, I found Dew to be a more credible witness than Junkert. Where their testimony is in conflict, I credit Dew's version over that offered by Junkert.

spondent was nonunion and wanted to stay that way. Bennett told Junkert that he had worked for 10 years for a nonunion company.[5] Bennett testified that prior to the election Junkert repeatedly questioned him as to whether Dew or other employees were attempting to persuade Bennett to join the Union.

According to Bennett, Junkert often complained about his high attorney fees due to the union matters. Junkert blamed Dew for these expenses. Junkert said he would never sign a contract and would close his doors before signing an agreement.

As stated earlier, on November 2, 1990, an NLRB representation election was conducted among the unit employees. Of the six ballots cast, three were cast for the Union and two were cast against. The ballot of Ken Ewert, leadman was challenged by the Union on the ground that Ewert was a statutory supervisor.

Junkert was upset because of the election results. He had expected that a majority would vote against representation. That morning, after the election, Bennett told Junkert that he had voted against the Union. Junkert told Bennett that he would fight to the finish, and that regardless of the outcome, Junkert would take care of Bennett. Shortly thereafter, Ewert told Junkert that he was upset that he was not permitted to vote and that he wanted to know what he could do about it. Junkert said he would try and find out what could be done.

Junkert had previously invited all the employees to a post-election lunch. While enroute to the luncheon, Junkert told Bennett that he had a pretty good idea of who voted for the Union. He indicated that he was not happy about buying lunch for those that had voted for the Union. He told Bennett that he would take care of Bennett and Paul Reed and that there would be work for Bennett and Reed. Both Bennett and Reed had already told Junkert that they had voted against the Union. Thus, Junkert knew that Ewert's vote had been challenged and that the other three employees had voted for the Union.

Present at the lunch were Junkert, Ewert, Bennett, Reed, Dew, and Steve Barbieri. The other employee, Mike McGlothin, went home after voting in the election. During the lunch, Junkert said that he couldn't believe that the employees had voted for the Union. Junkert suggested that maybe Dew could explain why anybody would vote for the Union. Dew answered that the Union offered good wages, benefits, and training programs. Dew suggested that Ewert would know why employees favored a union because Ewert had worked for a union company for 12 years. Ewert reacted by angrily cursing Dew. Ewert was angry that his vote had been challenged on the ground that he was a supervisor. When Dew and Barbieri got up to leave, Bennett said, ''Don't worry about it, we'll weed out these union guys and we'll have our shop back.'' Junkert said nothing to disavow or repudiate Bennett's statement. The General Counsel contends that, by remaining silent, Junkert accepted and ratified Bennett's threat to the employees.

Bennett testified that after Barbieri and Dew left, Junkert repeated his statement and also stated that the three union voters were not team players.

[5] Junkert admitted telling Bennett that Respondent was a nonunion company but denied saying that he wanted to stay that way. Bennett's version is credited over that offered by Junkert.

About a week after the election, Junkert assigned Bennett to take over as leadman on a job that Dew was in charge of at the Alhambra Medical Center. Junkert told Bennett that ''Bruce wasn't working with us and that we wouldn't be working with Bruce.'' Junkert told Bennett that Bennett was to take over the job and tell Dew what to do. Bennett protested that Dew had more experience with the job and that the job was substantially completed. Nonetheless, Junkert insisted that Bennett take over the job.

Bennett further testified that following the election, Junkert told him that Junkert would never join the Union and that he would fight them to the finish. Junkert again asked about Dew's union activity and Junkert again told Bennett that he knew he had not voted for the Union and that Bennett would be taken care of.

General Counsel contends that after the election Dew's job duties were restricted. Dew testified that after the election Junkert took away his key to the shop. Dew testified that he was no longer allowed to go to the shop. Previously, Dew visited the shop to get specifications and to pick up materials. Prior to the election, Dew was permitted to write purchase orders for materials needed at his jobsites. After the election, Dew was first prohibited from writing purchase orders and then later permitted to write them but only upon prior approval. Dew testified that as a result of these changes he was unable to work as many hours as before.

Junkert denied changing his policy regarding the use of purchase orders. Junkert admitted taking Dew's shop key but claimed that was simply a security measure. However, Junkert denied any change in Dew's work location or trying to isolate Dew. He admitted that the leadman on a job would be more likely to write purchase orders than other employees. The record shows Dew worked less hours. The evidence reveals that Dew was replaced by Donald Driver as the main sheet metal leadman. Junkert did not explain why Dew was used so few times as a leadman. Junkert ceased paying Dew's monthly health benefit because Dew did not work enough hours.

Dew testified that he did not work on December 31, 1990, because Junkert told him that the employees had agreed to take a 4-day weekend. Tuesday, January 1, was a holiday. Junkert told Dew that the shop would be closed that day. In fact, Junkert and four employees worked that day. Junkert testified that he gave Dew, and all the other employees, the option of working or taking the day off. According to Junkert, Dew and most of the employees took the day off. In fact, Junkert and four employees worked. Only Dew and one other employee took the day off.

General Counsel offered other evidence revealing animus and harassment against Dew. On one occasion Junkert denied Dew the use of a jack which helped with heavy conduit. On another occasion, Dew was given a warning for not giving 24-hour notice for an illness. Dew did not realize that he would need to take off work until that morning.

Barbieri testified that he broke his leg on Thanksgiving Day and did not return to work until February 1991. On Barbieri's return to work he was given a written warning for poor job performance for the previous November. Barbieri had been reprimanded and warned about his work habits prior to his leave. Barbieri had received written reprimands on September 7 and October 5. The warning of February 1991 reminded Barbieri of these past infractions. On

Barbieri's return to work, he was assigned to work with Dew on a job known as the Christ Unity jobsite.

Dew testified that as leadman on the Christ Unity jobsite, he learned from Barbieri that employee Dennis Eaton had removed screws from duct work that Dew had installed. Dew called Junkert and complained that Eaton was sabotaging his work. That evening Junkert called Dew at home and asked Dew to write a letter stating that Barbieri had worked that portion of the duct work where the screws had been removed. Dew said that Eaton had admitted removing the screws. Junkert then asked that Dew write that Barbieri and Eaton were responsible for the missing screws. Dew again refused and said he would write a letter stating that Eaton had removed the screws. Junkert told Dew to just forget the matter.

Barbieri was discharged on March 8, 1991. Junkert testified that Barbieri was discharged because of ongoing problems. The problems were reporting to work late, leaving work early and standing around on the job. Further, Junkert testified that Dew and Eaton complained about Barbieri's work habits. Barbieri was told he was being discharged for substandard work. This evidence was not rebutted by Barbieri or Dew.

Dew testified that he was laid off on or about June 19, 1991. Junkert claimed that Dew and other employees were missing work because of a lack of work. However, Junkert insisted that Dew was never laid off. Dew filed for unemployment benefits but Junkert did not contest Dew's application for benefits. Driver, a leadman, continued to work with Eaton, an apprentice. Both Driver and Eaton were hired after the election.

General Counsel contends that Respondent unilaterally changed heath benefits after the bargaining obligation arose. Prior to June 1991, Respondent had no health plan for its employees. Respondent negotiated individual arrangements with employees to reimburse them for their health insurance premiums or to pay premiums directly to their health care providers. In June 1991, Respondent implemented a health insurance plan. Employees had to work at least 80 hours per month to be eligible for such benefits. Dew was not paid his health benefit because he had not worked the 80 hours.

Dew testified that he was not invited to the employee meeting to explain the new heath plan. Further, Dew refused to sign an application for the plan because he had not received an explanation of the costs and benefits.

B. *The Supervisory Status of Ken Ewert*

Ken Ewert testified that he worked with Junkert at Airco Mechanical. Both were supervisors at Airco, a unionized employer. Ewert took over Junkert's position when Junkert left Airco to start up his own company. Ewert was Junkert's first employee. Ewert told Junkert that he wanted to work with the tools and did not want the hassles of being a supervisor or foreman. Junkert and Ewert agreed that Ewert would be a leadman after other employees were hired but would not have to exercise supervisory authority over the new employees. Ewert is Respondent's most experienced and highest paid employee. Ewert performs service work and installation. When Dew was hired he was to perform sheet metal and duct installation. Dew also was expected to act as a leadman on his jobsites just as Ewert did on service jobs. Dew was paid slightly less than Ewert.

Ewert worked on some jobs at which he was not the leadman. His job duties appear to be the same as Dew, Bennett, Driver and other journeymen-leadmen. If I were to find that Ewert was a supervisor, I would have to find four supervisors and two unit employees. That ratio of supervisors seems implausible. There is no evidence that Ewert hired or fired any employee or that he effectively recommended such action. On one occasion, Ewert reported to Junkert that an employee ''was a pleasure to work with'' and Junkert immediately granted the employee a raise. Junkert testified that he was concerned that the employee's starting rate was too much lower than other journeymen and raised the starting rate when Junkert confirmed that the employee was experienced. As leadman, Ewert and Dew were expected to be in charge of their jobs. When Dew needed help on his jobs, he was instructed by Junkert to obtain a helper from Ewert. Junkert would notify Ewert that when a helper was free, help should be sent to Dew. I find that the General Counsel has not established that Ewart was a supervisor within the meaning of the Act. Accordingly, I find that Ewert was eligible to vote in the representation election.

The union objections parallel the unfair labor practices allegations. In addition, the Union contends that Respondent gave an unlawful captive-audience speech. The evidence reveals that the speech was outside the 24-hour rule. Accordingly, the speech is not grounds for setting aside the election. See *AWB Metal*, 306 NLRB 109 (1992); *Midland National Insurance Co.*, 263 NLRB 127 (1982).

C. *Analysis and Conclusions*

1. The 8(a)(1) statements

Based on the credited testimony, I find that Junkert called Dew to a meeting on September 14 in response to the filing of the petition. Junkert offered Dew a foreman or supervisory position. Dew said that if Junkert hired qualified employees, he wouldn't need supervisors to pick the jobs apart. Junkert then mentioned the subject of the Union. Junkert said that he could not believe everybody signed union cards. Dew admitted that he had signed a card. Junkert then threatened Dew by saying, ''if you want to join the [expletive] Union then why don't you quit and go back to the [expletive] Union and leave my company alone.'' This constitutes a threat of loss of employment for union activities. *Goodman Investment Co.*, 292 NLRB 340 (1989); *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987). Junkert said he couldn't make promises now but things could be better. Finally Junkert said he did not have to sign anything but simply had to negotiate with the Union. Such a remark threatens that it would be futile for the employees to vote for representation. See *Fry Foods*, 241 NLRB 76 (1979), enfd. 609 F.2d 267 (6th Cir. 1979). Junkert's threat that Ewert would sue was a threat to Dew. *Carborundum Materials Corp.*, 286 NLRB 1321 (1987). Junkert's threat to Dew that Barbieri would be treated differently if he voted for the Union was also a violation. All of the above acts imply that Respondent would punish employees' union activities in violation of the Section 8(a)(1). See *Professional Eye Care*, 289 NLRB 1376 (1988); *Hacks Inc.*, 277 NLRB 916 (1985); *Southern Illinois Petrol*, 277 NLRB 160 (1985); *Thriftway Supermarket*, 276 NLRB 1450 (1985).

The credited testimony shows that Junkert when hiring Bennett told the employee that Respondent was nonunion and preferred to stay that way. See *Bay Area Mack*, 293 NLRB 125, 132–133 (1989); *Gilberton Coal Co.*, 291 NLRB 344 (1988). Junkert told Bennett that he simply had to negotiate with the Union but he did not have to sign a contract. The otherwise lawful statement appears to be a threat when coupled with Junkert's statement that he would never sign with the Union and that he would close his doors rather than sign a contract. See *Fry Foods*, supra. Junkert questioned Bennett about the union activities of other employees. See *Hanover Concrete Co.*, 141 NLRB 936 (1979). See also *Southern Illinois Petrol*, 277 NLRB 169 (1985). Junkert promised to take care of Bennett and threatened action against Dew based on their union sympathies. Junkert's promise to Bennett of job benefits for not supporting the Union is violative. The remark indicates that employees who oppose the Union will get benefits and those supporting the Union will be punished. *Azalea Gardens Nursing Center*, 292 NLRB 683 (1989). Informing Bennett that he was to take over a job from Dew because ''Bruce isn't working with us anymore,'' is a violation. The statement threatens that Respondent will retaliate against union sympathizers. See *Felbro, Inc.*, 274 NLRB 1268 (1985).

Junkert adopted the statement of employee Bennett that the union supporters would be ''weeded out.'' Under the circumstances Junkert was obliged to repudiate the statement. Rather, Junkert repeated the remark so that the threat had more impact. *Gold Bold Building Products*, 293 NLRB 1138 (1989); *Structural Finishing*, 284 NLRB 981 (1987).

2. The 8(a)(3) allegations

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The U.S. Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

On September 14, the Union filed the petition with the Board. Junkert had earlier knowledge of the organizing because the Union had requested voluntary recognition. Upon receipt of the petition, Junkert arranged a meeting with Dew. Junkert offered Dew a position as a supervisor but Dew declined the position. They spoke about the Union and Dew revealed that he had signed a union card. Junkert told Dew that he should quit and go back to the Union. Later Junkert said that his lawyer told him that he couldn't make promises but that things could be better. Finally, Junkert implied that he would talk to the Union but not sign anything.

One week later, Respondent Junkert told Dew that Ewert was going to sue somebody about the ''Union crap'' and implied that Junkert was going to sue Dew. A week before the election Junkert told Dew that only Barbieri was going to vote for the Union and implied that there would be retaliation against Barbieri. Dew stated that such retaliation wasn't fair.

The day of the election Junkert learned that Dew, Barbieri, and McGlothin had voted for union representation. Junkert was angry and asked Dew why anyone would want union representation. Dew mentioned wages, benefits, and training. As Dew was leaving Bennett threatened that the union employees would be weeded out. Junkert ratified that conduct.

After the November 2 election, Junkert appointed Bennett to take over as leadman on one of Dew's jobsites. Bennett pointed out that Dew was more experienced on that jobsite. Nevertheless, Junkert delegated Bennett to take over the job as leadman. Junkert admitted to Bennett that he was doing this because Bruce Dew was not ''working with us.'' I draw the inference that Dew was being demoted because of the election results.

At the same time Junkert took the keys to the shop from Dew, making it more difficult for Dew to perform his work. Dew was given few assignments as leadman. Prior to the election, Dew worked almost exclusively as a leadman. As a result of this change, Dew experienced a loss of work hours. Junkert's admission that Dew was a fine employee and did craftsman type work, raises an inference that this maltreatment was unlawfully motivated.

Dew was laid off in June 1991. Junkert testified that employees were losing work. He admitted that he told employees to file for unemployment benefits. However, Junkert insisted that Dew was not laid off and that Dew took it upon himself to file for unemployment. Junkert did not contest Dew's application for unemployment. However, Junkert claims that Dew filed because of lack of work and not because he was laid off. At least two employees, junior to Dew, kept working during the period of Dew's layoff.

In the context of the union animosity, I find that General Counsel established a prima facie case of discrimination against Dew. The burden shifts to Respondent to establish that the same action would have taken place in the absence of Dew's union activities. Respondent has shown some loss of work before Dew's layoff. However, the fact that a layoff may be economically justified is no defense if the selection of the employees laid off was because of union activities. *Seifert Mfg. Co.*, 244 NLRB 676 (1979); *Jimmy Dean Meat Co.*, 227 NLRB 1012 (1977). An employer cannot seize upon the opportunity occasioned by a reduction in force to weed out an employee because of his union activities. *Pacific Southwest Airlines*, 201 NLRB 647, 655 (1973); *Heath International*, 196 NLRB 318 (1972).

Respondent has not shown why Dew, a craftsman and senior employee, was not kept working.[6] Nor has Respondent shown why Dew was not acting as a leadman after the election. Under *Wright Line*, Respondent must produce evidence to persuade that such action would have taken place even absent the protected conduct. Respondent has been unable to do so.

There is also sufficient conduct to create a prima facie case regarding Barbieri's discharge. Respondent had animus against Barbieri for voting for the Union. Barbieri was discharged 1 month after returning to work. Junkert attempted to blame Barbieri for the misconduct of employee Eaton.

[6] See *M & J Trucking Co.*, 214 NLRB 592, 604 (1974); *Stearns-Roger*, 222 NLRB 1096, 1097 (1976).

When Dew would not aid in this plan, Junkert dropped the matter and did not discipline Eaton, the actual wrongdoer.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Barbieri's protected activities. Respondent has established that Barbieri was not a good employee. However, an employer cannot carry its *Wright Line* burden simply by showing it had a legitimate reason for the discharge, but must persuade that the action would have taken place even absent the protected conduct by a preponderance of the evidence. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). It is well settled that if an employer discharges an employee involved in ''unwelcome concerted activities'' for behavior that would warrant a discharge in the absence of union or concerted activities then ''the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.'' *Kate Holt Co.*, 161 NLRB 1606, 1612 (1966).

I find the prima facie case is overcome by the evidence that Barbieri was late for work, left work early and stood around on work time. Respondent issued warnings to Barbieri in September and October concerning these matters. The October warning carried with it a 2-day suspension. When Barbieri returned to work after a disability leave the problems continued. Junkert's testimony that these problems continued was not rebutted. Dew's testimony confirmed that Barbieri was not a good worker. On September 14, Dew sent Barbieri home because the employee was not working. Further, the record contains some evidence that Junkert disciplined Bennett an antiunion employee when Bennett had attendance problems. Barbieri was late for work on the day before his discharge. Further, Barbieri was told by Junkert that he was discharged for substandard work.

I am persuaded that Respondent would have discharged Barbieri absent the employee's union activities because of these poor work habits. The union activities and union animus have established a strong prima facie case. However, Barbieri's work habits would have caused his discharge in any event. Junkert was not going to permit these infractions to continue. I cannot find that Junkert overlooked or condoned these infractions. Accordingly, I find that the General Counsel has not sustained his burden of proof that the discharge was motivated by antiunion considerations. Accordingly, I recommend dismissal of this allegation of the complaint. See *Tapco Products Co.*, 253 NLRB 998, 1001 (1981).

3. The representation proceeding

The challenge to the ballot of Ken Ewert was overruled and his ballot must be counted. Having concluded that Respondent, between the date of the petition and the date of the election, engaged in numerous unfair labor practices, I find that Respondent's conduct affected the results of the election. This conduct is sufficient to set aside the election. *American Safety Equipment*, 234 NLRB 501 (1978); *Dayton Tire & Rubber*, 234 NLRB 504 (1978). Therefore, I recommend that if after opening the ballot of Ewert, a revised tally of ballots shows that a majority of votes has not been cast for the Union, the election should be set aside. However, if the revised tally of ballots shows that a majority of votes has been cast for the Union, then a certification of representative shall issue.

It is well settled that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering*, 253 NLRB 419, 421 (1980); *Red Express*, 268 NLRB 1154, 1155 (1984); *R. Dakin & Co.*, 284 NLRB 98 (1987). The Board does not automatically find that grants of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectionable ''unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election.'' *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting Goods*, 239 NLRB 1277 (1979).

The Board's general rule is that an employer's legal duty during a preelection campaign period is to proceed with the granting of benefits, just as it would have done had the union not been on the scene. See, e.g., *American Telecommunications Corp.*, 249 NLRB 1135 (1980). When an employer confers benefits during the course of a union organizing campaign, its actions are presumptively a violation of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). In the absence of evidence demonstrating that the timing of the changes was governed by factors other than the pendency of the election, the Board will infer interference with employee freedom of choice as the motivating factor. The burden of establishing a justifiable motive remains with the employer.

Applying these principles to the instant case, I have found that the election proceeding was still pending when Respondent changed its health insurance practices. Respondent has not demonstrated that the granting of the benefit at issue was governed by reasons other than the pendency of the election petition. I therefore find a violation of Section 8(a)(1) of the Act.

4. The bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

> (1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.
>
> (2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.
>
> (3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is ''slight,'' a bargaining order may issue.
>
> (4) Minor or less-extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

A union that chooses to petition for an NLRB election instead of seeking recognition may obtain a bargaining order under *Gissel* if it loses the election, but only if postelection objections establish that misconduct sufficient to invalidate the election occurred in the period between the filing of the

petition and the holding of the election. *Bernel Foam Products Co.*, 146 NLRB 1277 (1964); *Irving Air Chute Co.*, 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965). As seen above, I have found threats and promises, during the critical period, sufficient to set aside the election.

As a precondition to a bargaining order, the Board currently requires a showing that the union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984). I find that the Union had obtained valid authorization cards from five employees in a bargaining unit of six employees.

Here Respondent's reaction to the Union's petition and demand for recognition was to unlawfully question employees, make promises and threats, and unlawfully lay off an employee.

Where an employer's reaction to employee organizational activities is to engage in swift, pervasive, and severe illegal acts, and the misconduct is enough to convince that it is the type that has lingering effects and that is not readily dispelled by traditional remedies or time, the Board has held that an election would not reliably reflect genuine, uncoerced employee sentiment. See, e.g., *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Quality Aluminum Products*, 278 NLRB 338 (1986); *Reno Hilton*, 282 NLRB 819 (1987).

In *White Plains Lincoln Mercury*, 288 NLRB, 1133, 1139–1140 (1988), the Board discussed the application of the *Gissel* test, as follows:

> Because of the nature, extent, and severity of the Respondent's unlawful conduct in response to its employees' organizational activities . . . we shall require that the Respondent recognize and bargain with the Union. Respondent's unlawful discharge of five employees . . . in immediate retaliation against their card signing, is among the 'less remediable' of unfair labor practices. Loss of employment, frequently referred to as the 'capital punishment' of the workplace, has long been recognized as the type of action which will have a long-lasting coercive impact on the work force and demonstrate most sharply the power of the employer over the employees.
>
> Given the small size of the Respondent's operation and the swift and massive layoffs of employees who had signed cards supporting the Union, the Respondent's actions have a pervasive and lasting impact.

Here, Respondent prior to the election made threats and promises. Unfortunately, in this small unit the secrecy of the ballot was lost. Junkert, after the election, followed his prior words with unlawful retaliation against the perceived leading union adherent. He reemphasized his antiunion stance in discussions with employees in which various threats, including threats to close the business, were repeated on several occasions. Threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain. See, e.g., *Milgo Industrial*, 203 NLRB 1196, 1200–1201 (1973), affd. mem. 497 F.2d 919 (2d Cir. 1974); *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980); *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980).

The issue is whether a fair election can be run in this small unit. Respondent shortly after the election engaged in hallmark violations such as threats and promises, and an unlawful layoff. I find, in light of the violations' seriousness and pervasiveness, the unit's size, the substantial percentage of unit employees the Respondent's threats, promises and discrimination directly affected, and the strong possibility of repetition of similar unfair labor practices, that the unfair labor practices involved in this case would tend to undermine the Union's majority status and impede the election process. It appears that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, is slight and that the employee preference expressed through the authorization cards would, on balance, be better protected by a bargaining order.

Respondent argues that because of employee turnover, no bargaining order should issue. For the reasons stated above, I reject that argument. Further, the Board has been reluctant to consider employee turnover in *Gissel* situations. See *Gibson Products Co.*, 185 NLRB 362 (1970). To do so, would in effect be rewarding the employer and allowing him to profit from his own wrongdoing. Although some courts have not gone along with the Board in this view, the United States Court of Appeals for the Ninth Circuit, where this case arises, has done so. See *NLRB v. CAM Industries*, 666 F.2d 411, 413 fn. 4 (9th Cir. 1982). I am convinced that the lasting effects of the Respondent's offensive conduct cannot easily be eradicated and that a fair election at this facility is improbable. See *M.P.C. Plating*, 295 NLRB 583 (1989); *Massachusetts Coastal Seafoods*, 293 NLRB 496, 500 fn. 10 (1989).

REMEDY

Having found that the Respondent has violated Section 8(a)(l), (3), and (5), I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall offer Bruce Dew immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

Respondent shall make whole Dew for any loss of earnings and other benefits he may have suffered as a result of the unlawful layoff, by paying him an amount equal to that he would have earned from the layoff dates to the dates of his reinstatement or offer of reinstatement, less net interim earnings, if any, with backpay and interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 130 NLRB 716 (1962).

Having found that the Respondent began a campaign of unfair labor practices designed to destroy the Union's majority status on September 14, it shall be ordered to recognize and bargain on request with the Union as the exclusive bargaining representative of the bargaining unit employees retroactive to that date. See *Reno Hiltonn*, supra. Because the bargaining obligation is retroactive to September 14, 1990, the change in health benefits also violated Section 8(a)(5). See *Toyota of Berkeley*, 306 NLRB 893 (1992).

Conclusions of Law

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

2. Sheet Metal Workers' International Association, Local Union No. 162, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By making promises of better working conditions; by threatening employees with plant closure and other adverse actions for engaging in union activities; by threatening employees with discharge Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.

4. By laying off employees in order to discourage union activities Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By failing and refusing to recognize and bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]