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NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

ORANGE COUNTY PUBLICATIONS, AN UNINCORPORATED DIVISION,
OF OTTOWAY NEWSPAPER, INC., D/B/A THE TIMES-HERALD RECORD
AND
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1120, AFL-CIO

Cases 34-CA-8304 and 34-CA-8517
June 26, 2001

Summary

Agreeing with the administrative law judge, the Board found that, during a 1998 captive audience speech to employees, the Respondent's publisher, James Moss, threatened employees that they would receive less benefits than nonunion employees if they voted in favor of union representation in violation of Section 8(a)(1) of the Act. Contrary to the judge, Members Liebman and Walsh found that Moss' statement about a possible change in the Respondent's distribution system, also constituted an unlawful threat of job loss if employees selected Communications Workers Local 1120 to be their collective-bargaining representative. By linking a possible change in the distribution system, including the loss of full-time positions, to unionization, and the Union's attempts to exert pressure on the Respondent, Moss implicitly threatened employees with loss of their jobs if they voted in favor or the Union, they held. Chairman Hurtgen would dismiss this 8(a)(1) allegation, finding Moss' statement was not a threat of retaliatory action, but rather a statement of economic reality which would not be altered because of the presence or absence of a union.

The Board affirmed the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by restructuring its delivery operations.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Communications Workers Local 1120; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Goshen, March 1-2,1999. Adm. Law Judge Michael A. Marcionese issued his decision June 29, 1999.

DECISION AND ORDER

**1 BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On June 29, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On February 2, 1998, [1] the Union filed a petition seeking to represent the Respondent's drivers. On March 21, the Respondent's publisher, James Moss, met with the drivers to present the Respondent's position concerning union representation for the drivers.

At that meeting, which was tape recorded by an employee, Moss spoke at length about the possible consequences of unionization. Among other things, Moss told the drivers that the Respondent was smart enough to know that if it gave the Union more than it gave its unrepresented employees it would be making the case for the Respondent to organize the whole Company.

Moss also commented about the Union's tactics in pressuring the Respondent in support of its demands, including the Union's supposed use of sick outs. Moss urged the drivers as follows:
Let's work together to make this company stronger, not let's find a way to fight with one another and make the company weaker.

That is what it ends up being. Let's do some stuff to try and weaken the company. And if that is what you want to do, ultimately, you have to realize that all of that stuff is going to have a negative impact on the company.

If we need to, right now there could be a less expensive way to deliver the *Times-Herald Record* than the distribution system that we've got. We have never availed ourselves of those other mechanisms. We have out front looked for ways to keep our costs under control, and where there was not a need for full-time drivers. The window for our distribution is between twelve o'clock and four o'clock. That is when the papers come off the press. Those are not eight hour jobs, yet we have done some things for some body of jobs that we have. We have done some things on the front end and the back end to try to stretch the jobs into full-time, but we cannot do that for every job. But what we have tried to do is keep people employed on a full-time basis where it made economic sense. Where it doesn't, we cannot do that and we won't do that, even with a union.
Despite these comments, Moss admitted at the hearing that preserving full-time driver positions made economic sense at the time of his March captive audience speech.

****2** Pursuant to a Decision and Direction of Election, from March 25 to April 6 a mail-ballot election was held among the Respondent's drivers. The tally of ballots showed 45 against and 14 for representation. The Union filed objections asserting that Moss' statements set forth above threatened employees with loss of full-time work and lesser wages and benefits than nonunion employees, if they voted for the Union. [2] On September 8, while the objections were pending before the Board, the Respondent announced that, pursuant to a companywide restructuring initiative, it was restructuring its delivery operations by, among other things, eliminating the full-time driver classification.

The judge found that the Respondent violated Section 8(a)(1) by threatening employees that they would receive less benefits than nonunion employees if they voted in favor of union representation. The judge also found that the Respondent did not violate Section 8(a)(3) and (1) by restructuring its delivery operations, and that Moss' statement about the Respondent's distribution system, set forth above, did not violate Section 8(a)(1). According to the judge, this statement, read in context, was a truthful description of the collective-bargaining process and the potential impact of unionization on the Respondent's practice of stretching part-time jobs into 8-hour jobs in order to keep the drivers employed full time. The judge stressed that Moss' prediction that the Respondent would not continue this practice if it did not make economic ***351** sense to do so was not a threat of reprisal that would be taken by the Respondent of its own volition but was instead predicated on economics, including the economics of dealing with a union.

The judge acknowledged that the Board had previously found that the same statement constituted objectionable conduct in its September 29 Decision and Direction of Second Election. However, the judge discounted the significance of this finding on the grounds that the Board applies a different standard to election objections than it does to unfair labor practices, so that conduct may be objectionable even if it does not constitute an unfair labor practice. [3] The judge also concluded that this statement was "close to the edge of permissible speech, as evidenced by the split on the Board panel." [4]

Contrary to the judge, we find that Moss' statement, even when viewed in context, constituted an unlawful threat of reprisal and therefore violated Section 8(a)(1).[5] By linking a possible change in the distribution system, including the loss of full-time positions, to unionization, and the Union's attempts to exert pressure on the Respondent, Moss implicitly threatened employees with loss of their jobs if they voted in favor of the Union.[6] This linkage is especially clear in light of Moss' statement that the Respondent's options, "right now," included changing its distribution system and his admission that, at the time he made this statement, preserving full-time driver positions made economic sense. In these circumstances, we find that Moss was not describing the Respondent's past practices, as the Respondent claims, nor was he making a lawful prediction of the economic consequences of unionization "on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in the event of unionization."[7] Rather, Moss was at least implicitly threatening the drivers that, solely on the basis of unionization, the Respondent would cease its past practice of finding work for drivers so they could maintain their full-time status.

**3 Our dissenting colleague asserts that Moss' statement was no more than a statement of economic reality, i.e., that any decision it made regarding the elimination of full-time driver positions would be governed by what made economic sense and not by whether its employees chose to be unionized. In reaching this conclusion, the dissent fails to fully consider the context in which the statement was made. As set forth above, Moss mentioned eliminating the full-time positions in the context of his discussion of the impact of the Union's efforts to weaken the Respondent economically. Moss identified changing the distribution system as an option available to the Respondent "right now," even though by Moss' own admission preserving the full-time driver positions made economic sense at that time. Moreover, our colleague agrees that these remarks were made in the course of the same speech in which Moss unlawfully threatened employees that they would receive less benefits than nonunion employees if they voted in favor of union representation. In these circumstances, we do not agree that Moss' statement concerning the distribution system was permissible speech protected by Section 8(c).[8] Accordingly, we *352 find that the Respondent, by threatening its drivers with the loss of full-time work, has violated Section 8(a)(1) as alleged in the complaint.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. By threatening employees with loss of jobs if they selected the Union to be their collective-bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Orange County Publications, an unincorporated division of Ottoway Newspapers, Inc., d/b/a the Times-Herald Record, Middletown, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Threatening employees with loss of jobs if they selected Communications Workers of America, Local 1120, AFL-CIO, or any other labor organization, to be their collective-bargaining representative."

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

**4 CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I agree with the judge's finding that the Respondent's publisher, James Moss, in remarks to assembled employees, did not violate Section 8(a)(1). In my view, his speech was protected by Section 8(c).

Moss explained that the jobs were basically 4-hour jobs. He said that the past practice was to stretch part-time jobs into full-time jobs in order to keep the drivers employed full time. He acknowledged that, "right now," there were less expensive ways to do the work, i.e., convert to part-time. However, he said that he would continue to do this if "it made economic sense." If it did not make economic sense, he would not do it, "even with a union."

The quoted phrase "even with a union," was not tantamount to saying that Respondent would reduce to part-time if there were a union. Rather, Moss was saying that any reduction would be because of business considerations and that the presence of a union would not change that, one way or the other.

My colleagues mischaracterize Moss' speech. Moss stated that, "right now," there were less expensive ways to deliver the newspaper. Moss did *not* say that, "right now," there was an option to make a change. To the contrary, he said that he intended to retain the current system if that were economically feasible. If it were not, he would have to change, irrespective of union presence.

Further, although the Respondent also uttered an 8(a)(1) threat in the same speech, that threat did not pertain to the future existence of jobs. Thus, the threat did not taint the otherwise lawful statements set forth above.

Based on the above, I conclude that the statement was not a threat of retaliatory action, but rather a statement of economic reality which would not be altered because of the presence or absence of a union.

Each of the cases relied on by the majority for its position involve threats of adverse consequences directly linked to unionization. Thus, in *MK Railroad Corp.,* 319 NLRB 337 (1995), the employer threatened that "if the union came in [it] would have to look at one of its other options," specifically including "diverting work to Mexico." In *MPG Transport,* 315 NLRB 489 (1994), the employer stated that "I can't live with a union contract. I'll either close the place down or cancel the trucks, or bring in outsiders and do away with [employer's] drivers." Similarly in *Brunswick Corp.,* 282 NLRB 794 (1987), the employer's rhetorical question ("What would stop [the company] from picking up and moving to Mexico if the union did get it the plant?") conveyed the clear implication that the employer would decide whether to relocate outside the country solely on the basis of the union's success or failure at organizing its employees.

**5 Unlike any of threats cited in the cases relied on by the majority, the Respondent told employees that any decision it made would be governed by what made "economic sense" and not by whether its employees chose to be unionized. Accordingly, I find that the Moss statement is permissible speech protected by Section 8(c), and I would dismiss the 8(a)(1) complaint allegation. [1]

***353 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.

Section 7 of the Act gives employees these rights.
To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you by telling you that you will receive less benefits than nonunion employees if you select Communications Workers of America, Local 1120, AFL-CIO, or any other labor organization, to be your collective-bargaining representative.

WE WILL NOT threaten you with loss of jobs if you select Communications Workers of America, Local 1120, AFL-CIO, or any other labor organization, to be your collective-bargaining representative.

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

ORANGE COUNTY PUBLICATIONS, AN UNINCORPORATED DIVISION OF OTTOWAY NEWSPAPERS, INC., D/B/A THE TIMES-HERALD RECORD

Darryl Hale, Esq., for the General Counsel.
Richard A. Perras, Esq. (Edwards & Angell, LLP), for the Respondent.
Jerry Ebert, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge.

This case was tried in Goshen, New York, on March 1 and 2, 1999. The Communications Workers of America, Local 1120, AFL-CIO (the Union) filed the charge in Case 34-CA-8304 on March 31 and amended it on November 20, 1998, and filed the charge in Case 34-CA-8517 on September 8, 1998. [1] Based on the charges, as amended, an order consolidating cases, consolidated complaint and notice of hearing issued on November 23. The consolidated complaint alleges, inter alia, that Orange County Publications, an unincorporated division of Ottoway Newspaper, Inc., d/b/a Times-Herald Record (the Respondent or THR) violated Section 8(a)(1) of the Act, on March 21, through statements made by its president and publisher, James A. Moss, at a meeting with employees shortly before a mail-ballot representation election began. The consolidated complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act, since September 8, by announcing and implementing a reorganization of its distribution department which resulted in the elimination of all full-time driver positions. The Respondent filed its answer to the consolidated complaint on December 4, admitting that it made changes in its distribution department, but denying any unlawful motivation, and denying that it violated Section 8(a)(1) of the Act through Moss' statements.

****6** On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an unincorporated division of a corporation, engaged in the publication and circulation of a daily community newspaper from its facilities in Middletown, New York. The Respondent annually purchases and receives at its New York facility goods valued in excess of $50,000 directly from points located outside the State of New York, subscribes to interstate news services, and derives gross revenues in excess of $200,000 a year. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For many years, the Union has represented a unit of approximately 100 reporters, photographers, copy desk editors, research staff, and editorial assistants employed by the Respondent. The Respondent's bulk delivery drivers, employed in the distribution department, have historically been unrepresented. Beginning about September 30, 1997, the Union attempted to organize this group of employees. On that date, approximately seven drivers attended the first meeting with the Union's organizing director, Jerry Ebert. All but one were full-time drivers. Ebert continued to solicit support for the Union among the Respondent's full-time and part-time drivers, by standing outside the Respondent's facility to talk to the drivers as they arrived for work and left to deliver the paper, and by holding meetings. An organizing committee consisting ultimately of 12 drivers was formed. All but one member of this committee were full-time employees. Ebert testified that the full-time drivers formed the core base of support for the Union throughout the campaign. John Stroppel, a part-time driver who signed the initial petition and joined the organizing committee, testified that many part-time drivers also supported the Union because the Union campaigned on a promise of more full-time equivalent benefits for them. There were approximately 62 ***354** drivers employed during the campaign, of which 27 were full-time employees.

On February 2, the Union filed a petition with the Board seeking to represent the Respondent's drivers. Pursuant to a Decision and Direction of Election, a mail-ballot election was conducted from March 25 to April 6. The Union lost the election, by a 45 to 14 vote, and filed objections on April 14. A hearing on objections was held on June 4 and the hearing officer issued her report and recommendation on July 21. On September 29, a majority of the Board's three-member panel adopted the hearing officer's findings and recommendations, including the recommendation that a new election be held. The Respondent's conduct that was

found objectionable by the hearing officer and two members of the Board is the same conduct alleged to violate Section 8(a)(1) of the Act here. The second election was conducted on November 10, resulting in a union victory and certification as the Section 9(a) representative of the Respondent's drivers on November 18. The Respondent thereafter refused to recognize and bargain with the Union, challenging the validity of the certification. On May 11, 1999, the Board issued an Order, in response to a Motion for Summary Judgment, requiring the Respondent to recognize and bargain with the Union. Again, a majority of the Board reaffirmed its earlier decision ordering a new election on the basis of the conduct alleged as objectionable in the representation case and as unlawful here. [2] *Times-Herald Record*, 328 NLRB 404 (1999).

****7** There is no dispute that, on September 8, while exceptions to the hearing officer's report were pending before the Board, the Respondent announced a restructuring of its newspaper distribution system which, inter alia, eliminated the full-time driver classification. The plan was implemented on October 2. The General Counsel alleges that the Respondent made these changes to retaliate against the full-time drivers who were the main supporters of the Union. The Respondent argues that the changes were dictated by its corporate parent as part of a cost reduction plan affecting every department and were not motivated by any union activity on the part of the drivers.

A. The March 21 Meeting

Prior to the first election, the Respondent held a series of meetings with the drivers at which its president and publisher, James Moss, spoke about the Union. John Benson, a veteran driver and leading union activist, attended one of these meetings, on March 21, and surreptitiously tape-recorded the meeting. According to Benson, the meeting lasted about 2-1/2 hours. There were approximately 22 drivers at the meeting, about half of whom were full-time drivers. At the hearing, I received into evidence, over the Respondent's objections, the original tape and a transcript of it that was prepared for the Union by a court reporting service. The same tape and transcript had also been admitted into evidence at the objections hearing. The Board has found such tape recordings of employer meetings with employees to be admissible as evidence, even when the surreptitious recording violates State law. See, e.g., *East Belden Corp.,* 239 NLRB 776, 782 (1978), enfd. 634 F.2d 635 (9th Cir. 1980). The Board has, at times, even found such tape recordings to be the best evidence of what transpired at the meeting. See, e.g., *McAllister Bros.,* 278 NLRB 601 fn. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987); *Algreco Sportswear Co.,* 271 NLRB 499, 505 (1984). Although Respondent had an opportunity to listen to the tape during the objections proceeding and had received a copy of the transcript at the same time, it has never disputed the accuracy of the recording. Moreover, Moss essentially conceded the accuracy of the tape by acknowledging that he made many of the statements attributable to him in the recording. In making my findings regarding the meeting, I have relied on the testimony of the witnesses, Benson and Moss, who were basically in agreement as to the key points, and the transcript to the extent it was corroborative of this testimony.

Benson testified that Moss spoke about the collective-bargaining process and the Respondent's history of dealing with the Union as representative of the editorial department employees. Moss read two sections from the collective-bargaining agreement covering the editorial department that related to part-time employees. He then said, "[I]f, after 20 years of union representation, that's all they got … what have you got to lose? Well, I'll tell you what you've got to lose, you get to pay union dues." Later in the meeting, Moss told the employees that if he were to give the union employees more than he gave his nonunion employees he would make the case for the whole company to unionize. Benson testified further that at another point in the meeting Moss discussed the Respondent's current system for distributing its newspapers and said: "If we need to, right now, we can find a less expensive way to deliver this newspaper."

****8** Moss admitted saying "something to the effect" that the Respondent was smart enough to know that if it sat at the bargaining table and gave the Union more than it gave the rest of its employees it would be making the case for the Union to unionize the whole company. He denied telling the drivers that they would get less pay if the Union were selected. Instead, Moss compared the collective-bargaining process to blackjack, the employees could hold with what they now had in hand,

or they could put it on the table and gamble that they would end up with more, but they would also risk losing and having less. A videotape shown at the beginning of the meeting made similar points about the bargaining process. Moss also admitted discussing the cost of the Respondent's current distribution system and telling the employees that the Respondent had been aware for some time that there was a less expensive way to distribute the newspaper, but that the Respondent had not availed itself of that mechanism because it preferred to achieve savings through attrition. [3] Moss denied saying that this would change, one way or another, with the Union. According to Moss, this comment ***355** came after he had talked about the negativity and cynicism associated with the Union and referred to union actions, short of strikes, that had a negative impact on the Company, such as sick-outs and boycotts. On cross-examination, Moss admitted further that he told the employees that the driver's jobs were not full-time jobs and that the Respondent had done all it could to make these jobs 8-hour jobs "where it made economic sense." Finally, Moss admitted reading the two sections relating to part-time employees from the Union's editorial department contract.

The tape recording of the meeting shows that Moss' statement about the Respondent's current distribution system was as follows: If we need to, right now there could be a less expensive way to deliver the *Times-Herald Record* than the distribution system that we've got. We have never availed ourselves of those other mechanisms. We have out front looked for ways to keep our costs under control, and where there was not a need for full-time drivers. The window for our distribution is between twelve o'clock and four o'clock. That is when the papers come off the press. Those are not eight hour jobs, yet we have done some things for some body of jobs that we have. We have done some things on the front end and the back end to try to stretch the jobs into full-time, but we cannot do that for every job. But what we have tried to do is to keep people employed on a full-time basis where it made economic sense. Where it doesn't, we cannot do that and we won't do that, even with a union.

The tape also shows that these comments were made after Moss had described actions the Union had taken, short of going on strike, to put pressure on the Respondent during collective-bargaining negotiations. Some of these involved sick-outs and urging consumers to boycott businesses that advertise in the Respondent's newspaper, actions that Moss said damage the Respondent. Immediately before talking about the distribution system, Moss urged the employees to work together to make the Company stronger, rather than finding ways to fight with one another and make the Company weaker. The tape reveals that, after the above comments about the distribution system, Moss concluded with the following:

****9** So, these are the realities of the situation, and we all just ought to go into this thing with our eyes completely wide open. Yes, maybe they do not strike, but they sure tried to do some things to hurt us.

There is no dispute that the drivers were assigned nondriving duties, either at the beginning or at the end of their routes, and that actual driving time, in good weather, was less than 8 hours. Thomas Muldoon, one of the drivers who was active in the Union's campaign, acknowledged that there had been a trend in recent years to attrition out full-time driver routes and replace them with part-time employees. In addition, Benson testified, without dispute, that the Respondent had in the past subcontracted some bulk delivery routes in an effort to cut costs. The Respondent's distribution manager, Ronald Vandermark, who was the distribution foreman at the time of this meeting, testified that he was aware that full-time drivers' concern about job security was one of the reasons for the Union's campaign.

The complaint alleges that Moss' statements about the Respondent's distribution system threatened employees with loss of jobs if they selected the Union as their collective-bargaining representative. The complaint alleges further that Moss' statement, that paying union employees more than nonunion employees would "make the case for the whole company to unionize," threatened employees with lesser pay than its nonunion employees if they selected the Union as their collective-bargaining representative. The Respondent argues that these statements, when considered in the context of the entire meeting, were permissible expression of the likely consequences of unionization and protected by Section 8(c) of the Act.

The standard for evaluating an employer's preelection statements, such as those at issue here, can be found in the Supreme Court's decision in *NLRB v. Gissel Packing Co.,* supra at 618-619:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.… If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without protection of the First Amendment.… As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control" and not "threats of economic reprisal to be taken solely of his own volition." [Citations omitted.]

****10** The Court also noted that this analysis of employer statements "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id. at 617. Finally, in responding to criticism that the line between permissible and impermissible speech was too vague, the Court noted that the employer is in the best position to make his views known without engaging in "brinksmanship" simply by avoiding conscious overstatements he has reason to believe will mislead his employees. Id. at 620.

Applying the above test to the Respondent's statements at issue here, I find that Moss' statements regarding the Respondent's distribution system did not cross the line between permissible speech and unlawful threat. Moss' statement must be considered in the context of the entire speech, and in particular, his remarks that immediately preceded it. The General Counsel ***356** concedes that Moss did not directly threaten employees with loss of employment, arguing that such a threat was implicit in his statement. However, there is no contention that Moss' description of the Respondent's experience with the Union during negotiations for the editorial department was not truthful. Nor is there any contention that his description of the collective-bargaining process was unlawful. [4] When considered in this context, it is clear that Moss was merely describing for employees the economic impact of unionization and what that could mean for Respondent's continuation of its current practice of stretching part-time jobs into 8-hour jobs to keep people employed full time because it "made economic sense." The prediction that Respondent would not continue to do that if it didn't make economic sense, "even with a Union," is not a threat of "economic reprisal that would be taken solely of [Respondent's] own volition." It is clear from the context of the statement that any decision made by the Respondent regarding its distribution system would be based on economics, including the economics of dealing with a union. *Star Fibers, Inc.,* 299 NLRB 789 (1990); *Atlantic Forest Products,* 282 NLRB 855 (1987); *Rexall Corp.,* 265 NLRB 121 (1982), enfd. in relevant part 725 F.2d 74 (8th Cir. 1984).

The cases relied on by the General Counsel are distinguishable. In *Brunswick Corp.*, 282 NLRB 794 (1987), the Board found an unlawful threat in the following rhetorical question, "what would stop [the company] from picking up and moving to Mexico if the union did get in the plant?" Clearly, such a statement, without more, conveys the impression that an employer will simply pack up and leave solely on the basis of the union's success or failure in the election, and not on the basis of objective economic factors beyond his control. Similarly, in *MK Railway Corp.,* 319 NLRB 337 (1995), the administrative law judge, with Board approval, found the employer's statement, "if the union came in [the Respondent] would have to look at one of it's other options … diverting work to Mexico," was an unlawful threat. The clear implication of this statement was that any such decision was contingent exclusively on the union's success or failure in the election and not on economic hardships beyond the employer's control that might result from unionization. In *MPG Transport,* 315 NLRB 489 (1994), the threat was direct, not implied.

**11 In reaching this conclusion, I am mindful of the Board's decision adopting the hearing officer's finding that this same statement was objectionable. However, the Board applies a different standard to objections than it does to alleged unfair labor practices. In ruling on election objections, the test is whether the employer's conduct during the critical pre-election period destroyed the "laboratory conditions" necessary to ensure that employees have an opportunity to make an uninhibited choice of bargaining representative. *General Shoe Corp.,* 77 NLRB 124, 127 (1948). While conduct that violates Section 8(a)(1) is "a fortiori" election interference,[5] the reverse is not true. Conduct may be objectionable even if it does not violate the Act. See *ADIA Personnel Services,* 322 NLRB 994 (1997). Because the Board goes to great lengths to ensure employees' free choice in an election, it has held that communications which hover on the edge of the permissible and the impermissible are objectionable. *Pacific Telephone Co.,* 256 NLRB 449 (1981). Finally, I note that the statement in the instant case was close to the edge of permissible speech, as evidenced by the split on the Board panel.

I reach a different result with respect to Moss' other statement which is alleged to be unlawful. It is undisputed that Moss told the employees that the Respondent was smart enough to know that if it sat at the bargaining table and gave the Union more than it gave its nonunion employees, it would be making the case for the Union to organize the whole company. The clear implication of this statement is that the Respondent would never agree at the bargaining table to give the drivers more than they currently had as unrepresented employees, despite its obligation under Section 8(d) of the Act to bargain in good faith with the bargaining representative chosen by the employees. The Board has historically found such statements to be unlawful. *Excel DPM of Arkansas,* 324 NLRB 880 (1997); *American Telecommunications Corp.,* 249 NLRB 1135 (1980). The point Moss was trying to make with this statement was driven home by the presence at the meeting of a member of the editorial department bargaining unit, Steve Burr, who told the employees that, after 20 years, the union employees always get less than everybody else in the building. The clear implication of Moss' statement, when considered in the context of the meeting, is that the employees would have less benefits than they would if they remained nonunion. Accordingly, I find that the Respondent, by this statement, violated Section 8(a)(1) of the Act as alleged in the complaint.

B. The Reorganization of the Distribution Department

The distribution department is operationally part of the Respondent's production division which prints and delivers the Respondent's newspaper. As the newspapers come off the presses, they are carried via conveyor into the mailroom where advertising supplements are inserted by machine. The papers are then stacked and bundled by another machine and carried by conveyor to the loading area to be loaded on to the Respondent's vans and trucks driven by the drivers involved in this proceeding. Prior to the March election, the Respondent employed more than 160 employees in the mailroom and distribution department, including the 62 drivers. The remaining employees are primarily part-time employees who operate the inserting and stacking machines and prepare the papers for distribution. Prior to July, John Botti was the Respondent's distribution manager in charge of the mailroom and distribution department and Ronald Vandermark was the distribution foreman who supervised the drivers. Vandermark replaced Botti in July.

**12 The Respondent's bulk delivery drivers involved in this proceeding deliver the Respondent's 85,000 daily and 100,000 Sunday newspapers to stores and other dealers who sell individual copies, and to independent carriers and motor route drivers who deliver the paper to individual homes. The carriers and motor route drivers are independent contractors and are part of the Respondent's circulation department. Prior to the March *357 election, the Respondent had 34 different bulk delivery routes making in excess of 1000 individual drops. The drivers were assigned to specific routes that are posted as they become available when drivers leave the Respondent's employ. It appears that the full-time drivers generally delivered on their assigned routes Monday through Friday while the part-time drivers covered the same routes on weekends or when the full-time drivers were absent. The drivers were required to make their deliveries between the time the papers came off the press, around midnight, and 5 a.m., in order for the carriers to make their deliveries to individual customers before the Respondent's 6 a.m. guaranteed delivery time.

There is no dispute that deliveries could be delayed by occasional late press runs and bad weather or road conditions. Over the years, the Respondent had preferred using full-time drivers who could be relied on to work late in order to make deliveries because they had no other jobs to go to during the day.[6] It is undisputed that the drivers had various duties, in addition to the delivery of the paper, assigned to them. Some drivers had duties in the mailroom at the beginning or end of their shift, such as running sorting machines, sweeping floors, checking for scrap, and loading trucks, while others were required to remain in their trucks at the end of the route to cover delivery shortages. Shortages occur when, for any number of reasons, a carrier finds he does not have enough papers to satisfy his delivery route. Other drivers filled out their 8 hours by acting as couriers, delivering and picking up documents from the Respondent's headquarters or one of the bureaus.

As noted above, Publisher Moss reminded the drivers at the March 21 meeting of the steps the Respondent had taken to give the drivers full-time hours "when it made economic sense" to do so. Moss testified at the hearing that it did make economic sense to employ full-time drivers in March when he made that statement. In addition, driver Benson testified that, sometime during the summer of 1997, Vandermark reassured him that full-time drivers would always have a full-time position with the Respondent, although the Respondent would eliminate full-time routes through attrition and put full-time drivers on the longer routes in Sullivan and Ulster counties. According to Benson, Vandermark made this statement in response to a question from Benson about rumors circulating at the time that the Respondent was planning to get rid of full-time drivers. Because Vandermark was not asked about this conversation during his testimony, Benson's testimony is uncontradicted. Muldoon also testified that he was aware that the Respondent was eliminating full-time routes through attrition and Vandermark acknowledged that be was aware of concerns about job security among the full-time drivers during the union campaign.

****13** Moss and George McCanless, the Respondent's director of administration at the time, testified that they were summoned to a meeting at the corporate headquarters of the parent, Ottoway Newspapers, Inc. (ONI), in the first half of May. They were told that ONI's parent, the Dow Jones Company, was putting pressure on its community newspaper division, which included the Respondent, to perform to the standards of other publicly traded newspaper publishers. They were told that Dow Jones expected a profit margin in the 30-percent range. The Respondent was directed to develop a compensation reduction plan that would allow it to meet this target. Moss and McCanless testified, without dispute, that similar directives were given to the other newspapers that comprised ONI. The Respondent is the largest of the ONI newspapers.

The Respondent notified its employees of ONI's directive in a June 29 letter signed by Moss and distributed to all employees. This letter informed the employees that, in answer to this corporate directive, the Respondent developed a voluntary separation plan which employees had until July 17 to accept. This plan had three elements: (1) incentives to encourage employees already eligible to retire under the Respondent's pension plan to do so, (2) an early retirement plan for employees close to meeting eligibility requirements for full retirement, and (3) a voluntary buyout for employees who did not meet the requirements of the retirement offers. The latter buyouts were to be offered to certain employees based on the Respondent's business needs. Moss informed employees that, if a sufficient number of employees did not accept these buyout offers, the Respondent would consider involuntary layoffs to achieve the goals set by ONI.

On July 16, the day before the deadline to accept a buyout, Moss informed the drivers and the two fleet mechanics[7] in the distribution department that the Respondent's restructuring of the distribution department was incomplete. Moss advised these employees that the Respondent was continuing to work on the restructuring plan and that the voluntary buyout would be offered to drivers and mechanics after the deadline. On July 21, Moss informed all employees by memo that 65 people had accepted the voluntary buyouts before the deadline. However, since not all of these individuals were full-time employees, the total did not equal 65 "full-time equivalents (FTEs)." Nevertheless, according to Moss' memo, the Respondent was "on track to accomplish our restructuring in all areas of the company except distribution." With respect to the distribution department, Moss said:

The scope and complexity of our distribution operation did not lend itself to a restructuring during the allotted window. We continue to work on a plan for that part of the company and it will be addressed at a subsequent time.

Moss also informed employees in this memo that the Respondent's remaining departments were developing operating plans to account for the reduced staff and that a few involuntary layoffs had been necessary, despite the voluntary response to the buyouts.

**14 Benson testified that, about the time that the Respondent's buyout offer was being considered by employees, he and several other drivers had a conversation with Production Director Bill Lieb in the parking lot. According to Benson, Lieb told the drivers that there was a plan to keep 17 full-time driver positions and that those would be offered by seniority. Benson conceded that this statement was not contained in his pretrial affidavit, *358 claiming that he did not recall this conversation at the time he gave his affidavit. Muldoon corroborated Benson to some extent when he testified that drivers were told by Vandermark and Lieb, after the buyout was offered in June, that there would be a certain number of full-time positions available by seniority even after the compensation reduction plan. According to Muldoon, he and other drivers did not take the buy-outs when first offered because of these assurances. Lieb did not testify and Vandermark did not contradict Muldoon's testimony. The record reveals that, in fact, four full-time and two part-time drivers were among those employees who accepted the buyout in July.

Vandermark testified that he was informed by his boss, former Distribution Manager Botti, in late June, that ONI had directed the Respondent to "downsize" and that he had to reduce staff in the distribution department by 16 FTEs. According to Vandermark, upon receiving these instructions from Botti, he calculated the total number of hours that would be available in the department after removing 16 FTEs, then he looked at trip sheets to determine the average time it took to make all the deliveries on every route. He then looked at the hours that would remain after accounting for the deliveries and determined where those hours could best be used to reconstruct the department. On July 24, Vandermark sent a memo to Bill Lieb, the Respondent's production director, with a copy to McCanless, outlining his calculations. In this memo, Vandermark concluded that the Respondent would need 1024 man hours a week to distribute the paper using part-time drivers, and that this number could be further reduced by making other changes in the way the paper was distributed in Sullivan County and Port Jervis.

In addition to the analysis that Vandermark was doing, the record reveals that the Respondent hired an independent consultant to study its distribution system and make recommendations. There is no dispute that the consultant recommended, in a July 26 report, that the Respondent outsource its distribution operation and eliminate all the employees. Although the consultant recommended further analysis, the Respondent rejected his recommendation and did no further analysis of it. Instead, from late July through August, according to McCanless, the Respondent considered various alternative distribution systems, including Vandermark's suggestion, in his July 24 memo, of an all part-time driver system. On August 23, McCanless sent a memo to Moss and ONI Vice President Beverly Jackson summarizing the additional costs and savings to be realized from such a delivery system. McCanless predicted more than $400,000 a year would be saved by implementing Vandermark's recommendation.

**15 The Respondent adopted Vandermark's recommendation for restructuring the distribution department and communicated this decision to the drivers at a meeting on September 8. At the meeting, the drivers were given a memo from Lieb outlining the new distribution system. According to this memo, the plan was "meant to streamline the distribution process by eliminating nonproductive time and shortening truck run length." Under this plan, the Respondent eliminated the full-time driver classification, established additional single copy independent distributor routes, and consolidated truck runs with more bulk-drops locations. [8] Full-time drivers whose positions were being eliminated were offered four options: (1) apply for any open full-time or part-time job in the company, (2) accept an available part-time driver position, (3) apply for one of the new single copy distributorships (or any other independent contractor opportunities, or (4) take advantage of the separation package that had been offered June 29.

As part of the restructuring plan, the Respondent also created seven new salaried exempt positions (transportation managers) that were also offered to full-time drivers on a seniority basis. According to Vandermark, he created these positions, along with two new assistant foreman positions in the mailroom, with the hours left over after he calculated how many hours would be needed per week just to drive the delivery routes. Vandermark testified that there was a need for additional supervision in the mailroom/distribution area, which he hoped to fill by this action. With respect to the transportation managers, each was assigned a distribution area with six to seven drivers. The transportation manager would be responsible for hiring and training new drivers in his area, cross-training drivers so they could cover any route in the area, ensuring delivery on the routes within his area by arranging to cover for absent drivers, and covering shortages.

Benson testified that, after the Respondent announced this new plan at the September 8 meeting, he asked "when was this plan hatched" and Vandermark responded "some three years ago." Benson recalled that one of the drivers asked about the assurances they had been given at the time the buyout was first offered that there would be a certain number of full-time positions. Vandermark replied that "this was not about numbers, it's about a new distribution system." Benson testified that, toward the end of the meeting, Moss contradicted Vandermark by telling the drivers that the plan was "hatched" within the last week or so. Neither Vandermark nor Moss contradicted this testimony.

Both Benson and Muldoon accepted the buyout and were subsequently rehired as part-time drivers. They are driving routes that were formerly full-time routes. They no longer have the additional duties in the mailroom nor do they have to remain in their trucks at the end of the route to await a call to cover shortages. The mailroom duties previously performed by the drivers are now performed by part-time mailroom employees. Shortages are covered primarily by the carriers themselves and circulation department district managers, with transportation managers covering shortages closer to the distribution facility. As full-time drivers, Benson and Muldoon received benefits such as health insurance, pension, a 401(K) plan, and vacation and sick leave. Since becoming part-time, the only benefits they have are vacation and sick leave, pro rata, that was restored shortly before the hearing.

****16** The Respondent's new distribution system went into effect on October 2. There is no dispute that, since then, some "part-time" drivers have occasionally worked 40 hours or more. This ***359** is due to delays in hiring new part-time drivers to take over routes vacated by departing full-time drivers and the willingness of some part-time drivers to work hours in excess of their assigned schedules to cover these runs. Vandermark testified, without dispute, that some of the former full-time drivers have refused to work any hours beyond their new part-time schedules, causing the Respondent to rely on the same group of more cooperative drivers to meet its delivery needs. It also appears that other delays in implementing the new distribution system, caused by delays in the delivering of new vehicles, have caused some apparent inefficiencies in the distribution system. Such inefficiencies would not be unexpected during the transition phase of any reorganization. In any event, McCanless testified, without dispute, that the Respondent had already realized savings in excess of $100,000 during the first 5 months under the new system. Payroll records in evidence show that the Respondent's biweekly payroll for the distribution department is approximately $18,000 less than it was before the March 21 election.

Finally, the record establishes that the distribution department was not the only part of the Respondent's operation affected by the compensation reduction plan implemented to meet ONI's May directive to increase profit margins. By reducing the number and length of its delivery routes, the Respondent was able to reduce the size of its fleet and lower maintenance costs, resulting in the reduction of one fleet mechanic from a full-time to a part-time position. In addition, two full-time maintenance mechanics in the mailroom, who service the machines, were reduced to part time. The Respondent also terminated its separate commercial printing business, resulting in the elimination of a full-time sales position, five full-time press positions and four part-time positions in the mailroom that were associated with this operation. Any remaining commercial printing business is now handled by the Respondent's main press and regular crew. The Respondent also eliminated one full-time and four part-time positions in the library, which is part of the newsroom, and laid off its janitorial employees, replacing them with a contractor.

The General Counsel alleges that the Respondent restructured it's distribution department and eliminated the full-time drivers in retaliation for their support of the Union, in violation of Section 8(a)(1) and (3) of the Act. The General Counsel concedes in his brief that there is no direct evidence of unlawful motivation, relying instead on circumstantial evidence to prove an illegal motivation. Under the General Counsel's theory of the case, the Respondent tolerated inefficiencies in its full-time driver system for a number of years, informing the drivers, as recently as March, that it made economic sense to preserve full-time driver positions. Vandermark's recommendation to eliminate all full-time drivers and replace some of them with nonunit transportation managers and independent distributors was made at precisely the moment that the Board's hearing officer recommended that a new election be held because of the Respondent's objectionable conduct. That objectionable conduct included an alleged threat to full-time driver's job security, a threat allegedly carried out on September 8 when the Respondent announced its new distribution system. According to the General Counsel, the Respondent was aware that the Union's core support was among full-time drivers and, by eliminating them, it hoped to eliminate any remaining support for the Union before a new election could be held. The General Counsel argues that further evidence of the Respondent's discriminatory motive may be found in the Respondent's failure to consider other alternatives to elimination of the full-time driver classification and its failure to perform the "additional analysis" recommended by the independent consultant.

****17** The Respondent counters this argument by pointing to the evidence that the Respondent's restructuring of its distribution department occurred in the context of other operational changes made to reduce costs and increase its profit margins. With respect to timing, the Respondent argues that the timing was explained by the directive from ONI in early May, not by the hearing officer's report, pointing out that memos from Moss to the employees which predate the hearing officers recommendations establish that the Respondent was working on a plan to restructure its distribution system before it knew that a new election would be held. The Respondent further argues that it would make no sense for the Respondent to "retaliate" against full-time drivers, in anticipation of a new election, after the Union had lost the first election by a 3 to 1 margin. In this regard, the Respondent points out that it rejected a recommendation from its independent consultant that would have eliminated the entire unit in favor of a plan that retained most of the unit, but reduced their hours, a plan which might be expected to alienate the employees and cause them to vote for the Union in any new election. Finally, the Respondent cites the savings it in fact achieved as further evidence that the restructuring was an economically motivated business decision unrelated to the union organizing campaign.

In cases such as this, where the finding of a violation turns on motivation, the Board requires the General Counsel to establish, by a preponderance of the evidence, a prima facie case that union or protected activity was a motivating factor in the allegedly unlawful conduct. On such a showing, the burden shifts to the respondent to establish that it would have taken the same action even in the absence of union or protected activity. *Wright Line.* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accord: *Advance Auto Parts Distribution Center,* 322 NLRB 910 (1997). The Supreme Court approved the Board's burden-shifting analysis in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). As the General Counsel correctly points out, the Board frequently relies on circumstantial evidence to find a prima facie case of unlawful motivation because direct evidence is seldom available. See, e.g., *Hambre Hombre Enterprises v. NLRB,* 581 F.2d 204 (9th Cir. 1978); *Trader Horn of New Jersey,* 316 NLRB 194, 198 (1995); and *Abbey's Transportation Services,* 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). With respect to the Respondent's burden in response to a prima facie case, the Board has held that it must do more than merely show that it had a legitimate reason for taking the action in dispute. To meet it's *Wright Line* burden, a respondent must show by a preponderance of the evidence that it would have taken the same action even in the absence of union or protected activity. *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989).

****18** ***360** Applying this test to the evidence here, I find that the General Counsel has failed to make out a prima facie case that the union activity of the Respondent's employees was a motivating factor in its decision to eliminate the full-time driver classification. There is no question that the Respondent's drivers were engaged in union activity and that the Respondent was aware generally that the Union was seeking to represent this group of employees. However, the record does not establish that the Respondent was aware that full-time drivers supported the Union to any greater extent than part-time drivers when it made the decision to eliminate their positions. Although Vandermark admitted that he was aware that the full-time drivers supported the

Union because of concerns about job security, Moss credibly testified that he thought the part-timers would be more interested in the Union because they had the most to gain.[9] In fact, a significant part of Moss' March 21 speech to the employees was aimed at convincing part-time employees that this was not the case. Moreover, the fact that the Union garnered only 14 votes in the first election, when the Respondent employed 27 full-time drivers, could hardly have led the Respondent to believe that full-time drivers overwhelmingly supported the Union.

The Respondent clearly had antiunion animus as demonstrated by the 8(a)(1) violation found above, as well as by the Respondent's preelection campaign aimed at convincing the employees that union representation was not in their best interest.[10] However, Moss' statements about the cost of the Respondent's current distribution system and its efforts to preserve full-time jobs, found by the Board to be sufficient to set aside the results of the first election, does not establish that the Respondent was motivated by union activity when it made a decision later to change that system. I have found above that the Respondent did not threaten employees through these statements, but merely apprised them of the economic realities facing the Respondent and expressed his opinion how unionization might impact the Respondent's operation. The fact that the economic reality caused the Respondent to change its distribution system, even after the Union had lost the election, hardly proves that fear of unionization motivated the Respondent's action. In this regard, I note that Moss credibly testified that, although it made "economic sense" to preserve full-time jobs when he spoke to employees in March, it no longer made economic sense to do so in July and August, because the Respondent was now operating under a corporate directive to reduce its cost and increase its profit margin.

Although, as the General Counsel argues, the timing of the Respondent's announced change, coming after the hearing officer recommended a new election, is suggestive of an unlawful motivation, I find that the record establishes that this was no more than a coincidence. The changes to the Respondent's distribution system, including the elimination of the full-time driver classification, occurred at the same time that the Respondent was reducing its compensation costs by offering buyouts to employees, reorganizing other areas of the business and laying off employees, all in response to a directive from its corporate parent to increase its profit margin. While the changes in the distribution department were announced after the Respondent had already implemented the other changes, written communications to employees before there was any recommendation for a new election establish that the Respondent was working on restructuring the distribution department since June.[11] Vandermark's credible testimony confirms that the timing of the Respondent's decision to achieve its goal of reducing costs by eliminating full-time drivers was unrelated to the pending representation case. Thus, it was the ONI directive that intervened to cause the Respondent to rethink the way it distributed its product rather than the prospect of a second election. See *Gem Urethane Corp.,* 284 NLRB 1349 (1987); *Royal Coach Sprinkler, Inc.,* 268 NLRB 1019 (1984).

****19** The General Counsel also relies on the assurances allegedly given by Vandermark and Lieb to Benson, Muldoon and other drivers, that there would be a certain number of full-time driver positions remaining after any restructuring of the distribution department, as proof that the timing of the Respondent's decision was related to the hearing officer's report rather than the ONI directive. Even assuming such assurances were given, they occurred at a time when the Respondent had not yet finalized its restructuring plan, as shown by Moss' July 16 memo. There is no dispute that the Respondent was considering, during this period, alternative distribution plans that ranged from elimination of the entire unit through outsourcing to a plan to have all full-time drivers. The "assurances" thus fell within the range of alternatives being considered. The timing of its subsequent choice not to retain any full-time drivers does not compel a finding of unlawful motivation in light of the other evidence in the record.

In finding that the preponderance of the evidence does not establish that union activity was a motivating factor in the Respondent's decision, I have also considered the undisputed evidence that the ONI directive to reduce costs and increase profit margins was a corporatewide phenomena and that, even within the Respondent's operations, resulted in the elimination of other job classifications and the reduction of other employees from full-time to part-time. The fact that employees who were not involved in the union's organizing campaign were adversely affected by the Respondent's compensation reduction program is further evidence that the decision to eliminate full-time drivers was not unlawfully motivated. See *Advance Auto Parts*

Distribution Center, supra. The fact that the changes implemented had the desired effect, while not determinative on the issue of motive, is further support for the conclusion that ***361** the Respondent's decision was a legitimate business decision and not motivated by unlawful considerations. *Robinson Furniture, Inc.,* 286 NLRB 1076 (1987). Finally, although the Respondent created seven new full-time nonunit transportation manager positions to perform some of the duties of the eliminated driver positions, this does not establish that the Respondent still had a need for full-time drivers. I found that Vandermark's explanation of the reasons for creating this position was credible and plausible and note that other supervisory positions in the mailroom were created at the same time.

Even assuming that the General Counsel had established a prima facie case of unlawful discrimination, the preponderance of the evidence here establishes that the Respondent would have taken the same action even in the absence of union activity. Thus, contrary to the General Counsel's arguments, the record here shows that the Respondent did consider alternatives to eliminating the full-time drivers and did a substantial analysis before arriving at its decision. In fact, the Respondent considered and rejected a recommendation to eliminate all its drivers by contracting out its delivery operation. McCanless' August 23 memo detailing the costs and savings associated with implementation of Vandermark's recommendation shows that the Respondent had a valid and reasonable basis for choosing the plan it did. It is not for the Board to decide whether other steps might have been equally effective or to substitute its business judgment for that of the Respondent. Rather, the crucial question is whether the business reason advanced by the Respondent was honestly invoked and, in fact, caused the change. *Ryder Distribution Resources*, 311 NLRB 814 (1993); *Gem Urethane Corp.,* supra.

****20** Based on the above and the record as a whole, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by restructuring its distribution department to eliminate all full-time driver positions. Accordingly, I shall recommend dismissal of this allegation of the complaint.

CONCLUSIONS OF LAW

1. By threatening employees that they would receive less benefits than nonunion employees if they selected the Union to be their collective-bargaining representative, the Respondent is engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent did not threaten employees with loss of jobs if they selected the Union to be their collective-bargaining representative, in violation of Section 8(a)(1) of the Act, by statements made by President and Publisher James Moss on March 21.

3. The Respondent did not violate Section 8(a)(1) and (3) of the Act on September 8 when it eliminated all full-time driver classifications as part of a restructuring of its distribution department.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [12]

ORDER

The Respondent, Orange County Publications, an unincorporated division of Ottoway Newspaper, Inc., d/b/a The Times-Herald Record, Middletown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that they would receive less benefits than nonunion employees if they selected Communications Workers of America, Local 1120, AFL-CIO, or any other labor organization, to be their collective-bargaining representative.

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

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

(a) Within 14 days after service by the Region, post at its facility in Middletown, New York, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 34, 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, 1998.

****21** (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 Region attesting to the steps that the Respondent has taken to comply.

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

Footnotes

1 Unless otherwise noted, all dates are in 1998.

2 On September 29, the Board issued an unpublished decision sustaining the Union's objections and setting aside the election. In a second election held on November 12, a majority voted in favor of the Union, and it was certified as the representative of the Respondent's drivers on November 18. On May 11, 1999, the Board issued a Decision and Order in *Times-Herald Record,* 328 NLRB 404, finding that the Respondent had violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union.

3 The judge cited *ADIA Personnel Services,* 322 NLRB 994 (1997).

4 Former Member Brame, dissenting, would have found that the Respondent had not engaged in objectionable conduct. See *Times-Herald Record,* supra at 406.

5 For the reasons stated In the Judge's decision, we adopt his finding that the Respondent violated Sec. 8(a)(1) by threatening employees that they would receive lesser benefits than its nonunion employees if they voted in favor of the Union.

Despite our finding, for the reasons set forth below, that the Respondent unlawfully threatened to change its distribution system in reprisal for its drivers' union activities, we nevertheless find, in agreement with the judge, that even assuming

arguendo that the General Counsel established a prima facie case that the Respondent's restructuring of its delivery operations was motivated by antiunion animus, the Respondent established that it would have taken the same action even in the absence of its employees' union activity. Thus, we also adopt his dismissal of the allegation that the restructuring of the distribution department, in September, violated Sec. 8(a)(3) and (1). In these circumstances, we find it unnecessary to pass on the judge's finding that the General Counsel did not establish that the drivers' union activity was a motivating factor in the reorganization and the elimination of the full-time driver classification.

Our conclusion that the Respondent unlawfully threatened employees with job loss in the course of Moss' March 21 speech is consistent with the Board's prior decision holding that this same statement, together with Moss' unlawful threat of lesser benefits, constituted objectionable conduct affecting the outcome of the first election. Accordingly, we find it unnecessary to pass on the judge's discussion of the standards under which the Board will evaluate alleged threats such as those at issue in this case in representation and unfair labor practice cases, respectively. However, we disavow any implication in the judge's decision that the existence of a dissent in the Board's prior decision in any way indicates that Moss' unlawful statements were "close to the edge."

6 See, e.g., *MK Railway Corp.,* 319 NLRB 337, 341-342 (1995) (employer violated Sec. 8(a)(1) by telling employees that if union came in he would have to look at option of diverting work to Mexico); *MPG Transport,* 315 NLRB 489, 490 (1994), enfd. mem. 91 F.3d 144 (6th Cir. 1996) (statement that "I can't live with a union contract. I'll either close the place down or cancel the trucks, or bring in outsiders and do away with [employer's] drivers" violated Sec. 8(a)(1)); *Brunswick Corp.,* 282 NLRB 794 (1987) (employer's rhetorical question to employees, "what would stop [the employer] from picking up and moving down to Mexico if the union did get in this plant here?" violated Sec. 8(a)(1)).

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

8 See, e.g., *Quamco, Inc.*, 325 NLRB 222-225 (1997) (employer's "UAW wall of shame," listing other UAW-represented plants that had closed and including "tombstone" with employer's name and a question mark, and its letter equating vote for union with a vote for job insecurity, violated Sec. 8(a)(1)).

1 I recognize that the Board has found the statement to be objectionable. 328 NLRB 404. However, the fact that a statement is objectionable does not establish that it is an unfair labor practice.

1 All dates are in 1998 unless otherwise indicated.

2 Member Brame dissented from the direction of a second election and the bargaining order on the basis that the Respondent's statements at issue here were permissible expressions of the probable consequences of unionization under *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617-618 (1969).

3 Neither Benson nor the tape corroborate Moss' testimony that he mentioned attrition at this meeting. Moss conceded that he might have referred to attrition at one of the other meetings he held with a different group of employees where the same subjects were discussed.

4 See, e.g., *Custom Window Extrusions,* 314 NLRB 850 (1994); *Fern Terrace Lodge,* 297 NLRB 8 (1989).

5 *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962).

6 Many of the Respondent's part-time drivers also held full-time jobs with other employers.

7 The fleet mechanics were not included in the unit that voted on union representation in March.

8 In the past, drivers delivered the papers to individual carriers at their home or another location. Under the new system, the papers would be delivered to a single location and all the carriers in the area would have to come to that location to pick up their papers.

9 Stroppel confirmed that this perception was true.

10 In the past, the board has relied on such campaign propaganda to prove animus, although many courts have rejected this reliance. See *Holo-Krome Co. v. NLRB,* 907 F.2d 1343 (2d Cir. 1990); Cf. *Lancaster Fairfield Hospital,* 311 NLRB 401 (1993).

11 In fact, the record establishes that the Respondent had been eliminating full-time routes through attrition for several years. Benson himself acknowledged that there were rumors before any union activity commenced that the Respondent was thinking of eliminating full-time drivers. This is further evidence that the plan announced on September 8 was not

something that was hastily crafted together in response to the possibility of a rerun election, but rather the result of careful consideration of alternatives that had been under consideration for some time to address inefficiencies in the department.

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

13 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."

334 NLRB No. 48 (N.L.R.B.), 334 NLRB 350, 167 L.R.R.M.
(BNA) 1300, 2001-02 NLRB Dec. P 15889, 2001 WL 736676