Hankins Lumber Company, Inc. *and* International Woodworkers of America, U.S., AFL–CIO. Cases 15–CA–11281, 15–CA–11394, 15–CA–11523, and 15–RC–7533

March 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

This case presents several unfair labor practice issues involving employees at the Respondent's Quitman, Mississippi, and Melvin, Alabama lumber mills.[1] The judge has found, inter alia, that the Respondent: (1) did not threaten Quitman employees or grant them a wage increase in order to undermine the Union's organizing campaign; (2) did not threaten Melvin employees in speeches by its president; (3) violated Section 8(a)(5) and (3) of the Act by temporarily laying off Melvin employees on October 22 and November 1, 1990;[2] (4) violated Section 8(a)(5), but not Section 8(a)(3), by permanently laying off Melvin employees on November 5; and (5) did not violate election 8(a)(3) by closing the Melvin plant on December 22. 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,[3] and conclusions,[4] except as modified below, and to adopt the recommended Order as modified.[5]

1. As indicated, the judge found that the Respondent unlawfully discriminated against prounion Melvin mill employees by temporary layoffs on October 22 and on November 1. He also found that the Respondent temporarily laid off employees on October 19 for the same purpose of retaliating against those who voted for the Union in a Board election held on that day. He declined, however, to find that this layoff was an unfair labor practice. The judge reasoned that the General Counsel did not refer to October 19 in the complaint allegations of unlawful layoffs and, further, that the General Counsel disclaimed any intent to litigate whether the October layoff was a discriminatory change in an established past practice of assigning cleanup work to avoid layoffs during brief work interruptions.

The General Counsel's exceptions do not allege an unlawful change of past practice. The General Counsel contends, however, that the judge erred by failing to find that the October 19 layoff was unlawful for the same reasons that the two succeeding temporary layoffs were unlawful. We agree.

Although the General Counsel disclaimed a ''change of past practice'' theory, he did assert, at the hearing, that the temporary layoffs, including the October 19 layoffs, were unlawful. The complaint's allegation of unlawful layoffs on October 22 and November 1 gave the Respondent sufficient notice of a factual time frame reasonably encompassing October 19. Furthermore, the first temporary layoff is closely related to and raises the same issues as the two subsequent temporary layoffs. These issues were fully litigated as to all three layoffs. As set forth in the judge's decision, the Respondent designed each temporary layoff to affect a disproportionate number of identifiable prounion employees. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by laying off employees on October 19.[6]

2. We agree with the judge that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union about the decision to lay off numerous Melvin mill employees permanently on November 5 due to a log shortage. We also note the narrow basis on which the Respondent defends its conduct. The Respondent has admitted in its answer that the layoff was a mandatory subject of bargaining.[7] It contends, how-

[1] On November 16, 1992, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions and a supporting brief. Both the Respondent and the General Counsel filed answering briefs.

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

[2] All dates are in 1990, unless otherwise indicated.

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

[4] We agree with the judge that Wallace Hamburg did not act as a statutory supervisor or as the Respondent's agent when he spoke to Quitman mill employees about rumors of an antiunion mill closing. We do not rely on the judge's alternative rationale that Hamburg's remark was not unlawfully coercive even if he acted as a supervisor or agent.

[5] We shall delete from the judge's recommended remedy provisions requiring that the Respondent bargain with the Union if it decides to reopen the Melvin mill. The judge found only that the Respondent violated Sec. 8(a)(5) by refusing to bargain over the decision to lay off employees. There was no allegation or finding that the Respondent unlawfully refused to bargain with the Union over the decision to close the Melvin mill indefinitely, and the judge dismissed the allegation that the plant closing was unlawfully motivated. If the Respondent in the future decides to reopen the mill, the circumstances at that time will determine whether it has a duty to bargain with the Union. See *Sterling Processing Corp.*, 291 NLRB 208 (1988); and *Morton Development Corp.*, 299 NLRB 649 (1990).

[6] We shall modify the judge's recommended remedial provisions to include references to this violation. We note that the General Counsel does not allege that the October 19 layoff violated Sec. 8(a)(5).

[7] This case does not, therefore, present the kind of decisional bargaining issue addressed in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and in *Dubuque Packing Co.*, 303 NLRB 386 (1991). Indeed, the Respondent does not refer to this precedent in its brief in support of exceptions.

ever, that compelling economic considerations excused it from bargaining.[8] The Respondent refers to its chronic difficulties in procuring logs for the Melvin mill.

The Board has observed that

> Most layoffs are taken as a of result economic considerations. However, business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially.[9]

Accordingly, the Board recognizes as ''compelling economic considerations'' only those extraordinary events which are ''an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'' *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987).

The Respondent's log shortage does not fall within this narrow exception to the general duty to bargain. This shortage had been a continuous problem for months prior to the permanent layoff. The Respondent has failed to prove any precipitate worsening of this situation that required immediate action prior to bargaining with the newly certified Union. Indeed, at least initially, the Respondent signaled its willingness to bargain in advance about the permanent layoff decision.[10] A November 2 letter notified the Union of the intent to implement a layoff of approximately 30 employees. The letter further stated that ''[u]nless we hear from you immediately, this decision will go into effect in seven days or less.'' The Respondent did not wait a sufficient amount a time, however, for the Union to respond. The permanent layoffs actually began on the same day that the Union received the letter.

Based on the foregoing, we find that the Respondent has failed to prove its defense of compelling economic circumstances which would justify a failure to bargain about the November 5 layoff decision. Accordingly, we adopt the judge's conclusion that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union about this decision.[11]

[8] The Respondent also contends that the Union waived its right to bargain about the layoff decision. For the reasons set forth in the judge's decision, we find no merit in this contention.

[9] *Farina Corp.*, 310 NLRB 318, 321 (1993).

[10] In this regard among others, this case is distinguishable from *Brooks-Scanlon, Inc.*, 246 NLRB 476, (1979), on which the Respondent relies.

[11] We note that the Respondent's exceptions do not independently challenge the propriety of the judge's recommended remedy for the violation found.

ORDER

The National Labor Relations Board orders that the Respondent, Hankins Lumber Company, Inc., Quitman, Mississippi, and Melvin, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because of their support for a union.

(b) Laying off or otherwise discriminating against any employee for supporting the International Woodworkers of America, U.S., AFL–CIO or any other union.

(c) Unilaterally laying off employees without first notifying their exclusive collective-bargaining representative and affording it a reasonable opportunity to bargain about the layoff decision and its effects on employees.

(d) 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) On request by the Union, bargain in good faith with it, as the certified exclusive bargaining representative of an appropriate unit of Melvin mill employees, about the decision and effects of the permanent layoffs initiated on November 5, 1990, at the Melvin mill.

(b) Make whole, with interest, in the manner set forth in the remedy section of the judge's decision, all Melvin mill employees for losses suffered as a result of temporary layoffs initiated on October 19, October 22, and November 1, 1990, and of permanent layoffs initiated on November, 5, 1990.

(c) Remove from its files any reference to the discriminatory layoffs of Melvin mill employees and notify the affected employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) 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 analyze the amount of backpay due under the terms of this Order.

(e) Mail copies of the attached notice marked ''Appendix''[12] to all employees on the Melvin, Alabama payroll as of October 19, 1990, to their last known mailing address. Copies of this notice shall be on forms provided by the Regional Director for Region 15.

[12] 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.''

(f) Post at its mill in Quitman, Mississippi, copies of the attached notice to employees. Copies of the notice, on forms provided by the Regional Director for Region 15, 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.

(g) 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

1. The complaints in Cases 15–CA–11281 and 15–CA–11523 are dismissed in their entirety.

2. The Union's objections in Case 15–RC–7533 are overruled and that case is severed and remanded to the Regional Director for Region 15, who shall, within 14 days of this Decision and Order, open and count the ballots cast by Dennis Cochran, Daniel Norris, and Ernest Manning. The Regional Director shall thereafter prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

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 to fire you because of your union activities.

WE WILL NOT lay you off or otherwise discriminate against any of you for supporting the International Woodworkers of America, U.S., AFL–CIO or any other Union.

WE WILL NOT unilaterally lay off employees without first notifying their exclusive collective-bargaining representative and affording it a reasonable opportunity to bargain about the layoff decision and its effects on employees.

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

WE WILL, on request by the Union, bargain in good faith with it, as the certified exclusive bargaining representative of an appropriate unit of Melvin mill employees, about the decision and effects of the permanent layoffs which we initiated on November 5, 1990 at the Melvin mill.

WE WILL make whole, with interest, all Melvin mill employees for losses suffered as a result of temporary layoffs initiated on October 19, October 22, and November 1, 1990, and of permanent layoffs initiated on November 5, 1990.

WE WILL remove from our files any reference to the discriminatory temporary layoffs of Melvin mill employees and WE WILL notify the affected employees that this has been done and that the layoffs will not be used against them in any way.

HANKINS LUMBER COMPANY, INC.

Constance Traylor, Esq., for the General Counsel.
Michael S. Mitchell, Esq. and *Gregory A. McConnell, Esq.*, of New Orleans, Louisiana, and *Charles W. Reynolds, Esq.* (not on brief) *(McGlinchey, Stafford, Cellini & Lang)*, of Little Rock, Arkansas, for the Respondent.
James P. O'Connor, Esq. (Youngdahl, Trotter, McGowan, O'Connor & Farris), of Little Rock, Arkansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. The principal issue here is whether Hankins Lumber Company (HLC, Company, or Respondent) closed its sawmill in Melvin, Alabama, on December 22, 1990, for economic reasons, as it asserts, or because the Union won the October 19, 1990 election, as the Union charges and the Government alleges. Crediting Owner Burton Hankins and HLC's witnesses on this issue, I dismiss that allegation.

Although I dismiss the plant closing allegation, plus most others, I find that certain layoffs were discriminatory and that HLC must pay backpay to all Melvin employees for the unilateral layoffs of October 22 and November 1 and 5, 1990.

In the Quitman, Mississippi representation case I find no merit either to the Union's objections or to its pending challenges to the ballots of three voters there. I recommend that the Board adopt these findings and direct the Regional Director to open the three ballots, prepare and serve a revised tally of ballots, and issue the appropriate certification.

I presided at this 17-day trial in Laurel, Mississippi, beginning January 27, 1992, and concluding May 22, 1992. The Government's trial pleading consists of separate complaints for each of the three unfair labor practice cases. Issues from the representation case are embodied in the Regional Director's April 24, 1991 report on challenged ballots and objections. By a third order consolidating cases, dated July 31,

1991, the Acting Regional Director consolidated the three complaint cases with the representation case for hearing.

The first charge, docketed as Case 15–CA–11281, was filed by the Union (International Woodworkers of America, U.S., AFL–CIO) on July 11, 1990, and served the following day, against Hankins Lumber Company, Inc. The General Counsel, by the Regional Director, issued the Government's complaint in the case on January 24, 1991. This complaint pertains to HLC's facility in Quitman, Mississippi.

The Union's second charge, filed against the Company on November 8, 1990, in Case 15–CA–11394, pertains to Respondent's Melvin, Alabama facility. The General Counsel's complaint, dated December 31, 1990, actually issued before the complaint in the first case.

Complaint number three, dated July 31, 1991, is based on the Union's charge filed against HLC on May 8, 1991, in Case 15–CA–11523. As with the second charge, this case also pertains to Company's facility in Melvin, Alabama.

Turn now to the Quitman, Mississippi facility with the representation case and the Regional Director's April 24, 1991 report on challenged ballots and objections in Case 15–RC–7533. That report addresses objections by both HLC and the Union. The Regional Director overruled HLC's objections, the Company apparently did not request review, and its objections have passed from the case. Thus, the representation case presents issues raised by the challenged ballots and the Union's objections. Although the ballots of eight employees were challenged by the Union at the Quitman election, only four are before me for resolution.

Quitman is about 24 miles south of Meridian in the east by southeast sector of Mississippi. Just across the Alabama line, some 20 miles to Quitman's southeast, lies Melvin. HLC operates, or did during the relevant time, sawmills at Quitman and Melvin. Joy Lynn Smith, the Union's organizer in this case, testified that she began the Union's organizing campaign at Quitman about April 25, 1990. (7:1784.)[1] The Union filed its election petition for Quitman on May 7[2] and the election was conducted on June 15 where, of approximately 110 eligible voters, 51 cast ''Yes'' ballots for the Union, 50 employees voted no, and 8 had their ballots challenged. The challenged ballots are sufficient in number to affect the election's results. (GCX 1s.) The Regional Director has resolved four of the challenges, and only four were presented here. Of those four, the parties have agreed (1:221–223) that the ballot of Wallace Hamburg should not be opened. That leaves three to be resolved here.

As to Quitman, the complaint alleges that HLC violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), between May 7 and June 12 by interrogating employees, threatening them with stricter enforcement of work rules and discharge if they voted in the Union, and creating the impression of surveillance of their union activities. The complaint also alleges that HLC violated 29 U.S.C. § 158(a)(3) and (1) about May 1990 by granting employees a pay increase in order to dissuade them from supporting the Union. Other than admitting the fact of the pay raise, HLC denies the allegations. For the most part, the Union's objections mirror the complaint allegations.

Two of those whose ballots were challenged are Paul Sims and Bruce Young, timber buyers (timber ''cruisers'' or procurement foresters). Timber buyers work away from the sawmill much of the time. The three challenges preserved for decision here respect the ballots of log scalers Dennis Cochran and Daniel Norris and maintenance purchasing clerk Ernest Manning. Log scalers work in the sawmill's yard and scale house measuring arriving logs for their volume of lumber. The Petitioner, the Union, would exclude the scalers and Manning as lacking a community of interest with the unit Employees, whereas HLC, the Employer, would include them as sharing a community of interest with the unit employees. The stipulated bargaining unit, quoted at footnote 2 of the Regional Director's April 24, 1991 Report (GCX 1s) on challenged ballots and objections, reads:

> All production and maintenance employees employed by Hankins Lumber Company, Inc. at its facility located in Quitman, Mississippi; excluding office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

Moving on to Melvin, Smith began the Union's organizing there about August 6. (7:1786.) Johnnie Stephens, Melvin's plant manager, testified that around that same date the fact of the organizing was reported to him. He informed Hankins. (9:2357; 10:2383–2385.) The Union filed its election petition sometime in late August, the date not being clearly established in the record. In her opening statement, the General Counsel's attorney represented that the Melvin petition was filed on August 27. (1:18.) Smith testimonially referred to the ''last of August, about August 23.'' (7:1788.) The parties stipulated that the Melvin election was held October 19, in Case 15–RC–7554, from 10 a.m. to 12 noon. (2:462, 565.) The Melvin unit, in October, consisted of some 60 unit employees. (11:2750; GCX 6.) The tally of ballots is not disclosed.

The Union won at Melvin, for the pleadings establish that the Union was certified on October 29 and, since October 19 (denied, but later I so find), has been the exclusive bargaining representative of the unit employees there. The Melvin unit is described as:

> All production and maintenance employees employed by Hankins Lumber Company, Inc. at its Melvin, Alabama facility; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

There are two Melvin complaints (Cases 15–CA–11394 and 15–CA–11523). The first alleges that Respondent violated 29 U.S.C. § 158(a)(1) about August 29 by a threat of discharge, and about October 4 and 10 (in speeches, as we shall see, by HLC's president, A. Burton Hankins) by threatening (1) plant closure and (2) loss of benefits if the employees voted in the Union. Layoffs about October 22 and November 1 at Melvin violate 29 U.S.C. § 158(a)(3) and (5) the complaint alleges. The second Melvin complaint alleges that about December 24 HLC violated 29 U.S.C. § 158(a)(3) by closing its Melvin facility and terminating its employees there. Admitting the fact of the layoffs and plant closing, HLC denies violating the statute.

[1] References to the 17-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for the Charging Union's, and RX for those of Respondent HLC.

[2] All dates are for 1990 unless otherwise indicated.

At trial I granted (5:1382), over objection, the General Counsel's motion (5:1366–1367) to amend the Quitman complaint (Case 15–CA–11281) and the second Melvin complaint (Case 15–CA–11523) to allege that Wallace ''Bud'' Hamburg was a statutory supervisor at the Quitman sawmill during the relevant time. At the same time I granted, over objection (5:1376), the General Counsel's motion (5:1369) to amend the second Melvin complaint to add an allegation that in the fall of 1990 Hamburg told employees at Quitman that one of HLC's facilities would be closed if its employees selected the Union as their bargaining representative. (HLC, Br. at 170, understandably treats this as an amendment to the Quitman complaint.) I granted that motion and the Hamburg threat allegation was added to the second Melvin complaint as paragraph 11. (5:1382.)

HLC also objected (5:1377) that it could not keep track of all the allegations because of the absence of a consolidated complaint, and it moved for a continuance on two grounds. First, lack of due process and needing time to investigate. As we were about to adjourn the hearing for some weeks, I rejected that ground.

Second, HLC moved (5:1384) that the trial should be continued until the General Counsel's Regional Office issued a consolidated complaint. Although sympathetic to the motion, I denied it on the basis, advanced by the General Counsel, that we were not far from the Government's resting and there had been so many references to the individual complaints that a consolidated complaint, desirable though it would have been earlier, might then confuse matters. (5:1385–1386.) When the Government (initially) rested its case-in-chief, the General Counsel withdrew an allegation of October 16 interrogation at Melvin. (7:1911–1913.) (Because of certain outstanding items, the General Counsel did not finally rest the Government's case-in-chief until 10:2523.)

HLC's answer admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At the beginning of the last week of trial, the Union's attorney announced that he would be unable to participate further in the case, and he then departed. (13:3070–3074.) Joy Lynn Smith, the Union's organizer, thereafter entered her appearance as the Union's representative at the hearing. (13:3288, 3303.) The Union did not file a brief.

By unopposed motion dated July 16, 1992, HLC moves to correct some of the numerous errors in the transcript of testimony. I grant that unopposed motion, but I note that 15:3826 should list line 11 rather than 17. Moreover, I correct 1:168:20 from ''Judge Linton'' to ''Mr. Reynolds'' and 1:208:21 from ''Ms. Traylor'' to ''Ms. Smith.'' At 6:1438:11 the name apparently should be ''James Evans'' rather than ''Jay Miven [phonetic].'' The context clarifies most other errors.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and HLC,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

HLC, a Mississippi corporation, produces and sells lumber at nonretail. During the 12 months ending December 31, 1990 HLC sold and shipped from its Quitman facility goods and materials valued at $50,000 or more direct to points outside Mississippi. HLC admits, and I find, that it is an employer engaged in commerce within the meaning of 29 U.S.C. § 152(2), (6), and (7).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *HLC's Business*

Burton Hankins is president and CEO (chief executive officer) of HLC. (8:1988.) It appears that Hankins either owns or controls a majority of HLC's stock. (16:3885, 3972). Hankins and his older brother, who died in 1971 (16:3883), began the business in 1955 when they bought a planer mill in Winona, Mississippi. (16:3879.) In 1957 they started building a sawmill at Grenada, Mississippi. (16:3881, 3998.) HLC purchased sawmills at Melvin, Alabama, in April 1984, Quitman, Mississippi, in April 1985, and, in 1986, at Sturgis, Mississippi. (16:3884, 3999.) HLC treats these mills as its five divisions, Robert Lewis Smith testified. (8:1980, 1987.)

A certified public accountant, Smith is HLC's comptroller, secretary, and chief financial officer (CFO). (8:1980, 2077–2078). HLC's headquarters are located at the Grenada facility, and Hankins and Smith have their offices in the same building there. (9:2292; 16:4012, 4114.) Unlike HLC's four other mills which buy timber and logs, saw them, and plane them into finished lumber, Winona buys no logs and remains a planer mill only. (9:2252.)

As the 1991 official Mississippi highway map reflects, Grenada is 113 miles north of Jackson on IH 55. Winona is 21 miles or so south of Grenada, and Sturgis is situated just above the Tombigbee National Forest about 60 miles southeast of Winona. These three mills, therefore, are in the central north to central northeast sector of Mississippi. Quitman, as earlier noted, is about 24 miles south of IH 20 in the east by southeast sector, with Melvin being in Alabama some 20 miles southeast of Quitman. W. L. Brown Jr. has been Quitman's plant manager from its 1985 purchase by HLC. (14:3440). From Melvin's 1984 acquisition until its December 1990 closing, and even several weeks beyond, Johnnie Lee Stephens was its plant manager. (9:2336–2337; 10:2576–2578.)

HLC manufactures Southern Yellow Pine (SYP) lumber. (16:3874). Hankins testified that the SYP market is now divided into three markets, with everything west of Mississippi being the western zone, Alabama and Mississippi being in the central, and all east of Alabama being the eastern zone for SYP. (16:3907.)

HLC sells and ships its finished lumber to markets on the east coast, in the midwest, the south, and wherever it can. (16:3875, 4028–4029.) Transportation costs are an important business factor, and it costs substantially less to transport lumber by rail than by truck. (8:1992–1995; 9:2163, 2357.) Actually, HLC sells nearly all of its lumber (and 99 percent of that from Quitman and Melvin) through its wholly owned subsidiary, Hankins Lumber Sales. (16:3874, 4027–4028; CPX 20 nos. 8 and 9.)

[3] HLC's unopposed motion of August 31, 1992, for leave to file a 16-page reply brief is granted, and I have considered that August 31 reply brief. *Fruehauf Corp*., 274 NLRB 403, JD fn. 2 (1985).

The evidence discloses that U.S. softwood producers, such as HLC, have been caught in a cost-price squeeze since about mid-1987, with the purchase price of logs (timber) increasing while the sales price of lumber has dropped. A graph in evidence (RX 39) illustrates this gap. By the spring of 1990 the gap had expanded to the point, Hankins testified, that it was almost impossible to make a profit. (16:3973, 4102.) HLC's pretax profit data (RX 12) for its four sawmills reflect a decline in pretax profits for 1990 from 1989. (Winona, the planer mill, enjoyed an increase.)

Melvin suffered a 1989 loss of $51,627,[4] but that would have been cause for celebration in light of its 1990 loss of $757,051. As we see in a moment, Melvin's drastic 1990 loss is largely attributable, in Hankins' opinion, to human error rather than to market forces. In addition to Melvin's drastic loss, Quitman's 1990 profit plummeted nearly 72 percent from the 1989 mark. Sturgis made a profit in 1989, but a substantial loss in 1990 dropped it well into the loss column for that year. Grenada remained profitable, but its 1990 profit fell nearly 58 percent from its 1989 level.

At Melvin 1990 loss figures appear for every month except March, April, and August. (HLC's fiscal year is the calendar year except that it ends with the last full week in December. 9:2183.) What caused Melvin's enormous 1990 losses? Rivaling the simplicity of Willie Sutton's famous answer to the question of why does he rob banks,[5] CFO Smith's surface response is that the losses developed ''because the expenses were more than income.'' (8:1991.)

Aside from surface simplicity, the evidence discloses that 97 percent of Melvin's 1990 loss resulted from what is called ''tract losses.'' (CPX 33; 9:2227–2228; 11:2965). Hankins attributed the tract losses, or much of them, to ''overcruising'' by Melvin's timber buyer, Gary Graham. (16:3954–3955, 4119). In a private meeting at Melvin in about April or May, Hankins told Graham (13:3140–3141, 3235, 3266; 16:3955, 4044–4045) that the tracts had to ''cut out,'' meaning (13:3141; RX 22 at 21) that the lumber volume estimated at purchase of the standing timber had to equal that which the scaler measures (estimates) when the logs reach the yard.

As Melvin's losses continued to mount, Hankins held another meeting with Graham, this one about August at Quitman. Graham concluded from the meeting that he no longer had a future at HLC, and some 3 weeks later he left HLC to work for Sumter Timber Company in Alabama. (13:3144-3147, 3245-3248, 3259; 16:3957-3959, 4052-4055.) The parties stipulated that Graham left the week ending September 15. (CPX 20 no. 4.) Aubrey Cannon succeeded Graham on October 8. (14:3362; CPX 20 no. 5.)

Reference to Melvin's tract losses requires a brief description of the timber buyer's work. The timber buyer (also timber cruiser or forester) ''cruises''—estimates—standing timber on tracts of land. Based on a figure set by management, the buyer, in competition with buyers from other firms, submits a bid (frequently bids are sealed) to the landowner for the timber. The buyer's ''cruise'' is an estimate, mostly by eyeball and based on experience and training, of the volume of lumber that can be produced from the timber standing on that tract of land.

If the buyer's bid is the winner the timber is cut and, as logs, hauled to the mill (lumber mill, sawmill) where the logs are ''scaled'' (or weighed in some instances). The logs are then sawn in the sawmill portion of the mill and finished in the planer mill (a section of the mill) from which they emerge as finished lumber.

Scaling, most agree, is or should be more accurate than cruising. Scalers use calibrated sticks to measure the timber (''stems'') brought to the mill as logs. Nevertheless, scaling involves judgment and experience and, to some extent, is itself an estimate. If the board feet of the cruiser's estimate equals (or exceeds) that measured by the scaler, after all of the tract has been cut, then the buyer's cruise is said to have ''cut out.'' ''Overcruising'' means that the buyer's estimate exceeds the board feet of lumber measured by the scaler. Undercruising, of course, is the opposite. HLC bases its financial records and bids on the measurements made by the scalers.

When the buyer's cruise of lumber that can be produced from the standing timber fails to ''cut out'' (that is, when the scaler's measuring estimate is less than the cruiser's estimate for a given tract), the result is a ''tract loss.'' Because the terms describe only the relationship between two estimates, tract losses are not themselves accounting losses. That is, tract losses are not an item on the balance sheet or profit-and-loss statement. They however can reflect actual financial losses and, in the record, tract losses at times are described as actual losses. In those instances, presumably, the tract losses resulted in actual losses of those amounts.

Although specific tracts are not tracked through the mill, HLC (and that part of the industry using the Doyle scale method) uses the term ''overrun'' to describe the relationship between the total volume that is scaled at the mill and the total which emerges from the mill as finished lumber. (1:68, 73–75; 8:2014–2015; 16:3933–3934.) This overrun factor, as it is described in the testimony and exhibits (RXs 13, 38), is a percentage expressed as a number. The overrun factor apparently incorporates whatever miscuts or other errors occur in the sawmill and planing mill process.

(Although HLC apparently makes no effort to track timber from the various tracts through the mill into finished lumber so that the sawn lumber can be measured and compared to both the cruiser's estimate and the scaler's measure, Bruce Young, who cruised for HLC at Quitman for the last 2 years before leaving about late June 1990 (1:27, 227), described a tracking procedure another company (Long Leaf) experimented with in which the stem butts were painted colors. When the logs came out the mill as finished lumber, the lumber with the painted ends could be counted, measured, and compared to what had been scaled. So far as he knew, Young testified, HLC made no such effort to track the logs and compare with the volume scaled. (1:147–148, 169, 241–243; 2:388).)

All agree that it is desirable, even necessary, that the cruise result in producing more lumber (an overrun) than the buyer estimates is actually contained in the standing timber. A higher overrun means more profit because the mill is being more efficient. Hankins testified that a good overrun figure is 70 percent or greater. (16:3934.) That is, a tract cruised/scaled at, to illustrate in simple terms, 1000 board

[4] Unless I show them, I drop the cents from all figures.

[5] Asked why he robs banks, Sutton replied, ''Because that's where the money is.'' 11 *The New Encyclopaedia Britannica*, 421 (1990).

feet but resulting in sawn lumber of 1700 board feet produces an overrun figure of 70 percent (700 divided by 1000). (16:3933–3934.)

As stated, the higher a mill's efficiency the higher its profit. One advantage a mill with higher profit enjoys is the ability to purchase logs (timber) when a less efficient mill cannot afford to pay the prevailing price. (12:3028.) Thus, in a market of increasing log costs and low sales prices for finished lumber, a good overrun figure, or high mill efficiency, is critical. Of HLC's four sawmills, a chart (RX 13) in evidence reflects, Melvin had the lowest overrun factor. The 1990 percentages, substantially the same as for 1989, were (RX 13):

Grenada	96
Sturgis	79
Quitman	79
Melvin	60

By letter (GCX 4) dated October 24, 1990, Hankins notified (4:932–933; 11:2746; 16:4087) all unit employees at Melvin as follows:

> Hankins Lumber Company, Inc. (Melvin Division) located at County Road 14, Melvin, Alabama, will discontinue all manufacturing operations at its lumber mill on or about December 24, 1990, unless market conditions improve, as reflected by the mill profit and loss statement for the months of October and November, 1990. This action, if taken, is expected to be permanent and, as a result, all employees will be separated from employment on December 24th. Some plant upkeep positions will remain.
>
> Employees have no contractual right to priority of employment nor bumping rights at any other lumber mill operated by Hankins Lumber Company, Inc.
>
> We wish you the best of luck in the future.

The following day, October 25, Hankins sent a letter (GCX 5) to Joy Lynn Smith advising the Union that HLC recognized the Union and naming Company's attorney to be contacted for contract negotiations. That is followed by the concluding paragraph reading:

> You should be aware, however, that unless market conditions improve, as reflected by the mill profit and loss statement for the months of October and November 1990, Hankins Lumber Company will discontinue manufacturing operations at its Melvin, Alabama plant on or about December 24, 1990. As such, we suggest that negotiations focus on the decision and the effects of the decision to discontinue manufacturing operations.

Also on October 25 Hankins, as president of HLC, sent a letter (GCX 6) to the Union ''in accordance with our obligations under the Warren Act.'' (That is, WARN, the statutorily required 60-day notice before a plant closing. 29 U.S.C. § 2101 et seq.) Aside from repeating most of the notice given by the October 24 letter to employees, this letter lists all 66 persons, by job classification and name (including the plant manager) employed at the plant, as the employees affected. This notice advises that affected employees will be separated ''on or before'' the date that operations are discontinued.

After the October 19 election at Melvin, certain layoffs and work shortages did occur. In consultation with CFO Smith on December 8, Hankins decided to close the Melvin mill on December 24, 1990. (8:2942, 2081; 9:2326; 16:3971, 4069–4071). By letter (GCX 11) dated December 13, HLC's attorney notified the Union, in part:

> Hankins Lumber Company has now had an opportunity to examine market conditions, and to project the likelihood of profitable operations at its Melvin mill, and concluded that it must in fact discontinue operations. The Company will attend the bargaining session scheduled for 10:00 a.m., December 19, 1990, at the Western Inn in Waynesboro, Mississippi, prepared to discuss the effects of its decision to discontinue operations.

Johnnie Stephens, then Melvin's plant manager, testified that the Melvin mill ceased operating the week ending Saturday, December 22. (9:2366; 10:2494.) The parties stipulated that a handful of employees remained employed at Melvin (CPX 20 no. 13.) They are there to provide fire watch as required by HLC's fire insurance carrier. (16:4023–4024.) Company has not offered the Melvin mill for sale (16:4112), and correspondence (GCXs 16, 17) in evidence indicates that in 1992 HLC removed some of the equipment from that mill.

I turn now to summarize the evidence. Following the chronology of events, I begin with the Quitman complaint (Case 15–CA–11281) and then address the two Melvin complaints (Cases 15–CA–11394 and 15–CA–11523).

B. *Quitman—Case 15–CA–11281*

1. Allegations of 8(a)(1) coercion

a. *Joey McCarra*

The complaint alleges that about May 7 HLC, acting through Joey McCarra, ''created an impression among its employees that their union activities were under surveillance by Respondent.'' The Company denies.

Richard McCree worked relief at Quitman for about 6 years (he was working there when HLC acquired the mill) until he was fired about mid-1991. His supervisor was Joey McCarra, the planing mill foreman. (7:1858–1859, 1874; 13:3282, 3285, 3296, 3299.) McCree testified that about May 1, around midmorning, McCarra summoned him to his office where, with just the two of them present behind the closed door, McCarra said he had heard that McCree was serving cake and coffee for a union meeting at his home. The refreshments were not for any union meeting, but for a baseball match, McCree answered. McCarra then said he had heard that McCree and Charles Barnett had brought in the Union. ''No,'' McCree replied. So far as McCree describes, the conversation ended and McCree returned to work. (7:1861–1863, 1873.)

McCarra testified that he first learned of union activity at Quitman about May 5 when W. L. Brown, the plant manager, asked him if he knew about a union leaflet being circulated. (13:3279–3280, 3292.) About 3 to 4 weeks later, McCarra acknowledges, McCree came to his office concerning the union topic. (13:3282, 3297). The morning McCree came to his office, McCarra testified, several employees that morning already had told McCarra that McCree had been

serving refreshments for a union meeting at his home. (13:3293–3299.)

Later that morning McCree came to McCarra's office and told McCarra that he had heard rumors that he, McCree, was serving refreshments at union meetings being held at his home. McCree said he wanted McCarra to know that he had not been serving refreshments. McCarra laughed. McCree then returned to work. McCarra testified that he laughed because McCree's concern was to correct the rumors about his having served refreshments rather than to address the matter of his hosting a union meeting. (13:3283–3284, 3298, 3305.) Charles Barnett, McCarra explains, is a former employee of McCarra's who was terminated (apparently after the office conversation with McCree) for failing to report to work one Saturday. McCarra denies saying he had heard that McCree and Barnett were the ones who had brought in the Union. (13:3284, 3299.)

McCarra was a credible witness; McCree was not. Crediting McCarra's version of the conversation, I shall dismiss the allegation that McCarra created the impression of surveillance.

b. *Stanley N. Majure*

(1) Allegations

Two complaint allegations attack statements attributed to Majure. The first alleges that about May 15 and June 12 Majure threatened employees ''with more strict enforcement of work rules if they selected the Union as their bargaining representative.'' About the second week of May, according to the second allegation, Majure threatened employees ''with discharge if they supported the Union.'' On brief the General Counsel moves to have an unalleged statement attributed to Majure be declared an unlawful threat of plant closure, or at least be considered as evidence of union animus. (Br. at 31.)

(2) Threat of stricter enforcement

(a) *Carl Brown*

During May, Quitman employees Carl Brown, Charles E. Gates, and Willie Matthews were among seven or eight employees who worked on the drive chain. Their supervisor was Stanley N. Majure. HLC fired Gates and Matthews about May 15 or 16; their discharges are not among the issues in this case.

About June 6, Carl Brown testified (5:1271, 1313–1315), Majure told Brown and several of his dry chain employees, as a group, that he would have to tighten his enforcement of the work rules, that this applied to everyone, and that this had come from the ''boss man,'' a reference Brown understood to be Plant Manager W. L. Brown. Majure said that the two employees who had been fired did have an ''effect on everybody around here.'' (Brown was aware of only Gates and Matthews having been fired recently.) ''Things are going to have to change,'' Brown (in a pretrial affidavit which he testimonially confirms as accurate) quotes Majure. ''We are going to have to tighten down on the rules,'' Majure said. Majure did not mention the Union in his remarks to the group. Of the group of some six employees present, only Carl Brown testified. (5:1271–1272, 1313–1315.) Although Brown recalls that earlier (how much earlier is not specified) he and Majure had discussed the union matter, no details are given and no connection with Majure's later statement to the group is shown.

At trial Majure, who in February 1991 left HLC for another company (15:3591), does not address this incident. I find nothing unlawful in Majure's June 6 remarks to the group.

(b) *Charles E. Gates*

The last day Gates worked was Wednesday, May 16, apparently the effective date of his discharge. (6:1571, 1575.) The day before, Tuesday, according to Gates, Majure approached him at his work station. Gates had arrived late for work that Tuesday. Majure told Gates that if the Union were there Majure would have had to ''write up'' Gates, and that Majure was going to ''stiffen down on the rules.'' Gates said he understood that Gates was just doing his job. (6:1558–1559.) After Majure spoke with him, Gates observed Majure go speak to Willie Matthews. (6:1560–1561.) Majure denies ever speaking with Gates about tightening the work rules. (15:3598.) Majure believes Gates and Willie Matthews hold grudges against him (and, by implication, lied) because he fired both of them about mid-May. (15:3598–3599.)

(c) *Willie Matthews*

According to Matthews, Majure came and told him that if a union were voted in that he would have to tighten down on the workers. (7:1698.) Matthews asserts that Majure stated that the ''boss man'' (whom Matthews identifies as W. L. Brown) told him he would have to do this because of the Union. Matthews observed Majure move on and speak to others on the dry chain. (7:1698–1700.) Matthews dates the event as about the second week of May, about 2 weeks before his discharge. (7:1696–1697, 1721.)

Matthews concedes that he had been late for work the day before, and that Majure said the stricter enforcement would apply to everyone, including supervisors, ''anyway.'' (7:1706–1707.) The ''anyway'' can be interpreted as ''for sure'' or as ''regardless.'' Matthews states that he also was late the day Majure spoke to him, although that appears to be a garbled rendition of the account in his pretrial affidavit. (7:1715–1716, 1726.) Matthews confirms the accuracy of his pretrial version that Majure said he was going to tighten down because of the Union, and that it would be that way ''if we get a union.'' (7:1715–1716.) In his pretrial statement Matthews expresses the belief that Gates and his other fellow workers heard Majure's remarks. (7:1726.)

Majure denies having the conversation with Matthews. (15:3598.) Finding Majure credible and Gates and Matthews not credible, I shall dismiss the complaint allegation respecting stricter rules enforcement.

(3) Threat of discharge

Majure was Carl Brown's supervisor even before HLC purchased the Quitman mill. (5:1308–1309.) On direct examination, Brown testified that about 1 p.m. in May or June Majure came to where he was working at the drive chain and told him to think about it before joining the Union because he owed that to himself and to his family to learn the facts before making a decision. Saying he was 100 percent against the Union, Majure observed that he and Brown had worked together for a long time, that he would hate to lose Brown,

but he would ''put someone else in my place.'' Majure then left and Brown resumed working. (5:1270–1271.)

Brown concedes on cross-examination that, respecting the ''someone else in your place'' conversation, Majure had said that if the Union came in and the employees went on strike, that Brown would be replaced. (5:1310.) On redirect examination Brown recalled two conversations, and further recalled that Majure made the strike replacement statement while they were on a trip in a dump truck, that no strike reference was made in the conversation at the dry chain. (5:1320–1321.)

Majure testified (15:3594) that the dump truck conversation, about the second week in May, was the only conversation he had with Brown about the Union. In the dump truck conversation, Majure testified, he said he wanted Brown to be aware of some facts because Brown had been with him a long time. Majure mentioned that contract negotiations could yield less than what a union demanded, that a strike could result, that HLC intended to operate during any strike, and that HLC would hire from the outside to keep the plant running. (15:3595–3596, 3628–3630.)

Even if Carl Brown's amended version (two conversations) were credited, I would find no violation because the ''hate to lose'' and ''put someone in your place'' are ambiguous and at least as consistent with replacement of an economic striker as with discharge because of union activities. In any event, I credit Majure rather than Brown, and Majure's account describes lawful comment. Accordingly, I shall dismiss the allegation of a threat of discharge at Quitman.

(4) Unalleged threat of plant closure

Carl Brown testified that he learned about the Melvin Mill's closing from fellow employees who, the day after the closing, were discussing that event. (5:1275–1276.) One afternoon thereafter, but still within the last few days of December 1990, Supervisor Majure approached Brown near the stacker. No other employees were nearby. With no preliminary remarks, Majure said to Brown, ''If the Union went in at Melvin, that they was going to close it down anyway.'' Brown did not respond. (5:1275.) Presumably Majure walked away after making this lone statement. During cross-examination, HLC did not ask Brown about this incident. Majure denies making the statement. (15:3596.)

The General Counsel urges that Majure's denial not be credited, and contends that his remark should be found violative of the Act even though it is not alleged in the complaint and although no motion was make at the trial to amend the complaint to allege it. Citing *Action Auto Stores*, 298 NLRB 875 fn. 2 (1990), the General Counsel advances the following reasons to demonstrate that the evidence should be considered. First, at the close of the hearing the General Counsel moved to conform the pleadings to the proof, which motion the Administrative Law Judge denied. (17:4149–4151.) Second, Majure's statement is related to other violations alleged. Third, the matter was fully litigated. Finally, the General Counsel urges that, in any event, Majure's statement should be considered ''as evidence of union animus.''

The General Counsel's motion to conform (to which HLC objected, 17:4149) is designed to address matters which are not substantive. Thus, the statutory General Counsel's guidelines provide, NLRB Casehandling Manual (Part One) Motion to Conform Section 10388.3 (June 1989):

> At the end of the hearing, the trial attorney should make a motion to conform the pleadings to the proof. Pressed for explanation or meeting with resistance, the trial attorney should note that the purpose is to dispose of minor and immaterial variances that might appear in the record, such as names, dates, and minor details. He/She should also keep in mind that this is the only effect—if substantive correction is necessary, it will not be accomplished by this motion.

At the hearing the General Counsel, in making her motion to conform, began on the basis that the motion addressed only minor variances, not matters of substance. She progressed from there and concluded with a motion which possibly could encompass substantive matters. (17:4150–4151.) As I suggested at the trial in denying the motion, the *Federal Rules of Civil Procedure* 15(b), provide that unobjected-to variances between allegations and evidence are waived because they are deemed as tried by implied consent. (17:4151.) Wright, Miller, and Kane, *6A Federal Practice and Procedure* § 1493 at 18 (2d 1990). Implied consent however ''seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. [Citation omitted.] If they do not, there is no consent and the amendment cannot be allowed.'' Id. at 19–20.

And where the opponent has objected to introduction of evidence on a new issue, the movant cannot seek to amend the pleadings ''to conform to the evidence on the ground that the party impliedly consented to the trial of that issue.'' Wright, Miller, and Kane, id. at 31.

> ''Furthermore, when the evidence that is claimed to show that an issue was tried by consent is relevant to an issue already in the case, as well as to the one that is the subject matter of the amendment, and there was no indication at trial that the party who introduced the evidence was seeking to raise a new issue, the pleadings will not be deemed amended under the first portion of Rule 15(b.) [Citations omitted.] The reasoning behind this view is sound since if evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is made clear.

Id. at 32–35, citations omitted, but see *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992); *Yellow Freight System v. Martin*, 954 F.2d 353, 358–359 (1992).

Was the issue fully litigated, that is, tried by implied consent? When the General Counsel began questioning Carl Brown on the incident, HLC objected. I observed that the General Counsel also had listed ''Complaint Number 3, paragraph 7'' among items to be covered by the witness. (5:1274.) That referred to the allegation that the closure of Melvin violated Section 8(a)(3). Of course, I should have asked the General Counsel to describe the relevance. Even so, by failing to correct my reference to the Melvin closure allegation, the General Counsel in effect allowed everyone to believe that the incident was being offered to support the closure allegation. That is, in line with the General Counsel's

fallback position on brief, the incident should be considered ''as evidence of union animus.''

Although Majure briefly addressed the topic, to deny it, that brief coverage is consistent with treatment accorded background evidence, here evidence of union animus, as distinguished from a possibly fuller response to an alleged independent violation.

In light of the General Counsel's silence at trial in the face of HLC's objection, and my pointing to the Melvin closure allegation, I find that HLC was not given fair notice that the Government would seek anything more than to have this incident considered as evidence of union animus. Finding that the matter was not tried by implied consent, I therefore deny the General Counsel's posthearing motion (''position,'' Br. at 31) that a violation be found if Brown is credited. If Brown is credited, the incident would constitute evidence of union animus, but nothing more. I turn now to the incident.

Carl Brown's description of such an abrupt remark by Majure casts the comment in a light uncommon to experience with most conversations. There is no evidence that Majure usually clipped his conversations in this fashion. Moreover, the remark Carl Brown attributes to Majure is ambiguous. Does the ''anyway'' impart the lawful meaning that HLC had intended to close Melvin regardless of whether the Union won the October election? Or should the remark be interpreted as an unlawful threat that HLC had intended all along to close Melvin if the Union won the election, but to keep it open if the Union lost? Either possibility seems to be a reasonable interpretation, although the ''regardless'' possibility appears less burdened than the alternate option.

Because the attributed statement is ambiguous and, of two possible interpretations, more likely to convey a lawful meaning, I shall not consider the statement as evidence of union animus by HLC even were I to credit Carl Brown. Moreover, as Majure is not shown to have any connection with HLC's decisions respecting Melvin, a mill where he did not work, any comment by him about HLC's intent respecting Melvin seems to be nothing stronger than mere speculation on his part. In any event, crediting Majure in his denial, I find that the late December 1990 incident described by Carl Brown did not occur.

c. *Billy Brown*

The complaint alleges that HLC, through Billy Brown, unlawfully interrogated employees about June 12. (Recall that the election was conducted on June 15.) HLC denies. I shall dismiss.

Billy Brown (listed as W. L. Brown III on the payroll, GCX 12 at 9) testified with far more clarity, accuracy, and specific recall than did Daniel Means, the Government's supporting witness for this allegation. Brown was by far the more credible witness. I therefore very briefly summarize the evidence on this matter. Daniel Means, who worked for Brown, claims that Brown approached him one morning before the election, he believes it was in June, and after asking a work-related question, began asking Means how each of three other employees felt about the Union (Means did not know), concluding by asking Means how he felt about the Union (Means saw the pros and cons.) (2:589–591; 4:1102.)

As part of the objections evidence, Means said he had been suspended for 3 days on June 19, after the election, for being a minute tardy (4:1105, 1114–1115, 1149–1150), and that it had come as a surprise because he frequently was tardy. Even so, Means concedes that only 2 weeks earlier Brown ''had told us'' to be on time. (4:1109.) According to Means, the first time Brown told him to start arriving at work punctually was the week of June 4. (4:1129, 1150.) Indeed, in his testimonially confirmed pretrial affidavit of July 11 (4:1113), Means proclaims (4:1150) that he previously had never been given a written warning for tardiness. As late as the trial he thought he had never received one. (4:1130.) In fact he had received one (RX 5) for not showing up for work one Saturday in May. At trial Means identified his signature acknowledging receipt of the written warning. (4:1130.)

Brown testified that he orally warned Means on May 8 that the next tardiness would result in a written reprimand. Brown completed a documentation sheet (RX 31) concerning the matter. (14:3553–3555.) When Means skipped Saturday, May 12, Brown progressed to a written warning and told Means that the next occasion would result in a layoff. (RX 5: 14:3556–3557.) That next occasion came on June 19, and Brown suspended Means for 3 days. (RX 32; 14:3558–3559.) The complaint does not allege any of these disciplinary actions to be a violation of the Act.

Turning now to the conversation which Means describes, I note that Brown places it in May, about 3 to 4 weeks before the election. Denying that he asked how any of the named employees, including Means, was going to vote, Brown asserts that he followed a set procedure by informing Means that if Means had any questions concerning the Union, or HLC's stand on the Union, that Means should feel free to ask Brown and Brown would do his best to answer the questions. (14:3544-3548, 3567.) Crediting Supervisor Brown over Daniel Means, I shall dismiss the interrogation allegation.

d. *Wallace A. ''Bud'' Hamburg*

(1) Allegation

As I described earlier, trial amendments added Hamburg to the litigation. First, he was added to the list of supervisors in both the Quitman complaint, Case 15–CA–11281, and the second Melvin complaint, Case 15–CA–11523. (5:1366–1367, 1382.) Second, he was added to the second Melvin complaint (the third complaint in the series), as paragraph 11, as having stated to Quitman employees, in the fall of 1990, that ''one of Respondent's facilities would be closed if employees at that facility selected the Union as their exclusive collective bargaining representative.'' (5:1370, 1382.) Respondent denies both the supervisory status and the threat allegation. (5:1386.) Sam Moss Jr. testified in support of the threat allegation (and also respecting the supervisory status of Hamburg.) Hamburg, who left HLC in early 1992, did not testify.

(2) Closure threat

Sam Moss Jr. worked at the Quitman mill for several years. He was employed there when HLC acquired the mill in 1985. Moss operated the lumber sorter. (6:1477.) He injured his leg at work on July 27 and was off work until September 17. Moss then worked until November 15, but because of various medical problems he has not returned to work. (6:1476–1477, 1510, 1523–1524.)

About mid-October, Moss testified, as Moss and fellow employee Alvin Patton were discussing the possibility that the Melvin mill would close, Hamburg came by and remarked to them that he had heard ''rumors'' that W. L. Brown had said that if the Union won the Melvin election the Melvin mill would close. (6:1519.) (On further questioning by the Government, Moss modified his testimony to remove ''rumors'' from his quote of Hamburg, so as to quote Hamburg as saying he had ''heard.'' 6:1520.) Neither Moss nor Patton replied and Hamburg proceeded to the sorter computer room. (6:1520.) Patton did not testify, nor did Hamburg who, as I mentioned earlier, no longer works for HLC. Thus, Moss' assertion is uncontradicted.

If Hamburg was a statutory supervisor in October 1990 then his statement (for whatever weight it is worth) is attributable to HLC. Respondent denies that Hamburg was a statutory supervisor. Before addressing the supervisor issue, I note that HLC complains (Br. at 170–171) that the General Counsel abused the Government's power by ''unwisely'' amending the complaint to add the Hamburg allegations of supervisor and threat. Because of these unwise amendments, HLC observes, the record has been unnecessarily increased by ''numberless pages of the transcript and hours of hearing time were devoted to analyzing Hamburg's status. Several pages of this brief are unnecessarily dedicated to discussing a rumor between employees at the mill.'' In essence, HLC protests that the amendments caused a big increase in the volume of the record without adding any weight to the Government's case. Thus, does Hamburg's remark about rumors, even if violative of the Act, assist in proving the Government's contention that HLC unlawfully closed the Melvin mill? The General Counsel describes that as the purpose of the amendments. (5:1369; Br. at 31.)

(3) Supervisor status

Until late June 1990 Jeff Colston (stipulated to be a statutory supervisor, 6:1474) was in charge of the sorter area as well as the sawmill department. Moss testified that Colston assigned Wallace ''Bud'' Hamburg to look after the sorter area by informing the employees that Hamburg would be the ''leadman'' there and to go to him with any sorter problems. (6:1481–1482, 1535.) About 1988 Colston, who visited the sorter area for only about 15 minutes once a week, told the sorter crew that Hamburg was in charge of the sorter and if they had problems or needed to take time off from work to see Hamburg. (6:1488-1490.) Moss understood that Hamburg's classification title was ''leadman/maintenance mechanic.'' (6:1536.)

In late June 1990 supervision of the sorter area passed from Colston to Billy Brown. (6:1515, 1543; 14:3507.) (Billy Brown's estimate of late 1989 to early 1990 appears to be incorrect. 14:3562.) Brown called the eight or so sorter employees together and informed them that henceforth he would be responsible for the area and that they should come to him with any problems. (14:3565–3567.) According to Moss, Brown said that he was taking over the sorter. ''Bud wouldn't be over the sorter no more.'' (6:1543–1544.) Moss either clips the ''Brown said'' from his testimony or supplies his own conclusion of what Brown meant, and this is so notwithstanding he repeats his clipped answer to the question of what Brown said. Denying any reference to Hamburg, Brown asserts that he told the group he was taking over supervision of the sorter from Jeff Colston, that everyone would ''answer to me,'' and if they had any problems they needed to come see him. (14:3565.) Brown testified that he had considered Hamburg a maintenance employee, not a leadman. (14:3573.)

If Hamburg, who quit HLC's employment in early 1992 (14:3573), was not a leadman, then Billy Brown was spread rather thin because his areas of supervision included 40 to 45 employees. (14:3541–3542, 3566.) Billy Brown's father, Quitman Plant Manager W. L. Brown Jr. (14:3502, 3541), testified however that although Hamburg was classified as maintenance (14:3454; RX 24), he was one of several employees at the Quitman mill who had the authority of a leadperson. (14:3455.) Hamburg, W. L. Brown testified, functioned as a leadman for the sorter crew. (14:3509.) During the relevant time W. L. Brown had four supervisors reporting to him: Billy Brown, Jeff Colston, Stan Majure, and Joey McCarra. When Majure left, Brown saw no need to appoint a successor and he since has supervised the area himself. (14:3450, 3502–3503.)

The evidence indicates that, during Colston's tenure as supervisor of the sorter crew, Hamburg may have effectively recommended the discharge of a total of three employees during 1988–1989. Thus, after disputes with the employees, Hamburg pulled their timecards, went to Colston, and the affected employee never returned to work.

Billy Brown acknowledges that he made no changes in Hamburg's work duties (14:3565, 3574), but denies awareness of any instructions Colston gave Hamburg regarding his duties or responsibilities. (14:3574.) W. L. Brown, who had been the Quitman plant manager under the predecessor, Timber Realization Company, before HLC acquired the mill in 1985 (14:3440), testified that Hamburg had been a supervisor for Timber Realization (TRC, herein) but had quit and, when later hired by HLC, he was hired as a maintenance person, not as a supervisor, and his status never changed thereafter except that he did serve as one of several lead persons at the mill. (14:3453–3455, 3509.)

Hamburg's principal duties entailed setting and operating the computer which ran the sorter, and repairing and maintaining the sorter and related equipment. Clearly Hamburg was a skilled employee, and he was paid substantially more than employees on the sorter crew. Moss testified that Hamburg spent a lot of time walking around the area and visiting other departments, and, at least on one occasion, sleeping in the scale house. (6:1503.) Billy Brown does not address the question of Hamburg's walking around and visiting other areas, or sleeping, and neither Colston (still employed) nor Hamburg (no longer with HLC) testified. Unlike Colston's 15 minutes a week in the sorter area, however, in 1990 Billy Brown was there about 2 hours a day. (14:3574.) Thus, the change of supervision from Colston to Billy Brown resulted in a major change respecting the attending presence of the sorter crew's supervisor and by the fact that now all problems were to be taken direct to Billy Brown.

(4) Discussion

It seems clear that even assuming Wallace Hamburg was a statutory supervisor before June 1990, beginning in late June 1990 with Billy Brown's assignment as supervisor of the sorter crew, Hamburg lost whatever statutory authority he had enjoyed under Jeff Colston. Before June 1990 incidents occurred which could support a finding of supervisory status.

Billy Brown's late June 1990 announcement of supervisory change, plus his own attendance in the area for 2 hours a day, his instruction that henceforth crewmembers were to bring any problems to him, and the lack of evidence showing that after Billy Brown took over that Hamburg still exercised discretionary matters such as pulling timecards, lead to the finding, which I make, that beginning in late June 1990 Wallace ''Bud'' Hamburg no longer possessed any authority of a statutory supervisor, even assuming that he had held such authority before June 1990.

Resolution of the supervisor question does not end the inquiry. Was Hamburg a statutory agent in October 1990? Could the employees reasonably believe that he delivered messages from management? Under Colston Hamburg distributed paychecks, and he presumably continued to do so under Billy Brown. But even if he passed on messages from management, or from Billy Brown, Hamburg's October statement was not couched as a message from management, but as a repeat of gossip, or ''rumors'' of a purported remark by W. L. Brown. Thus, even if employees could reasonably have viewed Hamburg as an agent for conveying messages from management, the October remark does not purport to be a message from management. Accordingly, I find that Hamburg's October remark is not attributable to HLC.

But even if it were determined that Wallace Hamburg was a statutory supervisor or agent and that his October repetition of rumors to Moss and Patton (Patton did not testify) that W. L. Brown had said thus and so, it is clear that the violation, if such, was by HLC through Hamburg—not HLC through W. L. Brown. First, Moss does not contend he is directly quoting the plant manager. He quotes ''rumors''; gossip; what he ''heard'' had been attributed to W. L. Brown. Any violation, therefore, is only by force of Hamburg's repeating the gossip, and not because the gossip purports to name the plant manager as the source. Thus, any impact of the gossip has to be weighed on the scale of a barely threshold supervisor, not on the scale of a plant manager. On either scale, and particularly the scale for Hamburg, I would find that the remark, admittedly quoting rumors, would not reasonably be coercive to employees. On every basis, therefore, I shall dismiss paragraph 11 added at trial to the third complaint, Case 15–CA–11523.

2. Allegation of 8(a)(3) discrimination

a. *Allegation that wage increase unlawful*

Paragraph 10 of the Quitman complaint (Case 15–CA–11281) alleges that about May 1990 HLC granted employees a wage increase because (par. 11) the employees were supporting the Union and for the purpose of dissuading them from that support. By granting this wage increase, paragraph 13 alleges, HLC violated Section 8(a)(3) and, derivatively, 8(a)(1) of the Act. Thus, we are concerned here with HLC's motive in granting the wage increase.

b. *Facts and discussion*

There is no dispute that at all of HLC's mills discretionary pay increases were made effective on various dates in April 1990. At two mills, Grenada and Sturgis, April 15 was the effective date. For Melvin and Winona the effective date was April 22. Quitman was last at April 29. (RX 17.) The evidence shows that HLC's weekly pay periods begin Sunday morning, run through the following Saturday, and that the paychecks are distributed on the following Friday, 6 days later. The pay raise made effective at Quitman on Sunday April 29 was therefore in the paychecks distributed 13 days later on Friday May 11, 1990. (12:3016–3023; 14:3496.)

What creates an issue respecting Quitman is that, as I noted in the statement of the case, the Union began its organizing at Quitman about April 25. HLC learned of the organizing when Supervisor Billy Brown, on Thursday May 3, turned over to W. L. Brown a union flyer which Billy Brown had discovered that morning. (14:3497, 3522, 3561.)

No copy of the flyer is in evidence, and its contents are not described. W. L. Brown's testimony indicates however that he understood the flyer and Bill Brown's report to mean that the Union was attempting to organize Quitman's employees. Under Board law, the General Counsel establishes a prima facie violation of the Act by showing that a discretionary pay increase occurred, as here, early in a union organizing campaign. The burden of rebuttal then shifts to the employer to show that its purpose in granting the discretionary pay increase was not to dissuade its employees from joining or supporting the union. *Elston Electronics*, 292 NLRB 510 fn. 2, 525–526 (1989). I find that HLC has carried its burden.

As the record reflects, W. L. Brown tentatively set a pay raise amount for each Quitman employee about April 4 or 5 (14:3488, 3490–3492), and he reached a firm figure after consulting with his line supervisors about mid-April. (14:3493.) About April 17 or 19 (a Thursday) Burton Hankins approved the pay increases except (for reasons not fully explained in the record) as to Billy Brown. (14:3521; 16:3991–3992.) On April 19 W. L. Brown entered those figures by each employee's name on his copy of the payroll register, except of course for Billy Brown. (14:3495.)

Plant Manager Brown, however, held up implementing the pay raises until an increase could be set for Billy Brown. (14:3521.) Two Saturdays later, on April 28, Hankins and W. L. Brown agreed on the amount of Billy Brown's pay raise, and the following day, April 29—4 days before W. L. Brown learned of the Union's organizing campaign—the pay raises went into effect. (14:3519–3521.) As the pay increase decision was made and implemented before HLC learned of the Union's organizing activity at Quitman, I shall dismiss complaint paragraphs 10 and 11, the wage increase allegations.

C. *Quitman—Case 15–RC–7533*

1. Challenged ballots

a. *Introduction*

Earlier in my statement of the case I noted that only three of the challenged ballots are preserved here for resolution: Dennis O. Cochran, Daniel Norris, and Ernest Manning. As reflected in the Regional Director's April 24, 1991 report (GCX 1s at 11), the Union challenged the ballots of these three on the basis they were not in the appropriate unit.

Although the Union also challenged Wallace ''Bud'' Hamburg's ballot on the basis that he is a supervisor (GCX 1s at 11), at the hearing the parties agreed that HLC would not contest the Union's challenge to Hamburg's ballot and that his ballot would not be opened and counted. At the same

time HLC made clear that it was not agreeing that Hamburg in fact was a statutory supervisor. (1:221–223; 5:1355, 1380.) I find that HLC has withdrawn its contest of the Union's challenge to the ballot of Wallace Hamburg. Thus, I find that the parties resolved the challenged ballot of Wallace Hamburg by agreeing that his ballot would not be opened and counted.

Dennis Cochran and Daniel Norris are log scalers at Quitman, and Ernest Manning is the maintenance purchasing clerk there. The Union has not filed a brief. The Union's challenge appears to be on the basis that Manning does not share a community of interest with unit employees. Contrary to the challenges, I find that the three employees share a community of interest with the employees of the bargaining unit.

b. *The log scalers*

The nature of the log scalers' work already has been described to some extent. They are the beginning of the production process at the sawmill. When trucks loaded with logs arrive, the scalers weigh the trucks and prepare a scale ticket. After a lift operator, operating a LeTourneau machine (a heavy duty lift), then unloads the logs the truck is weighed again without the logs and another scale ticket is prepared.

With HLC logs only the first load or two from a new tract is scaled, followed by every fifth load thereafter, but all logs of independents are scaled. All logs are weighed. After the logs are weighed and unloaded they are spread out on the yard (by the LeTourneau operator) where the scaler measures their volume when they are to be scaled. Scalers use a measuring stick (for length) and calipers (to measure diameter) to calculate the volume of wood in the logs. They also determine the quality of the logs based on specifications and guidelines. The scaler takes the scaled ticket to the office where an office clerical employee completes it (apparently for accounting and payment, 15:3698, 3733). A lift operator either stacks the logs in log runs or moves the logs directly to the sawmill.

The scale house and the yard are the principal work areas for the log scalers. Log scalers report to work at 6 a.m., the same as other employees, but work to 6 p.m., beyond the 4:30 p.m. quitting time for others. Scalers may even may work longer hours if a truck arrives close to the usual 6 p.m. quitting time. (Recall that boiler firemen work staggered shifts.) The parties stipulated that Cochran and Norris (and Manning as well) receive the same vacation, pension, and other benefits as unit employees. (7:1899.) In June 1990 Cochran and Norris each was paid $7.25 per hour, a rate placing them among the higher paid unit employees. (RX 27, GCX 12, CPX 49.)

Norris and Cochran are, and were in May–June 1990, supervised by the plant manager, W. L. Brown. Hourly paid, they both punch timeclocks used by unit employees. Both learned log scaling by on-the-job training. Actually, in May–June Cochran had been pulled off full-time log scaling in order to operate the LeTourneau machine. The LeTourneau can lift at one time all the logs from a truck. Around the election Cochran only helped part time at log scaling. When log scaling was slow during the preelection period, both Norris and Cochran helped perform other unit work in various areas or departments of the mill.

Finding that the log scalers, and particularly Dennis Cochran and Daniel Norris, share a community of interest with unit employees, I shall recommend that the Board overrule the Union's challenges to the ballots of Cochran and Norris and direct that their ballots be opened and counted and that a revised tally of ballots be issued.

c. *Ernest Manning*

Hired June 30, 1986, as a lumber grader, Ernest Manning has worked as the maintenance purchasing clerk since March 1987. (15:3752, 3777.) During the weeks leading up to the election Manning worked under Billy Brown's supervision. (15:3649, 3753, 3773, 3780.) Manning was earning $6.75 per hour in early June. (15:3764; CPX 49 at 2.) Manning punches a sawmill timeclock used by 80 to 90 other employees. (15:3765–3766.)

Manning's primary job duties are to order machine parts and supplies such as bearings, nuts, and bolts, stock and issue the inventory, and maintain the parts warehouse. The supply and parts warehouse has an office in the front of the building. That office is divided by a wall with a window. Supervisor Billy Brown has one of the offices and Manning the other. Manning spends about 30 to 50 percent of his day at his office telephone ordering parts and supplies. Brown now must approve any purchase over $300, but because of a business slump in May–June 1990 Brown had to approve every purchase. 13:3656, 3759–3761, 3781. Brown testified that even a maintenance employee may order parts costing no more than $300, as can Carl Brown, a unit truckdriver. (15:3677–3678.) Most of what Manning orders costs less than $300. (15:3787.)

During about 50 percent of his day Manning stocks and issues parts and supplies. This includes, Carl Brown reports, issuing hand soap. (6:1426.) For the remaining 20 percent or so of his time Manning performs ''hands on'' maintenance such as assisting on a lift or helping in the shop. In fact, Manning sustained a serious hand injury about late 1988 while helping the mechanics replace the pivot bearings on one of the large lifts. (15:3766–3767.) Carl Brown confirms that Manning assists with the maintenance work. (6:1435.) Supervisor Brown distributes paychecks to his crew, and in Brown's absence Manning performs that duty and any other routine matters Brown assigns to him. Brown supervised about 45 employees at the time. (14:3541–3542, 3566–3567.) Brown testified that, in Brown's absence, Manning does not assume all his duties, and another supervisor would assume Brown's supervisory role. (15:3668, 3679–3680.)

Manning also runs errands in a company vehicle. The vehicle is available to others for company business, and Manning does not drive it to and from work. As Carl Brown testified (5:1404–1405), and Manning confirms (15:3775), Manning, the three mechanics, supervisors, and perhaps one or two others, carry two-way radios, or ''walkie talkies.'' Supervisor Brown explains that Manning's duties carry him over all the facility when he is not in the warehouse. (15:3671.) The Quitman mill consists of several buildings, and an employee can walk several hundred yards from a building at one end to a building at the opposite end. In any event, the walkie talkies did not arrive until after the election. (15:3784.)

Because Ernest Manning's duties have him working in several clearly unit capacities (warehouse, supply clerk, and

maintenance helper), I find that he shares a community of interest with unit employees. Accordingly, I shall recommend that the Board overrule the challenge to Manning's ballot and direct that his ballot be opened and counted and a revised tally of ballots issued.

2. Objections

a. *Introduction*

The Union filed nine numbered objections to the election. As reflected in the Regional Director's April 24, 1991 report (GCX 1s at 9–10), the Union withdrew Objections 3, 4, 7, 8, 9, and the first part of 6, leaving allegations in Objection 6 that HLC (1) surveilled union meetings and (2) attempted to ascertain the identity of leading union adherents. The Regional Director found no merit to the surveillance allegation and recommended (GCX 1s at 10) that the Board overrule it. The Regional Director however also found evidence that Supervisor Joey McCarra ''created an impression of surveillance of employees''' union activities, and evidence that the Employer unlawfully attempted to identify the leading union adherents. Noting that these contentions (the impression of surveillance matter and the third item from Objection 6, attempting to ascertain identity of union supporters) parallel allegations in the Quitman complaint, Case 15–CA–11281, he referred these contentions to this proceeding along with Objections 1, 2, and 5.

b. *Objection 1*

Objection 1 alleges that during the critical period HLC ''threatened certain employees with retaliation and/or loss of their jobs if or after union was voted in.'' (GCX 1s.) The ''critical period'' for objections is that time from the filing of the petition to the date of the election. *Fruehauf Corp.*, 274 NLRB 403, 404 fn. 3 (1985.)

As far as I can determine in the absence of a brief from the Union, the Union relies on evidence pertaining to Wallace Hamburg and W. L. Brown.

Recall that the Wallace Hamburg incident is the subject of a trial amendment to the complaint. The allegation is that Wallace Hamburg, allegedly a supervisor, told employees in mid-October 1990 that W. L. Brown, Quitman's plant manager, had said that if the Union won the Melvin election then the Melvin plant would close. The Union apparently intended that evidence adduced on this incident support its objections as well as the trial amendment to the complaint. (5:1356–1360.) As the incident occurred, if it did, outside the critical period, however it would not be objectionable. Accordingly, I find that any such conduct by Hamburg, even assuming he was an agent of HLC at the time, would not support Objection 1.

That brings us to Quitman's plant manager, W. L. Brown Jr. As there are no complaint allegations naming Brown, and therefore no unfair labor practice evidence naming him directly (other than the supposed indirect naming by Hamburg), the Union adduced evidence respecting two speeches which Brown delivered. Brown identified written texts as his two speeches. The first he delivered on May 18 (RX 30; 14:3530) and the second on May 25. (RX 29; 14:3528.) The Union's objection is supported by the testimony of employee Carl Brown and former employees Charles Gates, Willie Matthews, and Richard McCree.

Carl Brown and the three former employees testified, to one extent or another (with many of the questions leading), that Plant Manager Brown said he was 100 percent against the Union and that if the Union won the election the employees would lose benefits and their jobs and HLC would hire other employees to replace them.

Carl Brown admitted, however, that W. L. Brown said that ''if we went on strike he would replace us.'' (5:1337, 1345.) Gates expanded his statement to assert that in the first speech Brown said that a union victory may cause employees ''to lose their jobs or fire or something'' (6:1588); that he would do all he could to keep the Union out even ''if that means having to fire somebody.'' (6:1616.) Gates concedes however that his pretrial affidavit, given on June 5, only a few days later, contains nothing about Brown's saying anything about firing employees. (6:1616–1617, 1625–1630.)

Matthews testified that Brown said employees could lose their jobs and everything they had (7:1736, 1757), but on cross examination admits that Brown, in that connection, could have stated (7:1757-1758):

> What I am telling you today is that you don't need to run the risk of losing everything in a strike or losing what you have now in good faith bargaining. [A line from RX 30 at 14.]

Convoluted testimony given by McCree, eventually involving his quoting from his pretrial affidavit, reflects that Brown told employees he could hire new employees (7:1883) and (7:1887, 1905) that HLC ''would do anything they had to do to keep the Union out, even if it meant hiring all new people because the mill would still run.'' McCree concedes that Brown also said, as shown by McCree's pretrial affidavit, that if the Union came in and called a strike ''then we could be replaced.'' (7:1901, 1904.)

Plant Manager W. L. Brown testified that he read the 14-page May 18 speech (RX 3) verbatim (14:3752, 3535, 3537), except that he did depart at one point to describe a personal experience involving the Union at another plant. (14:3535–3536.) Brown denies saying anything about firing employees. (14:3534.) The written text of the May 18 speech describes the collective-bargaining process: the Union can bargain away currently enjoyed paid holidays and benefits (RX 30 at 4, 7, 8, 14), and if a strike is called HLC lawfully may hire employees to replace the strikers. (RX 30 at 9, 12-13.)

Finding nothing objectionable either in the written text of Brown's first speech, and crediting W. L. Brown over the Union's witnesses, I find that the Union's evidence respecting the first speech fails to support its Objection 1.

Brown's second speech actually was 1-1/2 pages of comments (RX 29) which he delivered at a company cookout on May 25 (14:3529), the Friday before the Memorial holiday, at the planer mill. (14:3528.) Brown testified that he read it verbatim, adding nothing. (14:3529, 3537.) As to this speech the Union's evidence apparently consists of Carl Brown's testimony that W. L. Brown, at the planer mill cookout speech (5:1348; 6:1422), said he would terminate anyone who criticized the Company ''Vote No'' hats and shirts (5:1347) or that ''action would be taken'' against them. (6:1421.) Brown denies. (14:3530.)

On cross-examination Carl Brown concedes that Brown (no relation) could have used the word ''harassed'' rather than ''criticized.'' (6:1422.) With counsel then reading

Brown's closing paragraph from his May 25 remarks (RX 29 at 2), Carl Brown admits this is what he was referring to in his testimony (6:1422–1423):

> Everyone has a right to not wear a cap and shirt just like as everyone has a right to wear a cap and shirt. I have heard that some of you have been harassed because you were wearing the caps and shirts. I heard that one person said he was afraid that if he wore them he would be knocked in the head. I will not tolerate threats or harassment on either side. I want you to understand that—for or against.

Finding no evidence that W. L. Brown said anything objectionable in his May 25 remarks, and having found nothing objectionable in Plant Manager W. L. Brown's first speech on May 18, I shall recommend that the Board overrule the Union's Objection 1 respecting threats.

c. *Objection 2*

In its Objection 2 the Union alleges that during the critical period HLC (1) gave wage increases to its employees, (2) gave some employees different increases, and (3) promised other employees additional wages or benefits to vote against the Union and/ or assist in keeping the Union out.

Part one of the objection parallels complaint paragraph 10, an allegation I earlier dismissed. Part two makes no sense, but possibly was intended to allege discrimination against union supporters. No evidence was presented on part two or part three. Indeed, I found that HLC did not learn until May 3 of the Union's organizing, and that the decision to implement the raises predated that decision. I shall recommend that the Board overrule Objection 2.

d. *Objection 5*

Objection 5 alleges that during the critical period HLC ''promulgated a rule and or threatened to enforce existing rule or rules more strenuously to dissuade employees from voting for union representation and did discriminatorily enforce such rules on certain employees because of their membership in and activity on behalf of the Union.''

The evidence the Union apparently relies on for this objection pertains to Supervisors Stanley Majure (threats of stricter enforcement of work rules) and Billy Brown (his progressive warnings to Daniel Means in May 1990). The matter respecting Majure parallels complaint paragraph 7(a), an allegation I earlier dismissed.

In covering complaint paragraph 9, that on June 12 Billy Brown unlawfully interrogated employees (Daniel Means), I discussed what the Union apparently relies on here—Supervisor Brown's progressive warnings to Means in May (the June 19 suspension occurred after the election). No disparity or departure from past practice was shown in this. I shall recommend that the Board overrule Objection 5.

e. *Objection 6*

As Objection 6 is the subject of some confusion, I quote it (GCX 1s):

> 6. During the critical period, agents, representatives, or supervisors of the Company threatened employees with futility of bargaining if they selected the Union as their bargaining representative, threatening to deny union recognition, spying on union meetings and trying to find out who [the] leader of union drive was.

In his April 24, 1991 report, the Regional Director approved the Union's withdrawal of the part alleging threats of futility and denial of Union recognition. (GCX 1s at 9.) That is, everything up to ''spying'' was withdrawn. After reviewing the evidence presented during the Region's investigation, the Regional Director found the evidence insufficient to establish surveillance. This included evidence that Supervisor Joey McCarra was observed driving past the location where union meetings were held (across the road from the plant, outside, in open view of employees driving home from work) and that ''people'' were seen looking out of Hankins' office window at the union meetings. The Regional Director recommended (GCX 1s at 10) that the spying allegation be overruled.

The Regional Director however proceeds to state that the Region's investigation disclosed evidence that during the critical period Supervisor McCarra ''created an impression of surveillance of employees' union activities, and evidence that the Employer unlawfully attempted to indentify the leading union advocates. These two allegations which are, inter alia, the subject of the complaint issued in Case 15–CA–11281, raise substantial and material issues that can best be resolved after a hearing.'' Thus, except for the final allegation of trying to ascertain the identity of the leader of the union supporters, all other allegations of Objection 6 were rejected by the Regional Director by his recommendations to overrule.

Referred to hearing, therefore, was the one surviving allegation about discovering the leader plus the item disclosed by the investigation, that Supervisor McCarra had created an impression of surveillance. Both these items, as the Regional Director observes, parallel allegations in the complaint—paragraphs 8 (about May 7 McCarra created an impression of surveillance) and, apparently, 9 (about June 12 Supervisor Billy Brown interrogated employees). Earlier I dismissed both these complaint allegations.

As if a Halloween vampire requiring a stake through the heart to kill it permanently, the surveillance portion of Objection 6 rises in the record without objection that the Regional Director already has disposed of it. Although the Regional Director specifically rejected the allegation of surveillance generally and by Supervisor McCarra as he drove home from work, that evidence was presented here—without objection. To the extent HLC's failure to object, and thereafter addressing it, revived the issue, I reach the same conclusion as did the Regional Director that such evidence does not constitute prohibited surveillance (nor the impression of surveillance, if that be the distinction for the Union's reoffering the evidence). Thus, I find that the conduct is not objectionable.

The Union also presented, on this same allegation, evidence that Plant Manager W. L. Brown was observed standing outside the office (rather than looking out the window) and, arms folded, peering at the union meeting some 500 feet away. Even if Brown was looking at a union meeting being held in the open some 500 feet from the plant (Brown recalls no such incident, 14:3498), I find that it would not constitute objectionable conduct because there was nothing extraordinary about the incident.

Finding no merit to the one allegation surviving from Objection 6, nor on the two matters (one duplicating the item

about trying to find the identity of the employee or employees leading the union supporters) referred by the Regional Director, I shall recommend that the Board overrule these issues. No further objections remain to address.

3. Summary

All objections to the conduct of the June 15, 1990 Quitman election have been disposed of either by withdrawal or recommendation by the Regional Director or by me that the Board overrule the objections.

Of the four challenged ballots referred to this proceeding for resolution, the parties agreed that the ballot of Wallace ''Bud'' Hamburg would not be opened. That left the challenges to the ballots of Quitman voters Dennis Cochran, Daniel Norris, and Ernest Manning. I have recommended that the Board overrule all three challenges and that it direct the opening of those three ballots, the preparation and service of a revised tally of ballots, and the issuance of the appropriate certification.

D. *Melvin—Threats and Layoffs—Case 15–CA–11394*

1. Introduction

Recall that there are two complaints respecting the Melvin mill. The first, Case 15–CA–11394, alleges violations of Section 8(a)(1), (3), and (5) of the Act by coercive threats and unlawful layoffs, the layoffs allegedly being without notice to the Union. The second complaint, Case 15–CA–11523, alleges that HLC closed Melvin about December 24 and laid off the employees in violation of Section 8(a)(3) of the Act. Except as noted for the plant closure complaint, all complaint references are to the first Melvin complaint.

2. Allegations of 8(a)(1) coercion

a. *Jerry Turner*

(1) Alleged threat of discharge

Complaint paragraph 7 alleges that about August 29 Supervisor Jerry Turner threatened to discharge employees supporting the Union ''if the Union lost an upcoming representation election.'' Respondent denies. For the Government's supporting witness, the General Counsel called employee Ronnie E. Graham. Supervisor Turner did not testify.

Hired at Melvin in 1988, Graham worked on the ''green chain'' pulling and stacking lumber. (3:876–877.) Jerry Turner was his foreman. (3:880, 903.) Graham testified that on an occasion between summer's end (3:906) and ''about October'' (3:881), but when the union activity had ''first started getting organized good'' (3:906), he and Turner had a conversation in Turner's work area. No one else was close enough to listen. (3:881.) Initially placing the conversation during a morning (3:881), Graham later acknowledges that he does not recall whether it was morning or afternoon, the day of the week, or how the conversation began except that they began talking about the Union. (3:882, 906–908.) Graham was wearing his union pin, sized slightly larger than a quarter, in the center of his hat. (3:907.)

As they discussed the Union, Graham testified, Turner asserted, ''All you are doing is spitting in my face and taking my job away from me. If it was left up to me, I would run all you sonofabitches off.'' (3:882, 908.) Turner then said that Graham could leave. When Graham asked if Turner was firing him, Turner replied no, that he would not be the one to do it. Turner added that whether the Union won, ''you, Earnest Frost, and Bill Foster will be the first ones to hit the road.'' Laughing, Turner then walked away. (3:882, 914–915.)

Although Turner frequently used such coarse language (3:908), and sometimes did so when joking, he was serious on this occasion. (3:915.) Graham had never been disciplined. (3:908-909.) Graham, Frost, and Foster openly supported the Union (3:915), and Earnest Frost (like Graham) also wore a union pin. (3:916.)

(2) Discussion

Although HLC argues that Graham should not be credited because his memory fails to recall many details (Br. at 148), I find Graham's testimony on this incident to be credible. HLC next argues that no violation should be found because the incident was isolated as to number and employees. Rejecting that argument, I find that, as alleged, HLC violated 29 U.S.C. § 158(a)(1) by Supervisor Jerry Turner's remarks. Turner's coarse remarks clearly threatened that HLC would discharge Graham, and two others as well because they dared to support the Union.

b. *Burton Hankins*

(1) Introduction

Two allegations name HLC's president, A. Burton Hankins. Complaint paragraph 9 alleges that about October 4 and 10, 1990, Hankins threatened employees with (a) plant closure and (b) loss of benefits ''if they chose the Union as their exclusive bargaining representative.'' HLC denies.

The allegations refer to two campaign speeches Hankins delivered before the October 19 election at Melvin. The parties differ over what Hankins said. Although Hankins had written texts, copies of which are in evidence (RXs 15, 40), unfortunately HLC apparently did not tape record Hankins' remarks. The text (RX 15) for the first speech, October 4, extends onto 14 numbered pages; the second (RX 40) is shorter, extending to the top of page 3. Both texts are in larger type and double-spaced. Sentences and paragraphs are short and to the point.

Actually, Hankins and R. Lewis Smith, HLC's chief financial officer, delivered alternating parts of the first (October 4) speech, with each covering roughly one-half (a bit more than 6-1/2 pages). The Government alleges only as to Hankins' remarks, not those of Smith. (Only Hankins spoke on October 10.) Stated differently, the General Counsel does not attack the written text, but only what the Government contends that Hankins said. HLC contends that Hankins followed the written text.

Hankins acknowledges that he did not read line by line either the first speech (his portions) or the second speech, but instead occasionally glanced at the text and quoted, as necessary, while delivering the texts. Hankins worked on memorizing as much as he could of the texts by engaging in some 20 to 30 practice sessions. That memorization, plus glancing and spot quoting as necessary, enabled him, Hankins testified, to deliver the written texts from memory. (16:3981–3982, 3986, 4072.) Smith testified that he followed along as Hankins delivered his portions of the first speech and testi-

fied that Hankins delivered his portions verbatim. (8:2039.) Although Smith practiced his own portions of the first speech ''many times'' (8:2105), it appears that he may have read most of his portions. (8:2039.)

In support of the allegations, the General Counsel called seven employee witnesses and desired to call at least two or three more. (4:1083.) The Union proposed calling at least 7 to 10 additional witnesses on the speeches. (4:1084–1085, 1087, 1093–1094.) Earlier (3:879–880) HLC had raised the point that the evidence appeared to be cumulative. Although I declined to rule it so at that point, I did so after six witnesses had been called by the General Counsel on the speeches. (4:1083–1084, 1087.) In so ruling, I permitted the General Counsel and the Union each to call one additional witness. (4:1095.) The General Counsel called her seventh witness before being restricted. (4:1169.) The Union thereafter questioned, as its witness on the point, Jessie Prestage, and expressed its desire to call an additional 10 to 12 witnesses, a proffer I rejected. (4:1214–1216.) Thus, eight employees testified in support of the complaint allegations.

Testifying on behalf of HLC about the speeches were Hankins, Smith, and Johnnie Stephens, Melvin's plant manager. Smith was not present at the October 10 speech, but Stephens attended both dates. I credit HLC's witnesses over those of the Government and the Union.

In crediting HLC's witnesses, I recognize that the Government's witnesses appeared to testify sincerely. By the time of the trial, over a year after the speeches, memories had begun to fade (notwithstanding the existence of pretrial affidavits), and the fading was noticeable. (4:1085.) As such is natural, the fading was not limited to the General Counsel's witnesses. Hankins, who assertedly delivered much of his two October 1990 speeches from memory, admitted (16:4074) on cross-examination that he no longer could recite even the opening paragraph (three short sentences) from his October 4, 1990 speech.

Immediately following his October 10 address (a speech apparently about 2 minutes in length), Hankins orally added some 2 to 3 minutes without benefit of notes or other written text. (16:3987–3988, 4076–4077, 4081.) Much of the record dispute about the speeches appears to derive from these added remarks. Hankins testified that in making his additional remarks he told the employees that Joy Lynn Smith (the Union's organizer) was going to give them a beer party, that he used to do such things but no longer does so ''since I got right with the Lord.''

''I also told them,'' Hankins continues (16:3988, 4084), ''that we was losing money bad, and that I was giving them a 60-day notice of me closing that mill down. If we went to making money within that 60 days, I would keep the mill operating. If I didn't, I'd shut it down. After the 60 days, I would keep a timberman there for a certain length of period of time [Hankins had Aubrey Cannon in mind. 16:4081.] and if we could buy timber where we could make money, I would open the mill back up. If I could not do that, I would cut the mill down and haul it off somewhere where we could make money or carry the equipment back to Grenada.'' (16:3988-3989, 4081-4085.)

Hankins also recalled that his oral addition included his remarking that it was not the (production) employees' fault that the Melvin mill was losing money, that the (production) employees had performed well, but that the timbermen were responsible for some of the losses, with market conditions also being a factor. Respecting the 60-day notice, Hankins advised the employees that he was giving them that notice ''because I'm required to do that by law, to give a 60-day notice before I close this plant down.'' (16:3989, 4076, 4096.) Recall from my earlier description of HLC's business that Hankins, by letter (GCX 4) dated October 24, gave the employees their written 60-day notice of the probable closing of Melvin.

(2) Discussion

What happened, I find, is that the General Counsel's witnesses recalled various points addressed by Hankins, but that their faded memories recalled only a garbled version of what Hankins actually said, merging, at times, phrases from the different speeches, particularly a ''cut it up and haul it off'' version of Hankins' oral addition to the October 10 speech. For example, when Billy Ray Foster (2:440, 464), J. C. Hicks (3:634), Earnest Frost (4:942), Jeffrey Parker (4:1161), and Jessie Prestage (4:1223) testified that in the October 4 speech Hankins said that if the Union came in he would shut down/close the mill, their memories were distorting two statements from Hankins' first speech (RX 15.)

The first statement the employees distorted, appearing at page 3 of the text, reads: ''If they drive our costs up and we're forced to close this mill for economic reasons, that affects each and every one of you.'' The second, at page 13, the text, reads: ''If a union got in here and started demanding wages that we could not afford, we wouldn't have many choices—we could end up shutting down. [Frost recalls that Hankins made that statement. 4:976.] As I told you, we are losing a lot of money right now. There is no way we could afford some of the things the Union is promising now.''

Similarly, when Foster (2:441) and Anthony McGee (3:804–805) testified Hankins said that if the Union came in the employees would or could lose their paid holidays, vacation pay, bonuses, Thanksgiving turkey, and (Earnest Frost, 4:943) ''all our benefits,'' or ''risk losing all those things'' (Hicks at 3:633–634), what they really were misdescribing, I find, were statements in the written text which Hankins delivered. The first (RX 15 at 3) reads: ''If the Union bargains away a holiday or your overtime—that affects everyone whether you join or not.''

The second (a series of statements, actually) follows an explanation of the bargaining process. Correcting a misimpression that bargaining begins with employees' entitled to keep what they have and negotiations proceed upward from there, Hankins, holding up a blank piece of paper (some of the General Counsel's witnesses, such as Hicks at 3:634, 744 and Frost at 4:976, 1002, confirm that Hankins held up a blank sheet of paper) told the employees that such was how ''the contract looks when the Company and the Union begin bargaining.'' Hankins then told the employees (RX 15 at 6–7):

> As you can see, it's blank.
>
> Not one *paragraph*, not one *sentence*, not one *word* goes on that paper unless Hankins agrees to it first. You do *not* start with what you have and just go up from there. What about benefits and wages and even overtime that you enjoy now? You don't see them on this paper, do you? Everything is fair game for bargain-

ing—including your holidays, insurance, vacation—everything. What you have *may* remain unchanged or it may be bargained away—lost! If we don't agree to something then it doesn't go into the contract. It's that simple. The Union has absolutely no power to get anything for you that we don't agree to first. You will always receive the wages and benefits *we agree to pay* . . . and nothing else!

Some of you may not realize what you have now in the way of benefits—without a union—is really pretty good. And you got it without having to pay union dues or worrying about the Woodworkers' fines, fees, strikes, violence and other trouble that have hurt so many others. For instance, the Company pays your *entire* health insurance premium for you. The Company pays $85–$90 per month every month for insurance for each of you. That's like money in your pocket. The Company also pays for your life insurance. What if you had to buy your own?

You have five paid holidays a year as well as a week off with pay for the holidays. You get turkeys for the [Thanksgiving?] holiday and a $100 bonus for July 4th.

That's just some of what you have now. It would all go on the table with the Union—a union puts it all at risk—with a guarantee of nothing in return—except union dues.

The second prepared text, delivered on October 10, is quite short, and I quote it here (RX 40):

I want everybody to listen up, and to listen up good. I'm damn mad and I don't care who knows it. Some of you just aren't listening to what we're telling you. Sure, most of you have told Johnnie and me that you are backing the Company 100%—and that's great, I thank you—but some of you still seem to think that the Union has all the answers. But you are *wrong—dead wrong*. The Union is wrong for you. It's wrong for your family. It's wrong for this mill and it's wrong for this town. Let me tell you why. If the Woodworkers get voted in here, and make good on the big money they are promising [PAUSE] we will have to *shut down*! [Earnest Frost recalls that Hankins made this last remark. 4:977.]

There are no two ways about it. The Woodworkers got into General Box in Meridian and it closed. They got into Harrison's in Laurel and it closed. Coastal Lumber closed in Meridian and so did Pilliod Furniture. I don't know why they closed, but we'll close too if the Union and its big money promises make a bad situation worse. We're already losing our shirts and big money raises just are not in the picture.

Do you remember what it was like not to have jobs? After Masonite closed, and before I opened the place back up, most of you didn't have jobs. Now you do. But there is no guarantee this mill will stay open forever.

Better *stop* and *think* before it's too late. Joy Lynn Smith is a paid professional saleswoman. It's her job to talk you into the Union. But Union promises are not going to buy your bread or pay your bills. Before you make a mistake that you could regret for the rest of your life, just ask yourself who'll pay for that mistake. It's not the Union bosses or those guys coming over from Quitman—it's you and your family. Vote ''NO'' next week. Do the right thing for you, your family, and this community.

(End talk and walk away.)

Instead of ending his speech at that point Hankins, as I summarized earlier, added some additional comments, including the graphic one about cutting down the mill and hauling it away. Witnesses of the General Counsel merged elements of this second speech, including the ''damn mad'' and fist pounding, plus the cutting down and hauling away, with the first speech. I find that Hankins delivered the speech as it appears in the text, plus the oral remarks which he added at the end. I further find that Hankins' October 10 remarks (text plus unwritten addition) are not violative of the Act.

Having found that none of the remarks delivered by Burton Hankins on either October 4 or 10, 1990, unlawfully, as alleged, threatened plant closure or loss of benefits, I shall dismiss complaint paragraphs 9(a) and 9(b), Case 15–CA–11394.

3. The layoffs

a. *Overview*

Paragraph 10 of the first Melvin complaint (Case 15–CA–11394) alleges that HLC laid off all unit employees about (Monday) October 22. Respondent admits. (As we are about to see, not all were laid off.) On November 1 and 5, paragraph 11 alleges, Respondent laid off 16 named employees. HLC admits but asserts that all unit employees were involved. On October 19, the day of the election, about two dozen employees (apparently all supporters of the Union) went home. The General Counsel classifies (Br. at 57, 72) the October 19 incident as a layoff. Denying any layoff (Br. at 130), HLC counters that the event occurred when union supporters left work early apparently to celebrate their election victory.

The evidence respecting the October 19 matter was presented as part of a theory of an unalleged change in benefits of not sending employees home early. At the hearing HLC objected to evidence on this point. (2:500.) The General Counsel and the Union explained that the evidence, in effect, was background to the layoff and closure allegations, and that the General Counsel was not seeking to amend the complaint, or to litigate by implied consent, an allegation of changed benefits. I therefore overruled the objection. (2:500–504; 3:643–645, 812, 890–892; 4:953.)

Aside from the October 19 matter, the layoffs alleged in the complaint involve selections of employees for layoff or retention. The case of the General Counsel and the Union focuses on the insignia and hats worn by the employees. Nearly all the employees, at least by election day, wore one color or the other, with green designating Union and red saying Vote No. Plant Manager Stephens testified that he distributed the red ''Vote No'' hats to those employees who would take them. Some employees would not take them. (11:2839.) The complaint does not allege such distribution by Stephens to have been an unlawful interrogation. See *Lott's Electric Co.*, 293 NLRB 297, 303–304 (1989), enfd. mem. 891 F.2d 281 (3d Cir. 1989).

The Government points to the payroll records which show that a far greater percentage of employees wearing green (Union) were laid off, or at least selected first, than were those wearing red. As a consequence, the reds also worked more hours. Extrapolating from these payroll facts (plus reliance on allegations of threats) the Government argues that the selections were tainted by antiunion animus.

Viewing the same facts through a different prism, HLC argues that another conclusion applies. HLC contends that the factors guiding the selection for layoff/retention were (1) nature of the job and (2) versatility of the employees. Seniority was indirectly involved in this respect in the October 22 layoff, and expressly a factor in the November 5 layoff. As most of the greens occupied jobs paying lower rates, jobs not deemed ''key'' positions by HLC were less versatile in their skills, and generally held less seniority than the reds, it is not surprising, HLC argues, that the greens were laid off while the reds were retained or laid off later.

Before beginning the summary, I note that whatever risk there is in relying on the outward symbols of party support (greens and reds) is immaterial. The point is that such employees openly identified themselves, and it is unlikely that contrary assurances to the other side would persuade anyone. Thus, I attach no significance to the uncontradicted testimony (10:2629) of Stephens that J. C. Hicks, a green, told Stephens that he favored the Company and not the Union.

b. *October 19, 1990*

(1) Facts

The representation election in Case 15–RC–7533 was conducted at Melvin from 10 a.m. to 12 noon on Friday, October 19, 1990, with the ballots being counted immediately thereafter. (2:462, 565; 10:2647–2648.) The noon lunch (''dinner'' to most of the witnesses; for example, 2:437; 5:1270; 8:2042;)[6] period was 12 noon to 12:30 p.m. (3:664; 10:2507, 2630.) Counting of the ballots apparently was completed close to 12:30 p.m. Word quickly passed among the employees that the Union had won. J. C. Hicks testified that employee Mearl Horne reported that fact to him. (3:719.) Leo Mitchell, one of the Union's two election observers (Earnest Frost being the other), testified that Horne ''got caught up in the room when we counted the vote.'' (4:1081.)

Soon afterwards, Hicks testified, his supervisor, Doyle Dikes, came and told him that the ''Man'' (that is, Plant Manager Stephens) said to ''knock off and go home.'' Hicks was scheduled to work that day until 4:30 p.m. Although Hicks was in the midst of unloading the kiln, he stopped and went home. (3:661–663, 716–719.) Others testified similarly. As HLC's pay records for the week ending October 20 (GCX 3–7, 8, 9) reflect, Hicks (GCX 3–8) was paid for 5 hours that Friday, October 19, as were some 25 others. (10:2637.) From record identifications by Stephens, Joy Lynn Smith, and others of those wearing union insignia and those wearing ''Vote No'' red caps and shirts, it can be determined that all of the 26 but 1, John D. Evans, wore union insignia. (10:2663.) Evans, a trim saw operator (9:2372–2373), wore the Vote No red cap. (9:2420; 10:2661–2662.)

There is a problem reconciling the various time frame references. Several of the witnesses refer to the departure time, or notice to leave time, as being around 11 a.m. To some extent that seems to reflect knowledge that the payroll sheets (GCX 3–7, 8, 9) show that the two dozen or so worked, were paid for, only 5 hours that day. It also assumes that the shift began at 6 a.m. When business was stronger, in the months before September 1990, the shift did begin at 6 a.m. and ended 10-1/2 hours later at 4:30 p.m., Monday through Friday, unless the employee worked, frequently at his own request, after that. (Weekends also could be worked.)

But even the Government's witnesses, or at least some, agree that by mid-September log deliveries began to curtail and hours were reduced. Whether the starting time was ever changed to 7 a.m. is not clear. Jeffrey Parker testified that on election day he worked from 6 to 11 a.m. (4:1169, 1190.) Jessie Prestage testified that beginning about mid-September the normal shift was reduced so that the hours were from 6 a.m. to 3 p.m. (4:1234.) Stephens testified that the shift began at 6 a.m., and that pay for 5 hours meant that the employee worked from 6 to 11 a.m. (10:2630.) Stephens implies that the 6 a.m. starting time apparently prevailed even when the normal hours were reduced to 40 hours a week, for the 40 hours consisted of 4 days at 10 hours. (10:2448, 2450.)

The confusion about the 5 hours' work that day possibly caused several of the witnesses, including Stephens (10:2507), to recall that the election ended at 11 a.m. But while the witnesses may have misremembered the hours of the election, nearly all of them, including J. C. Hicks (3:719) and Stephens (10:2508, 2649), clearly remember that the ballots had been counted and the results reported before the Union's supporters departed. As the Board's election data are the most reliable factor here, I find that counting of the ballots concluded at close to 12:30 p.m., about when the 12 noon to 12:30 p.m. lunch period also was ending.

Shortly after the lunch period ended, Plant Manager Stephens testified, Stephens observed about 25 men in the parking lot preparing to leave the plant. According to Stephens, he thought they were union supporters and that they were leaving in celebration at the Union's election victory. (10:2500, 2505–2506, 2637, 2644–2646, 2650, 2654, 2663; 11:2806.) Moments later Stephens' sawmill foreman, Jerry Turner (9:2377), and planer mill foreman, Doyle Dikes (9:2379), informed Stephens that a lot of their employees had departed and that there were not enough employees left to operate the mill. (10:2503–2504, 2638–2640, 2644.) Stephens told them to send some others home but to retain the ''key'' employees and cleaning personnel. (10:2502, 2505, 2643–2644, 2663–2664.) Not many (additional) employees were sent home, Stephens testified, and he could not recall who they were. (10:2664–2665.)

Billy Foster, a union supporter and a forklift operator in the kiln area under Supervisor Haskell Doggett, testified that he worked until around ''2:00 something,'' having been told by Doggett to work until he loaded the kiln. (2:454, 499, 566.) The payroll record (GCX 3-9) reflects that he was paid for 7-1/2 hours that day. The half-hour mark suggests that Foster worked until about 2:30 that afternoon. Harvey Conner, who wore a Vote No hat, also was paid for 7-1/2 hours that day as was union supporter Jerry Bonner. (GCX

[6] ''Dinner: The meal Southerners eat while Northerners are eating lunch. When the Northerners are eating dinner, Southerners are eating supper.'' Steve Mitchell, *How To Speak Southern* (1976, Bantam books).

3–7.) The hours for the others vary, with several working 6 hours and others, for example, 8, 9, 11, and 12 hours. Most of these employees wore Vote No caps. As Stephens explains when discussing the dates alleged in the complaint, these other employees however held key jobs, usually at higher pay levels, or were cleanup personnel. Union supporter Rex Philon worked 12-1/2 hours that day. (GCX 3–9.) Philon was one of the boiler operators. (9:2385, 2397.) Stephens testified that the boilers, which must be operated 24 hours a day 7 days a week. (9:2431.) This certainly applies during any cold weather, when the temperature could drop to freezing, because the boilers contain water. (10:2493.) And it apparently applies so long as the mill is operating. (9:2382.) Of course, for any long-term shutdown of the mill, presumably the boilers likewise would be shut down and the water drained.

Stephens denies instructing the foremen to send the 25 home early on election day (10:2498–2499), and he denies sending any employees home early that day because of the Union or because of the election results. (10:2506–2507.)

(2) Discussion

Disbelieving Plant Manager Stephens, and crediting J. C. Hicks and the others who testified similarly, I find that Stephens told his foremen to send home the employees wearing the green hats (the union supporters) and to retain as many red hats (company supporters) as they could. Finding Stephens' testimony false, I infer that he sent the men home for another reason—an unlawful purpose. That unlawful purpose, I find, was to punish the employees for their election vote.

The Melvin mill apparently had enough logs to finish out that Friday (10:2656), and even if the logs would have run out before the day finished, under established practice HLC simply would have assigned the employees to clean their equipment and areas to complete the day. So Respondent's purpose in sending home the union supporters was two-fold. First, to punish the employees for their union vote. Second, to let them know that their vote also had cost them their preexisting benefit of cleanup work during work interruptions in the course of a day.

Respecting retention of the so-called ''key'' employees, as the mill did not operate the balance of that Friday, there is no showing that HLC needed the ''key'' employees (mostly red or company hats) or that the key employees in fact did any work. The mill foremen did not testify, and Stephens did not testify that he walked through the areas and observed the retained employees working at thus and so. By its action, therefore, HLC demonstrated animus against the employees who supported the Union. Although there is no complaint allegation concerning this event, I shall consider this animus in evaluating the layoffs which are alleged to be unlawful.

c. *October 22, 1990*

(1) Introduction

Because there were not enough logs, Plant Manager Stephens testified, only certain employees worked the week of Monday, October 22. The planer mill was not affected that Monday, and for that day everyone at the planer mill worked, with only certain ones working the balance of the week. (9:2367–2369; 10:2609–2610, 2650, 2668; 11:2825.) As reflected by the record, the following table shows the retention/layoff roster, party affiliation (g for green or Union; r for red or Company), job category, and hourly pay rate for the week of Monday, October 22 (pay period ending October 27, 1990; GCX 3–10, 11, 12; RX 18.) Rather than listing them alphabetically, as they roughly are on the payroll sheets, I arrange them by descending rank of pay rate—to closer reflect the basis of their retention or layoff.

For job classifications I have relied on, in addition to the testimony, HLC's October 25 WARN letter (GCX 6), referred to earlier when I described HLC's business. That letter lists the job classifications of all employees. The classification there shown as having the largest number of employees, 15, is that of ''lumber puller,'' with ''lift operators'' next with 5. Lift operator, forklift driver, and loader operator appear to be used interchangeably. The term I use in the tables here is ''lift.''

(2) Sawmill—Employees retained

Name	*Party*	*Position*	*Rate*
1. J. L. Turner	r	saw filer	$8.00
2. Jimmie Carney	r	saw filer	7.00
3. Donald Mayo Jr.	r	sawyer	7.00
4. Ray Craft	r	scaler	7.00
5. Ray Abston	r	lift	5.75
6. James Nicholson	r	Sherman gang	5.25
7. Clovest Smith	r	lift	5.00
8. Albert McLendon Jr.	r	cleanup	4.00
9. Cleveland Scruggs	r	watchman	4.00

(3) Sawmill—Employees laid off

Name	*Party*	*Position*	*Rate*
1. Nathan Baker	r	millwright	$6.50
2. Otto Whitfield*	r	millwright	5.25
3. Earnest L. Frost Jr.	g	edger	5.00
4. John D. Evans	r	trim saw	4.75
5. John Rodgers	r	edger helper	4.50
6. Jerry Bonner	g	unscrambler	4.25
7. Harvey Conner*	r	debarker	4.25
8. Lee Dell Nicholson	g	lumber puller	4.25
9. Franklin Johnson	g	lumber puller	4.20
10. Elmore Nicholson	g	lumber puller	4.10
11. Joe Murphy Jr.	g	lumber puller	4.00
12. Tommy Stewart	g	lumber puller	4.00
13. Ronnie Graham	g	lumber puller	3.90
14. Kelvin Kirksey	g	lumber puller	3.90
15. Leo Mitchell	g	lumber puller	3.90
16. Cleveland Miller	g	lumber puller	3.80
17. Douglas Jones	g	lumber puller	3.80

The two employees whose names are marked by an asterisk, Otto Whitfield and Harvey Conner, worked part of the week. Conner worked 8 hours on both Thursday and Friday. (9:2372; GCX 3–10.) Whitfield worked 6 hours of Friday and 9.25 hours on Saturday. (9:2377–2378; GCX 3–10.)

Stephens testified that on Monday morning, October 22, he told the mill foremen to lay off their employees except for ''key'' employees such as the sawyer (9:2370–2371), the saw filers (who file the saws which cut the logs, 9:2372, 2376–2377), mechanics, log lift operators (they unload the trucks, 9:2370–2376; 11:2819, 2828), log scaler (9:2372; 11:2819), boiler operators, cleanup personnel (required by insurance, 9:2374), night watchman (9:2376), and Sherman

gang (to perform maintenance, 9:2375.) Later that day he reviewed with the foremen the ones they had retained and laid off. Seniority was not an express factor in this temporary layoff. According to Stephens, the employees were laid off or retained based on their skills. (10:2666–2667; 11:2825–2834.) Those laid off, such as the lumber pullers, were laid off, Stephens testified, because there was no lumber to be pulled or, or further example, logs to be edged. (9:2372–2378.) Stephens denies that their party colors had anything to do with their layoffs. (9:2368; 10:2494.)

(4) Planer mill—Employees retained

Name	*Party*	*Position*	*Rate*
1. John C. Rhodes	r	planer	$8.00
2. John Haley Jr.	r	mechanic	6.90
3. Floyd Conner	r	lift	5.75
4. Bobby L. Dikes	r	lift	5.00
5. Freddie Hill	r	cleanup	4.00

The only witness to identify Rhodes' party affiliation was Jessie Prestage who testified that Rhodes wore red. (4:1213.) Although Stephens did not list Rhodes, Stephens testified that as of election day nearly everyone had openly declared his party affiliation. (9:2420; 10:2614, 2629.) Moreover, Stephens, who walks through the plant several times a day, knows the men. (11:2838.) He knew which ones were wearing what color. (10:2615.) Crediting Prestage that Rhodes wore red, I find that Stephens knew that fact.

(5) Planer mill—Employees laid off

Name	*Party*	*Position*	*Rate*
1. Arthur McGee	g	lumber grader	$5.75
2. J. C. Hicks Jr.	g	lift	5.00
3. Billy Jones	g	trim saw	4.50
4. James Prestage	g	lumber bander	4.35
5. Lencie Bonner	g	trim saw	4.25
6. Terry Kirksey	g	machine feeder	4.25
7. Jessie Prestage	g	lumber stamper	3.90
8. Elston Everett	g	stick layer	3.90
9. V. Bernard Hicks	g	lumber puller	3.90
10. Tony R. Hives	g	lumber puller	3.90
11. Clarence Mitchell	g	lumber puller	3.90
12. Michael Mitchell	g	lumber puller	3.90
13. Jeffrey Parker	g	lumber puller	3.90
14. Michael Grayson	g	lumber puller	3.80

Respecting the planer mill, Stephens testified that it operated Monday of that week and then it, too, ran out of lumber. (9:2379.) Testifying about the list of planer mill employees for that week (GCX 3–11), Stephens identified those retained as holding key positions, and those laid off as having limited-skill jobs, such as lumber pullers, for which there was no work that week. (9:2378–2386.)

Stephens testified (9:2381) that John C. Rhodes was retained as a ''key'' person because he not only operated the planer but also set up and maintained that equipment—''when we got lumber to run.'' (9:2381.) Moreover, Rhodes could grade lumber, Stephens testified. (11:2813.) Haley, the sole mechanic (GCX 6 at 2), was needed to maintain the forklifts, according to Stephens. (9:2379.) Stephens testified that forklift driver Floyd Conner was retained ''because we had to have somebody to load the lumber trucks.'' (9:2379.) That need is unclear in view of the fact no lumber was being produced that week. Stephens possibly means that there was finished lumber on hand still to be loaded onto trucks, but he did not so testify. Conner, Stephens testified, also could do the shipping. (11:2845.) There is no description of what shipping work Stephens meant.

Stephens testified that Bobby L. Dikes was retained because he not only could drive a lift but he also could load a truck or do ''just about anything,'' including helping with the boilers and kilns. (9:2378.) One of the Union's questions on cross-examination, apparently confusing Stephens' testimony about Dikes' ability with boilers with lift driver Floyd Conner, asked about that ability. Stephens answered that Conner could not run a boiler. (11:2845.) As Stephens never testified that Bobby Dikes could fire a boiler, I find that Dikes' skill in that area was limited to the status of helper.

Freddie Hill was retained, Stephens testified (9:2380), because, as cleanup, his presence was required by the insurance carrier. (Presumably the fire insurance carrier.) HLC has one cleanup person assigned to each area of the plant.

These five who were retained, all wearing red (Company), worked that week anywhere from 41 hours to (John Rhodes) 60 hours. The others, all openly declaring their support of the Union by wearing green insignia, worked no further hours after Monday, October 22, 1990. (GCX 3–11.)

Arthur McGee, the only Melvin employee classified by HLC as a lumber grader (GCX 6 at 2), and who worked there as a lumber grader (3:796, McGee), was laid off. He wore green. Stephens testified that when the planer mill is operating it needs a lumber grader, but if the mill is not operating no lumber grader is needed. (11:2811.) At one point Stephens identified Billy Jones as a grader (11:2809), but earlier he testified (9:2380) that Jones was a trim saw operator who only assisted the grader. I find that Jones only helped the sole grader, Arthur McGee.

Stephens testified that lift driver J. C. Hicks was sent home because, with the planer mill out of lumber to run, Hicks was not needed to lift lumber onto the planer machine. (9:2379.) As Hicks explains, with his forklift he removed the lumber from the kiln (now dry lumber) and transferred it to the planer mill. After the lumber had been planed, lift driver Floyd Conner lifted it and loaded it onto trucks. (3:694–698.)

The two trim saw operators laid off, Lencie Bonner and Billy Jones, wore green. The only other trim saw operator (GCX 6 at 1), however John D. Evans, who worked in the sawmill wore red and he was laid off. The others laid off from the planer mill, such as the lumber pullers, had no lumber to work on and were sent home.

(6) Boiler/kiln

In the boiler/kiln area 12 employees worked under the supervision of James H. Doggett. Nine wore red caps, and only three wore the green union caps: Joe Cunningham, Billy Foster, and Rex Philon. Cunningham and Philon worked no hours after that Monday, and Foster worked none at all that week. Foster was a lift driver who transferred ''green'' lumber, that had come from the sawmill, to the kiln to be dried. (2:533–537; 3:694.) Stephens testified that, as there was no lumber leaving the sawmill that week, Foster's services were not needed. (9:2383.)

Cunningham and Philon, two greens, worked as boiler firemen with two reds, brothers (9:2382) Garyie Davis and Carl Davis. (GCX 6 at 2.) The Davis brothers were paid more ($5.26 for Garyie and $5 for Carl) than Cunningham ($3.80) and Philon ($4.75.) This pay difference reflected the longer experience and greater skill of the Davis brothers. (9:2410.) Stephens testified that the four (two worked days and two worked nights) usually arranged their work schedule by agreement so that each would have a week off every month. (9:2394–2395.) Other than that, Stephens had no knowledge of why they worked whatever hours the payroll records show. (9:2382–2383, 2397.) Those records (GCX 3–12) reflect that Garyie Davis worked 24 hours that week, Carl 50.5, Cunningham 15 (but no hours after Monday), and Philon 12.5 (all on Sunday, October 21).

Windell Whitfield, one of the two persons at Melvin classified as maintenance (GCX 6 at 1), worked 6 hours on Thursday and 3.25 on Saturday. Stephens does not know about Whitfield's hours other than that he worked at the boiler. (9:2381–2382.)

J. W. Dew worked 58 hours that week. In addition to being the cleanup person for the boiler/kiln area, Dew ran the mill's errands for Stephens. (9:2382; GCX 6 at 2.)

In the stacker work area (where green lumber is stacked after emerging from the sawmill) four employees (Mearl Horne, James Johnson, Fred McLendon, and Terry Dikes, all red hats) worked zero hours that week, as did Billy Foster, a green hat. (9:2383-2385.) Apparently through error Stephens refers to Foster as a lumber puller who pulled lumber from the green chain when the sawmill operates. (9:2383.) That leaves William P. Jordan (red hat, the other employee classified as maintenance) who worked 5 hours that Tuesday in maintenance at the boiler room. (9:2384.)

(7) Discussion

As earlier mentioned, the General Counsel focuses on the fact that those sent home were mostly union supporters (greens), and those retained were mostly company supporters (reds.) HLC stresses that the selections were based on job functions, skills, and pay rates of the two groups, with the Union/Company hat colors indicative of nothing other than the fact that, for the most part, it was the lower paid and relatively unskilled employees who wore the green hats of the Union, while the more skilled or ''key'' workers wore the red hats to announce that they supported the Company.

In short, HLC argues that the hat colors are grouped where they are not because of any unlawful motivation, but because support of or opposition to the Union was divided along job lines. On the color monitor of a computer, a vertical job and pay graph would display mostly red at the top of the column, with the bottom of the column colored mostly in green. That distribution is not something caused by HLC, but is the product of factors such as experience, seniority, and skill.

The primary problem with HLC's argument is that the mill was not operating, yet all these ''key'' employees were retained. What they did is a mystery. The mill foremen did not testify, and in most cases Stephens had no personal knowledge of what an employee did on a particular date. Respecting one or two employees Stephens testified, in effect, that HLC had to keep the person on the payroll regardless of the circumstances or he, having a skill in great demand, would leave for another employer, possibly a competitor, if he lost any time at all. Donald Mayo, the sawyer, is one example. (9:2370–2371.)

Even if that is true as to Mayo, and Stephens' testimony on the point is only skimpy, Stephens did not testify similarly respecting all the other ''key'' persons. Thus, the presence of the two saw filers, Jimmie Carney and J. L. Turner (GCX 6 at 1), is not shown to have been necessary for the 40 hours (GCX 3–10) each worked, or was paid, that week. No doubt their work of sharpening the saws is necessary, as Stephens testified (9:2372, 2376–2377.) But with no logs being sawed that week, would they need more than 1 day to catch up on sharpening all the saws? The record does not tell us.

Whose burden was it to tell the record? The General Counsel's burden was to establish a prima facie violation. With no significant findings of animus favoring the General Counsel, the Government's prima facie case depends on the color groupings in the layoffs and retention dates (a factor which, standing alone, would be insufficient in light of the job and pay data), plus inconsistency of purpose in the layoff and retention selections, departure from past practice (retained to clean up when work interrupted by equipment failure), and timing.

The problem with the departure from past practice factor is that, outside of the election day incident, Melvin had never experienced log shortages of this nature. Such shortages as there had been in the past had merely reduced the workday from 10 hours to 8 hours. There had been no mill shutdowns. So that factor is no aid here to the General Counsel, for it would be unreasonable to say that HLC owed a duty under the Act to expand downtime cleanups for the balance of a day into an unemployment benefit of several days, a full week, or more. The timing factor suffers similarly. Unless the General Counsel prevails on the unlawful closing allegation, the timing factor here would seem to have no weight here.

HLC's treatment of the lift driver classification raises a question. There were six forklift drivers, four (Ray Abston, Clovest Smith, Floyd Conner, and Bobby Dikes) wore company hats and two (J. C. Hicks and Billy Foster) wore union green. Abston and Smith worked at the sawmill and Conner and Dikes at the planer mill. Hicks worked at the planer mill, and Foster worked under the boiler/kiln supervisor. Stephens testified that Ray Abston (9:2370) and Clovis Smith (9:2376) were needed to unload any trucks bringing in logs. On cross-examination by the Union Stephens testified that ''the lift driver and log scaler'' are necessary, but (11:2823) ''If the mill is running, we have to have two lift drivers and the log scaler.'' As the sawmill did not run that week, the suggestion seems to be that HLC could have done without the services of either Abston or Smith. Indeed, unless log deliveries were expected or anticipated, there was no need for any of the three, including the log scaler. The record does not state.

At the planer mill, it seems logical that J. C. Hicks would not be needed on the forklift as no lumber was passing through the kiln to the planer mill. But why was Floyd Conner needed? As earlier mentioned, Stephens testified that Conner loaded finished lumber from the planing mill onto trucks. (9:2379.) He did not say whether Conner actually did any such loading that week. As the planer mill was not operating, one has to assume (because Stephens did not say) that

any loading Conner did was of lumber planed before that week and waiting to be loaded.

But what did Dikes do? Stephens says only that Dikes could help here and there (with boilers and with loading trucks, 9:2378), but there is no showing that Bobby Dikes was needed for or did anything that week. Bobby Dikes was paid $5 an hour. So was J. C. Hicks. (GCX 3–11.) Dikes, who wore a company/red hat, was retained. Hicks, who wore union green, was laid off. HLC offered no evidence that it had some preexisting system, geared to insurance or bonuses, for example, which classified any employees as ''key.'' The WARN letter of October 25, for example, does not describe any employees as being ''key.'' Is ''key'' merely a euphemism for company supporter and a term adopted sometime after 1990?

Although the issue is close, I find that HLC retained the employees it now calls ''key'' in an effort to reward as many company supporters as it could by retaining them on the payroll regardless of whether there was work to do, yet at the same time laying off as many union supporters as possible. Because the union greens fell mostly in the lower paying jobs, a natural vehicle for getting rid of them was available to HLC. Even assuming, however, that the log shortage was not a device arranged by HLC before the election to frighten the workers into voting against the Union, and used after the election to get rid of the union greens, then the fact which has to be faced is that HLC had to respond to an economic crisis. It had to lay off employees.

But while HLC could not be required to retain everyone during an economic crisis, HLC was not at liberty to jettison the union greens while retaining the company reds. And that, I find, is the basis on which HLC made its layoff and retention selections, with ''key'' being a convenient euphemism, adopted well after the events in question, to give a surface justification for its selections. HLC has failed to demonstrate that, absent this unlawful motivation, it would have made this disparity of selection in any event. Accordingly, I find that, as alleged in complaint paragraph 10 and the conclusory paragraphs, HLC violated 29 U.S.C. § 158(a)(3) when it laid off employees the week of Monday, October 22, 1990. It therefore must pay them backpay, with interest.

To the extent that a few union greens were not immediately laid off, or that a few company reds were swept away when mostly the greens were laid off, that mixture of results does not absolve HLC. HLC, I find, achieved its goal. That it could not do so with laser precision does not shield HLC from the adverse consequences of its unlawful action. Thus, HLC will have to make whole those who were laid off, including those who wore company red. HLC was free to lay off everyone in response to an economic crisis. But it was not free to reward as many company reds as it could while trying to get rid of as many union greens as it could. Having made this disparity choice, HLC must now make whole all, even the reds that were swept away with the union greens.

d. *November 1, 1990*

(1) Facts

On brief the General Counsel does not expressly address the November 1 allegation.

The payroll register for the pay week ending Saturday, November 3 (GCX 3–13, 14, 15), reflects that everyone in the sawmill and planing mill worked the first 3 days (Monday, Tuesday, Wednesday) of that week. After that there were more temporary layoffs. Stephens testified that Melvin had enough logs to run 3 days that week in the sawmill plus an additional 1-1/2 hours into Thursday at the planer mill. (9:2388–2394, 2398.) Stephens testified that the employees who were retained and sent home are essentially the same ones, and for the same reasons, as in the previous week. (9:2399–2401.)

Again, Stephens displayed little personal knowledge about specific individuals, and it is clear that he was recalling his overall approach to the layoffs, and his instructions to his foremen to retain the ''key'' people. As to individual workers and their hours worked, Stephens, for the most part, was merely interpreting and projecting from the payroll register data. I later observed that such a procedure would leave the record ''fuzzy'' as to the specifics. (10:2455–2462.)

Those retained or sent home the balance of the week generally follow the pattern set the week of Monday, October 22 to 27, with some variation on Friday, November 2, when several of the ''key'' people did not work. At the sawmill the ''key'' employees not paid that Friday were the two saw filers (Turner and J. L. Carney), the sawyer (Mayo), Sherman gang (J. E. Nicholson), and the cleanup person, Albert McLendon. The nightwatchman, Cleveland Scruggs, doubles as a cleanup person at night. (9:2376, 2420; 10:2464, 2497–2498.)

As reflected by the payroll register (GCX 3–14), the planer mill's retention/layoff, after the 1-1/2 hours worked by everyone on Thursday, was a replay of the previous week. At the planer mill, therefore, all the company reds were retained whereas all of the union greens were laid off. Of the three lift drivers, two (Floyd Conner and Bobby L. Dikes) worked all week (50 hours), whereas J. C. Hicks was sent home Thursday after 1-1/2 hours. Although there is no evidence concerning what lift driver Bobby Dikes did that day, neither is there any evidence that there was additional work which lift driver J. C. Hicks could have done that Dikes did, or in addition to what Dikes may have done.

Presumably the mechanic, John Haley, used the day to perform equipment maintenance, but there is no evidence he did so. The planer operator, John C. Rhodes, was paid for 12 hours on both Thursday and Friday, for a total that week of 60 hours. Just what Rhodes did after the planer mill had to shut down after 1-1/2 hours that Thursday is not shown in the record. Planer operator Rhodes, a ''key man,'' apparently could and did, in the past, maintain the planing equipment, as Stephens testified. (9:2381.) Whether he did so on this occasion is not shown.

In the boiler/kiln department, where 75 percent of the employees wore company red on election day, everyone, except J. W. Dew, was laid off at least part of the week. Recall that Dew was cleanup and that he also ran errands for Stephens. (9:2382; 10:2466.) Cunningham, a boiler fireman who wore union green, worked 40 hours that week, although Rex Philon, another green, worked only 13 hours. The Davis brothers, the two boiler firemen who wore company red, worked 25 hours (Carl) and 31 hours (Garyie). Lift driver Billy Foster, a green, worked 29-1/2 hours. The hours of the others generally are in the 25- to 35-hour range.

(2) Discussion

As previously discussed, I find that the evidence shows a prima facie violation, and that HLC has not demonstrated that it would have made the layoff in the manner it did in the sawmill and in the planing mill absent the Melvin employees having voted for the Union in the election.

Some employees in the boiler/kiln area worked staggered shifts, and therefore the hours of that department do not automatically coincide with those of the sawmill or planing mill. The hours worked in that department do not reflect, prima facie, discrimination.

As to the sawmill and planer mill employees laid off, therefore, HLC must make them whole, with interest.

e. *November 5, 1990*

(1) Facts

Focus now on the last layoff alleged in the complaint, the week beginning Monday, November 5, 1990. This is the pay week ending Saturday, November 10, and the pay register for the week is in evidence as GCX 3–16, 17, 18.

The layoff this week, as Stephens testified, differs from the previous ones in two respects. First, Stephens expressly used seniority as a factor in addition to versatility of skills. (9:2403; 11:2833.) Second, those selected were permanently laid off. (9:2411.) Those selected and laid off permanently November 5 were:

Name	*Party*	*Position*	*Rate*
	Sawmill		
1. Joe Murphy Jr.	g	lumber puller	$4.00
			.....
2. Ronnie Graham	g	lumber puller	3.90
3. Leo Mitchell	g	lumber puller	3.90
4. Cleveland Miller	g	lumber puller	3.80
5. Douglas Jones	g	lumber puller	3.80
	Planer Mill		
1. J. C. Hicks Jr.	g	lift	$5.00
			.....
2. Lencie Bonner	g	trim saw	4.25
3. V. Bernard Hicks	g	lumber puller	3.90
4. Tony R. Hives	g	lumber puller	3.90
5. Clarence Mitchell	g	lumber puller	3.90
6. Michael Mitchell	g	lumber puller	3.90
7. Jeffrey Parker	g	lumber puller	3.90
8. Michael Grayson	g	lumber puller	$3.80
			.....
	Boiler/Kiln		
1. Joe Cunningham	g	boiler fireman	3.80

Complaint paragraph 11 names two more (Rex Philon and Barbara Smith) for a total of 16. There is no evidence that Philon was laid off. Stephens testified that the foreman (James Doggett) reported that Philon, who wore union green, quit that week. (9:2424–2425, 2433.)

Neither party discusses Barbara Smith who is the 16th and final employee named in complaint paragraph 11. Barbara Smith was one of the employees permanently laid off beginning November 5. (CPX 60.) Although listed in the office section of the payroll register (GCX 3-18), she apparently was the shipping clerk. (GCX 6 at 2.) There is no evidence that Barbara Smith openly supported the Union or that HLC considered her a union supporter. I shall dismiss the complaint as to Barbara Smith.

Plant Manager Stephens testified that he made these permanent layoffs in order to use a consolidated crew to operate the sawmill the first 3 days of the week and the planer mill the last 2 days. This allowed those who were laid off to file for unemployment benefits rather than having many of them working on, in effect, a share-the-misery option because of the lack of logs. (9:2403, 2411–2412; 10:2438–2442.) Stephens denies that union considerations resulted in 100 percent of those permanently laid off to have been union supporters. (11:2798.)

(2) Discussion

Recall that this November 5 layoff, unlike the previous dates when employees were sent home temporarily for lack of work, was permanent. Based on HLC's economic situation, and Stephens' decision to consolidate the crews into one, there seems little basis for finding discrimination in the selection of the five lumber pullers laid off from the sawmill. These were persons from the lower ranks of skill, pay, and seniority. The General Counsel advances no other choice HLC could have made. I shall dismiss complaint paragraph 11 as to those five.

This conclusion holds respecting the six lumber pullers selected from the planer mill, and I shall dismiss as to them.

Some question arises as to lift operator J. C. Hicks and trim saw operator Lencie Bonner. Respecting Hicks, recall that Stephens testified (9:2378–2379; 2408; 11:2845), without contradiction, that Hicks did not have the range of skills possessed by the other two lift operators, Floyd Conner ($5.75) and Bobby Dikes ($5.00, same rate as Hicks.) Conner and Dikes wore company red. Hicks was hired January 24, 1985 (CPX 60), but the seniority of Floyd Conner and Bobby Dikes is not shown. As the evidence is insufficient to show a prima facie violation, I shall dismiss as to J. C. Hicks.

Lencie Bonner was hired March 26, 1984. (CPX 60.) John C. Evans, the sawmill's trim saw operator, and a company red, was not laid off. His $4.75 pay rate was higher than Bonner's $4.25, and his seniority date of March 5, 1984 (CPX 60) was slightly earlier than Bonner's. Billy Jones, the planer mill's other trim saw operator, had a later hire date of August 14, 1985 (CPX 60), but a pay rate of $4.50. Jones, who wore union green, was retained. I shall dismiss as to Lencie Bonner.

Although boiler fireman Joe Cunningham wore union green, he was at the bottom of the list in both skill (as reflected by his $3.80 pay rate, as Stephens testified, 9:2410), and seniority (9:2410), having been hired on May 22, 1990. (CPX 60 at 2.) I shall dismiss as to Cunningham.

Similar layoffs, although not alleged, occurred thereafter until Melvin was closed about Saturday, December 22, 1990. (10:2494.) The pattern of these layoffs generally followed those of the permanent layoff of November 5. There were union greens who worked during the last week. Of the 19 employees laid off on Thursday, December 20 (CPX 60 at 2; GCX 3–36, 37, 38) after 3 days' operation that final week (10:2490–2494), 14 were union greens. Of the nine employees who worked that final Friday, December 21 (GCX 3–36, 37, 38), all had worn company red on election day.

The General Counsel (Br. at 67) points to the stipulated fact (5:1280; 7:1637–1641; CPX 20 at 3) that in late December 1990 and early January 1991 seven of the laid-off employees, all wearers of company red, went to work at HLC's Quitman mill (with two more hired there later in 1991). The parties never agreed whether these former Melvin employees were transferred to Quitman or employed there as new-hires (with applications and new seniority dates), and no other evidence was adduced on the point. As HLC observes (Br. at 142 fn. 131), no evidence was presented that any of the union greens applied for jobs at Quitman and were rejected. Thus, the General Counsel's description of this postclosure fact as ''extremely compelling'' (for a conclusion of discrimination, presumably) is merely a rhetorical flourish not based on matters of substance.

Nothing in these subsequent events shows that the permanent layoff of November 5 alleged in the complaint was unlawfully motivated. Accordingly, I shall dismiss complaint paragraph 11 of the first Melvin complaint, Case 15–CA–11394, respecting the permanent layoff of November 5, 1990.

4. Refusal to bargain

a. *Facts*

HLC does not address this issue either in its posthearing brief or its reply brief. As stated by the General Counsel (Br. at 71), the Government's allegation is established by the pleadings.

As I mentioned in the statement of the case, the parties stipulated that the Union won the October 19, 1990 election in the following bargaining unit:

> All production and maintenance employees employed by Hankins Lumber Company, Inc. at its Melvin, Alabama facility; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Complaint paragraph 14, admitted by HLC's answer, alleges that the Union was certified as the exclusive representative of the employees in the bargaining unit. Complaint paragraph 15 alleges, and HLC's answer denies, that at all times since ''on or about'' October 19, 1990, the Union has been the exclusive bargaining representative for the employees in the bargaining unit. (Apparently through inadvertence, the Regional Office used the phrase ''on or about'' to refer to the election's specific date of October 19.)

Exhibiting the first evidence that it was confused over the applicable law, HLC, denying paragraph 15, answers that the Union was ''not certified'' until October 29, 1990.

Complaint paragraph 16 alleges that the layoffs of October 22 and November 1 and 5 were mandatory subjects of bargaining. True but, HLC answers, it had no duty to bargain with the Union over those layoffs.

HLC, complaint paragraph 17 alleges, made the layoffs of October 2 and November 1 and 5 without notice to the Union and the opportunity to bargain respecting ''such acts and conduct and the effects of such acts and conduct.'' (Although vaguely stated, the allegation apparently alleges a failure to bargain over the decision as well as over the effects.) Admitting that the October 22 and November 1 layoffs ''were implemented without prior notice to the Union, HLC denies as to November 5, and ''affirmatively states that it had no obligation to notify or bargain with the Union until it was certified as the exclusive bargaining representative of the Union.'' (Emphasis added.)

By letter (GCX 7) dated November 2, Hankins notified the Union of HLC's decision to lay off employees:

> This is to inform you that due to economic conditions beyond our control, Hankins Lumber Company, Inc. (Melvin Division) will soon begin operating with alternating work days in the saw mill and planer mill. This will entail the layoff of approximately 30 employees. Unless we hear from you immediately, this decision will go into effect in seven days or less.
>
> Please contact Kenneth E. Lauter, McGlinchey, Stafford, Cellini & Lang, 643 Magazine Street, New Orleans, Louisiana 70130 (telephone: 504/586–1200) if you wish to discuss this matter.

Joy Lynn Smith, the Union's organizer, testified without contradiction that she received the letter about November 5 (a ''Received'' date stamp of November 5 appears on the face of the letter), and that the letter was the first notification of any layoffs. (7:1788–1789.)

By letter (GCX 8) dated November 5 the Union, by Vice President Randall L. Rice, acknowledged receipt, requested that any future correspondence be sent to his attention, and advised that the local union had no current authority to deal with HLC. Rice neither protested the layoffs nor requested bargaining.

b. *Discussion*

Contrary to HLC's apparent misconception, an employer's duty to avoid unilateral changes in wages, hours, and working conditions attaches when the Union wins the election. The employer is not free, during the time between the election and the certification, to make material unilateral changes. And it acts at its peril when it does so absent compelling economic considerations. *Venture Packaging*, 294 NLRB 544, 547, 548 fn. 4 (1989), enfd. mem. 923 F.2d 855 (6th Cir. 1991); *Celotex Corp.*, 259 NLRB 1186, 1193 (1982). The certification date is when the employer's limited duty to bargain, following the Union's election victory, ripens into the employer's plenary statutory obligation. *Celotex*, supra at 1194 fn. 45.

Although Hankins referred to ''economic conditions beyond our control'' in his letter of November 2, log shortages, indications of which had begun several weeks earlier, fall far short of meeting the Board's compelling economic considerations.'' The nature of these log shortages was unprecedented at Melvin. In the past, employees would clean up during work interruptions such as machine breakdowns. The layoffs here may have been a reasonable response to an economic problem, but HLC first was required to notify and bargain with the bargaining representative the employees had selected on October 19.

HLC's November 2 letter was not received until November 5, after employees already had been told they permanently were laid off. Thus, HLC's November 2 letter presented the Union with a fait accompli regarding the permanent layoff of November 5. Notice of a fait accompli did not satisfy HLC's statutory obligation respecting the permanent layoff of November 5, and the Union therefore did not waive

its right to charge here that HLC acted unlawfully. *Intersystems Design Corp*., 278 NLRB 759 (1986).

I therefore find that HLC violated 29 U.S.C. § 158(a)(5) when it unilaterally decided to and did lay off employees without giving the Union notice and opportunity to bargain over the decision and its effects to lay off employees on October 22 and November 1 and 5, 1990. Indeed, the Union already had been certified by November 1. Even if HLC did not unlawfully close its Melvin facility, HLC must make whole, with interest, all employees for their unlawful layoffs.

E. *Melvin—Closure—Case 15–CA–11523*

1. Introduction

Paragraph 7 of the complaint in Case 15–CA–11394, in conjunction with the conclusory allegations in paragraph 8, alleges that about December 24, 1990, HLC closed its Melvin facility and terminated all the mill's employees because the employees joined or supported the Union. Admitting the closure and terminations, HLC denies any unlawful motivation.

There is some discussion in the record and in the briefs concerning whether the closing was permanent or temporary. As I earlier mentioned in the section ''HLC's Business,'' some four employees have remained employed at Melvin performing watch to comply with fire insurance requirements. The parties stipulated that as of January 1992 mail was still being received at Melvin, forklifts and other equipment remained, and an operating telefax machine was at the office.

HLC has not placed the facility for sale, and HLC seems able to resume operation of the mill on short notice (assuming that employees are available to staff the mill). Melvin appears to have been closed indefinitely (that is, neither permanently nor temporarily) to await favorable market conditions. In his October 10 impromptu remarks following his second speech, Hankins said that he would reopen if he could make money there. If not, he would cut the mill down and either move it to where it could make money or move the equipment to Grenada. As of the May 22, 1992 closing of the hearing, HLC apparently had not collapsed the Melvin facility and moved it. On brief HLC ''readily admits that the closure was initially intended to be temporary until the market changed to a degree sufficient to allow the Company to operate at a profit.'' (Br. at 83 fn. 82.)

2. The Government's prima facie case

The General Counsel relies heavily on the factor of *timing*. The timing factor does favor the General Counsel. Only minutes after the election tally revealed a union victory, HLC, in a mean-spirited departure from past practice, sent many employees (mostly union greens) home for the balance of the day. Less than a week later Hankins notified the employees (GCX 4) and the Union (GCX 5) that it appeared he would have to close the plant by December 24 ''unless market conditions improve'' as reflected by HLC's profit-and-loss statements for October and November. On Saturday, December 22, Melvin closed indefinitely.

Although the General Counsel has not shown that HLC's figures are false, the Government stresses that 97 percent of Melvin's 1990 losses were attributable to *tract losses*. It is meaningless for the General Counsel at times to refer to these tract losses as events occurring ''outside the mill'' (Br. at 73, 79) as if they bore no relationship to HLC's money. Significantly, the tract losses were attributable to a single timber buyer, Gary Graham, who left in mid-September after Hankins all but fired him 3 or 4 weeks earlier for causing the tract losses by overcruising.

The significance of Melvin's tract losses is twofold. First, they were limited to 1990. Second, they were potentially damaging to HLC's bank credit for 1991. Respecting the first item, because Graham left in mid-September, in October–December 1990 Hankins was able to evaluate Melvin's economic future with no real fear of more tract losses. Such an evaluation would show that, compared with 1990's tract losses of $734,266, Melvin's other losses for all of 1990 were a relatively small $22,785. (CPX 33.) From this the question arises, why would HLC close Melvin when its nonrecurring 1990 losses were less than half of the mill's 1989 losses. As HLC did not close Melvin when it lost $51,627 in 1989 (RX 12), perhaps an inference of unlawful motivation can be drawn by HLC's closing Melvin in 1990 soon after the Union's election victory.

Disparity. While Melvin sustained nontract losses of $22,785 in 1990, the Sturgis mill suffered more than seven times as much—$173,947. (RX 12.) Despite its far greater loss at Sturgis, HLC never even considered closing that mill. (9:2207, Smith; 16:4010, Hankins.) At least on the surface perhaps it can be said that HLC's failure even to consider closing Sturgis, while closing Melvin, supports an inference that HLC reacted so strongly at Melvin because the employees there had voted in the Union. There is no evidence of any contemporaneous union organizing at Sturgis.

Although the General Counsel advances other contentions, I find no merit to any. One of these pertains to *repairs and capital improvements*. Hankins (16:3901–3903, 4013) and Smith (8:1989–1990, 2080; 9:2195) acknowledge that as early as their June 9 monthly meeting Hankins mentioned he might have to close Melvin (or to cease operations there) because of its losses, the high price of timber and low price for lumber, Melvin's inefficiency, the bleak U.S. economy, and the poor prognosis for a positive change in these factors. Smith suggested that Hankins think about it some more because Melvin had made money in the past. (16:3903, 4015, 4027.)

In attacking the credibility that Hankins, as early as June 9, expressed to Smith the idea of closing Melvin, the General Counsel argues (Br. at 90) that the various repairs and capital improvements made during 1990 support a finding of unlawful closing. This is so, it is argued, because ''it is unlikely Respondent would have made such improvements had it actually contemplated,'' in June 1990, closing the facility based on the losses reported through May.

While Hankins held off closing Melvin after June 9, repairs continued. Those expenditures however are not inconsistent with that wait-and-see approach. Indeed, the parties stipulated (10:2510–2517, 2545) that a list (GCX 19) of most of the repairs was for routine repairs. Some additional repairs and improvements were made in May–June and in the summer of 1990, with a dispute concerning whether repairs of $5684 on fuel tanks occurred in 1990 or 1989. (RX 34; GCX 23; 16:3857–3868.) One of the stipulations is that repairs/improvements of $7448 were made to log runs in May or June 1990. (10:2511, 2517.)

The routine repairs (GCX 19) for 1990 totaled $98,642. This total includes repairs to the mill. (GCX 19.) (Shown as repairs for machinery and equipment on the 1990 operating statement, CPX 54 at 2 L. 3.) Repairs to the buildings totaled $26,205 (CPX 54 at 2 L. 5), and expenses for the dry kiln ($5602) and boiler ($22,362) are shown on the 1990 operating statement. (CPX 54 at 2 LL. 29, 30.) HLC's 1989 profit and loss statement (CPX 53; apparently another name for 1990's operating statement) shows expenses of $69,291 for machinery and equipment, $773 for building repairs, and $41,035 for the mill. (CPX 53 at 2 LL. 14, 16, and 34.)

Although the evidence and documents on this point are not entirely clear, and even though the parties have not briefed the issue in detail, it is clear enough that the expenditures Hankins made in 1990 were consistent with the normal business goal of maintaining Melvin while trying to make a profit.

Expenses in the range of $7448 to improve log runs (concrete for places where logs are stacked), for example, hardly persuade that on June 9 Hankins really did not discuss with CFO Smith the idea of possibly closing Melvin. Anyone who ever has sold a home knows that he has to maintain the property in good repair if he expects to be able to attract a buyer at a reasonable sales price.

Rather than $7400 repair items, what the Government really needed to adduce, in order to make its point, is that in July (or at any time that summer after June 9) Hankins decided to make any of the mega-investments Melvin needed to make it a first-class sawmill. The first of these would be to convert Melvin from an inefficient circle saw operation to the efficiency of a bandsaw operation. A good part of the record is devoted to the inefficiency of Melvin's operation, including the nature of the principal saw. Converting to a bandsaw operation would be expensive. Very expensive. Plant Manager Stephens gives his rough estimate of at least $1 million. (11:2847–2848.)

Testifying that modernizing Melvin would also require a drop sorter (an automatic counting and sorting device, 16:3951) as well as a bandsaw, Hankins puts the cost of installing both at $1.5 million to $2.5 million. (16:3952, 4020.) That does not include adding fill dirt to provide the extra land, for the topography at Melvin currently is not suitable for the longer lumber that would be, and should be, produced at a modernized operation. (16:3953, 4021, 4030–4031.)

Another big item that would have been impressive is a rail spur. Melvin has never had a rail spur. This absence contributes greatly to Melvin's inefficiency as even Bruce Young observes. (2:278–279.) A former cruiser at Quitman and a principal witness for the Government, Young testified that the lack of a rail spur means that lumber has to be trucked from the mill at, he assumes, higher costs than by rail. (2:279, 284.) At Melvin lumber is shipped by truck. (16:3950.) CFO Smith confirms that rail costs are cheaper than shipping by truck (8:1992–1996), although he personally has not checked the difference respecting shipments from Melvin. (9:2166.)

The record contains no evidence whether HLC would have to pay to add a rail spur at Melvin, although presumably HLC would have to pay at least part of the cost. But aside from any cost which Melvin would incur, the record does not show that HLC (in 1990, but particularly that summer) made any effort to add a rail spur at Melvin. Had Hankins made an effort that summer to add a rail spur at Melvin, particularly if adding a rail spur would have been an expensive item for HLC, such a fact perhaps would tend to support the point the General Counsel attempts to make here.

In short, I find the item about 1990 repairs and improvements at Melvin fails to support the General Counsel's prima facie case.

One of the other contentions of the General Counsel (Br. at 84–86) is that HLC failed to terminate Gary Graham, Melvin's timber buyer, either in April 1990 when Hankins warned Graham that his tracts had to ''cut out,'' or in August 1990 when Hankins confronted Graham with a list of the specific tracts. The General Counsel does not articulate what this failure means.

In fact Hankins did fire Graham in their August meeting but, out of ''Christian'' compassion, immediately suspended that action when Graham pleaded that his family was packed and ready to depart on vacation. Whatever his faults, Graham was no fool. Concluding that he had no future at HLC, Graham soon thereafter found employment elsewhere. (13:3146–3148, 3259; 16:3958–3959, 4055.) Assuming that there is some relevance to Hankins' suspending his August discharge of Graham, I find that it adds no weight to the factors advanced by the General Counsel as the Government's prima facie case.

The General Counsel also contends that HLC manipulated both the prices it bid for timber and its log supplies in order to avoid purchasing timber for Melvin and, apparently, to divert logs to HLC's other mills as shown by their ample inventories. This contention ignores the all-important efficiency or overrun factor and the fact that HLC's bidding procedure and its scaling procedure had been in place for years. The fact is that Melvin's low efficiency factor knocked it out of the competition for timber. The higher overrun factor enjoyed by the other mills explains their success at obtaining logs. I attach no weight to this contention. Nevertheless, I have found a prima facie case based on the factors earlier discussed.

I turn now to summarize and discuss HLC's burden to establish, by a preponderance of the evidence, that it would have taken the same action of indefinitely closing Melvin even if the Union had never appeared at Melvin or, if appearing, had lost the election. HLC (Br. at 34) appears to suggest the three-stage process devised by the Supreme Court for certain Title VII cases in defining a two-step shifting of the burden of going forward with the evidence. The test for Board cases, which test the Supreme Court has approved, does not merely shift the burden of going forward to the respondent employer. Instead, the employer's burden is one of persuasion, similar to an affirmative defense, and it must discharge its burden by a preponderance of the evidence. *Merillat Industries*, 307 NLRB 1301 (1992). And see *Hyatt Corp. v. NLRB*, 939 F.2d 361, 374–375 (6th Cir. 1991).

3. HLC's defense

a. *Introduction*

CEO Hankins and CFO Smith confer every Saturday on HLC's finances. In addition to a general weekly review, the first Saturday of each month after the first full week, the two review the financial situation based on the previous month's

financial records. (8:1989, 1991, 2079–2080, 2107; 16:3901, 4008, 4038, 4040.) When Hankins and Smith held their regular monthly meeting on Saturday, December 8, 1990, and discussed Melvin, Hankins decided to close the mill. (8:2042, 2081–2083, 2108–2113; 9:2315, 2326.) For the following reasons, Hankins testified, he decided to close Melvin (16:3971, 4070):

1. Poor U.S. economy
2. Cost-price squeeze on timber/lumber
3. Melvin's unprofitability
4. Credit standing with banks
5. 60-day notice deadline approaching

Hankins never satisfactorily explained how the 60-day period, about to expire, was a factor in the decision as distinguished from the timing for the decision to close. His notice had left an option to remain open if profits improved. I shall attach no weight to this reason.

The Union's election victory, Hankins testified, played no part in his decision, and even if the Union had lost, Melvin still would be closed today. (16:3971–3972, 3990.)

b. *Poor U.S. economy and cost-price squeeze*

In the section summarizing HLC's business, I earlier referred to the cost-price difference which has been squeezing U.S. softwood producers since about mid-1987. The pressure from this squeeze was compounded by the poor U.S. economy having fewer housing starts and suffering a decline in construction.

In operating his business, Hankins belongs to several lumber organizations, serves on industry committees, and reads several industry and general publications in order to keep abreast of such matters as silviculture, taxes, environmental issues, and market conditions. Among the industry journals he reads are *Madison's Canadian Lumber Reporter* and Mark Layman's *Pine Page*, copies or excerpts from which are in evidence as RXs 35 and 36. (16:3886–3894, 3906–3911, 4004–4005.)

Copies in evidence of *Madison's* (RX 35) and Pine Page (RX 36) describe the problems facing the industry. For example, the November 23, 1990 issue of *Madison's* (RX 35–33) is headlined, ''US housing drops for 9th month in a row.'' The opening sentence of the article reports that U.S. housing starts, through October 1990, had dropped ''to the lowest rate since the 1981–1982 recession.''

Mark Layman's *Pine Page*, a weekly newsletter devoted to Southern Yellow Pine (SYP) analysis, states, in the August 24 issue (RX 36-3):

> HOUSING IS IN A RECESSION! Call it what you want but business stinks. Interest rates are high, lumber prices are declining, housing starts and permits are barely able to stay above 1 million, and disposable income has been disposed of.
>
> Right now, the only thing that will turn the SYP market around is loss of production or if prices get cheap enough to spec on. That is not likely to happen until lumber values move appreciably lower.

The November 16 *Pine Page* reported (RX 36–13):

> Lower [lumber] prices are further confirmation of a buyers market and a housing recession. A $15 decline in lumber futures in three days this week was also a vote of no confidence. Retail yards are buying much less than normal for the spring.
>
> Buying opportunities are still available for the hard core speculator, but producers and consumers alike are expecting lower prices in the weeks ahead.
>
> Only modest mill closures have occurred. Hardly enough to create a shortage.

The November 30 *Pine Page* (RX 36–14) was still looking for a ''missing miracle'' in the market, while reassuring that the market ''never goes as low as you think it could.'' *Madison's*, which all summer and fall detailed the adverse news about SYP, reports in its December 7 issue (RX 35–37, 38), the final issue in evidence, that sales of single family homes in the U.S. had dropped from September to October, and, through October, 16 percent from 1989. SYP buyers were described as ''cautious.''

With the December 7 *Pine Page* (the last issue introduced in the record), Layman reports that producers ''are paying higher log costs.'' ''The choices,'' Layman asserts, ''are to continue running and keep a weak stream of cash flowing, or to shut down completely and see how long the banker is willing to gamble on a strategy that the market will soon rebound.'' Layman encourages with, ''We will survive!'' Even so, in this final issue of record, he advises (RX 36–15):

> It is time to get to know your banker, because he is one of the wolves whose bite is much worse than his bark.

A graph (RX 39) in evidence portrays the python-like squeeze which faced the industry in 1990. Entitled ''U.S. Softwood Lumber Producers Have Been Caught in a Cost-Price Squeeze,'' the graph lines begin in 1985 with lumber prices moving above log costs. In 1986 log prices are well above log costs. By late 1987 log costs had caught and bypassed lumber prices—a trend that continues off the chart into 1991. (The chart is drawn from data published by the U.S. Bureau of Labor Statistics and the industry publication *Random Lengths* (one of the publications Hankins reads, 16:3891), and prepared by a law firm representing the Southeastern Lumber Manufacturers Association ''and the Coalition for Fair Lumber Imports in the Canadian Lumber Dispute.'' (16:3974, 3994–3995; RX 39–2.))

By early 1990 the gap, with log costs high and lumber prices low, was big. Pointing to that gap, Hankins testified that it was nearly impossible to make a profit. (16:3973, 4102.) The gap reaches its greatest distance at the close of the third quarter, or by September 30. While the gap retains most of that distance during the fourth quarter, the graph actually shows both lines proceeding upward. The wideness of the gap however would be no cause for joy. A glimmer of hope appears, however, from the fact that the line for lumber prices appears to be rising faster than the line for log prices. By March 31, 1991, the line for lumber prices, climbing steeply, had closed nearly half the gap, only to begin a steep drop while the log costs line proceeded higher. There the chart ends. Hankins testified that during late 1990 and early 1991 over 200 softwood lumber mills closed across the country. (16:3972.)

The evidence overall supports a finding, which I make, that as of December 8 and continuing at least through December 22, 1990 market conditions for sawmill companies were bad and there appeared to be very little hope for any recovery in the foreseeable future. In other words, I find that HLC proved that severe adverse economic conditions did exist during all of the last quarter of 1990, including December.

c. *Melvin's unprofitability*

Addressing Hankins' unprofitability reason, I shall exclude tract losses from the discussion although I shall include that item when covering the bank credit factor. Because tract losses are an item limited to 1990, Hankins should have excluded that item from his forecast of potential unprofitability for 1991. As a loss of hard cash, certainly the huge tract losses hurt in 1990 and were potentially damaging to HLC's bank credit. But they were not a recurring loss item for 1991.

Two other factors, however, had to be weighed by Hankins: (1) low mill efficiency and (2) no rail spur. I summarized the first item, also called the overrun factor, in the initial section, HLC's business. As shown there, Melvin's overrun of 160 (60 percent) was the lowest of the four sawmills, with Quitman and Sturgis at 179 and 196 for Grenada. Also as previously noted, when the cost-price has a gap with costs the high graph line, a mill with a low overrun cannot compete with a mill enjoying a high overrun. As HLC phrases it, ''In this Darwinian economic struggle, inefficient mills such as Melvin were fated to perish.'' (Br. at 45.)

With log costs up (and lumber prices down), Melvin's low overrun number severely hampered its ability to bid competitively on timber in order to get logs for the mill. Thus, although Aubrey Cannon, Gary Graham's replacement, tried to purchase timber for Melvin, he was unsuccessful. He was able to buy some ''gate logs.'' He was never told to stop trying to buy timber for Melvin.

Gate logs differ from ''stumpage'' logs in their source. Stumpage logs are those cut from tracts of timber and then transported to the mill. These also are known as company logs because the company already has purchased the standing timber. As the name implies, gate logs appear at the gate, transported there by independent loggers who seek the best place and price to sell their logs. Usually the cost is a bit cheaper than that for stumpage logs. The mill buys gate logs only at time of delivery.

Ideally a company would prefer to be able to operate solely with gate logs, but, understandably, gate logs are not considered a dependable source of supply. After his first week or so at Melvin, Cannon testified, Melvin purchased gate logs only. (14:3415–3416.) That 100 percent of Melvin's log supply compares to a percentage of 20 to 30 during normal times at Melvin. Unfortunately, those gate logs were not nearly enough to keep the Melvin mill open.

Refocus now on the overrun factor. Hankins attributes most of Melvin's inefficiency to at least two structural shortcomings there. First, and as I have mentioned, Melvin had a circle saw rather than a bandsaw for its breakdown saw. (16:3932-3933.) HLC's other mills have bandsaws. A circle saw has several disadvantages, and a principal one is the greater kerf it cuts. Because the blade of a circle saw is thicker than that of a bandsaw, the kerf (the gap cut by the blade) is wider. The wider kerf means more waste. A bandsaw produces more lumber and that means more money.

Second, because of Melvin's terrain the mill could not produce lumber longer than 16 feet. This factor lost sales in some areas of the country that specified lumber 18 and 20 feet in length. The longer lengths also sell at higher prices.

Aside from its low overrun factor, Melvin, as I have described, has never had a rail spur. That lack adds to Melvin's shipping costs.

Observing that Melvin's structural problems and lack of a rail spur were preexisting conditions, the General Counsel (Br. at 89) contends, in effect, that these defects should be considered makeweight arguments. The problem with the General Counsel's position is that it disregards the graph lines moving from favorable for Melvin in HLC's first 3 years there to the python-like squeeze suffocating Melvin in 1990. It is clear that while the structural defects and the lack of a rail spur had not prevented Melvin from earning a profit before 1989, they now were contributing to HLC's economic crisis and were two of the reasons for Hankins' decision to close Melvin.

Thus, even though Hankins was well aware, when purchasing Melvin in 1984, that the circle saw (16:4019) and absence of a rail spur (16:4027) were disadvantages, in the early years, before the 1989 loss of $51,627 (RX 12), the adverse factors had not prevented Melvin from earning a profit. (16:3901, 4025–4027.) But by 1989, Hankins testified (16:4027), the ''lumber business was going into a different mode than we'd been in in years.'' The chart (RX 39) displaying the python's cost-price squeeze graphically demonstrates that the constriction began suffocating the industry about September 1989. (16:4102.)

The suffocation caused by the python's cost-price squeeze and Melvin's low overrun number are the reasons, as Hankins testified, that Melvin could not afford to buy logs during the fall of 1990 when Quitman could. (16:4098, 4100–4101.) Because Melvin could not afford to buy logs in the latter half of 1990 (or even slightly earlier), the mill could not operate and therefore closed. Of course Melvin needed logs—but at a price it could make a profit. As Hankins puts it, ''We didn't need them if we was going to lose money.'' (16:4062, 4106.)

While a repetition of 1990's loss is not shown to have been likely, it seems quite reasonable for Hankins to have concluded, as he did, that the mill could not make money in 1991 given the combination of the python squeeze, Melvin's low overrun, and the lack of a rail spur. I find that HLC proved that Melvin, during the relevant time, including December 1990, was an unprofitable mill and that 1991 loomed as another loss year at Melvin in Hankins' view.

d. *Credit standing with banks*

There is no dispute that Hankins' nephews left in 1988 and that in September 1989 Hankins bought their interests with a $2.5 million bank loan. (16:3884–3885, 3971–3972, 4019.) Coupled with the problems facing Melvin, and steep drops in earnings at the other mills, even a loss at Sturgis, Hankins understandably became alarmed that his credit line at the banks was in jeopardy. In Hankins' words (16:3971):

> And I couldn't afford to put our business in the shape if I went to the bank, they'd turn me down, and

I had to make steps to be sure our company was on sound ground and could stay on sound ground.

I find that HLC factually established this reason.

e. *No pretext*

I have found that for 1990 HLC was suffering a setback in revenue, and that in December at Melvin HLC truly faced an economic crisis. I also find that HLC did not create the economic crisis at Melvin, or manipulate timber bids and log supplies, to take advantage of economic problems in order to justify closing the Melvin mill in retaliation against the employees there because they voted on October 19 for the Union to be their collective-bargaining representative.

Granted, HLC hurt its own cause when it, clearly in a fit of spite, sent many employees (mostly union greens) home the day of the October 19 election, and by temporarily, and unlawfully, laying off employees on October 22 and November 1. This spiteful attitude did not carry over to the permanent layoff of November 5, and it clearly did not cause Melvin's closure.

HLC similarly does not advance its defense by stressing the huge 1990 losses at Melvin when in fact 97 percent of those losses, because limited to Gary Graham's 1990 overcruising, would not have been a recurring factor for 1991. Nevertheless, HLC's stressing this item as if it were to be a recurring factor in 1991 does not convert the real economic crisis into a pretext. Moreover, the balance of the losses, amounting to $22,785 (CPX 33), is still a loss of money.

I find no disparity respecting Hankins' failure to consider closing the Sturgis mill despite its own large loss of $173,947 (RX 12) for the year. Sturgis had a 70-percent overrun, a rail spur, suffered no tract losses, and could still buy logs. (12:3033; 16:4010.) And let us not forget Bruce Young's testimony that if he had to close one mill it would have been Melvin. He would chose Melvin, other items being equal, because of its close proximity to Quitman and because Melvin had no rail spur. (2:278–279.)

Finally, aside from ending the uncertainty at Melvin, and foreclosing the possibility of another loss there in 1991 (for the third consecutive year), closing Melvin had the potential for a positive benefit. Ceasing production of limber at Melvin, Hankins testified (16:3902–3905, 4016–4017), could serve to help raise lumber prices by virtue of cutting back on the supply of lumber available. Hankins included this among his June 9 concerns when discussing closure with CFO Smith. (16:3902–3905.) Although he did not expressly repeat that potential positive factor when giving his reasons of December 8, I find that it was implied when he referred to the ''economy,'' ''bad lumber business,'' and ''no way for that mill to make money.'' (16:3971, 4069.)

Clearly this was only an incidental benefit, and only a potential one at that. No evidence was presented addressing what impact, if any, Melvin's closure had on lumber prices. The python graph (RX 39) however shows that lumber prices rose steeply the first quarter of 1991 before again dropping sharply. I attach only incidental weight to this factor.

Toward the end of Respondent's brief, HLC's attorneys, quoting a proverb from Mark Layman's *Pine Page* of August 10, 1990 (RX 36–1) that ''A clean conscience is a soft pillow,'' assert (improperly offering purported facts from outside the record) that Burton Hankins enjoys a clear conscience and sleeps well. (Br. at 212.) It is well that such is so, but as the prophet warns: ''Never will I forget a thing they have done.'' Amos 8:7.

f. *Summary*

To summarize, I have found that the Government presented a prima facie case showing timing, animus in temporary layoffs, misplaced emphasis on tract losses, and surface disparity respecting no consideration for closing the Sturgis mill which suffered a far greater loss (excluding Melvin's nonrecurring tract losses) than did Melvin.

Rebutting that prima facie case, HLC, I have found, responding to the legitimate economic crisis it faced at Melvin, demonstrated that it would have closed Melvin in December 1990 even had there been no union on the scene. Accordingly, I shall dismiss the closure allegation, complaint paragraph 7 of Case 15–CA–11523 (the third complaint).

Having earlier dismissed the allegation against Supervisor Hamburg, the only other unfair labor practice alleged in the third complaint, I now shall dismiss in its entirety the third complaint, Case 15–CA–11523.

CONCLUSIONS OF LAW

1. HLC violated 29 U.S.C. § 158(a)(1) about late August 1990 by threatening employees at its Melvin, Alabama sawmill with discharge for supporting the Union.

2. HLC violated 29 U.S.C. § 158(a)(3) and (1) when it temporarily laid off employees at its Melvin sawmill on October 22 and again on November 1, 1990.

3. HLC violated 29 U.S.C. § 158(a)(5) and (1) when it unilaterally laid off employees on October 22 and November 1 and 5, 1990, at its Melvin sawmill without notifying and, on request, bargaining with the Union concerning the decisions to lay off employees and the effects of those decisions.

4. HLC did not violate the Act when it closed its Melvin, Alabama sawmill on December 22, 1990.

5. HLC did not otherwise, as alleged, violate the Act at either of its sawmills at Melvin, Alabama, or Quitman, Mississippi.

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.

The Respondent having discriminatorily laid off employees, ordinarily it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, 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). Here, however, some would have been, and some were, included in the permanent layoff of November 5, 1990. In any event, the backpay period would have closed for all with the Melvin mill's last day of Saturday, December 22, 1990.

Moreover, the usual remedy described above appears to be subsumed in HLC's backpay obligation incurred as a result of its unilateral action in the layoffs of October 22 and No-

vember 1 and 5, 1990. In *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988), the Board held that an employer's backpay liability for unilateral layoffs runs from the date of the layoff until the employees are reinstated or have secured equivalent employment elsewhere. Here, of course, the mill closed indefinitely on December 22, 1990. Under *Lapeer*, therefore, HLC must make whole the employees, with interest, from the date of the layoffs until December 22, 1990, because it did not bargain with the Union about the decisions and their effects.

Had bargaining occurred, it may well be that many or most of the employees would have been laid off before December 22. That is something we will never know because HLC's unilateral action bypassed the bargaining process. ''The consequences of Respondent's disregard of its statutory obligation should be borne by the Respondent, the wrongdoer herein, rather than by the employees.'' *Lapeer* at 956. Accordingly, I shall order HLC to make all unit employees whole from the date of their layoffs until December 22, 1990. The backpay period for each employee shall be determined at the compliance stage.

Because HLC's Melvin, Alabama plant has been closed indefinitely for economic reasons, I shall order HLC to mail copies of the notice to employees to each employee on the payroll as of the October 19, 1990 election. Copies shall be mailed to such employee at his or her last known mailing address. I also shall order that copies of such notice be posted at HLC's Quitman, Mississippi plant because the close proximity of the two plants, the organizational drive at both plants, and the hiring at Quitman of some of the laid-off Melvin employees render it likely that employees at Quitman became aware of the Melvin conduct found unlawful.

[Recommended Order omitted from publication.]