

**Alcan Cable and Jerry Wayne Lawson. Case 17-
CA-10232**

15 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 23 September 1982 Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by issuing a written reprimand to, and subsequently discharging, employee Jerry Wayne Lawson because he filed a complaint under the Respondent's noncontractual internal complaint procedure.³ The judge deemed it unnecessary in the circumstances of the case to determine whether Lawson's action in filing the complaint "in and of itself" constituted concerted activity within the meaning of the Act. The judge concluded, however, that Lawson's action in filing the complaint "[could] not be separated from," and was "part and parcel of," his earlier action in contacting the State's workers' compensation agency

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

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

In the fifth paragraph of sec. C of the judge's decision, the date "October 16, 1980" should be "October 6, 1980." In the 11th paragraph of that section, the judge stated: "I conclude that the evidence does not support an affirmative response." It is clear from his next paragraph, however, that he meant: "I conclude that the evidence does support an affirmative response." Similarly, in the 19th paragraph of the same section, he stated: ". . . I may now allow myself to be blinded to the dictates of logic and probability," whereas the context indicates he intended to state: ". . . I may not allow myself to be blinded to the dictates of logic and probability." These inadvertent errors do not affect our decision herein.

³ The judge found, contrary to the General Counsel's allegations, that the Respondent did not reprimand and discharge Lawson because he contacted the state workers' compensation agency or because he engaged in union organizing activities. We have reviewed the relevant evidence and the parties' contentions, and we find that the judge's findings on these allegations are fully supported by the record.

to assert his right to medical treatment under the State's workers' compensation statutes. Citing *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980), the judge found that Lawson's action in contacting the agency constituted concerted activity within the meaning of the Act; he therefore found that Lawson's action in filing the complaint constituted concerted activity as well. For the following reasons, we find that Lawson's action in filing the complaint did not constitute concerted activity within the meaning of the Act, and that the Respondent therefore did not violate the Act by reprimanding and discharging him because he engaged in that action.

Contrary to the judge, we find that Lawson's action in filing the internal complaint was separate and distinct from his action in contacting the state agency. The record shows that, when he filed the complaint, Lawson was asserting a fundamentally different right than he asserted when he contacted the agency, namely, the right simply to receive his regular pay for the 2 days on which the chief engineer told him not to work while wearing a back brace. The record also shows that when he filed the complaint Lawson was utilizing a fundamentally different forum than he utilized when he contacted the agency, namely, Respondent's own purely internal noncontractual complaint procedure. An employee's action in filing an internal complaint cannot constitute concerted activity if, as Lawson's action undisputedly was, it is done solely by and on behalf of the employee himself and is not done in reliance on any collective-bargaining agreement. See *Snap-on Tools Corp.*, 207 NLRB 238 (1973). Since Lawson's action in filing the internal complaint was separate and distinct from his action in contacting the state agency, we find that the complaint action did not constitute concerted activity.

We also find, however, that Lawson's action in contacting the state agency did not constitute concerted activity. In our recent decision in *Meyers Industries*, 268 NLRB 493 (1984), we held that the activity of a single employee will not be found to constitute concerted activity within the meaning of the Act unless it is engaged in with or on the authority of other employees. In so holding, we overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and cited the opinion of the Fourth Circuit in *Krispy Kreme Doughnut Corp.*, above, holding that an individual's action in merely filing a state workers' compensation claim did not constitute concerted activity within the meaning of the Act. It is undisputed, and indisputable, that Lawson's action in contacting the state agency was not done with or

on the authority of other employees. Accordingly, for the reasons set forth in *Meyers*, we find Lawson's action in contacting the state agency did not constitute concerted activity. We thus conclude that his action in filing the internal complaint did not constitute concerted activity even if we assume *arguendo* that the complaint action was not separate and distinct from the agency action.

Since we find for the foregoing reasons that Lawson's action in filing the internal complaint did not constitute concerted activity within the meaning of the Act, we conclude that the Respondent did not violate the Act by reprimanding and discharging him because he engaged in that action. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. Based on a charge filed and subsequently amended by Jerry Wayne Lawson (hereinafter referred to as Lawson) that Alcan Cable (hereinafter referred to as the Respondent) has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, a complaint was issued by the Regional Director for Region 17 of the National Labor Relations Board on April 16, 1981. Generally speaking, the complaint alleges that the Respondent reprimanded Lawson on November 12, 1980, and discharged him on March 3, 1981, because Lawson complained to the State of Missouri's Workers Compensation Division on May 1, 1980, and, further, because Lawson filed a complaint under the Respondent's established complaint procedures on November 6, 1980. The Respondent's answer admitted certain factual allegation but, generally speaking, denied all wrongdoing.

Pursuant to notice this case was tried before me at Kansas City, Kansas, on December 15 and 16, 1981. At the trial all parties were afforded the rights to participate, to examine and cross-examine witnesses, and to adduce evidence in support of their position. Additionally, all parties were afforded the right to file briefs and make oral argument at the conclusion of the trial.

Based on the entire record, plus my consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent¹ is a New York corporation engaged in the manufacture of electric conductor cable at various

¹ The Respondent herein owns and operates the same plant once owned and operated by Olin Conductors. The Respondent acquired the facility in November 1979 from Martin Electrical Industries, which had

facilities, including the facility herein involved at West Highway 50, Sedalia, Missouri (herein called the plant). In the course and conduct of its business at the plant the Respondent annually sells goods and services valued in excess of \$50,000 directly to customers located outside the State of Missouri. Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The International Brotherhood of Electrical Workers (hereinafter referred to as the Union) is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Whether or not the written reprimand issued by the Respondent to Lawson on November 12, 1980, resulted from a discriminatory motivation by the Respondent.
2. Whether or not the Respondent discharged Lawson on March 3, 1981, because of his prior engagement in union or protected concerted activities.

B. Facts

Between May 1969 and March 3, 1981, Jerry Wayne Lawson was employed as a maintenance mechanic at a cable manufacturing plant in Sedalia, Missouri, which had an employee complement at roughly 170-180 employees. It has been owned by the Respondent herein only since November 1979. The department's employees, 20 or so in number, were supervised by Richard Dixon and Michael Harrison. Intermediate supervision came from the plant's electrical engineer, Edward Manley. The chief engineer was Charles "Pat" Faris. Not in the chain of command, but completing the scenario, was Ray Haley, the Respondent's manager of employee relations.

The plant's employees are not represented by a labor organization. They have, however, been the subjects of two organizational efforts, both by the Union's affiliate, Local 124. The first occurred in 1968-1969 and led only to litigation of unfair labor practice charges and objections to conduct affecting the results of the election. The Union evidently lost the rerun election ordered by the Board. The second occurred in the fall of 1978 and came about at the instance of Lawson, who contacted the Union, secured data and materials useful in organizing, and then proceeded to solicit support from his fellow

in turn acquired it from Conalco (Consolidated Aluminum Corporation). Oil Conductors made it sale to Conalco.

I once served as counsel for the General Counsel in an unfair labor practice proceeding against Olin Conductors, involving the same plant, and at least several of the same employees and supervisors. (See *Olin Conductors*, 185 NLRB 467 (1970).) I first became aware of this potential conflict while hearing the evidence in this case. I noted that much of the testimony concerning the plant's operations and personnel practices had a familiar ring to it and that I recognized, but could not place, the names of several witnesses for each of the parties. I broached my concerns about the matter to counsel for the parties. I was advised that there was no objection to my hearing the case to conclusion and deciding its issues.

employees. Among other activities, Lawson distributed authorization cards, and served as the Union's observer at a Board-conducted representation election which was conducted on November 29 and 30, 1978. Despite his efforts, the Union lost the election. No objections to conduct affecting the results of the election were filed. Nor, as so far as the record shows, were charges of unfair labor practices filed, except as set forth above.

Nonetheless, Lawson testified herein that in January 1979 he was called into Faris' office where Faris proceeded to refer to him as a troublemaker, an agitator, and an organizer, and bluntly threatened to find a way to get rid of him "sooner or later, one way or another," as Faris was tired of Lawson's efforts to make him look the fool. Faris denied that any such things were said to Lawson.

Some 15 or 16 months thereafter, around the period from April 7 to April 14² Lawson strained a muscle in his back while he was working. The injury was reported by Lawson to Dixon on April 15, 1980. Dixon advised the use of a heating pad while sleeping and requested that he be notified if the condition worsened.

Lawson renewed his complaint to Dixon on April 21. Pursuant thereto an appointment was arranged with the Respondent's physician, who diagnosed his condition as "pulled muscles," and prescribed pain pills and muscle relaxants. Lawson was excused from work for 4 hours in connection with his visit to see the Respondent's physician for diagnosis and treatment on Monday, April 21, 1980. That same day the Respondent completed its own internal report concerning the accidental injury claimed to have been suffered by Lawson, and complied with the law of the State of Missouri by filing a "Form 1—Notice of Injury" with that State's Workers Compensation Commission.

Lawson worked at the plant throughout the day on Tuesday, April 22, 1980. However, during that day Dixon and Manley heard a rumor from Scottie Brown, another supervisor, to the effect that Brown's daughter had seen Lawson working³ the night before at the Red Apple, only hours after he had missed half of the workday at the Respondent. At the trial Lawson admitted that he had worked at the Red Apple on the night of April 21, 1980, from around 8 or 8:30 p.m. until 1:30 a.m. the next morning.

On Wednesday, April 23, Lawson missed work with the Respondent for the entire day. That morning he telephoned the plant and spoke to Ray Haley, explaining that the medication prescribed 2 days earlier by the Respondent's physician caused him to feel drowsy, so much so as to make it unsafe for him to attempt to drive to work. Haley arranged for Lawson to return to the physi-

² The exact date of this occurrence remains unclear to me, but seems unimportant to the resolution of the issues in this case.

³ During all relevant times Lawson was admittedly employed in a second job at the Red Apple Lanes, a bar and bowling alley. He generally worked for the Respondent from 8 a.m. until 4 p.m., and normally worked only one evening per week at the Red Apple, from around 9 p.m. until 1:30 a.m. In his second job he was a doorman, checking ID's and occasionally acting as a "bouncer" for underage, unruly, or intoxicated customers. His duties permitted him to sit most of the time, and his testimony that he never had physical altercations while performing these duties stand unrefuted.

cian that day, and Lawson drove to the doctor's office after he'd "gotten his senses" back, around 10–10:30 a.m. The doctor changed his prescription, but by that time, around 3–3:30 p.m., when Lawson had finished his business with the doctor, it was too late to go to work at the Respondent's plant.

Lawson did, however, go in to work that night at the Red Apple, and he performed his regular tasks there between 9 p.m. and 1:30 a.m. While there he was observed by Dixon and Brown, who went there for the express purpose of checking the accuracy of the rumor they had heard the previous day.⁴

The next morning, Thursday, April 24, 1980, Lawson was called into Faris' office and notified that his employment with the Respondent was suspended for 5 days and that he was subject to discharge. According to Lawson, though denied by both Faris and Dixon, Faris said to him, "I knew you'd screw up . . . sooner or later . . . I've got you this time." Lawson was given a "Disciplinary Act Slip,"⁵ and Faris secured Lawson's signature on a "Post Disciplinary Action Interview—Memo of Understanding,"⁶ by which Lawson was placed on probationary status for a period of 1 year. This marked the first instances of discipline to Lawson since before the election, in the fall of 1978.

Haley had a heated exchange with Lawson following the meeting with Faris. Haley's point was that he found it disturbing that Lawson had not stayed home and gotten proper rest, in light of his view that the Respondent's benefit package was quite generous.

Later still, when Lawson returned to work following his suspension, Haley and Lawson exchanged apologies for having lost their tempers in the earlier discussion. Responding to Lawson's prediction that he would probably be disciplined sometime in the future, and therefore dis-

⁴ While Brown was not called to corroborate Dixon's testimony I draw no adverse inference therefrom, since Lawson admitted all essential facts on this issue.

⁵ Which read as follows:

Employee working a second job while absent from his primary job.

Jerry was sent for a physician's examination and treatment at noon on 4/22/80 and was treated and counseled about his muscle strain injury. However, the employee elected to work his second job that same day.

On 4/23/80 employee reported off work, claiming injury prevented him from working, yet he worked his second job that same day. It is not the intent of fair treatment that employees be absent and have the employee working for others in the same periods. It is expected that time off is to be used for recuperation for both the employee's and employer's benefit, and that this time off will be used to the best advantage. Employee unable to perform his regular duties, however he elected to perform the duties of his second job. By working second job, employee is further aggravating the injury.

⁶ Which read as follows:

Return to your work position and schedule is contingent upon your understanding of a probationary period of one year. A cause for further discipline will subject you to immediate discharge.

Absences will be investigated to determine authenticity.

You will comply with all plant assignments and work schedules. There will be no question about your work quality or quantity. You will not cause any problems among your fellow employees through erroneous remarks or behavior.

Nothing would please us more than to have you back as a willing, satisfactory employee but your actions are yours alone to control. If you do, excellent, if not, then you understand what has to be done.

charged, Haley reminded Lawson of the Respondent's "open door policy" and advised him to maintain a low profile, to do a good job.

C. The Workers Compensation

In this precarious state Lawson continued working for the Respondent. Yet his back injury continued to trouble him. So, around May 1, 1980, he telephoned the office of the Workers Compensation Division of Kansas City and inquired about the possibility of securing treatment by a specialist. An information offer advised that the division would contact the Respondent and check into the matter. On May 12, 1980, Haley called Lawson into his office and advised him that an appointment had been set up with a specialist in orthopedic surgery in Columbia, Missouri.

Lawson saw the specialist on either May 13 or 15, 1980. The specialist diagnosed the injury as stretched or pulled muscles in Lawson's lower back, prescribed home rest, and gave Lawson a pass to be absent from work for 4 weeks. Lawson returned to the plant and presented the pass to Dixon. According to Lawson, on seeing it Dixon exclaimed, "Oh boy, the old man's gonna hit the ceiling."⁷ Dixon then gave Lawson a copy of his performance evaluation⁸ and left him to examine it while he took the pass in to Faris. Lawson read his evaluation which, while noting room for improvement in most areas of Lawson's performance, stressed the absolute need for him to improve in the categories of "safety" and "absenteeism." Dixon wrote that Lawson was "definitely not a company man" in his commentary, and mentioned Lawson's probationary status due to the Red Apple incident mentioned above. Lawson claimed that he overheard Faris loudly exclaim, "The S.O.B.'s not gonna get away with this," followed by the sight of magazines and pencils flying across that part of Faris' office which he could see through a doorway.⁹ Dixon then returned and told Lawson to go home, that the evaluation could wait.¹⁰

Lawson was then off work for approximately 4 weeks, following which he was reexamined by the Respondent's specialist, and given a pass for an additional 4 weeks of absences. He returned to work pursuant to the specialist's instructions around July 17, 1980, such return apparently being delayed by a week due to Lawson having forgotten to keep a scheduled appointment with the specialist.

It is beyond dispute that Lawson was told by Faris shortly after he returned to work, and by Haley on several occasions during July and August 1980, words to the effect that the Respondent's did not believe that Lawson's injury had actually occurred on the job and that he was suspected of perpetrating a fraud on the Re-

spondent. Nevertheless, Lawson was assigned to do painting, apparently considered light work, for about 3 or 4 weeks following his return.

On October 16, 1980, Lawson asked Harrison to arrange for him to return to see the orthopedic specialist. Harrison later told¹¹ Lawson that there was no such thing as light duty in the maintenance department, that Lawson's back injury was completely healed, that Lawson should seek medical attention on his own time and at his own expense, and that he was conveying these views from Faris' office. Still later that same day Lawson called the office of the Workers Compensation Division and was told to secure both the Respondent's and its insurer's positions in writing. He thereupon phoned the office of the insurer, whose agent assured him he had been misadvised but, nonetheless, failed to recontact him to set up a doctor's appointment.

Instead, Lawson arranged and kept an appointment with another physician on October 13, 1980, who diagnosed his injury as pulled muscles and pinched nerves in the lower back area, and prescribed a back brace.

On October 31, 1980, Lawson obtained the brace and wore it to work at the Respondent's plant. Supervisors brought Lawson's relative immobility to Faris' attention. Faris sent for Lawson and, explaining that his immobility presented a safety hazard, told Lawson that he should check with his doctor to learn whether it might be possible to wear the brace while away from his job with the Respondent. He told Lawson not to work while wearing the brace. Lawson complained that all of this would mean that he would have to begin receiving workmen's compensation payments again,¹² and left the plant.

Lawson was unable to schedule a doctor's appointment for the next working day, Monday, November 3, 1980. He did see the physician on Tuesday, November 4, 1980, however. The physician assured him that his wearing of the brace posed no hazard to safety and gave him a notice to that effect. On Wednesday, November 5, 1980, Lawson returned to his job with the Respondent, note in hand.

On November 10, 1980, Lawson inquired of Haley if he was to be paid for the 2 days of work he had lost due to Faris' instruction not to come to work while wearing the brace. Haley responded that he was not,¹³ and said he would "help" Lawson file a complaint pursuant to the Respondent's internal written "grievance procedure."¹⁴

¹¹ Harrison did not deny these remarks attributed to him.

¹² The Respondent had in effect a plan, not funded by insurance, which provided for employees to receive supplements to workmen's compensation payments, which were funded by insurance. The supplemental benefits plan was so designed that employees lost very little of their income while off work due to injuries on the job. I note, however, that the Respondent doubted that Lawson's injury was related to his work, and that the plan made no provision for any permanent disabilities.

¹³ Evidently Faris and Harrison had determined that Lawson was not entitled to be paid for the 2 days, since, in their view, Faris' words were directed merely at Lawson's removal of a brace which they thought unnecessary, and were not to be understood as an instruction to miss work. Indeed they regarded his absences as exacerbating Lawson's already bad (in their view) absenteeism record, and as having been taken without permission or notice. Yet Faris' instructive words about not working with the brace on, as recounted by Lawson, were not denied.

¹⁴ While Lawson's testimony tended to depict Haley's offer to "help" as a sort of tacit admission of his entitlement to payment, and, therefore,

Continued

⁷ This was not denied by Dixon.

⁸ The format for such evaluations appears to remain in important respects as it was when first examined by the Board. See *Olin Conductors*, supra at 469.

⁹ Both Faris and Dixon denied the gist of Lawson's testimony concerning this incident.

¹⁰ Lawson's work performance was not evaluated until September 1980. Dixon testified that he elected to delay his conduct of the evaluation in order to allow Lawson time to improve.

On November 11, 1981, Lawson submitted his complaint under the Respondent's complaint procedures.

On November 12, 1981, Harrison sent for Lawson and issued him a written disciplinary action slip based on excessive absenteeism and his alleged failure to improve his record, despite counseling during each of the two preceding months. The warning noted that "Since that time" (the two preceding months) he had recorded another 31.5 hours of absence.¹⁵ According to Lawson on hearing Lawson complain that the warning amounted to retaliation by Faris for having missed work due to a compensable injury, Harrison rejoined by commenting that it was not "his doing," despite his signature on the warning.

In December 1980 Peter Anderberg, another maintenance mechanic, inquired of Dixon about Lawson being assigned work which was evidently lighter than that of other maintenance mechanics, despite his observation that the maintenance department was nearly swamped with work. Dixon asked if other employees shared Anderberg's feelings. Anderberg responded that he did not know. Dixon said he would speak to Faris. Later Dixon told Anderberg that Faris wanted to talk to him about the matter. That afternoon Faris asked Anderberg why he was so upset over Lawson doing painting assignments. Anderberg responded that journeymen mechanics were badly needed and that when they were available they should be so assigned. Faris replied that Lawson was "no longer a qualified mechanic."

Lawson testified that in January 1981 he asked Harrison why he had not been assigned to do his regular work, rather than the bobbin repair work he had been assigned. According to Lawson, and denied by Harrison, Harrison responded that Farris had directed that Lawson

of the injustice in the Respondent's denial of the pay, my sense of what happened is that Lawson misinterpreted Haley's words. I believe that Haley merely sought to assuage Lawson's feelings by doing something well within the ordinary purview of people in his position of employment, i.e., to maintain "control" of a possibility expensive workers' compensation claim. Here Haley found it necessary to persuade Faris and other supervisors to accept the reality of the situation, that the Respondent's insurer had determined not to deny Lawson's "claim." Moreover, probably of most importance, Lawson had never actually filed a workers' compensation "claim." As a result, it may be inferred that, in Haley's view Lawson was not a man to be provoked. For, had Lawson filed a claim of permanent partial disability, he might well have caused the Respondent to incur a liability much greater than the entire sum of workmen's compensation benefits he received for medical expenses and temporary total disability.

¹⁵ The conclusions set forth in the disciplinary action slip (G.C. Exh. 8) were, according to Harrison, supported by the data set out on the paper he gave to Lawson at the same time (G.C. Exh. 9). And G.C. Exh. 9 does indeed show Lawson to have missed 12 hours' work during October 1980 and 19.5 hours in November 1980. However, the underlying documentation, R. Exh. 2, shows only 3.5 hours of missed work during November 1980. The "missing" 16 hours must, therefore, be accounted for by noting that R. Exh. 2 has obviously been altered to change the notations for November 3 and 4, 1980, so that it reflects that these days were missed due to occupational injury, just as it does for 53 days during May, June, July, and August 1980. Thus, the conclusions are inescapable that (a) over half of the "absenteeism" used as a basis for the Respondent's disciplinary action slip of November 12, 1980, was due to an occupational injury, and (b) that it resulted from Faris' instruction not to work with the brace on, or without medical clearance. Finally, despite the eventual decision by the Respondent to pay Lawson for November 3 and 4, 1980, the written warning was explicitly stated to remain in full force and effect.

be assigned to work where he could be readily observed by supervisors, to make sure Lawson did not "goof off." Later that day, in response to a similar question, Dixon told Lawson, so Lawson testified, that he was needed and that efforts had been made to utilize his services, but Faris had ordered that he not be put "back on the floor." Dixon allegedly counseled Lawson to have patience, do good work, and trust him to get Faris "of his back." All this was denied by Dixon, and Harrison as well, even though it remains unclear whether the General Counsel ever contends that Harrison was present.

On March 3, 1981, Dixon gave Lawson another disciplinary action slip, suspending him for 5 days and making him subject to discharge. Dixon advised him that the basis for discipline was certain data compiled by Faris through the supervisors which caused Faris to order the issuance of the warning.

On March 11, 1981, Lawson was discharged.

The "data" referred to by the disciplinary action slip were actually references to various alleged offenses by Lawson, as follows:

- (1) The written warning of November 12, 1980 for excessive absenteeism;
- (2) Violation of departmental rules on November 26, 1980 by beginning lunch early;
- (3) Loafing in the shop before a shift change on January 22, 1981;
- (4) Being disrespectful toward a supervisor on January 23, 1981;
- (5) Loafing in the shop before a shift change on February 10, 1981;
- (6) Failing to perform housekeeping properly on February 10, 1981;
- (7) Poor workmanship on a drain line installation on February 17, 1981;
- (8) Three consecutive housekeeping failures as of February 18, 1981;
- (9) Disrupting a conversation between a supervisor and another employee on February 27, 1981;
- (10) Refusing a job assignment from a supervisor on February 27, 1981.

Much of this "data" was compiled by Dixon, who had a "system" of making notes, both laudatory and critical in nature, concerning employees and their work at any time he might notice something which impressed him. His practice was to then drop such notes in a file he kept for the employees supervised by him and Harrison. Then, whenever he needed to review an employee's record, as when the employee's evaluation or "talk plan" was due, he used the notes to refresh his recollection. According to Dixon, one such occasion for review of Lawson's record occurred on March 3, 1981, when Lawson requested some personal time off. Dixon's response was to review the entire personnel file pertaining to Lawson, including his absenteeism record. It was this review which allegedly caused Dixon to focus in on Lawson and to conclude that his probationary terms were not being fulfilled. After consultation with Manley and Harrison, with some input from Haley, a decision was reached that Lawson should be discharged.

C. Discussion

Counsel for the General Counsel has demonstrated a variety of bases for his case. First of all, there is the obvious activity of Lawson in attempting to persuade fellow employees to join him in supporting the cause of unionization in the fall of 1978. That Lawson engaged in such activities and that he was well known to the Respondent as the Union's most ardent champion seems beyond doubt. Secondly, Lawson filed a complaint under the Employer's own internal grievance procedure. Finally, Lawson pursued rights accruing to him under the laws relating to workers' compensation in the State of Missouri, another protected activity.

Lawson's activities on behalf of the Union are so clearly within the category of protected activities as to require no citation of authority. And I agree with the General Counsel's assertion that employees enjoy the Act's protection while asserting rights under the workers' compensation laws of the States. *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1981).

As a result I deem it unnecessary to the decision of this case to find that his act of filing a grievance under the Respondent's own internal grievance procedure in an attempt to recover the loss of 2 days' pay solely on his own behalf constituted concerted and/or protected activity in and of itself. I recognize that the mere absence of a negotiated grievance procedure will not preclude a finding that the filing of a grievance is protected. See, e.g., *Tri-State Truck Service*, 241 NLRB 225 (1979). Yet the Board has moved cautiously in this area of the law, and counsel for the General Counsel's brief is in error in stating that, "The filing of an individual grievance pursuant to an employer's complaint or counseling procedure has been found to be protected concerted activity," citing *Chrysler Credit Corp.*, 241 NLRB 1079, 1081 (1979). To the contrary, in that case the Board stated, ". . . we find it unnecessary to rely on [the administrative law judge's] finding that [the alleged discriminatee's] use of Respondent's employee counseling procedure was protected concerted activity." *Id.* at 1079 fn. 1.

Nevertheless, I am of the opinion that Lawson's claim that he should be paid for the 2 days' lost wages cannot be separated from his earlier and consistent assertion of his right to receive benefits, including medical treatment, under the workers' compensation laws of Missouri. Certainly it would make no sense to find that an employee is entitled to protection in asserting that he is entitled to receive medical treatment and, at the same time, conclude that he may be docked in pay, and disciplined, because he necessarily was away from the workplace while securing that treatment. I conclude that Lawson's assertion of a claim that he should be paid for the time he was caused to miss because the Respondent demanded proof of his ability to work without creating a safety hazard is part and parcel of his assertion of his right to treatment. Accordingly, under these limited circumstances, I find his activities to have been protected.

Additionally, the General Counsel has established that all these activities by Lawson were known to the Respondent. His union activities during the election campaign of 1978 were apparently conducted with some

openness. Certainly no one of the Respondent's supervisors or managers was ignorant of the fact that he was designated to be the Union's observer at the election. Lawson's efforts to secure medical treatment under the workers' compensation laws of Missouri could scarcely have been more obvious. At various times he had conversations with Haley, Dixon, and Harrison concerning such things as the bona fides of his injury, arrangements for treatment, and his mobility and other safety considerations attendant to his wearing a brace while working. And, finally, the facts underlying the grievance which he filed regarding the loss of 2 days' pay were known to Haley even before it was filed. After its filing no maintenance department supervisor or manager could have been unaware of them.

However, having shown Lawson's engagement in protected or union activities, and having proven the Respondent's knowledge of such activities, the General Counsel's case becomes much more difficult.

One cause of such difficulty is the length of time between his activities and the imposition of any discipline, or other detriment, sustained by Lawson. Another area of difficulty arises for the General Counsel in attempting to demonstrate the Respondent's animus toward unionism.

Here the 1978 election appears to have been conducted without incident. No allegations of unfair labor practices or objectionable conduct have ever been leveled against the Respondent regarding or since that organizational attempt, so far as this record shows. Nor is there any allegation or evidence in this case of contemporaneous, independent unfair labor practices other than the warning and discharge of Lawson. Thus, I conclude that the Respondent's labor relations history demonstrates no propensity by the Respondent to violate the rights of employees.

Normally, so large a gap in time as exists here between union or protected activities and a discharge would lead to the inference that one had no connection to the other. This seems especially true in situations where, as here, the union activities have long since subsided, and there has not been the slightest sign that the cause of unionism is about to be revived, or that the alleged discriminatee is about to resume his union activities. *Zarda Bros. Dairy*, 234 NLRB 93, 97 (1978). Here, however, the General Counsel argues that the gap can be bridged by the intent and animus expressed by the words attributed to Faris by Lawson. As shown, Lawson claimed that Faris referred to him in January 1979 as a troublemaker, an agitator, and an organizer "and warned that he was going to get rid of [him] one way or another." Further, Lawson claimed that in April 1980 Faris gloated that he had been able to carry out his earlier warning, stating, "I knew you'd screw up . . . sooner or later . . . I've got you this time." The General Counsel cites *Butler-Johnson Corp.*, 237 NLRB 688 (1978), for the proposition that such statements may be used to bridge the sort of lengthy gap which exists here. I agree with the General Counsel's proposition, but not with its application here. For while it seems obvious that an employer may conceivably harbor a grudge against an employee's union or

protected activities over an extraordinary length of time, yet still be held liable if shown to have been motivated by the grudge in discharging the employee, it is even more axiomatic that the evidence showing the connection must be credible. Lawson's demeanor in testifying made it impossible for me to credit his testimony concerning these matters over that of Faris, Dixon, Harrison, or Haley. Lawson's testimony seemed liberally laced with embellishment (e.g., "The s.o.b.'s not gonna get away with this," with pencils and magazines flying (Faris); Dixon confiding in Lawson that he had been trying to find a way to get him back "on the floor" but stymied by Faris' orders to keep Lawson on the floor; Harrison's confiding in Lawson that supervisors had been ordered to keep an eye on Lawson), and I further discount his credibility on account thereof. Finally, the various scenarios cast by Lawson, in which a succession of supervisors hostile to his interests are depicted as having either decided to confide in him or confess their culpable motivations, seem more than a little improbable. Granted, any or all the exchanges could have happened just as Lawson testified, but I am unable to believe that they did, or that the accounts were not enlarged on by Lawson.

Thus, I find that Lawson's previous union activities have not been shown to relate to his discharge or any discipline administered to him, or to the sequence of events which flowed from the compensable injury he suffered in April 1980.

The question remains, however, whether Lawson's activities in pursuing his rights, including his filing of the grievance, under the workers' compensation laws of Missouri were behind his reprimand or discharge. I conclude that the evidence does not support an affirmative response.

First of all, I cannot conclude that the *Krispy Kreme* rationale was intended by the Board to protect employees from punishment or instruction if an employer has cause to believe that the employee is engaged in a fraudulent claim, or has used bad judgment in attending to his injury. None of the stated bases for that decision, or of *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978), indicates a desire by the Board to deprive employer's of their rights to challenge either the authenticity or the severity of an employee's asserted on-the-job injury. The statutes of the State of Missouri specifically provide for an employer's right to contest an employee's entitlement to compensation, in whole or in part, and for such questions to be determined by resort to a hearing before a referee.

In one recent case the Board furnished some bases for my belief that an employer's inquiry into, or even its out and out resistance to, a claim which it finds suspect, cannot be used, in and of itself, as a predicate for an unfair labor practice finding. See *Ohio Brass Co.*, 261 NLRB 137 (1982). There, notwithstanding the fact that workers' compensation claims arise out of the employment relationship, and are presumed to be of common interest to other employees absent their disavowal, the Board held that there was no violation in an employer's inclusion of question about prior work-related injury claims on its employment application form.

Thus, an examination of surrounding circumstances must be made in order to determine whether or not the allegation of retaliatory or discriminatory motivation has merit.

Here the first such circumstance is the nature of the injury itself. Injuries to the back are common, both in and out of the workplace. They are also widely thought to be too readily available as refuges for those who wish to assert fraudulent claims. Much conventional wisdom of the day asserts that back injuries cannot be proven either to exist or not to exist by medical examination.

Lawson's own action in going to work, moonlighting as a "bouncer," may perhaps have been entirely innocent, as he claimed. Certainly, the record here will not support a contrary result. But neither will the record support a finding that the Respondent's suspicions were not reasonably aroused thereby. And while it is clear that the Respondent's supervisors regarded Lawson as a malingerer, or a "goldbricker," I do not find that he suffered any detriment as a result of his pursuance of rights under Missouri's workers' compensation law when the Respondent put him on probation as a result of his having been observed moonlighting.¹⁶ Accordingly, to the extent that the complaint is based on Lawson's various contacts with members of the Respondent's management or supervisory hierarchy who expressed their belief, in one way or another, that he was not entitled to workers' compensation benefits, I find and conclude that the complaint lacks merit. I recommend that it be dismissed insofar as subparagraph 5(f) is premised on Lawson's engagement in activities described in subparagraph 5(a), as previously discussed.

The facts, however, lead to a different conclusion on consideration of the issues raised when Lawson found himself compelled to file a grievance to recover the pay lost on November 3 and 4, 1980. From that time onward, until his termination, Lawson was a marked man, able to do little right.

Lawson's grievance was admittedly part of the bases or occasions for Harrison's initiation of administrative steps leading to the issuance of a written warning on November 12, 1980. Moreover, despite the merits of his grievance being eventually decided in his favor, Lawson was expressly told that the warning remained in effect. Finally, as previously shown, over half the 31.5 hours of "absenteeism" accrued by Lawson was at the express instruction of Faris. Under these circumstances I find the Respondent's argument spurious that the warning was the product of neither disparate treatment nor a departure from the Respondent's normal procedures. As Lawson's actions in filing the grievance have previously been found protected in the circumstances of this case I fail to

¹⁶ Having provided a bases for a belief that he was malingering, I find that various remarks and fulminations attributed by Lawson to supervisors take on a much less sinister appearance, even if it were assumed arguendo that Lawson's testimony on these points was credible, which I do not. (E.g., Dixon's "Oh boy, the old man's gonna hit the ceiling"; Faris' statement that he knew there was nothing wrong with Lawson and sooner or later he would prove it; Haley's repeated "counseling" to the effect that accidents which happened at home should not be claimed as job related; Harrison's expression of exasperation over Lawson's need for medical care and "light work" in the fall of 1980.)

comprehend any merit to the Respondent's position on this issue.

It is too obvious to require citation that the Respondent was free to discharge or discipline Lawson, or any employee, because of a record of absenteeism. But one need to be in favor of creating an employee's "right to absenteeism" in order to conclude, as I do, that the Respondent's actions here were so inconsistent as to be manifestly destructive of employees' rights to engage in activity which the Board has held to be protected, i.e., pursue workers' compensation benefits. Thus, (a) in itself causing a substantial portion of Lawson's absences, (b) in depriving him of pay for November 3 and 4, 1980, (c) in issuing him a warning based in substantial part on Lawson's having missed work on November 3 and 4, 1980, and (d) in responding to his grievance over the matter by, on the one hand, admitting the merit of his contention that he was owed pay for November 3 and 4, 1980, while, on the other hand, adhering to its view that Lawson's warning should stand, the Respondent has furnished evidence of an intent to "crack down" on Lawson regardless of the merits of any particular situation. While I am mindful of the Board's admonitions against attempting to intrude into the disciplinary process between employers and employees by substituting my own business judgment for that of the employer, I am also mindful that I may now allow myself to be blinded to the dictates of logic and probability. Here such considerations lead me to conclude that in issuing the warning to Lawson on November 12, 1980, the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint.

It follows that Lawson's subsequent termination is similarly tainted, and must be found to be illegal. This conclusion is not based simply on the fact¹⁷ that the warning was among the asserted, underlying factors leading to the Respondent's decision to discharge. It is, instead, based on an overview of the reasons individually and collectively asserted in the disciplinary action slip of March 3, 1980, as the basis for Lawson's discipline. While I must find that most of the instances¹⁸ of "misconduct" attributed to Lawson by the disciplinary warning slip of March 3, 1981, have at least some basis in fact,¹⁹ I cannot view them as a whole as anything other than pretexts for masking the Respondent's desire to retaliate against Lawson for the "troubles" he had caused the Respondent and its supervisors, by pursuing his rights to receive workers' compensation benefits and to protest having been penalized for doing so.

Lawson was a long-term employee for the Respondent, who evidently performed good work in a highly necessary and demanding area during almost all his tenure. One would not expect such an employee to be fired for trivial reasons, or without reasonable efforts at rehabilitation having been made. If an employer's reasons for discharge of such an employee are trivial, and are un-

accompanied by rehabilitation efforts, it is reasonable to infer that they are asserted to mask an unlawful reason.

Considering the pattern of timing of Lawson's offenses, I note that Lawson's work was not the subject of any discipline at all between the election in 1978 and the warning and probation notice he received on April 24, 1980. Following his probation's imposition it appears that he had a clean record for another substantial period of time, even granting that he was off work due to a compensable injury for roughly 2 months. Then he was warned (illegally, as we now see) about his "absenteeism" on November 12, 1980.²⁰ Next, on November 26, 1980, Lawson and others were admonished against beginning to eat lunch early. But it was only beginning on January 22, 1981, that Lawson's record began to turn "really bad," as I see the record. For between January 22, 1981, and February 27, 1981, Lawson accumulated between 80 and 90 percent²¹ of the "bad record" which led to his discharge.

It is claimed that Lawson was caught loafing on January 22, 1981, and again on February 10, 1981. Dixon's note and testimony about the January 22, 1981 incident show that, at worst, Lawson was guilty of nothing more than standing around a bit early for quitting time, and that he promptly returned to work when assigned housekeeping chores. As for the February 10, 1981 incident I find neither evidence nor argument by the Respondent to support its existence. Lawson's testimony was that neither incident occurred or was ever mentioned to him before he was suspended. I conclude that if these incidents occurred at all they were so trivial as to have no significance on Lawson's ability to work. In relying on them the Respondent has, in my view, lent credence to the General Counsel's argument that the list of incidents was contrived as a pretext to get rid of Lawson.

It was also claimed that Lawson was disrespectful toward a supervisor on January 23, 1981, that he refused a job assignment on February 27, 1981, and that he interrupted a supervisor on February 27, 1981. Harrison testified that on January 23, 1981, Lawson came to him and inquired about another employee, Anderberg, being assigned light duty. Harrison told Lawson that Anderberg had had an accident but it was not known when he would return or what sort of duties he had been assigned. Harrison testified that Lawson then reminded him in a "loud voice" that there was no such thing as light duty (evidently a bitterly sarcastic reference by Lawson to the treatment he had been accorded following his own injury and Anderberg's comments and inquiry to Dixon regarding Lawson being assigned light duty in December 1980). I note that Harrison, either at the time of its occurrence or at the trial, did not himself characterize the incident as one where Lawson was disrespectful, and Lawson denied that he spoke to Harrison in a disrespectful manner. In this he was corroborated by employee Jobe. Harrison also testified that on February 27, 1981,

¹⁷ While, as stated, this fact, standing alone, would not persuade me that the discharge was illegal, I do not mean to obscure that it contributes to my conclusion.

¹⁸ Excepting only the issuance of the November 12, 1980 warning; the reasons why I except this are as previously discussed.

¹⁹ The General Counsel's proof has failed to persuade me that there was not "something" that happened in a number of the instances.

²⁰ I note that the Respondent had no further complaint to make about his record of attendance.

²¹ The precise percentage is unclear, as it depends on whether the "improper housekeeping" between February 10 and 18 is counted as one instance of misconduct, or as four separate instances.

he asked Lawson what he was doing, prefatory to reassigning him. Harrison said that Lawson responded by saying, "I don't work for you."²² I don't have to talk to you," or words to that effect. Harrison also testified, though no such incidents are mentioned in the Respondent's list of Lawson's offenses, that Lawson had twice earlier refused assignments in a similar rude or surly fashion, once in January 1981 and once on February 10, 1981. Lawson's recollection of the February 27, 1981 incident was that he simply followed routine procedure and advised Harrison that he would have to first check with his "supervisor-of-the-day," Dixon, before accepting an assignment from another supervisor. Further, it is uncontradicted that he first encountered Harrison as a result of having gone in search of Dixon, to secure an assignment after having completed his previous assignment. Employees Jobe, Siron, and Doogs provided corroboration for Lawson's description of the practice requiring an employee to first check back with his "supervisor-of-the-day" before accepting a different assignment. The Respondent's supervisor did not seriously counter this testimony, except by establishing that a supervisor was "within his rights" in effecting a reassignment, if some emergency required, before himself checking with the affected employee's supervisor. They did not counter the General Counsel's evidence that the preferred practice was to first check with the employee's "supervisor-of-the-day." Nor did they demonstrate that any emergency situation existed when an attempt was made to reassign Lawson, or even that he was told of the existence of an emergency.

Dixon testified that on February 27, 1981, he was speaking to employee Harvey White, criticizing his work. According to Dixon, Lawson happened to be nearby and, overhearing, Lawson laughed and yelled something to the effect of "give 'em hell, Harv!" At that Dixon led White away from Lawson. After Dixon had completed his talk with White, Manley came up to Dixon and commented that he had allowed Lawson to succeed in angering him once again. Neither Manley nor White was called as a witness by the Respondent to corroborate Dixon's testimony, and no explanation for their absence was offered. Lawson's testimony was to the effect that he did indeed overhear the conversation and laughed. But, upon Manley coming up behind him and asking what was so funny, he apologized immediately. Significantly, like Harrison's examples of "disrespect," Dixon made no claim that he had made any mention of the incident to Lawson or attempted to correct his errant ways. Further doubt about the gravity of this incident is caused by the failure of Dixon to make any note of it for his file. Finally, I note that the Respondent's brief makes no mention of this matter.

²² This was a reference to a system of supervision employed by the Respondent whereby Dixon and Harrison jointly supervised employees in the maintenance department, each day "dividing up" the employees available depending on the needs to be met that particular day. Employees were, however, subject to being switched around in assignments during the day. Normally this would entail checking back with the employee's first supervisor to determine whether the proposed switch would interfere with his plans.

I find each of the five claimed instances of disrespect amounted to nothing more than makeweight excuses to discipline Lawson. Two of them were never mentioned, so far as this record shows, before the trial herein. And I find it utterly implausible that Harrison and Dixon would have allowed themselves to be treated disrespectfully by Lawson, a probationary employee, to the point that Lawson could succeed in refusing job assignments, addressing a supervisor in a near-scream, or engaging in mocking laughter toward a supervisor, without Lawson having ever been reprimanded or without some record having been made by the Respondent of each incident's occurrence. Instead I believe that Harrison and Dixon ingratiated themselves with the Respondent's management, notably Faris, by seizing on and magnifying incidents which were essentially nothing more than the routine friction necessarily expected in running a business of the Respondent's size. True enough, the Respondent is and has been free to lawfully discharge employees without regard for reasonableness. But where incidents so insignificant as these are utilized it warrants the inference that they are being used as a pretext to mask an unlawful reason. Harrison's readiness to attribute blame to Lawson without any basis in reason has already been seen in his claim that "31.5 hours of absenteeism" had occurred, over half of which was in fact due to Faris' instruction to Lawson to leave work. Thus, it is worthy of emphasis here that Harrison freely admitted that it was Lawson's attempts to secure payment for lost work time which led him to review Lawson's entire record and, eventually, to Lawson's discharge.

The Respondent also claims that its discharge of Lawson was justified by instances of poor housekeeping between February 10, 1981, and February 25, 1981. Dixon testified that Lawson failed to properly clean up bits of metal which remained after he had worked in the bobbin repair area on February 10, 1981. Dixon noted this failure on a report he posted, but made no mention of it to Lawson, saying it did not show a pattern of poor housekeeping to that point. The next week, on February 18, 1981, Dixon again noted a failure in Lawson's housekeeping, as there was welding slag and about a cupful of a compound used to dry spilled oil on the floor in Lawson's area of responsibility. Dixon stated that he talked to Lawson and showed him the unacceptable work, whereupon Lawson spent 5 minutes in cleaning it up properly. Dixon went on to testify that he found Lawson's housekeeping to be similarly unacceptable on February 25, 1981. Finally (though it is unclear whether the Respondent relies on this as an incident of poor housekeeping), Dixon testified that he once noticed some boxes stored in an area where they were not supposed to be stored, as they were in an area painted yellow to denote the fact that nothing should be placed there. He stated that he told Lawson to move the boxes and that, with a sigh of apathy, Lawson did so. Contrary to Dixon, Lawson claimed that the bobbin repair area was a difficult area to perform housekeeping in, noting that it is the largest area assigned. He also testified that Dixon routinely found instances of unacceptable housekeeping in his weekly inspections. Both men agreed that no other employee had

been subjected to discipline because of any such failure, though Dixon pointed out that no other employee had been on probation or had performed poorly so repetitively. Lawson claimed that the alleged incident of February 25, 1981, did not occur, as his work was found acceptable on that occasion. My own view is that the Respondent's evident eagerness to seize on incidents of a trivial nature is so pronounced as to warrant the inference that the trivia was a mere pretext. And, even at that, they were enlarged at trial beyond the grounds which were detailed in the disciplinary action slip which made no mention of a housekeeping failure after February 18, 1981.

Lastly, the Respondent claims that Lawson showed his intent "not to comply with the agreement made in good faith on 5/2/80 but rather to continue disrupting the Departmental workforce and to defy any and all of management's objectives" by work he did on February 17, 1981 on a "#2 C. V. splice box drain line." And it cannot be disputed that Lawson performed the work in a way which did not suit Dixon, for he admitted that, after he had completed the work in a way he thought proper, Dixon came and took him back to the machine where the work was located and told him he had not placed the drain as Dixon wanted it. Lawson claimed that he was quick to agree to do it as Dixon instructed, and that it required only half an hour to complete the job as it was desired. Lawson's and Dixon's testimony was in sharp dispute about whether Lawson had "argued" with Dixon that his way was better than Dixon's, and in this conflict I credit Lawson.²³ As with other instances of "misconduct," Lawson next heard anything about the matter when he was issued the disciplinary action slip preparatory to discharge. While it is beyond doubt that an employer is free to have its instructions obeyed, and that a failure to do work as instructed or desired warrants discipline, including discharge, I cannot find that this incident, even in combination with all the matters listed previously, would have led to the extreme sorts of conclusions as are set forth at the beginning of this paragraph. Those conclusions were, of course, copied directly from the Respondent's disciplinary action slip. Certainly, even granting that Lawson's way of performing the work was wrong, it amounts to extremism to characterize his failure in the task as "almost unethical," as Dixon testified.

At the trial the Respondent produced evidence of yet another instance of misconduct by Lawson, i.e., "falsifying a preventive maintenance report on some poly extruder drive belts." However, I regard such evidence as irrelevant to this case, for it is not among those listed on the Respondent's own disciplinary action slip. Clearly it had nothing to do with the discipline administered, for it is difficult to imagine that such an incident would have been inadvertently omitted from the listing, given the number of people utilized by the Respondent in reaching or reviewing the decision to discipline and discharge Lawson.

²³ My resolution is based on the very poor impression I received of Dixon's credibility, as shown by his demeanor, while testifying on this point.

In reaching the conclusions I have stated above I have been fully aware that Lawson "led with his chin" in working as a bouncer while off work at the Respondent's facility to secure medical treatment for a back injury in April 1980. The imposition of a term of probation cannot be viewed as unwarranted. His offense was real and the penalty seems both appropriate and proportionate. I cannot accept the argument advanced by the General Counsel that, in placing Lawson on probationary status, the Respondent engaged in disparate treatment. Nor, as shown earlier, do I credit Lawson's testimony concerning various statements he attributed to Faris, Dixon, and Harrison which would have furnished a basis for inferring the existence of a discriminatory motivation.

Instead, as stated earlier herein, I base my decision concerning the reasons for Lawson's discharge on the implausibility of the numerous reasons advanced by the Respondent, the sure knowledge that Lawson's deficiencies as an employee were magnified in several respects, and the hostility exhibited by the Respondent to his continued insistence that he be given workers' compensation benefits in accordance with Missouri law. I find that his discipline and discharge for these considerations were violative of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by issuing a written reprimand to Jerry Wayne Lawson on or about November 12, 1980, and by discharging him on or about March 3, 1981, because of his pursuit of workers' compensation benefits under the laws of the State of Missouri.
4. The above unfair labor practices have an effect upon commerce as defined in the Act.
5. The Respondent did not violate the Act in any respect other than as found above.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices, it shall be recommended that it cease and desist therefrom.²⁴

Having found that Jerry Wayne Lawson was unlawfully reprimanded and terminated, it shall be recommended that he be offered immediate reinstatement to his former position, displacing if necessary any replacement or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It shall be further recommended that Jerry Wayne Lawson be made whole for lost earnings resulting from the discrimination against him by payment of a sum of money equal to that he would have earned from the date of his dis-

²⁴ Considering the Respondent's previous record of respect for employee rights, and the narrowness of my findings herein, I provide for a narrow order herein. Cf. *Hickmott Foods*, 242 NLRB 1357 (1978).

charge to the date a bona fide offer of reinstatement, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).²⁵

It shall be further recommended that the Respondent be ordered to expunge from its records any reference to

the reprimand and the discharge mentioned above, and to provide Jerry Wayne Lawson written notice of such expunction, and inform him that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.²⁶

[Recommended Order omitted from publication.]

²⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

²⁶ See *Sterling Sugars*, 261 NLRB 472 (1982).