

The Gerber Co., Inc. and Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 1-CA-18362, 1-CA-18803, and 1-RC-17183

18 June 1984

DECISION, ORDER, AND DIRECTION

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 11 January 1983 Administrative Law Judge James J. O'Meara, Jr. issued the attached decision.¹ The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs.

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 conclusions³ and to adopt the recommended Order as modified herein.

Although we agree with the judge that the reasons given for James Noel's discharge were pretextual, we also find merit in the General Counsel's exception that Noel was treated disparately by the Respondent for discriminatory reasons.

The record shows that in 1980 employee Alfred Clemens was involved in an incident after work with one of the Respondent's trucks. The truck was damaged and Clemens was also under the influence of alcohol. The record also shows that the

Respondent did not discipline Clemens in any manner whereas the Respondent discharged Noel for allegedly abusing tools which belonged to him and for driving recklessly in the Respondent's parking lot. We find that Noel's alleged acts barely measure up to more than a minor incident which did not involve any loss or damage to the Respondent's property. Further support for our conclusion of disparate treatment stems from the fact that Noel was one of the Respondent's better employees who had never received any type of warning and who, just prior to his discharge, had received more than the usual wage increase from the Respondent because he was deemed to be "worth it." Thus it is clear that had it not been for Noel's protected concerted activity the Respondent would not have discharged such a good employee for such a minor incident and would have treated Noel the same as it had treated Clemens.

In fashioning a remedy for the Respondent's unfair labor practices, the judge gave a conditional bargaining order, the necessity of which depended on the challenged ballot of discriminatee Noel. Although the judge found that the Respondent's unfair labor practices were sufficiently severe to warrant the issuance of a bargaining order, he, nonetheless, failed to explicitly provide for the certification of representative if the Union prevails in the election after Noel's challenged ballot is opened. Therefore we shall provide for a certification of representative to issue if appropriate and we find it unnecessary to pass on the propriety of a bargaining order at this time.⁴ Accordingly, the judge's recommended Order⁵ is adopted as modified and the Direction is issued as set forth below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Gerber Co., Inc., Portland, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(g).

"(g) Discharging employees because of their protected concerted activities on behalf of the Union."

2. Insert the following paragraph 1(h).

"(h) 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."

¹ On 12 June 1982 an election was conducted among the employees in the appropriate unit. The tally of ballots showed that 11 employees cast ballots for, and 11 against, the Petitioner (the Union). There was one challenged ballot, a number sufficient to affect the results of the election.

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

³ Contrary to the judge, we do not find that the Respondent interrogated employees Keene and Grant during a discussion with them regarding the merits of unionization because there is no evidence that the Respondent inquired as to the union sentiments or activity of these or any other employee. Further, we do not find the Respondent's statement that "it could guarantee employees work for 52 weeks" constitutes a promise of benefits because the Respondent was merely making a comparison between its existing terms and conditions of employment and what the Union could not provide to employees. Comments such as these are permissible under Sec. 8(c) of the Act and therefore do not violate Sec. 8(a)(1). Accordingly, we shall modify the order where appropriate.

Member Zimmerman finds it unnecessary to pass on these incidents since any finding of violations based thereon would be cumulative and would not affect the remedy.

Chairman Dotson does not agree with his colleagues that the various conversations engaged in by the Respondent with its employees, and found by the judge to constitute illegal interrogations, are unlawful. Chairman Dotson is of the opinion that these conversations were rather innocuous and reasonable given the circumstances in which they occurred.

⁴ Member Zimmerman, for the reasons stated by the judge, would adopt his recommendation for a bargaining order to remedy Respondent's unfair labor practices, in the event the Union does not win the election.

⁵ We have confirmed the judge's recommended Order and notice.

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

DIRECTION

It is directed that the Regional Director for Region 1 shall, within 10 days from the date of this decision, open and count the ballot cast by James Noel in Case 1-RC-17183, and prepare and serve on the parties a revised tally of ballots. If the revised tally reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. However, if the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election results and forward the case to the Board for further consideration.

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.

Accordingly, we give you these assurances.

WE WILL NOT interrogate you regarding your union activities and sympathies or the activities and sympathies of your coemployees.

WE WILL NOT create the impression of surveillance or conduct surveillance of you regarding your union activities.

WE WILL NOT solicit grievances from you or resolve such grievances without negotiating with the Union.

WE WILL NOT promise benefits to employees without bargaining regarding such benefits with the Union.

WE WILL NOT threaten employees with discharge or replacement by other union journeyman plumbers.

WE WILL NOT offer benefits to employees to abandon the Union.

WE WILL NOT discharge employees because of their protected concerted activities on behalf of the Union.

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 offer James Noel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and **WE WILL** make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

THE GERBER CO., INC.

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA, JR., Administrative Law Judge. These cases, as reflected by the consolidated amended complaint filed on August 5, 1981, are based on certain charges of unfair labor practices filed by Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), against the Respondent, The Gerber Co., Inc. These cases have been consolidated with a case arising out of an election held on June 12, 1981, to which the Union has timely filed several objections. Since the objections are based on conduct factually similar to alleged unlawful conduct carried out by the Respondent and recited in the complaint, the cases have been consolidated for hearing.

The complaint alleges that the Respondent has interrogated employees concerning their union activities and sympathies; created the impression of surveillance of its employees' activities; solicited grievances which it promised to resolve; promised benefits to employees; threatened that it would not bargain with the Union and that such bargaining would be futile; threatened to discharge employees for union activities; revoked certain employee privileges; and discharged an employee, all in order to discourage union activity.

The Respondent has admitted the allegations of the consolidated amended complaint designed to invoke the jurisdiction of the Board and has denied that it is guilty of any violations of the Act.

The Union has filed timely objections to the election of June 12, 1981, alleging that during the critical period the Respondent: (1) engaged in extensive interrogation of employees about union activities; (2) threatened employees with discharge and other adverse consequences if they would not abandon the Union; (3) solicited grievances and promised to remedy such grievances; (4) dis-

criminated against various employees by revoking truck use privileges, transferring employees, and imposing new work rules; and (5) discriminatorily discharged James Noel.

A hearing on the consolidated amended complaint was held in Portland, Maine, on March 29 and 30, 1982. At the close of the hearing the parties waived oral argument and were requested to and did file briefs which have been received and considered.¹

Based on the evidence of record, including the testimony and demeanor of the witnesses, and in consideration of the briefs filed by the parties hereto, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and at all times material herein has been, a corporation duly organized and existing under and by virtue of the laws of the State of Maine, and is a plumbing contractor engaged in the installation of plumbing, heating, and air-conditioning systems in southern Maine, maintaining its principal office and place of business in Portland, Maine. In the course and conduct of its business operation, the Respondent annually purchases goods and materials valued in excess of \$50,000 directly from points located outside the State of Maine.

The Respondent admits in its pleadings, and I find, that the Respondent is, and at all times material herein was, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I further find that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION

Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is an organization in which employees participate, which deals with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work and, at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

A. Supervisory Status of Certain Employees

The Respondent has asserted that employees James Noel, Thomas Smith, and Mark Golden are supervisors and not employees as those terms are defined in the Act. The definition of the term "employee" contained in Section 2(3) of the Act excludes therefrom "any individual employed as a supervisor." Section 2(11) the Act defines the term "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical nature, but requires the use of independent judgment.

The Respondent hired employees who were classified either as journeymen plumbers or apprentices.² During the period from January 1 to June 12, 1982, the complement of the Respondent's employees fluctuated from 16 to 22 employees. These employees were supervised by John Gerber, president of Respondent, who spent approximately 50 percent of his time at the jobsites overseeing the progress of the work. The Respondent characterized some of its journeymen plumbers as "leadmen." It was the Respondent's practice to assign an individual journeyman plumber to a specific construction job. On most occasions the man so assigned worked alone and on some occasions the journeymen plumber would be assigned an apprentice to assist him on the job. The apprentice was expected to perform less skilled tasks and would, in effect, be engaged in "on-the-job training" in the plumbing trade. On other occasions a journeyman would be provided assistance from another journeyman plumber in order to expedite the work or to engage in the time of the second plumber. On these occasions neither journeyman plumber would direct the work of the other since both were equally skilled. The job assignment of the journeymen or "leadman" was to perform the work as scheduled from blueprints and to schedule his plumbing work to coordinate with the work of other crafts. When routine changes from the blue prints, or "minor problems," arose the "leadmen" could make such adjustments; however, in the event a change in the blueprints was required which could entail additional materials or labor, the change would require the consideration and approval of Gerber.

The "leadmen" journeyman plumber had no authority to, nor did he hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, nor did he adjust their grievances, nor did he recommended such action.

It is clear from the evidence that the employees of the Respondent who were journeymen plumbers usually performed the work of the Respondent on the jobsite in their individual capacity exercising their individual expertise. When an apprentice was provided to journeyman, the direction of that apprentice's work was in accordance with the rules of the craft in which they were engaged. The apprentice was an "on-the-job trainee" and as such was directed by the journeyman. This incidental "craft oriented" supervision is not within any of the indi-

¹ Subsequent to filing its brief, the Respondent, by letter to me proffered additional argument on the issue of supervisory status of the Respondent's leadmen. The General Counsel has filed a motion to strike the document from the record.

The practice in which counsel for the Respondent has engaged by his "letter-reply" is not only contrary to the Board's rules but constitutes an ex-parte communication. Counsel is requested to refrain from such practice in the future and the document is ordered stricken from consideration as part of the record in this case.

² In order for an employee to be classified as a journeymen plumber he must take an examination administered by the State of Maine designed to test his qualifications to represent himself as an accomplished plumber. An apprentice is an employee working in the plumbing trade who has not taken and successfully passed the state test for journeymen plumbers.

cia spelled out in the statutory definition of a "supervisor." In *Southern Bleachery & Print Works*, 115 NLRB 787 (1956), enf. 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). The Board noted that the direction of lesser skilled employees by skilled journeymen:

. . . is not the type of authority contemplated in the statutory definition of a supervisor; it is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a worker with management. Throughout the industry of the nation, there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced co-workers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers. [115 NLRB at 791.]

See also *Westlake United Corp.*, 263 NLRB 1095 (1978). (A degree of supervision analogous to those exercised by skilled workers over helpers was insufficient for a finding of a statutory supervisor.)

The Respondent's characterization of Noel, Smith, and Golden as "leadmen" is not persuasive of their status as "supervisors." It is well established that an individual's function and authority, rather than his title, determine his status under the Act. *Orr Iron, Inc.*, 207 NLRB 863 (1973). The "leadmen" have the experience to work a job alone. He is paid \$2 to \$3 more per hour. He is provided a company truck. The leadmen does, in fact, perform his tasks alone.³ While these "leadmen" were usually the sole representative of the Respondent on their jobs, they did not exercise vicarious acts for their employer in relation to others in the employer's hire. See *John Cuneo of Oklahoma*, 238 NLRB 1438 (1978).

Accordingly, I conclude that Noel, Smith, and Golden were not supervisors as that term is defined in the Act but are employees and entitled to the protection of, and are within the provisions of, the Act.

C. Unfair Labor Practices

As set forth above, the complaint alleges several acts attributed to the Respondent which acts allegedly constitute a violation of Section 7 of the Act. All, save the discharge of Noel, fall under the provision of Section 8(a)(1) of the Act.

1. Alleged 8(a)(1) violations

In October 1980, Noel and others among the Respondent's employees explored the procedures to be undertaken to accomplish union representation of the Respondent's employees. Several meetings were held between employees and the union representative, as well as meetings between the employees. On December 8, 1980, John

³ Smith worked as the Respondent's residential serviceman responding to residential trouble calls. He worked alone and had a company vehicle.

Gerber, the principal officer and stockholder of the Respondent, conversed with Thomas Smith, an employee, asking Smith what he knew about union activities in the shop. Smith replied that rumor was that the Union wanted to organize either the Gerber Company or another company. Gerber replied that he wished the Union would leave him alone.

On February 2, 1981, Gerber telephoned Smith at his home and stated that Gerber had been told that employees had met with the Union and that he had a list of their names. He inquired of Smith whether the procedure had extended as far as authorization cards being signed. Smith advised Gerber that nothing had been signed and Gerber asked Smith what he could do about stopping the union movement. Smith advised Gerber that if anything was going to be done it had to be done within 24 hours. Gerber told Smith he would call a meeting of the employees the following morning. At the meeting with the employees, Gerber stated that he "felt like he had been kicked in the balls." Gerber told the employees that he did not like the way that they had gone behind his back and that he would fight them all the way. He pointed out some of the benefits offered by the Company, such as vacations and holidays and a steady paycheck for 52 weeks a year which the Union could not offer. He further asked them to look at the history of union shops in the area and pointed out that the union shops had declined from 20 to 6 in the past 10 years.

On February 6, 1981, on a jobsite, Gerber spoke with employee James Noel, asking him, "What's going on with this union business? What is this anyway?" Noel advised Gerber that he was, "100 percent for the Union." The two then continued the discussion relating to the pros and cons of unionization in regard to the employer's and employees' interest. This conversation was at times heated. Gerber told Noel "Look, you're single. If there was to be a strike it wouldn't hurt you. Think about married guys that are here and can't afford to go out on a strike. If you don't like the way things are, you don't like working for me, why don't you quit. At least leave the married guys alone." Noel also told Gerber that the lack of a pension plan meant no security but with the Union he would have security.

Again, on February 6, on a jobsite, Gerber approached James Grant and Lawrence Keene, two of his employees, and engaged in a discussion regarding the merits of unionization. Gerber asked the two employees what they thought they were to gain by going union and pointed out certain benefits then provided. Gerber stated to Keene that, "Even if we are able to make \$50 an hour, if we weren't working, then it wouldn't do us any good." Keene also told Gerber the basic reason was that the Union offered a good pension plan where Gerber did not. Gerber responded that he had been working on the pension plan for quite a while and was going to talk about it that week.

Later that day, in the company office, Gerber discussed a pension plan with Smith and said he had a man coming in about the pension plan. He also said he had discussed the Union with Noel and that Noel "gave me

the typical union speech." Gerber added that he heard it a hundred times from the Union. Gerber told Smith "He's single. If he gets the Union, he'll probably take a travel card and go out of town." Gerber continued, "Can you do that? You're a married man. You have a family. I can guarantee you work fifty-two weeks a year. Can the Union guarantee you that?"

Again on February 8, 1981, Gerber engaged Smith in a conversation at the office. Gerber asked Smith what he thought he could possibly gain by going union. Smith responded again by raising the existence of a pension plan for union workers. Gerber again stated that he had a man coming in on it that week. Gerber requested Smith to help him win the election.

On February 6, Gerber received notice from the Union that it represented a majority of Gerber's employees and requested a meeting to commence negotiations. On February 10, Gerber responded by advising the union representative that he believed the fairest approach was through a Board-conducted secret ballot and refused to negotiate with the Union prior to such an election.

On February 9, Gerber again talked to Smith and asked whether Smith had had an opportunity to speak with other employees at the union hall. On the prior Friday night, Smith told Gerber that they had each paid \$216 into the Union for initial membership and were not going to back out now. Gerber responded that "the money could be taken care of."⁴

On February 18, 1981, Gerber met with employees Golden on a jobsite and stated that if the Union comes in Gerber would replace 50 percent of the shop and was going to have the last laugh.⁵

2. Alleged 8(a)(3) violations

On February 13, Noel and Grant returned to the shop about 4:15 p.m. When Noel learned that his regular parking space was taken and was told to unload his tools and park the truck on the other side of the driveway, Noel became angry. He turned the truck around, swore, unloaded tools from the truck in a rough fashion, and drove the truck about 40 or 50 feet at a rapid pace to park it. Noel denies that he "squealed" the tires or "burned rubber" when he moved the truck.

Charlotte Schaumacher, the bookkeeper, heard "tools and materials" being thrown off the truck and heard Noel "burn rubber" when he drove across the driveway. Lenny Drapeau, an employee of the Company and Gerber's brother-in-law, was also at the shop that afternoon and heard banging noises in the garage and saw the

truck speeding across the driveway with the tires squealing.

About an hour later, Drapeau saw Gerber at a gas station across the street from the shop. Drapeau went across the street to tell Gerber what happened. Gerber later called Grant. Grant told him that he did not hear or see Noel "burn rubber." Gerber discharged Noel when he reported to work on Monday, February 16. Gerber told Noel that he did not have to put up with Noel's swearing, throwing of tools, or reckless driving. Gerber told him to grab his tools and "hit the road." Noel was given no chance to explain the incident.

D. Discussion and Conclusions

1. The 8(a)(1) violations

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights of self-organization as guaranteed by Section 7 of the Act. In evaluating the conduct of an employer as to whether it violates the Act, the issue is whether the employer's conduct tended to affect the employees' freedom of choice, not whether such conduct, in fact, did affect that choice. The unlawfulness of the employer's conduct is derived from the aggregate of circumstances arising from statements and conduct of the parties.

The evidence establishes that the employees of the Gerber Company, in October and November 1980, undertook to acquire representation of the Union. Gerber, on several occasions, originated discussions with employees regarding their activities in the process of attempting to unionize the Respondent. He acknowledged to Smith that he had been told that the employees had met with union representatives and even stated that he "had list." He asked Smith if the meeting had gone as far as the signing of authorization cards. He later also asked Smith if he had an opportunity to speak to the employees before they paid their initiation fees. In addition to this conversation with Smith, Gerber interrogated several of the other employees about the union campaign.

It is clear from Gerber's professed possession of a list of employees and the frequent interrogation of employees about the union campaign that Gerber either had obtained information from some undisclosed source or was attempting to obtain such information from the individual employees. Such conduct on the part of the Respondent's principal officer clearly would create the impression among reasonable persons that the Respondent was conducting a surveillance of the union activities of his employees. It is also clear that such impression would tend to dampen the enthusiasm that the average employee would have for the union effort. This is true even in the absence of an expressed threat of reprisal. Smith's response to Gerber's interrogation of him was that "he shouldn't be talking to him." Smith was clearly concerned about peer reprisal and/or employer reprisal in the event he did not cooperate in submitting to the interrogation. These interrogations are improper and created the impression that the Respondent had the employees' union activities under surveillance. *Mark I Tune-Up Cen-*

⁴ Although Gerber denies stating that, "the money can be taken care of" I credit the testimony of Smith in view of the fact that Gerber was interested in avoiding union membership among his employees and had previously requested of Smith information as to what he could do to prevent it. It is consistent with this attitude that Gerber would offer to make his employees whole if they withdrew from the Union.

⁵ Gerber denies the literal recount of such a statement. In such a denial Gerber, in essence although with different words, implied that other, more qualified plumbers would work for Gerber and present employees would be out. Gerber embellished his explanation of the statement by adding that if he had to choose from union employees he would choose more qualified employees than his current nonunion plumbers and "If the choice came down to who I would choose, that's where it was at."

ters, 256 NLRB 898 (1981); *Pilgrim Life Insurance Co.*, 249 NLRB 1228 (1980).

The evidence also establishes that Gerber solicited grievances and promised benefits to remedy those grievances in his conversations with employees. In his telephone conversation with Smith on February 2, Gerber asked Smith if there was anything he could do to stop the Union. He also asked several employees what they expected to gain by going to the Union and volunteered the statement, on several occasions, that the Company was working on a pension plan and could guarantee 52 weeks a year of employment. He also specifically requested from his employees a recitation of their "gripes." The conduct displayed by Gerber reflects that as part of his antiunion campaign he solicited grievances from employees, a practice which had not existed previously. This conduct constitutes an implied promise to take steps to remedy the "gripes" manifested by the employees. Specifically, Gerber certainly gave the impression that he would institute a pension plan and a guarantee of a 52-week paycheck. These suggested promises of benefits during the union campaign were clearly designed to affect decisions of the union supporters among his employees. In the context of such an organizational campaign, such conduct suggests that these benefits might be withdrawn if existent or granted if not existent. Such promises of benefit or threats to withdraw such benefits constitute violations of Section 8(a)(1) of the Act.

2. The Respondent's union animus

The evidence conclusively establishes that Gerber was antiunion and considered the support of the Union by his employees as betrayal, or as he colorfully portrayed it, a "kick in the balls." In his conversation with Smith, he asked if the employees had paid their dues. When Smith advised him that they had, Gerber told Smith that the money was not the issue. While it is not unlawful for an employer to be antiunion and oppose the union campaign, it is unlawful to pursue his antiunion campaign in a matter that unfairly affects the judgment of the employees in the exercise of their evaluation of the issue proposed by the forthcoming union election.

Gerber further said that if they were successful in their union campaign the Company would replace 50 percent of the shop, and thus he was going to have the last laugh. He stated in that event he would staff his company with other union employees whom he characterized as the most qualified among union plumbers and further emphasizing this fact by implying that "if the choice came down to who I would choose, that's where it was at." This statement is a clear threat to discharge the current employees among his staff by eliminating those among his employees whom he deemed less qualified than other available union plumbers. Such a remark is clearly an effort on the part of Gerber to dissuade those to whom the remark was made and those to whom such remarks were conveyed to abandon their support for the Union in order to maintain their tenure. These threats of selection of other union plumbers to staff his company certainly carries the implication that present employees would be discharged. There is no more significant method to coerce an employee than to infuse into his

considerations the potential loss of his employment. Such conduct violates Section 8(a)(1) of the Act.

Gerber also in his discussions with two of his employees suggested that if they did not like the circumstances of their employment and if they wanted the Union they should quit their job. Such a statement is a violation of Section 8(a)(1) of the Act. *Rollion Corp.*, 254 NLRB 22 (1981).

Gerber's discharge of Noel, a known leader among the prounion employees, also had an adverse effect upon others of the Respondent's employees. Noel told Gerber that he was 100 percent for the Union. They had a "heated" discussion on the subject in the presence of two other employees. Noel's discharge, allegedly for disciplinary reasons,⁶ could only tend to cause other employees to fear for their jobs because of overt prounion activities.

3. Summary of 8(a)(1) violations

In summary, the evidence establishes, and I find, that the Respondent has violated Section 8(a)(1) of the Act in that the Respondent:

1. Created an impression of surveillance by Respondent of employees' union activity.
2. Interrogated employees about their union activity and such activities of other employees.
3. Solicited employees' grievances and implied an intent to resolve such grievances.
4. Offered to provide benefits for employees in the form of employee pensions and a guarantee of full employment.
5. Offered to reimburse employee members for fees and/or dues paid by such employees to the Union in return for their abandonment of the Union.
6. Threatened to replace present employees with other union plumbers if the Union won the election.
7. Discharged a known union leader because of his union activity.

4. The 8(a)(3) violation

The discharge of Noel on February 16 was allegedly because of Noel's intemperate conduct on February 13. As stated previously, Noel had expressed his prounion attitude to Gerber and had debated the pro's and con's of union membership for the Respondent's employees with Gerber on a construction site in the presence of other union members. It is clear that Noel was one of the more outspoken prounion employees among the Respondent's plumbers. Noel's conduct on February 13 comprised a loss of temper that did not result in any detriment to the Respondent. At the end of the working day on Friday, February 13, Noel was advised that the usual indoor parking facility for the truck he was using was not available and that he would have to park the truck outside the protected garage. This necessitated his removing tools and materials into the garage. Apparently Noel was angry by this requirement and unloaded the tools and materials in what is deemed to be a rough fashion. He swore and drove the truck about 40 to 50 feet at an alleged rapid rate of speed to the allotted parking location.

⁶ The discharge of Noel is discussed in detail below.

No contention has been made that tools or materials were damaged by the manner in which they were unloaded nor was the truck in any way damaged by the mode of driving it to the parking place. The Respondent's bookkeeper and Gerber's brother-in-law overheard and witnesses the episode and advised Gerber. It is my conclusion that the incident was a minor loss of composure by Noel and one which would not have attracted such attention unless other reasons existed for close observation of Noel's conduct. This impression that Noel's conduct was more closely observed than ordinary is further suggested by the haste with which Gerber's brother-in-law exercised in conveying the episode to Gerber. An hour after the incident Gerber's brother-in-law crossed the street to a gas station where he saw Gerber to tell him of the incident. The incident is not one such as would warrant discharge in ordinary circumstances but rather was seized upon by Gerber to discharge Noel a leader, if not the primary leader, of the union activists. Further supporting the conclusion that Noel was discharged other than for disciplinary reasons is the significant fact that he was not given an opportunity to explain the circumstances giving rise to the incident. Accordingly, I reject the proffered reasons for the discharge of Noel and find that Noel was discharged because of his union activities which gave rise to an expressed antagonism to Noel in Gerber. Accordingly, I find that the Respondent by discharging Noel on February 16, violated Section 8(a)(3) of the Act.

5. The objections of the Union to the election of June 12 and the challenged ballot

The Union has filed objections to the election of June 12. These objections are alleged as follows:

1. During the critical period the employer engaged in extensive interrogation of employees about union activities.
2. During the critical period the employer threatened employees with discharge and other adverse consequences if they would not abandon the Union.
3. During the critical period the employer solicited grievances and promised to remedy grievances.
4. During the critical period the employer discriminated against various employees by revoking truck privileges, transferring employees, and imposing new work rules.
5. During the critical period the employer discriminatorily discharged James Noel.

In conformance with the foregoing findings of violations on the part of the Respondent of Section 8(a)(1) and (3) of the Act, Objections 1, 2, 3, and 5 are sustained. The fourth objection filed by the Union to the election charges that the employer discriminated against various employees by revoking truck privileges, transferring employees, and imposing new work rules. The truck privileges were invoked as a result of the Respondent's reluctance to have his vehicles parked in front of a tavern frequented by the employee driver even though such circumstances arose outside the period of employment. The involved employees agreed that such a request was reasonable and chose to use their own vehicles after hours rather than those of the Respondent. This is

not an unreasonable or discriminating adjustment of prior conduct. The transferring of employees and the imposition of new work rules has not been established by a preponderance of the evidence to be of any substance and, accordingly, the fourth objection is overruled.⁷

The challenged ballots was that of James Noel. The challenge arose at the insistence of the Board agent conducting the election because Noel's name did not appear on the eligibility list furnished by the employer. Since I have found that Noel was discharged in violation of Section 8(a)(3) of the Act and as set forth below, Noel shall be reinstated and the appropriate remedies in the case applied. As a result, Noel should have been eligible to vote at the election and I find that the challenge to his ballot is not sustained and that ballot shall be counted.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within meaning of Section 2(2), (6), and (7) of the Act and the Board has jurisdiction over the subject matter in the parties hereto and further that it will effectuate the policies of the Act to assert jurisdiction in this case.
 2. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
 3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by:
 - (a) Interrogating its employees concerning their union activities and sympathies and the union activities and sympathies of other employees.
 - (b) Imparted the impression of surveillance of the employees' union activities.
 - (c) Solicited grievances from the employees with the implied promise of remedying such grievances.
 - (d) Promised benefits to its employees in the form of pensions and guarantees of employment.
 - (e) Offered to reimburse financial outlays of new union members among its employees if the employees would abandon the Union.
 - (f) Threatened the employees with loss of their jobs by the hiring of other journeymen plumbers who are union members.
 - (g) Threaten to discharge employees in the event of a successful union election.
 - (h) Discharged James Noel because of his union activities.
 4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by discharging James Noel because of his exercise of Union and protected concerted activities.
 5. The General Counsel has failed to establish by a preponderance of the evidence in this record that the Respondent has violated the Act by revoking certain employee privileges.
- The aforesaid practices comprise unfair labor practices affecting commerce within the meaning of the Act.

⁷ Objections 6 and 7 have been withdrawn by the Union.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices it shall be ordered that it cease and desist therefrom or from engaging in any similar or related conduct and that it take certain affirmative action by posting an appropriate notice, and taking certain affirmative action designed to effectuate the purposes and policies of the Act.

Having found that the Respondent discharged James Noel, I recommend that the Respondent be ordered to reinstate him to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges he previously enjoyed and to make him whole for any loss of earnings he may have suffered by reason of his discharge by paying to him a sum of money equal to that which he would normally have earned absent the discharge, less earnings during such period to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

The General Counsel has requested that the remedy appropriate in this case in regard to the representative election on June 12, and all surrounding circumstances is that the ballot of James Noel be counted and as a result of such count a determination be made whether or not the election of June 12 resulted in certification of representation on the part of Respondent's employees and in the event such ballot does not provide the Union with the majority in such election that a bargaining order be issued. Ordinarily, a tainted election should be held for naught and declared null and void; however, in this case in view of the potential that the election would have resulted in a union majority notwithstanding the unlawful conduct of the Respondent had Noel's ballot been counted, it is prudent in the interest of time and expense to validate the election if the Union obtains a majority as a result of Noel's ballot.⁹ The alternative remedy requested by the General Counsel is the imposition of a bargaining order on the Respondent. In order to impose a bargaining order on the Respondent, it must be concluded that the Respondent's unlawful conduct had a "tendency" to undermine the Union's majority. The unlawful conduct undertaken by the Respondent here was of such a degree in severity and frequency as to tend to undermine the Union's strength and to intimidate an employee in the exercise of his free choice. It is also questionable whether the conventional remedy of a cease-and-desist order without the bargaining order would accomplish an erasing of the effects of the Respondent's past practices and ensure a fair election in the event a new election is ordered, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1967). Accordingly, it is appropriate here for the reasons expressed above to require that in the event the counting of the ballot cast by James Noel does not give the Union a majority that the Respondent be ordered to negotiate with the Union as the certified representative

⁹ There were 23 ballots cast at the election, 11 for the petitioner and 11 against the petitioner. The inclusion of Noel's ballot in the results of the election, therefore, would tip the scale.

of the employees of Respondent comprising the appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended⁹

ORDER

The Respondent, The Gerber Company, Portland, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union activities and sympathies or the activities and sympathies of coemployees.

(b) Creating the impression of surveillance of its employees of their union activities.

(c) Soliciting grievances of the employees and by so doing implying to resolve such grievances without negotiations with the Union.

(d) Promising benefits to its employees without bargaining regarding such benefits with the Union.

(e) Threatening employees with discharge or replacement by other union journeymen plumbers.

(f) Offering benefits to employees to abandon the Union.

(g) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, as the exclusive bargaining representative of the Respondent's employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including construction and service employees employed by this Respondent at its Portland, Maine location excluding office clerical employees, professional employees, guards and supervisors as defined by the Act.

2. Take the following affirmative action which has been found to effectuate the policies and purposes of the Act.

(a) Offer James Noel full reinstatement to his former job or if said position no longer exists to a substantially equivalent position of employment without prejudice to his seniority or rights and privileges he formerly enjoyed and to make him whole for any loss of pay or other benefits which he may have suffered by reason of the unlawful discrimination practiced against him to be computed in accordance with the *F. W. Woolworth* formula,¹⁰ with interest calculated in accordance with the adjusted prime rate used by the Internal Revenue Service to compute interest tax payments. *Florida Steel Corp.*, 231 NLRB 651 (1977); *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

(b) Expunge from its files any reference to the discharge of James Noel and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) 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.

(d) Post in a conspicuous place on the Respondent's premises copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the

¹¹ 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 Na-

Regional Director for Region 1, 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.

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

tional 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."