

**Chicago Tribune Company and Local 134, International Brotherhood of Electrical Workers, AFL-CIO.** Cases 13-CA-28070, 13-CA-28247, and 13-CA-28311

December 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On July 3, 1990, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.<sup>1</sup>

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,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

<sup>1</sup>The Charging Party adopted the General Counsel's brief in response.

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

In its exceptions, the Respondent also asserts that the judge engaged in improper trial conduct, including, but not limited to, his interference with proper cross-examination, his interference with the presentation of evidence, his forcing counsel to introduce exhibits, his conducting sua sponte voir dire examination, and his sua sponte hearsay objections. After a careful examination of the entire record, we are satisfied that the assertion is without merit.

In his decision the judge inadvertently stated that employee Martin Kaczmarek used profanity on June 16. The correct date of the incident was January 16.

In agreeing with the judge that the Respondent violated Sec. 8(a)(3) of the Act by suspending employee Kaczmarek for "refusing to respond" to a possible fire situation, we do not rely on his conclusion that the situation was not an emergency because "there was, in fact, no fire and no smoke, only an odor." However, we agree with the judge that the credited evidence shows that there was no failure to respond to the situation because Kaczmarek immediately attempted to locate the source of the smell of smoke.

<sup>3</sup>In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Kaczmarek, we agree with the judge that the Respondent's asserted reason, namely, Kaczmarek's use of obscene and profane language, was pretextual. In doing so, we agree with the judge's alternative finding that the Respondent failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish that it would have taken the same action with respect to Kaczmarek even absent his union activities. We do not, however, adopt the judge's finding that this case is not appropriate for a *Wright Line* analysis. We emphasize that the Board's test in the application of *Wright Line*, 251 NLRB at 1089, applies to "all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation," including both "pretext" and "dual motivation" cases. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Jessica T. Willis and Paul Bosanac, Esqs.*, for the General Counsel.

*Douglas A. Darch, Esq.*, of Chicago, Illinois, for the Respondent.

*Robert E. Fitzgerald Jr., Esq.*, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. On timely filed charges by Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Union or Charging Party), a complaint issued in Case 13-CA-28070<sup>1</sup> on November 22, 1988, alleging that Chicago Tribune Company (Respondent or Employer) violated Section 8(a)(1) and (3) of the Act by prohibiting employees from bringing food on the shop floor and by suspending Martin Kaczmarek, an employee. Thereafter, on January 24, 1989, a complaint issued in Case 13-CA-28247 alleging that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a verbal and a written warning to Kaczmarek. On March 7, 1989, a complaint issued in Case 13-CA-28311 alleging that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written disciplinary warning to Kaczmarek and subsequently discharging Kaczmarek in about February 3, 1989. Answers were timely filed by Respondent. On March 7, 1989, an order consolidating cases and notice of consolidated hearing on Cases 13-CA-28070, 13-CA-28247, and 13-CA-28311 was issued. Pursuant to notice, a hearing was held before the administrative law judge on June 22, 23, July 31, and August 1 and 2, 1989. Briefs have been timely filed by General Counsel, Respondent, and Charging Party, which have been considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is an Illinois corporation engaged in the production, circulation, and distribution of newspapers at its facilities in Chicago, Illinois. During the past calendar year in the course and conduct of its business operations, Employer derived gross revenues in excess of \$200,000, held

<sup>1</sup>On July 31, at the hearing that portion of the complaint in Case 13-CA-28070 alleging a violation by prohibiting employees from bringing food on the shop floor (par. V) was dismissed on motion by the Respondent, joined by the General Counsel.

membership in or subscribed to various interstate news services, published nationally syndicated features and advertised various nationally sold products. During the past calendar year, Employer, in the course and conduct of its business operations, purchased and received at its Chicago, Illinois facilities, products, goods, and materials valued in excess of \$5000 directly from points outside the State of Illinois. The complaint alleges, the Employer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

### A. *Facts*<sup>2</sup>

Respondent publishes the Chicago Tribune, as well as press runs of USA Today. These operations are conducted principally out of the Respondent's Chicago printing facilities known as Freedom Center. Approximately 1800 employees work at Freedom Center, which operates three shifts on a 24-hour basis. Most of the newspaper runs take place in late evening and early morning hours so that these editions are available for early morning delivery. The third shift (11 p.m. to 7 a.m.), which is the shift primarily involved in the instant case, has about 800 employees, including the alleged discriminatee, Kaczmarek, who is an electrician on that shift.

The hierarchy of supervision from the top, insofar as relevant here, consists of Thomas Hojnicky, director of engineering, with overall supervision of electricians and machinists. Franz Perfect, operations manager, was responsible for electricians. Each of the three shifts employed an electrical supervisor. On the third shift, these were Ken Muskievitz until January 1989, and Leon Gebhart thereafter. As noted above, Kaczmarek was an electrician on the third shift. Occasionally, Kaczmarek was supervised by Tom Beilke, second shift supervisor (3 p.m. to 11 p.m.), when Kaczmarek was the "early man" on the third shift reporting to work 1 hour early at 10 p.m.

For over 40 years, the electricians have been represented informally, without a contract, by the Union. This informal relationship terminated when the Union filed a petition for an NLRB election, conducted on October 4, 1988, wherein the Union was elected the exclusive bargaining representative for the electricians' unit. Kaczmarek had been a union member throughout his employment, beginning in 1983. From 1986 until his discharge in February 1989, Kaczmarek was the union steward for all three shifts of electricians. When union

unfair labor practice charges were filed, Kaczmarek gave a statement to the National Labor Relations Board. During the election campaign, Kaczmarek was an active and open union supporter. In this regard, Kaczmarek told electricians about upcoming organizational meetings and attended organizational meetings during the summer of 1988. He campaigned for the Union at work, soliciting employee support for the Union at lunchtimes and during breaks. He also appeared to testify at the representation case hearing set for August 17, 1988.<sup>3</sup> Several times prior to the October 4 election, Kaczmarek wore a T-shirt to work inscribed "October 4th Vote Yes." He was observed by several supervisors wearing the T-shirt, including Hojnicky, Perfect, and Gebhart. Hojnicky and Perfect commented to him about the T-shirt. Kaczmarek also acted as the Union's observer at the October 4 election.

On the same day of and after the election, at about 5 a.m., Kaczmarek was doing some preventive maintenance work in the reel room in the area of press 3 when he was approached by Robert Sweet, a pressroom supervisor who was unknown to Kaczmarek, although Sweet knew who Kaczmarek was and was aware that he was a union member. Sweet mentioned to Kaczmarek that he smelled smoke and asked Kaczmarek if he smelled it. Kaczmarek credibly testified that he told Sweet that he did not smell any smoke and directed Sweet to his foreman, Ken Muskievitz, who was also the leader of the emergency response team charged with responding to emergency situations.<sup>4</sup> Sweet left; Kaczmarek stopped working and began to investigate Sweet's concern. As Kaczmarek began to investigate, he smelled an odor. He went to the reel room where he inspected drive motors for overheating and was discussing the problem with two machinists named Bill Stewart and Bob Wojota. In the meantime, Sweet had approached Hojnicky and complained that when he asked Kaczmarek about the smell, he got a "smart ass answer" to go ask Kaczmarek's foreman. Hojnicky then went to Kaczmarek and directed him to find the source of the odor. It does not appear that Hojnicky said anything to Kaczmarek about Kaczmarek's response to Sweet nor did Kaczmarek say that he was already looking for the source of the odor at the time Hojnicky approached him.

On further investigation, Kaczmarek determined that there was no smoke and no fire; that the odor was coming from a heat duct, apparently the type of odor caused by turning on an unused electric heating system. Kaczmarek then went to Hojnicky and reported this to him.

As to this incident, Sweet wrote a memo dated October 4 to his supervisor, Bill Unger, manager/plate and press, reciting:

This letter is to inform you of what I consider a poor response to a question asked to one of our support staff members.

This morning Lee Langon, Don Wickersham, and myself were in the Pressroom Office when Lee received a call from someone saying they smelled smoke in the Pressroom. Upon our investigation it seemed the strongest odor of smoke was coming from the area

<sup>2</sup>There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of witnesses, I rely specifically on their demeanor and have made my findings accordingly. While apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161 (1966).

<sup>3</sup>All dates refer to either 1988 or 1989 as appropriate to the chronology, unless otherwise indicated.

<sup>4</sup>All the electricians on each shift were members of the emergency response team.

around Press 3, the Audit press. I thought there might have been a chance of some welding being done since Electricians and Machinist were working on the Audit.

I asked an Electrician named Marty if he had smelled any smoke, and he responded yes. I walked away to continue looking for the source of the smell. A few minutes later I returned to Marty and asked him if he knew if anyone had been welding in the Reelroom. Marty's response was for me to go to the Machine Shop Office and ask Kenny the Foreman.

I don't feel this response was appropriate from an Electrician when being asked about a possible fire situation by a Pressroom Supervisor.

Hojnicki, by memo dated October 4, wrote to Perfect stating, inter alia:

Subject: Possible Fire Situation

At approximately 05:00 hours while touring the Reelroom area, Bob Sweet approached me and appeared concerned about the strong smell of smoke odor around press #3. It smelled like an electrical fire.

Bob Sweet indicated that he approached M. Kaczmarek and asked for help and was told "see my foreman." I later approached Marty and told him to stop what he was doing and assist us in locating the source of smoke.

Franz, I was of the opinion that our electricians are part of an emergency response team. I think that M. Kaczmarek demonstrated his lack of interest in the situation, and did not effectively represent this department in what could have been a most serious situation.

It is important that you reinforce this division's position in matters such as this.

Unger also wrote to Hojnicky, by memo dated October 5, stating:

I'm sure you will agree that this type of cooperation in a potentially dangerous situation is not acceptable.

Response by your staff is critical. It could have been a "fire"!

A memo on Perfect's calendar for October 6 reads:

TOM HOJNICKI GAVE ME LETTERS FROM BOB SWEET, BILL UNGER AND HIMSELF. THE LETTERS RELATED AN INCIDENT ON OCT 5 IN WHICH M. KACZMAREK DID NOT RESPOND TO A SMOKE CALL ON PRESS 3. I WILL MEET AUDREY BANK TO DISCUSS THIS AT 4:20.

AUDREY BANK WE WILL MEET AT 6:00 AM. TOMORROW TO TALK TO MARTY KACZMAREK ABOUT THE FIRE RESPONSE PROBLEM.

However, Perfect went on vacation and it was not until October 12 that a disciplinary meeting was held. In addition to Kaczmarek, the meeting was attended by Perfect and Luis Lewin, manager of employee relations who is Banks' supervisor. It is undisputed that whatever investigation was conducted prior to October 12, it did not extend to Kaczmarek, Stewart, or Wojota. At the October 12 meeting, Kaczmarek was advised that he was being suspended without pay for failing to respond to a fire emergency, pending further investigation to determine his employment status. Kaczmarek de-

clined to give any statement to Lewin, saying that the matter was idiotic and that he would consult his attorney.

On October 18, Kaczmarek was called by Perfect to report on October 19 at 6:45 a.m. for a meeting with Lewin. This meeting was also attended by Jim Kulas, who Kaczmarek thought was a lawyer for Respondent. Kaczmarek was given a written suspension from Perfect dated October 19, which he refused to sign. The suspension notice read:

On October 12, 1988, you were placed on suspension without pay pending further investigation and a review of all facts regarding your serious violations of established Company policies prohibiting safety violations; neglect of job duties; refusal to carry out supervisor's instructions; and failure to respond to an emergency situation as a qualified member of the EMERGENCY RESPONSE TEAM.

On October 4, 1988, at approximately 5:00 a.m., there was a strong smell of smoke around Press #3 where you were assigned. The smoke smelled like an electrical fire. You failed to immediately respond and, when approached by a supervisor and directed to take care of the problem, you responded, "go see my foreman." The division manager of the Engineering Department had to request you personally to locate the source of the smoke. Your negligence in responding to a potential emergency situation was a very serious unsafe act. A possible fire in the Pressroom could have catastrophic consequences in terms of injuries to fellow employees and damage to very expensive equipment. As a member of the EMERGENCY RESPONSE TEAM you have been specifically trained to respond to situations like this. In addition, as an electrician assigned to the Pressroom, you should have responded immediately. Your refusal to respond to a potential emergency situation is a very serious violation of Company policy.

After conducting a thorough investigation and a review of all pertinent facts regarding the aforesaid violations, we have no other alternative but to uphold your suspension without pay from October 12, 1988, to October 19, 1988.

The aforesaid serious violations of Company policies and procedures are inexcusable. Please be advised that this is your LAST AND FINAL WARNING. Any additional violations of Company policies and/or procedures will result in the immediate termination of your employment with Chicago Tribune Company.

Since the time of his suspension had been served, Kaczmarek was allowed to return to work that evening.

On November 4, another incident occurred. Kaczmarek was working as the early man on the third shift. As the early man, Kaczmarek reported to work 1 hour early at 10 p.m. and worked until 6 a.m. Each shift had an early man who reported 1 hour early. The purpose of the early man was primarily to cover a time period of about one-half hour from about 10:45 p.m., when the electricians on the second shift left the floor to wash up, to 11:15 p.m. when the third-shift electricians reported to work on the floor. The early man also performed prerun checks on press equipment, covered running press lines, and was available for emergencies.

On November 4, Kaczmarek reported to work sometime before 10 p.m. He went to the second floor maintenance

shop to get his tools. On the way to the elevator, at a few minutes past 10 p.m., he stopped at the cafeteria. Perfect and Tom Beilke were also in the cafeteria at this time. He purchased coffee and some food which he carried with him to the elevators and then to the fifth floor maintenance shop. When he arrived on the fifth floor, Kaczmarek went to the fifth floor maintenance shop to check the log to see if any breakdowns had occurred requiring his attention. There being none, he went to the back of the shop, set down his food and coffee on a table and, as he took a bite, there came into the shop Perfect and Beilke, who told Kaczmarek that he was out of his work area and was not supposed to be eating. With that, Kaczmarek put the food into the refrigerator, picked up his tools, and went out onto the shop floor.

Kaczmarek testified that there were no work rules prohibiting eating in the maintenance shop and it was part of his normal routine, when he was the early man, to stop at the cafeteria for coffee and food. This testimony was corroborated by electricians Gene Szostak and Frank Sojka, both of whom testified that it was a normal practice to pick up food and drink to consume when starting work as early men. It does not appear that this practice had been previously prohibited. Szostak testified, "I don't know if it is a verbal. It is just understood, you know. It has always been done. You eat in the shop."

On November 10, Kaczmarek was called into Perfect's office. Beilke and Muskievicz were also in attendance. Kaczmarek was advised by Perfect that he was being given a verbal warning for eating and being absent from his work area. Kaczmarek protested that Muskievicz had allowed this since the cafeteria closed before the third shift's regularly scheduled lunchbreak. Muskievicz denied this at this time but later conceded that he and Perfect had authorized third-shift electricians to take an early lunch when requested and work allowed, because the cafeteria hot food line closed at midnight. Muskievicz apologized to Kaczmarek for having denied this in Perfect's office.

On November 15, Kaczmarek was called into Perfect's office and given a written warning dated November 10, described as a "verbal warning," covering the incident. Kaczmarek refused to sign it. The warning read:

This is to confirm our conversation of Thursday, November 10, 1988, regarding your unauthorized absence from your work area.

On November 4, 1988, you were assigned to be the "early morning person" on the third shift. As you are well aware, the "early morning person" starts his shift one hour earlier than the rest of the electricians. The purpose of this early start is to insure a smooth transition between shifts in the packaging area. It is the responsibility of the "early morning person" to begin work promptly and to seek out electricians from the previous shift to make sure that he's well acquainted with any problems which will transfer to his shift. He's also accountable for checking out equipment to insure that all is ready for the run of his shift. These responsibilities have been explained to all electricians and is part of their overall performance.

On the above date, you were found at approximately 10:10 p.m. (start time 10:00 p.m.) eating instead of being at your assigned work area in the Packaging De-

partment. This is a direct violation of departmental procedures.

Please be advised that this is a VERBAL WARNING. The unauthorized absence from the work area compromises the efficient performance of work duties. Any additional violations of policies and/or procedures will lead to further and more severe corrective action which could be the termination of your employment with the Chicago Tribune Company.

Be further advised that this is your second violation of company policy. On October 19, 1988, you received a Last and Final Warning for serious violations of company policy.

In another incident on January 16, 1989, Kaczmarek was working with an apprentice electrician, Mike Kielba. At about 11:15 p.m., Kaczmarek suggested that they go into the breakroom on the fifth floor to have a cigarette and divide up some of their assigned work. When they entered the breakroom, which is the only designated smoking area on the fifth floor, they discovered that a meeting was in progress being conducted by Ed Cook, a packaging department supervisor, and some eight employees under his supervision. It appears that Cook and Kaczmarek exchanged words, with Cook asking them to leave because he was conducting a meeting. Kaczmarek complained that since this was the only smoking area on the fifth floor, that Cook should hold his meeting elsewhere. Cook testified that Kaczmarek, on leaving, asked "why the fuck" he could not smoke there, and told Cook that he should "get his shit" together.

On January 17, Cook called Audrey Banks and reported the incident to her. On the following day, January 18, Banks and Perfect met with Kaczmarek and advised him of the allegations that had been made against him by Cook and asked if he would like to give a statement relating his account of the incident. Kaczmarek refused to do so without first consulting an attorney and thereupon he was again suspended indefinitely pending investigation by Respondent of the incident to determine if further disciplinary action was warranted.

On January 25, while on suspension, Banks called Kaczmarek and asked if he would come to the plant to give statement on the January 16 incident. On the morning of January 26, Kaczmarek went to the plant. A meeting took place in Lewin's office, attended by Lewin, Kulas, and Kaczmarek. Lewin was taking notes of Kaczmarek's version of the incident. Perfect was not present at this meeting, however Lewin handed Kaczmarek a written warning dated January 26 from Perfect concerning another incident which had occurred on January 10, predating the January 16 incident, wherein Kaczmarek was alleged to have refused to cooperate with a newsprint supervisor as to an overload problem on a graphic panel, telling the supervisor to call the electrical shop for assistance. That warning reads:

This is to confirm our conversation of Thursday, January 26, 1989 regarding your unacceptable performance.

On January 10, 1989 you were assigned to work in the Reel Room. At approximately 6:10 a.m. (regular working hours), a newsprint supervisor requested assistance because of an overload on one of the graphic pan-

els. You refused to cooperate and told the supervisor to call the shop and proceeded to leave the area. Prior to this incident your own supervisor informed you that responding to these situations was a requirement of your job. Your failure to follow procedures outlined by your supervisor is a direct violation of company policy. In addition to other violations; you were also found taking an unauthorized break in direct violation of departmental policies and procedures. This failure to neglect your duties is very serious .

Please be advised that this is a warning for a serious violation of procedures. Any similar incidences will result in either suspension and/or the termination of your employment with Chicago Tribune.

Be further advised that this is your third violation of company policy.

This was the first time that this incident had been called to Kaczmarek's attention. Kaczmarek refused to sign the warning and told Lewin that he was not involved in that incident at all; that he was not there. It is undisputed that Perfect had not spoken to Kaczmarek from the time he was suspended on January 18 until Lewin gave him the written warning from Perfect on January 26.

With respect to the January 10 incident itself, John Cannizzo, a newsprint supervisor, testified that about 6:10 a.m., he walked past a breakroom where he saw three electricians but could identify only Kaczmarek. As he walked into the reel room he noticed that an overhead light on a conveyor system was lit. At first, Cannizzo thought the electricians were working on it, but when it was still lit some 20 minutes later, he went to the breakroom and asked Kaczmarek if they were working on the conveyor light. Kaczmarek said they were not and Cannizzo asked if they would take a look at the problem or whether he should call the shop. According to Cannizzo Kaczmarek directed him to call the shop. Cannizzo then called Gebhart, but he was absent for the day. Cannizzo then decided to look into the problem himself and solved it by simply pressing the reset button. Cannizzo testified:

I went to the conveyor panel where the light was on. Normally, sometimes during a lot of heavy use the conveyors will overload. It is just a matter of pressing a reset button. It is a fairly standard practice. Rather than bother a machinist or electrician to run downstairs to reset it, we do it ourselves. If that was the case I could take care of that. It was. I went over there and press[ed] the reset button and the conveyor reset.

Kielba testified that he and another electrician, Dave Cooper, were in the breakroom when Cannizzo came in and asked them if they knew anything about a conveyor system that was not running. According to Kielba, Kaczmarek was not to his recollection in the breakroom. They did not and suggested that Cannizzo call the shop, that maybe someone was working on it or they would send someone to check it out, whereupon Cannizzo simply said okay and left. Having reviewed the record and in evaluating the probative testimony, I am satisfied that Kielba and Kaczmarek's recollections are more reliable. Cannizzo's testimony was unimpressive, particularly in its failure to clearly establish the positions and identities of those in the breakroom.

Kielba's testimony was more credible, particularly since it was given against the interests of his own employer. In short, I am persuaded that Kaczmarek was not present during the time of this incident. On the next day, Cannizzo told Gebhart about the incident. Gebhart asked Cannizzo if he would provide a statement later if it were needed, and he agreed. Subsequently, Lewin called Cannizzo and asked him to write up a brief statement about the incident. By memo dated January 17, Cannizzo complied with Lewin's request. That memo reads:

AT APPROX. 6:10 AM ON TUES 1-10-89 I ENTERED NEWSPRINT OP. THRU SOUTH DOOR AND SAW 3 PEOPLE SITTING IN THE SOUTH CANTEEN. THEY WERE MARTY KACZMAREK (2) AN ELECTRICIAN, AN ELEC. APPRENTICE WHO I KNOW BY SIGHT, BUT NOT NAME AND 1 OTHER EMPLOYEE WHO I DO NOT KNOW AND COULD NOT IDENTIFY. I SAW AN OVERLOAD ON ONE OF MY GRAPHIC PANELS & THOUGHT THAT THEY WERE WORKING ON THE SYSTEM. I RETURNED ABOUT 6:35 AM AND ASKED THEM IF THEY WERE WORKING ON THE SYSTEM. THEY SAID "NO." I THEN ASKED IF I SHOULD CALL THE SHOP OR IF ONE OF THEM WOULD TAKE A LOOK AT THE OVERLOAD FOR ME. MARTY RESPONDED "CALL THE SHOP BECAUSE THEY WEREN'T WORKING DOWN HERE. (OR SOMETHING SIMILAR) THEY THEN GOT UP AND WENT THEIR OWN WAYS. I FOUND THE PROBLEM AND TOOK CARE OF IT MYSELF. I DIDN'T REPORT THIS TO THE ELECT. SHIFT SUPERVISOR TILL 1-12-89.

Kielba and Cooper were also given written warnings in connection with this incident. However, both of these warnings were rescinded by Perfect. As to Kielba, Perfect determined that since Kielba, an apprentice, was obligated to follow the directions of a journeyman, he was not responsible for the incident. As to Cooper, his disciplinary notice was rescinded by Perfect on the grounds that it was Kaczmarek, not Cooper, assigned to cover trouble calls that day and that discipline was not appropriate.

After the meeting on January 26, Kaczmarek's suspension continued and Kaczmarek received notice of his termination by letter from Perfect dated February 3, 1989. The letter reads:

This is to apprise you of your employment status with Chicago Tribune Company. On January 18, 1989, you were placed on suspension without pay pending further investigation and review of all facts regarding your alleged serious violations of established company policies prohibiting the harassment of other employees; the use of vile, obscene and profane language, and offensive and abusive behavior toward a management representative. At this time, you were informed that a determination regarding your employment status with the Chicago Tribune Company would be communicated to you.

After conducting a thorough investigation, including your own statement of the facts, it has been determined that all relevant facts regarding the aforesaid violations of company policies have been substantiated. Specifically, on January 16, 1989 at approximately 11:15 p.m. (unauthorized break time), you went into the west canteen on the 5th floor to smoke a cigarette. The

door on the canteen was closed because a Packaging Supervisor was holding his regularly scheduled weekly meeting with his crew. At this time, the Packaging Supervisor told you that he was having a crew meeting which would end in approximately ten minutes. You became abusive and offensive toward this Supervisor, and used obscene and profane language which resulted in several complaints of harassment from the Packaging employees in this room. This resulted in employees becoming extremely upset and in the disruption of this meeting.

A review of your overall performance shows that you have continuously refused to abide by company and/or departmental policies and procedures. Specifically, on October 12, 1988, you were placed on suspension without pay for refusing to respond to an emergency situation; on November 10, 1988, you were issued a warning for an unauthorized absence from your work area, and on January 10, 1989, you were issued another warning for neglect of duties and taking an unauthorized break.

Based on the aforesaid repeated violations of company and departmental policies, we have no other alternative but to terminate your employment with Chicago Tribune Company effective immediately.

#### B. *Analysis and Conclusions*

Respondent contends that Kaczmarek was disciplined for engaging in various misconduct which justified his suspension and subsequent discharge. The General Counsel takes the position that the justification offered for the disciplinary actions against Kaczmarek were pretextual and that the Respondent was actually motivated by antiunion considerations. I am satisfied that the General Counsel's position should prevail.

Turning first to Kaczmarek's union activity, there can be no doubt that Kaczmarek was an active union official and supporter and that Respondent was aware of his activities on behalf of the Union. As set out more fully above, Kaczmarek was shop steward fully committed to the Union's organizational effort and an observer at the election held on October 4.

With respect to the October 4 incident, Kaczmarek was suspended on October 12 for what was described in the February 3 discharge letter as "refusing to respond to an emergency situation." This conclusion is not warranted by the facts. When Kaczmarek was approached by Sweet, although he did not smell smoke himself, he directed Sweet to contact his supervisor who, as head of the emergency response team, needed to be notified. Sweet only asked Kaczmarek if he smelled smoke and did not ask Kaczmarek to help him look for the source. Moreover, Kaczmarek did not refuse to respond and, in fact, he began to investigate the situation and was so engaged when Hojnicki asked him to check out the source of the odor. Nor was the situation an emergency, since, as Kaczmarek discovered, the odor was coming from heat ducts caused when the heating system was turned on. There was, in fact, no fire and no smoke, only an odor. In these circumstances, noting particularly Respondent's failure to interview Kaczmarek, I am convinced that Kaczmarek was suspended on October 12 for his activities on behalf of the Union and not for any misconduct because, in my view,

there had been no "refusal to respond" and no "emergency situation," whatever Sweet's reaction to his conversation Kaczmarek may have been.

Turning to the verbal warning of November 10 and the followup written warning of November 15, it appears that Kaczmarek, when he came to work as the early man, picked up some food which he was eating in the fifth floor maintenance shop when confronted by Perfect and Beilke. While the Respondent's discipline was predicated on Kaczmarek's "unauthorized absence from the work area," the maintenance shop is a part of the work area. Respondent really appears to be contending that Kaczmarek was disciplined because he was eating when he should have been working. However, the evidence discloses that there are no rules prohibiting the eating of food in that area and that it was common for electricians on all three shifts when serving as early men to do so, and none, except Kaczmarek, had ever been disciplined. Crediting, as I do, the testimony from electricians that eating at this time was a common practice, it is highly improbable that the shift foremen were not aware that it was happening, which persuades me that Kaczmarek was singled out by Respondent for disciplinary action. Noting particularly the prior unlawful suspension of Kaczmarek on October 12, I conclude that the disciplinary action of November 10 and 15 also constitute disparate treatment, undertaken because of Kaczmarek's activities on behalf of the Union.

The January 26 disciplinary warning recites Kaczmarek's refusal on January 10 to cooperate with a newsprint supervisor in connection with an overload light on a graphic panel and taking an unauthorized break. As noted above, I conclude that Kaczmarek was not involved in that incident, and accordingly that Respondent's recital of that incident does nothing to support its contention that Kaczmarek's discharge was justified by disciplinary considerations. Further, I conclude that this warning was discriminatorily motivated. In this regard, I have concluded that Cannizzo was not a reliable witness and have credited the testimony of Kaczmarek and Kielba that Kaczmarek was not present.

In addition, even assuming that he was, this was an insignificant matter, not warranting disciplinary action. Moreover, while the other participants in the incident had their warnings rescinded, Kaczmarek's was retained and cited as a factor in his discharge. In context with the other 8(a)(3) misconduct found, consisting of written warnings, suspensions, and finally discharge, I conclude that the January 26 written warning was a part of a continuing pattern of discrimination being conducted against Kaczmarek in an effort to provide a progression of disciplinary action in the hope of justifying Kaczmarek's discharge.

Finally, as to the January 16 smoking in the breakroom incident, it seems to me that Respondent's characterization of the incident is a distortion of what actually occurred. Kaczmarek and Kielba went to the only designated smoking area on the floor, a breakroom, for a smoke. The room was occupied by Cook who was using it for a meeting with his supervisees. While it may be that Kaczmarek reacted with some profanity to his disappointment at not being able to smoke in the breakroom, I cannot conclude that this misconduct was sufficiently serious to constitute, either standing alone or in context with other incidents cited by Respondent, sufficient justification for his discharge. In short, the evi-

dence adduced at this hearing convinces me that Respondent, since the time of the October 4 election, was seeking out incidents, however trivial, on which to build a record to support Kaczmarek's eventual discharge. Accordingly, I conclude that the reasons assigned by Respondent for the disciplinary action it took were pretextual and that the real reason was Kaczmarek's open, significant, and long-term support for the Union. I do not regard this as a dual motive case appropriate for the application of "*Wright Line*"<sup>5</sup> criteria. I conclude that there was only one motive for the disciplinary action taken by Respondent and that was discriminatory, prompted by Kaczmarek's union activity. *Cone Mills Corp.*, 298 NLRB 661 (1990).

However, in the event that a *Wright Line* theory were deemed appropriate, I further conclude that only Kaczmarek's use of profanity during the June 16 incident could be viewed as misconduct. However, as noted above, the substance of the misconduct, despite Respondent's hyperbole, was inconsequential. Therefore, I conclude that General Counsel has made out a prima facie case since Kaczmarek's protected union activity was a motivating factor in Respondent's decision to discharge him. I further conclude that Respondent has not sustained its burden under *Wright Line* of showing that it would have taken the same action, even in the absence of Kaczmarek's union activity. In fact, the only misconduct so trivial as to virtually preclude such a result.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III above, occurring in connection with Respondent's operations described in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designated to effectuate the policies of the Act. I have found that Respondent suspended and discharged Martin Kaczmarek for reasons which offended the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Employer make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him. All backpay and reimbursement provided herein, with interest, shall be computed in the manner described in *New Horizons for the Retarded*.<sup>6</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>5</sup> 251 NLRB 1083 (1980).

<sup>6</sup> In accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on or after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621, shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and later discharging Martin Kaczmarek, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By issuing written disciplinary notices to Martin Kaczmarek on November 10 and 15, and January 26, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing verbal or written warnings to employees in order to discourage their membership in or activities on behalf of Local 134, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

(b) Suspending or discharging employees in order to discourage their membership in or activities on behalf of Local 134, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

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

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

(a) Offer to Martin Kaczmarek immediate and full reinstatement to his former job or, if that job no longer exists, to substantially equivalent employment, and make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files the disciplinary memos of November 10 and 15, and January 26 and any references to the suspensions or discharge of Martin Kaczmarek, and notify him in writing that this has been done and that evidence of his unlawful suspensions and discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Freedom Center facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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

<sup>7</sup> 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.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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.

#### APPENDIX

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

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

WE WILL NOT issue verbal or written warnings to employees in order to discourage their membership in or activities on behalf of Local 134, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

WE WILL NOT suspend or discharge employees in order to discourage their membership in or activities on behalf of Local 134, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

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

WE WILL offer to Martin Kaczmarek immediate and full reinstatement to his former job or, if that job no longer exists, to substantially equivalent employment, and make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him.

WE WILL remove from our files the disciplinary memos of November 10 and 15, and January 26 and any references to the suspensions or discharge of Martin Kaczmarek, and notify him in writing that this has been done and that evidence of his unlawful suspensions or discharge will not be used as a basis for future personnel action against him.

CHICAGO TRIBUNE COMPANY