

Aratex Services, Inc. and Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 10-CA-23659 and 10-CA-23862-1

September 30, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On October 18, 1989, Administrative Law Judge Howard I. Grossman issued the attached decision.¹ The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings as modified,² and conclusions and to adopt the recommended Order.

I. THE DISCHARGE OF BAILEY

The judge found the General Counsel established a prima facie case under *Wright Line*³ that employee J. L. "Sonny" Bailey's protected activity was a motivating factor in the Respondent's decision to fire Bailey. The judge further found that the Respondent failed to establish it would have discharged Bailey even in the absence of his protected activity. Accordingly, the judge found that the Respondent's discharge of Bailey violated Section 8(a)(3) of the Act. We agree with the judge's finding for the reasons that follow.

The record establishes the Respondent's antiunion animus.⁴ The record also establishes that the Respondent knew of Bailey's principal role in the union cam-

paign. We find that the General Counsel established a prima facie case that Bailey's protected activity was a motivating factor behind his discharge. Accordingly, under *Wright Line*, supra, the burden shifts to the Respondent to show that it would have discharged Bailey even in the absence of his protected activity.

The Respondent contends that the weight of the evidence shows it would have discharged Bailey regardless of his protected activity because of his drinking during lunchtime, dishonesty about his drinking, and poor work performance. We disagree.

The Respondent's investigation into lunchtime drinking implicated four employees. After learning about the drinking, General Manager Mabrey and Plant Manager Kelley questioned two of the employees, Jordan and Allen. The statements the Respondent prepared for Jordan and Allen were worded to implicate only union supporters Bailey and Wells in drinking activities. After taking Jordan's and Allen's statements, the Respondent did not question Bailey or Wells in the investigation, but continued the investigation through other sources. Rather than questioning Bailey and Wells before making a decision, the Respondent prepared discharge letters only for the two union supporters.⁵ Despite finding that all four employees engaged in lunchtime drinking,⁶ the Respondent discharged only Bailey and Wells.⁷ The two employees who engaged in lunchtime drinking and were not discharged, Jordan and Allen, opposed the Union.⁸ We find that the evidence pertaining to the investigation indicates the Respondent targeted the two union supporters for disciplinary action.

The discharge letter prepared by the Respondent and given to Bailey states several grounds for dismissal: drinking on the job, inaccurate linen counts, dishonesty to customers, and failing to provide a medical excuse. In its exceptions to the judge's decision, the Respondent now argues that Bailey was discharged because of repeatedly violating a company rule against drinking during lunchtime, his dishonesty about drinking during working hours, and poor work performance.⁹

¹ On November 3 and 16, 1989, the judge issued errata.

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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and adopt the judge's credibility findings that are germane to our analysis. It is irrelevant to our analysis whether employee Allen's or Bailey's version of their September 12, 1988 telephone conversations is credited. Because we find it unnecessary to adopt the judge's findings and inferences concerning those conversations as well as other findings discussed below, we set forth the analysis on which we rely to adopt the judge's conclusions.

In sec. II, D, 1, par. 3, L. 7 of his decision, the judge inadvertently refers to a discussion as being held on April 11, rather than on April 6. The first word in the second paragraph of the judge's fn. 26 should be Bailey. We correct these errors.

³ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁴ The conduct evidencing the Respondent's animus was resolved in a settlement agreement. The conduct includes a statement directed at Bailey that he would lose his job if the union campaign failed. Although this allegation was settled, the parties agreed that the Board could rely on evidence supporting the 8(a)(1) allegations in evaluating the lawfulness of Bailey's discharge.

⁵ In finding that the Respondent's investigation evidences an intent to target union supporters, we do not rely on the advance preparation of the discharge letters.

⁶ By the time management became aware of the drinking and began its investigation, the practice of lunchtime drinking had stopped.

⁷ Wells' discharge was part of a settlement arrived at during the hearing and is not before the Board for consideration.

⁸ We note that Allen performed no work after lunchtime. Thus, the Respondent's rule against drinking may not have been applicable or reasonably enforced against him. Accordingly, we have not relied on the Respondent's different treatment of Bailey and Allen in determining whether the Respondent engaged in disparate treatment in discharging Bailey.

⁹ No longer does the Respondent rely on the failure to produce a medical excuse. This may be explained by the fact that the record contains no evidence that the Respondent before the union campaign disciplined any employee for failing to produce a medical excuse. The Respondent's shifting reasons for the discharge, in addition to its inconsistent hearing statements regarding the actual cause of discharge being the lunchtime drinking (Kelley) or the lying about it (Mabrey and Kelley), suggest that the Respondent is offering reasons it be-

Continued

The Respondent, recognizing the appearance of disparate treatment of Bailey and Jordan, explains that the “crucial distinction . . . lies in their reaction to management’s investigation of the drinking.” Significantly, this ground for discharge—what the Respondent now asserts is the critical basis for understanding the Company’s different treatment of Bailey and Jordan—was never explained to Bailey.¹⁰ The Respondent’s offering shifting reasons for the discharge is grounds for finding that the discharge was for an unlawful reason.

There is further evidence of disparate treatment in the way the Respondent treated Bailey, as opposed to Jordan. The judge found that Jordan had quit his job on July 27 while intoxicated due to lunchtime alcohol consumption. The judge discredited Kelley’s testimony that Jordan never spoke to him after lunchtime, and credited employee testimony that Jordan was noticeably intoxicated following lunch. Given the credited evidence that Jordan was visibly intoxicated after lunch and that Jordan spoke with Kelley at that time, we conclude Kelley knew that Jordan had been drinking. The Respondent allowed Jordan to return to work at his request a few days later. We find no credible, lawful explanation to explain the contrary actions the Respondent took with respect to Bailey and Jordan.¹¹

The Respondent also points to Robinson’s discharge in September 1988 for the possession of alcohol on his truck as evidence of enforcement of its alcohol policy. Robinson, however, previously had been warned about (not discharged for) having beer on his company-owned truck and had promised not to do it again. Robinson was allowed to return to work about 3 weeks after his discharge. Robinson was a repeat offender who had not honored a prior promise to the Respondent regarding alcohol, whereas Bailey was a first-time offender. Thus, Robinson was given a second chance after his first offense; Bailey was not.¹²

believes will sustain its position rather than the actual reasons for the discharge. The shifting and apparently false reasons for its actions lend further support to our finding that the discharge was unlawfully motivated. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

¹⁰Bailey was at no time informed that he was discharged for lying about the drinking, nor that he would not have been discharged had he told the truth. The discharge letter makes a passing reference to the Company’s expectation that Bailey will deny the drinking charge. But, the letter was prepared before any interview with Bailey and does not allege lying about the drinking as one of the grounds for discharge.

The Respondent’s self-serving testimony that Bailey would have been treated the same as Jordan had Bailey not lied is weakened by the Respondent’s failure to explain to Bailey at the time of his discharge the now-purported reason for his dismissal.

¹¹The Respondent asserts that other employees have been discharged for drinking. The other employees discharged for reasons relating to alcohol, however, all were intoxicated while performing their jobs. Bailey was never known to be intoxicated at work and there is no showing that his beer consumption affected his job performance. We reject the Respondent’s contention that Bailey and these employees were similarly situated.

In considering the Respondent’s alcohol policy, we do not rely on Christmas party drinking as evidence of the policy.

¹²For purposes of analysis, we assume Robinson was discharged and later reinstated. We observe that there is some dispute over whether Robinson was discharged or merely suspended. Even assuming that Robinson was discharged

Nor do we find that the record supports the Respondent’s assertion that Bailey was discharged for poor work performance. Bailey received a plaque praising his production in 1987. Jordan, who was also eligible for such an honor, did not receive an award. In 1988, when Kelley began receiving complaints about inaccurate linen counts, the Respondent issued oral warnings to both Bailey and Jordan. The complaints escalated in summer 1988¹³ and, on August 23, both Bailey and Jordan received written warning notices. The August 24 petition from drivers complaining about inaccurate linen counts, which the Respondent referred to in Bailey’s discharge letter, mentions no particular linen counter. The Respondent failed to explain how it ascertained that Bailey should be held responsible for the inaccurate counts. In fact, Jordan, who was not disciplined as a result of the petition, was as likely to be responsible as Bailey. Thus, the record contains no lawful explanation for singling out Bailey after receiving the August 24 petition.¹⁴

In sum, we find the General Counsel has established that one of the reasons for the Respondent’s decision to terminate Bailey was his protected activity. The Respondent has attempted to show that it would have discharged Bailey even in the absence of his protected activity. We find the Respondent’s arguments on this point unpersuasive, however. Rather, we find evidence of disparate treatment in the handling of Bailey’s case, as compared to those of Jordan and Robinson. Further, the Respondent offered no evidence of a similarly situated employee who received the same treatment as Bailey.

Finally, the Respondent’s employee handbook prohibition¹⁵ on drinking stating that violation of the rule will result in termination does not justify Bailey’s discharge. Given the overall circumstances discussed above, the rule alone is insufficient to satisfy the Respondent’s burden to show that it would have discharged Bailey for his drinking in the absence of his protected activity.¹⁶ Accordingly, we find the Respondent discharged Bailey in violation of Section 8(a)(3).¹⁷

for a first-time offense, we would not find it conclusive evidence sustaining the Respondent’s *Wright Line* burden because Robinson’s discharge occurred after the charge in this case was filed. The record contains no showing of the Respondent discharging any employee similarly situated to Bailey before the controversy in this case arose.

¹³All subsequent dates refer to 1988 unless specified otherwise.

¹⁴We adopt, *infra*, the judge’s finding that Bailey’s May 31 oral warning, which occurred after management learned of his role in the union campaign, violated Sec. 8(a)(3). Thus, this warning cannot serve as an explanation for singling out Bailey.

¹⁵The Respondent’s employee handbook prohibits, *inter alia*, “Drunkness, drinking alcoholic beverages during working hours (including meal periods) or being under the influence of alcoholic beverages during working hours.”

¹⁶The same section of the employee handbook that deals with drinking makes gambling an offense punishable by discharge. Evidence of the Respondent’s managers participating in and running gambling activities on the Respondent’s premises makes clear that not all the prohibitions in the handbook are enforced.

¹⁷We observe that on November 28 an Alabama Department of Industrial Relations Appeals Referee, considering Bailey’s contested unemployment

II. THE OTHER 8(A)(3) FINDINGS

During the hearing the parties entered into a settlement agreement resolving most of the issues in the consolidated complaint. The agreement provided, inter alia:

7. The parties will litigate only the discharge of Sonny Bailey before the National Labor Relations Board. The Board may rely upon the evidence of violation of Section 8(a)(1) of the Act in deciding the propriety of Mr. Bailey's discharge but will not issue any independent findings as to violations of this Section.

9. All other allegations in this complaint are deemed fully and finally resolved.

11. The parties agree to provide a copy of this agreement to the General Counsel for the sole purpose of policing compliance with its provisions, and not for any approval of its substantive provisions. Respondent will provide the General Counsel with evidence of compliance with its provisions when such is fully achieved.

The judge found that the settlement agreement did not exclude the Respondent's May 31 oral warning and August 23 written warning of Bailey from adjudication. He further found that these disciplinary actions violated Section 8(a)(3). The Respondent claims that these allegations are part of the settlement agreement. We agree, for the reasons that follow, that the 8(a)(3) allegations regarding the May 31 and August 23 discipline are properly before the Board.

First, this is a non-Board settlement agreement, which, according to its specific terms, was not submitted to the General Counsel for approval. The settlement bar doctrine of *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978), and related cases does not apply to non-Board settlements. See *Auto Bus*, 293 NLRB 855 (1989) (a Regional Director's approval of the withdrawal of charges does not estop him from issuing a complaint on subsequent charges alleging the same conduct even when a Board agent was involved in negotiations leading to non-Board settlement agreement). Thus, the Respondent's reliance on all-party settlement agreement cases is misplaced.

Under certain circumstances the Board may honor a non-Board settlement agreement. See *Independent Stave Co.*, 287 NLRB 740 (1987). But, before the Board will decide to honor a non-Board settlement agreement, it is axiomatic that the Board must be sure what issues the parties have settled. We find in this case that the scope of the settlement agreement is ambiguous. Paragraph 7 states that the parties will litigate

claim, found that Bailey was discharged for union activity rather than the misconduct alleged by the Respondent.

Bailey's discharge and may rely on evidence regarding 8(a)(1) allegations as background, but the Board will not make any independent findings concerning possible 8(a)(1) violations. Paragraph 9 states that all other allegations in the complaint are deemed resolved. The disciplinary actions at issue are alleged in the complaint as violations of Section 8(a)(3), and they are the underpinnings of Bailey's discharge. Because paragraph 7 preserves the right to introduce, as background, evidence relevant to the discharge and specifically precludes independent findings of Section 8(a)(1) only, we are uncertain whether the Respondent and the Union intended to bar litigation of what the complaint alleged as 8(a)(3) conduct related to Bailey's discharge. Therefore, we conclude that it would be inappropriate to find that the non-Board settlement agreement encompassed Bailey's disciplinary warnings.¹⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Aratex Services, Inc., Decatur, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹⁸In the absence of exceptions to the judge's discussion of the merits, we adopt the judge's findings that the May 31 and August 23 disciplinary warnings to Bailey violated Sec. 8(a)(3).

Gaye Nell Hymon, Esq., for the General Counsel.
Curtis L. Mack, Esq. and *Adam J. Conti, Esq. (Mack & Bernstein)*, of Atlanta, Georgia, for the Respondent.
Hubert Coker, Coordinator, of Fulton, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge in Case 10-CA-23659 was filed on September 14, 1988,¹ by Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), a first amended charge on September 22, and a second amended charge on October 25. The Union filed the original charge in Case 10-CA-23862-1 on December 20, and an amended charge on February 3, 1989. After issuance of a complaint and an amended consolidated complaint, a second amended consolidated complaint issued on February 3, 1989, involving the aforesaid cases and Case 10-CA-23701, in which an individual was the Charging Party.

A hearing was held before me on these matters in Decatur, Alabama, on May 15 through 18, 1989. At the hearing on May 16, the parties with my concurrence, entered into a settlement agreement with respect to Case 10-CA-23701, which was thereupon severed from the instant proceeding. The remaining allegations of the second amended consolidated

¹All dates are in 1988 unless otherwise specified.

complaint averred that Aratex Services, Inc. (Respondent or the Company) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) in various respects. Included in these contentions were allegations that Respondent unlawfully issued written warnings to employee J. L. Bailey on about July 18, August 24, and September 15, and unlawfully discharged him on the latter date, in violation of Section 8(a)(3) and (1).

Respondent and the Union on May 16 entered into a partial settlement agreement of these remaining allegations. As read into the record by Respondent's representative, the parties agreed to litigate "only the discharge of Bailey." The Company agreed to expunge from its records all references to disciplinary action against employees "with the exception of those related to Bailey." The parties agreed that the Board could rely on evidence of violations of Section 8(a)(1) in order to determine the "propriety of Bailey's discharge," but could not find any "independent" violations of this section of the Act.

Respondent's representative stated at the hearing that the actual written partial settlement agreement in Cases 10-CA-23659 and 10-CA-23862-1 would prevail over Respondent's characterization of it at the hearing. Respondent also volunteered to provide a copy of said settlement agreement to the General Counsel "for the sole purpose of policing compliance with its provisions and not for any approval." At the hearing, the General Counsel's representative nonetheless stated that she "agreed" with the settlement agreement. I thereupon accepted it.

Upon receipt of the record, I noted that the partial settlement agreement was not included therein, and requested Respondent to supply a copy. In response, Respondent supplied to all parties copies of the settlement agreement in Case 10-CA-23569, and the partial settlement agreement in Cases 10-CA-23569 and 10-CA-23862-1. In the first agreement, the parties signatory thereto are the individual charging party and Respondent. In the partial settlement agreement, the parties signatory thereto are the charging Union and Respondent. The General Counsel is not a signatory to either agreement and Bailey did not sign the second one. I have sua sponte entered both agreements into the record.²

Subsequent to the hearing, the General Counsel and Respondent filed briefs. In counsel for the General Counsel's brief, she argues, inter alia, that Respondent "issued warnings, suspended and discharged" Bailey in violation of the Act, and requests a remedy, including expunction of such matters from Respondent's files.³ Thereafter, Respondent filed a "Motion to File Reply Brief and Reply Brief," in which it argues that the General Counsel had requested a remedy pertaining to matters already settled by the parties.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business located at Decatur, Alabama, where it is

²Bd. Exh. 1.

³G.C. Br. 14.

engaged in the rental of textiles and work uniforms. During the calendar year preceding issuance of the complaint, a representative period, Respondent received at its Decatur, Alabama facility goods valued in excess of \$50,000 directly from suppliers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The pleadings establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNION CAMPAIGN AND RESPONDENT'S REACTION

A. Bailey's Participation in the Union Campaign, and Respondent's Reaction to the Campaign

The Union began an organizational campaign at Respondent's facility in the spring of 1988. Bailey testified that it began in "April and May," and that he was "an active union man." He received union authorization cards from the Union's representatives, distributed some to other employees, and obtained signatures on such cards. Bailey wore a union shirt at work, spoke to employees about the Union, and acted as a union observer at a Board election on July 22. Later, at a hearing on September 7, on Respondent's objections to the election, Bailey was a witness for the Union. Respondent's witness Ronnie Jordan stated that Bailey was very active for the Union, and General Manager Mabrey testified that he knew that Bailey supported it.

Two Board elections, in different units, were conducted on July 22. The Union won the election among plant employees, but lost the one conducted among the Company's route sales persons or drivers.

Various witnesses⁴ testified to statements and questions made to employees in May and June by Washroom Manager Wayne Ledlow.⁵ Thus, Ledlow assertedly asked employees whether they had signed union cards, and said that he knew that Bailey was heading the union campaign. Ledlow directed employees not to talk to Bailey. Ledlow also told employees that they would lose all benefits, that overtime would be cut, that they would be discharged for coming in late, and that they would be worse off if the Union came in. Ledlow further told employees that anyone signing a union card would be discharged, but that employees would get a 50-cent raise if they voted the Union out. This evidence is uncontradicted and is credited.

Various other witnesses⁶ testified about statements made to employees by Maintenance Superintendent Ray Stone⁷ about the same time. Thus, Stone said that union supporters would lose their jobs, but that employees would get a 50-cent raise and would not have to pay for their insurance if they voted against the Union. This evidence is uncontradicted and is credited.

Two of the General Counsel's witnesses, employees of Respondent at the time of the hearing, testified that Plant Manager John Kelley⁸ promised employees a wage increase on

⁴Tate McLean, Kevin Linderman, John Wells, and J. L. Bailey.

⁵The pleadings establish that Ledlow was an agent of Respondent and a supervisor within the meaning of the Act.

⁶Bonnie Reeves, Tammy Murphy, and J. L. Bailey.

⁷The pleadings establish that Stone was an agent of Respondent and a supervisor within the meaning of the Act.

⁸The pleadings establish that Kelley was an agent of Respondent and a supervisor within the meaning of the Act.

July 1,⁹ while others affirmed that Company Group Manager Noah Pardue¹⁰ told employees that the raise scheduled for July 1 would be withheld until the union activity had ended.¹¹ Two of these witnesses were employees at the time of their testimonies.¹²

Kelley denied that he made the promise attributed to him, and said that he had no authority to grant a wage increase. General Manager Gene R. Mabrey averred that, to his knowledge, Pardue did not make the statement attributed to him. Rather, Pardue told employees that the Company could not make any promises at that time; Plant Manager Kelley gave similar testimony.¹³ However, on cross-examination by Respondent, Georgia Harris denied the version of Pardue's statements advanced by Mabrey and Kelley. Pardue himself did not testify.

The General Counsel's witnesses appeared to be truthful and corroborated each other. Two of them were current employees at the time of their testimonies. The Board has concluded in similar circumstances that such testimony is entitled to considerable weight since it is unlikely to be false when it is adverse to an employee's pecuniary interest, such as preservation of a job.¹⁴ For these reasons I credit the General Counsel's version of the statements made by Kelley and Pardue.

Bailey testified that, in the latter part of June, Plant Manager Kelley approached him, laughed, and asked Bailey whether he, Kelley, would lose his job if the Union "came in." Bailey gave a negative answer, and then himself asked Kelley whether he, Bailey, would lose his job if the Union did not "come in." According to Bailey, Kelley "shook his head and said, 'Yes.'" Bailey testified that Kelley's statement "scared" him. John Wells corroborated Bailey's testimony, giving almost exactly the same details of the conversation with Kelley.

On direct examination, Plant Manager Kelley was asked whether he ever "threaten[ed]" employees with discharge or loss of benefits if they joined or assisted the Union, and whether he made certain statements to employees McLean or Linderman. Kelley denied that he made any such statements or threats.

As indicated, Bailey was corroborated by another witness in precise detail. The statement attributed to Kelley was not inconsistent with similar threats made by Supervisors Ledlow and Stone, including specific references to Bailey. Kelley's denials—although directed to other matters and two other employees—do not specifically deny the alleged statement to Bailey. Although I do not credit all of Bailey's testimony in this proceeding, as appears hereinafter, I credit him in this instance, for the foregoing reasons.¹⁵

⁹Testimonies of Bobbie Reeves and Georgia Harris.

¹⁰The parties stipulated that Pardue was an agent of Respondent and a supervisor within the meaning of the Act.

¹¹Testimonies of Donna Dunn, Bonnie Reeves, Bobbie Reeves, Tammy Murphy, and Georgia Harris.

¹²Bobbie Reeves and Georgia Harris.

¹³Respondent's witness Judy Hill gave still another version of Pardue's statements.

¹⁴*Bohemia, Inc.*, 266 NLRB 761, 764 fn. 13 (1983); *Southern Paint & Waterproofing Co.*, 230 429, 431 fn. 11 (1977).

¹⁵The complaint alleges other independent violations of Sec. 8(a)(1). As indicated, these allegations were resolved in a settlement agreement, and my consideration of the evidence is limited to the issue of whether Respondent manifested union animus. In light of my findings above, it is unnecessary for

B. Bailey's and Wells' Drinking During Lunch Hours, and Their Discipline

1. Employee drinking during the lunch period

Respondent had posted the following rule since 1977:

Possession on the job of alcoholic beverage(s) of any kind or drinking of such on the job, or at work under the influence of alcoholic beverages or stealing, are cause for immediate discharge.¹⁶

In 1985, Respondent issued an employee handbook prohibiting, inter alia, the following:

Drunkenness, drinking alcoholic beverages during working hours (including meal periods) or being under the influence of alcoholic beverages during working hours.¹⁷

There is evidence that Bailey and three other employees, Ronnie Jordan, John Wells, and Ricky Allen, drank beer during the lunch periods, while away from the plant. Wells, like Bailey, was a linen counter, and was also active in the union campaign. He wore a union shirt, talked to employees about the Union, and handed out leaflets before and after work.

Jordan also counted linen or towels. However, unlike Bailey and Wells, he did not support the Union, and was a witness for Respondent on September 7 at a hearing on objections to the election. Jordan testified that the Company knew, prior to that hearing, that he was against the Union.

Allen was a route driver with stops that were concentrated in a limited area. His work for the day ended when his route was finished, and Allen affirmed that this took place any time from 11 a.m. to 1 p.m. General Manager Mabrey testified that Allen was a union supporter in 1984, and that Mabrey had no reason to believe Allen's union sympathies had changed in 1988. Allen, however, testified that although he had previously been a union supporter, he was "for the Company" at the time of the election in 1988.

The evidence is consistent that the drinking took place during the lunch period, which ended at 12:45 p.m.,¹⁸ but it is conflicting on the number of times that it took place. Respondent's witnesses Allen and Jordan, with some differences in their testimonies, affirmed that the practice had lasted for a year or more, and that the employees did so about twice weekly. The drinking ceased about July 27. One of the General Counsel's witnesses, John Wells, admitted to one such occasion in November 1986 when he began working for Respondent, but then agreed that he had done so twice. Bailey contended that this practice had been engaged in only two or three times. However, a clerk at a nearby convenience store testified that Bailey purchased beer for 3 years almost every day during the 3 days of the week that the clerk was on duty. Another employee gave similar testimony. Crediting Allen and Jordan, corroborated by the clerk, I conclude that this practice had been regularly engaged in for at least a year. I also find that it ended on about July 27 and,

me to consider the remainder of the evidence pertaining to alleged violations of Sec. 8(a)(1).

¹⁶R. Exh. 31; testimony of Respondent's general manager, Mabrey.

¹⁷R. Exh. 4, p. 5; testimony of Respondent's general manager Mabrey.

¹⁸Testimony of Ronnie Jordan.

crediting Wells and Jordan, that only the latter two employees participated in drinking that day.

2. Respondent's investigation of employee drinking

a. *Summary of the evidence*

During his appearance at the hearing on objections on September 7, Jordan testified about the foregoing matters. Respondent's general manager Mabrey testified that he called Jordan into his office the following Monday, September 12, and asked him whether drinking had taken place during his lunch period or on plant premises. Jordan responded that he and three other employees—Bailey, Allen, and Wells—purchased beer at a convenience store during their lunch periods, bought gum to “cover their breath,” and then returned to work. Mabrey was corroborated by Plant Manager Kelley, who added that Jordan claimed to have stopped drinking in July. Jordan gave a different version of this aspect of the investigation. It took place 2 or 3 weeks after the hearing on objections, in “late September,” and the company supervisors simply asked him “who all was drinking.”¹⁹

According to the company supervisors, Ricky Allen was called in for questioning at 12:45 p.m. on the same day that Jordan was interviewed. General Manager Mabrey testified that Allen named Bailey, Wells, Jordan, and himself as participants in the drinking. Allen agreed that Mabrey asked him the identities of the participants, but testified that he named only Bailey, Wells, and himself, despite his testimony that Jordan in fact was also a participant. Allen was uncertain about the date of this interview, and originally said that it took place about August 17. He later changed the date to September 17. Allen contended that he had finished his work for the day on each occasion that he participated in drinking, and that the company supervisors took his word for it. General Manager Mabrey, on the other hand, testified that he told Allen he would have to check his story to see whether it was true.

Respondent took statements on September 12 from Jordan and Allen. The statement from Jordan omits Allen's name as a participant in the drinking,²⁰ and the statement from Allen omits Jordan's name.²¹ Both statements include the names of Bailey and Wells as participants in the drinking and neither explicitly includes the affiant as a participant. Rather, the statements allege, the affiant was present when “they would drink beer and return to work.”²²

About 4 p.m. on September 12, General Manager Mabrey and Plant Manager Kelley decided to suspend Bailey pending investigation of the drinking and of allegedly inaccurate linen counts.²³

At least one telephone conversation took place about this time between Allen and Bailey. According to Allen, Bailey called him the same day that the Company questioned Allen, said that he knew about the visit, and asked the reason. Allen replied that the Company had found out about the drinking.

¹⁹ As described hereinafter, the subject of Jordan's drinking had come up previously in a different context.

²⁰ R. Exh. 29. Jordan's statement adds the name of employee Kevin Linderman as an alleged participant. There is no other evidence to support this assertion.

²¹ R. Exh. 30.

²² *Supra*, fns. 20 and 21.

²³ Testimony of Kelley.

Bailey assertedly told Allen that the latter had to go back to the Company and change his story. Allen replied to Bailey that he had “three kids to feed,” and would not lie about the matter. According to Allen, Bailey did not like this response, but said nothing. In later testimony, Allen averred that Bailey called him twice. On the first occasion, when the drinking investigation was discussed, Bailey called him a “SOB.” About an hour later, however, Bailey called again and merely talked about baseball.

Bailey acknowledged on cross-examination that he and Allen conversed regularly on the telephone, mostly about baseball. On one occasion, Allen called him and said that General Manager Mabrey had called Allen to the office and knew about the drinking. According to Bailey, Allen said that it was either “my [Bailey's] job or his [Allen's] job,” and Allen had five kids to support and would do anything to protect his job. Allen wanted to know whether Bailey would still be his friend. Bailey denied telling Allen to lie about the matter. “I told him” Bailey testified, “you'd better tell the truth, whatever.” Later, Bailey averred that he “didn't tell Rick to do anything. Rick said he had already told Mr. Mabrey.”

As described hereinafter, Allen later gave his version of a telephone conversation with Bailey to General Manager Mabrey and Plant Manager Kelley.

b. *Factual analysis*

Crediting the Company's supervisors, I find that they questioned Jordan and Allen on September 12, the Monday following the objections hearing. Jordan's and Allen's selections of different dates are erroneous. Although Jordan failed to corroborate the supervisors' averments that they specifically asked about drinking during the lunch period, Allen did supply this corroboration, and I conclude that this was part of the supervisors' questions.

I further conclude, crediting Mabrey and Kelley, that Jordan and Allen told them that all four employees participated in the drinking, despite Allen's testimony omitting Jordan's name, and the fact that both Allen and Jordan, in their statements at the time, omitted the other's name and, tacitly, themselves, as participants in the drinking.

Allen's account of his conversation or conversations with Bailey is improbable. Allen was called into Mabrey's office about the end of Bailey's lunch period, and there is nothing in the record to show how Bailey learned of this visit—as Allen asserted. Allen's contention that Bailey advised him to go back and “change his story” is unlikely. As Bailey himself testified, Allen had “already told” Mabrey. It is improbable that Bailey would have called Allen a “SOB” in the first call, and then would have called again a short time later for an amicable discussion of baseball, as Allen contended.

In assessing the relative credibility of Bailey and Allen, I have carefully considered the fact that Bailey was found guilty by the State of Alabama of issuing bad checks within 10 years from the date of his testimony.²⁴ I conclude that this offense involved dishonesty or false statement within the meaning of the Federal Rules,²⁵ and must be considered in determining Bailey's credibility.²⁶

²⁴ R. Exhs. 25 and 26.

²⁵ Fed.R.Evid., Rule 609.

²⁶ In Bailey's employment application, filed in April 1986, he stated that he had been convicted of a crime (R. Exh. 32). Plant Manager Kelley, who interviewed Bailey prior to employment, testified that Bailey told him that he had

On the other hand, there are problems with Allen's credibility. As indicated, he was contradicted by General Manager Mabrey on at least two issues. Further, his statement given to the Company is contradicted by his testimony in that the statement excludes Jordan and, tacitly, himself as a participant in the drinking. After two attempts, he could not name the date of his interview. Finally, Allen testified that he did not care whether the other employees were fired—"that was their chance they was taking, not mine." I conclude that a motivating factor in Allen's testimony was his desire to please the Company and thus preserve his job. Accordingly, I find he was a biased witness.

I further conclude that the factors tending to discredit Bailey have less weight than those tending to discredit Allen. Further, as indicated, Bailey's testimony is inherently more probable than Allen's. Accordingly, I credit Bailey's version of the telephone conversation between him and Allen on September 12.

3. The suspensions of Wells and Bailey, and preparation of the discharge letters

Plant Manager Kelley testified that on the evening of the same day that the Company interviewed Allen, the latter called Kelley at home and said that Bailey had told Allen that he would deny drinking "to the end." Early the following morning, September 13, Allen went to Mabrey's office and told the general manager that Bailey had called him the prior afternoon. Allen informed Mabrey that Bailey advised Allen to "change his story," and that he, Bailey, would deny drinking beer "to the end."²⁷ There is nothing in Allen's testimony about his telephone conversation with Bailey which attributes to the latter a statement of intention to deny drinking.

Thereafter, on the same day, September 13, the Company obtained statements of two employees who asserted that a clerk in a nearby convenience store confirmed the statements which Jordan and Allen had given to the Company.²⁸ This is similar to the clerk's testimony at the hearing. Jordan's statement to the Company contains the averment that "they," i.e., Bailey, Wells, and Linderman—according to Jordan—discontinued buying beer at the convenience store when "Sonny [Bailey] found out that the lady in charge of the store had a sister that worked for Aratex . . . in the sales and service office."²⁹

Bailey had been absent for a medical reason on September 12. On the following day, September 13, Plant Manager Kelley suspended him without pay. According to Bailey, Kelley said that it was for "those four days" (of absences).

served time for receiving stolen property, had been in a work release program, and was on probation. According to Kelley, none of this affected the decision to hire Bailey because applicants with criminal records qualified under a job Tax Credit program. Under this program, Respondent at one time hired applicants convicted of murder and burglary. Respondent has since discontinued participation in the program.

Jordan's employment application (R. Exh. 17) was not entirely complete in that he omitted at least one prior employer. However, he filled out the application at the end of the day. Although it was incomplete, Plant Manager Kelley was "in a hurry" and told Bailey that he wanted to show Bailey the work he would be doing. The application was not returned to Bailey for completion. He started working for Respondent at that time.

²⁷ Testimonies of General Manager Mabrey and Ricky Allen.

²⁸ R. Exh. 28.

²⁹ R. Exh. 29.

Bailey asked Kelley to specify the days, and Kelley replied that he did not have to. One of Respondent's attendance reports, dated September 15, states that Bailey was told to bring in a doctor's excuse and failed to do so.³⁰ Although Mabrey "approved" the report, the supervisor who reported is not named, and Bailey testified without contradiction that he was not asked to bring in a doctor's excuse.³¹ Kelley agreed at the hearing that he did not tell Bailey the specific reason for the suspension. The Company had completed a "full-scale investigation of the drinking," and Kelley was compiling data on assertedly deficient linen counts by Bailey. The suspension was for both this reason and the drinking. Kelley asserted that he told Bailey he was suspended for "some wrongdoings," and that Kelley would get back with him.

Wells was also absent on September 12 for a medical reason. He testified that he brought in a medical excuse the following day, but that "John" (Kelley) told him that he had been "seen out the day before," and that the excuse was not valid. A few days later, when he was discharged for drinking, Wells was told by Kelley that his excuse was valid, according to Wells' uncontradicted testimony.

On September 13 or 14, Respondent prepared discharge letters for Bailey and Wells, dated September 15.³² The letter to Bailey asserts that he had been suspended on September 13 for absences without providing a medical excuse. The letter states that the Company had evidence of "drinking . . . on the job," and of a telephone conversation on September 12 in which Bailey said he would "deny it to the end." According to the Company, "[t]his further confirms your guilt in this matter." The letter also alleges evidence of improper linen counts by Bailey, "dishonesty" to the customers, and resulting loss of business. Finally, the letter refers to the employee handbook prohibition against drinking "during working hours (including meal periods),"³³ and discharges Bailey.³⁴

Plant Manager Kelley was asked why absences without a medical excuse were asserted as a reason, when the company managers had decided to suspend Bailey on the drinking and linen count issues. Kelley replied that they decided to put in "any other problems" that they had with Bailey.

The letter to Wells contends that, although he reported for work September 13 with a doctor's excuse, he had been seen in the company of Bailey the prior day. Wells' suspension, the letter alleges, was because of an investigation of drinking, as to which the evidence was "overwhelming." After a reference to the handbook prohibition against drinking during meal periods, the letter discharges Wells.³⁵

General Manager Mabrey testified that he prepared the discharge letters before meeting with Bailey and Wells because he anticipated that they would deny the allegation, and on Mabrey's asserted opinion that Bailey lied "[j]ust about every day." However, Bailey had never been disciplined for lying. The letters, according to Mabrey, were "waiting in case they denied the charge," but could have been "torn

³⁰ R. Exh. 24. There are records alleging similar 1-day absences on a total of three occasions in July and August (R. Exhs. 21-23).

³¹ See discussion of medical absences, *infra*, sec. E.

³² Mabrey testified that Bailey's letter was prepared on September 13 or 14, and that the letter for Wells had been prepared before the Company's meeting with him on September 15. G.C. Exhs. 10 and 11.

³³ *Supra*, fn. 17.

³⁴ G.C. Exh. 11.

³⁵ G.C. Exh. 10.

up.” No letters were prepared prior to the interviews on September 12 with Jordan and Allen, because this was the “beginning of the investigation.” However, Mabrey acknowledged that when Allen, following Jordan, was interviewed, Mabrey had reason to believe that Allen had been drinking.

4. The discharges of Wells and Bailey

The evidence is consistent that Wells was called into Mabrey’s office about noon on September 15, with Plant Manager Kelley present, and was asked whether he had been drinking beer during his lunch periods. Wells denied it, and was given the discharge letter.

Bailey was called into the office a few minutes later. According to the company managers, Bailey was asked whether he had been drinking beer during his lunch periods, and denied it. According to Bailey, Mabrey said that Bailey had been drinking “on the job,” and Bailey denied this. On cross-examination, Bailey repeated this assertion, and claimed that lunch time was “free time.”³⁶ However, Bailey acknowledged that Mabrey “could have” told him that the Company had evidence that employees had purchased and drunk beer during lunch periods. It is unlikely that the company managers would have failed to specify lunch periods with Bailey after having done so previously with the other employees, and I conclude that they did so on this occasion. After Bailey’s denial, he was given the previously prepared discharge letter.

General Manager Mabrey testified that Wells and Bailey were fired because they were “guilty of drinking during lunch periods but would not admit it.” Respondent provided a list of employees allegedly terminated for violating company policy. In this list Bailey is said to have been terminated for “misuse of alcoholic bev.,” and Wells for “violation of rules and misuse of alcoholic beverages.”³⁷ Mabrey testified that the reasons given on this list were the “accurate” reasons for termination. He also testified that Jordan and Allen were not fired because they “told the truth.” If Wells and Bailey had done the same, Mabrey contended, he would have treated them as he did Jordan and Allen. Plant Manager Kelley stated that Bailey was discharged because of deficient linen counts, drinking during lunch periods, and “coming back to work [late].” If Bailey had “come clean and admitted the whole situation,” Kelley might have given him “another chance.”

C. Other Employee Drinking and the Company’s Reaction

1. Ronnie Jordan

a. Summary of the evidence

Jordan was a linen or towel counter, and worked alongside Bailey, i.e., on the 6 a.m. to 4 p.m. shift. As indicated, the last day of lunchtime drinking took place on July 27, when Jordan and Wells participated. The latter testified that Jordan had two or three beers on this occasion. Jordan was a little “smaller” than Wells, and became “intoxicated.” Donna

Dunn testified that she smelled alcohol on Jordan’s breath about 12:45 p.m. on July 27. Jordan agreed that he had two beers, but denied that he was intoxicated.

Jordan was married, was a father, and acknowledged that he had marital problems because of his drinking. According to Jordan, he returned from lunch on July 27 at 12:45 p.m. and, about 2 p.m., asked Plant Manager Kelley for a half day off because of marital problems. Kelley refused, and Jordan “quit.” Jordan was corroborated by Wells, who testified that, after the July 27 lunch period, Jordan “come back and quit his job.” Joel McLean affirmed that he was on a break when Jordan ran out of his work department and told “John” (Wells) that he had “quit.” According to McLean, Jordan’s “words were slurred,” and he was “dizzy or dingy or something.”

Plant Manager Kelley provided a different version of these events. Jordan asked for time off about 7 or 8 a.m., saying that he wanted to see his baby. Kelley denied this request. Later, after lunch, a supervisor informed Kelley that Jordan was gone.

Wells testified that Jordan returned to the plant on July 27 after quitting. According to Wells, Jordan was “drunker than he was when he left,” and drove through the parking lot holding up a beer. McLean averred that Jordan was driving by on the road holding up a beer and “beeping” his horn about 2:30 p.m. Later Jordan “pulled right up to the door” to pick up Wells, “still drinking, still apparently drunk,” according to McLean. Jordan testified that he had six beers on the afternoon of July 27, in addition to the two he had consumed at lunch—he was on his “own time,” according to Jordan. He did not remember driving through the parking lot.

The testimonies of Jordan and Kelley affirm that the former asked for his job back a few days later, saying that he had “a bad drinking problem,” and that his wife had left him. He promised to “straighten up” and quit drinking. According to Kelley, he had not discharged Jordan for walking out because he wanted to hear Jordan’s explanation. After hearing it, Kelley allowed Jordan to return to work after a 2-day suspension. Both Kelley and Jordan contended that there was no discussion at that time of drinking during work or lunch periods. According to Kelley, corroborated by Jordan, the plant manager first learned of this at the September 12 interview following Jordan’s testimony at the objections hearing on September 7. Kelley stated that he was surprised to learn this, because he had “monitored” Jordan following the July incident. Kelley did not take disciplinary action against Jordan in September because he “confessed entirely on his own,” and related the problems he was having with his wife and his “commitment” to stop drinking.

b. Factual Analysis

Wells, McLean, and Donna Dunn were reliable witnesses on this issue. Crediting them, I conclude that Jordan became intoxicated after consuming two beers during the lunch period on July 27, had alcohol on his breath about 12:45 p.m., and that his words were slurred.

With respect to the time that Jordan requested a half day off, Jordan, a witness for Respondent, was corroborated by Wells and McLean, witnesses for the General Counsel. I reject Kelley’s testimony that Jordan asked for time off early in the morning, and credit Jordan’s averment that this request

³⁶ As indicated above, although the employee handbook, distributed in 1985, prohibited drinking during lunch periods, the prior rule posted since 1977 merely barred drinking “on the job” or working under the influence of an alcoholic beverage (R. Exhs. 4, p. 5; 31).

³⁷ R. Exh. 32.

was made to Kelley about 2 p.m. After its rejection, Jordan walked out and consumed six more beers before 4 p.m. I credit Wells' and McLean's testimonies that Jordan returned more intoxicated than before, holding up a beer and honking his horn.

There is no direct evidence that Kelley knew of the lunch-time drinking in July, other than whatever inference may be drawn from Jordan's appearance before Kelley at 2 p.m. on July 27. Considering Jordan's condition at the time, it is probable that Kelley knew he had been drinking.

Donna Dunn, corroborated by Bailey, testified that employees came back from lunch intoxicated, but that "they never did do nothing about it."

2. Ricky Allen

As set forth above, General Manager Mabrey contended, and Allen denied, that Mabrey told Allen he would check the latter's statement that all his drinking had been done after he had finished working. Plant Manager Kelley, on the other hand, testified that he did not check the accuracy of Allen's contention, although he agreed that Allen's work sometimes ended at 1 p.m. "or later," i.e., after the end of the lunch period at 12:45 p.m. Kelley said that he did not know the precise days that Allen was drinking with the other employees, but did not investigate the matter.

3. Boyce Robinson

Boyce Robinson was a route salesperson. He did not support the Union. A few days before the union elections (in two units) on July 22, Robinson was attending a mandatory sales meeting on company property in the evening, after his workday had ended. He had beer on his truck and consumed some of it. The Company acquired knowledge of the fact that he had beer on his truck while on company property, but the evidence is unclear as to whether it also learned that he drank beer on company property. The transcript in relevant part reads as follows:

Q. And on that occasion did anybody in supervision observe you drinking this beer on company property?

A. Yes.

Q. Who saw you drinking it?

A. Well, I'm not sure the supervision that saw me drinking it.

Q. Okay, let me back up to make sure I understand you. Did anyone in management see you drinking beer on the company property at that mandatory meeting in July of '88?

A. It was told that I had some beer on my truck at that time.

Q. Who told you?

A. Someone in supervision; . . . I don't know.

. . . .

Q. Again, during that meeting in July of '88 when you were on company property and you drank beer, who in supervision talked to you about drinking beer on the company property?

A. No one would talk to me at that time.

General Manager Mabrey's attention was directed at the hearing to Robinson's testimony about "a drinking incident in July." Mabrey testified that he was unaware of it until a

few days later. Robinson was called to Mabrey's office and was asked whether he had beer on his truck. The employee acknowledged that this was so, but contended that he thought it was acceptable as long as he was to "on the job." Mabrey replied to the contrary, and Robinson promised not to do it again. Mabrey gave him a verbal warning. The general manager distinguished this discipline from the discharges of Wells and Bailey on the ground that Robinson admitted the truth and promised not to do it again.

Robinson attended a sales promotional meeting one evening in September at a restaurant a few miles from the plant. His truck was parked nearby, and had beer in it. When Robinson acknowledged it, he was suspended for 3 days. Robinson met with Mabrey at the end of the suspension, and admitted having beer on his truck. Mabrey then discharged him, according to Mabrey and Robinson. This asserted discharge does not appear on Respondent's list of employees terminated for violating company policy.³⁸ Robinson supposedly told Mabrey at the time that he would "never touch another drop."

About 3 weeks later, Mabrey rehired Robinson. According to the general manager, several of his supervisors asked him to reinstate the driver. Mabrey decided to do so, provided that Robinson would agree to relinquish all seniority rights and pass a drug and alcohol test. Robinson was employed on these conditions.

4. Christmas party drinking

John Wells described drinking which took place during a Christmas party. According to Wells, the employees were allowed to leave early, but were still "on the clock." Wells testified that Jordan informed him that Clarence White, whom Wells identified as a supervisor, had some beer on his truck. Wells and Jordan obtained some beer on this occasion, and drank it. Wells' testimony was corroborated by Bailey, is uncontradicted, and is credited.

5. Other discipline of employees

Respondent's list of terminated employees includes three assertedly discharged for being "under the influence on company property"—Don (Skip) Alsop in 1966, Milton Robinson in 1969, and Charles Roberts in 1978.³⁹ Mabrey testified that Alsop had been late returning from a lunch period, could "barely stand up," and needed someone to drive him home. Mabrey investigated and found that this was the employee's practice. Robinson was "under the influence on company property," and fired a pistol into the air. Roberts returned from a route "intoxicated" [and] out of control." All were discharged.

D. Bailey's Work Performance, Alleged "Talking" to Other Employees, and the Issue of Defective Linen Counts

1. Summary of the evidence

As indicated, Bailey began working for Respondent in April 1986. He was a linen counter, and worked on the 6 a.m. to 4 p.m. shift. Under Respondent's procedure, the route drivers picked up soiled linen from customers and bagged it

³⁸ R. Exh. 32.

³⁹ R. Exh. 32.

with the customer's name on a pickup card. The bags were opened at the plant, where each linen counter counted the items, placed the number on the customer's pickup card, and initialed or signed the card. The same number of items indicated on the pickup card were later shipped back to the customers, after cleaning, with billing for that number.

Plant Manager Kelley testified that he had no problems with Bailey's work for about a year. In the latter part of 1987, Bailey received a plaque from Respondent "in recognition of outstanding production performance in 1987 and for overall contribution to the success of Aratex Services." Bailey testified without contradiction that Kelley told him he was "proud" of the work Bailey had done.⁴⁰ Kelley testified that he had very few complaints about Bailey in 1987, and that there was no change in his work habits between 1987 and early 1988.

However, Kelley also asserted, he started having "problems" with the linen counts in late 1987,⁴¹ and began an "investigation" of Bailey, Wells, and Jordan in January 1988. Kelley testified that he spoke to Bailey and Jordan on April 6 about inaccurate counts, and that he documented these discussions.⁴² Kelley denied knowledge at that time of Bailey's union activities. Bailey did not recall the April 11 discussion, but Wells acknowledged that Kelley spoke to him at that time about defective linen counts, a conversation which is documented.⁴³ Jordan contended that on a few occasions he saw Bailey "pouring" bags of soiled linen without counting them, but changed his testimony on the number of times. Bailey testified that he counted "thousands" of items, and Wells said that he did the best he could. Kelley also asserted that he was "lenient" about the linen count problem from February through August, when he began receiving "bad complaints from customers and route people."

Kelley also contended that he had "problems" with Bailey going through the plant talking to other people" and interfering with their work.⁴⁴ Respondent's witness Judy Hill testified that Bailey "talked" to other employees, but denied that he left his work station to do so.

Respondent submitted copies of purported warnings to Bailey, Wells, and Jordan about improper linen counts, dated August 23. These have the heading, "Warning Notice."⁴⁵ It also submitted a letter dated the next day, August 24, signed by an assistant general manager, reciting alleged complaints from customers about improper linen counts, and soliciting

employee signatures thereto. Under the assistant general manager's signature are various other signatures. Plant Manager Kelley identified this document as a "petition" sent to and signed by the "route people" and others allegedly complaining of improper linen counts.⁴⁶ One of the signatories is Ricky Allen.⁴⁷ Although Allen was a route sales person and, although he was called as a witness for Respondent, he was not asked to testify about customer complaints of inaccurate linen counts.

The next documentary reference to improper linen counts by Bailey is found in his discharge letter, dated September 15. The letter contends inter alia that Respondent had "documented proof to support [its] evidence [as to] soil counts conducted by supervisory, management and route personnel."⁴⁸ Respondent suspended Jordan for 2 days in January 1989 because of improper shop towel counts. Plant Manager Kelley agreed that Jordan's problem with shop towel counts continued to that date.⁴⁹

2. Factual analysis

There is no reason to doubt Kelley's acknowledgement that Bailey was a good employee, at least up to the beginning of 1988.⁵⁰ Respondent's first documentary evidence of any change is the discussion which Kelley had with the three linen counters, including Bailey, on April 11. It should be noted that these discussions were not recorded on one of Respondent's "Warning Notice" forms. After the verbal warning given to Bailey on May 31 for "talking," the first formal notices issued to the linen counters were one to Wells on June 14 for alleged failure to bring a medical excuse, and three on August 23 to the linen counters for assertedly defective counts. As Kelley stated, he was "lenient" with linen counters until August, when he supposedly began receiving "bad" complaints from customers about allegedly inaccurate counts. At that time, of course, Respondent was opposing the Union, and had filed objections to the July 22 election.

There is no credible evidence of any change in Bailey's linen counts. The letter, or "petition," which Respondent sent to its route drivers reciting alleged customer complaints about inaccurate counts and soliciting the drivers' signatures to the petition, is pure hearsay. It does not qualify as a business record exception to the hearsay rule because there is no evidence that such memoranda were prepared routinely in the course of Respondent's business. Rather, the "petition" was prepared by Respondent after it became engaged in litigation with the Union, and there is no reason to believe that it is trustworthy.⁵¹ Although Respondent presumably had routine business records which would have reflected errors in linen counts—the "pickup cards" signed or initialed by the linen counters, corrected billings to customers, etc.—no such documents were produced. No customer testified about inaccurate counts and, indeed, no driver so testified, despite the fact that

⁴⁰ Respondent elicited testimony tending to minimize the significance of the plaque. Thus, Plant Manager Kelley testified that seven employees in the plant received plaques among seven "work areas." Seven persons worked in Bailey's area, but 4 of these were in a group," leaving Bailey as the highest producer of only three employees. The other two employees were Wells and Jordan. The latter was designated as "shop towel counter."

Respondent's witness Judy Hill, who opposed the Union, also minimized the significance of the plaque. Unlike Plant Manager Kelley, Hill had nothing favorable to say about Bailey's work—he "goofed off" in 1987 and was the "worst" rather than the best employee.

⁴¹ L. 24, p. 877 of the transcript indicates that the "problems" began in late 1977. This is either an inadvertent misstatement by Kelley, or an error in the transcript, since the witness obviously was referring to 1987.

⁴² R. Exh. 19, G.C. Exh. 13. These documents consist of photostatic copies of notes in Kelley's handwriting. They are not written on one of Respondent's "Warning Notice" forms (R. Exhs. 5, 6, 9, 10, 13-15).

⁴³ R. Exh. 11.

⁴⁴ Respondent submitted a copy of a "verbal warning" to Bailey, on May 31 for "stopping at other employee's [sic] stations to talk, disturbing the employee." (R. Exh. 20).

⁴⁵ R. Exhs. 15, 36, and 37; G.C. Exh. 12.

⁴⁶ R. Exh. 38. As indicated, the route salespersons voted against the Union.

⁴⁷ Allen's signature on R. Exh. 38 is partially eliminated by the copying machine. However, enough of it remains so that, compared with Allen's signature on the statement he submitted to Respondent (R. Exh. 30), it is clear that Allen signed the "petition."

⁴⁸ G.C. Exh. 11.

⁴⁹ Testimony of Plant Manager Kelley.

⁵⁰ I reject Hill's contrary opinion, since it was contradicted by Plant Manager Kelley.

⁵¹ Fed.R.Evid., Rule 803(6); Advisory Committee's Note, pp. 115-118; Wigmore, *Evidence*, Sec. 1546 et seq., Chadbourne Ed. (1974).

one of them (Allen) appeared as a witness for Respondent. No particular linen counter is singled out in the “petition,” and there is therefore no way to distinguish Bailey, who was discharged, from Jordan, who was retained despite the latter’s continued improper linen counting into 1989. I conclude that the “petition” has no probative value, and that Respondent has not explained why it delayed doing something about the asserted linen count problem until after it became involved in litigation with the Union.

I also conclude that Respondent has not established that Bailey wandered around the plant talking to and interfering with other employees. Although he may have talked with other employees, Respondent’s witness Hill contradicted Plant Manager Kelley’s contention that this took place away from Bailey’s work station. The May 31 verbal warning was issued after the beginning of the Union campaign and Bailey’s participation therein.

E. Bailey’s Alleged Failure to Provide Medical Excuses

1. Summary of the evidence

Respondent’s employee handbook provided that “employees may be requested to provide a doctor’s excuse and . . . a medical explanation . . . when several days have been missed due to illness or when derogatory attendance patterns appear to be occurring.”⁵² Respondent provided numerous copies of medical excuses for various employees dating back at least 10 years.⁵³

Plant Manager Kelley testified that when an employee was out for a “period of days” he was “required” to bring in a doctor’s excuse. According to Kelley, this policy has been “uniformly” applied for some time. However, on cross-examination, Kelley acknowledged that one day’s absence for a medical reason did not require an excuse “unless it became a pattern.” Kelley gave extended testimony on what constitutes a “pattern.” Thus, if an employee who seldom missed work because of illness suddenly began doing so, Kelley requires a doctor’s excuse. On the other hand, if the Company has actual knowledge of an incapacitating condition, then it would be “silly” to demand a written excuse. Kelley agreed that the Company exercises “discretion” on when to require a medical excuse. In any event, he added, “after the third one [day of absence] it really doesn’t make any difference whether they bring in a doctor’s excuse . . . because they’re not gonna get paid”—the employees have only three paid days of medical leave.

As indicated, Respondent’s records, all “attendance reports” rather than “warning notices,” show two instances in July and one in August when Bailey was absent for one day without bringing in a requested doctor’s excuse.⁵⁴ He was absent again for this reason on September 12. This absence was reported on an “attendance report,” which relates that Bailey had been asked to bring in a doctor’s excuse but had not done so. Although Mabrey “approved” of the report, the space for the name of the reporting supervisor is blank.⁵⁵ As indicated, Bailey testified without contradiction that he was not asked to bring a medical excuse. Failure to bring in re-

quested medical excuses is listed in his discharge letter as one of the reasons for his termination.⁵⁶

Respondent also submitted copies of numerous “Warning Notices” to various employees, dating back at least to 1980. Failure to provide a requested medical excuse does not form the basis for any of the warnings.⁵⁷

Bailey testified that he had missed work because of illness “every once in awhile.” However, he denied that the Company had a “policy” requiring medical excuses, and affirmed that he did not bring an excuse on those instances when he had been sick. According to Bailey, other employees, including specifically Jordan, missed work for illness and did not bring in medical excuses.

Donna Dunn testified that she had to be absent “quite a bit” because of the illness of her child, and that on such occasions she brought a medical excuse despite the fact that the Company did not “require” it. On some occasions when she herself was sick, she did not bring a medical excuse, but was not disciplined.

John Wells testified that he had been absent because of illness prior to the advent of the union campaign, and was not required in every instance to bring in a medical excuse. In those instances where he failed to do so, he was not disciplined. In May, Wells submitted a doctor’s request that he be excused from work “this week” because of illness.⁵⁸ Wells was ill again on June 14, did not bring in a medical excuse, and received a “Warning Notice.”⁵⁹

2. Factual Analysis

The language of the employee handbook demonstrates that a medical excuse was not required unless “requested,” and suggests that this would be the case only when there had been absences of “several days” or “derogatory attendance patterns.” Kelley’s testimony about the circumstances in which the Company requested a medical excuse fails to set forth any precise rules, and acknowledges that the Company utilized discretion in making this request.

Although the Company supplied documentary evidence of medical excuses and warning notices prior to the advent of the union campaign, it did not submit a warning notice for failure to supply a medical excuse, dated before that campaign. The first such notice for this reason is the one issued to Wells on June 14,⁶⁰ about a month before the election.

I credit the testimonies of Bailey, Wells, and Dunn on the Company’s policy concerning medical excuses. Based on this evidence, the timing of the warning notice issued to Wells, and the vagueness of Kelley’s testimony about company policy, I conclude that its policy on medical excuses included a large element of discretion, and that the Company applied this policy more stringently in the case of Bailey (and Wells) after the advent of the union campaign.

I credit Bailey’s testimony that he was not asked to bring in a medical excuse for the September 12 absence. It is clear that Bailey’s asserted failure to submit a medical excuse constituted his fourth alleged unexcused absence. According to Kelley, the failure to bring in this excuse “didn’t make any difference,” since Bailey would not have been paid for Sep-

⁵² R. Exh. 4.

⁵³ R. Exh. 42.

⁵⁴ R. Exhs. 21–23.

⁵⁵ R. Exh. 34.

⁵⁶ G.C. Exh. 11.

⁵⁷ R. Exh. 39.

⁵⁸ R. Exh. 12.

⁵⁹ G.C. Exh. 9.

⁶⁰ G.C. Exh. 9.

tember 12 in any event. Nonetheless, the medical excuse issue was included as a reason for discharge in Bailey's termination letter.

F. Bailey's Claim for Unemployment Compensation Benefits

Bailey applied for unemployment compensation benefits, and the claim was initially denied on the ground that he had been discharged for misconduct. Bailey appealed, and a hearing was conducted by the Alabama Department of Industrial Relations in November 1988. The Appeals referee's decision issued the following month. In it he noted evidence that Bailey had been disciplined for being absent without a medical excuse, for improper linen counts, and for drinking beer during lunch periods. With respect to these matters, the referee commented (1) that Bailey had not been "excessively absent," his most recent absences were due to personal illness and an on-the-job injury, and that he testified that he was not asked to bring a doctor's excuse on the last occasion; (2) that "testimony revealed" the claimant did make erroneous linen counts; and (3) that although the claimant may have had beer on occasion, he was never inebriated. Calling the evidence "contradictory," the referee concluded that, although the claimant had committed acts of misconduct, he was not discharged for those acts, but, rather, for legal union activity.⁶¹

G. Legal Analysis and Conclusions

1. Bailey's discharge

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in Respondent's decision to discipline an employee. Once this is established, the burden shifts to Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.⁶²

The evidence shows that Bailey was an active participant in the union campaign, participated as an observer for the Union at the election, and thereafter testified for the Union at a hearing on Respondent's objections to the election. The Company's knowledge of Bailey's union activities is unquestioned.

The evidence also shows that Respondent, by its supervisors, told employees that it knew that Bailey was heading the union campaign and directed employees not to talk to him. Employees were told that they would be worse off and were threatened with loss of benefits, overtime, and with discharge if they signed union cards or if the Union came in. Bailey himself was told that he would lose his job if the Union did not win the election. Employees were promised raises if they voted against the Union, and a scheduled pay raise was withheld until the union activity was over.

⁶¹ U. Exh. 1.

⁶² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test set forth above applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. 705 F.2d 799 (6th Cir. 1982).

Although Bailey had been counseled about linen counts, and verbally warned about "talking," he had never been warned about drinking. The absence of such warning is evidence that this stated reason for the discharge was pretextual, under well-established law. In addition, the decision to discharge Bailey was made and the discharge letter prepared before he was interviewed on September 15. Respondent's contentions that it "knew" Bailey was going to lie, and that the discharge letter could have been torn up if he had admitted drinking, are specious. He was not asked to respond to the charge until after the decision to discharge him had been made. This constitutes evidence of discriminatory motivation. *Holiday Day Inn East*, 281 NLRB 573, 575 (1986). I conclude that the General Counsel has established a strong prima facie case that Bailey's protected conduct was a motivating factor in Respondent's decision to discharge him.

Respondent has not established that it would have discharged Bailey in the absence of his union activity. The Company has advanced a number of reasons for the discharge, but the principal reason relates to drinking during lunch periods.

The Company attempted to distinguish its less stringent discipline of other employees who drank on the ground that they were "truthful" about the matter. This argument is not persuasive. Jordan had engaged in lunchtime drinking for some time with Bailey and others, and did so on July 27. Although he admittedly discussed "a bad drinking problem" with Kelley a few days later when he was reinstated, Jordan failed to disclose at that time that some of the drinking had occurred during lunch periods.⁶³ Respondent's position that Jordan was "truthful" because he admitted drinking when questioned on September 12 overlooks his lack of candor on July 27.

Although Allen admitted drinking, he contended that this took place when he was off duty. Mabrey told Allen that he would check this contention, but Respondent in fact failed to investigate it.

The statements which Jordan and Allen submitted to the Company are inconsistent with its purported belief that each was truthful. Neither mentioned the other, and tacitly omitted himself. The similar discrepancies between these statements and what Jordan and Allen told the managers suggest that the statements were fabricated for the purpose of implicating Bailey and Wells, while exonerating Jordan and Allen.

Boyce Robinson admitted having beer on his truck, on two occasions, only after its presence had been detected by a supervisor. It would have been pointless for him to deny something as to which the Company had detected the physical evidence. After having twice committed the same offense, Robinson continued to be employed. On the first occasion he received only a verbal warning and, on the second, a short suspension followed by a supposed discharge. The latter discipline is questionable, since Respondent did not include it in a list of employee discipline supplied at the hearing. In any event, Robinson was back at work within 3 weeks, albeit with loss of seniority benefits.

On the basis of the discipline or absence thereof imposed in the cases of Jordan, Allen, and Robinson, the failure to investigate Allen, the Christmas party drinking, and other

⁶³ As indicated, since Jordan was intoxicated at the end of his lunch hour on July 27, with alcohol on his breath, it is probable that Kelley knew at 2 p.m. that he had been drinking.

evidence, I conclude that Respondent was selective in its treatment of employee drinking. Jordan, Allen and Robinson opposed the Union. I conclude that they received more favorable treatment than that administered to Bailey (and Wells), who supported the Union.⁶⁴ It is well established that such disparate treatment constitutes evidence of discriminatory motivation.

I also note that Kelley and Mabrey themselves did not agree on the exact part that the drinking played in the discharge, the former stating that “drinking” was the reason, and the latter averring that “lying” about it was the determinative factor. These contradictions constitute additional evidence that the Company’s reason was pretextual.

With respect to work performance, it is clear that Bailey was a good employee at least until the beginning of 1988. Although the Company counseled the linen counters, including Bailey, in April, these were not recorded on official warning notice forms and did not constitute warnings. There is no probative evidence that the linen count problem, whatever its extent, had become any worse during the Company’s admittedly “lenient” treatment of the matter. Nonetheless, Bailey and the other linen counters were given formal warning notices concerning this matter on August 23, after the union campaign and the election. Respondent’s delay in doing anything more than counseling employees until it became involved in litigation with the Union constitutes additional evidence that this reason was pretextual. *Moore Business Forms*, 288 NLRB 796 (1988).

Further, Bailey was not discharged until September 15, about a week after he appeared as a witness for the Union at the hearing on Respondent’s objections to the election. The timing of this discipline constitutes further evidence of its unlawful nature.

The Company’s assertion of the absences of medical excuses as a reason for Bailey’s discharge is no more valid than the others. Kelley admitted that this reason was simply added to the discharge letter. As indicated, the rule on medical excuses was stated in nonmandatory language, and the Company in many instances did not require medical excuses, or failed to discipline employees who did not supply them. The Company’s list of warning notices previously given to employees does not include one for failure to provide a medical excuse. The first such warning was issued (to Wells) about a month before the election. Bailey himself was never given such a warning, and his asserted fourth failure to do so did not make “any difference,” in the Company’s own language. I find that this reason, like the others, is pretextual.

Since Respondent has not rebutted the General Counsel’s prima facie case, I conclude that Bailey’s discharge on September 15 was discriminatorily motivated, and constituted an unfair labor practice within the meaning of Section 8(a)(3) of the Act.⁶⁵

⁶⁴ Respondent’s reliance on the examples of employees who were discharged after being intoxicated while at work or on company property, or for firing a pistol in the air, obviously cannot be equated with Bailey’s lunchtime beer drinking without evidence of inebriation at any time.

⁶⁵ This conclusion is buttressed by the similar conclusion of the Alabama Department of Industrial Relations. Although it is well established that such state agency determinations are not conclusive with respect to alleged violations of the Act, they have probative weight.

2. Other violations of the Act—The settlement agreement

As indicated, the complaint alleges that Respondent unlawfully issued a warning to Bailey on various dates. I have found that it verbally warned Bailey about talking to other employees at their work stations on May 31, and issued a written warning to him on August 23 for alleged inaccurate linen counts. The complaint alleges that these warnings, together with Bailey’s discharge, violated Section 8(a)(3) and (1) of the Act.⁶⁶ The settlement agreement limits the adjudication to Bailey’s “discharge,” and bars a finding of “independent” violations of Section 8(a)(1) of the Act.

I have already found that Bailey’s discharge violated Section 8(a)(3), and it is well established that such discharges derivatively violate Section 8(a)(1). Since the settlement agreement bans Board consideration only of independent violations of Section 8(a)(1), it has no effect on derivative violations of that section. Accordingly, I additionally find, Bailey’s discharge violated Section 8(a)(1). There remains for consideration the complaint allegations concerning the warnings.

Counsel for the General Counsel stated at the hearing that she “agreed” with the settlement agreement in Cases 10–CA–23659 and 10–CA–23862–1. However, Respondent’s representative contended that he was submitting a copy to her for “policing . . . and not for any approval.” The position of the alleged discriminatee, Bailey, was not ascertained. Respondent further affirmed at the hearing that the actual written partial settlement agreement would prevail over characterization of it at the hearing. Neither the General Counsel’s representative nor Bailey signed the partial settlement agreement. I conclude that that agreement was, as indicated by the signatures thereon, a private non-Board settlement agreement entered into between Respondent and the charging Union.

The Board has recently reevaluated its position with respect to non-Board settlements in *Independent Stave Co.*, 287 NLRB 740 (1987). In that case three individuals filed charges that the employer had discriminatorily failed to hire them, and complaint issued thereon. Two weeks later, the individual charging parties signed settlement agreements with the employer providing inter alia for reinstatement and backpay. The union pronounced the agreement to be “fair,” but the General Counsel opposed it principally on the ground that the backpay amount was insufficient. In rejecting the General Counsel’s position, the Board stated that there are “risks inherent in litigation. For example, witnesses may be unavailable or uncooperative; procedural delays may occur; the issues may be complex or novel; supporting documentation may have been destroyed or lost and credibility resolutions may have to be made by the administrative law judge” (id. at 742). The Board overruled prior precedent,⁶⁷ and stated that it would determine whether non-Board settlements ef-

⁶⁶ The warning dates in the complaint are alleged to be on or about July 18, August 24, and September 15. Although the date of May 31 was not specifically included, the documentary evidence of same was volunteered by Respondent as part of its defense (R. Exh. 20), and I include that the May 31 warning, like the one on August 23, is appropriately within the ambit of the complaint.

⁶⁷ *Clear Haven Nursing Home*, 236 NLRB 853 (1978).

fectuate the purposes and policies of the Act and should be approved in the following manner (at 743):

[T]he Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the state of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Citing the fact that the individual charging parties had requested approval of the settlement which the Union had considered “fair,” and the risks in litigation, the Board granted the employer’s motion for summary judgment (*id.*).

The Board has subsequently applied the principles of *Independent Stave*. Thus, in *American Pacific Concrete*, 290 NLRB 623 (1988), the employer had already been determined to have committed an unfair labor practice, and the issue was the amount of backpay. Prior to opening of the backpay hearing, the employee, the union, and the employer entered into a settlement agreement over the amount of backpay. The employee was aware that the employer intended to challenge his evidence on interim earnings. The General Counsel opposed the settlement, and it was rejected by the administrative law judge. In accepting the settlement, the Board noted that the employee and the union had agreed to the amount. It also observed that the “outcome before the judge was not necessarily final” and, considering evidence of the employer’s troubled financial condition, a future award was “problematic” (*id.*).⁶⁸

In *Cambridge Taxi Co.*, 260 NLRB 931 (1982), separate charges against an employer were filed by an individual and a union. Thereafter, the individual filed another charge. A settlement agreement was entered into by the individual, the union, and the employer regarding the initial charges, and was approved by the Regional Director. Thereafter, complaint issued on the last charge, and the employer filed a motion for summary judgment. In granting the motion, a panel majority of the Board stated as follows:

We have consistently held that a settlement agreement disposes of all issues involving presettlement conduct of the parties, unless prior violations of the Act were either unknown to the General Counsel and not readily discoverable by investigation, or specifically reserved from the settlement agreement by mutual understanding of the parties (*id.*).

Member Jenkins, dissenting, reasoned that the fact that the agreement did not specifically provide for withdrawal of the

⁶⁸In another case, *Energy Cooperative*, 290 NLRB 635 (1988), the Board approved of a strike settlement agreement which waived certain employee economic rights. The Board based its position on other authority, but stated that it was consistent with *Independent Stave* (*id.* at 932).

last charge meant that it had been “specifically reserved” from the agreement (*id.* at 932).

In *American Laundry Machinery*, 263 NLRB 944 (1982), an administrative law judge, relying on *Cambridge Taxi Co.* and other authority,⁶⁹ granted an employer’s motion for summary judgment, and the Charging Parties and the General Counsel filed requests for review. In vacating the order, the Board stated as follows:

The Administrative Law Judge’s reliance on *Cambridge Taxi Company* is similarly misplaced. The settlement agreement involved in *Cambridge Taxi* was a Board settlement, which the General Counsel executed and which the General Counsel was responsible for policing. Effective administration and enforcement of the Act requires that a high percentage of labor disputes be settled, rather than litigated. Toward this end, the Board has a longstanding policy of encouraging parties to resolve their differences themselves, just as long as the resulting settlement agreement—either the Board or non-Board variety—adequately effectuates the policies of the Act. Settlement is not an end in itself, however, and when, as here, there is sharp disagreement among the parties as to what the non-Board settlement did or did not purport to include, we believe that the instant matter was not ripe for summary judgment

Applying the *Independent Stave* criteria to the facts in this case, Bailey, the discriminatee, did not agree to elimination of the allegation of unlawful warnings. Although the position of the General Counsel was ambiguous because of her stated agreement at the hearing, in essence this was a non-Board settlement because of Respondent’s statement that the General Counsel had no right to approve the agreement, and because she did not sign it. Inasmuch as I have already determined that Bailey was unlawfully discharged and have made credibility resolutions, this case does not present at this stage the risks of litigation mentioned by the Board in *Independent Stave* and *American Pacific Concrete*.

It is clear from the General Counsel’s brief that there is disagreement between the parties as to the meaning of the settlement agreement. Following the rationale of Member Jenkins’ dissent in *Cambridge Taxi*, if the parties had meant to exclude the alleged unlawful warnings from adjudication, they would have so stated.

Finally, the warning to Bailey about talking to other employees at their work stations issued in the midst of the union campaign, while the warning about linen counts took place a few weeks before Bailey’s appearance as a Union witness at a hearing on Respondent’s objections to the election. In the discharge letter, Respondent purported to rely on prior discipline of Bailey. The discharge and the warnings were thus closely related. A full remedy in this case would necessarily include an expunction order, in order to preclude reliance on such warnings as the basis of future discipline. For these reasons, and relying on the authority of *American Laundry Machinery* and the foregoing application of the *Independent Stave* criteria, I conclude that it would not effectuate the purposes of the Act to exclude the alleged unlawful warnings from this adjudication.

⁶⁹*Jefferson Chemical Co.*, 200 NLRB 992 (1972).

It is clear from the evidence recited above that both the May 31 and the August 23 warnings were discriminatorily motivated. The first warning took place in the midst of the union campaign, in which Bailey was an active participant with company knowledge thereof. The warning does not allege that Bailey had violated any company rule or policy, and its assertion that Bailey talked to other employees at their work stations was false. In essence, Bailey was given a warning for talking to other employees while at his work station. I conclude that this warning was motivated by Respondent's desire to limit Bailey's solicitation of union support among the employees, that it constituted an overly broad restriction on such communication under established Board law, and that it constituted an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.⁷⁰

It is also clear that the August 23 warning for alleged improper linen counts was unlawfully motivated. As indicated, Bailey was initially a good employee, and after tolerating asserted inadequacies in linen counts, Respondent has not provided any credible reason for the sudden imposition of a written warning in the midst of its litigation with the Union. Moreover, Jordan, who opposed the Union, was also warned about linen counts on August 23, and repeated the offense in January. Jordan was only suspended, whereas Bailey was discharged.

I conclude that Respondent discriminatorily warned Bailey on May 31 and August 23, thereby violating Section 8(a)(3) and (1) of the Act.⁷¹ Although the General Counsel's brief mentions an unlawful suspension of Bailey, no such allegation appears in the complaint.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

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

2. Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization with the meaning of Section 2(5) of the Act.

3. By issuing warnings to J. L. Bailey on May 31 and August 23, 1988, and by discharging him on September 15, 1988, because of his union activities and sympathies, Respondent thereby committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

⁷⁰ *Maremont Corp.*, 294 NLRB 11 (1989).

⁷¹ I deny Respondent's "Motion to File Reply Brief and Reply Brief." Although the Board's Rules provide for an answering brief to a brief in support of exceptions to an administrative law judge's decision, there is no such provision when the matter is still before the administrative law judge. Board's Rules and Regulations, Secs. 102.42 and 102.46.

It having been found that Respondent unlawfully issued warnings to J. L. Bailey on May 31 and on August 23, 1988, and discharged him on September 15, 1988, it is recommended that Respondent be ordered to offer him immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷³

ORDER

The Respondent, Aratex Services, Inc., Decatur, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by issuing warnings to or discharging employees because of their union activity, or by discriminating against them in any other manner with regard to their hire, tenure of employment, or terms and conditions of employment.

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

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

(a) Offer J. L. Bailey full reinstatement 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, and make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discrimination against him, in the manner described in the remedy section of this decision.

(b) Expunge from its personnel records or other files any reference to its warnings to Bailey on May 31 and August 23, 1988, and its discharge of him on September 15, 1988, and notify him in writing that this action has been taken and that evidence of his unlawful warnings or 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 copying, all payroll records, social security payment records, timecards, and all other records necessary

⁷² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁷³ 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.

to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Decatur, Alabama, plant copies of the attached notice marked "Appendix."⁷⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, 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 Respondent has taken to comply.

⁷⁴If 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."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, or any other labor organization, by issuing warnings to or discharging employees because of their union activities, or by other discrimination against them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer J. L. Bailey full reinstatement to his former job, without loss of any rights or privileges, and WE WILL make him whole for any loss of earnings he may have suffered because of our unlawful discharge of him, with interest.

WE WILL expunge from our records all references to our unlawful warnings to and discharge of J. L. Bailey, and notify him in writing that this has been done, and that such discipline will not be used as the basis for future personnel actions against him.

ARATEX SERVICES, INC.