

DBM, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Cases 18-CA-10771, 18-CA-10790, and 18-CA-10806

September 27, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On February 28, 1991, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, DBM, Inc., Cedar Falls, Iowa, its officers, agents, successors, and assigns shall take the action set forth in the Order.

¹The General Counsel filed a motion to strike the final sentence of the Respondent's brief in support of its exceptions, arguing that the brief's final sentence is an exception that does not conform to Sec. 102.46 of the Board's Rules and Regulations. The Respondent did not respond to this motion. To the extent that the final sentence of the Respondent's brief is a nonconforming exception, rather than a shorthand reiteration of an argument that appropriately could be placed in a brief, we grant the General Counsel's motion to strike it.

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

In its exceptions, the Respondent alleged bias on the part of the judge in deciding the case. We have carefully considered the record as a whole and the judge's decision in light of the Respondent's argument and find no basis for finding bias by the judge.

Everett Rotenberry, Esq., for the General Counsel.
Harry W. Zanville, Esq., of Waterloo, Iowa, for the Respondent.
Walter Schneider, Esq., of Waterloo, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on July 18-20 and September 12, 1989,¹ in Waterloo, Iowa.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America² filed charges in Cases 18-CA-10771, 18-CA-10790, and 18-CA-10806 on January 30, February 22, and March 10, respectively. Consolidated complaints issued March 15 and 28 alleging that DBM, Inc.³ violated Section 8(a)(1) of the National Labor Relations Act by threatening and interrogating its employees and by otherwise interfering with, restraining, and coercing them in the exercise of the rights guaranteed them in Section 7 of the Act, and violated Section 8(a)(1) and (3) of the Act by suspending, laying off, and discharging certain of its employees because of their union activities. Respondent denies the commission of any unfair labor practices.

All parties appeared at the hearing and were afforded full opportunity to be heard and present evidence and argument. The General Counsel and Respondent filed briefs.⁴ On the entire record,⁵ my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACTS⁶

The Respondent, DBM, was established in August 1987 and from the beginning was engaged in the operation of a machine shop in Cedar Falls, Iowa, where it performed chipping, grinding, and blasting services on various parts supplied to it by its nonretail, commercial customers. Although, from its inception, Respondent serviced a number of customers, as months passed, John Deere and Company became one of its most important customers. By April and May 1988, the "Pontiac block," the part which Deere supplied to Respondent for servicing, had become a more and more significant portion of the work being performed at Respondent's shop, representing 40 to 50 percent of sales.

As of May 1988, Respondent was receiving \$5.05 for each Pontiac block which it serviced. At that time, it was paying its employees a per piece rate of \$1.45 for each Pontiac block they chipped and ground. On July 29, 1988, Deere advised Respondent that henceforth it would pay only \$4.45 per block, an immediate reduction of 60 cents. Respondent accepted the reduction in order to keep the account but did not, at the time, pass on the loss to its incentive employees working on the Pontiac blocks. The result was that the labor costs on the block ate up the profits that would have been earned had Deere not reduced the price on the blocks.

By June, the servicing of Deere's Pontiac blocks accounted for 80 percent of Respondent's sales. Yet, these sales generated no profits. The situation continued in this state into the fall.

¹ All dates are in 1989, unless otherwise noted.

² Also called the Union.

³ Also called the Respondent.

⁴ Respondent's motion to strike the General Counsel's reply brief is denied.

⁵ The General Counsel's motion to correct the record, unopposed, is granted.

⁶ The complaint alleges and the answer admits that the Board has jurisdiction and that the Union is a labor organization within the meaning of the Act.

Meanwhile, about the first of June 1988 there was a falling out among Respondent's owners, as a result of which one of them left. He had been in charge of the computer system which contained profit-and-loss data and various other accounting records. The two remaining coowners, President Douglas McCalley and Vice President Sidney Bunger, were unfamiliar with the system and were at a disadvantage understanding the precise financial condition of the Company. To compound the difficulty, the part-owner who left the Company had attempted to retrieve certain data from the system for his own purposes before he left, and in the process blew out of the system much of the valuable financial data it contained. As a result of the destruction of Respondent's records and their general lack of understanding of Respondent's financial situation, McCalley and Bunger did not immediately realize the seriousness of their profit-and-loss status. They did, however, assign their bookkeeper the job of putting back into the computer, all the lost information, a project which was to take 2 to 3 months.

In late summer or early fall 1988 Respondent's bankers advised management that its financial figures "did not make sense" to them. The bankers suggested, following an analysis, that Respondent do something so that its management could determine its financial status.

On receiving the bankers' advise, Respondent hired a certified public accountant, to reconstruct its financial records. He began working on Respondent's records September 30, 1988, and shortly discovered that Respondent had been receiving erroneous profit-and-loss statements from its accounting system and set about cleaning up the inconsistencies and establishing a better system, concentrating on the period October through December 1988.

On November 16 and 17, 1988, the CPA supplied management with reliable profit-and-loss statements for the previous September and October. On analyzing these statements, management realized that whereas earlier in the year labor costs had been 45 percent of sales and averaged 50 percent for the year, for November it was 63 percent. Management understood that changes would be necessary or else the Company would be in dire financial trouble. McCalley and Bunger, nevertheless, decided to wait until they obtained the figures for November before taking steps to alleviate the situation.

On December 15, the CPA provided management with Respondent's profit-and-loss statement for November. McCalley decided that drastic steps would be necessary but did not know exactly what steps to take. After having the CPA's figures confirmed by Respondent's bankers, McCalley and Bunger decided to take a working vacation in Florida over the Christmas holidays and determine a course of action.

In Florida, McCalley and Bunger studied the Company's financial situation using the information obtained from the CPA. The focus of their study was on how to adjust the cost of labor to make the Company more profitable. Clearly, the Pontiac block was the single biggest labor cost factor as well as the single biggest gross revenue producer so that probably that was the area that should be targeted. Since Deere had reduced the price it would pay Respondent for chipping and grinding Pontiac blocks by 60 cents per piece, McCalley and Bunger decided that it would be fair to reduce the amount it paid to its employees by 30 cents, from \$1.45 per block to \$1.15 per block, thus sharing the loss equally between the company and the employees. It was further decided to advise

the employees of the reduction in the incentive by memorandum, through Harlan Weltzin, the chief supervisor, who had been left in charge of the shop, while McCalley and Bunger were in Florida.

Deere was shut down from Christmas through January 2,⁷ and no parts were shipped from Deere to Respondent's shop during that period. Consequently, production was limited to work on materials already in the shop. Since there was little work to be performed, Respondent permitted its employees to take voluntary time off during the holiday season and over 50 percent of them did so, at various times during the period.

Respondent's employees returned to work on January 3 and the rest of the week was a regularly scheduled workweek. However, since Deere's employees did not return to work until January 3, shipments of parts from Deere did not reach Respondent immediately so work continued slow, and employees continued to take voluntary time off during the week of January 3, with Respondent's permission.

Also on January 3, McCalley returned to the plant for the first time since leaving for his Florida vacation with Bunger. The record is silent with regard to any discussion between McCalley and Weltzin on the subject of reduction of the Pontiac block incentive rate, but on the basis of probabilities and subsequent events, I find that McCalley fully informed Weltzin about the discussion to reduce incentive.

I find further, on the basis of both probability and evidence, that Weltzin, on January 3, passed on to the employees the information that he had received that morning from McCalley that there was a planned 30-cent reduction in the Pontiac block incentive rate. Although employee Todd Salisbury testified that shortly after January 3, Weltzin made an announcement in the breakroom, to the entire first shift that the price of blocks was going to be cut from \$1.45 to \$1.15, I find for reasons stated, infra, that before the official announcement was made Weltzin informed the employees of the reduction unofficially on January 3.

Weltzin testified that in the first part of January, January 5, 6, or 7, when he went into the breakroom, to call the first-shift employees back to work after the break, he heard employee Rod Lesh say, "It's not fair. Maybe we ought to see about a union." I find that when Lesh said, "It's not fair," he was referring to the reduction in the Pontiac block incentive rate and that for reasons explained below, the incident occurred on January 3, not later in the week.

I reach the conclusion that Weltzin informed the first-shift employees on January 3, not later, that there was going to be a reduction in the Pontiac block incentive rate because of the fact that late in the afternoon and evening of January 3, three employees of Respondent, without apparent planning, independently and precipitously contacted the Union.

Employee Mike Derbyshire contacted the Union and advised one of its agents, Walt Schneider, that Respondent's employees were interested in being organized. Schneider told Derbyshire that he would have to talk to a few fellow employees and try to set up a meeting to be attended by at least 8 or 10 of their number.

Employee Hershel Hamilton also contacted the Union on January 3 about 4 p.m. and spoke with David Neil, an International representative of the Union. In answer to several

⁷ January 1, 1989, fell on a Sunday and employees of Deere and of Respondent were given January 2 off.

questions posed by Neil, Hamilton advised the union agent that DBM employed 35-40 employees, and that there was considerable interest in union representation. Neil advised Hamilton to get 8 or 10 interested employees together and a meeting would be scheduled for January 10 at 7 p.m. at the union hall. Neil also advised Hamilton to bring with him a list containing the names of rank-and-file employees, supervisors, and owners.

On the evening of January 3, employee Rod Lesh called the Union, just as he had suggested he might do earlier that day in the breakroom, and spoke with Neil, identifying himself as an employee of Respondent. He told Neil that he and his fellow employees were interested in being organized. Neil told Lesh about Hamilton's earlier call and about the meeting scheduled for January 10. Still later in the evening, Neil advised Schneider about the January 10 meeting scheduled with Respondent's employees.

The record reveals no general dissatisfaction with working conditions as they existed during the weeks just prior to January 3. The workload was light and employees were permitted to voluntarily take off, thus working the hours that pleased them. There had been no meetings among the employees to discuss obtaining union representation because of concerns about health and safety, increased wages, holidays, or other working conditions.⁸ Indeed, the three employees who contacted the Union in the late afternoon and evening of January 3 did so spontaneously and individually. Since it was their first day back at work, I find that their calls were precipitated by something that happened that day. The only thing of any significance that could have occurred which might have resulted in their contacting the Union would have been their learning of the planned reduction in the incentive rate. Since any reduction in the incentive rate would automatically result in a cut in pay, the affected employees would certainly have been concerned enough to seek the aid of a labor organization. I find that this is what occurred on January 3.

Following his discussion with Schneider on January 3, Derbyshire contacted 10 or 11 fellow employees, sometimes at the shop on breaks, at other times by phone at their homes, and asked them if they would be interested in obtaining union representation. Similarly, Hamilton did as instructed by Neil and contacted several fellow workers and spoke to them concerning union representation. He also compiled the requested list of employees.

Weltzin testified credibly that during the rest of the week, beginning on January 3, the employees were doing a lot of standing around. Though they all had work stations, most of the employees who were standing around were doing so away from their work stations, talking to each other. Weltzin, on a number of occasions, had to tell employees singly to return to their stations and get to work. Though Weltzin frequently could hear the employees talking on these occasions, he testified that he could not hear what they were talking about. Of 18 to 22 employees working on the first shift, Weltzin testified that 8 or 10 would be away from their work areas at any given time. The fact that the employees were wandering around, away from their working areas, talking with one another, probably reflects an attitude of disgruntle-

ment brought about by the expected forthcoming reduction in the incentive rate. It may also have had something to do with their union activity. At any rate, it came to Weltzin's attention and he eventually called a meeting to discuss the matter. This meeting became the subject matter of certain allegations discussed infra.

After discussing the possibility of union representation with 8 or 10 of his coworkers, Derbyshire called Schneider at the union hall to advise him of his progress. Schneider informed Derbyshire of the meeting scheduled for January 10. Derbyshire then contacted the employees with whom he had spoken earlier and told them about the forthcoming meeting.

On January 9, Bunger returned to the shop from vacation and it was agreed at that time that the planned reduction should be officially announced and implemented. Bunger typed the following memo pertaining thereto:

TO ALL EMPLOYEES:

09 JANUARY 1989

THE PRICE ON PONTIAC BLOCKS PER PIECE, WILL BE REDUCED TO \$1.15 ON 16 JANUARY 1989. DBM HAD A PRICE DECREASE FROM THE SUPPLIER TO KEEP ALL BLOCKS IN HOUSE.

DBM MANAGEMENT

The memo was then given to Weltzin to post and explain to the employees.

Both McCalley and Bunger testified that the announcement was delayed until January 9 because Bunger was not back from vacation until that date and a number of rank-and-file employees were still out on voluntary time off up until that date. Thus, it was determined to wait until January 9 when everyone had returned before making the announcement. Also, management decided to wait until January 16 to implement the new incentive rate in order to give the employees time to adjust to the planned reduction in wages.

Weltzin received the memorandum and instructions on January 9, a little after 7 a.m. He then went around to everyone and told them to remain in the breakroom after their 9 a.m. break because he wanted to speak with them for about 5 minutes.

At 9 a.m. Weltzin went down to the breakroom and waited there until the 15-minute break was over. He then explained to the employees what he had been told by McCalley and Bunger. He also read the memorandum to them. There was some question from the employees as to whether there had really been a decrease in the price of blocks paid by Deere. Weltzin defended the honesty of McCalley and Bunger to assure the employees that what he had been told was true. After some further discussion, Weltzin posted the notice.⁹

In accordance with the information contained in the memorandum, the employees continued to receive \$1.45 per block through January 16. After January 16 they received \$1.15 per block.

By January 9 the union activity of certain of Respondent's employees came to the attention of management. According to the complaint,¹⁰ on this date, Foreman Michael Johnson, an admitted supervisor, interrogated a number of employees

⁸ Hamilton's testimony concerning his reasons for calling the Union are not credited.

⁹ A number of witnesses for the General Counsel denied ever seeing the notice or attending the meeting discussed here. Nevertheless, I credit Weltzin.

¹⁰ Par. 5(a).

concerning their activities for and on behalf of the Union. The answer to this allegation was withdrawn at the hearing. I therefore find the allegation meritorious and the violation proven.¹¹

Weltzin's explanation that the memorandum bearing the unpopular announcement had been torn down by the following morning is credited.

On January 9 also, John Ambrose, an admitted supervisor under the act, wore a sign on which was printed the slogan, "Down with the Union."¹² Thus, Johnson's interrogation of employees and Ambrose's wearing of the sign, both of which occurred on January 9, evidence company knowledge of its employees' union activities, as of that time, as well as antiunion animus.

Weltzin testified, as noted above, that since January 3 the employees had been standing around, talking, and wandering away from their work stations. He testified further, that on January 10 he gathered the employees together before they left for the day, and warned them that if they continued to stand around he would discharge them.

The complaint¹³ alleges that on January 10 Weltzin "threatened an employee with discharge because of employees' activities for and on behalf of the Union." Respondent, after initially denying this allegation, withdrew its answer thereto at the hearing. The effect is an admission of the violation alleged and I so find.

On the evening of January 10, the meeting was held as scheduled at the union hall. Ten of Respondent's employees attended. Of the 10 employees, 4 were among the employees alleged in the complaint as discriminatees. Those were Michael Derbyshire, Todd Salisbury, Rodney Lesh and Keith Diesburg. Of the three employees who contacted the Union on January 3, all three were in attendance. Hamilton delivered to the Union the list of employees which had been requested.

At the meeting, the Union and Respondent's employees decided to go ahead with the organizing drive. The Union distributed buttons and scheduled the next meeting for January 14, at 4 p.m. After January 10, many employees wore their union buttons at work. Thus, the campaign was brought into the open.

On January 11, Foreman Chris Wilkenson, a supervisor under the Act, admittedly¹⁴ interrogated an employee about that employee's union activities and desires and about those of other employees in violation of the Act.

On January 12, Foreman Johnson admittedly¹⁵ threatened that employees' wages would be reduced and that Respondent would discontinue operations, in order to discourage employees' activities for and on behalf of the Union in violation of the Act.

¹¹ Respondent takes the position that its withdrawal of answers to certain 8(a)(1) allegations was motivated solely by a desire to avoid unnecessary litigation expenses and that the General Counsel should not be permitted to use the consequentially resulting admissions as support for the 8(a)(3) allegations. I find that the General Counsel never gave any indication that he would consider joining in such an agreement. Counsel for Respondent's reasons for withdrawing his answers are irrelevant. The effect is the same, i.e., an admission.

¹² Ambrose's affidavit, which contains this information, and which was submitted as G.C. Exh. 20 is admitted as an admission against interest.

¹³ Par. 5(b).

¹⁴ Complaint, par. 5(c). Answer to allegation withdrawn at hearing.

¹⁵ Complaint par. 5(d). Answer to allegation withdrawn.

As noted above, the second union meeting was scheduled for January 14. This scheduled union meeting came to the attention of management and on January 13, Foreman John Ambrose, a supervisor under the Act, admittedly¹⁶ directed that a group of employees not attend this union meeting.

The union meeting was held on January 14 as scheduled. Twenty-three of Respondent's employees attended the meeting. Of the 10 employees alleged as discriminatees in the complaint, 9 of them attended the meeting. All employees in attendance signed union authorization cards.

Present at this meeting was Foreman Michael Johnson, the supervisor who, during the previous several days, had engaged in acts of violative interrogation and threats. Johnson had appeared on Hamilton's list as a supervisor and his presence appeared to make the employees nervous so Neil asked him if he was a supervisor. When Johnson denied being a supervisor, Neil asked him a number of questions concerning his authority to hire, fire, and reprimand. Johnson denied having any such authority. Johnson had signed the sign-in sheet. When Neil later collected and checked out the signed union authorization cards, he found that Johnson had filled out his card lightly in pencil and had failed to sign it. When Neil asked Johnson if he was going to sign the card, Johnson did so, but Neil never saw him again.

The following day, and thereafter, most of Respondent's employees wore union buttons on the job. This, of course, did not go unnoticed by management. Bunger testified that the first time that he heard about the Union and the organizational drive was about January 15 or 17. However, inasmuch as Respondent admits that members of management engaged in antiunion activities as early as January 9, it is clear that management was aware of union activity among its employees prior to their wearing their union buttons.

The week ending January 15 marked the last week during which employees received the \$1.45-per-piece incentive for Pontiac blocks. Beginning January 16, they received \$1.15 per block. Although January was Martin Luther King's birthday and was celebrated at the shop as an unpaid holiday, some employees worked. Those who did and worked on the Pontiac blocks were paid at the new reduced rate.

The complaint¹⁷ alleges that on January 17, Foreman Weltzin announced the institution of new plant rules and instituted such plant rules as a reprisal for employees' activities for and on behalf of the Union. Respondent denies this allegation.

With regard to this allegation, the record indicates that Respondent, on January 17 announced the implementation of a set of work rules. These rules are quite diverse in nature, some being typical of plant rules everywhere, some being distinctly unique. Some of the rules announced on January 17 had been in effect prior thereto while others were new. McCalley and Bunger testified that together they were responsible for composing the list of rules. They defended each rule as a good one and offered explanations as to why the implementation of each rule was necessary. They did not, however, explain why suddenly, it became necessary to issue the list of rules at this particular time, right in the middle of a union organizing campaign, 3 days after a union meeting, well attended by Respondent's employees, a meeting which one supervisor directed these employees not to attend. I find that the timing of the issuance of these rules, and the nature

¹⁶ Complaint par. 5(e). Answer to allegation withdrawn.

¹⁷ Complaint par. 5(f).

of some of them, reflect a discriminatory motivation, while others do not. In my opinion, no set of rules would have issued at this time but for the union activity of Respondent's employees.

Apparently, however, in composing the list of rules designed, in part, as a reprisal for its employees' union activity, McCalley and Bunger decided to reiterate some preexisting legitimate rules and to implement certain new ones designed merely to improve the quality of production. To the extent I find certain of the rules to be motivated by antiunion considerations, I reject Respondent's explanation that the rules were designed merely to remind old employees and advise new employees of their existence.

Once McCalley and Bunger composed the list of rules, they gave it to Weltzin to present to the employees. Thereafter, Weltzin read the list to the employees, verbatim, then offered explanations concerning each rule. The list reads as follows:

17 January 1989

You have the right to organize and belong to a union.

Company rules:

When called in sick, you will need a doctor's excuse.

You need to call each and every day missed, whether sick, injured or [for] any reason you are absent.

If you have car trouble coming to work, notify DBM immediately and you must be at work as soon as possible that day.

If late for work you will be reprimanded and allowed a 5 minute grace period, if not misused.

Any time you take off work for personal reasons, you must notify the company 24 hours in advance and have it okayed by supervision.

No afternoon break.

If you are capable of making more than 150% [of your] job, the job will be looked at.

If out of work area without a reasonable reason, you will be reprimanded.

If late coming back from breaks, you will be reprimanded.

All blocks and other parts must be stamped.

If anyone is caught damaging company property or parts because of their own recklessness, they will be reprimanded.

If below base rate when running parts, it will be looked at and you will be reprimanded.

While on company property or company time, if you are in possession or under the influence of alcohol, drugs or contraband, you will immediately be dismissed. (The only exception is tobacco.)

Insubordination to any company personnel will result in immediate reprimand.

With regard to the reference in the document, to "the right to organize and belong to a union," McCalley testified that it was put in there to put the employees at ease. I find, however, that the reference to union organizing immediately above the list of rules proves, even more than the timing of their issuance, that the organizational activity of Respondent's employees was the occasion for the institution of the rules. The purpose of the inclusion of the reference in the document was to make it clear to the employees that the in-

stitution of the rules was Respondent's answer to its employees' union activity.

Concerning the need for a doctor's excuse, McCalley testified that employees had been taking off whenever they wanted and the Company was having a serious absentee problem as a result. The institution of the requirement that employees obtain a doctor's excuse was meant to solve this problem. Bunger testified that he had listened to McCalley interview prospective employees and heard him tell them that a doctor's excuse would be required when they call in sick, thus implying that the requirement was a nonwritten rule. However, the set of written rules in effect prior to January 17 contains no reference to the doctor's excuse requirement.

Concerning the second rule on the list—that which requires an employee to call in if he is going to be absent for any reason, McCalley testified that the purpose of the rule was to enable Respondent to know in advance that an employee would be absent and thereby make the necessary personnel change to cover his absence. The rules in effect prior to January 17 were silent as to any call-in requirement.

Concerning the third rule which requires an employee who has car trouble on the way to work to call in immediately, McCalley testified that its purpose was merely to let management know, one way or the other, whether the employee was going to report for work. Bunger did not testify and there is no evidence that this requirement was in existence prior to January 17.

Neither McCalley nor Bunger testified concerning the fourth rule—that regarding tardiness, and the old rules are silent on the subject.

The fifth rule which requires an employee who wishes to take a day off to give 24 hours' notice, was touched on by McCalley in his testimony. He did not, however, claim that this was a requirement prior to January 17 and, once again, the old rules are silent on the subject.

Concerning the sixth rule which abolishes the employees' afternoon break, McCalley testified that he decided to do away with the break because it was supposed to be a 5-minute break and employees stretched it to between 10 and 20 minutes. Bunger also testified that the afternoon break was taken away from the employees because they had been abusing the privilege. He explained that Weltzin reported to him and to McCalley that the employees had been taking too long on the afternoon break and that he had tried to limit the time they took but had been unsuccessful. According to Bunger, it was Weltzin who had suggested that the afternoon break be discontinued.

Though not clear from the document itself, the seventh rule referred to a 150-percent cap placed on the incentive rate on the production of Pontiac blocks. McCalley and Bunger decided on the cap on incentive production, according to McCalley, because of the safety factor involved. Bunger testified that the cost of workmen's compensation insurance had gone up substantially from 1988 to 1989. According to Bunger, it was decided to put a cap on production as an experiment, in an attempt to reduce injuries and thereby bring down the cost of insurance. The theory was that if the employees on the line did not try to push themselves to produce 200 percent, there would be fewer injuries. Bunger admitted that the effect of the cap was to reduce the wages of those previously producing 200 percent from \$10 per hour to a maximum of \$7.50 per hour.

The eighth rule which threatened a reprimand for employees who were caught out of their work area without a good reason was instituted, according to McCalley, in order for management to keep track of the whereabouts of its employees. He testified that this rule had been in effect before and, indeed, the old written rules includes a loitering prohibition.

McCalley testified that the ninth rule, which states that employees will be reprimanded for coming back late from breaks, was part of a continuous effort to get the employees to return to their work stations promptly and not remain in the breakroom 5 to 10 minutes past breaktime. As it was, their supervisor would have to go down to the breakroom to call them back to work. This rule is not contained in the old written rules.

The 10th rule which requires that parts be stamped was instituted for the purpose of tracing the part back to the employees who worked on it as a matter of quality control, according to McCalley. He did not testify as to whether this rule existed prior to January 17. The old rules make no reference to this subject.

The 11th rule which calls for the reprimanding of any employee caught damaging company property or parts because of recklessness was not a new rule, according to McCalley, but a rule which every company has. He implied that this was an unwritten company rule before January 17. The old written rules are silent on the subject.

McCalley testified concerning the 12th rule that it might be necessary to reprimand an employee who continuously fails to produce at base rate. He did not testify as to whether the rule was an old one or a new one. The old written rules make no reference to the subject.

The 13th rule prohibiting the use or possession of drugs on company time and threatened discharge for violation of the rule, McCalley testified, is a standard rule at any company. Indeed, the old company rules include such a prohibition.

The 14th and final rule concerning reprimand for insubordination was not, according to McCalley, a new rule and, indeed, is listed among Respondent's old rules. McCalley completed his testimony on the list of rules by stating that all of them were rules typically found at other companies.

Weltzin testified that it was necessary to read the rules given to him by McCalley and Bunger to the employees because some of the employees were new and the older employees had either misunderstood the existing rules or had forgotten them, implying that the rules dated January 17 had always been in effect.

Weltzin testified that a day or two before January 17 Bunger and McCalley drew up the list of rules and showed them to him and asked him if he had anything to add. Then, in accordance with their directions, on January 17, he held a meeting with the first-shift employees a few minutes after 7 a.m., then one with the second-shift employees about 2 p.m. According to Weltzin, he read each rule directly from the sheet, then explained to the employees what the rule meant.

Weltzin first discussed the Union with the employees. According to him, he told them that they had a right to organize and belong to a union; that they could, during breaks, talk about organizing and visit with each other, but during actual worktime he expected them to do the work and not be walking back and forth talking.

Employee Steven Belz testified briefly about Weltzin's discussion of the Union at his meeting with the first-shift employees. Belz could not remember Weltzin telling the employees that they had the right to organize and belong to a union. Employee Howard Howe testified that Weltzin told the second-shift employees that there would be no talking about the Union during working hours and that the penalty for breaking this rule was suspension. According to employee Boyd Niedert, who attended the second meeting, Weltzin said that he could not stop a union drive if the employees felt that they needed a union but that he did not feel that they needed one. He stated that he did not want to be hassled with a union or people hassling other employees on company time. He added that it would be all right for employees to discuss the Union on breaks.

The complaint does not allege that Weltzin's preliminary discussion of employees' union activities, just prior to his discussion of the institution of new plant rules, was violative of the act, and I do not find that it was. On the other hand, I find that the fact that the subject of union organizing was placed at the top of the list of rules, precludes any possibility that the institution of the rules and the initiation of the union organizational campaign were purely coincidental. Indeed, the effect of most of the rules, though perhaps not all, was either to restrict or inhibit employees' freedom of movement, or to punish them or to show them how well off they were before they chose to engage in organizational activity. Where I find below, that the institution of a particular rule was motivated by antiunion considerations, I shall find a violation as alleged in the complaint.¹⁸

Before actually reading the rules to the employees, Weltzin announced that the reason he was reading them was to refresh the memories of old employees as to their existence and to advise new employees of the rules to the extent that he had not already done so. He then read each rule, explained it, and asked if there were questions.

With regard to the first rule, Weltzin testified that he told the employees that when they call in sick, they would need a doctor's excuse for each and every day they were off sick, and that failure to provide the excuse would result in the employee being given the day off without pay, maybe more, depending on circumstances.

A number of employees testified that Weltzin threatened that failure to provide a doctor's excuse would result in disciplining, reprimanding, or termination. They testified further that there had never been such a rule in effect prior to January 17, either written or otherwise and that some of them had been sick in the past and had returned to work without a doctor's excuse, without any disciplinary action being taken against them.

I find this rule to be a new one or an old one not previously enforced, and in the total absence of any other explanation, instituted or newly enforced for the sole purpose of intimidating the employees because of their union activities. The rule was meant to and did adversely affect the employees' working conditions. The timing of the institution of this rule, in the midst of the organizing campaign and its appearance, along with the other rules, immediately below the Respondent's reference to the employees' organizing activities, is clear evidence of the obvious connection, cause and effect,

¹⁸ Par. 5(f).

between the two. I shall so find with respect to most of the other rules without engaging in unnecessary repetition of this reasoning.

Weltzin testified with regard to the second rule, namely, that any employee who intends to be off from work for any reason must call in and notify the Company beforehand. He warned the employees that failure to follow the rule would result in a reprimand, a written warning, a day off without pay for a second occurrence, 3 days off without pay for a third occurrence, and possible termination for an employee missing more than 1 day without calling in.

Employees testified that there were no written rules concerning having to call in before taking off and no penalties for failure to do so. Some employees testifying on the subject stated that they would call in when they expected to be absent while others testified that they, on several occasions, missed work without calling in and nothing was ever done about it.

For reasons stated above, I find this rule, newly instituted, or newly enforced, to be discriminatorily motivated and a violation of the Act. Its reasonableness is not in question. Its implementation, and that of the other rules, as a reprisal for union activities is what is relevant.¹⁹

Weltzin, according to at least one witness did discuss with the employees, the third rule—that concerning the necessity for employees to call in immediately if they have car trouble. Weltzin did not, however, testify concerning this rule. I find, for reasons discussed above, that its institution, or sudden enforcement, was discriminatorily motivated.

Weltzin testified with regard to the fourth rule, that he told the employees that if they were late for work they would be reprimanded but that they would be given a 5-minute grace period as long as they did not take advantage of it. He warned that employees who abused the grace period would be disciplined.

According to employee witnesses, Weltzin told them that they would have to be on time or they would have to take the day off or that other action would be taken. These witnesses testified further that before the January 17 announcement, although employees were expected to report on time, there had been no problem; that “lots of people had come in late” and no one had been sent home. Moreover, there had been no stated penalty for arriving late at work; there had been no disciplining and no warnings issued.

I find that the rule concerning lateness and the penalties announced for violation of the rule were newly instituted. No explanation having been offered for its institution, I find that it was discriminatorily motivated for the reasons discussed above in connection with other rules.

The fifth rule concerns the requirement that employees desiring to take a day off for personal reasons, notify the Company 24 hours in advance and obtain the permission of their supervisors. Weltzin read the rule and explained it to the employees. He did not, however, offer any explanation for the institution or sudden enforcement of this rule.

According to one employee who testified, Weltzin stated that failure to call in 24 hours in advance, as required, would result in a written warning for the first infraction and time off for the second infraction. Another employee credibly tes-

tified that prior to January 17 there was no 24-hour notice required. If he wanted the day off, he could call in that morning and would be told, “fine.” Another testified that if he wanted a day off, all he had to do was ask.

I find that the 24-hour rule was newly instituted for discriminatory reasons in retribution for the employees’ union activities and was therefore violative of the Act.

The sixth rule concerned the abolishment of the afternoon break. Weltzin testified that when he announced the abolishment of the afternoon break, he explained to the employees the reason for its discontinuance. He told them that he had initiated the break for the block line employees, in particular, so that all four employees could take their break and go to the restroom or smoke a cigarette at the same time because if any one of them left, it would stop the line anyway. Thus, the idea was to benefit the Company by having just one break instead of four. The break was being discontinued, according to Weltzin, because instead of taking 5 to 10 minutes, the employees were taking 15 to 20 minutes and this was adversely affecting production. Men on the line were complaining because fellow workers were taking too much time, and they were losing incentive. Weltzin testified Employees, other than block line employees, also began taking afternoon breaks, and they too began to abuse the privilege.

Robert Folkers, a supervisor at the time of the hearing, and a witness for Respondent, supported Weltzin’s testimony that employees had been abusing the privilege by overstaying the break. He testified that this was the reason that the afternoon break was discontinued and this was the explanation given by the Company.

Most employee witnesses testified that Weltzin announced the discontinuance of the afternoon break but did not testify as to whether or not he gave any explanation for its discontinuance. One employee witness specifically stated that Weltzin gave no reason for discontinuing the afternoon break when he announced it on January 17. This witness also testified that when Weltzin read the list of rules, he referred to them as “new rules.”

For several months prior to January 17, block line employees had been taking the 5- to 10-minute break as Weltzin had suggested. These employees were later joined by nonblock line employees who also took the break but apparently without permission. The time spent on these breaks tended to get longer and longer. Weltzin would visit the breakroom to order the men back to their work stations. He warned them about losing the privilege if they continued to abuse

Respondent takes the position that the afternoon break was taken away from the employees because the employees abused the time limitations. I find, however, that although there is evidence that certain employees did extend their breaks beyond the 5 to 10 minutes they should have taken, the breaks would not have been discontinued except as part of the Employer’s campaign of retaliation against its employees because of their union activities. It was just one of a dozen rule changes instituted on the same day, January 17, to make working conditions tougher for those employees. It should not go unnoticed that during the same speech in which Weltzin announced that employees were free to talk about union organization during their break periods, he also effectively did away with the afternoon break and the opportunity to engage in organizational activity. I find the dis-

¹⁹ *Joe’s Plastics*, 287 NLRB 210 (1987); and *Economy Foods*, 294 NLRB 660 (1989).

continuance of the afternoon break discriminatorily motivated.

The seventh rule concerned the capping of the incentive rate at 150 percent of base. This rule is quite different from those previously discussed. Whereas the first six rules tend to have the effect of merely making working conditions less pleasant for the employees, they could arguably indirectly benefit the employer. The rule capping the incentive rate, on the other hand, seriously affected the income of employees while it also adversely affected that of the Respondent. Weltzin testified that when he read the rules to Respondent's employees on January 17, Respondent had just hired a number of new employees.

Indeed, he claimed that to be one of the reasons he was reading the rules to them; to acquaint the new employees with these rules. Weltzin also testified that the reason new employees were hired was because new extra work was coming in and the Company was stepping up the production of Deere blocks and other parts which it had to get out. Thus, Weltzin testified, on the one hand, to planning greater production, and on the other, to capping production. The inconsistency is blatant and is not explained by Respondent's incredible and totally unsupported claim that the capping was an attempt to lower insurance costs. That defense will be discussed infra.

According to Weltzin, when he advised the employees of the rule capping the incentive rate at 150 percent, he told them that McCalley and Bunger felt that the employees were getting too fatigued and the quality of work on the blocks was suffering. He testified further that he also told them that employees had been complaining about their wrists and hands and the safety factor involved.

Robert Folkers testified that whereas there had been a shortage of parts early in January, and management gave employees the option of taking time off, by January 17 the Company had a lot of parts stacked up and a lot of things to do throughout the entire week. Despite this fact, Respondent decided to put the cap on production, effective immediately.

Folkers testified in support of Weltzin that when he advised the employees of the 150-percent cap, he mentioned the safety factor to them. Folkers testified further that employees had come to him with carpal tunnel, tendonitis and smashed hands, in effect, agreeing that there was, in fact, a safety consideration.

Whereas Respondent's witnesses testified that Weltzin explained the reasons for the institution of the 150-percent cap, rank-and-file employees denied that Weltzin gave any explanation. According to employee Boyd Niedert, Weltzin told the second-shift employees that although they had previously been allowed to run as many blocks as they could up to that date, thereafter they would be limited to 150 percent of base. Weltzin added that there was nobody there that was going to make over \$7.50 an hour; that \$10 an hour was gone.

Niedert testified affirmatively that Weltzin gave no reason for the institution of the 150-percent cap rule, but it would appear that Weltzin's statement that the \$10-an-hour wage was gone, implied that limiting the employees income was the object. Prior to the institution of the rule limiting production, employees frequently produced 200 percent or more of base.

According to Niedert, Weltzin explained that in order to keep production down to the 150-percent limit, he expected the employees either to pace themselves over the entire shift or if they reached their limit early, they could stand around on the line, at their work stations, or push a broom. They were not to be permitted to leave the shop or to just wander around the building.

Employee Hershel Hamilton testified that he attended the meeting of the first-shift employees where Weltzin read the rules. Like Niedert, Hamilton testified that Weltzin gave no reason for the institution of the 150-percent cap rule. Specifically, he denied that Weltzin mentioned safety in connection with the new rule.

Employee Steven Belz testified concerning Weltzin's meeting with the first-shift employees. According to Belz, Weltzin stated that henceforth employees would be limited to 150 percent of base rate, which is \$7.50 an hour and after reaching their limit, they were to quit work and remain at their work stations. Belz specifically denied that Weltzin offered any explanation for the institution of the 150-percent limitation on incentive production.

Other employees testified with regard to Weltzin's announcement of the institution of the 150-percent cap rule and none of them recalled any explanation of the reason for the rule's implementation being given by Weltzin.

With regard to the disparity in testimony between Weltzin and the rank-and-file employees, I credit that of the employees and find that Weltzin did not give any reasons for the institution of the 150-percent cap rule. I find further, that if the safety of employees or insurance costs or quality of product were really considerations, Weltzin would have said so because the employees were about to suffer a severe cut in wages and, assuming no animosity present, the naturally sympathetic thing to do would be to try to explain the necessity for the action. If, on the other hand, Weltzin and Respondent's management intended the production cap as retaliation for the employees' union organizing efforts, Weltzin might simply have said, "No more \$10 an hour" and, in fact, that is what he did say.

Moreover, McCalley testified that statistics concerning the nature and number of injuries to Respondent's employees were recorded by the Company nurse. If these statistics would have reflected a basis for a cause for concern, serious enough for Respondent to institute the 150-percent incentive limit, and thus support Respondent's position, Respondent would have, of course, introduced them and placed them in the record. It did not do so. I therefore conclude that there was no safety factor involved in Respondent's decision to institute the 150-percent limitation on incentive earnings. I find, on the contrary, that the rule was discriminatorily motivated and a violation of the Act.

The eighth rule stated that employees found out of their work area without a reasonable reason would be reprimanded. Weltzin testified that after reading the rule to the employees he explained that it did not concern employees who left their work area to visit the restroom or to get a drink but those who left their work area to go down "to talk to the next guy down the line" or to do things that did not involve the work which they were supposed to be doing.

There was little testimony from rank-and-file employees with regard to the requirement that they stay at their work stations while they were supposed to be performing their du-

ties—grinding and chipping. No employees testified that there was a change with regard to this requirement and I find none. However, the requirement that the employees stop working after producing 150 percent of the incentive base and stand at their work stations, producing nothing and doing nothing, was a change in working conditions but was part and parcel of the violation which I have already found in connection with the institution of the 150-percent limitation rule. The remedy I shall propose for the violation found earlier will also remedy the rule requiring the employees to stand idle at their stations after completing their 150-percent incentive quota.

The ninth rule states that employees returning late from breaks will be reprimanded. According to Weltzin, the employees had a 30-minute break and a 15-minute break. He testified that frequently they would overstay their breaks by 10 or 15 minutes and he would speak to them about it. Often he would have to go to the breakroom and admonish the employees for overstaying their allotted breaktime. On January 17, he read the rule which, though not previously in writing, had been in practice prior thereto. I find no violation here.

The 10th rule stated that all blocks had to be stamped. With regard to this rule, Weltzin testified that although certain parts had been stamped before, it had not been done in all cases. Weltzin testified that about the time the rules herein discussed were issued, management felt a particular need "to get a handle on our quality problems." The requirement that all blocks be stamped was merely a quality control measure taken at this time to remedy problems the Company had recently been having with quality.

Weltzin testified that he told the employees on January 17 that the blocks had to be stamped so that they could be traced back to the line and to the individual employees who had worked on them so that any problems with the blocks could be corrected. Without knowing which line produced the flawed block, there was no way of telling who was responsible for the workmanship; no way of correcting mistakes and improving quality. According to two witnesses, Weltzin threatened to discipline or write up any employee who forgot to stamp a part.

With regard to this rule, I find that the stamping of parts had always been required by Respondent, albeit to a lesser extent than required under the January 17 rule. It was part of the job legitimately required of employees and if an employee failed to do his job, it should go without saying, that action could lawfully be taken against the offending employee. I find that Respondent expanded the use of the stamping procedure for the purpose of improving quality control, that it threatened discipline to ensure compliance with its requirement, and that the ultimate object was a legitimate business aim and not retaliation against its employees because of their union activities.

The 11th rule states that if any employees are caught damaging company property or parts because of their own recklessness they will be reprimanded. Weltzin testified that the occasion for issuing this rule was the fact that certain employees were damaging the tooling or the parts they were running. Employees had used pencil grinders to write graffiti on a number of blocks which, if not caught, might have resulted in a loss of business. All but one such block was discovered before being shipped, but the one that was missed caused some problems with the customer. Weltzin also testi-

fied to air hoses being deliberately cut and nuts loosened on air grinders, actions which could have resulted in serious injury. These matters were discussed with the employees on January 17, according to Weltzin, and given as the reason for the rule.

Weltzin testified that prior to January 1989 these kinds of problems had not occurred. They began between January 1 and 17, thus, necessitating issuance of the rule.

One employee testified that Weltzin stated that any employee caught damaging company property would be terminated. Another, however, testified that the subject was never discussed.

I find that the rule concerning the disciplining of employees for damaging company property to be a legitimate one aimed at protecting the Company's property. The rule exists throughout industrial society everywhere, whether in written form or not. It is implicit in all employer/employee relationships. I find that Respondent's drawing attention of employees to the existence of this rule had nothing to do with the employees' union activities.

The 12th rule concerned the reprimanding of employees who ran parts below base rate. Weltzin testified that he explained this rule mostly for the benefit of those employees who had been working for Respondent for a number of weeks or months and producing at or above base rate but who, just prior to January 17, suddenly began running parts at below base rate. He explained to these employees that they would have to get their production up to base rate because the Company could not afford to pay them more than they actually earned. He added that they would be reprimanded if they failed to run the parts at base rate.

Employee witnesses did not testify at length with regard to this rule. Employee Derbyshire testified that Weltzin threatened employees with termination if they failed to make rate. I credit Weltzin that he used the term "reprimand."

The record is clear that there was always a base rate connected with the incentive program, and one must assume that if an employee consistently failed to make the base rate his supervisor would talk to him about it. I find that the rule, though not in written form, was one that was in practice prior to the advent of the Union and its reiteration on January 17 was not discriminatorily motivated.

The 13th rule which prohibited the use of alcohol and drugs and the 14th rule which dealt with insubordination had been included in the company's original written list of rules, published and in effect long before the advent of the Union. Their inclusion in the new list did not violate the Act.

As noted above, the decision to reduce the price paid to employees for block production from \$1.45 to \$1.15 was made and announced prior to January 17. However, the reduced price first went into effect that day for most employees, since many of them did not work January 16, a holiday. It is therefore natural that during the question period which followed the meetings Weltzin held on January 17 to discuss the rules the subject of the block price reduction would have been brought up by concerned employees, even though it was not one of the rules, new or old, which Weltzin read to them during the meetings proper. This would account, in part, for the discrepancies and confusion in the testimony of various witnesses trying to remember precisely when they first heard about the block price reduction. When the subject

was brought up, Weltzin explained to the employees the basis for the reduction.

The reduction in the block price meant that at \$1.45 per block, the employees had only to produce 112 to 115 blocks to reach their 100 percent base whereas at \$1.15 per block, the employees then had to produce about 140 blocks to reach their 100 percent base. Thus, under the new rate, the employees had to work longer to make the same amount of money. The institution of the 150-percent cap rule automatically limited employees' income to \$7.50 per hour, whereas prior to January 17, Respondent's employees could and did produce 200 percent or more of incentive and thereby earned \$10 or more per hour. Thus, the lawful implementation of the block price reduction and the unlawful institution of the 150-percent limit on production rule had an immediate adverse effect on the income of Respondent's employees. From \$450 to \$500 per week, some employees' income dropped to \$300 per week.

The institution of the 150 percent rule affected the employees' working conditions as well as their paychecks. Whereas prior to January 17, the employees reached their 100 percent of base at 11 a.m. or noon, then earned incentive pay the rest of their shift, after January 17 they were forced to stop working shortly after noon, having reached 150 percent, and had to stand at their work stations, doing nothing, producing nothing and earning nothing, unless, of course, they chose to, or were told to, push a broom.

In addition to Weltzin's announced institution of new plant rules, the complaint alleges that other incidents occurred on January 17 which were violative of the Act. Thus, the complaint²⁰ alleges that Foreman Michael Johnson, on that date, threatened employees that Respondent would relocate its operations as a reprisal for employees' activities for and on behalf of the Union. This violation was admitted by Respondent at the hearing. The complaint²¹ further alleges that on January 17, President McCalley and Vice President Bunker solicited employees' complaints concerning working conditions, impliedly promised that such complaints would be corrected, and threatened that it would discontinue operations because of employees' activities for and on behalf of the Union. This violation was likewise admitted by Respondent at the hearing. Finally, on the same date, the complaint²² alleges that Respondent, by its foreman, Weltzin, told employees, that Respondent was not soliciting business because of employees' activities for and on behalf of the Union. Respondent admitted this violation at the hearing.

These violations, particularly the threats to relocate and to cease soliciting business, support the earlier finding that the 150-percent cap on production was discriminatorily motivated. The reduction in production would tend to prove that Respondent was serious when it threatened to relocate and to cease soliciting new business. The fulfillment of any of these threats would injure these employees financially.

Late in the evening of January 17, after Weltzin had held his two meetings with employees, Boyd Niedert asked employee Doug Akely for some union cards that Akely had in his locker, advising him that he had a couple of employees interested in filling them out. Akely supplied the cards and

Niedert distributed about six of them to fellow employees during the remainder of the break which took place early in the morning of January 18. He explained to them that the first shift had started a union organizing drive and had already held some meetings. He asked those present to go along with the effort. One employee filled out the card, signed it, had his signature witnessed and returned it to Niedert who eventually gave it back to Akely.

John Ambrose, Niedert's supervisor at the time, had taken Niedert and the other employees to the breakroom for their supper break. While Niedert distributed the cards, Ambrose was standing about 10 feet away, talking to another table of employees. Ambrose did not address Niedert nor any of the employees to whom Niedert was talking, nor did he comment on the distribution of the cards.

The employees to whom Niedert distributed the union cards were all younger than Niedert, some with just 4 to 6 weeks of service with Respondent. After the supper break, Ambrose took the employees back to their work stations where they worked for 3 more hours to finish the shift. They then worked the next shift and some, though not Niedert, even worked the following shift.

Ambrose, in an affidavit supplied to the Board by him, acknowledged seeing union authorization cards in the break room on January 18, but denied witnessing anyone sign the cards. Nevertheless, the complaint²³ alleges, and Respondent admits,²⁴ that Ambrose, on January 18, threatened employees with layoffs because of their activities for and on behalf of the Union.

The complaint further alleges,²⁵ and Respondent admits,²⁶ that on January 18 Foreman Michael Johnson threatened an employee with layoffs by telling him that Respondent was no longer bidding on jobs as a reprisal for its employees' activities for and on behalf of the Union.

I find each of these incidents violative of Section 8(a)(1) of the Act and evidence supportive of allegations of violations of Section 8(a)(3). On January 18 Johnson made his sympathies and loyalties clear by telling certain employees, including Boyd Niedert, that he had told the Union to "screw off," that he did not need it. Since Johnson had attended the meeting at the union hall, in light of his sympathies, I find it likely that he informed management of whatever he knew of employees' union activities.

On January 19 Respondent laid off employees Michael Derbyshire, Larry Latham, and Boyd Niedert. The complaint²⁷ alleges that the layoffs were discriminatorily motivated and in violation of Section 8(a)(1) and (3) of the Act. Respondent denies the allegation. Though Respondent admits that these three employees were laid off, it denies that the layoff was discriminatorily motivated.

The evidence on which the General Counsel relies to prove its allegation is substantial. With regard to Derbyshire, the record indicates that he was one of the three employees who first contacted the Union on January 3. When Schneider told him to contact fellow employees in order to schedule a meeting, he contacted 10 or 11 of them and solicited their cooperation on behalf of the Union. After advising the Union of his contact with the other employees, he contacted them

²⁰ Par. 5(g).

²¹ Par. 5(h).

²² Par. 5(i).

²³ Par. 5(k).

²⁴ By stipulation at the hearing.

²⁵ Par. 5(i).

²⁶ By stipulation at the hearing.

²⁷ Par. 6(b).

a second time to advise them of the union meeting scheduled for January 10. The record clearly reflects that Derbyshire was among the first and most important activists.

When Johnson began to interrogate employees concerning their union activity on January 9, and Ambrose, on the same date, wore a sign with the caption "Down with the Union" and Weltzin, the following day, threatened an employee with discharge because of his union activities, it clearly indicated that Respondent was aware of its employees' union activities and resented it to the extreme.

Derbyshire attended the union meeting on January 10, obtained union buttons, and wore them thereafter, thus specifically identifying himself as a union adherent. Meanwhile, Respondent's supervisors continued their campaign of interrogation and threats over the next several days, including threats to discontinue operations.

When Ambrose warned employees on January 13 not to attend the union meeting scheduled for the following day, Respondent not only violated the Act but indicated that Respondent was probably aware of what went on at the union meeting of January 10 because it was there that the meeting for January 14 was scheduled. It is therefore more than likely that Respondent was aware of Derbyshire's presence at the meeting of January 10 and of the extent to which he participated in it.

Despite management's warning that its employees should not attend the meeting on January 14, more than 20 of them did so, including Derbyshire, Latham, and Niedert, who also signed union cards as did everyone present. Since Michael Johnson also attended, there is no doubt that their presence and activities there were reported back to management as was the presence and activities of all of the employees who attended the meeting.

When, on January 17, Johnson threatened employees that Respondent would relocate its operations, and McCalley and Bunger threatened them that Respondent would discontinue operations and Weltzin told them that Respondent was no longer soliciting business, all because of the employees' union activities, these members of management were not just threatening the ringleaders but all of the employees engaged in the organizational campaign, virtually the entire first shift, the 22 two rank-and-file employees whom it knew had attended the meeting and signed union cards on January 14.

When, on January 18, Ambrose reiterated Weltzin's earlier threat that Respondent was no longer soliciting business because of the employees' organizational efforts he, as second-shift supervisor, was adding to the list of threatened employees, those on the second shift whom he had seen accept union cards from Niedert the evening before.

The complaint²⁸ alleges and Respondent admits²⁹ that on January 19, McCalley and Bunger assembled Respondent's employees and solicited their complaints concerning working conditions and impliedly promised to correct such complaints, in order to discourage employees' activities for and on behalf of the Union.

The complaint³⁰ further alleges, and Respondent admits,³¹ that on January 19, Foreman Michael Johnson told employees that Respondent had rejected orders from customers and

that it was going to discontinue operations because of its employees' activities for and on behalf of the Union.

On January 19, Derbyshire worked the first shift. At 2 p.m., Weltzin called him away from his job and took him to the breakroom. There, he told Derbyshire to turn in his helmet, that he was being laid off for lack of work. Derbyshire was third in seniority at the shop and neither he nor the two employees senior to him had ever been laid off before.

Derbyshire testified that in previous layoffs Respondent had always laid off according to seniority. The subject of layoffs according to seniority had been brought up on previous occasions of layoffs and Derbyshire received the impression that this had been the practice. On January 19, however, Respondent did not follow this practice in Derbyshire's case nor in the case of the two other employees laid off that day.

After being laid off, still on January 19, Derbyshire went to McCalley's office to talk to him about it. When he entered the office, McCalley was walking toward a filing cabinet, just 5 or 6 feet away. McCalley neither said anything nor acknowledged Derbyshire's presence. Derbyshire asked McCalley why he had been laid off. McCalley remained silent and did not look at Derbyshire. Derbyshire said, "Well, Doug, this has never happened this way before. Why did you do it?" McCalley replied tersely, "That's the way it goes." Derbyshire left.

Shortly after January 19, several of Respondent's employees had a meeting with McCalley and after the meeting was over asked him why he had laid off Derbyshire when he was near the top of the seniority list. McCalley replied that the Company was laying off the slower chippers and Derbyshire was one of them.

The second employee laid off on January 19 was Larry Latham. Evidence concerning Latham and his layoff was entered into the record chiefly by stipulation. Thus, it was stipulated that Latham had been hired on June 30, 1988. In January 1989 he was working on one of the block lines. He was laid off on January 19 at the end of his shift, which was the first of the day. As noted earlier, Latham attended the union meeting on January 14 and signed a card.

It was further stipulated that as of January 19 Latham had a hiring date earlier than some full-time block line employees who were retained on first shift and who were not laid off before the time of his recall at the end of January. He also had a date of hire earlier than some full-time employees who were transferred from the second shift to first shift on or about January 19, and who remained on the first shift, and not laid off before Latham was recalled.

Boyd Niedert is the third employee alleged to have been laid off on January 19 for discriminatory reasons. He wore union buttons every day at work after obtaining them at the January 14 union meeting where he, like the others, signed a union card. As noted above, Niedert had distributed union cards to certain second-shift employees during break early in the morning on January 18. Later that day there was a layoff of a number of recently hired employees, apparently by seniority. Thereafter, at the 8 p.m. second-shift supper break, Niedert asked Ambrose why certain employees had been laid off. He commented that it seemed awfully funny to him that three quarters of the guys to whom he had given union cards the night before had been laid off. He added that he thought

²⁸ Par. 5(l).

²⁹ By stipulation at hearing.

³⁰ Par. 5(m).

³¹ By stipulation at the hearing.

the Company was wrong laying them off. Ambrose replied that Respondent was not a union shop, that the Company did not have to go by seniority to lay off and that there was going to be some more layoffs.

On January 19, as Niedert was getting ready to go into the locker room before the second shift, he was stopped by Ambrose who asked him if he wanted to work that night or just go home since it was his last day. Niedert stated that if he was being laid off he might as well go home.

Niedert testified that he did not know if there were other second-shift employees who were laid off, but he did know that two employees with less seniority than he were kept on, one or both being transferred to the first shift later on.

Further, with regard to seniority, Niedert testified that unlike Derbyshire, he had been laid off once before. Presumably this was the previous October. On this occasion, Weltzin took Niedert to the maintenance room to let him know about the layoff. According to Niedert's very credible testimony, Weltzin told him that he hated to let him go because his work was a lot better than that of many of the other employees, but he had to lay Niedert off by seniority. He added that he did not want to do it but Niedert had less time than anyone else. At that time, Niedert was on the first shift and he and the other two first-shift employees laid off along with him were the most junior of any employees on the first shift. Niedert did not know if Weltzin was referring to plant seniority or shift seniority. The layoff in October lasted 2-1/2 to 3 weeks and when called back, Niedert was put on second shift.

Employee Hamilton also testified concerning the procedure used by Respondent on occasions of previous layoffs and stated that it was by seniority. Moreover, according to Hamilton, Weltzin specifically stated that the Company laid off by seniority.

With regard to the layoffs of Derbyshire, Latham, and Niedert on January 19, I find that the General Counsel has established a prima facie case. The three were all involved in the union organizational campaign and this fact was known to Respondent's supervisory staff. Antiunion animus was clearly established and the timing of the layoffs, coming at the height of the union campaign, supports the General Counsel's case. In addition, I credit the General Counsel's employee witnesses that testified that previous layoffs had been in accordance with seniority whereas the layoffs of January 19 were not. I also credit the General Counsel's witnesses that testified that by January 19 there was plenty of work to be performed, but also find that if there was not, it was because Respondent actually carried out the threats of its supervisors that new orders would not be filled and would, on the contrary, be rejected because of the union activities of Respondent's employees. I find, in accordance with the numerous 8(a)(1) allegations contained in the complaint and equally numerous admissions thereto, that Respondent's agents threatened Respondent's employees with layoff because of their union activities. I also find that the General Counsel has proven a prima facie case that Respondent's threats were carried out with the layoff of Derbyshire, Latham, and Niedert on January 19.

Once the General Counsel has established a prima facie case, the burden shifts to Respondent to show that

Derbyshire, Latham, and Niedert would have been laid off regardless of their union activities.³²

Respondent called several witnesses to testify to the reasons the three alleged discriminatees were laid off. Certain members of management testified that the layoffs in January basically followed the procedure used in previous layoffs. Weltzin testified that the layoffs on January 18 and 19 were necessitated by the fact that John Deere had not yet geared up, that therefore there were insufficient parts to keep everybody busy. This being the case, according to Weltzin, McCalley and Bunger requested Weltzin to lay off a certain number of employees and to decide himself, which employees should be laid off.

Weltzin testified that in choosing employees for layoff in January he followed the same criteria he used during the layoff which had occurred October 21, 1988, and lasted until November 10, 1988. He did not choose according to seniority in January any more than he had the previous October. Rather, he chose to keep those employees whose quantity and quality of production and ability to run different parts was superior to that of other employees.

On January 18 he laid off three to five newly hired employees and on January he laid off the three alleged discriminatees.

Three supervisors were called to support Weltzin's testimony. Gary Nie testified that in October employees were laid off in accordance with the types of parts being run. Employees had experience running only certain parts. If an employee ran out of the parts which he knew how to run, he was laid off because he did not know how to run the other parts which were available. Nie, who was a supervisor at the time, stated that employees were unhappy that Respondent did not lay off according to seniority.

On cross-examination, however, Nie admitted that neither Bunger nor McCalley ever confided in him how they chose employees for layoffs nor conferred with him on the subject. He further admitted that the layoff in October 1988 had nothing to do with him and that his testimony on the subject of how management chose employees for layoff was merely an assumption on his part.

Folkers, a supervisor, who was a rank-and-file employee in October 1988, testified that the layoff, which lasted until mid-November, pretty much followed seniority; that one or two employees had been laid off out of seniority if their performances were not good enough to keep them.

Todd Salisbury, another supervisor, who was a rank-and-file employee at the time of the October 1988 layoff, testified that layoffs then were determined by which employee was running what parts and what parts were needed. Salisbury was not laid off at the time and did not notice if employees were irritated because seniority was not followed.

Bunger testified, like Weltzin, that the procedure followed during the January layoff was the same as the one used the previous October and that the determination as to which employees would be laid off was made by McCalley and Weltzin, based on Weltzin's recommendations. Bunger denied that he had much input as to which employee was going to be laid off.

³² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Bunger explained that Weltzin's recommendations were considered most important because he was on the floor with the employees most of the time and could best determine which employee was doing the best and most productive work and who was most suited for what job.

Production is most important, according to Bunger, when determining which employees to lay off. Production records for each employee are kept by the Company. Each employee writes down on his job card precisely how many pieces of a given part that employee has run. Since Bunger, in the usual course of his job function, handles these job cards, he has a good sense of which employees are most productive and occasionally will indicate to McCalley or Weltzin that a certain employee, not previously chosen for layoff, should be considered for layoff since his dollar output is not as great as that of other employees.

McCalley testified basically in agreement with Bunger and Weltzin. He stated that the October 1988 layoff was the only other layoff that the Company had had prior to January 1989 and that the procedure followed and the criteria used for determining which employees to lay off was the same. McCalley further testified that employees from both the first and second shifts were laid off on January 18 and 19 and that some employees were transferred to the first shift from the second shift which was eliminated. He explained that the layoff was caused by the fact that the Company did not have enough customer parts to justify two shifts.

McCalley testified that the layoffs were necessary because Respondent did not have the parts to run. The laid-off employees, he said, were specialists on the parts which were no longer in supply and Respondent had nowhere to employ them. It was hoped that in a few weeks when parts arrived, the laid-off employees could be recalled. McCalley added that as a service company Respondent had no control over when parts would be delivered and he could not keep the idle employees just standing around until parts arrived. He testified that there was no intention not to recall the laid-off employees because it would take too long to break in new employees.

McCalley agreed with the testimony of Weltzin and Bunger to the effect that Respondent depended on Weltzin to make the decision on layoffs because he was out on the floor and was familiar with the employees' work and with the available workload.

McCalley testified that the newly hired employees were laid off on January 18. They were, he said, not put to work on Pontiac blocks because of their inexperience and because the customer supplying Pontiac blocks was particular. These employees were put on other parts and when Respondent ran out of these other parts the new employees were laid off. They were also laid off because they were the least productive. On January 19, Derbyshire, Latham, and Niedert were laid off, McCalley testified, because Respondent ran out of the type of parts on which they had been working.

According to the undisputed credited testimony of employee Hershel Hamilton, a day or two after the layoff of the three alleged discriminatees, he asked Johnson why Derbyshire had been laid off when he was at the top of the seniority list. Johnson winked at Hamilton and said, "We both know why."

Nie testified that beginning January 19 and continuing until the end of January only the first shift worked and there

was no second shift. This, he said, was because of a shortage of parts to chip and grind. Hamilton, on the other hand, testified that after the layoffs he saw another employee drilling suitcase weights on several occasions, a job normally done by Derbyshire and Hamilton.

I find with regard to the layoff of Derbyshire, Latham, and Niedert that Respondent has failed to carry its burden of showing that they would have been laid off regardless of their having participated in union activities. Not only do I find the testimony of the General Counsel's witnesses more convincing and credible than that of Respondent's witnesses, but I also find that with regard to a number of issues Respondent failed to offer documentation in its possession which, if it supported Respondent's position, should have and would have been placed in the record.

Thus, Respondent's assertion that historically it never followed seniority during layoffs could easily have been proven by introducing personnel files into the record indicating dates of hire of employees laid off in October 1988. Failure of Respondent to produce and offer into the record these documents, gives rise to the presumption that the documents, if produced, would not have supported Respondent's case but would do the opposite, and I so find.

Further, Respondent's position that in January it chose to keep junior men working while laying off more senior employees because the junior employees were working on available parts while the senior employees did not have any parts available on which to work, could easily have been proven by introducing into the record the timecards, which reflect the type of part which employees worked on prior to and after the layoff. Respondent's failure to offer these records raises the presumption that if they had been introduced they would not have supported Respondent's position but would do the opposite, and I so find.

Respondent takes the position that it kept employees working regardless of their seniority if their production was greater than that of other employees. However, Respondent failed to offer the timecards which reflect the number of pieces each employee produced each day. Respondent's failure to produce this evidence in support of its position warrants the presumption that if it were introduced it would not support Respondent's position but would do the opposite, and I so find.

I therefore conclude that Derbyshire, Latham, and Niedert were laid off on January 19 in retaliation for their union activities in violation of Section 8(a)(1) and (3).

Though there had been two shifts prior to the layoff of January 18 and 19, about the time of that layoff the Respondent eliminated its second shift. It laid off certain of the second-shift employees and transferred the remainder to the first shift.

On January 23, the Union filed its petition for a representation election and the following day held its third organizational meeting at the union hall with Respondent's employees, 18 of whom attended. Following the union meeting, of January 24, and on the same day, Foreman John Ambrose interrogated an employee concerning the number of employees who had attended the meeting and threatened the same, or another, employee that Respondent would discontinue operations if the employees voted for union representation.

Both the interrogation and threat were alleged in the complaint³³ as violative of Section 8(a)(1) and both allegations were admitted at the hearing by stipulation. I find both incidents violative of the Act, as alleged.

The complaint alleges³⁴ that on January 25, Respondent violated Section 8(a)(1) of the Act by its Foreman Johnson, who interrogated an employee about that employee's union activities and desires. The Respondent admitted,³⁵ and I find, the violation.

Toward the end of January, McCalley called Derbyshire and told him that he had some work available for him on the third shift. Derbyshire had never worked on third shift prior to his layoff. Indeed, there had not been a third shift in existence immediately prior to the layoff. Derbyshire accepted the recall offer and began working on the 10:30 p.m. to 7 a.m. shift with John Ambrose as his supervisor. Niedert was also recalled.

At the time of his return, Derbyshire noted that engine blocks were being run both on the first and third shifts. The third shift had just one block line running with only two men on the line instead of the usual four. Derbyshire automatically attempted to fill in on the block line since he had experience on the blocks but Ambrose told him that McCalley had said that Derbyshire was not to work on the blocks. When Derbyshire asked why, Ambrose replied that he did not know, that McCalley had written these instructions on a note for him. Ambrose then assigned Derbyshire to chip and grind axles and miscellaneous parts. The axles were bigger and a different type than any that he had run before and although it was incentive work, he was only able to produce at 50 percent initially. No one else on the third shift was assigned the same job that Derbyshire was doing. Eventually he was able to meet the incentive requirements.

After being called back to work on third shift, after the first night's work, Derbyshire went to McCalley's office and asked McCalley how long he was going to be on third shift. McCalley replied that he did not know, that Derbyshire was lucky to have a job. He then accused Derbyshire of trying to run the Company and said that Derbyshire's attitude was poor. Derbyshire defended himself, stating that he thought things should be fair, and that "it wasn't meant that way."

I find that, in the conversation between McCalley and Derbyshire, described immediately above, McCalley was accusing Derbyshire of taking over the running of Respondent's business by helping organize on behalf of the Union; that the reason that he was put on third shift rather than first was because of his union activity. I find, further, that when McCalley told Derbyshire that he was lucky to have a job, he was telling him that, but for circumstances beyond his control, he would not be recalling Derbyshire at all.

Based on the circumstances and this discussion, I find factually that Respondent's recalling Derbyshire to the third shift rather than to the first shift was discriminatorily motivated and that his assignment to the heavy axle work rather than to the block work was also discriminatorily motivated. I do not, however, find violations with respect to either the shift assignment or the work assignment inasmuch as they were not alleged as such. I do rely on them, however, as evi-

dence of continued animosity toward employees who were active on behalf of the Union.

The factual finding that Respondent's treatment of Derbyshire, after his recall, was discriminatorily motivated raises the question: "Why, then, did Respondent bother to recall Derbyshire at all?" Unfortunately, the record does not supply a definitive answer to this question but does supply three possible answers. First, Respondent hired counsel and received its first legal advice on January 20. Second, the charge in Case 18-CA-10771 was filed on January 30 and Respondent may have been advised that if the layoff were determined to have been a violation of the law, it could cost Respondent substantial backpay unless it rehired Derbyshire.³⁶ Finally, Respondent was party to a contract with the agency which administers the Job Partnership Training Act. The Job Partnership Training Act provides that if an employer hires an employee in a disadvantaged category, the agency will pay half of the employee's wages, up to 11 weeks. The Job Partnership Training Act also provides, however, that if one of these disadvantaged employees is laid off, he must be rehired before any new employee is hired, otherwise the agency will discontinue paying part wages. The record is unclear as to whether Derbyshire was a participant in this program. In any case, for whatever reason, I find that Respondent continued to bear animosity toward Derbyshire because of his involvement with the Union, but nevertheless felt constrained to rehire him.

On February 3, Foreman Michael Johnson told an employee that Respondent was laying off senior employees and replacing them with newly hired employees because of the employees' union activities. The same day Weltzin told employees that Respondent was not soliciting business because of their union activities. Both of these statements were alleged in the complaint³⁷ and were admitted at the hearing. I find them both violative of Section 8(a)(1) of the Act.

On February 3, as though in partial fulfillment of Johnson's threat, Respondent hired seven new employees, mostly as chippers.³⁸ Within the next 3 weeks, Respondent hired 11 more new employees. According to Respondent's witnesses, although the Company had three shifts going and employees were working overtime, Respondent was still falling behind in production and so had to hire additional employees. The 150-percent cap was still in effect.

Hamilton asked Weltzin and McCalley, about this time, why Respondent was hiring new employees when he had been told earlier that there were going to be no new jobs and no bidding for new jobs. McCalley and Weltzin both replied basically that it was none of Hamilton's business, that there was work there and there was more work coming in.

About February 6 McCalley finally recalled Niedert. This was several days after he began hiring new employees. That McCalley chose to employ new, inexperienced help rather than recall Niedert is further evidence of discriminatory motivation.

³⁶The precise date of Derbyshire's reinstatement is not clear from the record so no conclusion is possible as to the effect of the filing of the charge on the decision to recall Derbyshire.

³⁷Pars. 5(o) and (p), respectively.

³⁸The complaint alleges no violation in connection with the hiring of new employees. Although the Respondent and Union had signed a Stipulation for Consent Election on February 2, the agreed-upon payroll ending date was February 1, and the election was not affected by the new hires.

³³Pars. 5(g) and (r), respectively.

³⁴Par. 5(n).

³⁵By stipulation at the hearing.

The complaint³⁹ alleges that Respondent discharged its employee Howard Howe on February 20 because of his union activities. The record indicates that Howe worked Sunday, February 12 through Friday morning, February 17.

Howard Howe was a known union activist among Respondent's employees. He attended the union meeting on January 14 and signed a union authorization card on that occasion. Since this meeting was also attended by Michael Johnson, an admitted supervisor, it is certain that Howe's attendance was known to Respondent. Following the meeting, Howe attempted to get other employees to sign union cards both at their homes and at the shop. After January 14, Howe conspicuously wore union buttons every day at the shop. I conclude that Respondent was well aware of his union sympathies.

On the morning of Friday, February 16, during the third shift, Howe's supervisor, John Ambrose, approached a group of employees which included Howe and told them that because Respondent was behind schedule there was going to be overtime beginning that evening. Howe objected that he could not work because he had already made plans with his wife to go to Des Moines over the weekend to celebrate their second wedding anniversary. Ambrose instructed Howe to talk to McCalley about the matter. Howe sought out McCalley and told him what he had told Ambrose. McCalley merely stated that he "could really use" Howe but said nothing more. Howe rejoined that he had already made plans and could not change them. McCalley did not reply. He did not instruct Howe that he had to work the overtime, nor did he threaten Howe with discipline if he failed to work overtime. He did not state that overtime was mandatory.⁴⁰ Howe did not work overtime that Saturday.

When Weltzin reported to work Sunday morning, Ambrose told him about Howe's failure to work overtime. Weltzin testified that Howe's failure to work the assigned overtime hurt the Company because running a four-man block line with just three men was not as efficient. He emphasized that everyone who was not sick worked overtime that weekend, particularly on the block line, Howe being the exception.

I do not doubt that Respondent could have used Howe on the evening in question but find that his absence from the block line was not as serious a matter as Weltzen portrayed. After all, just a few weeks before, when Derbyshire first returned to work and joined two coworkers on the understaffed block line, management immediately took him off the block line, letting it continue to run understaffed, so that he could be assigned more difficult work at which he could not make rate.

When Howe returned to work on his next regular shift, Sunday, February 19, his supervisor, John Ambrose, asked him if he had a doctor's excuse to cover his absence on Saturday. Howe replied that he did not, that McCalley knew the reason that he had not worked overtime. Ambrose stated that he had been told by Bungler that if Howe did not have a doctor's excuse, to let him go. Howe argued briefly that Ambrose knew why he had not worked overtime on Saturday. He then went to his locker, gathered his belongings, and left.

After his discharge, Howe applied for unemployment benefits at Job Services of Iowa. He supplied that agency with

a statement concerning the circumstances of his discharge. His statement was basically the same as his later testimony at the Board hearing. Howe subsequently received a few payments but these were stopped after Respondent successfully appealed Howe's case and Howe then had to repay the agency the money he had received earlier.

The appeal took the form of a telephonic hearing in which an administrative law judge listened to Howe and McCalley explain their positions. McCalley emphasized the importance of the overtime which Howe failed to work and the fact that Howe had missed work on one previous occasion. Howe offered no defense but merely agreed to McCalley's description of events. Neither the question of discriminatory motivation nor the fact of Howe's union activity were considered. The judge found against Howe. He appealed the judge's decision to the Employment Appeal Board but lost.

On February 24 Howe visited the plant and asked McCalley to be reinstated. McCalley told Howe that he would like to rehire him, that he had never had any complaints about his work but he could not do so because of the union negotiations. Precisely what McCalley meant by this statement is not clear from the record. However, the statement does clearly establish a connection, in McCalley's mind, between Howe's employment, or lack thereof, and the Union.

The complaint⁴¹ alleges and I find that Howe's discharge was discriminatorily motivated. I make this finding based on the following considerations: Howe was active in the union campaign. He attended a union meeting, spoke in favor of the Union to fellow employees both at the shop and away from it, and openly wore union buttons. Respondent was fully aware of Howe's prouinion sympathies because Johnson attended the same meeting that Howe attended and so was aware of his attendance and, of course, Howe's wearing of the union buttons at work, in front of management, proclaimed his union sympathies. Supervision's threat to replace senior, reads prouinion, employees with newly hired employees because of their union activities was an accurate forecast of exactly what happened in Howe's case. The discharge of Howe at this time, if effective, would have precluded his casting a ballot for the Union in the forthcoming representation election, scheduled for March 10. Respondent's insistence that Howe's presence was vital to his four-man Pontiac block team lacks credibility in light of its treatment of Derbyshire whom they removed from an already understaffed team on his return from layoff. Finally, application to Howe of the "doctor's excuse" rule, which I have found to have been discriminatorily implemented in violation of Section 8(a)(1), is unlawful⁴² and requiring a doctor's excuse for an absence due to celebrating a wedding anniversary is stupid.

But for the fact that Howe was a known union adherent who would certainly cast his ballot for the Union, Respondent would not have discharged him for celebrating his wedding anniversary rather than working one shift of overtime.⁴³

The complaint⁴⁴ alleges that on March 8 Respondent discharged employee Steve Belz because of his union activities. The record reveals that Belz was an active union adherent. He attended at least two union meetings including the Janu-

³⁹ Pars. 6(e) and (h).

⁴⁰ Testimony to the contrary is not credited.

⁴¹ Par. 6(e).

⁴² *Murphy Oil, USA*, 286 NLRB 1039 (1987).

⁴³ *Wright Line*, supra.

⁴⁴ Pars. 6(g) and (h).

ary 14 meeting where he signed the sign-in sheet immediately after Michael Johnson, then sat next to him during that meeting. Belz also signed a union card at that meeting. Thereafter, he wore union buttons every day to work. Obviously, Respondent had knowledge of Belz' prounion sympathies.

Belz had been employed by Respondent since March 1988, most recently as a chipper and grinder. On March 7, the date of his discharge, Belz rode to work with fellow employee Brian Lampman because Belz no longer had a driver's license. At 11:30 a.m., Belz and the other employees on his Pontiac block team, on the first shift, reached the 150-percent production mark and, under the rule still in existence, stopped production. Weltzin told Belz to remain at his work station and push broom or do "odd stuff." Belz swept around his work station and generally cleaned up the area. The other members of his team just sat at their work stations.

There was a half hour break at noon after which the employees went back to their work stations and Belz pushed a broom up and down the main floor. Bob Folkers, a close friend of Belz', had been assigned as supervisor over Belz and his fellow workers on the block line just 2 or 3 days before. On the afternoon of March 7 he did not assign any work to Belz so Belz and his coworkers were expected to sit around, sweep, or do "odd things" until 3:30 p.m. when the shift was scheduled to end.

About 1:30 p.m., Lampman came over to Belz and informed him that he had gotten permission from Sid Bunger to leave work early because he was not feeling well. Belz then went over to Folkers and asked him if he could leave early because his ride was leaving. Folkers replied that Belz could not leave just because his ride was leaving.⁴⁵ He then offered to give Belz a ride himself, something which he had done numerous times before, after the shift was over. He then sent Belz back to work by telling him to "find something to do." Belz left the maintenance room where he had been talking to Folkers. The latter assumed Belz was returning to his work station after being refused permission to leave. Instead, Belz picked up his tools, left the floor, and the plant with Lampman. Half an hour later, Folkers went to look for Belz and found out that he had gone for the day.

Belz, at the time of his discharge, was the second most senior employee and it is undisputed that he was one of Respondent's most productive employees, turning out quality work in great quantity. His attendance was good and he received no warnings and few criticisms since working for Respondent. Nevertheless, with regard to this incident, according to Folkers, he was not treated any differently from any other employee. It was company policy, at the time, to keep the employees at the plant until the shift ended even though they may have met the 150-percent cap hours earlier. No one was permitted to leave simply because the production cap had been reached. The employees, rather, were expected to sweep, band or unband blocks, or just remain at their work stations.

On March 8, Belz again rode to work with Lampman. When he arrived, Folkers told him to go see Bunger. He did so and was told to go get Weltzin and Folkers. When he returned with the two supervisors, Bunger told him he was

fired for leaving without filling out his timecard. Belz complained about not receiving a written warning before being terminated but Bunger noted that the matter was too serious to warrant a mere warning. He instructed Weltzin and Folkers to take Belz to his locker and clean it out. They did so and Belz left the plant. Later, Belz returned to the plant to pick up his check. He asked Bunger for a good work recommendation. Bunger agreed to provide one noting that there was nothing wrong with Belz's work, that he had "just stepped out of line."

I find with regard to Belz' termination that although Respondent was undoubtedly happy to get rid of another prounion vote it would have terminated any employee who walked off the job in the face of a direct order to remain. I recommend that the allegation be dismissed.⁴⁶ An employee's union activity does not protect him from discharge for legitimate cause.⁴⁷

Three days after the March 10 election, Respondent issued a memorandum announcing that it was going to two shifts and because material was accumulating and production had to increase, it was going to open up incentive earnings. In effect, this meant removal of the 150-percent cap. The memorandum made no mention of injuries on the job or insurance costs, the ostensible reasons for implementing the 150-percent cap rule. Weltzin, however, testified that he discussed the reasons for implementing the cap and removing it on March 13 and at that time mentioned injuries in that context when he addressed the employees. I do not credit Weltzin with respect to this testimony.

THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employees Michael Derbyshire, Larry Latham, and Boyd Niedert were discriminatorily laid off and employee Howard Howe was discriminatorily discharged, I shall recommend that Respondent be required to offer them full and immediate reinstatement, with backpay to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴⁸

I shall further recommend that employees be made whole, in similar fashion, for any losses suffered by them, as a result of the implementation of new company rules on January 17.

⁴⁶ *Wright Line*, supra.

⁴⁷ *Klate Holt Co.*, 161 NLRB 1606 (1966); *A&T Mfg. Co.*, 276 NLRB 1184 (1985).

⁴⁸ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁴⁵ Belz' version of this conversation differs markedly from Folkers' version which appears above in the text. Where the testimony of Belz differs from that of Folkers, I have credited Folkers.

CONCLUSIONS OF LAW

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

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

3. Respondent interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Unlawfully interrogating its employees as to their activities on behalf of the Union.

(b) Threatening an employee with discharge because of the employee's activities for and on behalf of the Union.

(c) Threatening that employees' wages would be reduced in order to discourage employees' activities for and on behalf of the Union.

(d) Threatening to discontinue operations in order to discourage employees' activities for and on behalf of the Union.

(e) Directing that a group of employees not attend a union meeting.

(f) Announcing the institution of new plant rules and instituting such plant rules as a reprisal for employees' activities for and on behalf of the Union.

(g) Threatening to relocate its operations as a reprisal for its employees' activities on behalf of the Union.

(h) Soliciting employees' complaints concerning working conditions and impliedly promising that such complaints would be corrected, in order to discourage employees' activities for and on behalf of the Union.

(i) Telling employees that Respondent was not soliciting business because of employees' activities for and on behalf of the Union.

(j) Threatening an employee with layoffs by telling the employee that Respondent was no longer bidding on jobs as a reprisal for employees' activities for and on behalf of the Union.

(k) Threatening employees with layoffs because of employees' activities for and on behalf of the Union.

(l) Telling employees that Respondent had rejected orders from customers because of employees' activities for and on behalf of the Union.

(m) Telling an employee that Respondent was laying off senior employees and replacing them with newly hired employees because of employees' activities for and on behalf of the Union.

(n) Engaging in the conduct specified below in paragraph 4.

4. Respondent engaged in unfair labor practices and committed unfair labor practices violative of Section 8(a)(3) of the Act by:

(a) Laying off Michael Derbyshire, Larry Latham, and Boyd Niedert because of their activities for and on behalf of the Union.

(b) Discharging Howard Howe because of his activities for and on behalf of the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondent, DBM, Inc., Cedar Falls, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from discouraging membership in, activities on behalf of, or sympathies towards International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, or any other labor organization by:

(a) Unlawfully interrogating its employees because of their activities on behalf of the Union.

(b) Threatening an employee with discharge because of the employee's activities for and on behalf of the Union.

(c) Threatening that employees' wages would be reduced in order to discourage employees' activities for and on behalf of the Union.

(d) Threatening to discontinue operations in order to discourage employees' activities for and on behalf of the Union.

(e) Directing that a group of employees not attend a union meeting.

(f) Announcing the institution of new plant rules and instituting such plant rules as a reprisal for employees activities for and on behalf of the Union.

(g) Threatening to relocate its operations as a reprisal for its employees' activities for and on behalf of the Union.

(h) Soliciting employees' complaints concerning working conditions and impliedly promising that such complaints would be corrected, in order to discourage employees' activities for and on behalf of the Union.

(i) Telling employees that Respondent was not soliciting business because of employees' activities for and on behalf of the Union.

(j) Threatening an employee with layoffs by telling the employee that Respondent was no longer bidding on jobs as a reprisal for employees' activities for and on behalf of the Union.

(k) Threatening employees with layoffs because of employees' activities for and on behalf of the Union.

(l) Telling employees that Respondent had rejected orders from customers because of employees' activities for and on behalf of the Union.

(m) Telling an employee that Respondent was laying off senior employees and replacing them with newly hired employees because of employees' activities for and on behalf of the Union.

(n) Laying off employees because of their activities for and on behalf of the Union.

(o) Discharging employees because of their activities for and on behalf of the Union.

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

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

(a) Offer Michael Derbyshire, Larry Latham, Boyd Niedert, and Howard Howe immediate reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions without prejudice to the seniority or other rights or privileges previously enjoyed, and expunge from its files any reference to the unlawful layoffs/discharge and notify them in writing that this has been done and that the layoffs/discharge will not be used against them in any way.

⁴⁹ 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.

(b) Make Michael Derbyshire, Larry Latham, Boyd Niedert, and Howard Howe whole for any loss of pay that they may have suffered as a result of their layoffs/discharge in the manner set forth in the remedy section of this decision.

(c) Revoke all rules implemented on January 17, found to have been discriminatorily motivated, and make whole all employees for any losses suffered by them as a result of the unlawful implementation of those rules.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary or useful in complying with the terms of this Order.

(e) Post at its facility in Cedar Falls, Iowa, copies of the attached notice marked "Appendix."⁵⁰ Copies of the notice, on forms provided by the Regional Director for Region 18, 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.

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

⁵⁰If 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 unlawfully interrogate you as to your activities on behalf of the Union.

WE WILL NOT threaten you with discharge because of your activities for and on behalf of the Union.

WE WILL NOT threaten you that your wages will be reduced in order to discourage your activities for and on behalf of the Union.

WE WILL NOT threaten to discontinue operations in order to discourage your activities for and on behalf of the Union.

WE WILL NOT direct you not to attend union meetings.

WE WILL NOT announce the institution of new plant rules nor institute such rules as a reprisal for your activities for and on behalf of the Union.

WE WILL NOT threaten to relocate our operations as a reprisal for your activities for and on behalf of the Union.

WE WILL NOT solicit your complaints concerning working conditions and impliedly promise that such complaints will be corrected in order to discourage your activities for and on behalf of the Union.

WE WILL NOT tell you that we are not soliciting business because of your activities for and on behalf of the Union.

WE WILL NOT threaten you with layoffs by telling you that we are no longer bidding on jobs as a reprisal for your activities for and on behalf of the Union.

WE WILL NOT threaten you with layoffs because of your activities for and on behalf of the Union.

WE WILL NOT tell you that we have rejected orders from customers because of your activities for and on behalf of the Union.

WE WILL NOT tell you that we are laying off senior employees and replacing them with newly hired employees because of your activities for and on behalf of the Union.

WE WILL NOT lay you off because of your activities for and on behalf of the Union.

WE WILL NOT discharge you because of your activities for and on behalf of the Union.

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

WE WILL offer Michael Derbyshire, Larry Latham, Boyd Niedert, and Howard Howe immediate reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions without prejudice to the seniority or other rights or privileges previously enjoyed, and expunge from our files any references to their unlawful layoffs or discharge and notify them in writing that this has been done and that their layoff or discharge will not be used against them in any way.

WE WILL make Michael Derbyshire, Larry Latham, Boyd Niedert, and Howard Howe whole for any loss of pay that they may have suffered as a result of their layoffs or discharge, with interest.

WE WILL revoke all rules implemented on January 17 found to have been discriminatorily motivated, and make whole all employees for any losses suffered by them as a result of the unlawful implementation of those rules.

DBM, INC.