

**Opelika Welding, Machine and Supply, Inc. and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.** Case 10-CA-25008

November 8, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On March 14, 1991, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions, a supporting brief, and record excerpts. The Charging Party filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Opelika Welding, Machine and Supply, Inc., Opelika, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Expunge from its personnel records or other files any references to its suspension of Richard Tate, and to the disciplinary slips issued to Richard Tate and Arthur Lee Morris between October 19 and December

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We find merit in the Respondent's exceptions regarding the judge's statements that its disciplinary system, implemented in January 1990, as a whole was unlawful. Neither the charge, filed in October 1990, nor the complaint in this case, allege that the disciplinary system itself was unlawful. We note, however, that the judge's conclusions of law contain no such finding.

We also find merit in the Respondent's exceptions as applied to the judge's finding that two disciplinary slips issued to Richard Tate prior to October 19, 1990, were unlawful. The General Counsel does not allege, and the record does not contain any basis for finding, that the Respondent was aware of Richard Tate's activity in support of the Union proper to his statement to a supervisory that he would be absent from work on October 18, 1990, to attend a negotiating session. Accordingly, we find no basis for finding a prima facie case of discriminatory discipline prior to this statement. We therefore reverse the judge's finding that the disciplinary slips issued on June 5 and October 3, 1990, were unlawful.

6, 1990, and notify each of them in writing that this action has been taken and that evidence of the discipline will not be used as a basis for future personnel actions against him.”

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discourage membership in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization by suspending employees or by issuing disciplinary slips to them because of their assistance to the foregoing labor organization or any other labor organization, or by discriminating against them in any other manner with regard to their hire, tenure of employment, or terms and conditions of employment.

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

WE WILL make Richard Tate whole for any loss of earnings he may have suffered by reason of our suspension of him, with interest.

WE WILL expunge from our records all references to the suspension of Richard Tate, and to the disciplinary slips issued to Richard Tate and Arthur Lee Morris between October 19 and December 6, 1990, and notify each of them in writing that this action has been taken and that evidence of the discipline will not be used as a basis for future personnel action against them.

OPELIKA WELDING, MACHINE AND SUPPLY, INC.

*Keith R. Jewell, Esq.*, for the General Counsel.  
*Chris Mitchell, Esq. (Constangy, Brooks & Smith)*, of Birmingham, Alabama, for the Respondent.

James R. Waers, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge was filed on October 25, 1990,<sup>1</sup> and an amended charge on November 15, by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union). Complaint issued on December 3, and alleges that Opelika Welding Machine, and Supply, Inc. (Respondent or the Company) issued disciplinary slips to employees Arthur Lee Morris and Richard Tate, and suspended Tate for 10 days because of their union and other protected concerted activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on this matter in Opelika, Alabama, on January 22, 1991. Thereafter, the General Counsel, Respondent, and the Union filed briefs. On the entire record, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Alabama corporation with an office and place of business located at Opelika, Alabama, where it is engaged in job shop steel fabrication. During the calendar year preceding issuance of the complaint, a representative period, Respondent sold and shipped from its Opelika, Alabama facility goods valued in excess of \$50,000 directly to customers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union was certified on January 15, 1988, as the collective-bargaining representative of Respondent's production and maintenance employees. Following issuance of a complaint on March 29, 1989, by the Regional Director for Region 10, and the filing of a Motion for Summary Judgment by the Acting General Counsel, the Board, on September 29, 1989, issued an unpublished Decision and Order in which it held that Respondent had unlawfully refused to bargain with the Union, and issued a bargaining order.<sup>2</sup> The Board's Order was affirmed by the Court of Appeals for the 11th Circuit on August 22, 1990.<sup>3</sup>

On January 2, 1990, following issuance of a complaint and a hearing, Administrative Law Judge Lawrence W. Cullen concluded that Respondent had violated Section 8(a)(3) and (1) of the Act in March and April 1989 by its transfers to

more onerous work, warnings, suspension, and discharge of employee Peggy Martin.<sup>4</sup>

B. Respondent's New Disciplinary Rules and Procedure

Russell M. Musser was appointed the Company's vice president and general manager on October 27, 1989. Thereafter, he formulated, posted on a bulletin board, and discussed with employees, various company rules and regulations. They list 22 offenses organized into four groups in increasing degree of significance. The first two offenses in the first group were "repeated tardiness" and "irregular attendance." The rules stated that they would be implemented in a five-step process, the fifth step being discharge.<sup>5</sup>

Discipline was recorded on a document entitled "Employee Disciplinary Record." It included a blank for the "step advanced to" in the disciplinary process, and a statement wherein the employee acknowledged that he had been "notified and counseled about the above violation."<sup>6</sup> Company witnesses testified that the same form was also utilized for administrative recordkeeping of absences which did not involve discipline. If no entry appeared in the blank entitled "Step Advanced To In Disciplinary Process," then the form merely recorded an excused absence.

Product Manager Charles Heard, the immediate supervisor of alleged discriminatee Richard Tate, testified about "excused" absences. Thus, in June 1990, he gave Tate permission to go to his aunt's funeral. This was listed as a "Group I" offense on the administrative/disciplinary form. However, there was no entry in the "Step Advanced" blank (other than a dash). This meant, according to Heard, that no discipline had been imposed.<sup>7</sup> In October, Tate requested permission to leave during worktime to meet a man who had undertaken to dig a well for him. Heard granted this request. Nonetheless, Tate was advanced a step in the disciplinary process<sup>8</sup> because his wife was at home and Heard saw "no reason" why Tate should have left his job.

Heard gave further testimony on this subject which is difficult to understand. On cross-examination, he testified that an employee can be advanced a step in the disciplinary process for absence even though he had been given permission to be absent. On further examination, Heard denied that anybody had ever been disciplined for an excused absence, despite his former testimony and the fact that alleged

<sup>4</sup> Opelika Welding & Supply, Case 10-CA-24392 (G.C. Exh. 4).

<sup>5</sup> The various steps were (1) verbal counseling with written record of the counseling being maintained; (2) written warning; (3) written warning and suspension for up to 3 days; (4) written warning and suspension for 4 days or more; and (5) discharge. R. Exh. 2.

<sup>6</sup> The complete form reads:

OPELIKA WELDING, MACHINE & SUPPLY, INC.  
EMPLOYEE DISCIPLINARY RECORD

Employee: \_\_\_\_\_ Date of occurrence: \_\_\_\_\_  
Company Rule Violation: \_\_\_\_\_  
Category of Violation: \_\_\_\_\_  
Step Advanced To In Disciplinary Process \_\_\_\_\_  
Description of Offense: \_\_\_\_\_

I Have Been Notified and Counseled about the Above Violation.  
Employee Signature \_\_\_\_\_ Date \_\_\_\_\_  
Supervisor Signature \_\_\_\_\_ Date \_\_\_\_\_  
Witness: \_\_\_\_\_ Date \_\_\_\_\_

<sup>7</sup> R. Exh. 3.

<sup>8</sup> Ibid.

<sup>1</sup> All dates are in 1990 unless otherwise specified.

<sup>2</sup> Opelika Welding & Supply, 296 NLRB No. 109 Sept. 29 (1989) (not reported in Board Volumes).

<sup>3</sup> G.C. Exh. 3.

discriminatee Richard Tate was advanced a “step” for seeing the well-digger after having been given permission to do so. Heard denied that four more such incidents, for violations after excused absences, could result in discharge. However, he agreed that the company rules provide for a step progression after each violation. Heard testified about an employee who was issued a disciplinary slip for “tardiness,” but was not advanced a “step.”<sup>9</sup> On subsequent instances of tardiness, the employee could be disciplined for the offense of “repeated tardiness.” All slips go into an employee’s file, whether or not discipline has been imposed. General Manager Musser testified that it was within a supervisor’s discretion to determine whether an excused absence would result in discipline.

There are numerous slips without any employee signature, and at least one without an employee or supervisory signature.<sup>10</sup> General Manager Musser agreed that there were instances where supervisors had not obtained the signatures of witnesses when the employees refused to sign. However, the Company does request that the employee sign the form voluntarily. Asked why the Company wanted a signature on forms where no discipline was involved beneath the statement that the employee had been counseled about the “above violation”—Musser replied: “Simply for verification that they got a copy of it and understand that they are not being held accountable for it.”

### C. *The Alleged Discrimination*

#### 1. Tate’s and Morris’ attendance at the October 18 bargaining session

Morris’ union activity began in 1987, and Tate’s in early 1989. Both were appointed union stewards in March 1989,<sup>11</sup> and attended a bargaining session on October 18, 1990. This was the first session either of them had attended. The company representatives were General Manager Musser and company counsel. Morris, Tate, Peggy Martin, and Hoover Wilson represented the Union.<sup>12</sup> The parties discussed a proposed contract. Prior to the bargaining session, which took place during working hours, Tate and Morris had been verbally excused by their respective supervisors to attend the session, Tate by Charles Heard, and Morris by Lee Owens.

#### 2. Tate’s disciplinary slip and suspension on October 19

##### a. *Summary of the evidence*

##### (1) The disciplinary record form

Tate’s supervisor, Charles Heard, testified that he prepared an “Employee Disciplinary Record” to indicate Tate’s absence at the bargaining session. In the blank space following the printed words “Company Rule Violation” Heard wrote, “Irregular Attendance.” Following the printed words “Step Advanced in Disciplinary Process,” Heard inserted a dash.<sup>13</sup>

<sup>9</sup>R. Exh. 10.

<sup>10</sup>R. Exh. 4. Excused absence of Arthur Lee Morris for a dental visit.

<sup>11</sup>Decision in Case 10–CA–24392.

<sup>12</sup>Testimony of Morris. As indicated, Martin had been discharged. Although Morris listed Martin as present at the bargaining session, he also stated that he and Tate “negotiated on behalf of the Union.”

<sup>13</sup>G.C. Exh. 5.

Heard approached Tate on the morning of October 19, and asked him to sign the slip. He testified that he wanted Tate to acknowledge that he had been notified and counseled about “the violation of irregular attendance.” Tate refused, and testified that he told Heard that it was Labor Board business and that Musser knew where he, Tate, had been. Heard contended that Tate also said that Heard could “go tell Russ Musser that he [Tate] was not gonna sign.”

Tate had previously signed two such forms, one on June 5 involving his attendance at his aunt’s funeral, where there was no disciplinary “step,” and one on October 3 involving the well-digging absence, where he was advanced a “step.”<sup>14</sup> He was cross-examined about the form covering the funeral absence, as follows:

Q. Does it impose any discipline on you?

A. I don’t really know how that works.

Q. Well, there’s an item there for “Step Advanced to in the Disciplinary Process.” Are you familiar with the five-step disciplinary process in the Company’s rules and regulations?

A. Yes. I glanced through it, but I ain’t just read all the way through there.

Q. Well, did you know if you had five unexcused absences in a year, you could be terminated?

A. No. I didn’t know that.

Q. Did you sign this particular disciplinary record?

A. Yes.

• • • •

Q. Why did you not refuse to sign that record?

A. Well, I don’t know why. It just had got started and he said I got to sign it. I didn’t see no problems. These were just personal things. So, I figured I was supposed to go in and sign it.

• • • •

Q. And you signed it without any question. Is that right?

A. Yeah. I asked him about it; how do it work.

Q. What did he say when you asked him how it worked?

A. He said it’s just something they keep up with where you’re at, or something or other.

Q. Said it was just to keep a record of where you were at. Is that right?

A. Something like that.

Q. But it wasn’t any discipline. Is that right?

A. Yeah. That’s what he said, but I don’t know.

Tate was further asked why he refused to sign the slip concerning his absence at the bargaining session, after previously signing the other slip. His answer:

A. I told you, I thought when you go through something with the Labor Board you’re automatically excused from that where you didn’t have to have no slip. You know, just ’cause we went to a negotiating meeting.

Q. So, the only difference was that you went to a negotiating meeting on the 18th of October.

A. Yeah.

<sup>14</sup>R. Exh. 3.

## (2) Musser's first conversation with Tate

Heard reported to Musser that Tate had refused to sign the slip because it was "Labor Board business," and that Heard was supposed to tell this to Musser. The general manager opined that Tate did not understand the form, and that it was his, Musser's, responsibility to explain it. Musser and Heard then went to Tate's work station, where a conversation ensued.

According to Tate, Musser told him that no step or discipline was involved, but Tate still refused to sign. Musser then said that he would get a witness to Tate's refusal to sign, and Tate replied, "Go ahead." "I take this very seriously," Musser said to Tate according to the latter. The general manager then got another employee to witness the slip. Heard gave Tate a copy and Musser left. Tate told Heard that Musser knew where he was, and that there was no reason for a slip. He further testified that Musser's voice was normal when the conversation started, but that it "raised up like on another level" when Tate refused to sign. Musser's voice had a "violent tone." Heard asked Tate whether he would be available for overtime work the next day, Saturday.

Musser agreed with Tate's account of what he said, except that he denied saying that he took Tate's refusal to sign "very seriously." Heard denied that Musser raised his voice, although he acknowledged that the plant was noisy.

## (3) Musser's second conversation with Tate

After Musser left, Tate said to Heard: "What am I supposed to be, scared of him or something?" Heard promptly reported this inquiry to Musser. According to Musser and Heard, the general manager felt that Tate still had a "misunderstanding" about the form, and that Musser should go back and "explain it to him again." Musser and Heard then returned to Tate's work station, and a second conversation took place which led to Tate's suspension.

According to Tate, the general manager, still with a "high tone" and "red" face, said, "Look here, young man, if you've got anything to say to me, say it in front of my face. Did you ask Charles [Heard] were you supposed to be scared now?" "Yeah," Tate replied, and bent over to write a production report. Musser kept talking, and Tate raised back up again. Musser then "walked up on" him until their bodies were almost touching. He started waving his finger 2 to 3 inches from Tate's face, while shouting. Tate testified that he pushed Musser's hand away, and said that he himself was not putting his finger in Musser's face.

During cross-examination, counsel engaged Tate in a reenactment of the scene. Counsel took the general manager's part, and approached the witness until their bodies were almost touching. Counsel shook his finger in an upright position, and, according to my characterization agreed to by all parties, the witness "semi-grasped" counsel's hand with his palm and a finger, and pushed it away.

Tate was asked on cross-examination whether, at an unemployment compensation hearing, he had testified that Musser "never got closer than three feet" from him. Tate denied so testifying. Instead, he affirmed, he stated that Musser was about 3 feet away "at first," but that the general manager thereafter "walked up on" him.<sup>15</sup>

<sup>15</sup> Musser, Heard, and Plant Manager Thomas Pitts asserted that, at the state unemployment compensation hearing, Tate said that

Musser testified that Tate was writing a production report on a table when the general manager approached him. Musser said, "If you have anything to say, you're supposed to say it to my face and not behind my back." Tate asked what Musser meant, and the latter repeated his statement. Musser denied that he was angry and denied calling Tate, "Young man." Tate then "grabbed and slapped" Musser's hand, and held onto it, saying, "Don't put your finger in my face." According to Musser, he was "about three feet away, off to [Tate's] left rear." On cross-examination, Musser contended that Tate "grabbed" his hand, "held onto it," and that "when he hit it, there was a very loud pop." Musser said "Fine," and walked away. He denied shaking his finger in Tate's face.

Heard's version, as reenacted at the hearing, was that Musser was about 2 feet away from Tate and was gesturing with his right hand next to his chest with the palm down extending out about one foot. Tate, who had started working again on his production card, stood up, leaned over, and "slapped" Musser's hand while telling him not to put his finger in Tate's face. Tate did not take a step. Tate was in between Heard and Musser, and all that the project manager saw, according to his testimony, was Tate's hand going up. Heard said that he did not see the "actual lick," but claimed that he heard Tate's hand striking Musser's, and knocking it back. Musser looked surprised, said "Fine," and left.

## (4) Tate's conversation with Heard

Tate testified that Supervisor Heard again asked him to come in the following day, a Saturday, and work overtime. Tate replied: "What? You want me to come in for y'all to write me up again?" Heard did not reply. Tate asked him whether he had reported to Musser what Tate had said to Heard. The supervisor acknowledged that he had done so, but gave as the reason that Musser already knew that Tate had said something, and wanted to know from Heard what it was.

According to Tate, Heard advised him not to get "so upset." Tate replied that it made him upset for Musser to "put his finger" in Tate's face. Heard responded that he could understand that, and that he would not want anybody to put his finger in his, Heard's, face. He added: "Russ (Musser) just wants a reason. Don't give him that reason. Y'all have come too far to mess up now." Heard continued: "Just between me and you, the management, they feel like we'll be against the Union, but I hope y'all do get a contract." Tate agreed that this account of his conversation with Heard was not reported in his pretrial affidavit. The reason, Tate averred, was that Heard told him that the conversation was just between Heard and Tate, and that Heard did not want anybody to know anything about it.

Heard acknowledged having a conversation with Tate after Musser left. He asserted that Tate told him that he, Heard, was being "used" by white supervisors to "write-up" black employees.<sup>16</sup> Heard agreed that he told Tate not to be upset. However, he denied the other statements attributed to him by Tate. Thus, he denied (1) discussing overtime work with

Musser was 3 feet away. The decision of the appeals referee, denying Tate's claim, is in evidence (R. Exh. 1), but there is no copy of a transcript of testimony.

<sup>16</sup> Both Tate and Heard are black.

Tate, (2) saying that he hoped the employees would get a contract, or (3) saying that he could understand somebody being upset about having a finger in his face.

(5) Tate's suspension

General Manager Musser testified that he decided to suspend Tate for 2 weeks and to advance him to step 4 in the disciplinary process, for insubordination. Accordingly, he prepared a disciplinary slip stating that the rule violation was "insubordination, i.e., assaulting a supervisor," in that Tate had "physically grabbed" Musser's right hand during a counseling session. The discipline was 2 weeks' suspension without pay.<sup>17</sup> Musser went to Plant Manager Pitts' office, and assembled various management personnel and employees, the latter as "witnesses." He gave them his version of what had transpired, and said that no employee would be allowed "to strike" another employee.

Tate was then brought into the room, about 50 minutes after the second conversation with Musser at his work station. Musser read the disciplinary slip. According to Musser, when he reached the part alleging that Tate had "grabbed" his hand, Tate interrupted, saying "No, I didn't; I slapped your hand." Heard and Pitts corroborated Musser.

Tate testified on direct examination that, after Musser read the disciplinary slip, he asked Tate whether the latter had grabbed his wrist. Tate replied: "No, I didn't grab your wrist; I pushed your finger out of my face." He continued: "Why did you put your finger in my face?" (Heard partially corroborated this.) Musser replied: "That ain't the issue here. You can't touch me. You can't put your hands on me. We'll let the lawyer handle it. You've got two weeks suspension." Musser asked Tate whether he would sign the slip, and Tate refused. On cross-examination, Tate was asked whether he corrected Musser's reading of the disciplinary slip by saying that he "slapped" Musser. Tate's answer: "I've done said that."

Arthur Lee Morris, who was present, was asked whether there was any discussion of the "type of touching" that precipitated the discipline. Morris replied, "Well, he said he put his hand on him." Morris denied that Tate said he had slapped Musser.

(6) Tate's additional disciplinary slips

After his return from suspension, Tate received four more disciplinary slips, none of which advanced him a step in the disciplinary process. Three were for attendance at "union negotiations," and the fourth for attendance at an unemployment compensation hearing. Tate did not sign any of them, and the name of a witness appears on each.<sup>18</sup>

b. *Factual analysis*

It is apparent that Product Manager Heard prepared an "Employee Disciplinary Record" covering the bargaining session which did not advance Tate a step in the disciplinary process, and that Tate refused to sign. It is obvious from Tate's testimony on cross-examination that he did not understand the process. I credit Tate's testimony that he told Heard that Musser knew where he was, rather than Heard's

embellishment that Tate said Heard was to tell Musser that Tate refused to sign.

Musser then went to Tate and said that no discipline was involved, but Tate still refused to sign, and Musser obtained a witness. I credit Tate's testimony that Musser said that he took Tate's refusal to sign "very seriously." This is consistent with Musser's use of a witness in light of his acknowledgement that a witness was not always used on such occasions. On the basis of Tate's testimony, I find that Musser spoke at a pitch which was louder than usual.

Tate then asked Heard whether he should be "scared" of Musser, and the supervisor reported this to the general manager. I do not credit Musser's or Heard's testimony that Musser's objective in going to Tate's work station a second time was to explain the disciplinary process—there is nothing in the testimony of Musser, Heard, or Tate that any such explanation was attempted during the second conversation.

The factual issues regarding the second conversation are the distance between Musser and Tate, Musser's actions, and Tate's response. Musser's and Heard's versions of the distance between Tate and Musser are highly improbable, considering the fact that physical contact was made. Musser said that he was 3 feet away, and denied putting his finger in Tate's face. Heard's version put Musser 2 feet from Tate, and included an account of the general manager raising his right hand to waist level and extending it 1 foot. Tate's version was the most probable considering the fact that physical contact was made, and he was a more believable witness. Accordingly, I credit his testimony that Musser, initially about 3 feet away, walked up to a very close distance, shouted at him, and waved his finger in Tate's face. Musser's appearance at the hearing was that of an individual of more than average size and stature.

The evidence of Tate's response has been presented at various times. The first response, which Musser wrote on the disciplinary slip shortly after the incident, was that Tate "physically grabbed" his hand. Later, in Pitts' office before Tate's arrival, Musser used the word "striking." However, he read the language in the disciplinary slip about "Grabbing" after Tate arrived. Crediting Respondent's witnesses, partially corroborated by Tate, I find that Tate corrected him by saying that he had "slapped" his hand. At the hearing, Heard's and Musser's versions increased in decibel strength to an "actual lick" or a "very loud pop."

Although Tate said at the suspension interview that he had slapped Musser's hand, Tate was not skilled in the nuances of language. I consider Musser's original description, written on the disciplinary slip, to have the greatest probative weight. This is corroborated by Tate's actual demonstration at the hearing. He grasped Musser's hand and pushed it away, while protesting about having a finger in his face.

There is no question that Tate and Heard had a private conversation, since Heard admitted it, but disputed Tate's version of the details. Accordingly, the fact that the conversation was not reported in Tate's pretrial affidavit has no significance. I accept Tate's testimony that the reason for the omission was Heard's request that nobody else know about it.

I accept Tate's account of the conversation, and reject Heard's. Tate was a more truthful witness. The project manager's denial that he told Tate that he, Heard, could understand anybody being upset with a finger in his face, was tai-

<sup>17</sup>G.C. Exh. 6.

<sup>18</sup>The slips are dated November 5, November 19, December 3, and December 6, 1990. (G.C. Exh. 9.)

lored to conform to Respondent's position at the hearing. His denial that he discussed overtime with Tate is unlikely in light of the specific details of that part of the conversation given by Tate. Whether Heard's statement to Tate that he would like to see the employees get a contract reflected Heard's true opinion, or was merely a management stratagem, is unknown and unimportant. Heard's explanation to Tate for his prompt reporting to Musser what Tate had said—that Musser already knew Tate had said something—is probably fictitious. There is no evidence that Musser learned anything about Tate's statements from anybody but Heard.

I interpret Heard's statement to Tate, that Musser "just wants a reason," as meaning that, according to Heard, Musser wanted a reason to discipline Tate.

### 3. The disciplinary slips issued to Morris

Morris testified that he was absent for medical or dental reasons, or was late, about 10 times between January and October 1990. He affirmed that he did not receive any disciplinary slips. Morris was shown a disciplinary slip dated January 8, initialed by "L.F.O.,"<sup>19</sup> with a written notice that he left without prior notice or approval, that he would need a written excuse to document the current absence, and that future appointments should be scheduled as close as possible to the end of the working day.<sup>20</sup> On cross-examination, Morris denied without contradiction that he had ever seen the document before the hearing, that he had been given a copy of it, or that he had any discussion about it with his supervisor, Lee Owens. Morris denied seeing other asserted disciplinary slips documenting absences for medical or dental reasons. The first slip which he received was the one on October 19, after his participation in the October 18 bargaining session. This document asserts that the absence was excused, and that Morris was not advanced a step in the disciplinary process.<sup>21</sup> I credit Morris' testimony.

Morris' work station was about 15 feet from Tate's, and he observed Heard and Tate "arguing." Thereafter, according to Morris, Heard came to his machine and asked whether Morris had ever "had slips before or anything like that." Morris said "No," and Heard responded: "Well, I need to find out why I'm the only supervisor in the plant giving out slips." Heard denied making these statements. I credit Morris, a more reliable witness.

Morris' supervisor, Lee Owens, presented the slip to Morris on the morning of October 19, and asked him to sign it. Asked on cross-examination whether Owens explained that no discipline was involved, Morris answered: "Well, he explained it to me, but he did not explain it like that." Morris signed it because it was his first slip, and he did not believe that it would "go against his record."

The evidence includes additional disciplinary slips issued to Morris. A slip on October 25 was for lateness, and advanced Morris a step in the disciplinary process. He signed this document.<sup>22</sup> Another slip which Morris signed was an

excused absence to attend a "union meeting" on November 1.<sup>23</sup> However, Morris failed to sign two other such slips, on November 19 and December 4, each of which bears the signature of a witness.<sup>24</sup>

## 4. Legal analysis and conclusions

### a. Applicable principles

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in Respondent's decision to discipline an employee. Once this is established, the burden shifts to Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.<sup>25</sup>

In deciding whether the General Counsel has established a prima facie case, we start with the fact that it has already been determined in prior proceedings that Respondent unlawfully refused to bargain with the Union, and that it disciplined another employee, Peggy Martin, because she engaged in protected activities. Both of the alleged discriminatees in this proceeding previously engaged in the same protected activities which led to the discrimination against Martin.<sup>26</sup> As the Court of Appeals for the Fourth Circuit has stated, "the Board is not required to blind itself to past infractions as is a judge or jury in determining the guilt or innocence of a criminal defendant. That history is relevant to the two types of alleged violations in this case." *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676 (5th Cir. 1980), enfg. as modified 245 NLRB 198 (1979).<sup>27</sup> In the case at bar the administrative law judge's conclusions and recommended decision in the prior case involving Respondent may be relied upon as evidence of Respondent's continuing antiunion animus. *Southern Maryland Hospital Center*, 293 NLRB 1209 fn. 1 (1989).

Respondent argues that "where General Counsel relies on previous cases to raise an inference of animus, there must be some specific evidence of animus towards the protected conduct at issue," citing *Mistletoe Express Services*, 295 NLRB 273 (1989).<sup>28</sup> *Mistletoe*, however, does not stand for the proposition asserted by Respondent. And if it did, the animus established in the last proceeding was against Martin's union activities—precisely the same activities in which her colleagues, Tate and Morris, were engaged in this proceeding.

### b. The disciplinary slips

Respondent's new disciplinary procedures must be considered in light of this history. These procedures were established some time after the arrival of General Manager Musser in October 1989, i.e., subsequent to Respondent's discrimination against Martin earlier that year. Although the rules themselves were unexceptional, the progressive method

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>26</sup> G.C. Exh. 4.

<sup>27</sup> One of the alleged infractions in *J. P. Stevens*, as here, was violation of Sec. 8(a)(3) of the Act. See also *Brenal Electric*, 284 NLRB 552, 554 (1987).

<sup>28</sup> R. Br. at 27.

<sup>19</sup> Morris' supervisor was Lee Owens.

<sup>20</sup> R. Exh. 4.

<sup>21</sup> G.C. Exh. 7. The record contains evidence of disciplinary slips issued to another employee, Albert Morris, to be distinguished from Arthur Lee Morris. (R. Exh. 5.) Albert Morris' supervisor was Charles Heard, while Arthur Lee Morris' was Lee Owens.

<sup>22</sup> G.C. Exh. 8.

of implementing discipline as a result of their violation was not understandable. No rational employee could be expected to comprehend a system whereby he was disciplined for being absent after his supervisor had given him permission to be absent.

This confusion was compounded by the company practice of combining a record of discipline on the same form recording excused absences. The employee was asked to sign an acknowledgment that he had been notified and counseled about a "violation," even though there was no violation if a prior entry on the form had not advanced him a "step" in the disciplinary process. General Manager Musser's explanation for this signing request—that he wanted the employee to understand that he was not accountable for the "violation"—is mystifying. The natural tendency of this system was to confuse employees about an element of their working conditions, to wit, discipline, and the record demonstrates that they did not understand it.

In addition to its confusing format, the disciplinary system was administered sporadically. Thus, although Morris had been absent for medical reasons or late about 10 times between January and October 1990, the first slip which he received came the day after the first time that he represented the Union in a bargaining session. Although the slip professed not to be disciplinary in that Morris was not advanced a "step," the fact that this was the first such slip, just after his representation of the Union, constitutes evidence that it was discriminatorily motivated. Tate also received a slip the day after the first time that he represented the Union in a bargaining session. Although Tate had previously received slips, there is no rational explanation for his prior discipline after seeing a well-digger when his absence for that reason had been excused.

Taking into account Respondent's prior unlawful refusal to bargain with the Union, its unlawful discrimination against union advocate Martin, the timing of its implementation of its new disciplinary procedures, their confusing nature and haphazard administration, and the timing of the first slip administered to Morris, I conclude that Respondent's motive in implementing this disciplinary procedure, in part at least, was to "bolster a defense which served to shield its true motive" of continuing discrimination against union advocates. *Contemporary Guidance Services*, 291 NLRB 50 (1988).

The complaint alleges that the disciplinary slips issued to Tate and Morris on October 19, 1990, were unlawful. I conclude that the General Counsel has established a prima facie case that the issuance of these slips was discriminatorily motivated. Respondent has not proved that it would have issued them in the absence of the employees' protected activity.

The General Counsel argues that the question of the other slips issued to Tate and Morris was fully litigated, and that their expunction from the employees' records is necessary in order to provide a complete remedy.<sup>29</sup> I agree. Following Tate's return from suspension, Respondent continued to issue disciplinary slips to him and to Morris after their attendance at bargaining sessions. The evidence establishes that the employees' participation in these sessions on behalf of the Union was the reason for the slips. Although one of the slips issued to Morris was for lateness, he had previously been late without receiving a slip. Although only the illegality of

the October 19 slips was alleged in the complaint, the nature of and justification for Respondent's disciplinary system was extensively litigated. The Board has stated in an analogous matter that there was no showing "how the Respondents have been prejudiced by the General Counsel's failure to allege specifically that the Respondents were not entitled to establish initial terms and conditions of employment. There is nothing indicating that the Respondents would have litigated the case differently, or would have presented any different evidence had such a specific allegation been made." *U.S. Marine Corp.*, 293 NLRB 669 (1989).<sup>30</sup> In this case, considering Respondent's 5-step disciplinary process whereby employees may be discharged after a series of excused absences, together with the number of disciplinary slips already issued, failure to expunge all of the slips would place the employees at risk of discharge—for, primarily, attending bargaining sessions.

I conclude that all the disciplinary slips issued to Tate and Morris were violative of Section 8(a)(3) and (1) of the Act. *Vought Corp.*, 273 NLRB 1290 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986).

### c. Tate's suspension

The evidence in summary shows that Tate, a union protagonist and steward, was excused to represent the Union at the bargaining session, for the first time, on October 18. The general manager and others were at this meeting. The next day, Tate received a disciplinary slip because of the absence, which did not advance him a "step" in the process. He refused to sign, and told the supervisor that the general manager knew where he was. On receiving this news, the general manager went to Tate's work station, and explained that no discipline was involved. Tate still refused to sign. The general manager, raising his voice, said that he took this "very seriously," and caused another employee to witness Tate's refusal to sign. The general manager left, and Tate asked the supervisor whether he was supposed to be "scared" of the general manager. On receiving this news, the general manager visited Tate's work station a second time and inquired whether Tate had asked the question attributed to him by the supervisor. After receiving an affirmative reply, the general manager walked up to a close distance from Tate and, shouting, shook his finger close to Tate's face. The employee partially grasped the general manager's hand, and pushed it away, protesting about having a finger in his face. He was then suspended for 2 weeks without pay for insubordination.

The same prima facie case which supports the complaint allegation about the disciplinary slips supports the allegation that the suspension was discriminatorily motivated. As Supervisor Heard stated, Musser was looking for "a reason."

The issue is whether Tate's response to Musser's close approach, finger-waving, and shouting provided Respondent with a lawful reason for suspending him. More precisely, the question is whether the facts fall within the rule prohibiting discipline as a result of provoked insubordination. In *M & B Headwear*, 349 F.2d 170 (4th Cir. 1965), *enfg.* in part 146 NLRB 1634 (1964), an employee was discriminatorily laid off following union activities. The decision of the Court of Appeals for the Fourth Circuit reads in relevant part:

<sup>30</sup> See Board and judicial authorities to the same effect cited in *All American Gourmet*, 292 NLRB 1111 (1989).

<sup>29</sup> G.C. Br. at 9.

It is conceded that she was angered by her layoff, that she threatened to harm the supervisor who had observed her union activities, and that she was rude to a vice-president several days later. . . . We in no way condone the insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughan gave rise to the antagonistic environment in which these remarks were made.

An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment [citation]. The more an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of section 8(a)(3) . . . . [Id., 349 F.2d at 174.]

The Board has applied this reasoning in factual situations similar to those herein—where the supervisor came up close to the employee and shouted at him, whereupon the employee placed his hand on the supervisor's chest and pushed him back;<sup>31</sup> and where the supervisor appeared to be waving his finger in the employee's face, whereupon the employee defensively clenched his fists.<sup>32</sup> The Board and the courts have applied this principle in other cases.<sup>33</sup> In addition, the Court of Appeals for the Fourth Circuit has supported a distinction made by the Board between spontaneous and premeditated statements by employees, finding the former to be excusable. *J. P. Stevens & Co. v. NLRB*, 547 F.2d 792 (4th Cir. 1976), enf. 219 NLRB 850 (1975).

General Manager Musser's first visit to Tate's work station took place despite the fact there was nothing unusual about Tate's refusal to sign the slip Heard gave him on the morning of the 19th. There are numerous unsigned slips in the record, and Musser admitted that signing was not mandatory. Musser's raising his voice and telling Tate that he took the refusal to sign "very seriously" started the confrontation between the two. Tate's asking Heard thereafter whether he should be "scared" of Musser was innocuous. Musser, however, used this question as an excuse to see Tate a second time and to escalate the confrontation by shouting at Tate, by approaching him closely, and by waving a finger in his face. These actions were not justified by anything Tate had said or done up to that point. Considering Musser's stature, they may have tended to be intimidating.

I conclude that Tate's response to Musser's shouting, close approach, and finger waving—grasping Musser's hand and pushing it away, while protesting—was instinctive and spontaneous in nature, and not inappropriate under the circumstances. The response was precipitated by the general manager's actions. Accordingly, it did not constitute insubordination justifying discipline. It follows that Tate's 2-week

suspension without pay, discriminatorily motivated, constituted a violation of Section 8(a)(3) and (1) of the Act.<sup>34</sup>

In accordance with my findings above, I make the following

#### CONCLUSIONS OF LAW

1. Opelika Welding, Machine and Supply, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing disciplinary slips to employees Richard Tate and Arthur Lee Morris on various dates,<sup>35</sup> because of their assistance to the foregoing labor organization and their participation in other acts of mutual aid and protection, Respondent thereby committed unfair labor practices violative of Section 8(a)(3) and (1) of the Act.

4. By suspending employee Richard Tate for 2 weeks without pay beginning October 19, 1990, because of his assistance to the foregoing labor organization and participation in other acts of mutual aid and protection, Respondent thereby committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

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

#### THE REMEDY

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

It having been found that Respondent unlawfully suspended employee Richard Tate for 2 weeks without pay beginning October 19, 1990, it is recommended that Respondent be ordered to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him the amount of money he would have earned absent such conduct from the time of his suspension to the time of his reinstatement, less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>36</sup>

<sup>34</sup>I have considered the decision of the appeals referee denying Tate's claim for unemployment compensation benefits. That decision contains at least one statement not supported by the credited evidence in this case, to wit, that there was a company policy requiring an employee to sign a statement concerning the reason for an absence, even though it was authorized. R. Exh. 1. It is well established that state unemployment compensation decisions are not determinative in unfair labor practice proceedings before the Board.

<sup>35</sup>The dates of Tate's disciplinary slips are June 5, October 3, October 19, November 5, November 19, December 3, and December 6, all in 1990. The slips issued to Arthur Lee Morris are dated October 19, October 25, November 1, November 19, and December 4, all in 1990.

<sup>36</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>31</sup>*E. I. du Pont & Co.*, 263 NLRB 159 (1982).

<sup>32</sup>*Consumers Power Co.*, 282 NLRB 130, 132 (1986).

<sup>33</sup>*NLRB v. Steinerfilm, Inc.*, 669 F.2d 845 (1st Cir. 1982), enf. as modified 255 NLRB 769 (1981); *Spartan Equipment Co.*, 297 NLRB 19 (1989); *Brunswick Food & Drug*, 284 NLRB 663 (1987); *Vought Corp.*, supra.

It having been found that Respondent unlawfully issued disciplinary slips to employees Richard Tate and Arthur Lee Morris at various times, it is recommended that Respondent be ordered to expunge all such disciplinary slips, and its record of its suspension of Tate, from its personnel records, and to notify each such employee in writing that such expunction has been made and that evidence of his unlawful discipline will not be used as a basis for future personnel actions against him.

It will also be recommended that Respondent be required to post appropriate notices.

On the findings of fact and conclusions of law and on the entire record, I recommend the following<sup>37</sup>

#### ORDER

The Respondent, Opelika Welding, Machine and Supply, Inc., Opelika, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO or any other labor organization by suspending employees or issuing disciplinary slips to them because of their union or other protected concerted activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

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

<sup>37</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(a) Make Richard Tate whole for any loss of earnings he may have suffered by reason of Respondent's unlawful suspension of him on October 19, 1990, in the manner described in the remedy section of this decision.

(b) Expunge from its personnel records or other files any references to disciplinary slips issued to Richard Tate and Arthur Lee Morris, and to its suspension of Richard Tate, and notify each such employee in writing that this action has been taken and that evidence of such discipline will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for copying, all payroll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Opelika, Alabama place of business copies of the attached notice marked "Appendix."<sup>38</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted immediately on receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

<sup>38</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."