

**Seminole Fire Protection, Inc. and Sprinklerfitters  
United Association Local 821, AFL-CIO.** Cases  
12-CA-13865, 12-CA-13877, 12-CA-13944,  
12-CA-13962, and 12-CA-13965

February 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On October 21, 1991, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> 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, Seminole Fire Protection, Inc., Apopka, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>In its exceptions, the Respondent contends that the judge erred by preventing the Respondent from conducting a full cross-examination of Tyler Hughes. We have reviewed the record and conclude that the Respondent was provided an opportunity for full cross-examination of witness Hughes. Specifically, we note that in response to the judge's asking the Respondent's president, Russell Klingbeil, during the examination of Hughes whether he had "Anything more?," Klingbeil said "Nothing." In addition, the judge acted well within his discretion in limiting the Respondent's cross-examination to one questioner per witness.

<sup>2</sup>In the section of his decision concerning the discharge of Tyler Hughes, the judge inadvertently referred to a second customer letter as having been written on January 4, 1991. The correct year was 1990.

The section of the judge's decision concerning the March 27, 1990 meeting was inadvertently titled March 17, 1990.

*E. Walter Bowman, Esq.*, for the General Counsel.  
*Russell Klingbeil*, of Orlando, Florida, for the Respondent.  
*Oscar George Chaires*, of Ocala, Florida, for the Charging Party.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Orlando, Florida, on August 5 and 6, 1991. An amended consolidated complaint issued on March 28, 1991. The charges were filed on March 7, March 16, April 30, May 11, and May 14, 1990, respectively.

The complaint alleged that Respondent engaged in activity in violation of Section 8(a)(1) by interrogating and threatening its employees because of union activities; and activity

in violation of Section 8(a)(3) by terminating the employment of four employees because of union activity.

Respondent admitted the commerce and jurisdictional allegations of the complaint. In view of that admission, I find that it is an employer at its facility in Apopka, Florida, where it is in the business of marketing, fabricating, and installing fire protection systems, and is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find, on the basis of Respondent's admission, that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent terminated four employees soon after a union organizing campaign started in January 1990. Gregory Bennett was discharged on February 1. James Lay was fired on February 23. Tyler Hughes was fired on February 26. Timothy Viehweger worked on February 27 and took off beginning February 28 for surgery because of a hernia. When Viehweger reported to Respondent in April that he was ready to return to work, he was told that he was no longer needed.

After being phoned by employee Gregory Bennett, Union Organizer Oscar Chaires visited Respondent's jobsites at Vistana Resorts and Wekiva Riverwalk on January 25, 1990. Several employees including all four alleged discriminates signed union authorization cards at that time.

After January 25, 1990, David Dickey was called into the office of Respondent's part owner Daniel Driggers and asked about the Union. Driggers asked Dickey what was going on with the Union and had Dickey talked with Union Organizer Oscar Chaires. Dickey replied that he had talked with Chaires. Driggers asked who had talked with Chaires and Dickey told him that his entire crew had talked with Chaires. At that time Dickey's crew included Gregory Bennett, Tim Viehweger, and Shannon Rodus. On February 21 or 22, 1990, while Tyler Hughes was wearing a union ball cap, Driggers asked Hughes if he was involved with the Union. When Hughes replied that he was Driggers looked disappointed and left.

The Union filed a petition for an election on February 26, 1990. The NLRB Regional Director issued a direction of election on April 11, 1990.

Respondent met with and wrote its employees expressing that it opposed the union organizing efforts.

Findings

All the above evidence including the testimony of David Dickey and Tyler Hughes regarding questioning by Daniel Driggers, is not disputed on the record. Although Driggers testified, he was not asked about the conversations with Dickey or Hughes. I credit the above evidence.

Respondent, in its brief, argued that it was unlikely that Driggers knew of the January 25 meeting involving employees and the union organizer, when he allegedly interrogated David Dickey. Respondent argued that the only reason Driggers had to question Dickey, was Respondent's belief that Dickey planned to leave his employment to work for his brother in a union. However, that argument is not supported by evidence. Although Driggers testified, he did not testify about Dickey's allegations that Driggers questioned him about the employees' meeting with Union Organizer Chaires. Dickey's testimony in that regard was un rebutted by Driggers. That testimony illustrated that Driggers specifically asked Dickey about the meeting with Union Organizer

Chaires. Therefore, I find that the record evidence failed to support Respondent's contention that Driggers was asking Dickey about his plans to eventually leave and go to work with his brother in a union.

As mentioned above, Respondent contends that David Dickey held out that he planned to leave and go to work with his brother in a union. However, there was no showing that David Dickey was a known supporter of the Union in its organizing efforts among Respondent's employees, when he was interviewed by Daniel Driggers in late January.

The full record illustrates that Respondent strongly opposed the Union's organizing efforts. Dickey was not a known union supporter in the organizing campaign. Subsequently, Driggers questioned Tyler Hughes as to whether Hughes supported the Union because Hughes was wearing a union ball cap on the job. I find that Driggers' interrogation of Dickey tended to coerce the employees in their union activities and constitutes a violation of Section 8(a)(1) of the Act. The interrogation was conducted in Driggers' office. Driggers was one of Respondent's highest supervisory officials. Driggers gave no assurances regarding possible consequences of the interrogation and Dickey was not advised of why he was being questioned. At that time there was nothing pending which justified the interrogation of Dickey. All those factors have been considered in prior cases as grounds for determining that interrogation constitutes violative conduct. *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *WXON-TV*, 289 NLRB 615, 619 (1988); *NLRB v. Brookwood Furniture*, 701 F.2d 452 (5th Cir. 1983).

The interrogation of Tyler Hughes presents a more difficult question. At that time Hughes was not a known, open and active, union supporter. However, Hughes was wearing a union ball cap. In view of that fact I am reluctant to find that incident constitutes an additional 8(a)(1) violation. *Dynamics Corp. of America*, 286 NLRB 920 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1985).

#### Gregory Bennett

Gregory Bennett worked for Respondent for about 3 months. Bennett was a fitter helper. He was the employee that first contacted Union Organizer Chaires. After talking with Chaires, Bennett talked to the employees on his job at Vistana Resorts about the Union. After he was contacted by Bennett, Chaires came out and talked with Respondent's employees. As mentioned above, Bennett along with others, signed a union authorization card on January 25. Bennett was in David Dickey's crew and as such, was among those employees identified to Daniel Driggers as having talked with the union organizer.

Bennett wore a union tee shirt at work beginning on January 26. On that day Bennett went by the office to pick up his paycheck. While there he saw Respondent's manager Mark Stimmel.

During the next week Bennett's foreman, David Dickey, was off work due to a back problem. However, Bennett testified that Dickey came out to the job at least twice that week "just to keep (the workers) going on what was going on." Bennett worked with Dickey's helper Shannon Rodus.

The record failed to show that anyone was designated to replace Dickey as foreman during the week Dickey was out.

Shannon Rodus who was Dickey's helper, picked up Dickey's truck, drove it during each workday, and returned the truck to Dickey's house after work each day. Both Bennett and Rodus were helpers. Russell Klingbeil testified that Bennett was acting foreman in the absence of Dickey. However, there was no testimony from anyone showing that Bennett, Dickey, or anyone on their crew, was ever told that Bennett was acting foreman. President Klingbeil admitted that he had no knowledge that anyone had designated Bennett as acting foreman. Bennett testified that Dickey continued to handle the foreman functions of keeping up with the employees time and checking on supplies on the job. Dickey also testified that he continued to be responsible for monitoring the level of supplies and material on the job.

On January 31 Rodus and Bennett ran out of materials. Because of that Rodus and Bennett stopped work early and Rodus returned the company truck to the home of David Dickey where Rodus and Bennett told Dickey why they had stopped work.

On February 1, Rodus and Bennett went by the shop to pick up needed materials. Bennett testified he was called into the general manager's office where he was fired by Mark Stimmel. According to Bennett Stimmel said:

we are getting your last paycheck, we cannot afford to pay you anymore. And, I just, you know, why, and he said, we just can't afford to pay you no more.

Bennett was not given any other reason why he was discharged. He was not given a copy of his termination form.

However, Respondent furnished a termination form during the hearing which shows as the reason it terminated Bennett: "failure for not showing up for work."

Foreman David Dickey testified that he had occasionally stopped work early because of parts shortage and that he had not been disciplined on those occasions.

Dickey's helper Shannon Rodus, who along with Bennett stopped work early on January 31, was not fired or otherwise disciplined.

#### Findings

I find on the basis of the record evidence, that General Counsel proved prima facie, that Gregory Bennett was discharged because of his union activity. The evidence in that regard includes evidence that Respondent opposed its employees' organizing efforts; the employees commenced their organizing efforts on January 25, 1990, when Union Organizer Chaires came on the job and several employees, including Gregory Bennett, signed union authorization cards; Gregory Bennett was the employee that originally contacted Chaires regarding organizing Respondent's employees; Gregory Bennett was one of the first, if not the first, employee to present himself to high-level supervision wearing union clothing when he went to the office and saw Manager Stimmel on January 26 while he was wearing a union tee shirt; and Bennett was discharged in an apparently discriminatory manner shortly after his union activities became known to Respondent.

The evidence illustrates that Respondent campaigned against the Union and committed 8(a)(1) violations as shown above.

The evidence regarding the employees' meeting with Organizer Chaires on January 25 is un rebutted and is credited as is the evidence showing that Bennett was the employee that first contacted Chaires and that Bennett came to the office in the presence of Mark Stimmel wearing a union tee shirt. It was around that time that Daniel Driggers questioned David Dickey about the meeting with Union Organizer Chaires.

On February 1, Bennett was fired after he and another helper, Shannon Rodus, left work on the previous day after running out of needed materials. Both Rodus and Bennett were fitter helpers. Their foreman, David Dickey, was off work due to a bad back. Rodus and Bennett reported to Dickey upon leaving work. Rodus returned the company truck to Dickey's house.

Russell Klingbeil testified that Rodus had only 6 months' experience and that Bennett was acting as crew chief or foreman in the absence of David Dickey. However, there was no evidence that Bennett was ever told that he was acting foreman. Bennett had actually worked for Respondent a shorter time than Rodus. Bennett had worked for Respondent for 3 months.

The record showed that David Dickey continued to serve as foreman while out from work during the last week of January 1990. Dickey maintained the crewmembers' time records and the supplying of materials for the job even though he was out from work due to back injury.

On cross-examination Respondent questioned Bennett on whether he had prior experience and whether he had served as foreman for an earlier employer but offered no evidence that Bennett was ever instructed to serve as foreman or acting foreman while working for Respondent.

Only Bennett was discharged on February 1. Dickey, the foreman, was not consulted regarding Bennett's discharge. Rodus received no disciplinary action.

David Dickey testified without rebuttal, that he had occasionally stopped work early when his crew ran out of materials. Dickey was never disciplined because he stopped work early.

Finally, Dickey admitted that he was responsible for the job at the time of Bennett's discharge even though he was out of work because of his back. Dickey admittedly was responsible to maintain the job in materials and supplies. However, Dickey was not disciplined even though it was uncontested that Bennett and Rodus ran out of materials and had to stop work for that reason.

I find that the record proved that Respondent treated Gregory Bennett disparately when he was fired on February 1 in view of the evidence showing that Shannon Rodus committed the same alleged offense and was not disciplined and that Foreman David Dickey had engaged in similar activity on occasion but was never disciplined. *NLRB v. Inland Empire Meat Co.*, 611 F.2d 1235 (9th Cir. 1979); *D'Youville Manor v. NLRB*, 526 F.2d 3 (1st Cir. 1975); *Kent Corp.*, 275 NLRB 138 (1985).

In view of my finding that General Counsel proved a prima facie case, I shall consider whether Bennett would have been discharged in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enf. 840 F.2d 309 (5th

Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

Respondent advanced three different versions of why it discharged Gregory Bennett. When Bennett was discharged he was told by Manager Mark Stimmel that Respondent could not afford to pay him anymore. That testimony by Bennett was un rebutted. Stimmel, who is no longer employed by Respondent, did not testify.

Subsequently Respondent prepared a termination form which was not given to Bennett. That form lists as reason for termination, "failure for not showing up for work."

Finally, Respondent's attorney at the time, submitted a position statement on behalf of Respondent, dated June 1, 1990, which states that Bennett was fired because "(t)he company came under severe criticism from it's customer for leaving the job, two straight days." Despite the statements in that letter, President Russell Klingbeil admitted that Respondent's records show that Bennett did not leave work early on 2 straight days.

Evidence showing that an employer gave shifting reasons for action against an alleged discriminatee, illustrates that those reasons are pretextuous. *Zurn Industries*, 255 NLRB 632, 634, 635 (1981). "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978).

In addition to the fact that Respondent changed its basis for discharging Bennett, the evidence also shows that other employees including another helper, and a foreman, engaged in conduct similar to that of Bennett, but were never disciplined. That evidence also casts doubt on whether Respondent was truthful in its contention that Bennett would have been discharged in the absence of union activities.

Respondent argued that the other helper, Shannon Rodus, was not fired because Bennett was acting foreman. However, there was no record evidence showing that Bennett was ever appointed acting foreman. The record illustrated that David Dickey continued to serve as foreman despite the fact that he was out of work. Both Rodus and Bennett reported to Dickey at the end of each workday and Dickey came out on the job to check on supplies and materials. Therefore, the record did not support Respondent's assertion that Bennett was treated differently than Rodus because Bennett was acting foreman. Respondent did not offer any other justification for treating Bennett differently than Rodus.

Moreover, even if Respondent's assertion is credited, the record would continue to support a finding of disparity. If Bennett was acting foreman, then I must question how he was treated in comparison with the way Respondent normally treated its working foreman. The only evidence in that regard was the un rebutted testimony of David Dickey. Dickey testified that he occasionally stopped work early when his crew ran out of supplies and that he had never been disciplined because he stopped work early. Respondent routinely received the time records from Dickey and, for that reason, would have been aware when Dickey stopped work early. Some of those time records were received in evidence. In consideration of that evidence it is apparent that Bennett was not treated in the same manner that Respondent treated its foremen when they stopped work early because they ran out of supplies and materials.

Finally, the record failed to reveal that Respondent investigated the basis for Rodus and Bennett leaving early on Jan-

uary 31. Neither Foreman David Dickey nor Gregory Bennett was asked to explain why Rodus and Bennett left early on January 31. By failing to investigate why Rodus and Bennett left work early, Respondent cast further doubt on its reasons for discharging Bennett.

In view of the above, I find that Respondent failed to show that Gregory Bennett would have been discharged in the absence of his union activities. Respondent failed to prove that other employees who had not been seen with a union tee shirt, have been discharged for leaving work early due to running out of supplies and materials.

I find that Bennett was discharged because of his union activities and Respondent failed to prove that he would have been discharged in the absence of union activities.

#### Tyler Hughes

Tyler Hughes was working on the Wekiva Riverwalk job when he was fired on February 26, 1990. He was a non-supervisory working foreman and had worked for Respondent on two occasions. When discharged he had worked for Respondent for the last 25 months. Until February 23 Hughes had a helper, James Lay. Lay was terminated on February 23. After February 23, Hughes worked alone.

Both Hughes and Lay signed union authorization cards when Oscar Chaires visited their job on January 25, the same day he had visited the employees on the Vistana Resorts job.

After January 25, Hughes attended union meetings and he occasionally wore a union baseball cap and a union tee shirt at work.

On one occasion when Hughes was wearing a union baseball cap, Respondent's vice president and part owner Daniel Driggers came on his job. That was on February 21 or 22, 1990. From September 1989 through February 1990, Driggers acted as field superintendent for Respondent. Driggers asked Hughes if Hughes was involved with the Union. Hughes told him that he was and that he had signed a union card. Driggers looked disappointed and left. Hughes recalled that incident occurred before James Lay was discharged. Hughes testified that Lay wore a union hat on occasion while at work but Hughes did not recall whether Lay was wearing his union cap on the day Driggers came on the job and asked Hughes about the Union.

Driggers did not deny that the above conversation occurred as recalled by Hughes. I was impressed with Hughes' demeanor. I credit his testimony.

Hughes testified that during mid-February, Driggers told him that he would be going to a job at Westwood Center when he completed the job at Wekiva Riverwalk. However, on February 26 Driggers came to the job and told Hughes he was terminated because Respondent could no longer afford to pay him. Hughes' termination form lists the reason for termination as "lay off due to lack of work."

Hughes testified that there were several weeks of work remaining on the Wekiva Riverwalk job when he was discharged.

Respondent's president admitted that despite what Hughes was told and despite the fact that Hughes' termination form stated that Hughes was terminated because of lack of work, Hughes was actually terminated because of a suspended driver's license. Hughes as crew foreman, was responsible for driving the company truck. However, Hughes' license had been suspended because of a DUI conviction. President

Klingbeil testified that Respondent was notified of Hughes' license suspension by Respondent's insurer on April 12, 1989.

#### Findings

As in the case of Gregory Bennett, I find that the evidence supports a finding that Hughes was discharged because of his union activities. I base that finding on the evidence showing that Respondent opposed its employees' union organizing efforts. Hughes engaged in union activities. Respondent learned of those activities when its part owner Daniel Driggers saw Hughes wearing a union ball cap and questioned Hughes about his union involvement. Hughes told Driggers that he had signed a union card. Shortly afterward Hughes was discharged. Respondent gave several different reasons for Hughes' discharge including that it could no longer afford to pay him; that he was terminated due to lack of work and that he was discharged because his driver's license had been suspended. Moreover, Respondent's president admitted that Hughes was not discharged because Respondent could no longer afford to pay him or because it was out of work. Instead according to President Klingbeil, Hughes was discharged because his driver's license had been suspended. However, Klingbeil admitted that Respondent knew of Hughes' license suspension for some 10 months before it discharged Hughes on February 26, 1990.

The Board and courts have traditionally viewed substantial delays in action after knowledge of the alleged cause, as evidence of illegal motivation. *Merchants Truck Line v. NLRB*, 577 F.2d 1011 (5th Cir. 1978); *National Grange Mutual Insurance Co.*, 207 NLRB 431 (1973).

Finally, near the end of the hearing, Respondent presented evidence in an effort to show an additional reason why it discharged Tyler Hughes. Respondent offered two letters from the general contractor on the Wekiva Riverwalk job complaining that the work was behind schedule. However, during cross-examination it was shown that one of those letters was written before Tyler Hughes was assigned to Wekiva Riverwalk.

As indicated above, evidence showing that an employer gave shifting reasons for action against an alleged discriminatee, illustrates that those reasons are pretextuous. *Zurn Industries*, 255 NLRB 632, 634, 635 (1981). "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978).

In view of the record I find that Respondent was motivated by Hughes' union activities in its decision to discharge him.

Moreover, the record shows that Hughes would not have been discharged in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

According to Respondent's president, Hughes was discharged because his driver's license had been suspended. Klingbeil admitted that Respondent knew of that suspension for 10 months before it discharged Hughes. Klingbeil testified that it had to take steps to accommodate Hughes' inability to drive by, among other things, assigning him to the

Wekiva Riverwalk job which was across the street from Hughes' apartment.

Klingbeil admitted that the Wekiva Riverwalk job was not completed when Hughes was discharged. Nevertheless, according to Klingbeil that job was near enough to completion that Respondent could do without Hughes.

However, the evidence shows that shortly before his discharge Hughes was told by Daniel Driggers that he would be going to a job at Westwood Center when he completed the job at Wekiva Riverwalk.

That evidence which I credit, illustrates two important considerations. It shows that Respondent intended for Hughes to complete the Wekiva Riverwalk job and, at a time when Respondent was fully aware of Hughes suspended license, it intended to continue his employment past the Wekiva Riverwalk job.

Respondent failed to offer evidence that anything occurred after Driggers told Hughes he would be going to Westwood Center, which caused it to decide against continuing Hughes' employment. The record shows that one event did occur. That was Driggers learning that Hughes was involved with the Union.

Therefore, I find that Respondent failed to show that Hughes would have been discharged in the absence of his union activities. Of four reasons advanced by Respondent at various times to justify its discharge of Hughes, President Russell Klingbeil's testimony illustrates that the first two of those reasons were incorrect. Hughes was not discharged because Respondent could not afford to pay him and he was not discharged because of lack of work. As to Klingbeil's testimony that Hughes was discharged because of a suspended license, the record shows that Respondent knew of that problem for at least 10 months and, shortly before Hughes' discharge Respondent told Hughes that it planned to transfer him to another job after he completed Wekiva Riverwalk. Therefore, I do not credit Respondent's evidence that Hughes was discharged because of a suspended license.

Finally, I do not credit Respondent's evidence that customer complaints influenced its decision to discharge Hughes. The first of two letters from a customer complaining about the Wekiva Riverwalk work, was written before Hughes started working on that job. The record illustrated that letter influenced Respondent's decision to assign Hughes to that job in order to straighten out the problems mentioned in the customer's letter.

The second customer letter was written on January 4, 1991. Respondent had that letter for over 7 weeks before it decided to discharge Hughes. During that 7 weeks nothing was said to Hughes to show that Respondent was considering discharging him because of the letter. To the contrary, shortly before his discharge, Daniel Driggers told Hughes that he would be sent to another job after he completed his work at Wekiva Riverwalk.

In view of the above I find that the evidence failed to prove that Respondent would have discharged Tyler Hughes in the absence of his union activities.

James Lay

Although subpoenaed by General Counsel James Lay did not appear and testify during the hearing.

Lay worked as helper to Tyler Hughes on the Wekiva Riverwalk job.

Lay was terminated on February 23, 1990. His termination form lists as reason for termination, "laid off—due to lack of work." However, in a letter of position to the NLRB Regional Director, Respondent denied that it had knowledge of any union activity by James Lay and indicated that Lay had been caught sleeping on the job and had demonstrated irregular attendance at work. The letter stated that the things which directly caused Lay's discharge was his being caught sleeping and the fact that the project he was working on was substantially finished and there was no practical way to send Lay anywhere else.

Tyler Hughes testified that he was not consulted about Lay's termination. According to Hughes, there was work remaining for Lay on February 23.

Daniel Driggers testified that Lay's attendance including his frequent absences on Mondays and Fridays, illustrated that Lay was not dependable and when Respondent determined which people to keep, they decided against Lay because he was not dependable.

When Driggers was asked on cross-examination, when it was that Respondent determined which people to keep, he was unable to recall a time other than his belief that that decision was made sometime a little later than October 1989. When asked under cross about one of the reasons proffered in Respondent's position statement being that Lay was caught sleeping on the job, Driggers testified that he had forgotten about that reason for Lay's discharge. Driggers admitted there was no written documentation of Respondent catching Lay asleep on the job.

Driggers admitted that the Wekiva Riverwalk job was completed by another employee and his helper, after James Lay and Tyler Hughes were discharged in February 1990.

#### Findings

In view of my finding above, the case of James Lay causes deep concern. The record revealed that Lay may have been discharged because of the employees' union activities. However, that suspicion alone does not establish a violation.

There was no evidence that Respondent knew that James Lay supported the Union. The evidence does show that Respondent, through Daniel Driggers, learned that all the members of David Dickey's crew had signed union cards. However, there was no showing that Respondent ever learned that Tyler Hughes' crew had signed cards. In fact, as shown on the record, James Lay signed a union authorization card on January 25, 1990.

Tyler Hughes was questioned about his involvement with the Union shortly before Lay was discharged. However, Daniel Driggers did not ask about Lay and Hughes' account of that conversation, which I credit, failed to show that anything was said about Lay's involvement with the Union.

Moreover, even though Tyler Hughes recalled that Lay did on occasion wear a union ball cap or tee shirt, he did not recall whether Lay was wearing union clothing on the day Hughes was interrogated by Driggers. There was no other evidence showing that a supervisor was present at any time Lay was wearing union clothing.

James Lay did not appear at the hearing despite efforts by General Counsel.

General Counsel argued that Lay was discharged as a precursor to and related to the discharge of Hughes some 4 days later. However, that argument was not supported in the

record. There was no evidence showing why it was necessary, or why Respondent may have thought it was necessary, to discharge Lay in order to subsequently discharge Hughes.

In view of the record evidence I am unable to find that General Counsel proved a prima facie case that Lay was discharged because of his union activities.

#### Timothy Viehweger

Timothy Viehweger, like Gregory Bennett, was a fitter helper on David Dickey's crew at the Vistana Resort job. He had worked for Respondent about a year and a half when he took off work on February 27, 1990, for surgery.

Viehweger recalled that Union Organizer Chaires came on the job at Vistana Resort on January 25 and at least one other occasion before he last worked on February 27. Chaires talked with the employees including Viehweger. Viehweger along with the other employees, signed a union authorization card.

After January 25 Viehweger wore a union tee shirt at work two or three times a week until February 27. Viehweger was not aware that any supervisor noticed him wearing anything which advertised the Union. Viehweger also passed out union cards and talked about the Union with other employees.

On April 20, 1990, immediately after Viehweger received his doctor's release to return to work, he called Respondent and told Daniel Driggers that he had been released and could return on April 23. Driggers told Viehweger that Respondent had no work and no longer needed Viehweger. However, according to Viehweger, the Vistana Resort project had not been completed on April 20.

Subsequently Viehweger was reemployed by Respondent on May 25, 1991.

#### Findings

Although Respondent learned that David Dickey's crew talked with the union organizer when Daniel Driggers questioned Dickey, there was no evidence that Respondent knew of Viehweger's involvement with the Union beyond meeting with the organizer. Viehweger testified that he was not aware of any supervisor observing him wearing union clothing. Moreover, unlike the situation involving Gregory Bennett, Respondent took no action against Viehweger until several months later.

Unlike the situation involving Bennett and Hughes, there was no showing of discriminatory treatment in the case of Viehweger nor was there a showing of changing assertions as to the basis for Respondent's refusal to reinstate Viehweger. In that regard the evidence illustrated that Respondent was reducing its work force at the time Viehweger applied to go back to work in April 1990. General Counsel conceded that point in his brief.

I am unable to find evidence which proves a prima facie case regarding Viehweger. Of special significance in that regard was the failure of the record to show that Respondent treated Viehweger in a disparate manner. The record in fact, supported Daniel Driggers' comment to Viehweger when Viehweger phoned on April 20, that Respondent had no work for Viehweger.

At the time of the hearing Viehweger had returned to work for Respondent. The evidence failed to show that he had

been denied reinstatement during the period of time before he returned to work, because of his union activities.

March 17, 1990

Former employee Paul Goldman testified that he attended a meeting which Respondent's president held with the field employees on March 27, 1990. Goldman recalled that either President Klingbeil or Manager Mark Stimmel told the employees that he would not tolerate union activities, they would not accept union contracts and that they would close their doors. Goldman could not recall whether Klingbeil or Stimmel made those statements but he testified that it was one of the two.

On cross-examination Goldman testified that he did not recall what was said in the speech independently of his testimony in an affidavit. Goldman testified that he was now able to recall only bits and pieces of the March 1990 meeting.

Respondent called Stephen Jefferies who testified that he was employed by Respondent and was in charge of six or eight of Respondent's jobs at the time of the March 27 meeting between Respondent and the field employees. Jefferies testified that President Klingbeil did not tell the employees that he would not tolerate any union activity and Klingbeil did not say he would close the business if the union prevailed.

Crew Foremen Russell Roberts, Wayne Reeves, and Mark Lomen testified that they attended the speech which Klingbeil gave to the employees on March 27, 1990. Each testified that Klingbeil did not say that he would not tolerate any union activity nor did he say that he would close the business if the Union prevailed.

I am unable to credit the testimony of Paul Goldman that Respondent's agents Klingbeil or Stimmel told the employees that Respondent would not tolerate union activities or accept union contracts and would close their doors if the Union came in. Goldman admitted that he had no recollection of what was said in that meeting and that he was testifying on the basis of statements he had made in a prehearing affidavit. Stephen Jefferies, Russell Roberts, Wayne Reeves, and Mark Lomen disputed Goldman's testimony. I was not impressed with Goldman's demeanor and I do not credit his testimony to the extent it conflicts with the testimony of Jefferies, Roberts, Reeves, or Lomen.

#### Findings

The credited evidence shows that Respondent's president Russell Klingbeil did not tell the employees that Respondent would not tolerate union activity, he did not say that Respondent would reject any union contract and he did not threaten to close if the Union came in, when he spoke to the employees on March 27, 1990. Additionally Mark Lomen testified that Mark Stimmel did not say anything about the Company closing or going out of business during his address during that March 27 meeting. Russell Roberts testified that Stimmel said pretty much the same as Klingbeil when he spoke on March 27. In view of that testimony which I credit, I am unable to find that either Klingbeil or Stimmel threatened the employees that it would be futile to select the Union or that Respondent would close if the Union came in, during their addresses to the employees on March 27, 1990. As shown above Paul Goldman testified that he did not recall

whether Klingbeil or Stimmel made the statements which he testified were made on March 27. However, Goldman testified that one of the two did make the statements. I do not credit Goldman in that regard.

I find that the evidence does not show that any statements were made which constitute violations of Section 8(a)(1) during Respondent's March 27, 1990 meeting with its employees.

#### CONCLUSIONS OF LAW

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

2. Sprinklerfitters United Association, Local 821, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by coercively interrogating its employees about their union activities, engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent, by discharging its employees Gregory Bennett and Tyler Hughes because of its employees' activities on behalf of Sprinklerfitters United Association, Local 821, AFL-CIO has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally discharged its employees Gregory Bennett and Tyler Hughes in violation of Sections of the Act, I shall order Respondent to offer Bennett and Hughes immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I further order Respondent to make Bennett and Hughes whole for any loss of earnings they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against its employees Bennett and Hughes and notify each of those employees in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Seminole Fire Protection, Inc., Popka, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>1</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.

(a) Interrogating its employees about their union activities.

(b) Discharging its employees because of their protected activities.

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

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

(a) Offer Gregory Bennett and Tyler Hughes immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Bennett and Hughes whole for any loss of earnings plus interest, they suffered by reason of its illegal actions.

(b) Rescind its discharge of employees Bennett and Hughes, and remove from its files any reference to its illegal actions and notify each of those employees in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

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

(d) Post at its facility in Apopka, Florida, copies of the attached notice.<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be post 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.

<sup>2</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."

#### 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 coercively interrogate our employees about their activities on behalf of Sprinklerfitters United Association, Local 821, AFL-CIO or any other labor organization.

WE WILL NOT discharge our employees because they engage in union activities.

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

WE WILL offer immediate and full reinstatement to Gregory Bennett and Tyler Hughes to their former jobs or, if

those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL make Gregory Bennett and Tyler Hughes whole for any loss of earnings they suffered by reason of our discrimination against them with interest.

WE WILL rescind the discharges of Gregory Bennett and Tyler Hughes.

WE WILL notify Gregory Bennett and Tyler Hughes, in writing, that we have rescinded their discharges and that we will not use those actions against them in any manner.

SEMINOLE FIRE PROTECTION, INC.