

**Southeastern Brush Company and International Brotherhood of Firemen and Oilers, Local 288, AFL-CIO.** Case 10-CA-25112

March 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On August 15, 1991, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party 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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</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, Southeastern Brush Company, East Point, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the

<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 they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Production Manager Van Voorhees' October 23, 1990 statement to employees was a violation of Sec. 8(a)(1), we note that, in addition to the reasons cited by the judge, Van Voorhees' proscription of any employee's engaging in union activities on "Company time" was overly broad since "Company time" could reasonably be construed as encompassing both working and nonworking time. See *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by withholding wages from employee Helms and deducting attendance points from his record because of his union activities, we note that the judge made an inadvertent error in referring to Union Business Agent Anna Hampton as a grievant. This does not affect the result. We emphasize that, at the time of the second step grievance meeting, the Respondent's only objection to Helms' attendance was that he had been scheduled to attend a class within the time period for this meeting. It did not object that Helms' attendance was barred by the Respondent's interpretation of the contract.

Finally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to comply with the Union's request for information, we note that, although the Respondent contends that the grievances are procedurally defective and therefore, it has no obligation to supply the requested information, "the Board, in passing on an information request, is not concerned with the merits of the grievance, [and] it is also not 'willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding.'" *Pfizer, Inc.*, 268 NLRB 916, 918 (1984) (quoting *Conrock Co.*, 263 NLRB 1293, 1294 (1982)).

Order, except that the attached notice is substituted 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 prohibit employees from discussing grievances in nonworking areas during nonworking time.

WE WILL NOT tell employees discussing grievances during nonworking time that they will be discharged for engaging in union activity during working time.

WE WILL NOT discourage membership in the International Brotherhood of Firemen and Oilers, Local 288, AFL-CIO, or any other labor organization, withholding wages or deducting attendance points from our employees for engaging in union activities, or by otherwise discriminating against them in connection with their wages, hours or tenure of work, or conditions of employment.

WE WILL NOT refuse, on request, to supply the Union with information that it needs as the employees' bargaining representative.

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

WE WILL, on request, supply the Union with the information which we unlawfully refused to give it.

WE WILL rescind our prohibition against employees engaging in grievance discussions during nonworking time in nonworking areas.

SOUTHEASTERN BRUSH COMPANY

*Victor McLemore, Esq.*, for the General Counsel.

*Robert L. Thompson, Esq.* and *Victor J. Maya, Esq.* (*Elarbee, Thompson & Trapnell*), of Atlanta, Georgia, for the Respondent.

*Paul L. Styles, Jr., Esq.*, of Atlanta, Georgia, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on January 11, 1991, by International Brotherhood of Firemen and Oilers, Local 288, AFL-CIO (the Union), and an amended charge on March 1, 1991. Complaint issued on the latter date, and alleges that Southeastern Brush Company (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by prohibiting its employees from discussing grievances on company premises, by threatening them with discharge if they engaged in union activities on said premises, and by telling an employee that he was denied a promotion because of his union activities. The complaint also alleges that the Company violated Section 8(a)(3) of the Act by withholding wages and deducting attendance points from an employee because of his union activities, and Section 8(a)(5) by refusing to supply the Union with information which it needed as the employees' collective-bargaining representative.

This case was heard before me in Atlanta, Georgia, on April 23 and 24, 1991. Thereafter, the General Counsel, Respondent, and the Charging Party filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Respondent is a Georgia corporation with an office and place of business located at East Point, Georgia, where it is engaged in the manufacture of industrial brushes. During the past calendar year, a representative period, Respondent purchased and received at its East Point, Georgia facility goods valued in excess of \$50,000 directly from suppliers located outside the State of Georgia. 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. The Union's Representative Status, the Vacancy in the Master Mechanic Position, and the Company's Posting of the Vacancy*

The Union was certified as the collective-bargaining representative of the Company's production and maintenance employees in 1979, and had a collective-bargaining agreement with it at the time of these proceedings.

The Company had a vacancy in early 1990<sup>1</sup> for a position designated as master mechanic and posted this vacancy in late September. It selected Ricky Sherman for this position. Sherman began work on October 15. He was a former employee who had held this job when it was classified as lead mechanic, and had also been a union steward.

Johnny Helms was a "Class A" mechanic in the maintenance department at the time of this litigation, and became the Union's steward on September 19. Helms, and others, applied for the master mechanic position when it was posted.

Although the complaint does not allege that Helms was discriminatorily denied the position, it does allege that he was told that he had not been appointed because of his union activities including the filing of grievances. Helms had conversations with maintenance supervisor, William Bell, before the posting of the position and his appointment as steward. These conversations concerned Helms' qualifications for the master mechanic position, and the Company's plans with respect to the vacancy.

Helms contended that he had a conversation with Bell in June 1990 in which the latter told him that he, Helms, was "next in line" for the position. Helms also asserted that he had two conversations with Bell in August, in which the latter told him that Bell did not need a supervisor, that he was thinking of hiring Ricky Sherman, and that he intended to put Sherman on one side of the production line and Helms on the other. Further, according to Helms, Bell intended to promote all the maintenance employees one classification.

Although Bell acknowledged conversations with Sherman prior to the job posting, he testified that they were social in nature, and denied that they had anything to do with Sherman's return to the Company. Bell denied that he told Helms that he intended to put Sherman and Bell on opposite sides of the production line. This was impractical, because most of the high priority machines were on one side the line, and the asserted arrangement would therefore result in an unequal distribution of work. Bell also detailed several areas in which Helms lacked sufficient expertise for the master mechanic position—specifically, the programming of some of the machines and electrical work—and testified that Helms asked him how to qualify for the position. Helms partially corroborated Bell on these matters, and I conclude that he was not promised advancement to the master mechanic position, or "sharing the line" with Sherman.

In late September, Helms—who had been appointed steward on September 19—had a conversation with Bell in which he advised him that the master mechanic vacancy had to be posted. The posting took place on September 23 or 24.<sup>2</sup> Two maintenance employees, one of whom was Helms, and two production employees signed the posting. Three female applicants also signed, but their names were crossed out.<sup>3</sup>

Bell affirmed that none of the applicants was qualified for the position, and gave detailed reasons. As for Helms, Bell listed various areas of lack of expertise. Helms testified that he agreed with Bell as to his own lack of skill in some areas,<sup>4</sup> and disagreed with Bell's assessment in only one area.<sup>5</sup>

Helms also testified that Bell told him on October 2 that he was not given the master mechanic position because he

<sup>2</sup>The posting is dated September 24. R. Exh. 6. Bell testified that it was posted after the first shift on September 23, and remained posted for about 3 days. The collective-bargaining agreement requires posting in the event of a vacancy R. Exh. 1, art. XII(5). Helms asserted and Bell denied that the latter tried to avoid posting. I credit Bell.

<sup>3</sup>Bell testified that three of the applicants were female employees, and that he discussed with them the requirements of the master mechanic position. Bell stated that he did not know who crossed out their names. The posting also carried the name of a fictitious character that appears in cartoons.

<sup>4</sup>Cutting threads, reading micrometers, and machine shop work.

<sup>5</sup>Electrical work.

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

had filed grievances. Helms further contended that Bell said this at a later time, while Bell denied that he ever did so. Helms had not filed any grievances as of October 2, and I do not credit his statement that Bell on that date gave grievance filing as one of the reasons for the Company's failure to select him.

The collective-bargaining agreement provides that determinations as to skill, ability, and qualifications of an applicant will be made by the Company. If it determines that no bidder is qualified, the Company may transfer an employee from another classification or hire a new employee from the outside, subject to the grievance and arbitration provisions of the contract.<sup>6</sup>

Bell testified without contradiction that Ricky Sherman called him a few days after the posting, and asked whether there was any opening. Bell replied that there was, and the two discussed whether Sherman's planned schooling would interfere with his working. Bell replied that he would let Sherman know, and, a few days after October 2, told Sherman that he had the job. Sherman started work on October 15.

#### *B. Alleged Additional Conversations Between Helms and Bell, and the Filing of the Grievances*

Helms contended that Bell told him on October 15 that he, Helms, had been selected for the master mechanic position. Nonetheless, Helms filed grievances on October 16 or 17 because, he said, "his supervisor (Bell) had not come back to (him) and told him about it." Helms asserted that he did not trust Bell's word on the matter. A few days later, according to Helms, on October 18 or 19, Bell told all the applicants the reasons they were rejected, and advised Helms that he was not selected because he had filed grievances. Bell testified that the only time that Helms was told he had been denied the master mechanic position was at the meeting on October 2, and, as indicated, denied that he ever told Helms that the reason was Helms' filing of grievances.

I do not credit Helms' testimony that Bell told him on October 15 that he, Helms, was getting the master mechanic position—Sherman started work in that position on the same day. If Helms in fact had been promised the position, his reasons for filing grievances on his own behalf were strained. I do not credit Helms' assertion that Bell, on October 18 or 19, told Helms that he had not been promoted because of the grievances—this was a decision which Bell had made prior to the filing of the grievances.

The grievances which Helms filed or attempted to file are dated October 16, 17, or 18. Helms filed several on his own behalf, while other employees also submitted their grievances to Helms for filing. The names of several employees appear on one of the grievances with a statement that they were filing.<sup>7</sup> The grievances generally allege that Respondent violated the contract by hiring Ricky Sherman without posting the master mechanic vacancy and giving other employees an opportunity to bid on the job.<sup>8</sup>

<sup>6</sup>R. Exh. 1, art. XII, sec. 5.

<sup>7</sup>Kemuel Fowler, Bettye Nunnally, Josephine Arnold, Clara Lott, Johnnie Ward, Dorothy Robinson, and Greg York. G.C. Exh. 2; R. Exhs. 4, 7.

<sup>8</sup>One of the grievances alleges that Personnel Manager Garrett Gerst stopped Helms from writing grievances at 3:40 p.m. on Octo-

Bell testified that he was not the immediate supervisor of the employees listed on the grievances. This was true with respect to some of them. Respondent considered this to be significant because of a provision in the collective-bargaining agreement requiring that a first-step grievance be filed with the employee's "immediate" supervisor.<sup>9</sup> However, Helms himself was a maintenance employee, and Bell acknowledged that he was Helms' supervisor.<sup>10</sup> Personnel Manager Gerst testified that former Steward Ricky Sherman filed a grievance with Bell.

Respondent contended that a first step grievance involved an oral discussion. The Union argued that the reading aloud of a previously written grievance was not inconsistent with the contractual requirements.<sup>11</sup> Helms testified that he walked into Bell's office on October 16 or 17 and placed 5 grievances on Bell's desk. The latter said they were not any good, did not want to discuss the matter further, and walked out of the office with Helms following him. Bell agreed that he told Helms that the filing was incorrect or "not legal." Asked whether he told Helms the reason, Bell replied that Helms was in a hurry to get out of the office. It is unlikely that Helms, the steward, would have avoided conversation over the grievances, and I credit his version of the filing.

Personnel Manager Garrett Gerst appears to have written Helms a memo dated October 22 denying the grievances because they "did not follow the proper steps as outlined in the contract."<sup>12</sup>

Helms returned to Bell's office on October 24 with several of the other grievants.<sup>13</sup> Bell testified that the other grievants signed the grievances, but that he refused Helms' request to initial the documents indicating that he was a witness. Personnel Manager Gerst testified that Helms was the first steward who filed more than one grievance.

#### *C. Alleged Prohibition Against Discussing Grievances on Company Premises*

##### 1. Summary of the evidence

The collective-bargaining agreement contains prohibitions against union activity in certain circumstances and against

ber 17 on company premises, and another protests changes in employee classifications.

<sup>9</sup>Sec. 1 and step 1 of art. VII of the contract, as relevant, read:

*Section 1.* Should any employee have a grievance arising from the operation or interpretation of this Agreement, an earnest effort to adjust such grievance shall be made in accordance with the procedure hereinafter provided.

Step 1. Any grievance as defined above shall be taken up by the Steward and/or by the employee with the aggrieved employee's immediate supervisor within five (5) working days of the occurrence of the event giving rise to the grievance, or within five (5) working days of the time that the employee has knowledge of it or is reasonably charged with knowledge of it . . .

<sup>10</sup>Production Manager S. Coert Van Voorhees stated that Bell was the immediate supervisor of all maintenance personnel, and was corroborated by Personnel Manager Garrett Gerst.

<sup>11</sup>Supra, fn. 9.

<sup>12</sup>Gerst's memo appears in the exhibit file in the middle of G.C. Exh. 5, a seniority list.

<sup>13</sup>Bettye Nunnally, Josephine Arnold, Clara Lott, and Johnnie Ward.

threatening another employee to participate in such activities.<sup>14</sup>

Helms affirmed that he was talking with employee Greg York about grievances in the company parking lot at 3:35 p.m. on October 17.<sup>15</sup> Working time for both of them had ended for the day. The parking lot is not a production area, and there are no company rules against being in the parking lot, according to Helms.

Helms testified that Personnel Manager Gerst approached and told him to quit filling out grievances on company time and premises. Helms asked how he could get the grievances filled out properly, Gerst replied that Helms had to leave the property, and that he could give the grievances to employees to take home for completion. According to Helms, he handed Gerst another grievance, and then left with York.

Helms testified that the United Way is allowed to solicit donations from employees, that employees solicit contributions for wedding gifts, and that Production Manager Van Voorhees allows an employee to keep candy in Voorhees' office for sale to employees on behalf of the school attended by the employee's child.

Personnel Manager Gerst testified that Maintenance Supervisor Bell told him that two employees—Luis Santiago and Ricky Bates—had complained to Bell that Helms was “harassing” employees. Gerst contended that he investigated this complaint, but agreed that he did not question either Santiago or Bates. Neither employee testified at the hearing.

On direct examination, Gerst stated that he saw Helms in the parking lot on October 17 standing by his truck with a briefcase. He approached Helms, and the latter “slammed” his briefcase shut. Gerst denied seeing York, denied knowing that Helms was soliciting grievances, and denied telling Helms to stop discussing grievances on company property after working time. All he did tell Helms was to stop “harassing” employees after work. (Helms denied that Gerst made the latter statement.) Gerst agreed that Helms handed him a grievance.<sup>16</sup>

On cross-examination, Gerst acknowledged that the alleged harassment concerned the filing of grievances. He initially denied telling Helms to have the employees take the grievances home and return them to Helms the next day. However, after being shown his pretrial affidavit, Gerst acknowledged that he may have said this to Helms. Gerst initially denied that the Company's policy was to prohibit any type of solicitation. However, on being shown his pretrial affidavit, he agreed that the Company's policy was to prohibit any type of solicitation during working hours.<sup>17</sup> Gerst agreed

that the Company allows solicitation by United Way and that Van Voorhees allows an employee to keep candy in Van Voorhees' office for sale to employees, but denied solicitation for wedding gifts.

## 2. Factual analysis

The only evidence in support of this complaint allegation is Helms' testimony and the written grievances themselves. Although I have not credited other parts of Helms' testimony relating to other matters, I must consider his averments on this issue. The only evidence opposing his testimony is that of Personnel Manager Gerst. The contradictions in Gerst's testimony outlined above cast doubt on his reliability as a witness, and, in fact, constitute partial admissions. Gerst's failure to question the two employees who assertedly complained about Helms and Respondent's failure to call them as witnesses are additional reasons for discrediting Gerst. I conclude that Helms was the more reliable of the two witnesses who testified about this matter.

I therefore conclude that Helms was engaged in union activity, to wit, grievance solicitation, during nonworking time in a nonworking area on October 17. There is no published company rule prohibiting such activity. While Helms was engaged in the activity described above, Personnel Manager Gerst told him to stop filling out grievances on company time and premises, to give the grievances to the employees to take home, and to leave the property.

### D. *The Alleged Threat to Discharge Employees for Engaging in Union Activities*

#### 1. Summary of the evidence

Helms testified that Production Manager Van Voorhees<sup>18</sup> called a meeting of all employees in the afternoon of October 24 as a result of overhearing them discussing the grievances during break periods. Van Voorhees said that orders were getting “thin.” He also said that any employees talking about the union or engaging in union activities on company time and premises would be terminated.

Van Voorhees testified that the Company was “experiencing a slowdown.” “People were congregating, talking, walking around, leaving their work stations, [and] all the machines seemed to go down at the same time.” This occurred during work time, according to Van Voorhees. Production declined “significantly.”

Van Voorhees testified that he attempted to approach employees “while they were in groups,” but that the group would thereupon disperse. A few minutes later it would form again.

Van Voorhees gets daily production reports. None was presented at the hearing. Helms denied that there was a slowdown, affirmed that the machines never stopped running, and, as indicated, testified that the employee discussions took place during break periods.

Van Voorhees called a meeting of all employees during the afternoon after a break period.<sup>19</sup> On direct examination he said that he told the employees they were being paid to work during work time, and that they would be disciplined

<sup>14</sup> Secs. 2 and 3 of art. III of the contract read:

*Section 2.* There shall be no Union activity carried on during work time of the Company's premises or work sites except in connection with the Grievance Procedure as provided herein.

*Section 3.* It is further agreed that no employee shall threaten another employee in an effort to have him join or refrain from joining the Union or to participate or refuse to participate in union activities. Any employee who engages in such activity shall be subject to discipline or discharge as a result of such activity whether it occurs on or off the Company's premises or work sites. [R. Exh. 1, art. III.]

<sup>15</sup> As indicated, York was one of the grievants. *Supra*, fn. 7.

<sup>16</sup> R. Exh. 4.

<sup>17</sup> The General Counsel moved to admit Gerst's pretrial affidavit, G.C. Exh. 6, in order to establish prior inconsistency in his testimony. I reserved ruling on the motion, and now grant it.

<sup>18</sup> The pleadings establish that Van Voorhees was a supervisor within the meaning of the Act.

<sup>19</sup> Van Voorhees stated that the date was October 23.

for “congregating” and failing to put out a work product. On cross-examination, Van Voorhees first denied saying that the “slowdown” would not be tolerated if it was caused by union activity, but then affirmed that he did say this if the union activity took place during work time. Van Voorhees acknowledged that the phrase “during work time” does not appear in his pretrial affidavit.

## 2. Factual analysis

Van Voorhees’ testimony is questionable because of the changes he made in it, and the fact that the Company did not produce any production reports to support Van Voorhees’ assertion of a slowdown. In these circumstances, I credit Helms’ denial that there was a slowdown. I also credit Helms’ testimony that the employees discussed the grievances during break periods, and that Van Voorhees overheard at least some of these discussions. Van Voorhees admitted that he approached employees engaged in group discussions. I conclude that, at the meeting, he told employees that they would be terminated if they engaged in union activities on company time and premises.

### *E. The Alleged Withholding of Wages and Deduction of Attendance Points*

The complaint alleges that Respondent withheld wages and deducted “attendance points” from Helms on October 26<sup>20</sup> because of his union activities. The latter allegation concerns Respondent’s disciplinary program of deducting points for unauthorized absences from a preset quota of points.

Helms called International Representative Lawrence McNeil, and informed him that there were problems with the filing of the grievances. McNeil testified that he called Personnel Manager Gerst on October 18 and again on October 23, and asked what was wrong with the manner in which Helms filed the grievances. McNeil denied that Gerst said Helms was bypassing the first step of the grievance procedure. All that Gerst replied was: “Read the contract.” Gerst testified that he told McNeil that the grievances had been filed incorrectly and to read step 1 of the contract. I credit McNeil’s version of this aspect of their conversation.

McNeil wanted a meeting with management on the grievances, and wanted Helms to attend.<sup>21</sup> The contract provided that in the absence of adjustment a second-step grievance had to be filed and a meeting held within 7 days of the filing of the first step grievance.<sup>22</sup> This would have mandated a second-step meeting during the week of October 22. However, the Company had scheduled a 2-day training class in hydraulics for maintenance employees beginning October 25, and Helms was assigned to attend this class.

McNeil testified that he and Gerst tentatively decided on Friday, October 26, as the date of the second step meeting. McNeil informed Gerst that Helms, the steward who had

filed the grievances, would be present. Gerst replied that Helms was assigned to a class that day. McNeil testified that he then asked whether Gerst wanted to “extend the time” (for the second step meeting) to accommodate this conflict in schedules. According to McNeil, Gerst replied, “No.” Gerst asserted that he could not remember whether McNeil made this request, and was “unclear” on whether Helms would be present.<sup>23</sup> I credit McNeil.

On October 24, the day after McNeil’s second conversation with Gerst, Helms asked Maintenance Supervisor Bell whether he, Helms, should attend class or the grievance meeting on October 26. Bell replied that he would not give an opinion, and that Helms had to make his own decision, according to Helms Bell affirmed that he told Helms he knew what his assignment was,<sup>24</sup> and I credit Helms.

Helms attended the first day of the class, on October 25, without incident. It was held at a Ramada Inn about 30 minutes drive from the plant. Helms arrived at the plant at 6:30 a.m. the next morning, October 26. Both the training class and the grievance meeting were scheduled to begin at the same time, 9 a.m. Helms testified that he attempted to clock in, but that his timecard was not in its slot. Bell testified that he had pulled the timecards of all employees who were assigned to the class. He did not let Helms go to work that morning, but did allow him to walk around the plant while Bell was working. Bell contended that he told Helms to go to class. At 8:20 a.m., Gerst came to the production area and told Helms to go back to his car.

The grievance meeting began at 9 a.m., and was attended by McNeil, Helms, and another employee<sup>25</sup> for the Union, while the Company was represented by Gerst, Van Voorhees, and Bell. The meeting lasted about 20 or 25 minutes. McNeil asked what was wrong with the grievances, and Gerst replied that they were procedurally defective. When McNeil asked for an explanation, Gerst responded: “Read the contract.” Gerst admitted that he did not tell the union representatives “in plain English” that the grievances were defective because they had not been filed with the “immediate” supervisor, but contended that he did say that “Step 1 had not been met.” McNeil, corroborated by Helms, denied that Gerst said anything about step 1. I credit McNeil and Helms.

McNeil further testified that he asked Van Voorhees why the latter had told employees on October 23 that they would be fired if they talked about the Union. Van Voorhees replied that he did not have a tape recorder, and did not remember saying this. He said nothing about a slowdown. McNeil’s testimony as to Van Voorhees’ statements on October 26 is uncontradicted and is credited.

McNeil testified that, about 15 minutes into the meeting, Van Voorhees stood up and said that it was a waste of time. McNeil persuaded him to sit down and continue the meeting for another few minutes, but “they finally said, ‘Get out, you need to leave or we will call the police.’” Gerst’s version is that, as the meeting closed, “the president of the Company walked by.” McNeil asked why the president did not call the police and have the union representatives removed. The president replied that they would do that if they had to.

<sup>20</sup> The record contains evidence of other asserted wage withholdings on other dates, and asserted repayments. I have not considered this evidence because the complaint alleges only a withholding on October 26.

<sup>21</sup> The collective-bargaining agreement provided that, at a step 2 grievance meeting, the Union could be represented by its business manager or his representative, and a representative from the International. R. Exh. 1, art. VII.

<sup>22</sup> *Ibid.*

<sup>23</sup> Gerst argued that Helms was not required to be present under the terms of the contract.

<sup>24</sup> Errors in transcript have been noted and corrected.

<sup>25</sup> Anna Hampton, who had a grievance.

The only management representatives mentioned by McNeil and Helms were Gerst, Bell, and Van Voorhees; the president of the Company did not testify. McNeil was a more trustworthy witness than Gerst, and I credit his account of this matter.

McNeil then asked the management representatives a series of questions: (1) Should Helms go back to work? (2) Would he be allowed to clock in? (3) Would he be docked points for the day? (4) Would he be docked for the entire day if he drove to the Ramada Inn (where the class was being conducted). To each of these questions, a management representative gave the same response: "He knows what to do." Gerst admitted that he told McNeil that Helms knew his work assignment, and further agreed that this was not his, Gerst's, normal response to an inquiry of this nature.

Helms testified that he had already missed about one-third of the class, taking into account driving time to the Ramada Inn, and did not know whether they would allow him to enter. He could not clock in at the plant, because there was no timecard in his slot. Accordingly, Helms went to the union hall to discuss the situation with a union lawyer, and remained there for the day. He was not paid for October 26, and two points were deducted from his attendance record.

#### F. *The Alleged Refusal to Give Information to the Union*

The pleadings as amended at the hearing establish that on October 20 and 30, the Union requested and Respondent thereafter failed to furnish the Union with the following information: current seniority roster; employee breakdown by age, race, and sex; the qualifications for the positions of master mechanic and mechanic class A & B; personnel records for newly hired mechanics and operators; evaluations for all unit employees for one year, including performance reviews; training records for all machinery for one year; training manuals for mechanics and operators; current and past personnel files of Ricky Sherman; names, job classifications, and rates of pay of all unit employees for 1 year prior to the date of the Company's response, together with their dates of hire, transfers, terminations or layoffs, hours worked and benefits received. International Representative McNeil testified that one of his written requests for information stated that the request was necessary in order to process grievances.<sup>26</sup>

McNeil repeated this necessity in his testimony, and averred that there were grievances in addition to those involving the master mechanic position. He stated that a seniority roster was necessary because of the contractual provision allowing the Company to consider length of service when an applicant is bidding for a job. McNeil acknowledged receipt of a roster dated June 26,<sup>27</sup> but asserted his need for a more recent one. He wanted the information as to age, sex, and race because of the other grievances that were "in a black hole somewhere." He needed the master

mechanic and mechanic A and B qualifications to make certain that there had been no recent changes, and cited a letter to the Union from the Company in September 1989 listing a change in the title of maintenance leader to master mechanic.<sup>28</sup>

On November 5, according to McNeil, the Company wrote the Union a letter stating that the Union was not entitled to any of the requested information because the grievances were procedurally deficient.<sup>29</sup>

#### G. *Legal Analysis and Conclusions*

##### 1. Statements of Personnel Manager Gerst

The credited evidence establishes that Respondent, by its Personnel Manager Gerst, told an employee engaged in grievance solicitation in a nonworking area during nonworking time to stop engaging in such activity, to give the grievances to the employees to take home, and to leave the property. Respondent has shown no business justification for this action. It is therefore clear that it violated Section 8(a)(1) of the Act. *Pizza Crust Co.*, 286 NLRB 490 fn. 1 (1987).

##### 2. Statements of Production Manager Van Voorhees

The record establishes that during break periods on about October 23, employees congregated in groups and discussed the grievances. Production Manager Van Voorhees approached these groups and overheard at least some of the discussions. Later, the same day or soon thereafter, Van Voorhees called a meeting of employees and told them that any employee engaging in union activities on company time and premises would be terminated. The record contains evidence that Respondent permitted other solicitation in the plant, although it is unclear whether any of this took place during working time. The collective-bargaining agreement prohibits union activity during working time on company premises, except for activity "in connection with the Grievance Procedure" provided in the contract.<sup>30</sup>

"The test of a violation of Section 8(a)(1) is whether the employer's conduct reasonably tends to interfere with the employees' exercise of their Section 7 rights." *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980), enf. 234 NLRB 927 (1979). The fact that Van Voorhees' statement about union activities during working time took place immediately subsequent to the employees' discussion of grievances during nonworking time tended to link the two subjects. Respondent's opposition to employee discussion of grievances during nonworking time in nonworking areas was established by Gerst's prior unlawful statements to Helms. Considering all the circumstances, I conclude that Van Voorhees' statement was coercive.<sup>31</sup>

The language of the collective-bargaining agreement does not provide Respondent with a defense. The ban on union

<sup>26</sup> The Union's written requests for information were received in evidence as G.C. Exhs. 3 and 4. Nonetheless, these exhibits do not appear in the formal exhibit file, and attempts to secure copies have been unsuccessful.

Despite these lapses, the record is sufficient to support findings because of the pleadings and testimonial evidence.

<sup>27</sup> G.C. Exh. 5.

<sup>28</sup> R. Exh. 5.

<sup>29</sup> McNeil's description of this letter attributes to the Company a position which is consistent with the one it advanced during the presentation of the grievances.

<sup>30</sup> The complaint is silent on the contractual ban against union activity during working time on company premises.

<sup>31</sup> *Ling Products Co.*, 212 NLRB 152 (1974); *Chem Fab Corp.*, 257 NLRB 996, 1000 (1981), enf. 691 F.2d 1252 (8th Cir. 1982).

activity during working time has an exception allowing activity “in connection” with the grievance procedure. Although it may be argued that this language refers to the formal steps of the grievance procedure, an equally plausible argument is that employee discussion of grievances is “connected” to the grievance procedure and thus falls within the exception to the ban. In any event, whatever the interpretation of the contract language, it is clear that the Union did not waive the employees’ statutory rights under Section 7 of the Act by entering into the agreement. *Page Avjet Corp.*, 275 NLRB 773, 778 (1985).

I therefore conclude that Van Voorhees’ statement to the employees was violative of Section 8(a)(1) of the Act.

### 3. Alleged discriminatory withholding of wages from Helms and deduction of attendance points

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 withhold wages from Helms and to deduct attendance points. 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>32</sup>

The General Counsel has established a strong prima facie case that Helms’ grievance activity was a motivating factor in the withholding of wages and deduction of attendance points. There is ample evidence of Respondent’s opposition to the filing of the grievances. In addition to the unlawful statements of Supervisors Gerst and Van Voorhees discussed above, Respondent was unresponsive to the Union’s attempts to ascertain the Company’s reason for the asserted illegality of the filings. Gerst’s letter to Helms dated October 22 states merely that he had not followed “the proper steps as outlined in the contract” but was not explicit. When International Representative McNeil asked Gerst the reason on the telephone, he received the curt reply, “Read the contract.” This obduracy continued throughout the October 26 meeting, and at no time did Respondent inform the Union of its position that the filings were defective because they had not been submitted to the affected employees’ “immediate” supervisor. Aside from the Company’s refusal to explain its position, it is clear that, with respect to Helms at least, the Company’s position had no merit, since Bell was Helms’ immediate supervisor. Finally, after a brief meeting, on October 26, the Company told the union representatives to leave or it would call the police.

Respondent’s argument that the contract did not require Helms’ attendance at the second-step meeting is not established by the record. The agreement provided for the attendance of the business manager or his representative, together with a representative from the International. Other than International Representative McNeil, the only other two employees at the meeting were Anna Hampton, who had a grievance, and Helms, the steward. There is nothing to show that Helms was not the business manager’s representative, pursuant to the contract. This argument, in any event, is a technicality recently advanced by Respondent. Prior to the hearing in this case, the Company’s only objection to Helms’ attend-

<sup>32</sup> *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ance at the grievance meeting was the fact that he had been scheduled to attend a class within the time period for the second step grievance meeting. However, when McNeil suggested that the meeting be postponed so that Helms could attend both, Gerst declined.

The merits of the grievances themselves are irrelevant, since it is well established that lack of merit does not affect the protected status of the filing of grievances. Such activity is normally held to be protected regardless of the time of day it occurred or its effect on production. *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294–295 (1984).

Respondent’s unlawful motivation is further evidenced by the cryptic response from its managers to McNeil’s repeated requests for instructions about the remainder of Helms’ day—“He knows what to do”—plus Gerst’s admission that this was not his normal response to an inquiry of this nature. Since Helms could not have clocked in at the plant without a timecard, had already missed about one-third of the class counting traveling time, and did not even know whether he would be admitted to the class, his uncertainty about what to do was justified. I conclude that Respondent’s refusal to give him instructions amounted to a constructive layoff discriminatorily motivated. Accordingly, its failure to pay him his wages for the day and the deduction of attendance points were violative of Section 8(a)(3) and (1) of the Act.

### 4. Alleged unlawful refusal to supply information

Respondent disputes the relevance of the information sought by the Union. The Board has recently stated that “it is well settled that a union is not required to show the precise relevance of such (requested) information unless the employer has submitted evidence sufficient to rebut the presumption of relevance . . . . Thus, if the information is of potential or probable relevance, the General Counsel need not make a showing that the information is clearly dispositive of the negotiation issues between the parties.” *Shrader’s, Inc.*, 293 NLRB No. 76, slip op. at 3, fn. 3 (Apr. 11, 1989) (not reported in Board volumes). A host of Board decisions has affirmed the relevance of the type of information sought by the Union herein.<sup>33</sup> Respondent argues that it had already supplied certain information (seniority list, job descriptions), but it is obvious that a seniority list becomes dated with the passage of time and the hiring of new employees, while there is evidence of prior change in a job description. The Board has held that failure to update relevant information is violative of the Act.<sup>34</sup>

## CONCLUSIONS OF LAW

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

2. International Brotherhood of Firemen and Oilers, Local 288, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

<sup>33</sup> *Shrader’s*, supra; *Bristol Manor Health Care Center*, 295 NLRB 1106 (1989); *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989); *Bundy Corp.*, 292 NLRB 671 (1989); *American Commercial Lines*, 291 NLRB 1066 (1988); *Champ Corp.*, 291 NLRB 803 (1988); *FMC Corp.*, 290 NLRB 483 (1988).

<sup>34</sup> *Potters’ Medical Center*, 289 NLRB 201 (1988); *Shangri-La Health Care Center*, 288 NLRB 334 (1988).

3. Respondent committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(a) By prohibiting an employee from discussing grievances in a nonworking area during nonworking time; and,

(b) Immediately after employee discussion of grievances during breaks, by telling them that they would be discharged for engaging in union activity on working time and premises.

4. Respondent withheld wages from Johnny Helms for October 26, 1990, and deducted two attendance points from his record because of his union activities, thus discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

5. All production and maintenance employees employed by Respondent at its East Point, Georgia facility including all machine operators, shipping and receiving employees, chemical plant employees, and truck drivers, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since June 7, 1979, the Union described above has been and is the representative of the employees in the unit described above, and has been and is the exclusive representative of such employees for the purpose of collective bargaining.

7. By refusing in October 1990 to comply with the Union's request for certain information needed to enable the Union to fulfill its statutory responsibility as the employees' representative, to wit, a current seniority roster, the qualifications for the positions of master mechanic and mechanics class A and B, personnel records for newly hired mechanics and operators, evaluations of unit employees for 1 year, including performance reviews, training records for all machinery for 1 year, current and past performance files of Ricky Sherman, names, job classifications, and rates of pay of all unit employees for 1 year with their dates of hire, transfers, terminations, or layoffs, hours worked, and benefits received, Respondent thereby committed an unfair labor practice within the meaning of Sections 8(a)(5) and (1) of the Act.

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

9. Respondent has not committed any unfair labor practices except as specifically found herein.

#### 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 withheld wages and deducted attendance points from Johnny Helms on October 26, 1990, it is recommended that Respondent be ordered to make Helms whole by restoring his deducted attendance points and by paying him the salary and other benefits to which he would have been entitled absent Respondent's unlawful conduct, less net interim earnings, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>35</sup>

<sup>35</sup> Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986

It having been found that Respondent unlawfully refused to supply information needed by the Union to enable it to fulfill its statutory responsibility as the employees' representative, it is recommended that Respondent, on request, be ordered to furnish such information to the Union.

I shall further recommend that Respondent be ordered to rescind its unlawful rule against grievance solicitation during nonworking time in nonworking areas. I shall also recommend the posting of notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>36</sup>

#### ORDER

The Respondent Southeastern Brush Company, East Point, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing grievances in a nonworking area during nonworking time.

(b) Telling employees that they will be discharged for engaging in union activities during working time on company premises immediately subsequent to their discussion of grievances during break periods.

(c) Discouraging membership in the International Brotherhood of Firemen and Oilers, Local 288, AFL-CIO, or any other labor organizations, by withholding wages or deducting attendance points from employees because of their union activities, or by otherwise discriminating against them with regard to their wages, hours of work, tenure of employment, or conditions of work.

(d) Refusing to give the Union the information described in Conclusion of Law 7.

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

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

(a) Make Johnny Helms whole for the unlawful withholding of his wages and deduction of attendance points in the manner described in the remedy section of this decision.

(b) On request, supply the Union with the information described in Conclusion of Law 7.

(c) Rescind its prohibition against employees engaging in grievance activity during nonworking time in nonworking areas.

(d) 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 remedial action necessary under the terms of this Order.

(e) Post at its East Point, Georgia facility, copies of the attached notice marked "Appendix." <sup>37</sup>Copies of the notice,

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>36</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>37</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

*Continued*

on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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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. "

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.

IT IS FURTHER ORDERED that, with respect to any allegation in the complaint not found to be a violation herein, the allegation is dismissed.