

**Virginian Metal Products Co., Inc. and International Ladies' Garment Workers' Union, Southern District Council, Upper South Department, AFL-CIO.** Cases 11-CA-13206, 11-CA-13284, 11-CA-13402, and 11-CA-13804

January 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On March 12, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting brief, and the Respondent 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, and conclusions only to the extent consistent with this Decision and Order.<sup>1</sup>

We agree with the judge's findings that the Respondent committed numerous violations of Section 8(a)(1), (3), and (5).<sup>2</sup> However, we do not agree with his finding that the layoffs of June 2 and July 13 and 20, 1989,<sup>3</sup> were economically motivated, and therefore lawful, rather than a response to the Respondent's employees' union activity.

I. FACTUAL FINDING RELEVANT TO LAYOFFS

As more fully set forth by the judge, the Union won an election at the Respondent's truck manufacturing facility on January 27, 1988, and was certified on February 9. The parties soon thereafter commenced bargaining. On April 11, 1988, 40 of the Respondent's 50 employees went on a strike that lasted 4 months. The Respondent hired replacements, whom it retained after the strikers returned. The replacements virtually doubled the work force, and the Respondent put the replacements on an unprecedented second shift.

As further found by the judge, in August 1988, the Respondent began a carefully planned campaign to decertify the Union, including enlisting replacement employee Dewey Knuckles to circulate and file a decertification petition. Although the parties reached agree-

ment on a contract on January 30, the Respondent delayed executing the contract until February 13, and refused to make it effective from the January 30 date when agreement was reached. The delay was calculated to make certain that the decertification petition which was filed on February 10 would be considered timely filed. As a result of the delay on the contract's execution, the petition finally filed by Dewey Knuckles with substantial assistance from Supervisor Bill Fullen, was in fact filed in the window period between the end of the certification year and the actual execution of the collective-bargaining agreement. It therefore was timely under the Board's Rules and Regulations.<sup>4</sup>

During the time between the return of the strikers in August 1988 and the June 1989 layoff, the Respondent kept its second shift intact even though its production rate did not increase. During the course of these 9 to 10 months, Plant Manager Boyd met with supervisors periodically and discussed production, as well as the possibility of layoffs. The Union urged the Respondent to lay off the second shift, but the Respondent steadfastly refused and instead dealt with being overstaffed by instituting 4-day workweeks throughout the fall of 1988.

There was extensive testimony that the Respondent had not laid off employees since the early 1980s. Historically, when work was slow the Respondent found maintenance and cleaning jobs for its employees. In fact, the constancy of work was regarded as one of the job's benefits, which compensated for the modest pay. Consistent with this, when advertising jobs for strike replacements, the Respondent billed the jobs as "steady regular job[s]."

Despite his participation in the decertification effort, in April 1989 Dewey Knuckles and fellow second-shift employee Daniel Harmon joined the Union. Shortly thereafter Harmon and Knuckles told Supervisors Larry Clark and Tom Lawson they had done so. On April 20, the Union filed charges alleging that the Respondent had unlawfully initiated, assisted, and encouraged the filing of the decertification petition.

Knuckles was suspended for 5 days in late May, and, during this time, he withdrew the decertification petition. When he returned to work, he told everyone on the second shift, including Supervisors Clark and Lawson, that he had withdrawn the petition. On May 25, while discussing a possible grievance on Knuckles' behalf, Plant Manager Boyd said to Union Steward Steve Richardson, "Dewey Knuckles was a union member, wasn't he?" Richardson responded that he did not know, but that he thought that most of the second shift were members.

On June 2, 1989, just 4 days after Knuckles returned to work from his suspension and told supervisors that he had withdrawn the petition, and 1 week after

<sup>1</sup>The judge found, and we agree, that the Respondent unlawfully refused to furnish the Union records pertaining to profit sharing and to pay profit sharing for fiscal year 1988 as in prior years or to demonstrate that none could be paid. The judge inadvertently failed to include an affirmative direction in his recommended Order that the Respondent pay any applicable profit sharing for fiscal year 1988. We shall modify the recommended Order accordingly.

<sup>2</sup>No exceptions were filed to these findings.

<sup>3</sup>All dates are in 1989 unless otherwise specified.

<sup>4</sup>29 U.S.C. § 159(c)(3); *Brooks v. NLRB*, 348 U.S. 96 (1954).

Boyd's conversation with Richardson, the entire second shift was laid off. No advance notice was given concerning this layoff. At that time the second shift consisted of 13 bargaining unit employees. The asserted reason for the layoff was lack of work. According to the credited testimony of second-shift employees Knuckles and Harmon, the production level at that time appeared to be just the same as it had been during the entire course of their employment.

On June 6, Boyd had a conversation with Steward Richardson and Supervisor Steve Spivey. Boyd said that he heard the Union might be filing grievances for two employees who had come to the plant on June 5 wanting to bump back in after the June 2 layoff. Richardson testified that Boyd then stated:

Filing grievances for people like Dewey Knuckles and Danny Harmon would be the the end of Virginian Metals that they couldn't pay their bills now and once you drained all the blood out of anything it's all gone and that I wasn't only dealing with my job, but his job and everybody else's and that there wasn't going to be no Virginian Metals. I wouldn't have no job, no Union, and I wouldn't be no steward.

Boyd went on to tell Richardson that the coming Friday might be another one like that Friday before. The "Friday before" was a reference to the June 2 layoff.

That same day in a separate conversation with Union President Hart, Boyd spoke about tools being damaged in the shop and expressed the opinion that the damage was deliberate. Hart testified that Boyd went on to state:

The company was going broke and they were in debt and they were right on the verge of going bankrupt and then he started talking about us filing grievances and the cost of arbitration. He said he thought the minimum of arbitration would probably be around a thousand dollars, and we had already filed eight or ten grievances and that if we kept filing grievances like we were, then there could be another Friday like the Friday before.

Despite Boyd's comments, the Union continued to file grievances.

On June 16, Boyd had another discussion with Hart in Boyd's office with Steward Pinion present. Boyd stated that he had received a letter from the Union asking to combine the grievances of Knuckles, Harmon, and Benny Messick. Boyd discussed the merits of the grievances, particularly the seniority date for Harmon. Boyd then stated that he did not care whether the Union got Harmon's job back, because if Harmon won the arbitration, Boyd would create a slack in the work area so that Harmon would be laid off anyway.

On July 13, three departments were laid off for 10 days. They were parts manufacturing, sidebuilding, and steel welding. The employees in steel welding received their layoff slips about 3 p.m. There were trucks to be worked on at the time. During the 10-day layoff, both supervisors and other unit employees performed a great amount of work ordinarily performed by the employees on layoff.

The aluminum department was not involved in the layoff. Prior to the layoff, the aluminum department employees were working overtime, partly in steel welding.

On July 20, about 2 p.m., Richardson filed another grievance. Richardson worked in the welding installation department. Just before 4 p.m., the entire department was laid off for 2 days.

As of June 15, the Respondent knew that it had secured the contract for a major truck bed order from the State of Virginia. After a pilot model was completed and approved in September, work on this order began in earnest in October.

## II. ANALYSIS

Contrary to the judge, we find that all three layoffs were motivated by the employees' union activity, and that the Respondent has not shown that the layoffs would have occurred in the absence of their union activity. The Respondent laid off its second shift on June 2 immediately after learning two pieces of information. First, the pending decertification petition had been withdrawn. Second, a majority of the second shift supported the Union. Apart from this newly acquired knowledge, there were no other changed circumstances that could explain the layoff of the second shift. The only thing that had changed was the known union sentiments of the employees on the second shift, including Dewey Knuckles. In addition, on June 6, just 4 days later, the Respondent virtually admitted an unlawful motivation for the June 2 layoff when Plant Manager Boyd in two separate conversations threatened another layoff "like the Friday before" if the Union continued to file grievances.

The judge noted that production records show that the production for June 1989 dropped from the levels of the immediately preceding months. Apparently solely on the basis of these records the judge concluded that the Respondent's economic motivation for the layoffs effectively rebutted the General Counsel's prima facie case. These records also show, however, that production was greater in June than the production rate for the previous August, September, October, November, December, and January, when the Respondent had vigorously opposed laying off the second shift. Thus, production was better than it had been in 6 out of the preceding 10 months. Further, a major contract was pending. Nevertheless, a few days after the Respondent

learned that the union sentiments of the second shift had changed and that the decertification petition had been withdrawn, the second shift was eliminated. The Respondent did not implement 4-day workweeks or find other work for the employees as it had done to avoid layoffs in the past.

Similarly, the July 13 and 20 layoffs were unprecedented. Several employees testified that the pace of work seemed only somewhat slower, and there is uncontradicted evidence that after the layoff some employees were working overtime and that the work of laid-off employees was being performed by supervisors and other employees. The record reveals that the Respondent has complete control over bringing orders to the floor. Plant Manager Boyd's comment that he would "create a slack in the work area" so that Harmon would be laid off shows that a layoff could be engineered at will and that the Respondent would not hesitate to use layoffs in retaliation for the employees' union activities.

Furthermore, the timing of the July temporary layoffs is striking. The previous month, Boyd twice threatened layoffs if the Union continued to file grievances. The Union did not stop filing grievances and Boyd's "prediction" was fulfilled. In addition, the July 20 layoff occurred within 2 hours of Richardson's filing another grievance and involved only Richardson's department. In sum, we find that the Respondent made good on Boyd's threats. In fact, all three layoffs occurred against a background of numerous and significant unfair labor practices. Accordingly, we find that the layoffs of June 2 and July 13 and 20 were in violation of Section 8(a)(3) and (1) of the Act.

In finding that the layoffs were unlawful, we rely on the timing of the layoffs, the absence of evidence that production levels warranted a reduction in the work force, the Respondent's unlawful threats to close the plant or lay off employees because the Union pursued employee grievances, the performance of the laid-off employees' work by supervisors and other employees, and the Respondent's deviation from its past practice of no layoffs. These circumstances lead us to conclude that the three layoffs were in response to the employees' changed union sentiments and their filing of grievances. The Respondent's evidence for its purported economic reasons for the layoffs is insufficient either to rebut the evidence of unlawful motive or to carry the Respondent's burden, under *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), of showing that the layoffs would have occurred even in the absence of the employees' protected activities.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease

and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

The Respondent shall be ordered to offer immediate and full reinstatement to the second-shift employees laid off on June 2, 1989, to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

The Respondent shall also be ordered to make whole the employees laid off on June 2 and July 13 and 20, 1989, for any loss of earnings and other benefits they may have suffered by payment to them of the sum of money they would have earned but for the discrimination against them, less interim earnings, plus interest.

All backpay due shall be calculated on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

"3. When the Respondent failed and refused to furnish the Union information on what profit, if any, the Respondent made in fiscal years 1986, 1987, and 1988, and when the Respondent failed to pay profit sharing for fiscal year 1988 or demonstrate that none could be paid, the Respondent violated Section 8(a)(5) and (1) of the Act."

2. Insert the following as Conclusion of Law 4 and consecutively renumber the remaining paragraphs.

"4. When the Respondent laid off its employees on June 2 and July 13 and 20, 1989, because of their union activities, it violated Section 8(a)(3) and (1) of the Act."

#### ORDER

The National Labor Relations Board orders that the Respondent, Virginia Metal Products Co., Inc., Richlands, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because of their union activities.

(b) Failing and refusing to furnish to the Union information necessary and relevant in order for the Union to carry out its collective-bargaining responsibilities such as profit statements for fiscal years 1986, 1987, and 1988, and evidence of oral warnings for the period October 1, 1988, to February 13, 1989.

(c) Unilaterally failing to pay profit sharing or demonstrate that none could be paid.

(d) Unilaterally and without giving notice and opportunity to bargain to the Union, holding meetings with employees to tell them what the 401(k) pension plan will be.

(e) Delaying raising employees to top pay because they engage in protected concerted activity.

(f) Denying access to a union-selected industrial hygienist to inspect the plant ventilation system.

(g) Issuing written warnings to employees because they engage in protected concerted activity.

(h) Encouraging or assisting employees to decertify the Union.

(i) Threatening to close the plant or lay off employees because the Union pursues employee grievances.

(j) Conditioning good job recommendations on withdrawal of grievances.

(k) Discharging employees because they engage in protected concerted activity or testify at arbitration hearings.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them under the Act.

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

(a) Furnish to the Union, on request, evidence of oral warnings issued employees between October 1, 1988, and February 13, 1989, and evidence of profits made by the Respondent in fiscal years 1986, 1987, and 1988.

(b) Pay any applicable profit sharing for fiscal year 1988, with interest computed in the manner set forth in the remedy section of this decision.

(c) Offer the second-shift employees laid off on June 2, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges previously enjoyed, and make whole the employees laid off on June 2, July 13 and 20, 1989, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Offer Mike Hagy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, and make Mike Hagy whole for any loss of earnings and other benefits suffered by him from the date he was able to return to his regular job. Backpay is to be calculated in the manner set forth in the remedy section of this decision.

(e) Pay to employee Richard Webb the difference in pay between \$7.75 per hour and top pay of \$8.30 per hour, with interest, for the period between his return to work in September 1988 and when he was raised to top pay in February 1989.

(f) If requested by the Union, grant access to its facility to an industrial hygienist selected by and paid by the Union to inspect the ventilation system.

(g) Remove from its files any reference to Ronald Keene's unlawful warning and to the unlawful discharge and layoffs and notify the employees in writing that this has been done, and that evidence of these unlawful actions will not be used against them in any way.

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

(i) Post at its Richlands, Virginia facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>5</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.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT refuse to furnish to the Union information necessary and relevant to the Union's carrying out its collective-bargaining responsibilities.

WE WILL NOT unilaterally and without giving notice and opportunity to bargain to the Union, hold meetings with employees concerning the 401(k) pension plan.

WE WILL NOT delay raising employees to top pay because they engage in protected concerted activities.

WE WILL NOT deny access to a union-selected industrial hygienist to inspect the plant ventilation system.

WE WILL NOT issue written warnings to employees because they engage in concerted protected activities.

WE WILL NOT encourage or assist employees in decertifying the Union.

WE WILL NOT threaten to close the plant or lay off employees because the Union pursues grievances.

WE WILL NOT condition good job recommendations on withdrawal of grievances.

WE WILL NOT discharge employees because they engage in protected concerted activities or testify at arbitration hearings.

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 furnish the Union, on request, evidence of oral warnings issued employees between October 1, 1988, and February 13, 1989, and evidence of profits made by the Company in fiscal years 1986, 1987, and 1988. WE WILL pay any applicable profit sharing for fiscal year 1988, with interest.

WE WILL offer the second-shift employees 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 WE WILL make whole the second-shift employees laid off on June 2, 1989, and the employees laid off on July 13 and 20, 1989, with interest, for any loss of earnings and other benefits suffered by them as a result of our unlawful conduct.

WE WILL offer Mike Hagy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, and WE WILL make Mike Hagy whole for any loss of earnings and other benefits suffered by him from the date he was able to return to his regular job, with interest.

WE WILL pay to employee Richard Webb the difference in pay between \$7.75 per hour and top pay of \$8.30 per hour, with interest, for the period between his return to work in September 1988 and when he was raised to top pay in February 1989.

WE WILL, on request, grant access to our facility to an industrial hygienist selected by and paid by the Union to inspect the ventilation system.

WE WILL remove from our files any reference to Ronald Keene's unlawful warning and to the discharge and unlawful layoffs and notify the employees in writing that this has been done and that evidence of the unlawful actions will not be used against them in any way.

#### VIRGINIAN METAL PRODUCTS CO., INC.

*Jane P. North, Esq.*, for the General Counsel.

*Lawrence E. Morhous, Esq.*, of Bluefield, West Virginia, for the Respondent.

*Adrienne A. Berry, Esq.*, of Louisville, Kentucky, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On February 23, 1989, the Charging Party filed the charge in Case 11-CA-13206, on April 20, 1989, the Charging Party filed the charge in Case 11-CA-13284, on July 11, October 20 and 26, 1989, the Charging Party filed the charge, amended charge, and second amended charge in Case 11-CA-13402, and on April 13, 1990, the Charging Party filed the charge in Case 11-CA-13804. The aforementioned charges were all filed against Virginian Metal Products Co., Inc. (Respondent) by the International Ladies' Garment Workers' Union, Southern District Council, Upper South Department, AFL-CIO (Charging Party or Union).

On January 17, 1990, the National Labor Relations Board, by the Regional Director for Region 11, issued an amended second order consolidating cases and amended consolidated complaint in Cases 11-CA-13206, 11-CA-13284, and 11-CA-13402. On May 14, 1990, the National Labor Relations Board, again by the Regional Director for Region 11, issued a complaint in Case 11-CA-13804. These cases were consolidated for trial before me.

The complaints allege that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act in numerous ways, set forth below, following the Board certification of the Union to represent a unit of Respondent's employees. The hearing was held in Tazewell, Virginia, on April 11, 12, and 13 and May 24, 1990.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel, Respondent, and Charging Party, and on my observation of the demeanor of the witnesses, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

The Respondent, Virginian Metal Products Co., Inc., is now and has been at all times material a Virginia corporation with a facility at Richlands, Virginia, where it is engaged in the manufacture of truck bodies.

During the 12 months preceding the issuance of the complaints tried before me Respondent received at its Richlands, Virginia facility goods and raw material valued in excess of \$50,000 directly from points outside the commonwealth of Virginia, and Respondent shipped from its Richlands, Virginia facility products valued in excess of \$50,000 directly to points outside the Commonwealth of Virginia.

Respondent admits, and I find, that it is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

###### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Overview

The Union in the fall of 1987, began a campaign to organize the production and maintenance employees of the Respondent. Respondent is in the business of manufacturing truck bodies.

An election was held on January 27, 1988. The Union won the election and was certified by the Board as the collective-bargaining representative of the production and maintenance employees of the Respondent on February 9, 1988.

The parties began negotiating for a first collective-bargaining agreement. Between April and August 1988 there was a strike. When the workers returned to work the work force was close to doubled since Respondent had hired and kept on the strike replacements it hired.

The Union had beginning on February 9, 1988, an irrebuttable presumption of majority status for a 1-year period or until February 9, 1989, when it would then have merely a rebuttable presumption of majority status unless the Union and Respondent had agreed to a collective-bargaining agreement, in which case there would be a contract bar to any attempt to decertify the Union as the representative of the employees.

It is alleged that during the 1 year of irrebuttable presumption of majority status following certification that Respondent, acting through various supervisors and agents, sought to undermine support for the Union by committing unfair labor practices, for example, failing and refusing to pay profit sharing in November 1988, paying less than full Christmas bonuses in December 1988, failing to give a pay raise to employee Richard Webb, giving a written warning to employee Ronald Keene, encouraging and assisting an employee in the filing of a decertification petition, and bargaining in bad faith with the Union for a first contract by denying access to the plant by an industrial hygienist and refusing to turn over to the Union information or benefits and profit sharing.

In February 1989, at the end of the 1-year period of irrebuttable presumption of majority status the Union and Respondent agreed on a 1-year collective-bargaining agreement effective from February 13, 1989, to February 13, 1990.

Because of the "contract bar" rule the Union enjoyed for the period of this contract, i.e., 1 year, an irrebuttable presumption of majority status.

It is alleged that Respondent committed a number of unfair labor practices during the term of this 1-year contract with a view toward undermining support for the Union among its employees. These alleged unfair labor practices included threats to close the plant, threats to lay off employees, threats to terminate employees, three separate layoffs, the close monitoring and suspension of employee Dewey Knuckles for 5 days because he switched from being antiunion to being prounion, telling an employee that Respondent would give him a good job recommendation if he withdrew a grievance, and failing to bargain in good faith by refusing to turn over information on oral warnings to the Union and implementing a 401(k) pension plan without giving prior notice and opportunity to bargain to the Union, and, lastly, by discharging employee Mike Hagy.

In February 1990, Respondent and the Union entered into a collective-bargaining agreement to succeed the 1989-1990

agreement. This new collective-bargaining agreement is effective from February 13, 1990, to February 13, 1993.

I will first address the unfair labor practice alleged to have occurred between certification of the Union in February 1988, and the first contract between Respondent and the Union in February 1989.

#### B. Alleged Unfair Labor Practices between Certification and the Parties First Contract

##### 1. Profit sharing

Respondent's fiscal year ran from July 1 to June 30. Respondent normally paid profit sharing to its employees between September and November based on profits for the fiscal year ending the prior June.

Employees when hired were told that one of the benefits of working for Respondent was their profit-sharing plan. Evidence at the hearing reflected that profit sharing was paid every year in varying amount for decades with the exception of several years in the early 1980's because of the slump in the coal industry which at that time was a big customer of Respondent.

In 1988 no profit sharing was paid. Respondent claimed that it was solely a management prerogative to pay profit sharing and 1988 was a year either with little or no profit because of the 4-month strike between April and August 1988 (half of which occurred during the 1988 fiscal year) and because Respondent had extra expenses for legal fees occasioned by events and the extra costs of hiring and training the strike replacements it hired when the strike started. In addition, when the strike ended and Respondent's striking employees returned to work, Respondent kept on the payroll the replacement workers and had close to double the number of employees with a production rate which evidence at the hearing reflected was no higher. Of course, keeping double the work force beginning in September 1988 had no effect on fiscal 1988 profits since the fiscal year ended June 30, 1988.

The Union in November and December 1988 requested that Respondent give it information regarding the profit-sharing plan, i.e., the formula for deciding how much of the profits was made available for profit sharing and what the profits were for fiscal 1986, 1987, and 1988. Respondent refusal to turn over this information.

During bargaining an employer must maintain in place current benefits such as profit sharing until agreement changing or modifying them is reached, or until impasse is reached, and then the employer may implement its last best offer on the matter. See *299 Lincoln Street*, 292 NLRB 172 (1988).

It was incumbent on Respondent to pay profit sharing as it always did or at least demonstrate with some kind of documents why it was not paying any profit sharing that year. Respondent did neither. Therefore, it violated Section 8(a)(1) and (5) of the Act. The information requested by the Union was necessary and relevant for it to carry out its duty to represent these employees. See *NLRB v. Truit Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Ind. Co.*, 385 U.S. 432 (1967). The remedy is to turn over the records requested by the Union and pay the normal profit sharing paid in previous years, or let the records reflect that no profit sharing could be paid that year because no profits were available to share with the employees. This will be left to the compliance stage

of these proceedings. I note that the Union promised that it would keep these records of profits confidential and such a promise will be asked for in the compliance stage of these proceedings.

I note that the parties reached agreement on collective-bargaining agreements covering the period February 13, 1989, to February 13, 1990, after 21 negotiating sessions and the period February 13, 1990, to February 13, 1993. There is no provision for profit sharing in either agreement. However, that does not excuse the failure of Respondent to demonstrate the formula for paying profit sharing in the past, and either pay or justify why it did not pay profit sharing in November 1988.

#### 2. Less than full Christmas bonuses in December 1988

Respondent's employees regularly received a Christmas bonus in December of each year. The bonus was based on length of service, i.e., an employee with 1 to 5 years' service received 1 weeks' pay, 5 to 10 years' service received 2 weeks' pay, and over 10 years' service received 4 weeks' pay. New employees hired by Respondent were told that they would be paid a Christmas bonus. Evidence at the hearing reflected that oftentimes a full Christmas bonus was not paid and employees received half the normal bonus. This was not unusual.

In Christmas 1988, the employees received one-half the normal bonus. A not uncommon event. Respondent has an obligation to continue in effect the practice of paying Christmas bonuses until changed by agreement or changed after impasse in negotiations is reached. Respondent claims it did continue the normal practice of paying a Christmas bonus, and in 1988 paid less than full bonuses as it has in the past because profits were down due to the strike and Respondent having to hire and train a replacement work force.

I do not find that Respondent violated the Act by not paying full Christmas bonuses because what it did in 1988—pay less than full bonuses—it had done a number of times in the past.

There was no provision for a Christmas bonus in the 1989–1990 collective-bargaining agreement but there is a provision for a Christmas bonus in the 1990–1993 collective-bargaining agreement.

#### 3. Delay to bringing employee Richard Webb up to top pay

Richard Webb was hired by Respondent on April 17, 1987. He began at the regular pay and was given the regular three automatic pay raises. He was actively prounion during the organizing campaign, e.g., he wore a union button, etc. He went on strike with many of his fellow employees in April 1988. He returned to work after the strike in mid-September 1988. He did not receive top pay of \$8.30 an hour until late February 1989.

Evidence at the hearing reflects that employees normally got to top pay in 1 year or less although pay raises to top pay were not automatic. It took Webb 22 months to get to top pay. If one discounts the 4-month strike period, it took Webb 18 months to get to top pay rather than the more normal 12 months.

On the one hand evidence at the hearing reflects that Webb was less than spectacular at his job and that Super-

visor Scott Spivey had criticized Webb's work *before* the strike began and even *before* Webb joined the Union. There was also evidence that another employee complained to management about the quality of Webb's work.

On the other hand, strike replacements hired after Webb was on the job for a year got to top pay before he did, and there were statements credibly attributed to supervisors that Webb's work was every bit as good as the work done on second shift by those strike replacement workers who were making more money than Webb.

The only distinction between the strike replacement employees and Webb is that Webb was actively prounion and participated in the strike. The quality of their labor was the same. Accordingly, it was a violation of Section 8(a)(3) of the Act for Respondent to delay Webb receiving top pay until February 1989. He should have gotten it beginning after 1 year on the job or in September 1988 when he returned from strike. The remedy for this violation is to make Webb whole for the difference in pay between what he made (\$7.75 per hour) and top pay (\$8.30 per hour) from September 1988 until February 1989.

#### 4. Denial of access to industrial hygienist

On November 14, 1988, the Union requested that Respondent permit it to have an industrial hygienist make an inspection of the air ventilation system in the plant.

Beginning in July 1988, the Union reiterated to Respondent the complaints about air quality in the plant it heard from the employees it represented. Initially the Union wanted to send an expert into the plant to see what a new ventilation system would cost. Eventually, the Union merely requested that it be allowed to send in an industrial hygienist to see if the air quality was as bad as some of its members thought.

The Union, obviously, has an interest in doing what it can to see that the employees it represents work in as healthy an environment as possible consistent with getting the job done.

There is no evidence that the industrial hygienist would have interfered in any way with production at the plant. Respondent's flat out denial of access to a union designated industrial hygienist to check air quality was a violation of Section 8(a)(5) of the Act. Balancing the property rights of Respondent against the right of the Union to check on ventilation, a health concern for the employees it represents, at the expense of the Union, I conclude that the Union's right of access for this very limited purpose outweighs Respondent's property rights and denial of access violates Section 8(a)(5) of the Act. See *NLRB v. American National Can Co.*, 293 NLRB 901 (1990), *enfd.* 924 F.2d 518 (4th Cir. 1991); and the Board's precedent setting decision in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), *enfd.* 778 F.2d 49 (1st Cir. 1985).

Obviously a union paid industrial hygienist's recommendation on improving or replacing the ventilation system at the plant would not necessarily have to be implemented unless Respondent wished to do so, but the matter would have to be negotiated between Respondent and the Union.

#### 5. Written warning to employee Ronald Keene

Ronald Keene began his employment with Respondent in 1978. He was actively prounion during the campaign and participated in the April to August 1988 strike.

On January 17, 1989, Keene and another employee passed out union handbills in front of the building across the street from Respondent's facility. They were seen handbilling by General Manager Jim Boyd.

Two days later Keene received a written warning for being away from his work station. In point of fact, persons with jobs like Keene were away from their work station on occasions throughout the day to check on the paper work for a particular job, etc. In other words an employee like Keene being away from his work station did not necessarily mean he was away goofing off or that he was not doing his job.

Keene credibly testified that he left his work station on the day in question to check on some paperwork, which was part of his job, saw a defective welding job, and brought it to the attention of a management official. He then returned to his work station. He was away from his work station for only a couple of minutes. In fact, the supervisor who wrote him up did not even know how long he was away from his station. These facts were brought to the attention of General Manager Jim Boyd by the Union who was protesting Keene's discipline. Boyd refused to rescind the written warning.

While Keene had some previous disciplines on his record it seems clear that the instant warning on January 19, 1989, was given to him because of his protected concerted activity; specifically, the fact that he handbilled the day before his so-called misconduct. The fact that the other employee who handbilled with him was not disciplined is not persuasive that the disciplining of Keene, therefore, must have been legitimate. Applying the analysis of *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I must and do conclude that the written warning to Keene was a violation of Section 8(a)(3) of the Act since even if Keene violated a rule of the workplace by being away from his work station he would not have been disciplined but for his protected concerted activity.

#### 6. Respondent's participation in efforts to decertify the Union

As noted above the employees went on strike in April 1988, which was some 2 months after the Union was certified as the collective-bargaining representative of the employees. Approximately 40 of Respondent's 50 employees participated in the strike.

Replacement employees were hired. They were offered permanent employment by Respondent and when the striking employees made an unconditional offer to return to work in August 1988, they were brought back and added to the complement of strike replacement employees. The result was that the number of Respondent's production and maintenance employees virtually doubled in size between April and August 1988 from 51 employees to 95 employees.

It is alleged that Respondent unlawfully assisted and encouraged employee Dewey Knuckles to circulate and file a decertification petition.

Knuckles was hired in May 1988 as a strike replacement employee. In August 1988, Knuckles signed a decertification petition, and evidentially, because his name was first on the petition (which Knuckles had not prepared or circulated) a Board agent called Knuckles at Respondent's facility and a supervisor brought Knuckles to the phone at which time the

Board agent told Knuckles that the petition was untimely since filed only half way through the certification year.

In August 1988, Supervisor Bill Fullen and newly minted Supervisor Teddy Monk told Knuckles that if he and the other employees did not get rid of the Union Knuckles would lose his job when the striking employees returned to work due to Knuckles' job classification and seniority vis a vis the returning employees.

Knuckles circulated a second decertification petition in August 1988, which was also returned by the Board as untimely.

Thereafter, Supervisor Bill Fullen told Knuckles to call the Board to find out what to do next. The Board advised Knuckles that a petition to decertify should be filed at the end of the certification year.

In January 1989 Fullen told Knuckles to bring the decertification petition to the plant and circulate it among the employees. Knuckles was reminded again by Fullen that if the Union was not gotten out of the facility Knuckles, because of his lack of seniority and job classification, could lose his job.

In late January 1989, at the plant Fullen asked Knuckles where the decertification petition was. Knuckles told him at home and Fullen directed him to get it and send it to the Labor Board right away, because the union representative had apparently agreed to a contract proposal offered by Respondent.

Knuckles called his wife at home and told her to bring the petition to the plant right away. Karen Knuckles, Dewey Knuckles' wife, did so. When she arrived at the plant Supervisor Bill Fullen told Dewey Knuckles where to get the address for the Labor Board from in the cafeteria and instructed Karen Knuckles to go to the post office and mail the petition to the Labor Board. He instructed her to make sure that the envelope containing the petition was postmarked that date. Karen Knuckles did as instructed.

I found Dewey and Karen Knuckles to be very credible witnesses. I found Fullen to be less than totally credible. Fullen claims he merely told Knuckles when Knuckles asked for the phone number and address of the Labor Board that he could not help Knuckles in any way, and all information Knuckles needed he could get off the employee bulletin board. Fullen claims he told Karen Knuckles to buy an envelope and stamps at the post office but claims he did *not* know what Karen Knuckles was going to mail. I do not believe him.

Since I credit Dewey and Karen Knuckles, it is clear that Respondent, through Supervisor Bill Fullen, unlawfully encouraged and assisted in the filing of a decertification petition in violation of Section 8(a)(1) of the Act. See *Hancock Fabrics*, 294 NLRB 189 (1989). Fullen encouraged Knuckles in the decertification effort by telling him that if the Union was not decertified he could lose his job and his efforts on the night of January 30, 1989, with respect to both Dewey and Karen Knuckles assisted in the filing of decertification petition.

Interestingly enough, this third petition was also untimely and by the time the certification year ended Respondent and the Union had agreed to a 1-year collective-bargaining agreement.

In April 1989, Dewey Knuckles joined the Union and withdrew the January 1989 petition. It is alleged that Knuck-

les was later harassed and finally suspended from work because he switched and became prounion. He was later part of a permanent layoff at the plant and no longer works for Respondent.

*C. Alleged Unfair Labor Practices Between the Time the Parties Signed a 1-year Contract in February 1989 and the Time a 3-year Contract Was Signed in February 1990*

Subsequent to the signing of the 1-year collective-bargaining agreement between the parties which covered the period February 13, 1989, to February 13, 1990, it is alleged that Respondent committed a number of unfair labor practices to include threats of plant closure, termination, and lay-off, and unlawful harassment of union supporter Dewey Knuckles, a 5-day suspension of union supporter Dewey Knuckles, three separate layoffs, promising an employee a good job recommendation if he withdrew a grievance, and the discharge of union supporter Mike Hagy.

1. Threats of plant closure and layoffs

There was a grievance and arbitration closure in the collective-bargaining agreement signed on February 13, 1989. A number of grievances were filed.

On April 25, 1989, Shop Steward Steven Richardson, who has worked for Respondent since 1977 and still works for Respondent, met with Plant Superintendent Jim Boyd and Supervisor Scott Spivey. A second shop steward, Wayne Pinion, was present with Richardson. The four men met in connection with some grievances. Boyd told Richardson and Pinion that "Doc" Stanton, the owner of Respondent, did not like working with a third party (the Union) and might just padlock the place or close the plant. I credit Richardson and Pinion. This is a threat in violation of Section 8(a)(1) of the Act. See *Tomco Construction Co.*, 275 NLRB 1 (1985).

On June 6, 1989, Richardson met with Boyd and Spivey concerning a grievance and Boyd said that with all the money spent by Respondent on grievances it might not be able to pay its other bills and might go out of business. I credit Richardson's testimony. This is also a threat in violation of Section 8(a)(1) of the Act.

Again on June 6, 1989, Boyd told Union President and employee Mike Hart when again discussing the cost of grievance processing that next Friday may be like last Friday due to excessive costs of grievances. The "last Friday" was June 2, 1989, when there was a permanent lay off of the second shift which is discussed below.

Boyd admitted that on two or three occasions he did comment on the cost of grievance processing but never threatened plant closure or layoffs. I credit Richardson, Pinion, and Hart and find that Respondent, by Plant Superintendent Jim Boyd, did threaten plant closure and layoffs if the Union persisted in exercising its right under the collective-bargaining agreement to pursue grievances.

I note that the Union first proposed in order to save money that some grievances be combined for arbitration. Respondent originally refused to do this but later changed its mind.

2. Harassment and 5 days' suspension of Dewey Knuckles

Dewey Knuckles is the same employee discussed in connection into the allegation that Respondent, through Supervisor Bill Fullen, encouraged and assisted in the filing of a decertification petition. An allegation I sustain. See section III,B,6, above.

Knuckles was originally hired in May 1988 as a strike replacement employee. When the strike ended in August 1988, and the striking employees returned to work, Respondent started up a second shift composed mostly of strike replacement employees. Knuckles worked on the second shift.

In April 1989 Knuckles and fellow strike replacement employee Daniel Harmon both joined the Union. Shortly thereafter they told Supervisors Larry Clark and Tom Lawson that they had done so.

Thereafter, Dewey Knuckles claims and it is corroborated by fellow employee Daniel Harmon that Supervisor Bill Fullen kept a close eye of Knuckles at work. Fullen conceded that there were occasions when he would be outside the plant and in a position to observe Knuckles at work.

The evidence of Fullen keeping an eye on Knuckles or harassing him by closely monitoring Knuckle's activity at work after he joined the Union is so weak that I find no violation of the Act. It would be absurd to require a supervisor to make sure you do not look at or watch a particular employee too much while the employee is at work.

Knuckles was active in the aborted decertification effort. In April 1989, he joined the Union and on May 24, 1989, he was suspended from work without pay for 5 days for horseplay and for threatening another employee. Knuckles, who I find credible, is a big husky man and one, who I judge from his demeanor on the stand, has something of a temper and doesn't like to be fooled with. While there was credible evidence that there had been horseplay at Respondent's facility in the past and no one had been disciplined, there is no evidence that any employee had *threatened* another employee and not been disciplined.

Knuckles was engaged in horseplay with two other employees, i.e., Sherry Justine and Claude Mitchell. Following the horseplay, which involved throwing water on one another, Knuckles, by his own account, sought out Mitchell. According to Knuckles' testimony he weighs 240 lbs. and Mitchell is a "little man." I never saw Mitchell since he never testified. Knuckles and Mitchell argued. Knuckles concedes that Sherry Justine was in a position to overhear part of the argument. Both Mitchell and Justine told management that Knuckles threatened Mitchell.

It is my conclusion that Respondent relied on the statements of Mitchell and Justine and disciplined Knuckles with a 5-day suspension for engaging in horseplay and threatening Mitchell, and that Respondent would have done the same thing even if Knuckles had not joined the Union. See *Wright Line*, supra.

On May 26, 1989, 2 days after Knuckles was told that he was suspended Knuckles wrote to the National Labor Relations Board, and asked to withdraw the decertification petition he had filed several months earlier.

### 3. Layoffs of June 2 and July 13 and 20, 1989

There were three layoffs of employees at Respondent's facility during the term of the 1-year collective-bargaining agreement signed February 13, 1989.

The first layoff was a permanent layoff of the second shift on June 2, 1989. A total of 15 employees were permanently laid off but 1 was later recalled. As noted above when the striking employees returned to work from the strike in August 1988, Respondent added their number to the strike replacement employees almost doubling the number to employees from 51 in April 1988 to approximately 95 employees in August 1988.

Suffice it to say production did not go up. The rate of production with almost double the work force stayed about the same.

Production records reflect that in June 1989, the rate of production dropped. The work was seasonal and a drop in production was not unexpected at this time of the year. Respondent had a reputation over the years according to numerous witnesses of not laying off employees when work was slow. A number of witnesses credibly testified that when work was slow in the past, Respondent kept the men on and found so-called "make work" jobs for them to do. However, evidence at the hearing also demonstrates that there had been 4-day workweeks instead of 5-day workweeks in the past when things were slow. In addition, there had been Christmas shutdowns when work was slow. Indeed there was a Christmas shut down in 1988.

Respondent claims it laid off the second shift because of economic reasons and not because the employees engaged in protected concerted activity or to undercut support for the Union.<sup>1</sup>

The General Counsel and the Union point out that the second shift was laid off by an employer who generally did not lay off employees because Dewey Knuckles and some other second-shift employees were joining the Union and Respondent felt it could not count on their support in getting rid of the Union in the event of another decertification effort.

I am persuaded that the General Counsel has not proved that the layoff was unlawfully motivated. I find the economic motivation for the layoff to be more persuasive. The June 2, 1989, was not unlawful.

On July 13 and 20, 1989, there were temporary layoffs. The July 13, 1989 layoff of 18 employees was for 10 days, however, many of the employees were recalled before the full 10-day period expired. On July 20, 1989, there was a 3-day layoff of 14 employees.

Respondent claims that the two temporary lay offs were due to lack of work and are supported in this contention by production records which reflect a drop in production.

The General Counsel and Union claim that the sections of the work force more highly unionized were laid off and other sections less heavily unionized were not laid off. The two temporary layoffs, however, impacted on both union member employees and nonunion member employees.

In July and August 1989, the production rate was 30 and 33 truckbeds, respectively, whereas even General Counsel's

<sup>1</sup> The rate of production—Respondent produces truck bodies—was 33 truck bodies in January 1989, 60 in February, 83 in March, 76 in April, 68 in May, 59 in June, 30 in July, and 33 in August. Fifty truck bodies per month was considered good production.

witnesses claimed that good production was 50 to 80 beds per month.

Respondent did have a history of avoiding layoffs with "make work" jobs, etc., but there is no evidence that it ever came up with so-called "make work" jobs in order to avoid a layoff when it had double the number of employees or close to double for many, many months. In addition, there had been as noted above periods of lack of work when Respondent put the employees on a 4-day workweek, rather than a 5-day workweek. As further evidence that there was a lack of work the employees voluntarily agreed to shut down the plant from September 1 to 11, 1989.

I conclude that Respondent was economically motivated when it laid off employees temporarily on July 13 and 20, 1989, and was not unlawfully motivated. Hence, I conclude the Act was not violated by the layoffs.

### 4. Respondent's conditioning of a good job recommendation on an employee's withdrawal of a grievance

Employee Daniel Harmon was a strike replacement employee hired in April 1988. He worked second shift and was laid off at the time of the June 2, 1989 layoff.

He was a steel fabricator and there were some opening for aluminum welders. He had previously (before the layoff) applied for one of the openings which would have required some additional training. He was not one of the employees accepted. After he was laid off he filed a grievance over not being selected as an aluminum welder. This is not alleged as an unfair labor practice.

After the layoff Harmon applied for a position with the Norfolk and Southern Rail Road. He called Supervisor Sam Altizer and asked for a job reference. Altizer told Harmon that Respondent would give him a good job recommendation if he dropped his grievance.

Harmon called Mike Hart, the president of the Local, and told him about his conversation with Altizer and told Hart he wanted to withdraw the grievance.

Although Altizer denied he conditioned the job recommendation on withdrawal of the grievance it is clear to me—since I find Harmon and Hart very credible—that he did do so. This was a violation of Section 8(a)(1) of the Act. The law is clear that you cannot discriminate against an employee for filing a grievance and the implied threat to withhold a good job recommendation because the employee filed a grievance is discrimination.

### 5. Discharge of Mike Hagy

Mike Hagy began his employment with Respondent in 1985. He was prounion and wore a prounion button at work during the organizing campaign. He was on sick leave with an injured back when the April 1988 strike began. When his sick leave ended he joined the strike.

In January 1989 Hagy reinjured his back on the job. He secured a note from his doctor that he should perform only light duty work. He returned to work, presented the doctor's slip, and was told that there was no light duty work available for him to do. He went home.

Every month thereafter Hagy, whose back problem continued, called into the plant to see if there was any light duty work for him to do. He was told there was not any.

He was never told that he was out of work for a certain period because of an injury or illness that he could or would be fired.

On December 15, 1989, an arbitration hearing was held. A union attorney was present for the Union and Plant Superintendent Jim Boyd was present for Respondent. Boyd was accompanied by Lawrence E. Morhous, Respondent's attorney.

Mike Hagy, who was still out of work with his injured back, was a union witness at the arbitration hearing. On the day of the arbitration, he exchanged pleasantries with Jim Boyd who inquired about his injured back, but did not tell or even hint to Hagy that he was going to be discharged because of his prolonged absence from work.

Several days later Mike Hagy picked up a certified letter from Respondent, postmarked December 18, 1989 (3 days after the arbitration hearing), advising Hagy that he was discharged effective December 15, 1989. The letter was dated December 15, 1989. The ground for termination was Hagy's "absence from work since January 31, 1989."

Respondent claims through Plant Superintendent Jim Boyd and Attorney Lawrence Morhous, who testified without objection from the Union or General Counsel, that Hagy's discharge was decided on *prior* to the arbitration hearing of December 15, 1989, although the letter was not sent out to Hagy until *after* December 15, 1989. Respondent claims it discharged Hagy because of a Virginia statute, effective July 11, 1989, which made it unlawful to discharge an employee during the first 6 months of an absence caused by a compensable injury or illness under the Virginia Worker's Compensation Act. The Virginia statute did not make it lawful or unlawful to discharge subsequent to a 6-months absence. Respondent and its attorney corresponded about this Virginia statute in June 1989, yet took no action to terminate Hagy until *after* Hagy testified at the arbitration hearing. It seems to me, at least by a preponderance of the evidence, that Hagy was discharged because he joined the Union, participated in the strike, and testified against Respondent at the arbitration hearing. This is a violation of Section 8(a)(3) of the Act.

The remedy for this violation is that Respondent should offer Hagy reinstatement and pay him back pay with interest from the time he would have been able to return to his regular job, which would be some date subsequent to December 15, 1989, obviously, since he was still out on injury as of that date. Indeed, he was still injured as of the date he testified before me, i.e., May 24, 1990, but this is a matter best left to the compliance stage of this litigation.

It is not alleged that Respondent violated the Act in failing to bring Hagy back to work in a light duty capacity but evidence was introduced that other employees had been given work assignments, when sick or injured, that only involved light duty work which Hagy could have done, e.g., Robert Simpson, Donny Reynolds, Norell Van Dyke, and Buddy Messick. Indeed, it was an arbitration involving Buddy Messick where Hagy was a witness. There was no evidence that Hagy is so injured that he could never return to work and perform his regular duties.

#### 6. Union information request for oral warnings

A union can request an employer to furnish it with certain information. If an employer refuses to turn over the information, the employer commits an unfair labor practice in viola-

tion of Section 8(a)(5) of the Act if the information sought by the union is necessary and relevant to the union in carrying out its collective-bargaining responsibilities.

On February 24, 1989, the Union wrote to Respondent and requested names and copies of all disciplining warnings, oral or written, placed in employees' files between October 1, 1988, and February 13, 1989.

The Union, of course, had represented the employees since February 1989 and represented the employees for the period covered by the information request.

On March 28, 1989, Respondent furnished the names and copies of *written* warnings for seven employees between October 1, 1988, and February 13, 1989. Respondent refused to turn over information on oral warnings on the grounds that the contract entered into on February 13, 1989, in article X provided that the Union was to receive copies of written warnings and said nothing about the Union's right to copies of oral warnings.

Clearly the Union as collective-bargaining representative was entitled to copies of written *and* oral warnings of employees for the period requested, which predates the collective-bargaining agreement.

Respondent had a progressive disciplinary system in effect during the period in question, i.e., October 1, 1988, to February 13, 1989, and the Union should have been furnished information on both oral and written discipline in order for it to determine if the progressive disciplinary system was operating as it should.

It is obvious in the extreme that it is necessary and relevant to a Union's duty to represent employees to ascertain if the employees are in disciplinary difficulty at work.

Respondent's refusal to furnish this information violated Section 8(a)(5) of the Act. See *Washington Gas Light Co.*, 273 NLRB 116 (1984).

#### 7. Respondent's refusal to provide information on 401(k) retirement plan

In the 1-year contract executed on February 13, 1989, there was a provision for a 401(k) retirement plan for Respondent's employees.

The contract provided at article XXVIII as follows:

#### *NEW RETIREMENT/SAVINGS PLAN*

Upon approval from the Internal Revenue Service and ratification of the labor agreement, Virginian Metal Products Co., Inc. will begin a new 401(k) Retirement-Savings Plan. All regular, full-time employees will be eligible to participate after the plan has been approved by the IRS and implemented.

On February 21, 1989, Union Attorney and Chief Negotiator Irwin A. Cutler Jr. wrote to Respondent. Cutler wrote "Please advise me of the status of the Company's step to implement a 401(k) Retirement/Savings Plan, as provided in Article XXVIII of the contract, and the terms of the plan."

Respondent wrote to the Union's attorney on February 25, 1989, and advised that Respondent was considering three proposals for a 401(k) and without further notice to the Union Respondent posted a notice on the employees bulletin board advising the employees—but *not* their collective-bargaining representative—that there would be two meetings on

March 21, 1989, at 2 and 3:30 p.m., where Respondent would explain what a 401(k) plan was, answer questions about it, and gauge the number of employees interested in participating.

At the March 21, 1989 meeting, a woman from a Virginia bank explained the 401(k) plan to the employees. was not advised of this meeting before hand.

Did Respondent violate the Act when it bypassed the Union and held a meeting with the employees explaining the terms and conditions of the 401(k) plan Respondent was putting into effect. Clearly a 401(k) pension plan is a most important term and condition of employment. In the contract the Union did not waive any right it might have to negotiate with Respondent regarding the particulars of the 401(k) plan selected by Respondent. Accordingly, Respondent violated Section 8(a)(5) when it bypassed the Union, went directly to the employees without prior notice to the Union, and told the employees what the 401(k) plan was that Respondent selected. See *Toffenitti Restaurant Co.*, 136 NLRB 1156 (1962), enf. 311 F.2d 219 (2d Cir. 1962).

#### CONCLUSIONS OF LAW

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

2. The Union, International Ladies' Garment Workers' Union, Southern District Council, Upper South Department, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. When Respondent failed and refused to turn over information on what profit, if any, Respondent made in its fiscal years 1986, 1987, and 1988 to the Union when requested by the Union in connection with 1988 profit sharing, Respondent violated Section 8(a)(1) and (5) of the Act.

4. When Respondent failed to raise employee Richard Webb's hourly rate to top pay from September 1988 to Feb-

ruary 1989 because of his protected concerted activity, Respondent violated Section 8(a)(1) and (3) of the Act.

5. When Respondent denied access to the plant for a union designated industrial hygienist to inspect the plant air ventilation system it violated Section 8(a)(1) and (5) of the Act.

6. When Respondent issued a written warning to employee Ronald Keene because he engaged in protected concerted activity, it violated Section 8(a)(1) and (3) of the Act.

7. When Respondent encouraged and assisted employees to decertify the Union Respondent violated Section 8(a)(1) of the Act.

8. When Respondent threatened to close the plant and lay off employees because they filed grievances with the Union which the Union pursued, Respondent violated Section 8(a)(1) of the Act.

9. When Respondent conditioned a good job recommendation on behalf of a laid-off employee on his withdrawing a grievance he had previously filed, Respondent violated Section 8(a)(1) of the Act.

10. When Respondent discharged employee Mike Hagy because he engaged in protected concerted activity and testified for the Union at an arbitration hearing, Respondent violated Section 8(a)(1) and (3) of the Act.

11. When Respondent failed and refused to turn over to the Union at its request evidence of oral warnings issued to employees between October 1, 1988, and February 13, 1989, Respondent violated Section 8(a)(1) and (5) of the Act.

12. When Respondent held a meeting with employees about the details of a 401(k) pension plan without first giving prior notice and opportunity to the Union to bargain, Respondent violated Section 8(a)(1) and (5) of the Act.

13. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from the publication.]