

Tecmec, Inc. d/b/a T.M.I. and Plumbers and Pipefitters Local Union 189, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Case 9-CA-27940

February 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On August 20, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision, and the Respondent filed a reply 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,¹ and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tecmec, Inc. d/b/a T.M.I., Amlin, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 1(c).

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

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

Eric A. Taylor, Esq., for the General Counsel.

Ronald L. Mason, Esq., of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Columbus, Ohio, on March 14 and 15, 1991. Subsequently briefs were filed by both parties.¹

The proceeding is based on a charge filed October 18, 1990,² by Plumbers and Pipefitters Local Union 189, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union).

The Regional Director's complaint dated November 30, 1990, alleges that Respondent Tecmec, Inc. d/b/a T.M.I., of Amlin, Ohio, violated Section 8(a)(1) and (3) of the Act by discharging its employee Dustan Apel and by threatening to discharge and permanently laying off its employee Jeffrey Apel because of their activities on behalf of, and in support of, the Union.

At the close of the Respondent's case the General Counsel requested a postponement so that he could have the opportunity to obtain testimony from a Larry Young, an employee whose identity counsel learned of from the testimony presented during Respondent's defense. The court ruled that the General Counsel would be given the opportunity to investigate the matter further and that a motion to reopen the record would be entertained if the investigation led to information that would necessitate further testimony. No such request was made. Although the Respondent speculates on brief as to why Young was not called, I find that no basis exists for the drawing of any inference regarding why Young was not called as a witness.

On review of the entire record and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a mechanical contractor engaged in the construction industry. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Ohio and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a large, multistate mechanical contractor with widespread operations in 10 or more States, including Ohio and several nearby States. Its work force consists of several hundred employees, including those generally skilled in the plumbing and pipefitting trade, persons who would normally be within the jurisdiction of the involved Union. Respondent, however, is a nonunion contractor and in the past several years has resisted an ongoing organizing attempt

¹The Respondent's unopposed motion to correct the record, dated April 23, 1991, is granted and received into evidence as R. Exh. 19. Also, as provided for at the hearing, Jt. Exh. 3 (a list of employees transferred to and from the "Mead Shutdown") was filed by letter of April 9, 1991, and it is hereby received into the record.

²All following dates will be in 1990 unless otherwise indicated.

by the Union. On occasion however, Respondent, or a subsidiary, have signed several project agreements with the Union at specific jobsites.

Respondent's president and founder is Gail Thompson. At various times Respondent has employed members of Thompson's family including his daughter Jennie and his brothers Steve and Kelly.

The Union made contact with Thompson on several occasions after the Company was founded and it attempted to organize Respondent's employees in mid-April 1989, at a Sears' jobsite in the Columbus, Ohio area. Approximately 12 of Respondent's employees walked off the job at the same time and subsequently joined the Union. Joe Apel, who had been employed by Respondent from May 1988 in the capacity of foreman or superintendent, led the walkout after speaking with other employees at the jobsite about leaving for the Union and he passed out leaflets and union authorization cards to them.

Joe Apel also spoke with the jobsite superintendent, Rex Carter, and Foreman Ralph Shaw shortly after passing out the leaflets and authorization cards. Both Carter and Shaw told him that he and the other employees were making a mistake, that they had been misled by the Union, and they would not be admitted as members.

Joe Apel's brothers, Jeffrey and Dustan, also worked at the Sears' jobsite in April and they both signed authorization cards but did not join the walkout.

In November 1989 Joe Apel and Assistant Union Business Representative Bob Dyer were at Respondent's Seymour, Indiana jobsite in the Union's continuing attempt to organize Respondent's employees. Apel answered questions from employees and spoke on behalf of the Union at a local Holiday Inn before a group of Respondent's employees, including Kenny Walden, the superintendent of the Seymour project who later left Respondent's employ and began working for a unionized contractor. The Union's efforts resulted in six or more employees leaving Respondent for membership in the Union and employment with unionized contractors.

After the defection of the employees from the Sears' jobsite in April 1989, Gail Thompson immediately held a meeting with the remaining employees, and spoke against the Union and about the benefits of continued employment with Respondent and he told the employees that he believed the Union was after him rather than being after his employees.

Thompson then called Jeff and Dustan Apel to the side to speak privately with them and said he knew their brother Joe had played a role in defection of the Sears' project employees, that he did not want to hear any more talk about Union and if he did, he would discharge them (Thompson denied having this conversation and it is not the basis for any allegation in the complaint).

Jeff testified that he had a subsequent conversation with leadman Rick Williams, who subsequently became a supervisor, in which Williams asked him to speak to his brother Joe about what he could do for him. Williams denied having any conversation with Jeff "about Unions" except for a discussion about trying to join the apprenticeship program but admitted that he left the Respondent and went to a union job shortly after Joe Apel's walkout but was later hired back by the Respondent.

Jeff had a similar conversation in late April or early May 1989, with James Carnes, Jr. who later became a foreman on

the Mead Shutdown. Carnes approached him during the lunch break and asked if Joe Apel could assist his joining the Union. Jeff relayed the message that Joe suggested that Carnes contact the union hall directly. Also, in July 1990, Bob Lovejoy, who was acting superintendent at the time, expressed interest in returning to the Union and asked Jeff whether Joe Apel could be of any assistance.

Both Carnes and Lovejoy deny seeking Apel's help; however, Lovejoy stated his union dues are currently paid up.

Jeff Apel also spoke about the Union's apprenticeship program with Steve Thompson, brother of Gail Thompson, who had been superintendent prior to leaving Respondent's employ, and Thompson, who had been through the program, told him that it was a good career move.

In late September 1990, Jeff and Dustan Apel, along with approximately 66 other employees, were at a job at the Mead Paper Plant in Chillicothe, Ohio. The plant was shut down at the time and the job was referred to as the "Mead shutdown" job. Kelly Thompson, Gail Thompson's brother, was the project superintendent and Lovejoy was a foreman.

Jeff Apel testified that he had a conversation with Kelly Thompson and Lovejoy at the end of September. As Jeff was walking out the gate Thompson and Lovejoy pulled beside him in a truck and asked if he wanted to join them for lunch. Jeff declined but told Kelly Thompson that his brother Joe had a message for Thompson "that the Union was going to send organizers to the jobsite to talk to Respondent's employees again and that the Union was aware that Respondent had a job in Toledo and it intended to do something about it." Thompson asked Jeff how he knew about the job in Toledo and Jeff replied that his brother told him about it. Thompson told Jeff that he did not "want to hear any of this shit."

Jeff testified that later that same date Lovejoy approached him and told him not to talk about the Union in front of Thompson again because Thompson had become "real pissed off" as a result of the earlier conversation and that Jeff could lose his job if he said anything more to Thompson.

Both Kelly Thompson and Lovejoy deny that these conversations took place and Gail Thompson denies that his brother told him about it.

Foreman Ralph Shaw recalls that as the job was winding down and only a few persons were left, Jeff asked to leave at midday and, as he was going to be laid off that evening anyway, Shaw told him to see Jeannie Freeman (at Respondent's office), about being sent somewhere else. Apel recalls that Foreman Williams told him it was his last day and to call the shop. Company records show that he left on October 2, for ROF (reduction of force). Apel called the office five or six times over the next month and spoke with Jeannie who kept telling him they would get back with him. He also recalled that Shaw had previously said they would go back to the jobs they had come from. (He had been at the "other" Mead project, which continued after September 31.)

On other occasions when he had been laid off he had been given a layoff slip but after the Mead job shutdown he received nothing nor was he ever given any explanation. He thereafter applied for unemployment benefits that were uncontested by the Respondent.

Dustan Apel's last day on the Mead shutdown job was September 30 and he was told by Shaw to return to his last

job. Company records show he left for "transfer to Litel." After having phoned in sick with the flu, Dustan testified that he returned to the Litel job on October 4 and worked the entire day without incident. The following morning Superintendent Rick Link asked Dustan "what have you done," and said he had been told by Jeff Jarvis that Gail Thompson personally told him to fire you and your brother. Link then added something about Jeff talking about the Union. Link recalled that when Dustan came to the job he put him to work then called the office and was told to go back out and lay him off. He asked Dustan what had happened at its Mead job and said that he was told to lay him off by the Columbus office. Shaw said Dustan replied with a comment about his brother and Gail Thompson's daughter. A few weeks later Link was short-handed on the job. He asked Vice President of Operations Doug Stevenson if he could get Dustan back and was told no (Link also said it was Stevenson, not Jarvis, who had told him to lay Dustan off), that the Apels were suspected of stealing tools. Link then said Dustan had inquired about returning and asked what reason should be given for the layoff. Stevenson told him to say it was for excessive absenteeism, and then asked if, in fact, he had missed a lot of work. Link said yes, and it was agreed that that would be the reason given if Dustan asked again.

Stevenson testified that he called Link about Dustan before the Mead shutdown job and told Link to lay him off. He said that Jeff Jarvis had told him they thought he was stealing tools from the Mead job but that he didn't mention that to Link. He agreed that a few weeks later he told Link about the stealing suspicion and told Link to give excessive absenteeism as an excuse if Apel asked.

Dustan also was not given a written layoff notice as he had on previous occasions. He did not check back with Link again after Link had spoken with Stevenson. He received no additional reason for the layoff, specifically the absenteeism reason discussed by Respondent's supervisors, and his unemployment compensation claim was not contested.

In the first half of December 1990, the Apels first learned that Respondent intended to justify their discharge by asserting that they had engaged in theft.

Jeff Apel and Donetta Sowards (who thereafter became engaged to Jeff), had a conversation at a chance meeting with Respondent's foreman Carnes and his wife at a Ramada Inn in Portsmouth, Ohio. Carnes and Jeff Apel spoke for 5 to 15 minutes and Sowards was present for part of the conversation. Carnes told Jeff that Gail Thompson was accusing Jeff and Dustan of theft. Carnes then said that he and others knew this was not true and that they all knew it was "over the Union situation in Toledo." He also told Jeff that "Gail was really upset over that and Kelly was pissed off." Jeff testified that Carnes stated that Thompson had even offered someone money to crack his head. Carnes then said he was sorry about this layoff and had talked about it with Vice President Jarvis and they wanted to get them back to work through the Cincinnati rather than the Columbia office. Sowards independently confirmed and amplified her own recollection of the conversation.

Carnes testified that he was foreman at the Mead shutdown and was never aware of any problem there with tools being stolen. He agreed that he had a chance meeting with Sowards and Jeff Apel at a Ramada Inn but believed it was

in October after he had been transferred to an Indiana job as a foreman. He stated that their conversation lasted for about 5 minutes and that they merely made mutual introductions between his wife and Apel's girlfriend and went on to his table.

In answer to a series of three direct leading questions by Respondent counsel, Carnes denied that any of the conversation related to or mentioned on-the-job theft by Apel, the Union, or any statements that Gail Thompson may have said. On cross-examination by the General Counsel he then admitted that during the conversation he did tell Apel that he would try and help him get back to work at the Company and that he occasionally has conversations with Jarvis whom he considers to be a friend. Jarvis, who apparently still is Respondent's vice president, was not called as a witness.

Jeff Apel first started with Respondent as a laborer. He then became a helper/fitter and received several wage increases. He was rated good (the highest rating versus fair and poor) in company evaluations. His evaluation, dated April 19, 1990, noted that he was quiet, his work was neat, he caused no problems or distractions, and his work with a torch was better than most helpers and some fitters.

When he was rehired after a layoff, Jeff filled out an employment application dated October 6, 1989. The application was brief and there was no inquiry regarding possible felony or misdemeanor convictions. The Respondent elicited information that Jeff Apel was convicted of sexual battery and was in jail between 1984 and 1989, prior to his employment with Respondent. While in prison he was indicted and sentenced to a consecutive term for aggravated riot that he understood "was run with his other sentence, just added to it." After being hired, he never received any subsequent inquiry about this subject. In September he became aware of a rumor that someone was saying he had gone out with Jennie Thompson, owner Thompson's daughter who, as noted, worked at the same Mead shutdown jobsite. He spoke with Supervisor Lovejoy, denied that the rumors were true, and expressed his concern that he could lose his job if the rumors got back to Thompson.

Dustan Apel was a second-year helper with evaluations that reflect the Company rated his performance as good and "encouraging," and in 1989, he received two raises less than a month apart.

As noted, Dustan Apel was transferred to work the Mead shutdown from Respondent's job at Litel. Jeff Apel was transferred from Respondent's job at Mead Opus. A total of 66 men were assigned to work the Mead shutdown job, (which lasted about 2 weeks), 3 of whom were new hires who were released "rof" (reduction of force), after a few days (1 worked only 1 or 2 days). Respondent's records show as "reason for leaving": that 3 persons quit, 15, including the 3 new hires and Jeff Apel were "rof," and 48, including Dustan Apel (on 9/30/90) were listed as transfers to other jobs (1 to vacation). Of these 48, 12 were transferred back to the same Mead job that Jeff Apel had come from.

Shaw, the superintendent on the Mead shutdown, testified that he asked Jennie Thompson about the rumor connecting her and Jeff Apel and that she denied it. Gail Thompson testified that Jennie then told him of the rumor. He said he admittedly was "upset" about it but that he took no action against Jeff Apel because of it.

Kelly Thompson testified that he had already transferred from the Mead shutdown job when he was faxed a list of missing tools. He talked to his brother, Gail, and was instructed to investigate. He then told Superintendent Shaw to find out what he could about the missing tools which included a generator and other smaller items.

Shaw's investigation consisted of talking to a number of employees about the missing tools and, contrary to Kelly Thompson's testimony, Shaw recalls being asked to investigate by Gail Thompson. He stated that a lot of the tools were in storage trailers and "gang boxes" and that the Apels have access to the tools and, as helpers, often had the job of getting and moving tools to a work location. The Apels, however, pointed out that the Mead shutdown jobsite covered a very large area with 10 buildings with employees from other contractors as well as a night shift, which resulted in the trailers and boxes being unlocked after their own shifts. Jeff testified that he spent most all of his time running a jack hammer and he only occasionally got tools from one trailer outside his building (no sign-in sheet or other custody record was kept of the tools). On one occasion he helped move a large welder to another part of the jobsite and he was aware of 10 other helpers on the jobsite. One day he also was sent by Lovejoy with some other "guy" to look for a welder and a generator that were said to be missing. Otherwise, he was never asked about missing tools or any involvement with their disappearance.

Dustan Apel spent most of his time at the shutdown as a helper for foreman Carnes' small crew. He never worked with his brother and he only occasionally got small tools from nearby, open gang boxes. He said he heard a rumor about some missing welding lead but otherwise never was asked about missing equipment. Neither Jeff nor Dustan worked with employee Larry Young or knew what his job was at the jobsite.

Shaw testified that other employees told him they thought Young and Jeff Apel and possibly his brother "might be stealing," Young had already gone to another jobsite. Gail Thompson learned that the word on Young was that he had taken a generator. When looking into this it found that there might actually be two generators missing. However, there was a discrepancy in the paperwork and it was possible that only one generator was missing.

Thompson then had his staff run a past history of employment on the Apel Brothers and Larry Young to determine whether there were any missing tools on other jobs where they worked, and it was reported that on every job where Jeff and Dustan Apel worked, (otherwise undescribed), there had been tools stolen off the jobs.

Thompson testified that he then decided to layoff both Apels and placed notes in both Apel's files that they were laid off and added "not eligible for rehire." Respondent's termination form asks "for what reason" under the "laid off" category that was checked, however no reasons were given, only the notation "not eligible for rehire." Thompson said he decided to wait before he took action against Young because of the paperwork confusion about missing generators.

On October 11 Thompson called the jobsite and talked to both Shaw and Young and told Young that he was suspected of stealing a generator and other tools. Thompson then told Young that if the generator "appeared" that he would let it

pass. Young denied taking a generator and Thompson told him that he was indefinitely suspended pending further investigation. Respondent asserts that Young was never recalled from his suspension and thereafter was terminated, not eligible for rehire. It admits, however, that no paperwork or termination slip was actually filled out on Young or placed in his file.

Respondent introduced a one-page undated, unsigned, portion of a police report of items, including a generator, assertedly stolen from the Litel jobsite, however, it doesn't identify the company or the jobsite. This is the only documentation to show that the Company ever gave serious concern to purported thefts on any of its jobsites and no police reports were made involving the purported thefts by the Apels and Young at the Mead shutdown. No attempt was made to report the alleged suspicions to the police and no other investigation was made. The Apel brothers were laid off, not eligible for rehire, despite the fact that Respondent's employee handbook specifically provided that any theft, of any kind, "will result in immediate termination and prosecution."

III. DISCUSSION

The primary event which caused this proceeding was the sudden termination of two brothers whose older brother was a union activist, an activist who previously had led a walkout from one of Respondent's jobsites and who was involved with threatened organizational activity at other jobsites. The terminations were not made overtly but took the form of a verbal layoff with an uncommunicated notation on the company payroll termination slip that they were "not eligible for rehire." The Company never gave them the normal layoff slips and it never informed them that they had been discharged for suspicion of theft, Respondent's relied on justification for their termination. Respondent's defense otherwise rests on a strong attack on the credibility of former employees Jeff and Dustan Apel and Donetta Sowards, Jeff's fiancée.

A. *Motivation and Credibility*

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected concerted activities were a motivating factor in the employer's decision to terminate them. Here, the record shows that Respondent's management was well aware of union activity at one of its jobsites in April 1988 and that this activity was led by Joe Apel, the older brother of alleged discriminatees Jeff and Dustan Apel. This activity resulted in a walkout by a number of employees, including Joe Apel but not his brothers. Shortly thereafter Respondent's president Gail Thompson made a strong antiunion speech to all his employees at the jobsite. It is uncontested that many of Respondent's supervisors were aware of Joe's involvement with the Union and that Jeff and Dustan were his brothers. Gail Thompson was well aware of Joe Apel and he certainly was made particularly aware of Jeff Apel prior to the terminations when he was informed of the jobsite rumor about Jeff going out with his daughter. He was specifically aware of both Jeff and Dustan, and their unique last name, when their names were reported to him in connection

with the asserted stolen property investigation. Under these circumstances, I infer that Respondent connected Jeff and Dustan with the union activities of his brother (independent of any alleged union activity threats made directly to them).

This, as well as the showing discussed below that Respondent's reasons for their terminations were pretextual, is sufficient to demonstrate unlawful motivation, see *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986).

Under these circumstances, I find that General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that Joe Apel's union activities in April 1989, were a motivating factor in Respondent's decision to pretextually terminate his brothers on October 2 and 4, 1990.

The Respondent accurately contends that the Company is not shown to be "a rabid anti union company" and in fact, there appears to have been an occasional exchange of employees (including leadmen, foremen, and supervisors) back and forth from union to nonunion jobs. This, however, does not change the fact that the Company has remained adamantly nonunion over a number of years and it does not preclude the possibility that its supervisors and witnesses would couch their testimony in terms of denials of past statements or events that would tend to reflect adversely on Respondent's current rationalization for the discharges of the Apel brothers.

Respondent extolls the sincerity of its company witnesses and strongly attacks the logic of Dustan Apel's testimony. It primarily argues that Jeff Apel cannot be credited because he is a convicted felon who spent 4 years in prison for sexual battery, because he repeatedly lied on the stand, and because he coaxed his fiancée to lie for him in her testimony. It contends that the brothers got together and "fabricated" conversations between themselves and supervisors to create arguable credibility claims and it suggests that any assumption of lack of sophistication to create such a fabrication cannot stand because they went to the Union after their layoff and the Union drafted and filed the charges. Finally, Respondent maintains that it is being required to spend thousands of dollars to defend against "frivolous," one-on-one credibility claims because the General Counsel continues to follow the March 5, 1976 memo of then General Counsel John S. Irving, Esquire. This memo addresses the subject of "resolving" credibility conflicts in the investigating process only when documentary or other objective evidence is the basis for doing so and the memo states that the issue of credibility is best resolved through a formal hearing where the testimony of witnesses is subject to cross-examination.

Contrary to Respondent's contentions, I am not persuaded that the testimony of the Apel Brothers and Donnetta Sowards lack credibility. Moreover, I find that they are, in fact, unsophisticated witnesses who answered with apparent truthfulness despite the alleged contradictions suggested by Respondent.

For example, Respondent asserts that Dustan's testimony is not credible because when asked if he had any conversation with other employees about Gail Thompson's daughter and his brother he answered "No. It was none of my business," and when asked if he had knowledge that such rumor was "circulating" he answered, "No." While it is clear that the rumor was widespread, Dustan's answer doesn't state that he hadn't heard the rumor, as Respondent asserts, but only

that he did not have knowledge that it was circulating around the jobsite.

The two brothers live at different locations and worked at different jobsites prior to the Mead shutdown job, and I find that Dustan displayed a personal independence from his brother. Dustan also testified, in response to Respondent's questions, about what occurred when he was interviewed by a union representative prior to the charge being filed and I find nothing in his testimony that would suggest any improprieties that might tend to indicate that any story was fabricated about the circumstance that led to his discharge.

To the contrary, I do find that the circumstance of Dustan's termination and Respondent's explanation thereof are so pretextual, independent of any background testimony by Dustan, that they place into question the overall credibility of Respondent's witnesses where they almost completely and uniformly deny the existences or contents of inherently probable conversations of both the brothers.

As further discussed below, the so-called company investigation of stolen property, the foundation of Respondent's justification, is of no persuasive evidentiary value. Most specifically, the only apparent tie to Dustan Apel is that someone told Supervisor Shaw that possibly "Jeff's brother" might also be linked to the occurrences. On this single thread of speculation (independent of any antiunion motivation connected with brother Joe Apel), and without further questioning or investigation (other than running a list of jobsites worked and other tool losses), Respondent and its witnesses insist that the Company has a credible reason for terminating Dustan, in spite of the fact that it admittedly failed to tell him this asserted reason for his layoff, failed to give him a layoff slip as it had done in the past, failed to tell them that his layoff records were marked "not for rehire" and agreed among top managers to lie to him if he asked again about reemployment with a false reason about absenteeism. This is not a background that connotes trustworthiness in Respondent's witness testimony.

Jeff Apel's testimony is said to be unbelievable because he served time for a felony conviction. As noted in the General Counsel argument, the type of crime involved is unrelated to truthfulness and otherwise, the witness readily admitted his conviction as well as the indictment that occurred while in prison and his understanding of what occurred.

Prior to Jeff's discharge, in both May 1989 and April 1990, Respondent's employees review form rated him as good (the highest rating) in subject including: attendance and punctuality, attitude, performs present responsibilities, accepts new responsibilities, problem solving, and solutions, works well with others and works well without supervision. Specific comments were added in April 1990, which said: "He is quiet and causes no problems or distractions." It therefore appears that Jeff Apel became untrustworthy in Respondent's eyes only after the events of September 1990, and the alleged untrustworthiness of Sowards is based on her association with Apel.

In addition to these circumstances, I also have considered that much of the company witnesses' critical testimony was generated in the form of a direct leading question by Respondent's counsel in which the witness merely denied the statement in the question, a statement which generally related to something mentioned by the General Counsel's witnesses in their testimony. This type of questioning does little to en-

hance any inherent reliability in the answer which follows and I find that the testimony of the company supervisors that conflicts with that of the other witnesses discussed below is not persuasive or credible.

Otherwise, the following recitation of affirmative statement of facts are my factual conclusions based on the demeanor of the various witnesses and my evaluation of the most plausible and credible testimony. In instances where testimony is not set forth in detail herein, I have reviewed such testimony but found it to be nondeterminative of the conclusions reached.

I also find the implicit attack on the General Counsel for pursuing a case purported to be based on frivolous credibility claims is unfounded.

C. *The Alleged Threat*

I credit Jeff Apel's testimony that he would occasionally have conversations with supervisors and others where they made general inquiries related to his brother Joe's membership in the Union, and the Union's apprenticeship program. The record also shows that Joe Apel and the Union had engaged in ongoing, occasional efforts to solicit union membership at some of Respondent's jobsites and that Respondent had a jobsite in Toledo.

Something happened at the Mead shutdown jobsite in September 1990 that triggered the discharge of the Apel Brothers. For the reasons shown below, I find that Respondent's reasons and explanations for what happened are pretextual and, under these circumstances, I find that Apel's recollection of a brief encounter with Kelly Thompson and Bob Lovejoy, where Kelly reacted angrily to Apel's casual delivery of a verbal message about further union activity, is inherently plausible and consistent with events that occurred both before and after that occasion. I therefore credit Apel's testimony over the denials by Thompson and Lovejoy. I also find that Lovejoy, who then held a supervisory position (but also maintained his union membership and was paid up in his dues while he worked for Respondent), gave Jeff a "friendly" warning that Thompson had really become upset and that he could lose his job if he spoke about the Union again in front of Thompson. The clear implication of such a remark, made by a supervisor, about the reaction of a higher level supervisor, constitutes a coercive threat that interferes with employee Section 7 rights even if it is given in a "friendly" manner, and I conclude that the General Counsel has shown that this action occurred and that it constitutes a violation of Section 8(a)(1) of the Act, as alleged.

D. *Respondent's "Wright Line" defense*

As noted, Respondent contends that the Apel Brothers were discharged because they were suspected of stealing tools from the jobsite. While it appears that some apparent theft occurred, Respondent's management was so inadequately organized that it didn't know if one or two (rental) generators were missing and had no regular system to record or monitor the storage or custody of tools and equipment. A generator would appear to be a major item and employee Young was identified with that alleged theft. He was transferred to another job but only later accused, after the Apel brothers already had been terminated for suspicion of the theft of smaller, miscellaneous items. Thompson also gave

Young the chance of returning the generator, no questions asked. Young denied the theft but then was suspended, and left and didn't return. The Apels, however, were given no such opportunity, and, in fact, were not even advised of the suspicion against them even though their alleged offense appears to be less serious. Moreover, there is little to show that Respondent had any probable cause to suspect the Apels, especially Dustan, who appears to have been a suspect only because of his relationship to brothers Jeff and Joe.

Supervisor Shaw was asked to investigate by Gail Thompson and did so by asking other employees about the missing tools. There is no indication that he used objective, non-leading or nonsuggestive questions that might generate independent answers. Significantly, a list of employees at the jobsite, Joint Exhibit 3, notes some persons who were new hires to the Company as well as several employees that were on the jobsite for only 1 to 3 days before being laid off, circumstances that would appear to provide opportunity and motivation for petty thievery, yet no apparent suspicion was attached to these persons, only to Young and the Apels. After this asserted naming of Jeff as a possible source of the thefts, no further investigation was made except to specifically seek to tie the Apels (and Young) into circumstantial attendance at other jobsites where petty thefts had occurred. No other corroborative or persuasive evidence was generated and no meaningful attempt was made to report these allegedly significant thefts to the police. (In this connection, I find that R. Exh. 17, which purports to be part of a police report, apparently from another jobsite, lacks any meaningful identifying information and is of no evidentiary value.) Finally, the Apels were given no opportunity to be faced with the charges against them, as Young was and nothing was said to them or placed in their records (in a manner consistent with Respondent's employee handbook provisions), that would confirm that this was the real reason for their discharges. As noted by the General Counsel, this reason would have secured the Respondent from unemployment compensation claims, yet Respondent failed to oppose such claims by either brother.

The Apels did not learn of the alleged reason for their discharges until Jeff's conversation with Foreman Carnes several weeks after the close of the Mead shutdown job and I credit Apel's and Sowards' testimony in this respect over the denials by Carnes which were generated by Respondent's counsel's leading questions (especially since Carnes reluctantly admitted on cross-examination by the General Counsel that he in fact had said something more than introduce his wife and had offered helpful comments about trying to help get Apel back to work at the Company, comments that are consistent with the contents of Apel's and Soward's testimony).

Gail Thompson admits that he was "upset" over the spreading of a rumor that his daughter had gone out with Jeff Apel, a rumor she denied. It is therefore quite plausible that he was at least equally as upset by the probable receipt of information from his brother Kelly that this same Jeff Apel had said that his brother Joe, a known union organizer, was going to be engaging in some further actions involving Respondent's jobs and I credit Apel's testimony that he had a conversation along these lines with Kelly Thompson.

Additional factors which tend to support the pretextual nature of Respondent's justification include the irregular com-

pany documentation of the layoffs and terminations and the timing of its theft investigation, and immediate termination decision, all apparently within the week following Jeff Apel's statement to Kelly Thompson about his brother and the Union.

Jeff was one of the first employees on the Mead shutdown job, arriving September 18. Respondent's jobsite records (Jt. Exh. 3) show October 2 (a Tuesday) as the day he left. The company "Payroll termination slip" shows October 4 as the date of termination and is dated the same day. Jeff testified that his conversation with Kelly Thompson took place in late September and that he was laid off October 1 or 2. He then said he was laid off in the "same week" as the conversation. Rather than demonstrating an inconsistency, I believe he was indicating a 7-day timeframe. Moreover, neither Jeff or Dustan received Respondent's layoff slips and, unexplainably, Dustan's payroll termination slip showed a termination date of October 4 but a document date of October 23.

Under all these circumstances, I am not persuaded that Respondent actually fired the Apels for suspicion of theft. I find that the Respondent's stated reasons are pretextual and accordingly, I conclude that the Respondent has failed to show that either Jeff or Dustan Apel would have been discharged absent Respondent's animus, Jeff's message about the Union, and their relationship to a known union activist. The General Counsel otherwise has met its overall burden of proof and I further conclude that Respondent's discharge of these two employees is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

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

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

3. By telling an employee that he could lose his job if he again spoke about the Union in front of company supervisors, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discharging employees Jeff Apel on October 2, 1990, and Dustan Apel on October 4, 1990, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate each of the discriminatees to their former job or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practices against them by payment to the sum of money equal to that which they normally

would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1989),³ and that Respondent expunge from its files any reference to the discharge, and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Tecmec, Inc. d/b/a T.M.I., Amlin, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling an employee he may lose his job if he talks about the Unions.

(b) Discharging any employees because of activity protected by Section 7 of the Act.

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

(a) Offer Jeff Apel and Dustan Apel immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section above.

(b) Expunge from its files any reference to these discharges and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

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

(d) Post at its Amlin, Ohio facility and all its jobsites in Ohio, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by 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.

³Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁴If 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.

⁵If 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."

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

To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

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

WE WILL NOT discharge any employee for engaging in activities protected by Section 7 of the Act.

WE WILL NOT tell employees they may lose their jobs if they talk about unions.

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 offer Jeff Apel and Dustan Apel immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them.

WE WILL expunge from our files any reference to these discharges and notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

TECMEC, INC. D/B/A T.M.I.