

Equitable Resources Exploration, a Division of Equitable Resources Energy Company and Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 6-CA-22721

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 30, 1991, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions. The General Counsel filed limited exceptions, a supporting brief, an answering brief, and a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified,² and to adopt the recommended Order as modified and set forth in full below.³

1. For the reasons set forth below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off employees

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

We correct the following errors in the judge's decision: in sec. III,C, he referred to Sunnyvale Medical Clinic as Sunnyside Medical Clinic, referred to employee Lynn Miller as "Larry Miller," and referred to the reprimand of Matthew Hamner as "the reprimand of Hanifan;" and in sec. III,D, he stated that David McClure and five other employees had been laid off in 1986 for 26 days; in fact they were laid off for 26 weeks.

² The judge found that the May 14, 1990 layoff violated Sec. 8(a)(3) and (1) of the Act. However, the judge inadvertently failed to include in his findings the names of all of the laid-off employees as pled in the complaint and admitted by the Respondent. Thus, we will amend the judge's conclusions of law and recommended Order to include the following employees: Thomas Kelley, Mike Koon, Edwin McClure, Gary Phillips, and Robert Workman.

We will also amend the judge's conclusions of law to include his finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by sending employees Malcolm and Shingleton home early because they engaged in union activities.

³ We will modify the judge's recommended Order to require the Respondent to remove from its files any reference to the unlawful layoff, to make whole any employees who were sent home early because of their union activity, and to require that the Respondent rescind its new overtime policy and make whole all employees adversely affected by this unilateral change in policy in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

on May 14, 1990,⁴ because they engaged in union activity.

In early March, employees Lynn Miller and Matthew Hamner contacted the Union to discuss the possible representation of the Respondent's employees. Soon after, they began soliciting employees to sign union authorization cards in the Respondent's parking lot, in full view of management, and conducted their first union meeting.

On March 3, the Respondent called a meeting of all employees with three supervisors present. During this meeting, Superintendent Rose threatened the employees that if they voted in the Union, the plant would close for 1 year, the employees would lose the overnight use of company trucks, the Respondent would install a timeclock, employees would work an 8-hour rather than a 9-hour day, and unit work would be subcontracted or performed by supervisors. The judge found, and we agree, that these threats violate Section 8(a)(1) of the Act.⁵

On March 5, Supervisor Ronald Bonnett asked employees Shingleton and Malcolm if they had heard anything about a union petition going around or if they were in favor of the Union. The employees replied that they had not heard of the petition and were undecided about whether the Union would work there. Bonnett then told them that he would not advise the employees to go union and that if the employees did go union, they could lose the use of the company trucks, there would probably be layoffs,⁶ and the Company just would not stand for it.

Roustabout Charles Malcolm testified that in early March, Bonnett told him that if the employees selected the Union as their bargaining representative, the employees would be sent home after they completed their assigned job, rather than being assigned other work, as was the current practice.

Employee Randall Shingleton testified that at 9 a.m. on March 12, Supervisor Bonnett approached Shingleton and Malcolm as they were working and asked them what they had left to do. They replied that

⁴ All dates are in 1990 unless otherwise stated.

⁵ With regard to the threats made by Rose at the early March meeting, we note that the judge erred in stating that the testimony of employees who were present at the meeting was "not controverted." Rose testified that he did not make any threatening statements at the meeting, and that he only sought to compare the terms and conditions of employment offered by Equitrans, a unionized firm, to those offered by the Respondent. Based on our review of the record, we find that the judge's error in overlooking Rose's testimony does not affect the outcome of the case. We note that the testimony of employees Hamner, Hinchman, Johnston, Detamora, and McClure regarding the statements made at the meeting was mutually corroborative and that the testimony of these witnesses was credited by the judge on the basis of their demeanor.

⁶ We adopt the judge's finding that Bonnett's threat that if the Union were voted in there would probably be layoffs violated Sec. 8(a)(1) of the Act.

they had one more T to weld. Bonnett then told them that when they were finished, they should just pack up and go home because “we don’t have anything else” and because it was lightly snowing outside. Prior to the employees’ union activity, the Respondent generally assigned employees to do clean up or other work when they completed their assigned job before the end of the workday. This practice was followed when work was slow or when the weather was bad. In this regard, Shingleton and Malcolm testified that prior to the union campaign, they had never been sent home because of a lack of work or weather conditions.⁷

Employee Leonard Spotloe testified that in April, Supervisor Leigh told him that he had just come from a supervisor’s meeting in which Rose told them that he had five employees—Matthew Hamner, Bob Stewart, Cliff Loudin, Randy Shingleton, and Lynn Miller—all known union supporters, whom he wanted to get rid of if the Union was not selected. The judge found, and we agree, that Rose’s statement violated Section 8(a)(1) of the Act.

On May 4, the Union won the election. One week later, May 11, the Respondent issued an unlawful written warning to Matthew Hamner.⁸ On the same day, the Respondent called a meeting of employees to inform them that certain employees would be laid off the following Monday, May 14, and that evening notified the Union about the layoffs.

Hamner testified that after the layoff, Heater’s Dozer & Excavating, a subcontractor, performed work 60 miles away in Tyler and Ritchie Counties that had previously been performed by the laid-off equipment operators. Hamner testified to another instance after May 14 when the Respondent subcontracted dozer work to a large dozer operator rather than using the Respondent’s own smaller dozer that could have done the same job in the same amount of time for a lesser fee, and that Hamner had seen this kind of work performed before with the Respondent’s smaller dozer. Hamner admitted that the Respondent had subcontracted work in the past, but testified that this was only under special circumstances, such as when the Respondent’s heavy equipment was not available or could not otherwise do

the job. Hamner did not see any special circumstances surrounding the work contracted out after May 14.

Well Tender Joseph Montgomery also testified that since the layoff, he observed outside contractors pulling slate trucks and cement trucks and redoing road crossings, work that had previously been performed by roustabouts and operators with the Respondent’s own equipment. He testified that this was also true with respect to grading roads, repairing creek crossings, putting in culverts, and spreading rock on well roads.

We agree with the judge that the timing of the layoff, 2-1/2 months after the commencement of union organizing activities and just 1 week after the Union won the election, supports a finding that the layoff, at least in part, was unlawfully motivated. In this regard, we note that after the Respondent became aware of the employees’ union activities about March 2, it interrogated employees about their union sympathies and threatened them with layoff and other reprisals if they selected the Union as their bargaining representative. On May 11, exactly 1 week after the Union won the election, the Respondent unlawfully reprimanded an employee who had served as the Union’s observer and thereafter served as president of the Union local (see sec. 2, below). The same day, the Respondent advised its roustabouts, pipeline employees, and equipment operators that they were laid off the following workday.

In view of the timing of the layoffs and the Respondent’s unlawful conduct between early March and May 14, we find that the General Counsel has established a prima facie case that the employees’ union organizing activity was a motivating factor in the Respondent’s decision to lay them off. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Under *Wright Line*, the burden then shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the employees’ protected conduct. The Respondent asserts that the reason for the layoff was lack of work resulting from a shift in the direction and scope of its business operations by abandoning and selling wells and eliminating its drilling and pipeline operations. In support, the Respondent submitted evidence that since 1984 it has been selling wells and drastically decreasing the number of wells drilled, thereby redirecting its business operations towards tending wells. The Respondent claims that these operational changes resulted in a corresponding decline in bargaining unit work, especially pipeline and reclamation work. In this regard, the Respondent’s in-house counsel, Robert Wallace, testified that he was aware since 1987 of the Respondent’s plan to gradually downsize its drilling operations. However, he also testified that there were 953 wells in operation at the time of the hearing, about the same number as in the previous year.

⁷The judge found that the Respondent violated Sec. 8(a)(3) and (1) of the Act by sending employees Charles Malcolm and Randall Shingleton home early because they engaged in union activities. In agreeing with the judge’s conclusion, we note that he erred in stating that the Respondent “did not controvert” the testimony supporting this allegation. Superintendent Rose testified that the employees were sent home because the Respondent did not have any work for them, and denied sending them home because of their union activities. Based on our review of the record, we find that the judge’s error in overlooking Rose’s testimony does not affect the outcome of the case, particularly in light of the judge’s statement that he was persuaded by Shingleton’s demeanor and credited his testimony.

⁸For the reasons set forth in sec. 2, *infra*, we adopt the judge’s finding that Hamner’s warning was discriminatory and violated Sec. 8(a)(3) and (1) of the Act.

We agree with the judge's finding that the Respondent was not lacking in work on Monday, May 14, for full-time employment of the laid-off employees and that the Respondent's asserted reasons for the layoff are pretextual. The evidence establishes that the laid-off employees worked full time up until the layoff, including up to 5 hours of overtime per week, and had received no indication from the Respondent that their work was about to cease. Several employees testified that they did not notice a change in the volume of their work prior to May 11. Further, no evidence was presented by the Respondent to show that all the work previously performed by the laid-off employees suddenly ceased on May 11. There was no evidence that any particular group of wells was scheduled to be shut down on that date nor that any aspect of the Respondent's business operations was suddenly discontinued. The judge pointed out that the downsizing of the Respondent's operation has been a gradual process over the preceding 5 or 6 years, with no end in sight. Based on all the foregoing, we find that the Respondent failed to establish that the employees laid off on May 14 would have been laid off at that time in the absence of any union activity by the employees. Having found that the Respondent failed to rebut the General Counsel's prima facie showing, we conclude that the Respondent's May 14 layoff violated Section 8(a)(3) and (1) of the Act.⁹ *Wright Line*, supra.

2. For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing Matthew Hamner a written warning.

During the union campaign in early March, Hamner served as the liaison between the employees and the Union. He served as the Union's observer at the May 4 election and was subsequently elected local president by the unit employees.

Employee Lynn Miller credibly testified that Supervisor Dick Leigh told him that Superintendent Rose had instructed employees Rod Davis and Ricky Hanifan to watch Hamner closely to see if they could catch him doing something wrong.¹⁰ Davis reported to Rose that he saw Hamner's truck parked outside the

⁹We agree with the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by laying off employees on May 14 without affording the Union timely notice and an opportunity to bargain over the decision. Our finding that the layoffs were implemented for unlawful discriminatory reasons precludes any argument that the decision was exempt from the bargaining obligation as a legitimate entrepreneurial decision. See cases cited at fn. 11, *infra*.

We leave to compliance the issue of whether any subsequent agreements between the parties regarding future layoffs and the recall rights of laid-off employees would affect the reinstatement and backpay of the employees laid off on May 14.

¹⁰We adopt the judge's finding that Supervisor Leigh's statement to Miller informing him that the Respondent had requested certain employees to watch a known union supporter to catch him doing something wrong violated Sec. 8(a)(1) of the Act.

Midway Diner on April 23 and again on May 7. The Midway Diner is located within the boundaries of Hamner's assigned working area.

On May 11, the day the Respondent announced the layoffs, Hamner was issued a written warning for stopping at a restaurant on April 23 and May 7. Hamner admits being at the restaurant on both dates and testified that he has been stopping at the Midway Diner once or twice a week for about a year and a half to buy lunch and is usually inside about 20 minutes. Hamner was not previously notified that the April 23 and May 7 instances would serve as the basis for a written reprimand.

We find that the Respondent's policy against stopping at restaurants during the workday has been disparately enforced against Hamner because of his union activities. The evidence shows that it has been common practice for many of the well tenders to stop and pick up lunch or other food items during their workday. Employee Leonard Spotloe testified that he has been stopping at food stores or restaurants at least once during each workday to buy lunch or soft drinks, several times with supervisor Leigh, and has never been disciplined. Employee Miller testified that he stopped for food approximately two times per week for about 10 minutes and was never reprimanded. Employee Clifford Loudin testified that he was aware of a company policy against an employee being out of his area during the workday with a company truck and that he was given a verbal warning for violating this policy. The record shows that the only other written warning issued was to Robert Stewart on March 27, 1990, for being 15 miles out of his area with a company vehicle during working hours.

Based on the fact that no employees were ever issued written warnings for being in restaurants, and that only one employee was issued a written warning and that was for being 15 miles out of his working area, we adopt the judge's finding that the Respondent disparately enforced its restaurant policy against Hamner, a known union supporter, in violation of Section 8(a)(3) and (1) of the Act.

3. The judge found that after the May 14 layoff, the Respondent subcontracted unit work and permitted its supervisors to perform unit work previously performed by the laid-off employees without prior notice to the Union and without affording the Union an opportunity to bargain, in violation of Section 8(a)(5) and (1) of the Act.¹¹

¹¹We agree with the judge that the subcontracting violated Sec. 8(a)(5) and (1). In doing so, we note that the subcontracting was necessary in order to accommodate the needs of the Respondent following the May 14 discriminatorily motivated layoff. The subcontractors were performing work normally performed by the unlawfully laid-off employees. Therefore, the Respondent's decision to subcontract unit work was based on antiunion animus and is not a legitimate entrepreneurial decision exempt from the Respondent's

The Respondent excepted to the judge's finding that the Respondent permitted supervisors to perform unit work on the basis that there was no evidence that the individuals involved were supervisors within the meaning of the Act, rather than nonsupervisory unit employees, and because the General Counsel failed to meet his burden of proving that the Respondent changed its policy with regard to supervisors working. We agree with the Respondent and find that the General Counsel has not shown that the Respondent violated Section 8(a)(5) by permitting supervisors to perform unit work.

Hamner testified that after the layoff, he saw bargaining unit work, including roustabout, shop labor, and pipeline work, being performed by unnamed "supervisors." He also testified, however, that supervisors have always performed this work when no other employees were available. Other than these fill-in situations, the only other instance Hamner could recall when supervisors performed work was when Well Tenders Davis and Hanifan, found by the judge *not* to be Section 2(11) supervisors,¹² were performing roustabout work. We find this testimony to be insufficient to support the judge's finding that supervisors, as opposed to nonsupervisory unit employees Hanifan and Davis, were performing unit work or that the Respondent changed its past practice in any way.

4. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it announced a change in its overtime policy, without notifying the Union and without affording the Union an opportunity to bargain over the change. In adopting the judge's finding, we do not rely on his statement that the Respondent changed its policy "by ordering that all wells coming up be shut down at the end of the 8-hour shift, rather than letting the wells run past the work day shift as was the practice prior to May 14." Rather, we rely on the credited testimony of employees David McClure and Matthew Hamner that prior to May 14, the Respondent permitted the employees to work beyond their 8-hour workday, without specific approval, as necessary to finish up a job, including a need to work on a well that came up late in the workday. Under this policy, the employees worked up to 5 hours of overtime each week. On May 14, Operations Superintendent Jim Rose announced a change in the policy, without notice to the Union, stating that from this point on, employees could work overtime only with the specific approval of their supervisors. We find that the new overtime policy constituted a substantial change in employees' terms and conditions of employment by depriving the employees of up to 5 hours of overtime pay each week. By unilaterally implementing

bargaining obligation. *Central Transport*, 306 NLRB 166 (1992); *Ad-Art, Inc.*, 290 NLRB 590 (1988); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

¹²The General Counsel filed no exceptions to this finding.

that change, the Respondent violated Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 14.

"14. By unilaterally contracting out unit work of the laid-off employees without notifying the Union and without affording it an opportunity to bargain on its decision, the Respondent violated Section 8(a)(5) and (1) of the Act."

2. Substitute the following for paragraph 17.

"17. By discriminatorily laying off employees Charles Hinchman, Randall Shingleton, Ernest Johnston, David McClure, Donald Detamora, Charles Malcolm, Thomas Kelley, Mike Koon, Edwin McClure, Gary Phillips, and Robert Workman, the Respondent violated Section 8(a)(3) and (1) of the Act."

3. Insert the following after paragraph 12 and renumber the remaining paragraphs accordingly.

"13. By sending employees home early because they engaged in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

"14. By threatening employees with layoff if they selected the Union as their collective-bargaining representative, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Equitable Resources Exploration, a Division of Equitable Resources Energy Company, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that the plant would close if they selected the Union as their collective-bargaining representative.

(b) Threatening employees that the Respondent would withdraw their privilege of driving company trucks home overnight if they selected the Union as their collective-bargaining representative.

(c) Threatening employees that the Respondent would install a timeclock if they selected the Union as their collective-bargaining representative.

(d) Threatening employees that their overtime would be cut if they selected the Union as their collective-bargaining representative.

(e) Threatening employees that their work would be subcontracted or performed by supervisors if they selected the Union as their collective-bargaining representative.

(f) Threatening employees with layoff if they selected the Union as their collective-bargaining representative.

(g) Interrogating employees about their union interest and union activities.

(h) Informing employees that the Respondent wanted to get rid of known and suspected union supporter employees.

(i) Threatening to send employees home early because they engaged in union activity.

(j) Informing employees that the Respondent requested certain employees to observe known union supporters to catch them doing something wrong.

(k) Sending employees home early because they engaged in union activities.

(l) Unilaterally changing a policy or practice of allowing employees to work 9 rather than 8 hours a day.

(m) Unilaterally laying off employees and contracting out their work without notifying the Union and without affording it an opportunity to bargain on the changes.

(n) Failing to timely notify the Union and afford it an opportunity to bargain on the unilateral decision to change the overtime policy.

(o) Issuing written warnings to employees because they are union supporters.

(p) Discriminatorily laying off employees because they engaged in union or concerted activity for mutual aid and protection.

(q) Failing and refusing to recognize and bargain with Oil, Chemical and Atomic Workers International Union, AFL-CIO as the bargaining representative of the employees.

(r) 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.

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

(a) Remove from all company records on Matthew Hamner any reference to the unlawful warning issued to him, and notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

(b) Offer employees Charles Hinchman, Randall Shingleton, Ernest Johnston, David McClure, Donald Detamora, Charles Malcolm, Thomas Kelley, Mike Koon, Edwin McClure, Gary Phillips, and Robert Workman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful layoffs, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that

this has been done and that the layoffs will not be used against them in any way.

(d) Rescind the new overtime policy and make whole all employees affected by the unilateral decision to change this policy, with interest as provided in *New Horizons*, supra.

(e) Make whole any employees who were sent home early because of their union activity, with interest as provided in *New Horizons*, supra.

(f) On request, bargain with Oil, Chemical and Atomic Workers International Union, AFL-CIO as the exclusive representative of the employees in the following appropriate unit, concerning the decision to lay off employees, subcontract unit work, change the overtime policy, and other terms and conditions of employment:

All hourly employees including Truck Driver, Roustabout, Grader Operator Shop Laborer, Dozer Operator, Mechanic B, Welder, Meter Tech/Well Tender and Well Tenders employed by the Respondent at its Buckhannon, West Virginia and Pennsylvania and New York well tending sites but excluding office clerical employees, janitorial employees and professional employees, guards and supervisors as defined in the Act.

(g) 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.

(h) Post at its facility in Buckhannon, West Virginia, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 6, 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.

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

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten employees that our plant would close if they selected the Union as their collective-bargaining representative.

WE WILL NOT threaten employees that we will withdraw their privilege of driving company trucks home overnight if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees that we will install a timeclock if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees that their overtime would be cut if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees that their work would be subcontracted or performed by supervisors if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten to lay off employees if they select the Union as their collective-bargaining representative.

WE WILL NOT interrogate employees about their union interest and union activities.

WE WILL NOT inform employees we want to get rid of known and suspected union supporter employees.

WE WILL NOT threaten to send employees home early because they engage in union activity.

WE WILL NOT inform employees that we have requested certain employees to observe known union supporters to catch them doing something wrong.

WE WILL NOT send employees home early because they engage in union activity.

WE WILL NOT unilaterally change our policy or practice of allowing employees to work 9 rather than 8 hours a day.

WE WILL NOT unilaterally lay off employees and contract out their work without notifying the Union

and without affording it an opportunity to bargain on the changes.

WE WILL NOT fail to timely notify the Union and afford it an opportunity to bargain on the unilateral decision to change our overtime policy.

WE WILL NOT issue written warnings to our employees because they are union supporters.

WE WILL NOT lay off or otherwise discriminate against any of our employees for organizing or supporting Oil, Chemical and Atomic Workers International Union, AFL-CIO or any other labor organization.

WE WILL NOT fail and refuse to recognize and bargain with Oil, Chemical and Atomic Workers International Union, AFL-CIO as the bargaining representative of the employees.

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 remove from all company records any reference to the unlawful warning issued to Matthew Hamner, and notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

WE WILL offer employees Charles Hinchman, Randall Shingleton, Ernest Johnston, David McClure, Donald Detamora, Charles Malcolm, Thomas Kelley, Mike Koon, Edwin McClure, Gary Phillips, and Robert Workman 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 them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our company records any reference to the unlawful layoff of the above-named persons, and notify each of them in writing that this has been done and that the unlawful layoff will not be used against them in any way.

WE WILL rescind the new overtime policy and make whole any employees affected by our unilateral decision to change this policy, with interest.

WE WILL make whole any employees who were sent home early because of their union activity, with interest.

WE WILL, on request, bargain with Oil, Chemical and Atomic Workers International Union, AFL-CIO as the exclusive representative of our employees in the following appropriate unit, concerning the decision to lay off employees, subcontract unit work, change our overtime policy, and other terms and conditions of employment:

All hourly employees including Truck Driver, Roustabout, Grader Operator Shop Laborer, Dozer Operator, Mechanic B, Welder, Meter Tech/Well

Tender and Well Tenders employed by us at our Buckhannon, West Virginia and Pennsylvania and New York well tending sites but excluding office clerical employees, janitorial employees and professional employees, guards and supervisors as defined in the Act.

EQUITABLE RESOURCES EXPLORATION,
A DIVISION OF EQUITABLE RESOURCES
ENERGY COMPANY

Julie Rose Stern, Esq. and *Clifford Spungen, Esq.*, for the General Counsel.

Henry J. Wallace, Jr., Esq. (Reed, Smith, Shaw & McClay), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A charge and an amended charge were filed on May 21 and December 24, 1990, respectively, by Oil Chemical and Atomic Workers International Union, AFL-CIO (the Union) against Equitable Resources Exploration (EREX), a division of Equitable Resources Energy Co. (EREC) (the Respondent).

The complaint alleges in essence that Respondent threatened employees with plant closure for 1 year, loss of the use of company trucks, the installation of a timeclock, an 8-hour workday rather than a 9-hour workday, and that unit work would be subcontracted, if the employees selected the Union as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act; and that Respondent threatened its employees with layoff if they selected the Union as their bargaining representative, interrogated employees concerning their union membership, activities, and sympathies, and threatened them with change of its policy of sending employees home early when they completed their specific job work, solicited employees to sign a petition repudiating the Union, and informed employees that the activities of union supporters were under surveillance by Respondent, all in violation of Section 8(a)(1) of the Act; and that Respondent laid off several employees, subcontracted work its employees performed, denied an employee the opportunity to receive training, withdrew the benefit of employees receiving work gloves, withdrew the benefit of employees driving company trucks to and from home, withdrew benefits by changing holiday and overtime policies, issued a written discipline to an employee, and sent home three employees, all because of union activities of employees, in violation of Section 8(a)(1) and (3) of the Act.

Respondent, Equitable Resources Exploration (EREX), a division of Equitable Resources Energy Co. (EREC), filed an answer to the complaint on August 9, 1990, denying that it has engaged in unfair labor practices as set forth in the complaint.

The hearing in the above matter was held before me on January 17 and 18 and February 5 and 6, 1991, in Clarksburg, West Virginia. Briefs have been received from counsel from the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses, and my consideration of the briefs filed by respective counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a West Virginia Corporation with facilities in various States, including a facility in Buckhannon, West Virginia, has been engaged in the business of oil and gas exploration, development, and production.

During the 12-month period ending April 30, 1990, Respondent, in the course and conduct of its business operations, sold and shipped goods and services valued at \$50,000 directly to customers located outside the State of West Virginia.

Respondent is now and has been, at all times material, an employer engaged in commerce within the meaning of Section 2(5) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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. Background Facts

Prior to 1984 EREX was a part of Union Drilling, Inc. (UDI), a privately owned company which engaged in drilling and maintaining gas wells. However, in 1984, UDI was sold to KEPCO, and a subsidiary of Equitable Gas Company maintained UDI corporate identity until January 1, 1988, when the name was changed to Equitable Resources Exploration, Inc. On January 1, 1989, the UDI operations were split into two separate divisions above EREC. The drilling aspect became Union Drilling Division and EREX attained its present form. Union Drilling Division is a contract driller which drills wells for well owners or lessors and has nothing to do with the operation or maintenance of wells after the drilling is completed. EREX is a service organization which by contract with well owners, maintains existing wells and provides support services for their operation and production functions.

The instant proceeding involves the Company's operations located at Buckhannon, West Virginia, where an office complex and yard and shop area constitute the primary reporting location for hourly employees now represented by the Union. These employees are well tenders and pipeline and reclamation workers.

At the time the Union filed its petition for representation in March 1990, there were 25 well tenders, 23 of whom were assigned to specific geographical areas or "ends." Two other well tenders (Ricky Hanifan and Rod Davis) were not permanently assigned to an area but were used to fill in for other well tenders during vacations and absences. Well tenders perform routine maintenance on gas wells, including changing gas measurement charts, painting, maintaining pipelines and grounds, as well as assisting other well tenders as assigned. The supervisory status of Rod Davis and Rick Hanifan is a subject of dispute in this proceeding.

Another group of production employees is the pipeline and reclamation crew, which in March 1990, consisted of four equipment operators, five roustabouts, a welder, and a truck-driver.

A third group of employees called operators because they operate six pieces of heavy equipment such as small dozers, grader, and backhoe equipment in building and maintaining well sites and location roads, backfilling, setting storage tanks and dryers used in the installation and maintenance of pipeline, and related functions.

Employees called roustabouts are general laborers who perform various types of manual work as needed and assigned.

Drivers, who are sometimes assisted by operators, drive three company trucks which haul dozers and other equipment.

The welder does pipeline welding and other welding functions, for which he must be "certified" by the owner of the pipeline. Reclamation and pipeline employees may perform work interchangeably, depending on their qualifications to perform and the nature of the job to be performed.

At all times material, the following named persons occupied the positions set opposite their respective names, and are now, and have been at all times material, supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents within the meaning of Section 2(13) of the Act:

Robert James Rose—Operations Superintendent
 Ronald G. Bonnett—Operations Supervisor, Pipeline and Reclamation
 Everett "Dick" Leigh—Operations Supervisor, Well Tenders

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All hourly employees including Truck Drivers, Roustabout, Grader Operator Shop Laborer, Dozer Operator, Mechanic B, Welder, Meter Tech Well Tender and Well Tenders employed by the Employer at its Buckhannon, West Virginia and Pennsylvania and New York well tending sites but excluding office clerical employees, janitorial employees and professional employees, guards and supervisors as defined in the Act.

The parties stipulated that only the operation at Buckhannon, West Virginia, is involved in the instant dispute.

The parties further stipulated that a petition for an election in this matter was filed March 28, 1990, and the representation election was conducted by the Board on Friday, May 4, 1990.

Employees also stipulated that the Union was certified the collective-bargaining representative of members in the above-described unit on May 14, 1990.¹

Motion to Correct the Transcript

Along with her brief, counsel for the General Counsel filed a motion to correct the transcript with respect to various

¹ The facts set forth above are not in dispute or conflict in the record.

numerical and word changes, spelling, punctuation, and in other minor respects. No objections having been filed to her motion and having noted that her requested changes are correct, her motion is granted and the transcript, accordingly corrected.

B. *The Supervisory Status of Ricky Hanifan and Rodney (Rod) Davis*

One of the issues presented for determination in this proceeding is whether Ricky Hanifan and Rod Davis are supervisors and/or agents of Respondent within the meaning of the Act.

Respondent's Contention

According to the uncontroverted testimony of superintendent James Rose, Ricky Hanifan, and Rod Davis perform all duties designated in the job description of other well tenders assigned in any geographic area, whenever the assigned well tender is on vacation or absent. However, in addition to those duties, Hanifan and Davis perform other shop duties such as dispensing storeroom supplies, traveling out of town to relieve work duties at other fields at times when their expertise are needed. They also lead dozer operators to well sites and acquaint themselves with the area and survey the damage, as well as train well tender trainees, as other well tenders do. They are paid the same pay other well tenders are paid.

The Respondent (Superintendent Rose) contends that these duties, in addition to the general area assignment to all geographic work areas (ends) of Hanifan and Davis, do not render them supervisors within the meaning of the Act. In support of its position, Respondent cites *NLRB v. American Oil Co.*, 382 F.2d 786 (7th Cir. 1967), cert. denied 391 U.S. 906 (1968). However, the latter cited authority must have been inadvertently miscited since it does not address the issue of supervisory authority.

The Evidence

The uncontroverted evidence established that although Ricky Hanifan and Rod Davis have worked in the past as well tenders, and are presently classified as well tenders, they, nevertheless, are the only well tenders who are not now assigned to service a specific geographic area (end), as are all other well tenders. Instead, both Hanifan and Davis travel to any and all geographic work areas (ends) to assist or give instructions to other well tenders, when they are needed or when the supervisor for any given work area is not present. They also fill in for other well tenders who are on vacation or absent from work.

Lynn Miller, a well tender for Respondent for 8-1/2 years testified that since the summer of 1988, Ricky Hanifan generally handed out the first paycheck of the month with work gloves. Miller further testified he considered Hanifan a supervisor because on one occasion Hanifan has given him instructions on how the new holiday would be handled with respect to completing well tending monthly charts. He said only supervisors usually gave such instructions.

While Hanifan may very well have instructed Miller on how the charts were to be completed as the holiday was observed, Miller did not testify that Hanifan was acting independently, or whether he was following orders from a superior manager, as might have been the case.

Matthew Hamner, a former well tender and current equipment operator, testified without dispute, that in the fall of 1988, during a meeting of well tenders at shop 2, Superintendent James Rose, while talking about responsibilities of Ricky Hanifan and Rod Davis, told them to give both Hanifan and Davis the respect they would give work area Supervisor Dick Leigh; and that the employees should go to them for help or supervision if they are available.

Joseph Montgomery has been in Respondent's employee 8 years, the last 4 of which as a well tender. He testified he considered Ricky Hanifan a well tending supervisor because he is not assigned to any specific geographic area (end).

Montgomery also said he considered Hanifan a supervisor because he, Hanifan, like other supervisors, has his choice of the modern fully equipped air-conditioned trucks. However, Respondent was able to explain without dispute that Hanifan's prior truck was replaced with the current one because replacement of his old truck was due, and the new one is not equipped with air conditioning and cruise control as Montgomery stated. In fact, Hanifan's truck is not like other supervisors' trucks except that it is relatively new.

Employee Randall Shingleton, a welder helper-trainee, testified he considered Ricky Hanifan a supervisor because work area Supervisor Ronald Bonnett told him (Shingleton) and his coworkers, whenever their supervisor (Bonnett) is not around, they must listen to Ricky Hanifan. Hanifan has in fact given him instructions on what needed to be done.

Leonard Spotloe has been employed by Respondent 13 years as a well tender. He testified he believes Ricky Hanifan is a supervisor because during a meeting in the summer of 1989, Superintendent Jim Rose told well tenders if Ricky Hanifan or Rod Davis were in their work area (end) and told them to do something, they were to do it. Also in April 1990, Ricky Hanifan approached him with a paper he was circulating and told him he (Hanifan) was circulating the paper at shop 2 for employees to sign and let the Company (Respondent) know where we stood with the Union and the Company. Language appeared on the paper which read: "To Let The Company Know that We are With The company and Not for the Union." Spotloe testified he signed the petition to keep Hanifan from harassing him.

Spotloe acknowledged however, that Hanifan has not ever given him any instructions and that Everett Leigh is his designated supervisor.

Correspondingly, Donald Detamora, a dozer operator and roustabout for 5 years, testified that in the fall of 1989, he, operator Tom Kelly, and Supervisor Bonnett were talking, and Bonnett told them if Ricky Hanifan or Rod Davis were in their work area and he (Bonnett) was not there, they were to take orders from Hanifan or Davis. Both Hanifan and Davis have acted as his (Detamora) supervisor a couple of times, once in Kinchlow and over in Dolly Sods. Detamora does not describe what orders Hanifan and Davis gave him, or in what specific way and how long did Hanifan supervise his (Detamora's) work.

Ernest Johnston, a grader operator for Respondent 7 years, testified he sustained an injury to his hand on or about March 15, 1990, and thereafter performed light work in the shop until he was laid off in May 1990. However, he said he previously worked at Dolly Sods, where Ronnie Bonnett was supervisor part of the time and Rod Davis the other part of the time. Consequently, Johnston said he considered Davis

a supervisor. At times, both Supervisor Bonnett and Davis would pitch in and work with their hands.

It is noted that Johnston also makes the general assertion that Rod Davis supervised him a part of the time at Dolly Sods without specifying what directions, instructions, or orders Davis gave him, or how long he served in that capacity.

Additionally, employees Lynn Miller, Joseph Montgomery, Randall Shingleton, Leonard Spotloe, and Donald Detamora all testified that they considered Hanifan and Davis supervisors for the reasons they stated above in their testimony.

Neither Ricky Hanifan, Rodney Davis, Richard Leigh, nor Ronald Bonnett appeared or testified in this proceeding and no plausible explanation was offered for their nonappearance. However, since the testimony of Miller, Hamner, Montgomery, Shingleton, Spotloe, Detamora, and Johnston constituted conclusionary assertions of the supervisory status of Hanifan and Davis, which are unsupported by necessary and sufficient detail of what specific indicia of supervisory authority Hanifan or Davis exercised, I cannot accept the above-named employee witnesses' conclusionary language of supervisory status.

Conclusions

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or *responsibility to direct them*, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession or regular exercise of any one or any combination of the above-stated powers of authority is sufficient to confer supervisory status on an individual. NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 355 U.S. 908 (1949).

The above testimony of employees Lynn Miller, Matthew Hamner, Joseph Montgomery, Randall Shingleton, Leonard Spotloe, Donald Detamora, and Ernest Johnston does not establish that Rick Hanifan or Rod Davis possessed any of the usual indicia of supervisory authority, such as a combination of authorities to hire, transfer, suspend, layoff, promote, discharge, or discipline well tenders. Their undisputed testimony does however establish that Hanifan and Davis had the responsibility and authority to direct their work, in the absence of Supervisors Leigh and Bonnett, or whenever Hanifan or Davis was in a given work area (end). Nor does the testimony establish that Hanifan or Davis' exercise of such limited authority was frequent, or not of a merely routine or clerical nature, or that it required the use of independent judgment.

It is true the Board has held, as the General Counsel argues, that an individual need only possess one element of indicia of supervisory authority to be considered a supervisor under the Act. *Superior Bakery*, 294 NLRB 256 (1989), enf. 893 F.2d 493 (2d Cir. 1990). However, it would appear that the exercise of one such indicia of authority would not include the irregular and temporary exercise of such author-

ity, or authority of a routine or ministerial nature which does not require the use of independent judgment.

The credited testimony of record shows that Respondent's superintendent James Rose, in addressing the responsibilities of Hanifan and Davis, told the employees to give Hanifan and Davis the respect they gave to Supervisor Leigh, and to go to them for help and supervision. Superintendent Rose must have meant that the employees were to follow the instructions of Hanifan and Davis, in the absence of the work area supervisor, because he certainly did not replace the work area supervisors with Hanifan and Davis. Nor did he designate either of the latter a supervisor. On the contrary, as the uncontroverted evidence shows, both Hanifan and Davis are well tenders. In fact they are Respondent's most experienced well tenders with the most expertise. They are paid at the same rate of pay as Respondent's other well tenders, and as the other well tenders, they train and help less experienced employees.

The evidence fails to show how frequently Hanifan or Davis went to any of the geographic areas of work. Employee Matthew Hamner testified without dispute, that Davis and Hanifan were rarely in his work area and that Supervisor Leigh was in his (Hamner) work area about once a month. He said he had never seen Superintendent Rose in his work area. The evidence is uncontroverted that Hanifan and Davis work in supplies in the shop when they are not in a work area or out of town. Otherwise, the record is barren of any evidence that Hanifan or Davis go to any work area frequently, or how long they remain in a work area, except when a work area supervisor or a well tender is on vacation or absent, or when the job to be performed requires a second man. Considering a work year, the above-described occasions when Hanifan or Davis give routine directions to employees in a work area would not appear to be frequent or regular.

Superintendent Rose testified that neither Hanifan nor Davis has or actually exercised authority to hire, fire, discipline, layoff, recall, promote, or recommend promotion, transfer, or assign work area of employees without directions from management. He further testified that he could recall only two occasions when Rod Davis was temporarily assigned to a job in Kentucky. On one occasion he was given specific instructions from Supervisor Bonnett on what he was to oversee and have the work crew do. The other occasion was when Hanifan was assigned to Lewis County, Kentucky, to oversee the routine proper placement of Hey by the work crew. Each occasion involved a duration of 1-3 days. The evidence does not show that either assignment required, or that either Hanifan or Davis exercised independent judgment in performing the assignments.

Consequently, when the evidence is viewed in its entirety, it is clearly demonstrated, and I find, that Hanifan and Davis were a part of the work unit of their fellow employees and not supervisors within the meaning of the Act. This conclusion is supported by the Board's decision in *UTD Corp.*, 165 NLRB 346 (1967); 118 NLRB 20, 25 (1957), in which the Board said:

It is also necessary to note that Congress, in defining the term "supervisor" did not include "employees with minor supervisory duties." Congress, distinguished between straw bosses, leadmen, set-up men and other minor supervisory employees on the one hand, and the

supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such acts.

At most, the evidence here demonstrates, and I find, that Ricky Hanifan and Rodney Davis were at best, leadmen but clearly not supervisors within the meaning of the Act.

C. The Organizing Activities of Employees and Respondent's Reactions Thereto

The evidence established without contradiction that in late February or early March 1990,² well tenders Lynn Miller and Matthew Hamner contacted the Union about the prospects of union representation of EREX's employees for purposes of collective bargaining. The union representative gave them union literature.

Lynn Miller testified that while soliciting employees on Respondent's parking lot to sign union authorization cards in early March 1990, he saw Superintendent James Rose watching the soliciting activities from his office.

Matthew Hamner testified that he was the contact man for the Union. The union representatives would contact him and he would distribute information to his fellow employees. He, Joseph Montgomery, and other well tenders attended the first union meeting held in early March 1990. Hamner was also an observer for the Union during the election and is presently president of the Union.

A day or two after the first union meeting in early March, well tenders Hamner and fellow employees Charles Hinchman, Ernest Johnston, Donald Detamora, and David McClure testified that the Company called a meeting of 25-30 employees, including operators, truckdrivers, roustabouts and the pipeline crew. Present for management were Superintendent James Rose and Supervisors Ronnie Bonnett and Danny Morgan.

Employee witnesses Hinchman, Johnston, and McClure essentially corroborated Hamner's account that Superintendent Rose told the employees at the meeting that he did not think a small company like Respondent would allow them to go union; that the Company did not want a union and it may hurt the employees because he did not think the employees needed a union; if they voted in the Union, they may be laid off, and Respondent would probably shut down for a year and run the Company with supervisors—management personnel or subcontractors; that they (employees) would lose their overnight use of company trucks; that a timeclock would be installed and there would be no more 9-hour workdays, only 8-hour workdays; that their overtime would be eliminated and that when local Badges Coal Company shut down, the Union was not able to do anything to help the employees (apparently suggesting a union would probably not be able to help Respondent's employees either).³

Matthew Hamner testified on cross-examination that when Superintendent Rose talked to them in early March about the use of company trucks, he was comparing the employees'

² All dates referred to occurred in 1990 unless otherwise indicated.

³ The above-described statements by Superintendent Rose were not controverted. Consequently, since I was persuaded by the demeanor of witnesses Hamner, Hinchman, Johnston, Detamora, and McClure that they were testifying truthfully, I credit their respective and collective accounts of Superintendent Rose's remarks at the early March meeting.

benefit of use of company trucks with employees at Equitrans, which was unionized by the same union. Rose pointed out that the employees at Equitrans did not have the overnight use of Equitrans' trucks but they were paid a little more, and he did not know what would be the case at Respondent if the employees voted in the Union. Hamner acknowledged that management spoke at subsequent meetings from a written outline or paper and some meetings were recorded on tape. However, employee David McClure does not recall Robert Wallace having a pad, or a paper in his hand or nearby, during the meeting on or about May 11, 1990.

Consequently, I find that the statements by Superintendent Rose that if the employees voted in the Union, Respondent would shutdown the business and/or subcontract the work, clearly constituted a threat to shutdown the business and/or subcontract the work because the employees engaged in union activities.

The Board has repeatedly held that a threat to shutdown a business in retaliation for employees engaging in union activities is in violation of Section 8(a)(1) of the Act. *Yellowstone Plumbing*, 286 NLRB 993 (1987). Citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Board stated that "as long as the statements made were not a carefully phrased prediction based on objective facts which conveyed to employees the Employer's belief as to demonstrably probable consequences beyond his control," the statements were inherently coercive. *Taylor Chair Co.*, 292 NLRB 658 (1989); *SMCO, Inc.*, 283 NLRB 1291, 1295 (1987); *Limpert Bros., Inc.*, 276 NLRB 364, 374 (1985).

Since Respondent witnesses testified Respondent had no intention of moving its plant and Superintendent Rose nor other representatives of Respondent offered any objective facts supporting Rose's prediction of plant closure, I find Rose's statements had a coercive effect on the exercise of the employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

Since Superintendent Rose also informed the employees if they selected the Union as their bargaining representative, Respondent would probably rescind their privilege of driving their company truck home overnight, such announcement constituted a coercive threat to withdraw that privilege in violation of Section 8(a)(1) of the Act.

Superintendent Rose told the employees if they selected the Union as their bargaining representative, Respondent would install a timeclock. The Board has also held that threatening employees with the installation of a timeclock violates Section 8(a)(1) of the Act. *Premiere Maintenance*, 282 NLRB 10 fn. 3 (1986); *Kenrich Petrochemicals*, 294 NLRB 519 (1989). Since the employees here did not have a timeclock, I find that Rose's threat to install one under the circumstances was coercive and in violation of Section 8(a)(1) of the Act. *Premiere Maintenance*, supra; *Kenrich Petrochemicals*, supra.

Respondent's (Superintendent Rose) telling the employees if they selected the Union as their bargaining representative their work hours would be cut from 9 to 8 hours a day, eliminating the overtime they had worked for many years on a regular basis, and they may be laid off, had a coercive effect upon employees' Section 7 rights, and I find that such statements constituted a violation of Section 8(a)(1) of the Act. *Romal Iron Works Corp.*, 285 NLRB 1178 (1978).

Threatening the employees if they selected the Union as their bargaining representative, Respondent would subcontract their work, has a coercive effect on employees Section 7 rights, and I find that by doing so, Respondent (Superintendent Rose) violated Section 8(a)(1) of the Act. *SMCO, Inc.*, supra at 1301.

Respondent's Threat to Lay Off and its Interrogation of Employees

Pipeline welder Randall Shingleton testified without dispute that on or about March 5, a day or two after the first union meeting, Supervisor Ronnie Bonnett asked Shingleton, a welder setter, and roustabout employee Charles Malcolm to shut down their truck for a minute, he wanted to talk to them. They shut down the truck and Supervisor Bonnett said, "I wanted to know if you guys heard anything about a union—paper going through or anything like that." Shingleton said he told Bonnett he did not know anything about the Union. Malcolm testified Bonnett asked him how he felt about the Union and he told Bonnett he was in favor of the Union but he did not know if a union would work there. Supervisor Bonnett then told them he did not know what they thought about the Union, but said, "I wouldn't advise it," if the employees went union they would probably lose the use of their trucks for from home to work use, they would probably not be allowed to cross job classifications for work as they were presently allowed, and there would probably be layoffs because Respondent would have to hire more people and the Company would not stand for it.

Neither supervisor, Ronnie Bonnett nor Danny Morgan, testified in this proceeding and no explanation was offered for their nonappearance. Having been persuaded by the demeanor of Shingleton and Malcolm that they were testifying truthfully, I credit their testimony.

Conclusions

Based on the foregoing uncontroverted and credited testimony, I conclude and find that Respondent's employees commenced union organizing activities on or about March 1, 1990; that Respondent (Superintendent James Rose) observed from his office, the unusual congregation of employees on the Company's parking lot and Matthew Hamner soliciting employees to sign union authorization cards. Respondent's managerial personnel acknowledged Respondent learned about the employees' union activity in early March. Also, a few days (1-3) after the first union meeting in March, Respondent (James Rose) called an unexpected meeting of all 20 to 30 production employees along with management, and talked against unionization of Respondent.

Thus, I conclude and find on the foregoing credited evidence that it may be reasonably inferred from Respondent having observed employee Hamner engaging in union solicitation activity, the interrogation of employees by Supervisor Bonnett about the employees' union interest and activities, and the unexpected meeting called by James Rose to talk against unionization, that prior to March 5, 1990, Respondent knew that their employees were engaged in union organizing activities.

Since Respondent had knowledge its employees were engaged in union organizing activities, I further find on the credited evidence that after learning of the employees' union

activities but not knowing whether Randall Shingleton and Charles Malcolm were union supporters, Respondent (Supervisor Ronald Bonnett) approached employees Shingleton and Malcolm in the shop and asked them how they felt about the Union—had they heard anything about it or the filing of papers (a petition).

Since Bonnett was the supervisor of Shingleton and Malcolm, he had control over their work and jurisdiction over the shop where they were, and his status and control over them was unquestionable. Neither Shingleton nor Malcolm were known union supporters. Consequently, the circumstances under which Bonnett interrogated Shingleton and Malcolm was necessarily coercive and in violation of Section 8(a)(1) of the Act. Bonnett did not assure either employee against company reprisal for their union interest or activities. *Sunnyside Medical Clinic*, 277 NLRB 1217 (1985); *Taylor Chair Co.*, 292 NLRB 658 (1989).

Leonard Spotloe testified without dispute that in April 1990 Supervisor Everett Leigh brought him a valve that he had requested. While there and in the presence of well tender Wamsley, Supervisor Bonnett told him he had just come out of a supervisor's meeting; that during the meeting, Superintendent James Rose told them he had five employees (Matthew Hamner, Bob Stewart, Cliff Loudin, Randy Shingleton, and Lynn Miller all union supporters), that he wanted to get rid of, if the Union was not selected. Spotloe stated in his affidavit given to the Board June 7, 1990, that he should have gotten rid of Miller and Loudin years ago; that he wanted to find something on Miller to justify firing him. Spotloe said Rose has not liked Miller for 2 years and Supervisor Leigh did not say why Rose wanted to get rid of the five named employees.

As previously stated, Supervisor Leigh did not appear and testify in this proceeding and no explanation was offered for his nonappearance.

At the conclusion of General Counsel's presentation of her case, and again in her posthearing brief, counsel for Respondent moved to dismiss the substance of Spotloe's testimony as supportive of an allegation contained in paragraph 9 of the complaint. Counsel for Respondent contends his motion should be granted because Supervisor Leigh never stated why Rose said he wanted to get rid of the five named employees. Although Rose did not like Miller, Leigh did not state that Rose said he wanted to get rid of the five named employees because of the employees' union activity.

Although counsel for Respondent is correct that Leigh did not state why Rose wanted to get rid of the five named employees, and Rose certainly did not say he wanted to get rid of them for their union activity, Rose's statements, as reported by Leigh, nevertheless must be interpreted within the context of the climate and setting in the plant at the time.

More specifically, it appears Rose's statements about the five employees were made within 3 to 4 weeks after the onset of the employees' union activities, and after Respondent had received notice that the petition for certification was filed. The statements attributed to Rose by Supervisor Leigh, who reported them to employee Spotloe, were also made and reported to Spotloe a few weeks after Superintendent Rose gave his captive-audience threatening antiunion speech to the employees in early March. Thus, under these circumstances, I find that it may be reasonably inferred from the circumstances and Rose's reported statement about getting rid

of five employees were in fact statements made by Rose, and reported by Leigh to Spotloe, to intimidate the employees (Spotloe, Wamsley, and the five named employees, all of whom were union supporters). Since Rose did not specifically state why he wanted to get rid of the five employees, it may be reasonably inferred from the recent organizing activities at the plant that union activity was the implied reason Rose wanted to get rid of them. Consequently, I further find that Rose's statement, although stated in the negative (that he wanted to get rid of them if the Union was not selected), nevertheless had a chilling and coercive effect upon the employees organizing activities, and was violative of Section 8(a)(1) of the Act.

In view of these findings, Respondent's motion to dismiss the designated portion of paragraph 9 of the complaint is denied.

Solicited Employees to Sign a Petition

Paragraph 12 of the complaint alleges that in or about March 1990, Respondent, through Supervisor Ricky Hanifan, requested Respondent's employees to sign a petition to inform the Respondent they were for the Company and against the Union.

It is correct that the Board has upheld that an employer violates 8(a)(1) of the Act by providing more than "ministerial assistance" in the filing of a decertification or disaffection petition repudiating the Union. *Walter Garson, Jr., & Associates*, 276 NLRB 1226 (1985). However, the evidence in the instant case has failed to establish that Hanifan is either a supervisor or an agent. Nor has it established that Hanifan, as a leadman or agent, was circulating the petition upon the suggestion or instigation or consent of Respondent. The record shows that Hanifan was not supportive of the Union and the petition he asked employees to sign might have been his independent effort on behalf of management. Under the latter circumstances, since Hanifan is not a supervisor or an agent, and it has not been shown that he was acting on the directions or approved consent of management, his circulating the petition cannot be imputed to Respondent. Consequently, the allegation in paragraph 12 of the complaint is dismissed.

Paragraph 9 of the complaint, among other things, alleges that Ricky Hanifan threatened employees with layoff if they selected the Union as their bargaining agent. However, since Hanifan has not been found a supervisor or agent of Respondent herein, any threat made by him would not be imputed to Respondent. Consequently, the allegation in reference to Hanifan in paragraph 9 of the complaint is dismissed.

Did Respondent Deny an Employee Welding Training?

Paragraph 16 of the complaint alleges that since March 12, 1990, Respondent has denied Randall Shingleton the opportunity to receive promised training as a welder.

The evidence of record shows that in early 1990, Randall Shingleton, a building maintenance employee, informed his Supervisor David Dean that he wanted to work in other work departments of the Company. Supervisor Dean informed Superintendent Rose of Shingleton's interest. Also in early 1990, pipeline welder James Rhinehart notified Respondent he was leaving the Company. Superintendent Rose, knowing

of Shingleton's interest, informed Supervisor Dean of the expected opening and Shingleton applied for Rhinehart's position. Rose explained what the welding job involved. Shingleton told Rose he had done some welding at home and he was rusty, but he would try to learn the required skill as quickly as possible, and Rose told him there would be a 90-day probationary period. Shingleton promised Rose he would practice on weekends and in the evenings on his own at the shop until he got the hang of things again. Shingleton went to work with welder Rhinehart for 2-1/2 days when Rhinehart was sent to work in the field. Shingleton remained in the shop to weld on his own.

The evidence is essentially uncontroverted that Rose used his influence to have Shingleton admitted to a welding training class which was already in progress in mid-February, until March 13, 1990, where Randall Shingleton received a card-certificate. Shingleton acknowledged he stopped going into the plant and practicing welding on his own. Charles Malcolm testified he never saw Shingleton practicing. Safety Inspector Stephen Andrews inspected several of Shingleton's welds and found them unacceptable. Shingleton was sent to Clarksburg, West Virginia, at company expense to be tested for certification twice, on May 15 and again on May 16, 1990. He failed the test each time. Shingleton acknowledged that one cannot weld if not certified to weld.

Shingleton testified that one morning in April 1990, after Shingleton discontinued practicing welding and had failed the welding examination twice, Supervisor Morgan told him he did not know what was going on "but they don't want you around the welding truck." Shingleton was assigned to roustabout work but continued to be paid at a welders wage.

Conclusion

The credited evidence fails to establish that the Respondent denied Shingleton the opportunity to receive training as a welder. To the contrary, the evidence shows that Respondent was influential in getting Shingleton into a welder training class already in progress; that Shingleton did not attend all of the remaining sessions of the class; that he started to train in the shop on his own as he promised Superintendent Rose, but also stopped training on his own; that his welding was unsatisfactory and he was tested twice and failed each time; and that he was thereafter assigned to roustabout work while Respondent continued to pay him his higher welder's wage.

Under the foregoing circumstances, the evidence shows that Respondent afforded Shingleton an opportunity to learn welding and it appears Shingleton did not seriously take advantage of that opportunity, as he promised he would, by not attending all classes of the training session and stopped going into the shop and practicing on his own.

Consequently, the evidence fails to sustain the allegation and paragraph 16 of the complaint is dismissed.

Did Respondent Refuse to Provide Employees Work Gloves?

Paragraph 17 of the complaint alleges that since about March 1990, Respondent withdrew benefits previously conferred on employees by refusing to provide employees with work gloves.

Well tender Lynn Miller testified that since the summer of 1988, Respondent, through Ricky Hanifan, handed out work gloves with the employees' first paychecks of the month until union activity or the Union came in March-May 1990. However, Leonard Spotloe testified Respondent furnished employees with work gloves until the first payday in 1990. He said he asked Hanifan where were the employees gloves and Hanifan said there won't be any gloves, but gloves were given to three or four employees in May 1990, and all employees received gloves again in November 1990.

Since there is a discrepancy in the testimony of Miller and Spotloe as to when Respondent ceased distributing work gloves to employees, January or March 1990, I find this discrepancy critical to a determination of the lawfulness of the Respondent's cessation of furnishing work gloves to employees. If distribution of work gloves stopped in January, this was 3 to 5 months prior to union activity and the union election. That being so, the cessation of distributing gloves could not have been in retaliation of employees' union activities which did not commence until March 1990. Moreover, according to Miller's testimony, no explanation was given by Respondent for discontinuing the distribution of work gloves. Under these circumstances, the evidence has failed to establish that Respondent withdrew the benefit of distributing work gloves to the employees because they engaged in union activity.

Accordingly, paragraph 17 of the complaint is dismissed.

Did Respondent Refuse to Allow Employees to Drive Their Trucks Home Overnight?

Paragraph 18 of the complaint alleges that in May 1990, Respondent withdrew benefits previously conferred upon employees by refusing to allow employees to drive company trucks home overnight.

No evidence was offered in support of paragraph 18 of the complaint, that Respondent did in fact deny employees the privilege of driving company trucks home overnight and therefore, paragraph 18 is hereby dismissed.

Did Respondent Threaten Employees it Would Change its Policy and Send Employees Home Early?

Paragraph 11 of the complaint alleges that Respondent threatened employees it would change its policy regarding sending employees home, if the employees selected the Union as their bargaining representative.

In this regard, roustabout welder-helper Charles Malcolm testified that after the first union meeting in early March 1990, Supervisor Ronald Bonnett told employee Malcolm if the employees selected the Union as their bargaining representative, the employees would be sent home when they completed their respective jobs, instead of being assigned another job function, as was the current practice. Supervisor Bonnett did not testify in this proceeding and Malcolm's testimony is uncontroverted.

Since I was persuaded by the demeanor of Malcolm that he was testifying truthfully, and because his testimony is consistent with other unlawful conduct by Supervisor Bonnett found herein, I credit Malcolm's account in this regard.

Additionally, I further find upon the credited evidence that Supervisor Bonnett's threat to change Respondent's policy of assigning employees who completed their official work early to other job assignments, rather than sending them home, has a coercive effect upon employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

Respondent Advised Employees that Other Employees Were Watching a Union Supporter

Paragraph 13 of the complaint alleges that Respondent, acting through Supervisor Everett Leigh, at Leigh's residence, informed employees Respondent was more closely observing a union supporter.

Matthew Hamner served as the Union's observer during the election on May 4, 1990. Well tender Lynn Miller testified without dispute that a week later, on May 13, 1990, while visiting Supervisor Leigh at his home, Leigh told employee Lynn Miller that nonunion supporters Ricky Hanifan and Rodney Davis were watching Hamner, in an effort to catch him doing something wrong. Leigh did not testify in this proceeding and Miller's testimony is uncontroverted in this regard.

Since I was persuaded by the demeanor of Miller that he was testifying truthfully, I credit his testimony, and find that Supervisor Leigh's telling Miller about Hanifan and Davis watching known union supporter Hamner to catch him doing something wrong had a chilling and coercive effect upon the exercise of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

Respondent Sent Employees Home Early

Paragraph 21 of the complaint alleges that in March 1990, Respondent sent Charles Malcolm and Randall Shingleton home early because of the employees' union activities.

Randall Shingleton testified without dispute that at 9 a.m. on March 12, 1990, Supervisor Ronald Bonnett approached himself and Charles Malcolm and asked them what they had left to do. They told him they had one more "T" to make (welding). Bonnett said well, when you are finished, "just go ahead and pack up and go home . . . we don't have anything else." It was snowing slightly but the uncontroverted evidence shows that prior to the employees' union activity, Respondent generally assigned employees to other work when they completed their regular work before the end of an 8 hour workday. This practice was followed by Respondent when work was slow or the weather was bad (rain, snow, or slow work).

Since I was persuaded by the demeanor of Shingleton that he was testifying truthfully in this regard, I credit his testimony because it is also consistent with other evidence of record.

Conclusion

It is particularly noted that Supervisor Bonnett, who has been found involved in other unlawful 8(a)(1) conduct herein, was following through on Respondent's (Superintendent Rose) March 5 specific and implied general threats to withdraw benefits and make working conditions less satisfying for employees by sending them home whenever they completed their regular work before the end of the workday. Since Bonnett sent Malcolm and Shingleton home early on

March 12, only 10 or more days after the employees commenced union activities, after Respondent's threat to withdraw employee benefits on March 5, and after Bonnett previously informed them they would be sent home early, I find such action by Bonnett (Respondent) was an abrupt change in Respondent's practice of assigning employees to other kinds of work rather than sending them home under the circumstances. Malcolm and Shingleton told Bonnett they had another "T" to make, which means they had work to do which Respondent permitted them to do prior to the union activities of the employees.

Since Respondent did not controvert the above evidence, I find that it may be reasonably inferred from such abrupt change in the policy of transferring employees to other work rather than sending them home, when they completed their regular work assignment, was a retaliation against the employees because of the employees union activities. Such a change constituted discrimination against employees for engaging in union activity in violation of Section 8(a)(1) and (3) of the Act.

Respondent's Discipline of Matthew Hamner

Matthew Hamner credibly testified without dispute that for 1-1/2 years he had been stopping and picking up a hotdog at a small concessionaire at a turnoff three-quarters of a mile from the well he tendered. On April 23, 1990, Hamner stopped at that store for a hotdog and the clerk told him they did not have any. As he came out of the store he observed Rod Davis driving by. He waved to Davis.

On May 7, 1990, Hamner stopped at the same concessionaire to purchase a snack and was inside about 15 minutes. He said he did not see anyone from the Company as he left but he was suspicious they were watching him.

On May 11, 1990, Hamner received the first and only reprimand he had ever received from Respondent, when he was informed of both incidents as follows:

To: Matthew N. Hamner

You are hereby notified of the following violations of company policies:

1. Monday, April 23, 1990, your truck was observed at the Midway Diner in Randolph County at 10:32 a.m. o'clock.

You are hereby reprimanded for your conduct.

2. On Monday, May 7, 1990, your truck was observed at the Midway Diner in Randolph County from 12:18 to 12:49 p.m. o'clock.

You are hereby reprimanded for your conduct.

You have been previously advised that you are not permitted to be in restaurants during your workday. You are hereby reprimanded for your conduct.

Further violations of this nature will result in disciplinary action taken against you, including possible termination of employment.

Dated May 11, 1990, and signed by Superintendent James Rose, notably, 7 days after the union election.

Well tender Leonard Spotloe testified that the Company has had a policy that employees and their truck stay in their end (area of work). He further testified that he has stopped at food stores or restaurants during his workday at least once a day for a snack and Supervisor Dick Leigh was with him

on several occasions. He was never reprimanded for doing so.

I credit the testimony of Leonard Spotloe not only because I was persuaded by his demeanor that he was testifying truthfully but, also, because his testimony is not controverted by the Respondent and it is consistent with other evidence of record.

Conclusion

As previously found herein, Respondent's Supervisor Leigh told employee Larry Miller that nonunion supporters Ricky Hanifan and Rodney Davis were watching "known union supporter Matthew Hamner," trying to catch him doing something wrong. In fact, Hamner testified he saw Rodney Davis driving by as he left the little restaurant and he waved to Davis. Further supporting this conclusion is the fact that Leonard Spotloe testified he occasionally stops in a store to purchase something for lunch, sometimes in the presence of Supervisor Leigh. Nevertheless, he has never been reprimanded or spoken to about such conduct. Supervisor Leigh did not appear and testify in this proceeding and no explanation was offered for his nonappearance. Since I was persuaded by the demeanor of Spotloe that he was testifying truthfully, I credit his testimony.

The record evidence shows that leadmen Hanifan and Davis were opposed to unionization of Respondent. In fact Hanifan even circulated a petition of disaffection among the employees.

I therefore conclude and find on the foregoing credited evidence, that it may be reasonably inferred from such evidence that Davis and/or Hanifan had seen Hamner entering or leaving the little food store, and reported their observations to management. Management in turn, knowing that Hamner served as observer for the union during the election, seized upon the report of Davis and/or Hanifan as an opportunity to lay a foundation for getting rid of Hamner, as Superintendent Rose had previously informed Supervisor Bonnett he desired to do. Thus, Superintendent Rose issued a written reprimand to Hamner, whom he knew was a union protagonist. Since Respondent has not uniformly enforced a policy against employees for being out of their end (geographic work area) during work hours, the reprimand of Hanifan for being three-quarters of a mile out of his area to pick up something for lunch was obviously discriminatory and in retaliation against him for his union activities, in violation of Section 8(a)(1) and (3) of the Act.

D. *The Union Election and Events Which Followed*

The Union's International representative, Lawrence Abel testified that he was assigned the task of organizing the Respondent's employees. Respondent's management was in contact with him from the time the petition for an election was filed on March 28, 1990, until he went on disability May 28, 1990. The union election was held May 4, 1990, and the Union certified May 14, 1990.

Notice To The Union

Union Representative Larry Abel testified that the following letter from the Respondent's manager, Will Hardman, was read to him by the Union's secretary on May 11, 1990:

Dear Larry:

In the interest of good faith communications, I am informing you that due to lack of work for various reasons, effective on Monday, May 14, 1990, ten or eleven employees in the classifications of roustabouts, Bulldozer Operator, Welder, Truck Driver and Grader Operator will be laid off. This layoff will be effected on the basis of Company seniority by classification.

Effective on or about June 30, 1990, some Well Tenders will also be laid off as the result of decreased work availability, including the loss of contracts for the well tending services.

If you desire discussion regarding these matters, please contact me. [G.C. Exh. 3.]

Hardman testified that he attempted to call Abel on May 10, and again on May 11, at which time he left a message on Abel's recorder that the layoffs advised in his letter (G.C. Exh. 3) were in fact going to occur; that there were valid business reasons for them; and that he requested Abel to call him so he could explain and discuss the reasons. Abel returned the call at 7:30 p.m. on May 11, 1990, during which time both Abel and Hardman testified they had a bitter argument, which Hardman described started with Abel calling Respondent a bunch of no good mother fuckers and dominating the conversation with loud accusations that supervisors unlawfully threatened employees; that there was going to be a war, and the Union was going to harass management. Abel acknowledged he invited Hardman outside, telling him the Union would file with every agency. He promised to have government investigators crawling all over the Respondent's place.

Abel testified he tried unsuccessfully to call Respondent's manager, Will Hardman, on May 11, 1990. Abel said he recalls a message on his recorder from Hardman on May 10, 1990, regarding whether or not to return his call but he could not recall the substance of the recorded message. Although the Union had not been certified at that time, Abel said he felt Respondent had an obligation to call him.

Notice of Layoff

Roustabout Charles Hinchman, 18 years in Respondent's employ, testified that on May 11, 1990, Bob Wallace told them they were laid off effective Monday morning, May 14, 1990; and that they had been doing makeup or catchup work but Respondent had not gotten its point across to the employees.

Charles Malcolm, a roustabout welder-helper testified that on May 11, they were advised they were laid off effective as of May 14, 1990, for lack of work. He said he had not noticed any reduction in available work prior to the layoff. In fact, he said they worked overtime once or twice a week with prior approval until the layoff.

The Union was certified the exclusive collective-bargaining representative of Respondent's employees on May 14, 1990.

The Company-Called Meeting of May 14

Matthew Hamner has worked for EREX since August 1980 and Lynn Miller has worked for Respondent 8-1/2 years. Both employees testified they attended a company-called meeting of 20-22 employees on May 14, 1990. Super-

intendent James Rose and Supervisors Ronnie Bonnett and Dick Leigh were present for the Company.

Hammer and Miller testified that Superintendent Rose, speaking for the Company, told the employees they were going to start working 8-hour shifts instead of 9 hours, as they had always worked and were paid for overtime up to 4 hours. Rose told them this was not his doing but because of their union activity, company officials who had come from Pennsylvania saw things they did not like; and that the employees were responsible for the changes which included, loss of overtime that they currently worked without prior approval; that the employees would lose the travel time from home to work and from work to home but would receive pay for time going from the shop to the field and from the field to the shop; and that there would be no more paid holidays, that the easy time, give time, was over. However, on the next morning (May 15, 1990), Rose told the employees the cancellation of the well tenders longstanding "travel time" was rescinded and the traveltime reinstated.

The above testimony of Miller and Hamner was essentially corroborated by employee witnesses Joseph Montgomery, Leonard Spotloe, and Clifford Loudin.

Only Matthew Hamner testified on cross-examination that during the *May meetings* with employees, Respondent (Superintendent Rose, Wallace, or Hardman) told the employees they had the right to engage or not engage in union activities, or vote for the Union, and that the Company would not retaliate against them in any way for their activities.

Respondent Informed Employees it was Observing Union Supporter

Well tender Lynn Miller testified that on May 13, 1990, Supervisor Everett Leigh told him it was pretty bad what Ricky Hanifan and Rod Davis, nonunion supporters, were doing to Matthew Hamner, a known union supporter—trying to catch Hamner doing something wrong.

Hamner was an observer at the May 4 union election only 9 days earlier. Respondent (Supervisor Leigh), as well as nonunion supporters Hanifan and Davis, knew that Hamner was a leading union supporter.

Supervisor Leigh did not testify in this proceeding and I was persuaded by the demeanor of Miller that he was testifying truthfully in this regard. I therefore credit Miller's testimony.

Conclusion

It is noted that Supervisor Leigh did not state to Miller why Hanifan and Davis were trying to catch Hamner doing something wrong. Notwithstanding, Leigh's statement to Miller on the heels of the union activity and the recent election, and 1 day before the previously announced layoffs, had to cause Miller, a union supporter, to know or believe that, through leadmen Hanifan and Davis, Respondent would learn if Hamner was in fact doing something wrong, as the record shows Respondent later learned (Hamner was stopping in a store during the workday).

Under these circumstances, I find that Supervisor Leigh's statement to Miller tended to have an intimidating and coercive effect upon Miller's employee's right to organize, in violation of Section 8(a)(1) of the Act.

Did Respondent Unilaterally Change its Holiday and Overtime Policy?

It is alleged in paragraph 27 of the complaint that on or about May 14, 1990, Respondent changed its overtime and holiday policy.

Holidays

The allegation in paragraph 27 that Respondent unilaterally changed its holiday policy is predicated upon the testimony of well tenders Matthew Hamner, Joseph Montgomery, Leonard Spotloe and Clifford Loudin, that in the May 14 meeting with employees, Superintendent Rose announced that there would no more paid or free holidays. The above-named witness-employees testified that in compliance with Superintendent Rose's instructions, they would write in time on their time cards that they did not work during a holiday week. Superintendent Rose testified that he gave no such instructions to the employees, but, rather, he told them they could work extra hours during the holiday week to make up the time lost by the holiday. This practice is still in effect, he said. Rose denied he told the employees on May 14 that there would be no more free holidays because the employees have not received paid holidays since January 1, 1989, when the policy was changed to employees would not be paid for holidays.

On cross-examination, Hamner agreed with Rose that Rose did not tell the employees on May 14 that "there would be no more holiday time or free holidays." Moreover, Hamner corroborates Superintendent Rose's testimony that there has been no change in Respondent's holiday policy.

While the employees may have been writing in false time that they did not work during a holiday week, the evidence does not show that Respondent knew about the false time or that the employees were actually paid for such time. The General Counsel did not present any testimony or timecard evidence to substantiate that the employees ever received approved paid holidays prior or subsequent to their union activity. Apparently, some of the employee witnesses were confused by the questions propounded to them, or in their testimony, confused about what Rose told them during the March meeting with what was said during the May 14 meeting, concerning an adjustment for holiday pay (authority from Rose to work extra hours during the week to make up for the holiday of that week). The evidence does not show that the privilege to work the extra hours during a holiday week to make up for the holiday has been terminated.

Consequently, I do not find that on or about May 14, the Respondent changed its holiday policy then, or anytime after the employees commenced their union activities. Thus, to the extent that paragraph 27 of the complaint alleges that Respondent changed its holiday policy on May 14, paragraph 27 of the complaint is dismissed.

Overtime

With respect to the alleged May 14 termination of overtime policy, Hamner testified that prior to May 14, employees working more than 8 hours a day did so with approval of management, except, he said, employees in defined circumstances, had prior approval to work overtime if a well was coming up late. In such case, he said the employees were to stay with it, that Superintendent Rose told them

“don’t shut it in, let it flow. If you get an extra hour don’t worry about it. . . . we would rather get the well to flow and you spending another hour out there, than have to go back tomorrow and spend five more hours with it to get it back up to the point of flowing.” As a result of Rose’s above-quoted statements, Hamner said the employees always tried to not get the wells to flow early so they could get “9 hours” a day.

On May 14, Hamner said Rose told them to shut the well down at the 8-hour-a-day closing time. Rose did not deny that he told the employees that. He testified that overtime was denied on only two occasions after May 14.

David McClure’s testimony tends to corroborate Hamner’s account. McClure testified that prior to May 14, he was assigned to work overtime “a few hours a week” on a regular basis because it usually took an extra hour, over 8 hours, to finish up a job. He and the other employees would remain after the 8 hours and finish the job.

Conclusion

Based on the foregoing essentially uncontroverted evidence, I find that on May 14, Respondent did alter its policy or past practice of working an hour or so overtime rather than shutting down wells that came up, by ordering that all wells coming up be shut down at the end of the 8-hour shift, rather than letting the wells run past the workday shift as was the practice prior to May 14. To this limited extent, Respondent did change its overtime work policy for employees under these defined circumstances.

I further find that shutting down wells at the end of the 8-hour work shift apparently would deprive employees of earning essentially one hour a day. Since the employees frequently worked 9 hours a day, they may actually be deprived of being paid for 5 hours a week and such a change in policy amounts to a change in wages, hours, and terms and conditions of employment, *Venture Packaging*, 294 NLRB 544 (1989), and therefore, constitutes a mandatory subject of bargaining. Consequently, since Respondent announced the change in its overtime policy on May 14, without notifying the Union and affording it an opportunity to bargain on the change, I find that Respondent has failed and refused to bargain in good faith with the Union, the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

Did Respondent Subcontract and Have Supervisors Perform Unit Work?

Well tender Matthew Hamner testified that after the employees were laid off on May 14, Respondent hired a subcontractor with a large Komatsu Dozer, with twice the pushing capacity, to perform 2 weeks’ work in Tyler County. Hamner said Respondent has contracted for the larger dozers prior to May 14 when it was absolutely necessary, but he did not see any unusual reasons why the larger dozers were necessary and hired in this instance. He said Respondent’s smaller No. 9 dozer could have done the work as it has done on prior occasions. Besides, the rate charge for smaller dozers would be cheaper, since the Komatsu rented for \$65 an hour, while the smaller dozer rented for \$45 an hour.

Hamner further testified without dispute that after the May 14 layoff, he saw bargaining unit work (roustabout, shop

labor, and pipeline work) being performed by Respondent’s supervisors. The work involved was pumping a pit in Lewis County, and unloading a truck of purchased used tanks.

Joseph Montgomery testified that since the May 14 layoffs, he has seen the work described in the receipt (G.C. Exh. 4) dated July 4, 1990, performed by a hired outside contractor. He said he has seen the same work listed in the receipt (pulling slate trucks, cement trucks and redoing road crossings performed with Respondent’s equipment by roustabouts and operators) prior to the May 14 layoff. The same thing he said is true with respect to grading roads and repairing creek crossings, putting in culverts, and spreading rock, as listed in the receipt.

Roustabout Charles Hinchman was laid off May 14 but recalled for 1 to 3 days a week. He testified that since the May 14 layoffs, he has seen well tenders Rodney Davis and Ricky Hanifan in the yard and in the field performing unit work such as hauling flow lines, ladders, all kinds of tools to perform work in the field, which were previously performed by roustabouts and operators.

The testimony of Hamner, Montgomery, and Hinchman is uncontroverted in the record. Since their account is consistent with substantially most of the evidence in the record, and since I was persuaded by their demeanor that they were testifying truthfully, I credit their testimony.

Based on the foregoing credited evidence, I find that after the layoffs on May 14, 1990, Respondent permitted its supervisors and well tenders Davis and Hanifan to perform other unit work of the laid off employees. I further find that Respondent contracted for the performance of other unit work of the laid off employees. These findings are consistent with Respondent’s (Superintendent Rose) early March threat to close down the plant and utilize supervisors and subcontractors to perform the work of unit employees.

Additionally, I find that Respondent contracted with third persons and permitted supervisors to perform unit work of the laid-off employees without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain, as the exclusive bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

Conclusions

The General Counsel correctly argues that Respondent became obligated to give notice and bargain with the Union on its decision to lay off employees, and change its policy on overtime and subcontracting when the Union won the election (May 4). In *Advertising Mfg. Co.*, 280 NLRB 1185 (1986); *NLRB v. Laney & Duke Co.*, 369 F.2d 859, 866 (5th Cir. 1966); *Allis-Chalmers Corp.*, 286 NLRB 219, 222 (1987), the Board upheld a finding that unilateral changes in terms and conditions of employment of employees (which are mandatory subjects of bargaining), constitutes a refusal to bargain in good faith that is not excused by the fact that the changes occurred before certification of the Union.

Additionally, the Board has also held that an employer is put on notice of the Union’s majority status upon the tally of the ballots, and it is at this juncture that the obligation to bargain attaches. *Venture Packaging*, supra; *Westinghouse Broadcasting & Cable*, 285 NLRB 205, 212–213 (1987) (where the Board held that the employer has an obligation to bargain following the election, even before the issuance of certification).

Accordingly, I conclude and find that the Respondent had a duty to bargain with the Union on its layoff decision and overtime and subcontracting changes after the Union won the election on May 4, 1990. Correspondingly, Respondent was likewise obligated to give notice to the Union and afford it an opportunity to bargain on its layoff decision and its unilateral change of its overtime and subcontracting policy. *Venture Packaging*, supra; *Westinghouse Broadcasting*, supra.

Here, Respondent not only failed to notify and afford the Union an opportunity to bargain on its layoff, overtime, and subcontracting policy change decisions, but only 2 days before implementation of these changes Respondent presented the Union with a fait accompli. *Intersystems Design Corp.*, 278 NLRB 759, 760 (1986).

Respondent argues, however, that it notified the Union 4 days prior to the layoffs that the layoffs would occur, but the Union neglected to present any proposals to the Respondent. In essence, Respondent appears to be contending that its notice to the Union was timely.

However, it is noted that Respondent's letter to the Union (Abel) dated May 11, 1990, was a Friday. Apparently, the earliest the Union could have received Respondent's letter (G.C. Exh. 3) by regular mail would have been Saturday, May 12, or Monday, May 14, 1990. Saturday and Sunday are generally nonbusiness days. Under these circumstances, I find that Respondent's notice by mail was not timely, because it did not afford the Union a reasonable time within which to meet with its officer or committee persons and respond with proposals to bargain, before the layoff was implemented by the Respondent on Monday, May 14.

Although Respondent may have left a message of its layoff notice on the Union's answering telephone recorder on Friday evening, May 11, the following 2 days, Saturday and Sunday, were not business days. It would be unreasonable to expect the Union to have received the letter possibly on Saturday and probably on Monday, and meet with its offices or committee persons, discuss the matter and/or prepare proposals, file a request and actually bargain with the Union before Respondent implemented its layoff, overtime, and subcontracting policy changes on Monday, May 14. Under such circumstances, I find that Respondent's written and telephone notice to the Union about its layoff and policy changes were not timely.

As the Board stated in upholding the judge in *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 1016 (1982):

The Board has long recognized that, when a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the Union of a fait accompli.

Also, in *Speciality Stamping Co.*, 294 NLRB 703 (1989) where an employer failed to notify the Union of its plan to lay off employees until the layoff was imminent, the Union learning about the layoff 1 or 2 days before it was imple-

mented, the Board held there was no justification for the employer's failure to notify the Union.

Based on the above-credited evidence and cited legal authority, I find that Respondent has failed and refused to bargain with the Union as the duly designated bargaining representative of its employees on its decisions to layoff, and change overtime and subcontracting policy, in violation of Section 8(a)(1) and (5) of the Act.

The Layoffs

During the company-called meeting on Monday, May 14, 1990, 10 days after the Union won the election, Respondent laid off the following employees assertedly for lack of work:

1. Charles Hinchman, roustabout, operator and truck driver.
2. Randall Shingleton, welder trainee-helper.
3. Ernest Johnston, grader operator.
4. David McClure, a dozer operator, was laid off but recalled to work May 17, 1990, and sent home for bad weather. He has not been recalled to work since that time. He testified he did not notice any change in available work and he worked a few hours overtime until he was laid off. He and five other employees had previously been laid off for 26 days in 1986 by Union Drilling Company.
5. Donald Detamora, truck driver and dozer operator.
6. Charles Malcolm, a roustabout and welders helper.

This was the first layoff implemented by Respondent in nearly 4 years.

International Representative Lawrence Abel testified he received a telephone call from Lynn Miller on May 14 or 15, 1990, who told him that after a company-called meeting of employees, Respondent had dropped the hatchet by advising them of the elimination of holiday pay, the extra days work, and several other employee benefits. Abel said he called Hardman and told him he was very dissatisfied with what was going on; that he felt the Respondent was violating the employees' rights under Federal law; that the Union intended to go to war; and that Hardman told him the Union could do "any damn thing we wanted to do," that it was the Respondent's company and that was the decision that was made. Abel said he had never been informed by the Respondent about any of the policy changes announced to the employees prior to the Respondent announcing them to the employees on May 11.

With respect to Respondent's asserted reason for the layoffs and lack of work, several employees testified about their observations of available work prior to the layoff.

In this regard, roustabout Charles Hinchman testified he noted little change in their workload prior to the May 14 layoff, and that they (the employees) continued to work 1 to 20 hours overtime prior to the layoff. He had never been laid off by Respondent.

Truckdriver Donald Detamora testified he did not notice any change in the amount of available work prior to the layoff. In fact, he said for 3 or 4 months prior to the layoff, he worked up to 5 hours a week overtime. He has not been laid off since 1985 at the Union Drilling Co.

Dozer operator David McClure testified he had not noticed much change in available work prior to the layoff because he worked a few hours a week overtime. He has not been laid off since 1986 while he was at Union Drilling Co.

Roustabout welder-helper Charles Malcolm testified he did not notice any reduction in available work prior to the layoff. In fact he said they worked preapproved overtime once or twice a week.

The testimony of neither Hinchman, Detamora, McClure, nor Malcolm was controverted and I was persuaded by their demeanor that they were expressing their honest judgment.

Additionally, equipment operator Matthew Hamner testified that after the May 14 layoff, equipment operators' work was performed by well tenders, supervisors and outside contractors. Some of such work Hamner said he observed being performed was pumping a pit in Lewis County, and unloading a truck of purchased used tanks.

Hamner further testified without dispute that work was hired out or subcontracted to Heater Mecca and Dozer for work performed 60 miles away in Tyler and Ritchie Counties, which had been done in the past only upon an urgency or special circumstances, when Respondent's heavy equipment could not do the job. He did not believe special circumstances or an urgency existed in the latter situations.

Well tender Joseph Montgomery corroborated Hamner's account by testifying that the work listed in General Counsel's Exhibit 4 of pulling slate and cement trucks, and redoing road crossings was previously done by Respondent's roustabouts and operators prior to the union activity and layoff. Those employees performed those jobs with Respondent's equipment. The same thing was true for grading roads, repairing creek crossings, putting in culverts, and spreading rock. The equipment Scott Heater used to perform the work for which he was contracted described in General Counsel's Exhibit 4, was brought from Buckhannon, West Virginia, where Heater lives.

Charles Hinchman testified without dispute that he has seen well tenders Rodney Davis and Ricky Hanifan hauling flowlines, ladders, and all kinds of tools to perform work in the field, work previously done by roustabouts and operators.

The testimony of neither Hamner, Montgomery, nor Hinchman was controverted by Respondent and I was persuaded by the demeanor of the aforementioned witnesses that they were testifying truthfully.

Conclusion

Although employees of a business operation, such as Respondent's, may not be the most accurate source of the volume of work currently available, or in the near future, they are, nevertheless, in a position to reasonably estimate the adequacy of work available by reason of their presence on the job and their familiarity with the work to be performed. Workers Hinchman, Detamora, McClure, and Malcolm testified they had sufficient work at all times prior to the May 14 layoff, and I find upon their credited testimony that Respondent was not lacking in work on May 14 for full-time employment of the employees laid off. This finding is supported by the credited account of employees that they continued to work overtime each week for several years until their layoff on May 14. Their account in this regard is supported by the fact that Respondent had access to the hours of work and pay records of each of the aforementioned employee witnesses, but it made no effort to produce them to refute their testimonial accounts.

Since the Respondent contends the employees laid off on May 14 were laid off due to lack of work and not for their

union activities, the issues raised by Respondent's defense call for consideration of the *Wright Line* doctrine. *Wright Line*, 251 NLRB 1083 (1980). There, the Board held "that in such 8(a)(3) cases, the General Counsel must first make a prima facie showing sufficient to support the inference that protected concerted conduct was a 'motivating factor' in the employer's decision and once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the employees' protected conduct."

Thus, the first question raised under the *Wright Line* doctrine here, is whether the General Counsel has made a prima facie showing that Respondent's layoff of the employees would have taken place even if the employees were not engaged in union activities.

In this regard, it has been found herein that Respondent's employees commenced union organizing activities on March 1, 1990, that Respondent learned about the employees' union activities on or about March 2; that on or about March 5, a company-called meeting was held, during which Respondent's superintendent threatened employees with plant shutdown for 1 year, layoff, loss of overnight use of company trucks, the installation of a timeclock, a reduction in work hours from 9 to 8 hours, elimination of overtime work without prior approval, termination of assigning them work outside their classification, and subcontracting or allowing supervisors to perform their work, if the employees selected the union as their bargaining representative.

Also, in early March, Respondent, through its supervisors, coercively and unlawfully interrogated employees about their union interest and sympathies, and threatened them with layoff if they selected the Union as their bargaining representative.

The union election was held May 4, 1990, and the Union won the election. Exactly 1 week later (Friday, May 11, 1990), Respondent, acting upon a report of supervisors and/or nonunion supporter employees, unlawfully reprimanded an employee who served as the union observer and thereafter served as the elected president of the Union; that on the same date (May 11, 1990), Respondent called a meeting of its roustabout, pipeline, and equipment operator employees and, precipitously advised them that they were laid off the following workday, Monday, May 14, 1990. Considering the timing of the layoffs, 1 week after the Union was victorious in the election, in conjunction with Respondent's unlawful 8(a)(1) conduct between early March and May 14, as found herein, I find that the General Counsel has sustained its burden of establishing a prima facie showing, that the employees' union organizing activity was a motivating factor in their layoff by the Respondent.

The General Counsel having established the required prima facie showing, the burden (under *Wright Line*) now shifts to the Respondent to demonstrate that the May 14 layoffs would have occurred even absent union activity by the employees.

Respondent's Defense

The Respondent argues however that by laying off its employees, and if it changed its overtime and holiday policies, or actually subcontracted work without notifying the Union, it nevertheless has neither violated Section 8(a)(1), Section 8(a)(3), nor Section 8(a)(1) and (5) of the Act. Instead, Re-

Respondent contends it merely exercised an entrepreneurial prerogative, for compelling business and economic reasons, of shifting the basic direction and nature of its enterprise from drilling and pipeline work to servicing existing well-tending accounts, as it is permitted to do under *Otis Elevator II*, 269 NLRB 891 (1984), and *First National Maintenance Corp.*, 452 U.S. 666 (1981). In the latter case, the Court held that an employer is not obligated to bargain with a union over its economically motivated decision to close a part of its operation, even though such decision may have a substantial impact on continued availability of employment. The Board has followed the same principle in *Chippewa Motor Freight*, 261 NLRB 455 (1962); and *U.S. Contractors*, 257 NLRB 1180 (1981).

In *First National Maintenance*, supra, the employer was providing housekeeping, cleaning, maintenance, and related services to commercial customers at different locations. When the weekly fee for services at one customer location was substantially reduced by the customer, rendering performance of the service nonprofitable for the employer, the employer upon notice to the customer, terminated the service and the employment of employees assigned to that customer location. The Court held that the employer was not legally bound to bargain with employees about its decision to discontinue service to the customer.

Although the employer's decision had a direct impact on employment, having inexorably eliminated some 35 jobs, the Court said, citing its decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the employer's decision was nevertheless a decision involving a "change in the scope or direction of the enterprise," akin to a decision whether to be in business at all. The Court further noted that the dispute between the employer and the customer was about a fee for services to be paid by the customer over which the Union had no control or authority.

With the above authority in mind, the Respondent submitted in support of its position, evidence of declining acquisition of contracts for drilling and pipeline work, showing its sales of wells and leases of wells.

In this regard, Respondent (Robert Wallace) testified that he was aware of a decline in available work at Respondent since March 1990. By early 1990, he said the salaried work force of Respondent had been reduced. Since the splitup of Union Drilling in 1989, Respondent does no drilling of wells but simply maintains them and Robert Wallace assumed extra duties as a result of lack of adequate management personnel. Respondent's managerial witnesses testified that in January 1989, well tenders ceased being salaried employees from \$362 a week to hourly employees at \$8.62 per hour (R. Exh. 16).

Superintendent Rose testified that in late 1989 and early 1990, most of the work of welding flowlines was petering out. Respondent lost well tending work for 100 Miller wells when Miller died.

A change in the frequency of changing and tending charts from once every 7 days to twice every 31 days, decreased the amount of work for well tenders.

Managerial witnesses further testified that the type of work performed by employees Rhinehart, Shingleton, and Malcolm petered out when the Barbour County and Dolly Sod properties were sold. By early 1990, Respondent was pretty much caught up with the Beckley project in Lewis County. Em-

ployee, grader operator Ernest Johnston, testified that one of the concerns of the employees in organizing was the number of wells that were being sold.

Both Wallace and Superintendent Rose's testimony is uncontroverted and I was persuaded by their demeanor that they were testifying truthfully.

Respondent's uncontroverted evidence further shows that after the acquisition of union drilling by EREX in 1984, Respondent for business reasons, started to reduce promotional drilling. Consequently, between 1984 and 1990, the number of wells drilled decreased from 174 in 1984 to 5 in 1990. The impact of the reduction in drilling resulted in a reduction in available work for bargaining unit employees (pipeline and reclamation crews), and generated a layoff in 1986. Since 1984, 137 wells have been plugged or abandoned and 251 wells operated by Respondent were sold in 1988 and 1989. Nevertheless, after the 1986 layoffs, Respondent was able to expand the pipeline and reclamation work force by performing neglected work on well roads, pipelines, leakages, setting tanks, digging moats, and correcting erosions.

Four new employees (Koon, Workman, Malcolm, and Phillips) were hired in late 1988 or early 1989 to help perform the above-described work. They were told the work would be performed on a project basis, which would run out in 3 to 12 months. From 1988 to early 1989, pipeline and reclamation crews and outside contractors were assigned to install environmentally required tanks, construct a 6-mile underground pipeline, and installation of well head compressors in Dolly Sods, West Virginia, and maintain neglected wells in Barbour County which was completed in October 1990.

The Question

The question raised by Respondent's defense is whether its evidence is sufficient to establish that the reason the Respondent laid off the employees on May 14 was because of a lack of work resulting from a shift in the direction and scope of its business operations, by abandoning and selling wells, and eliminating its drilling and pipeline operations.

It is clear from the credited evidence of record that since 1984, Respondent has been shifting the direction and scope of its operations by eliminating the drilling of wells and work essential thereto, and moving towards confining its business operations to tendering wells. The evidence is equally clear that Respondent's operational changes resulted in a corresponding decline in bargaining unit work, especially pipeline and reclamation work. What the evidence does not establish, however, is that all pipeline and reclamation work had in fact ran out on May 11 or 14, 1990, for the employees laid off on May 14.

More specifically, although Respondent's evidence shows that it sold wells and well leases in January 1990, it also shows that its pipeline reclamation crew not only worked a full-time week without interruption, but they also worked a minimum of 1 hour overtime per day until they were laid off May 14. So it is well established that the employees did not experience any loss of worktime prior to May 14 even though they were concerned about the number of wells being closed by the Respondent. Respondent had not said anything to the employees to indicate that the duration of their employment was imminent or approaching.

However, the record shows that Respondent's employees commenced union organizing activities on or about March 1,

1990, and the Union won the election on May 4, 1990. Seven days later, May 11, 1990, Respondent notified its roustabouts (pipeline and reclamation crew) that they were laid off, effective Monday, May 14. This is the first layoff of employees since the 1986 layoffs.

Thus, it is particularly noted that no evidence was presented by Respondent to show that all work of the laid-off employees had ran out on May 11. Nor was there any evidence presented to demonstrate that any particular group of wells were shut down or other identified business operations suddenly discontinued on that date. The downsizing of Respondent's operation has been a gradual process over the past 5 or 6 years, with no foreseeable definitive ending by the employees, or definitive ending indicated by the Respondent. The employees worked full time and overtime straight up to the time the layoffs were announced on Friday, May 11, 1990.

The Board has held that when an employer is aware of union activity in its plant, as the Respondent was here, and no creditable and legitimate explanation is presented for a reduction in force, it is reasonable to infer that the layoff was motivated by the employees' union activities. *Dutch Boy, Inc.*, 262 NLRB 4, 5 (1982); *Fabricut, Inc.*, 238 NLRB 768, 769 (1987). In addition to such reasonable inference drawn in the instant case is the cold evidence that shortly after Respondent learned about the union activities of its employees in early March, it called a meeting of the unit employees and threatened them with plant closure, layoffs, and subcontracting the work they performed if they selected the Union as their bargaining representative. Although Respondent, in subsequent meetings with the employees, told the employees Respondent would not engage in any reprisals against them if they selected the Union as their bargaining representative, Respondent's May 11 announcement of the layoffs is consistent with its gloomy forecast given the employees in the early March meeting. It is incomprehensible to disassociate Respondent's earlier threats from its current conduct of laying off the employees, even though Respondent tried to repair the threats by a subsequent assurance against reprisal. In fact it is clear that Respondent was following through on its early March promise of layoffs, eliminating overtime and subcontracting unit work. These results being so uniformly in compliance with the March threats cannot be attributed to coincidence.

The above conclusion is further supported by the fact that high-ranking Manager Robert Wallace told the employees on May 11 that "they had been doing makeup or catchup work but Respondent had not gotten its point across to the employees." Under the circumstances in this case, it may be reasonably inferred from Wallace's latter statement that "Respondent had not gotten its point across to the employees," meant the employees had selected the Union in spite of Respondent's opposition to unionization and to threat of layoff of the employees.

Respondent argues pursuant to *First National Maintenance Corp.*, supra, that Respondent had the entrepreneurial right to change the direction and scope of its business operations by eliminating its drilling and pipeline operations amid union activity of the employees, without violating Section 8(a)(3) of the Act. However, a clear examination of *First National Maintenance* will reveal that the Supreme Court expressly confined its decision to limited circumstances analogous to

those in *First National Maintenance*. There the employer actually terminated a part of its business services and the employment of the employees rendering services to that particular customer all at the same time. In the instant case, the Respondent did not terminate a particular aspect of its operation at once, in which all of the laid-off employees were working exclusively, because it would have been unprofitable for Respondent to render any additional services. Respondent's downsizing of its operation was an ongoing process with no definite point of cessation.

However, assuming that Respondent here did terminate a particular aspect of its operation in which all of the laid-off employees were employed, it is further noted that in *First National*, the Supreme Court noted that the dispute in *First National* was between the employer and the customer about a fee contracted for the employers services, over which the Union had no control or authority. Here, unlike there, there was no contract dispute between the employer and a third party customer, over which the Union would not have had control or authority. Instead, here, the Union had a representative relationship with Respondent's employees. In that capacity, the Union and the employees might have offered concessions or other suggestions to Respondent which might have averted their imminent layoff on May 14. By presenting the Union with a fait accompli, the Union and the employees were precluded an opportunity to intercede with the Respondent in an effort to avoid the layoff on May 11, if not avoiding the layoff indefinitely or for a considerably later date. *First National Maintenance*, supra; *Mashkin Freightlines*, 274 NLRB 427, 433 (1984).

Under the foregoing circumstances, I find that Respondent's May 14 layoff of the employees is not protected by *First National Maintenance* which is distinguishable from, and inapplicable to, the facts in the instant case. Consequently, I further find the Respondent's evidence fails to establish that the employees laid off on May 14 would have been laid off absent any union activity of the employees. Having failed to establish such fact, Respondent's evidence has failed to rebut the General Counsel's prima facie showing that Respondent's decision to lay off the employees on May 14 was, in part, motivated by the employees' union activity, in violation of Section 8(a)(1) and (3) of the Act. *Mashkin Freight Lines*, 272 NLRB 427 (1980).

Additionally, since Respondent reduced the overtime work of employees, laid off the pipeline crew, contracted some of the work, and permitted supervisors to perform unit work of the laid-off employees, without first notifying the Union and affording it a reasonable opportunity to bargain over these decisional changes, I further find that Respondent has failed and refused to bargain with the Union, as the bargaining representative or its employees, in violation of Section 8(a)(1) and (5) of the Act. *Mashkin Freight Lines*, supra at 433.

This conclusion and finding is not affected by the fact that Respondent contends it told employee Malcolm he was hired for 3 to 12 months. It is not shown when the 12 months would have started to run and Malcolm was still a part of the unit.

IV. REMEDY

Having found that Respondent has engaged in certain unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such con-

duct, and that it take certain affirmative action designed to effectuate the policies of the act.

Having found that Respondent has coerced and restrained its employees by engaging in numerous threatening, interrogating and intimidating conduct in violation of Section 8(a)(1) of the Act; that Respondent has made several unilateral changes affecting mandatory subjects of bargaining, thereby failing and refusing to bargain in good faith with the duly designated collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act; and that by laying off several of its bargaining unit employees because they engaged in union activity, in violation of Section 8(a)(1) and (3) of the Act, the recommended Order will provide that Respondents cease and desist from engaging in such unlawful conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Because of the character of the unfair labor practices herein found the recommended Order will provide that Respondents cease and desist from or in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except as specifically modified by the wording of such recommended Order.

CONCLUSIONS OF LAW

1. Respondent Equitable Resources Exploration, a division of Equitable Resources Energy Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Oil Chemical and Atomic Workers International Union, AFL-CIO, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All hourly employees including Truck Drivers, Roustabout, Grader Operator Shop Laborer, Dozer Operator, Mechanic B, Welder, Meter Tech Well Tender and Well Tenders employed by the Employer at its Buckhannon, West Virginia and Pennsylvania and New York well tending sites but excluding office clerical employees, janitorial employees and professional employees, guards and supervisors as defined in the Act.

4. By threatening employees the plant would close if the employees selected the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees Respondent would withdraw their privilege of driving their trucks home overnight, Respondent has violated Section 8(a)(1) of the Act.

6. By threatening employees Respondent would install a time clock if the employees selected the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

7. By threatening employees that their overtime would be cut if they selected the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

8. By threatening employees that their work would be subcontracted or performed by supervisors if they selected the union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

9. By interrogating employees about their union interest and union activities, Respondent violated Section 8(a)(1) of the Act.

10. By threatening employees Respondent wanted to get rid of a known and other suspected union supporter employees, Respondent violated Section 8(a)(1) of the Act.

11. By threatening to send employees home when they complete their regular job functions instead of assigning them to another job function, as was the current practice, because the employees engaged in union activity, Respondent violated Section 8(a)(1) of the Act.

12. By threatening employees that nonunion supporter employees were watching a known union supporter to catch him doing something wrong, Respondent violated Section 8(a)(1) of the Act.

13. By unilaterally changing its policy or past practice of allowing employees to work 9, rather than 8 hours a day, without notifying and affording the Union an opportunity to bargain on the decision, Respondent violated Section 8(a)(1) and (5) of the Act.

14. By unilaterally contracting out and permitting supervisors to perform unit work of the laid-off employees without notifying the Union and affording it an opportunity to bargain on its decision, Respondent violated Section 8(a)(1) and (5) of the Act.

15. By failing to timely notify the Union and afford it an opportunity to bargain on its layoff, and policy changes on overtime and subcontracting unit work, Respondent violated Section 8(a)(1) and (5) of the Act.

16. By disciplining an employee by issuing him a written warning because he is a leading union supporter, Respondent violated Section 8(a)(1) and (3) of the Act.

17. By discriminatorily laying off employees Charles Hinchman, Randall Shingleton, Ernest Johnston, David McClure, Donald Detamora and Charles Malcolm, Respondent violated Section 8(a)(1) and (3) of the Act.

18. By failing and refusing to bargain with Oil Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of its employees in the appropriate unit, Respondent has violated Section 8(a)(1) and (5) of the Act.

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

[Recommended Order omitted from publication.]