

Special Mine Services, Inc. and Southern Illinois Laborers' District Council, Laborers' International Union of North America, AFL-CIO

Special Mine Services, Inc., and Smith's Machine and Tool Shop, Joint Employers and Southern Illinois Laborers' District Council, Laborers' International Union of North America, AFL-CIO. Cases 14-CA-21389 and 14-CA-21458

August 31, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On April 2, 1992, Administrative Law Judge William A. Pope, II issued the attached decision. The Respondent, Special Mine Services, Inc., filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

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

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

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

The judge's decision contains certain errors, which we correct below. These errors do not affect our results. In par. 14 of sec. II of the "Issues" section of his decision, the judge stated that "Randy Orlandini had sat in on employment interviews." We find that he meant "Rick Orlandini." In the fifth paragraph of sec. III of the same section, the date "July 10, 1990" should read "July 12, 1990." Finally, in the sixth paragraph of sec. IV of the same section, the judge stated that the date the Union filed exceptions to the Regional Director's Report on Challenged Ballots and Objections was "May 20, 1991." We find that date should read "May 29, 1991." With regard to this error, the Respondent contends that the judge inferred union animus by relying "heavily upon his erroneous finding that the exceptions were filed prior to the date when [the Respondent changed] its seniority policy from a plant-wide system to a department-wide system." We do not read the judge to have drawn this inference. In any event, we have not relied on any such inference in reaching our results. We have also added the standard injunctive provision to the Order and notice.

²The General Counsel excepts to the judge's failure to order the Respondent to reestablish and resume the connector work that it subcontracted for unlawful reasons. We find merit to this exception and shall require restoration of the status quo ante in this respect. The Respondent may introduce at compliance any evidence not available prior to the hearing bearing on the appropriateness of this portion of the remedy. See *Lear Siegler Inc.*, 295 NLRB 857, 860-862 (1989).

The judge found, and we agree, that the Respondent subcontracted its connector manufacturing work and laid off certain employees in violation of Section 8(a)(3) and (1) of the Act. The judge correctly analyzed the issue under the Board's holding in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In concluding that the General Counsel made a prima facie showing that the Respondent's actions were based on union animus, the judge found that the Respondent's presettlement conduct (i.e., conduct occurring before a settlement of other unfair labor practice charges in September 1990) evidenced "strong union animus." We agree. As stated by the judge, the Respondent's presettlement conduct consisted of "nearly classic examples" of unlawful surveillance, interrogation, and discriminatory layoffs and discharges of employees. This substantial evidence of union animus was properly considered by the judge and sheds considerable light on the Respondent's motivation in acting as it did in April, May, and June 1991.

The Respondent contends that its postsettlement conduct offers no basis for inferring that it acted from union animus. Like the judge, we find that it does provide that basis. We particularly emphasize the strong inference of antiunion motivation to be drawn from the fact that the Respondent's initial consideration of a plan to subcontract work, and its decision to do so, occurred in the second or third week of April 1991—*shortly after* the Union filed its petition for certification on March 8, 1991, and the parties entered into a March 26 Stipulated Election Agreement. Although the Respondent contends that it commenced a review of operating costs in December 1990, the Respondent's president and part owner, Les Hunstman, admitted that the Respondent began to consider subcontracting only after the Union's petition was filed.

Finally, the Respondent, in excepting to the judge's rejection of its rebuttal case, urges among other things that the judge substituted his business judgement for that of the Respondent. We disagree. The judge properly reviewed the Respondent's evidence to determine whether the Respondent established that it would have acted as it did in the absence of the union activity. In our view, the judge did not determine how the Respondent should conduct its business—only whether it met its burden under *Wright Line*. The Board is not required to accept self-serving declarations of motive. see *Shattuck Denn Mining Corp.*, 151 NLRB 1329 (1965), enfd. 362 F.2d 466 (9th Cir. 1966).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Special Mine Services, Inc., West Frankfort, Illinois, its officers, agents, suc-

cessors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(c).

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

2. Add the following as paragraph 2(a) and reletter subsequent paragraphs.

“(a) Reestablish and resume its connector manufacturing operation at its West Frankfort, Illinois facility consistent with the level and manner of connector operations that existed at that facility prior to the unlawful relocation of equipment and transfer of such work about May 4, 1991.”

3. Substitute the attached notice for that of the administrative law judge.

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT transfer or subcontract operations and effectively terminate our employees by placing them on indefinite layoff because of their actions in joining, supporting, or otherwise assisting a union for the purpose of collective bargaining or other mutual aid or protection.

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

WE WILL reestablish and resume our connector manufacturing operation at our West Frankfort, Illinois facility consistent with the level and manner of connector operations that existed at that facility prior to our unlawful relocation of equipment and transfer of such work on or about May 4, 1991.

WE WILL offer Ingram Morgan, Leslie Wood, Robert Dotson, Brent Wall, Fred Blades, Randy Orlandini, David Cain, George Kirk, Danny Burnett, and James Stratton immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice

to their seniority or any other rights or privileges previously enjoyed; and,

WE WILL make them whole for any losses they have incurred as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the unlawful layoffs of Ingram Morgan, Leslie Wood, Robert Dotson, Brent Wall, Fred Blades, Randy Orlandini, David Cain, George Kirk, Danny Burnett, and James Stratton, and notify them in writing that this has been done and that the layoffs will not be used against them in any way.

SPECIAL MINE SERVICES, INC.

Lucinda L. Flynn, Esq., for the General Counsel.

William W. Cody, Esq., of West Frankfort, Illinois, for the Respondent Special Mine Services, Inc.

Donald Smith, of Royalton, Illinois, for the Respondent Smith's Machine and Tool Shop.

DECISION

WILLIAM A. POPE, II, Administrative Law Judge. In an order consolidating cases, and a consolidated amended complaint,¹ filed on July 15, 1991, the Regional Director of Region 14 of the National Labor Relations Board (the Board) charged that Respondent Special Mine Services, Inc. (Special Mine Services), and Respondent Smith Machine and Tool Shop (Smith Machine and Tool) are joint employers of the employees of Respondent Smith Machine and Tool Shop, and that Respondent Special Mine Services, Inc., violated Section 8(a)(1) and (3), by laying off and refusing to reinstate certain of its employees, because they engaged in concerted activities for the purpose of collective bargaining and joined, assisted, or supported a union, and by ceasing production of certain types of connectors and subcontracting the work to Respondent Smith Machine and Tool Shop. The original charge in Case 14-CA-21389 was filed on May 3, 1991; the original charge in Case 14-CA-21458 was filed on June 12, 1991. Trial was held before Administrative Law Judge William A. Pope, II, from July 31 through August 2, 1991, in Benton, Illinois.²

Background

Special Mine Services, Inc. is a privately held corporation engaged in the manufacture, sale, and repair of mining supplies and equipment. Its business falls into four main categories: (1) repair of batteries used in underground mining operations; (2) manufacture and sale of electrical connectors used in mining operations; (3) rebuilding and repair of dam-

¹ The original complaint in Case 14-CA-21389 was filed on May 22, 1991.

² Donald Smith, who acknowledged that he is the owner of Smith Machine and Tool, was advised of his right to be represented by counsel of his choice, at his own expense, but elected to proceed in the hearing without counsel. He was afforded the opportunity to cross-examine witnesses, and present witnesses and other evidence on behalf of Smith Machine and Tool. He was also afforded the opportunity to make opening and closing statements and to file a written brief. He chose to take none of these actions.

aged electrical cable used in mining operations; and (4) retail sale of a line of mining supply products purchased for resale from other manufacturers and suppliers. Special Mine Services operates facilities in four locations. At its corporate headquarters in West Frankfort, Illinois, it maintains a warehouse, and manufactures connectors,³ repairs batteries and cables, and sells mining supplies. It also operates warehouses, sales offices, and battery repair facilities in Petersburg, Indiana, and Greenville, Kentucky, and a sales office in Toronto, Canada.

The owners of Special Mine Services are Les Huntsman, George Kee, and Jim Rickert, each of whom owns a one-third interest in the Company. Les Huntsman, who holds a degree in industrial engineering, worked for Anextor Cable Service Company from 1976 until September 1983,⁴ when he and George Kee started Special Mine Services and purchased the assets of Anextor Cable Service Company. Les Huntsman is the president and chief executive officer (CEO) of Special Mine Services. George Kee is vice president of the Company, and participates in the day-to-day operation of the Company, mainly in the area of sales.⁵

Respondent Special Mine Services admitted in its answer that Les Huntsman and George Kee, and two of the Company's foremen, Brett Kee and Rick Orlandini, are supervisors within the meaning of the Act. Brett Kee, who is the son of George Kee, is the foreman in charge of cable repair at Respondent's West Frankfort, Illinois facility. Rick Orlandini is foreman of the connector room and machine shop at Special Mine Services' West Frankfort facility.⁶

Smith Machine and Tool, a well-equipped machine shop located in Royalton, Illinois, is owned and operated by Donald Smith. Smith, who was employed by Special Mine Services as a machinist for a period of a little over a year during 1986 and 1987, has operated Smith Machine and Tool since approximately 1988. Smith Machine and Tool's primary business is fabricating parts and repairing equipment for coal mines. Since 1988, Donald Smith has fabricated races (a brass ring for ball bearings) for Special Mine Services. In May 1991, Smith agreed to make electrical connector parts for Special Mine Services. There is uncontroverted testimony that Smith sold a 20-percent interest in his connector business with Special Mine Services to Rick Orlandini for \$1000.

On July 25, 1990, the Southern Illinois Laborers District Council, Laborers International Union of North America (the Charging Party), filed with the Board an unfair labor practice charge, which was signed by Randy Mayhew, district organizer, charging that since on or about July 13, 1990, Special Mine Services had discriminated against employees Fred Blades and Danny Burnett by discharging them, and Brent Wall, John Natyshok, Les Woods, and Herb Armes by laying them off, in order to discourage them from joining and supporting the union and engaging in other concerted activities.

³ West Frankfort, Illinois, is the only facility at which Special Mine Services manufactures electrical connectors.

⁴ He started with Anextor Cable Service Company as manager of its machine shop, and advanced to manager of the company.

⁵ The record is silent as to the role of Jim Rickert, the remaining one-third owner of the Company, in the Company's day-to-day operations.

⁶ Rick Orlandini worked for Anextor Cable Service Company for 15 to 16 years before going to work for Special Mine Services when it purchased the assets of Anextor Cable Service Company.

That charge was subsequently settled by the parties on September 27, 1990.

On March 8, 1991, the Union filed a petition for certification as representative for collective-bargaining purposes of all employees of Special Mine Services employed at its West Frankfort, Illinois facility, except clerical and professional employees, guards, and supervisors.

On March 26, 1991, the Union and Special Mine Services entered into a Stipulated Election Agreement providing that a secret-ballot election would be held in the "Battery Repair Department at Employer's facility," on April 19, 1991. The appropriate collective-bargaining unit was described as:

All employees including battery repair, cable repair, connector room, machine shop, maintenance, and warehouse employed by the Employer at its West Frankfort, Illinois facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

The payroll period for eligibility was the period ending March 23, 1991.

On April 24, 1991, the Union filed⁷ objections to conduct affecting results of the election which was held on April 19, 1991. The included verification was signed by the following employees of Special Mine Services: Danny Burnett, Fred Blades, Les Wood, Randy Orlandini, and Jeff Kennerly. The Regional Director's report on challenged ballots and objections, order, and recommendation was issued on May 17, 1991.⁸ The Union filed its exceptions to Regional Director's report on challenged ballots and objections, orders, and recommendations on May 20, 1991. At the time of the hearing, the Union's exceptions were still pending before the Board.⁹

Issues

a. *Complaint.* The consolidated amended complaint alleges that between on or about April 26 and June 7, 1991, and continuing, Respondent Special Mine Services violated Section 8(a)(1) and (3) of the Act by laying off and refusing to reinstate a number of its employees because they joined, assisted, or supported the Union and engaged in concerted activities; and, on or about May 4, 1991, by subcontracting out unit work to Respondent Smith Machine and Tool. The employees laid off on or about April 26, 1991, were Ingram Morgan and Leslie Wood; the employees laid off on or about May 31, 1991, were Robert Dotson, Brent Wall, Fred Blades, and Randy Orlandini; and, the employees laid off on or about June 7, 1991, were David Cain, George Kirk, Danny Burnett, and James Stratton. The complaint further alleges that at all material times, Respondent Special Mine Services controlled the labor relations policy of Respondent Smith Machine and Tool and administered a common labor policy

⁷ The actual date of filing, according to the Regional Director's Report of May 17, 1991, was April 25.

⁸ The Regional Director's report states that the results of the election were 18 votes for the petitioner and 18 against, with 3 challenged ballots. The Regional Director approved the Union's withdrawal of its challenges to the three ballots, and ordered that the ballots be opened and counted. The Regional Director recommended that the Union's objections be overruled in their entirety.

⁹ According to counsel for the General Counsel's posthearing brief, a certification of results of election issued on September 12, 1991.

with Respondent Smith Machine and Tool for the employees of Smith Machine and Tool, and Respondent Special Mine Services and Respondent Smith Machine and Tool have been joint employers of the employees of Respondent Smith Machine and Tool. Through the actions of Respondent Special Mine Services, Respondent Smith Machine also violated Section 8(a)(1) and (3) of the Act.

b. *Answer.* In its answer to the consolidated amended complaint, as amended at the hearing, Respondent Special Mine Services admitted the following allegations in the complaint and denied all others:

- (1) Filing and service of the charges;
- (2) jurisdictional facts;
- (3) that the Union is a labor organization within the meaning of Section 2(2), (6), and (7) of the Act;
- (4) that Les Huntsman, George B. Kee, Rick Orlandini, and Brett Kee are supervisors and agents of Respondent Special Mine Services within the meaning of Section 2(11) and (13) of the Act;
- (5) that on or about April 26, 1991, it laid off employees Ingram Morgan and Leslie Wood;
- (6) that on or about May 31, 1991, it laid off employees Robert Dotson, Brent Wall, Fred Blades, and Randy Orlandini; and,
- (7) that on or about June 7, 1991, it laid off employees David Cain, George Kirk, Danny Burnett, and James Stratton.

In its answer to the consolidated amended complaint, Respondent Smith Machine and Tool admitted that Donald Smith is the owner of Respondent Smith Machine and Tool and an agent and supervisor of it within the meaning of Section 2(11) and (13) of the Act, the jurisdictional facts with respect to Respondent Special Mine Services, and the layoff of Special Mine Services employees, all as alleged in the complaint. It denied filing and service of the charge, jurisdictional facts with respect to it, that the Union is a labor organization within the meaning of the Act, and all other allegations of the complaint.

c. *General Counsel's Position.* As framed by the General Counsel, the issues in this case are whether Respondent Special Mine Services violated Section 8(a)(1) and (3) of the Act by laying off employees on April 25 and 26, 1991, May 31, 1991, and June 7, 1991, because of their union activities; and whether Respondent Special Mine Services and Respondent Smith Machine and Tool are joint employers, and as joint employers, violated Section 8(a)(1) and (3) of the act by transferring connector work from Respondent Special Mine Services to Respondent Smith Machine and Tool, thereby providing Special Mine Services with a pretextual justification for laying off four employees on May 31, 1991, and four more employees on June 7, 1991. It is General Counsel's position that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act,¹⁰ that Respondent Smith Machine and Tool is an employer engaged in commerce within the meaning of the Act, that Respondent Special Mine Services laid off 10 of its employees in violation of Section 8(a)(1) and (3) of the Act, and that Respond-

¹⁰ Special Mine Services amended its answer at the hearing to admit that the Charging Party Union is a labor organization within the meaning of the Act. In its answer, which was not amended during the hearing, Smith Machine and Tool denied that the Union is a labor organization within the meaning of the Act.

ent Special Mine Services and Respondent Smith Machine and Tool are joint employers, or in the alternative general contractor and subcontractor, and that they violated Section 8(a)(1) and (3) of the Act by transferring work from Respondent Special Mine Services to Respondent Smith Machine and Tool because of union activities by certain of Respondent Special Mine Services' employees.

d. *Position of Special Mine Services.* Respondent Special Mine Services argues that it did not violate the Act when it transferred work and laid off certain of its employees, as alleged in the consolidated amended complaint, and that Respondent Special Mine Services and Respondent Smith Machine and Tool are not joint employers.

Respondent Special Mine Services contends that General Counsel has failed to make a prima facie showing sufficient to support an inference that the subcontracting of its connector work was motivated by antiunion considerations. Respondent argues that its decisions to subcontract the connector work to Smith Machine and Tool and layoff certain of its employees were based on legitimate, nondiscriminatory business reasons, principally that its labor costs were too high and erratic, orders were down, and it had space and electrical service problems at its West Frankfort, Illinois facility, which it resolved by subcontracting the connector work and transferring the equipment used for that purpose to Respondent Smith Machine and Tool. Special Mine Services argues that it has met its burden of proof under the *Wright Line*¹¹ doctrine by showing that the transfer of work and layoffs were for substantial business reasons and would have taken place even in the absence of the alleged union activities of certain of its employees.

I.

Respondent Special Mine Services admitted in its answer, as amended, that the Charging Party Union is a labor organization with the meaning of Section 2(5) of the Act, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Smith Machine and Tool, however, denied both of these allegations in its answer, and the denials remain a part of the record. Smith Machine and Tool, represented by its owner, Donald Smith, who appeared pro se, however, offered no evidence on either issue.

The most recent constitution of the Laborers' International Union of North America, as amended on September 8-12, 1986, of which the Southern Illinois Laborers' District Council is a part, states that its purpose is to organize workers into bargaining units, and secure recognition by employers of the workers' right to engage in collective bargaining for the purpose of promoting or establishing appropriate wages, fringe benefits, training, hours of employment, and working conditions. This un rebutted evidence of the Union's labor organization status is sufficient to establish that it is a labor organization within the meaning of Section 2(5) of the Act. *Texas Institute for Rehabilitation*, 228 NLRB 578 (1977).

Invoices admitted into evidence show that between June 10 and July 3, 1991, Respondent Smith Machine and Tool shipped finished connectors valued at \$8,753.80 to Respondent Special Mine Services. As argued by General Counsel, projected over a 12-month period, at that rate Respondent

¹¹ 251 NLRB 1083 (1980).

Smith Machine and Tool would ship finished connectors valued at over \$100,000 to Respondent Special Mine Services for resale from its sales facilities in Illinois, Indiana, Kentucky, and Canada. On that evidence, I find that Respondent Smith Machine and Tool is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II.

General Counsel argues that Special Mine Services and Smith Machine and Tool are joint employers. The Board having asserted jurisdiction over an employer in a joint employer relationship if at least one of the employers meets the Board's jurisdictional standard, and Special Mine Services having admitted that it is an employer within the meaning of the Act,¹² General Counsel concludes that Smith Machine and Tool also is an employer within the meaning of the Act.

The Board has said that "it will find joint employer status where it can be shown that two or more employers 'co-determine those matters governing essential terms and conditions of employment.' *NLRB v. Browning-Ferris Industries*, 691 F.2d 1114, 1124 (3d Cir. 1982)." *Ryder System*, 280 NLRB 1024 (1986); *TLI, Inc.*, 271 NLRB 798 (1984);¹³ *C. R. Adams Trucking*, 262 NLRB 563 (1982); *Manpower Inc. of Shelby County*, 164 NLRB 287 (1967). In *Chesapeake Foods*, 287 NLRB 405, 407 (1987), the Board said:

[T]he appropriate test for ascertaining joint employer status is whether two separate entities share or codetermine "those matters governing the essential terms and conditions of employment" and to establish such status "there must be a showing that the [alleged joint] employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

In 373-381 *South Broadway Associates*, 304 NLRB 1108 (1991), the Board said that "it is well established that the commerce data of joint or single employers may appropriate be combined for jurisdictional purposes."

Donald Smith is the founder and owner of Smith Machine and Tool, which he started in 1988, after he left a year's employment as a machinist with Special Mine Services. He testified that he started with a little shop behind his house, then purchased the property in Royalton, Illinois, upon which Smith Machine and Tool is currently located, when it became available. He owns all of the equipment in the shop, except for certain equipment which he obtained from Special Mine Services in 1991. He testified that he accumulated the equipment over a period of years, and values it at \$150,000 to \$200,000. He owns a truck which he uses in his business to pick up and deliver parts. He stated that his net income from the shop for 1990 was \$30,000 to \$40,000.

¹² Respondent Special Mine Services admitted its status as an employer within the meaning of Sec. 2(2), (6), and (7) of the Act.

¹³ Citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), and *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984), the Board said in *TLI, Inc.*, that to find joint employer status, "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."

Smith operated Smith Machine and Tool for approximately a year before he did any work for Special Mine Services. His customers included several mines, for which he fabricated parts and repaired equipment, as well as other local businesses for which he performed machine shop work.

Sometime in 1990, Smith Machine and Tool began making ring races (for ball bearings) for Special Mine Services. Using different machining techniques, Donald Smith was able to make one more race than Special Mine Services could from the same amount of stock. Special Mine Services provided the stock, and Smith Machine and Tool charged only for labor. In March 1990, Donald Smith submitted a proposal to Special Mine Services to make a nylon sleeve and coupling used for weather proofing cables. He said he could make them cheaper than Special Mine Services could. He started making them, but stopped after he got equipment from Special Mine Services and started making connector parts in 1991.

Until he started making connector parts for Special Mine Services in 1991, Donald Smith operated Smith Machine and Tool by himself for the most part. For a time after leaving Special Mine Services and starting his own business, Smith employed a salesman who solicited work for him from various mines and from Special Mine Services. From approximately March to May 1990, he employed Ingram Morgan as a machinist.¹⁴ Morgan later worked for Special Mine Services from December 16, 1990, until he was laid off on April 25, 1991. Dana Brandon has worked part-time for Smith for 2 years, as a secretary. About the time he started making connectors for Special Mine Services, he hired his daughter-in-law, Gail D. Smith, to handle the payroll.

Donald Smith testified that Rick Orlandini, who is employed by Special Mine Services as foreman of the connector room-machine shop,¹⁵ lives in Royalton, Illinois, and that he has known him all of his life. He stated that Rick Orlandini first mentioned the possibility of going into business with him in August 1990. In April 1991, Orlandini asked him if he would be interested in making connector parts for Special Mine Services, and Smith replied that he would.¹⁶ In May 1991, Smith met with Orlandini and Les Huntsman, the president and financial officer, as well as one-third owner, of Special Mine Services, who showed him a "price book" listing the cost to Special Mine Services of making connector parts. Smith told Huntsman that he could make the parts cheaper, and agreed to Huntsman's proposal that Smith Machine and Tool manufacture connector parts for 5 percent

¹⁴ Ingram ended his employment by Donald Smith in a dispute over wages.

¹⁵ Rick Orlandini worked for Anextor Cable Service for 16 years, until its assets were purchased by Special Mine Services, and was a foreman when Anextor was sold. He started working for Special Mine Services in 1987, and 6 or 7 months later was made supervisor or foreman of the connector room and machine shop.

¹⁶ According to Orlandini, around mid-April to the third week of April 1991, he reported to Les Huntsman that Donald Smith was interested in making connector parts for Special Mine Services. Orlandini said that prior to that he had told Huntsman that he and his brother, Randy Orlandini, were interested in making the parts, but that he had abandoned the idea because he and his brother lacked the facilities and the equipment.

less than Special Mine Services' cost of manufacture.¹⁷ According to Donald Smith, his agreement with Special Mine Services was initially oral, but Les Huntsman and he later signed a letter of agreement (the date on which the letter of agreement was signed is shown as June 18, 1991, but the letter shows that it was prepared on May 4, 1991), which provides, as follows:

Special Mine Services agrees to provide Smith Machine and Tool Company such pieces of manufacturing equipment as may be required to manufacture molded electrical rubber connectors exclusively for Special Mine Services.

Smith Machine and Tool Company agrees to provide labor necessary to produce and maintain all manufacturing equipment necessary to manufacture in good working condition at Smith Machine and Tool Company's expense and will use this equipment to produce parts exclusively for Special Mine Services.

The price of all manufacture parts is to be determined and is agreed to be the cost to manufacture by Special Mine Services less 5%.

Smith sold Randy Orlandini a 20-percent interest in the connector business with Special Mine Services for \$1000, and hired Orlandini to act as his quality control supervisor at the rate of \$150 per week. Smith denied that taking Orlandini as a part-owner and quality control supervisor was part of his deal with Special Mine Services. Smith said he entered into the arrangement with Rick Orlandini because Orlandini would know whether the parts being made by Smith Machine and Tool were good or bad, something Donald Smith would not be able to ascertain. He said that he asked Rick Orlandini if "he would be my quality control man."

Smith stated that he used the \$1000 which he received from Orlandini as partial payment for an air compressor which he needed to operate the injection machine used in connector manufacturing operations.¹⁸ Smith testified that he also had to increase the electrical service to his building for connector manufacturing operations.

Beginning around June 1, 1991, Special Mine Services transferred equipment valued at \$25,000 to \$30,000 to Smith Machine and Tool, including a conveyer oven, injection machine, six vulcanizers, three tables, and molds which go with the injection machine, all of which are used in the manufacture of electrical connectors for Special Mine Services. Prior to June 1991, Smith received an automatic screw machine from Special Mine Services for use in making pins for connectors.¹⁹ Smith admitted that he does not pay anything to use the equipment.

¹⁷Smith testified that he did not actually know what Special Mine Services' costs for manufacturing connectors were when he entered into the oral agreement in May 1991, but he knew he could make them cheaper because his building was paid for, his overhead was lower, and he was not going to use as many employees. He said that he probably did not know at that time what his actual costs of manufacture would be.

¹⁸The air compressor was also useful for other work performed by Smith Machine and Tool.

¹⁹Smith stated that Special Mine Services had trouble putting the machine into operation, and as of the time of the hearing, it was not yet in service at Smith Machine and Tool.

The first employee hired by Smith to do connector manufacturing work was Randy Orlandini, Rick Orlandini's brother, who was hired on June 3, 1991. He had worked for Special Mine Services as an injection machine operator, making connector parts, until he was laid off on May 31, 1991. Randy Orlandini's starting pay at Smith Machine and Tool was \$8 per hour. Another former Special Mine Services employee experienced in use of the injection machine hired by Smith was Leslie Wood, who was hired on June 7, 1991. Wood had been laid off by Special Mine Services on April 26, 1991. While employed by Special Mine Services, Wood had been paid \$7 per hour, plus benefits, including medical insurance and vacation. As an employee of Smith Machine and Tool, he receives an hourly wage of \$7, with no benefits other than holiday pay, for doing the same type of work as he did for Special Mine Services. According to Donald Smith, Leslie Wood and Randy Orlandini are "more or less like group leaders," who train new employees.²⁰ Smith said that he pays Randy Orlandini and Leslie Wood more than other employees because they are acquainted with the work.

Other employees hired by Smith Machine and Tool to perform connector manufacturing operations were Michael L. Brayfield, hired on June 4, 1991, at \$4.50 per hour; Wesley Frain,²¹ hired on June 4, 1991, at \$4.50 per hour; Shawn Walker, hired on June 4, 1991, at \$4.50 per hour; and, Jesse D. Yates, hired on June 4, 1991, at \$4.50 per hour, and let go on July 29, 1991, because of "poor production, too many mistakes, and bad parts."²²

Smith hired Brayfield, Frain, Walker, and Yates through a subsidized job training program operated by the Farmer's Union.²³ Under that program, Farmer's Union paid one-half of the wages of the trainees for 6 months, after which the employer would have to pay all of the employees' wages. Smith stated that he was able to save money through the arrangement.

Smith admitted that Randy Orlandini had sat in on employment interviews with Brayfield, Frain, Walker, and Yates, but not on Smith's interviews with Randy Orlandini and Leslie Wood. Smith said that he did not ask Orlandini to sit in on the interviews, but let him because he is a part-owner. Smith stated, however, that he may have asked Rick Orlandini if Randy Orlandini would be interested in working for "us," because Rick Orlandini was familiar with the work. According to Smith, Randy Orlandini filed an application and was interviewed before production started. He said there was no doubt that he would hire Randy Orlandini, because of his familiarity with the work.

Rick Orlandini acknowledged that Donald Smith may have asked him if he cared whether his brother, Randy Orlandini, and Leslie Wood went to work for Smith Machine and Tool.

²⁰Donald Smith testified that he had observed operation of the machinery used in connector manufacturing, but had not done the work himself. He described the operations as "not very sophisticated," and something which could be learned very quickly.

²¹Frain apparently had worked for Donald Smith before on an intermittent, part-time basis, when Smith needed help on a big job.

²²There was testimony that Donald Smith also terminated the employment of Michael Brayfield for unacceptable work.

²³Smith said he had first contacted Farmer's Union about the hiring people for the training program about a year before he started doing work for Special Mine Services. He contacted them again when he received the injection machine from Special Mine Services.

Rick Orlandini stated that he told Smith that was up to him, and he did not care. Rick Orlandini also said that he had probably said “yes” when Smith asked him after the interviews of the other four employees if he thought Smith had hired “a good bunch of employees.”

Les Huntsman, the president of Special Mine Services, denied that he had anything to do with hiring of personnel by Donald Smith, or setting the employees’ wage rates.

Smith stated that applications for employment by Smith Machine and Tool are submitted to him or his secretary. He said that employees ask him when they want time off. He said that he makes the decisions on who to hire or who to fire, what benefits the employees will get, and what their hours will be. According to Smith, he set the employees’ work hours from 7 a.m. to 3:30 p.m., after he asked Randy Orlandini what the hours should be and Orlandini said those hours would be fine with him.

Les Wood, after being laid off by Special Mine Services, filed an employment application with Donald Smith, and was interviewed by Smith, who told him what his rate of pay would be. Wood stated that he gets instructions each day concerning what work to do in a note left by Rick Orlandini. He acknowledged that he goes to Smith if he wants time off. Wood said that he complained to Rick Orlandini about wanting time off and changing the work hours, but he never complained to Orlandini about his pay. He also complained to Orlandini about problems with the injection machine and the people he worked with. On the other hand, Wood said that he told Donald Smith that Smith Machine and Tool made a better product than Special Mine Services, and had a higher production rate.

Rick Orlandini stated that he brought it to Donald Smith’s attention that the two employees fired by Smith (Brayfield and Yates) had produced bad parts. Donald Smith, however, said that he had made the decision to fire Brayfield and Yates, and Orlandini did not learn of it until later during the day Smith fired them.

As described by Donald Smith and Rick Orlandini, Orlandini, who lives in Royalton, the small town in which Smith Machine and Tool is located, stops by Smith Machine and Tool in the morning, on his way to his job with Special Mine Services, and turns on the machines used to make connectors so that they will be warmed up and ready to use when Smith’s employees report for work.²⁴ He stops at Smith Machine and Tool each evening to inspect the production for the day, and leaves a note for the employees instructing them what parts to make for Special Mine Services the next day. Donald Smith stated that sometimes his secretary brings orders back from Special Mine Services after delivering completed parts. When that happens, Donald Smith posts the orders on the bulletin board.

Smith agreed that Rick Orlandini told him which parts were bad, but he did not instruct Smith to warn the employees or take other action. According to Smith, Orlandini just told him that the parts were bad, and let Smith take it from there. Smith stated that he also received reports from Randy

Orlandini and Leslie Wood when the other employees’ work was bad.

Orlandini said that he may have instructed Donald Smith to tell an employee he need to be shown how to make a part correctly, and on one occasion, he told Smith to tell an employee that he had put the wrong color code on a pump. Orlandini said that Les Huntsman was aware of that incident, and that Les Huntsman expected him to make sure the parts produced at Smith Machine and Tool were manufactured correctly.

On this evidence, I conclude that Special Mine Services and Smith Machine and Tool are not joint employers. The test to be applied in making such a determination is whether the two employers share or codetermine “those matters governing essential terms and conditions of employment.” *Chesapeake Foods*, supra. Applying that test, I find that it is clear from the record that Special Mine Services does not share or codetermine the essential terms and conditions of employment of Smith Machine and Tool’s employees engaged in making connector parts for Special Mine Services. It is clear that Special Mine Services’ only interest is in receiving completed connectors for the agreed price. Special Mine Services appears to have no interest in who or how many workers Smith Machine and Tool, or how much Smith Machine and Tool’s employees are paid, what benefits they receive, or what the other terms and conditions of their employment are. Therefore, it is clear that Special Mine Services does not have sufficient indicia of control over those employees to support a joint employer finding.

The contracting out, or subcontracting, by Special Mine Services of the manufacture of connectors to Smith Machine and Tool was an arm’s-length transaction between the two employers, insofar as Smith Machine and Tool is concerned. Whether for good or bad reasons insofar as the National Labor Relations Act is concerned, Les Huntsman, concluded that it was to Special Mine Services’ advantage to subcontract the manufacture of connectors. But, whatever Huntsman’s reasons may have been, insofar as Donald Smith was concerned, it appears that it was strictly a business arrangement from which he expected to make a profit.

Rick Orlandini, foreman of Special Mine Services’ connector room and machine shop, who supervised the manufacture of connectors by Special Mine Services, was aware of Huntsman’s interest in subcontracting connector manufacturing operations, and told Huntsman that he thought that he and his brother, Randy Orlandini, could do the work. Rick Orlandini stated that after looking into the possibility further, he abandoned the idea because he lacked the necessary equipment and facilities. Upon determining that he could not put together a feasible proposal to manufacture connectors for Special Mine Services, Rick Orlandini, acting apparently on his own initiative, contacted Donald Smith, who was already successfully performing machining work for Special Mine Services, and ascertained from Smith that he would be interested in making connectors for Special Mine Services. Orlandini communicated Smith’s interest to Les Huntsman, and from there on the arrangement was concluded between Huntsman and Smith.

Huntsman proposed to Smith that Smith Machine and Tool make connectors for 5 percent less than what Huntsman, alone, determined Special Mine Services’ cost of manufacturing the same items to be. The agreement which Huntsman

²⁴ Otherwise, Smith said, he would have to get up at 5:30 a.m. or 6 a.m. to do it, because the machines have to warm up for an hour and if they are not turned on until the employees come in at 7 a.m., they would have to wait until 8 a.m. to start work.

concluded with Donald Smith allowed Smith to use equipment, which Special Mine Services already had, and raw materials which it provided, solely for the purpose manufacturing connector parts for Special Mine Services. Maintenance of the equipment and the cost of electricity to run the equipment were Smith Machine and Tool's responsibility. The venture posed little risk to Donald Smith and Smith Machine and Tool. He was not required to make any capital investment of his own to get the connector manufacturing business (except possibly the cost of an air compressor, which was largely paid by Rick Orlandini, in return for a share in the connector manufacturing business). His agreement with Special Mine Services was not for any set period, and like Special Mine Services, he could terminate it at will. It was a safe assumption by Donald Smith that he would be able to produce connectors for Special Mine Services at a cost substantially below Special Mine Services' cost. As noted, the arrangement required no capital investment by him for machinery or raw materials. His labor costs could be expected to be substantially lower than those of Special Mine Services for the same work. Smith hired fewer employees than Special Mine Services had used, and paid them less in wages and benefits. Where he paid the same hourly rate to two former employees of Special Mine Services, he did not pay them the same benefits, such as vacations and health insurance, as Special Mine Services had paid. Four of the employees Smith initially hired and used were hired at a lower wage of \$4.50, one-half of which was paid by a job training program, and he did not provide them with any benefits, such as vacations or health insurance. Considering these factors, it is apparent that Smith Machine and Tool's labor costs would be lower than those of Special Mine Services for hiring the same employees.

Although a foreman for Special Mine Services, Rick Orlandini was not part of the upper management of the Company. Management decisions and policy were clearly made and established by Les Huntsman, possibly with input and coordination with his two partners. In suggesting Donald Smith to Huntsman, Orlandini acted on his own, for, as it turned out, his own monetary gain. It is not unreasonable to conclude that in return for suggesting Smith's name to Huntsman, Donald Smith allowed Rick Orlandini to buy a 20-percent interest in the connector business for the relatively nominal sum of \$1000, and agreed to pay Orlandini \$150 per week to act as quality control inspector. The venture was a purely private one between Randy Orlandini and Donald Smith. While selling Rick Orlandini a 20-percent interest in the connector business and paying him a salary of \$150 per week for his services as quality control inspector could be construed as something in the nature of a kickback to Orlandini, there is no evidence suggesting that Les Huntsman was part of the arrangement or had required Donald Smith to sell Orlandini an interest in the business or pay him a weekly salary as quality control inspector. It was, in short, a private business arrangement between Orlandini and Smith.

The potential for a conflict of interest with his full-time employment with Special Mine Services is evident in this situation, but there is nothing in the record indicating that Les Huntsman, and Special Mine Services, were unaware of Orlandini's financial interest in the manufacture of connectors by Smith Machine and Tool. Indeed, there is evidence that Les Huntsman knew of the arrangement, and expected

Orlandini to inspect the product manufactured by Smith Machine and Tool to ensure that the connectors were made properly. There is no evidence required that Orlandini be given an interest in Donald Smith's business or that he be paid by Smith to act as quality control inspector.

The essential terms and conditions of employment by Smith Machine and Tool of employees involved in manufacturing connectors were set by Donald Smith. Although Rick Orlandini, a 20-percent owner of Smith Machine and Tool's connector business, was present when Smith interviewed four of the employees hired by Smith Machine and Tool to do connector work, his presence was essential. It appears from the record that the decisions concerning who would be hired by Smith Machine and Tool were made by Smith, and concurred in after the fact by Orlandini. There is no evidence that Orlandini played any role other than an advisory one in the hiring of employees. There is, moreover, no evidence that he played any significant role in setting wages, benefits, work hours, or other terms and conditions of employment for the six employees hired by Smith Machine and Tool to make connectors for Special Mine Services.

Neither is there any evidence that Orlandini played any significant part in discharge of employees by Donald Smith. Although he inspected connectors made by Smith Machine and Tool employees, and rejected some which were not made properly, there is no evidence that Orlandini did anything more than report the results of his quality control inspections to Donald Smith. He left it up to Smith to determine what to do about unacceptable quality work.

To the extent that Rick Orlandini had any part in the management of connector manufacturing operations by Smith Machine and Tool, he acted out a personal financial interest in the operations, as 20-percent owner of Smith Machine and Tool's connector business and as a paid quality control inspector, a function for which he was paid \$150 per week by Smith Machine and Tool to perform. There is no evidence that Rick Orlandini acted in the interest of or at the direction of Special Mine Services. His actions were motivated by personal concerns, partially for personal economic gain, and partially to protect his own full-time employment by Special Mine Services by making sure that the connectors manufactured by Smith Machine and Tool, which he had recommended to Huntsman of Special Mine Services, were of acceptable quality.

The evidence is insufficient to establish that Special Mine Services had any interest in or control over setting the terms and conditions of employment by Smith Machine and Tool for its employees involved in making connectors for Special Mine Services. The price which Special Mine Services agreed to pay Smith Machine and Tool for connectors was set in advance by agreement. The price Special Mine Services was entirely independent of Smith Machine and Tool's labor and other costs. It was immaterial to Special Mine Services who Smith Machine and Tool hired or fired, or what the employees were paid, or what the other terms and conditions of their employment were. Not only is there an absence of any evidence that Special Mine Services had any interest in the essential terms and conditions of Smith Machine and Tool's employees, neither is there any evidence that Special Mine Services, or any of its management, attempted to or actually did exercise any control over those employees or the terms and conditions of their employment.

In these circumstances, I find that Respondent Special Mine Services and Respondent Smith Machine and Tool are not joint employers of Smith Machine and Tool's employees.

III.

On the morning of April 6, 1990, Fred Blades and Danny L. Burnett, two employees of Special Mine Services at its West Frankfort, Illinois facility, were told by Rick Orlandini to go to Les Huntsman's office. Also present was George Kee, vice president of Special Mine Services and a one-third owner of the corporation. Huntsman told them that on the previous Friday, he had received a telephone call in which the caller related that Blades and Burnett had been heard talking at a party or gathering about starting a union and their feelings that a union was needed. Huntsman told them that he had received the same information on Saturday from an employee who had stopped by his house.

Before summoning Blades and Burnett to his office on April 6, Huntsman testified, he discussed the information he had received about their union sympathies with George Kee. According to Huntsman, he and George Kee knew they could not threaten or coerce employees because of their union activities, or take away their jobs, but, he said, they did not know whether they could talk to them about their union involvement. He said they agreed between themselves that although they did not know whether they were permitted to talk to employees about their union involvement, they would talk to Burnett and Blades anyway, because it was important to them to find out if the two employees had been thinking about a union, and if so, what shortcomings in their employment caused them to think that way.

Huntsman acknowledged that he told Burnett and Blades that he would like to know if they were involved in union activities, and related the information he had received the preceding Friday and Saturday. Both of the employees responded "no" to the question. Huntsman told them that was fine, because he did not think that "we need a union here," and he would take their word.

Burnett's testimony, which I find credible, differed from Huntsman's only in the degree of union animus exhibited by Huntsman during the meeting on April 6, 1990. Burnett testified that Huntsman said he did not like unions and if there was a union, things would change dramatically. He told them if they did not like the way he and George Kee ran things, they "could hit the door." Huntsman asked them if they had any problems. Fred Blades, whose testimony I also find credible, gave essentially similar testimony concerning Huntsman's remarks. Blades and Burnett said they denied any union involvement.

On or about July 10, 1990, Randall J. Mayhew, a district organizer for the Southern Illinois Laborers' District Council, met with a group of employees of Special Mine Services at the Union's district office in West Frankfort, Illinois, located approximately 3 miles from Special Mine Services' West Frankfort facility.²⁵ Special Mine Services employees who attended the meeting included John Natyshok, Steve Reiger, Brent Wall, Leslie Wood, Fred Blades, Danny Burnett, and Ron Innis. At the meeting, Mayhew passed out union pref-

erence cards, some of which were signed by Special Mine Services employees and returned on the meeting to Mayhew.

A total of 16 signed cards were returned to Mayhew. Some of them were turned in by the signers to Mayhew at the meeting on July 12, 1990, others were turned in later through a union organizing committee. Cards signed by Fred W. Blades, Danny Burnett, Brent A. Wall, and Ronald E. Innis were turned in to Mayhew at the meeting on July 12, 1990.

Danny L. Burnett testified that he drove his personal vehicle to the meeting at the Union's office. He stated that while he was at the Union's office, he saw George Kee, one of the owners of Special Mine Services, drive by in his Lincoln. The next day, July 13, 1990, Burnett passed out union cards in Special Mine Services' parking lot. Fred Blades also attended the July 12, 1990, meeting. He, too, said that he saw George Kee drive by in front of the Union's office. Brent Wall, also an employee of Special Mine Services who attended the July 12, 1990, meeting, saw Brett Kee, a Special Mine Services foreman, and the son of George Kee, driving in the vicinity of the Union's office. The next day, July 13, Brett Kee asked him, "How was the union meeting?"

Sometime after lunch on July 13, 1990, the day following the union meeting, Les Huntsman held a meeting with all of the employees of Special Mine Services, including salesmen and foremen. Huntsman first asked who was spokesman for the group. When he received no answer to that question, he asked if anyone had any problems. That question also went unanswered. Huntsman said that he had problems. He told the employees he had been good to them, and that they would not find a better employer. He said that there would be drastic changes that afternoon.

Later that afternoon, Huntsman laid off four employees and terminated two employees. At about 3 p.m. that afternoon, Huntsman summoned six employees to his office. Danny L. Burnett testified that Huntsman said that "Due to slow mine conditions, I'm going to have to lay you guys off," and he also said, "We'll let the guys with least seniority go first." Huntsman laid off Brent Wall, John Natyshok, Herb Armes, and Leslie Wood. After those four employees were given their paychecks by George Kee and were dismissed, Huntsman told Danny L. Burnett and Fred Blades that they were fired. Of the six employees, only Herb Armes had not attended the union meeting on July 12, 1990, and signed a union preference card.

Danny L. Burnett testified that Huntsman said, "You two guys are a different story. You two guys are fired." When Burnett asked for an explanation, Huntsman said that they had lied in April about contacting the Union. When Blades denied that they had contacted the Union, Huntsman said, "That's bullshit." George Kee said they knew it for a fact. Huntsman said that he could no longer trust them, and he was afraid they would sabotage the connectors.

In his testimony, Les Huntsman admitted that after lunch on July 13, 1990, he told Rick Orlandini and the other foremen to get the employees together. He admitted that he asked the assembled employees who their spokesman was and whether they had any problems. He said that he told them something was bothering him, and made a speech about the benefits the Company provided them without any negotiation. He said that the company gave the benefits it could afford. At the end of the meeting, he said that some changes

²⁵ Mayhew testified that he was first contacted by Special Mine Services' employees on or about July 10, 1990.

would be made that afternoon. Later that afternoon, Huntsman said, four employees were laid off and two employees were terminated. Between 3 and 3:30 p.m., he instructed Rick Orlandini to send in the five out of the six who worked in his department, and he instructed Brett Kee, also a foreman, to send in the one employee of the six who worked in his department.

Huntsman testified that the reason for the layoffs was that work orders and sales were down and inventory was up. As his reason for firing Blades and Burnett, Huntsman said that he could not trust them and feared that would sabotage connectors or equipment. He said that they lied to him, and he could not trust someone who does not tell the truth. He denied that he terminated them because of their union activities. He explained that on the morning of July 13, 1990, George Kee, Brett Kee, and Jim Short told him that Blades and Burnett, and some others, not identified, had been at a union meeting on July 12. Huntsman said that he and Rick Orlandini had concluded the meet must have involved formation of a union. He admitted that he said, "bullshit" when Burnett and Blades denied on July 12 that they were involved in union activities.

Danny L. Burnett and Fred Blades returned to work for Special Mine Services on September 4, 1990. Les Wood was recalled 2 days after he was laid off, and Brent Wall was recalled on August 8, 1990.

On July 25, 1990, the Union filed an unfair labor practice charge against Special Mine Services, alleging that employee Fred Blades and Danny Burnett were discharged and Brent Wall, John Natyshok, Les Wood, and Herb Armes were laid off because of their union activities. The charge was resolved by agreement on September 27, 1990.

The General Counsel argues that even though the events of April and July 1990 were resolved by agreement, they can be used to show that knowledge and union animus were motives in the layoffs of April, May, and June 1991. In support of this proposition, General Counsel cites *Host International*, 290 NLRB 442 (1988); *Lawyer's Cooperative Publishing Co.*, 273 NLRB 129, 130 fn. 4 (1984); *Steve's Sash Co.*, 164 NLRB 468, 476 (1976).

Respondent Special Mine Services, citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978); *Ventura Coastal Corp.*, 264 NLRB 291 (1982); and *Leeward Nursing Home*, 278 NLRB 1058 (1986), strongly objects to introduction evidence of allegations of discriminatory conduct occurring prior to the September 27, 1990 settlement. Special Mine Services contends that the alleged unlawful conduct has been remedied, and, furthermore is stale and too remote, and moves to strike the testimony.

Respondent Special Mine Services' actions constitute nearly classic examples of unlawful surveillance, interrogation, and discriminatory layoffs and discharges of employees because they engaged in protected union activities, all in violation of Section 8(a)(1) and (3) of the Act. These actions, undertaken by Special Mine Services' president and chief executive officer, and its vice president, clearly demonstrate strong union animus on the part of Special Mine Services' top management, and amounted to nothing less than an attempt to frighten and intimidate Special Mine Services' remaining employees into abandoning any further union activities, by making an example of the six employees who were laid off or discharged, all but one of whom had attended a

union meeting the night before and had signed union preference cards. The threatening message being sent by Huntsman and Vice President Kee was anything but subtle, and was one which the employees could hardly miss.

The fact that Respondent Special Mine Services' July 1990 conduct was the subject of a settlement agreement, and is not alleged in the complaint to be violations of the Act for which a remedial order is being sought, does not make the conduct inadmissible for any purpose. As stated by the Board in *Host International*, supra, 290 NLRB at 442:²⁶

[W]e agree with the judge that the Respondent's presettlement conduct may properly be considered as background evidence to establish the motive for Respondent's postsettlement conduct in this case. Thus although the 1981 discharges of Rizzo and Sarubbi cannot be made the basis of a remedial order because of the settlement, the events surrounding those discharges can be used to shed light on the Respondent's reasons for refusing to hire them in 1985. We also agree with the judge's finding that the Respondent's refusal to hire Rizzo and Sarubbi in 1985 was not simply the natural result of their original discharges, but rather was a new and independent act of discrimination that occurred after the settlement and, therefore, could be litigated.

Respondent Special Mine Services' reliance upon the Board's holding in *Hollywood Roosevelt Hotel Co.*, supra, is misplaced. In that case, the Board noted that there are exceptions to the "general rule that a settlement agreement with which the Parties have complied bars subsequent litigation of presettlement conduct alleged to constitute unfair labor practices," and went on to hold that the case before it did not fall within any of the exceptions. Unlike the instant case, in that case a remedial order was sought concerning presettlement conduct on grounds that the settlement should be set aside.

Here, in contrast, the General Counsel does not seek to set aside the settlement, and the presettlement conduct of Respondent Special Mine Services was not litigated as the basis for a remedial order. Rather, the presettlement conduct was offered as background evidence to establish that union animus motivated its new and independent postsettlement conduct, which is alleged to be the basis for a remedial order. The postsettlement permanent layoffs of some of the same employees laid off or discharged in the presettlement actions are alleged to be new and independent acts of discrimination which occurred after the settlement. I find this to be a proper use of evidence of presettlement conduct.

As background evidence of union animus, I find the evidence of Respondent Special Mine Services' presettlement conduct to be neither too remote or stale. Respondent's actions in laying off or discharging its employees on July 13, 1990, did not terminate the Union's activities at Respondent's plant nor did it prompt all of those employees who had expressed an interest in or preference for the Union to withdraw their support. Further, the settlement did not take place

²⁶ Similar language may be found in the Board's decision in *Lawyer's Cooperative Publishing Co.*, supra, also cited by counsel for the General Counsel.

until September 27, 1990, and on March 8, 1991,²⁷ the Union filed a petition for certification, which led to an election and further objections and exceptions by the Union. Clearly, the union activities among Respondent Special Mine Services employees at its West Frankfort facility, which were first reported to Les Huntsman in April 1990, and were confirmed by unlawful surveillance on July 13, 1990, continued unabated, and resulted in an election, followed by objections and exceptions, and alleged new and independent postsettlement violations of the Act, which are the basis for this case and the remedial order which General Counsel seeks.

Respondent Special Mine Services' motion to strike is denied.

IV.

General Counsel contends that Respondent Special Mine Services violated Section 8(a)(3) and (1) by laying off 10 employees between April and June 1991, because of its employees' union activities, and by transferring or subcontracting its connector manufacturing work to Smith Machine and Tool because of union activities by its employees.

The General Counsel has the initial burden of establishing a prima facie case that an employee was discharged or laid off by his employer because of union animus. *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As part of the prima facie case, the General Counsel must prove that the employee engaged in union or other protected activity, that the employer had knowledge of the employee's union or other protected activity, and that the employee was discharged or laid off from his employment because of union animus or other unlawful motive, in violation of Section 8(a)(3). Inference of unlawful discrimination against an employee may be drawn from an employer's hostility toward the union, and coincidence between the employee's union activities and his discharge. *Lemon Drop Inn v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985). Union animus can be inferred from circumstantial evidence. *Abbey's Transportation Services v. NLRB*, 837 F.2d 575 (2d Cir. 1988). Unlawful motivation may be inferred from the timing of an employer's action. *Lemon Drop Inn v. NLRB*, supra. Another factor from which unlawful motivation may be inferred is the pretextual nature of an employer's asserted reasons for his actions. *T.M.I.*, 306 NLRB 499 (1992); *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986). Where there is a mass layoff to discourage union activity, it is not necessary for the General Counsel to prove the employer's knowledge of a specific employee's opinion as to the union. *Ballou Brick Co. v. NLRB*, 798 F.2d 339 (8th Cir. 1986). Once the General Counsel has met his burden of establishing a prima facie case of discharge or other discrimination because of union animus, the burden then shifts to the employer to show as an affirmative defense that the employee would have been discharged or laid off regardless of his union activity. *Wright Line*, supra.

The Board has found that discriminatory relocation of work and discriminatory subcontracting violate Section 8(a)(3) when motivated by union animus. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

²⁷ It appears that the Union declined Respondent Special Mine Services' suggestion in the interim that an election be held.

There can be no doubt that Respondent Special Mine Services was aware of union activity by its employees at its West Frankfort facility by July 12, 1990, at the latest, and probably as early as the first week of April 1990.²⁸ On July 12, 1990, its vice president, George Kee, and a supervisor, Brett Kee, unlawfully surveilled a union meeting attended by a number of Special Mine Services employees, including Danny Burnett and Fred Blades. The next day, President Huntsman, clearly upset by discovery that some of his employees had attended a union meeting, threatened his assembled employees that there would be changes that afternoon. Later that afternoon, he made good on that threat by laying off a number of employees and discharging Burnett and Blades, ostensibly because they were untruthful when they denied being involved in union activities in April 1990, when he had unlawfully interrogated them. These precipitous actions could have no purpose other than to eliminate the two employees identified as union supporters, and discourage the remaining employees from supporting the union. Huntsman's actions on July 13, 1990, clearly demonstrate union animus on his part and by Respondent Special Mine Services.

Respondent Special Mine Services efforts on July 13, 1990, to suppress union activity failed, however. The Union filed an unfair labor practice charge over the discharges, and the Respondent reemployed Burnett and Blades as part of a settlement of that charge, in September 1990. The Union continued its efforts to organize Special Mine Services' employees, and on March 8, 1991, petitioned for certification as collective-bargaining representative of Respondent Special Mine Services' employees doing battery repair, cable repair, connector room, machine shop, maintenance, and warehouse work at Respondent's West Frankfort facility. On March 26, 1991, the Union and Special Mine Services entered into a Stipulated Election Agreement providing for an election to be held on April 19, 1991.

The election resulted in a tie,²⁹ with three challenged ballots. On or about April 24, 1991, the Union filed "Objections to the Conduct of the Election." Respondent's employees Danny Burnett, Fred Blades, Les Wood, Randy Orlandini, and Jeff Kennerly signed the verification which was part of the pleading. The Union's objections centered on allegedly "false and coercive assertions" made by Les Huntsman before the election. On May 6, 1991, the Union withdrew its challenges to three of the ballots. On May 17, 1991, the Regional Director for Region 14 issued the "Regional Director's Report on Challenged Ballots and Objections, Order, and Recommendations," approving the Union's withdrawal request and recommending that the Union's objections be overruled in their entirety, and ordering that the ballots which had been challenged be opened and counted. Subsequently, on May 20, 1991, the Union filed exceptions to the Director's Report. A "Certification of Results of Election" was issued after the trial of this case, on September 12, 1991.³⁰

²⁸ As noted earlier, as early as April 6, 1990, Huntsman had interrogated two of his employees, Fred Blades and Danny Burnett, about whether they had been engaging in union activities.

²⁹ There were 18 votes for the petitioner, 18 votes for the Company.

³⁰ The certification, which is referred to in General Counsel's brief, is not a part of the record.

In a notice to its employees, dated May 24, 1991, which was posted at Respondent Special Mine Services' West Frankfort facility, Respondent announced that it was adopting a layoff policy providing that layoffs "are to be made on the basis of seniority hire date of the employee Department," with the last person hired in the department to be laid off first. According to the notice, the departments at Respondent's West Frankfort facility were battery repair, cable repair and maintenance, connector room, machine shop, and warehouse. Where a temporary layoff was caused by a temporary condition, temporary assignments to other departments could be made without regard to seniority. The notice further provided that an employee with special training or skills could be retained out of seniority order, and employees laid off for a period of up to 6 months would be considered for recall to their former department in the order of the person laid off most recently being recalled first. No reasons were given to explain to the employees why Respondent was changing its layoff policy from plantwide seniority to department seniority.³¹

On April 25 and 26, 1991, Respondent laid off two of its employees, Ingram Morgan and Leslie Wood, both of whom were employed in the connector room. According to a seniority list dated May 24, 1991, prepared by Respondent, Morgan Ingram was the least senior employee in the connector room, and Leslie Wood was next to least senior.³² It also appears from the seniority list that they were the two least senior employees on a plantwide basis.

On May 31, 1991, Respondent laid off connector room employees Robert Dotson, Fred Blades, and Randy Orlandini, and machine shop employee Brent Wall. According to the seniority list prepared by Respondent, all four were the least senior employees in their departments. Fred Blades and Randy Orlandini were not the least senior employees on a plantwide basis.

On June 7, 1991, Respondent laid off connector room employees David Cain, George Kirk, and Danny Burnett, and machine shop employee James Stratton. The four employees were the least senior employees remaining in their departments. They were not the least senior on a plantwide basis.

Prior to the series of 3 layoffs, there were 12 employees in the connector room and 9 employees in the machine shop. The layoffs reduced the employee complement in the connector room to four employees and the employee complement in the machine shop to seven employees.

Using the department seniority layoff system adopted by Respondent on May 24, 1991, in order to reach Fred Blades, one of the two employees it had unsuccessfully tried to dis-

charge on July 13, 1990, on the connector room seniority list, it was necessary to first layoff Morgan Ingram, Leslie Wood, and Robert Dotson, which Respondent did. In order to reach Danny Burnett, the second employee Respondent had unsuccessfully tried to discharge on July 13, 1990, on the connector room seniority list, after Fred Blades was laid off, it was first necessary to lay off Randy Orlandini, David Cain, and George Kirk, which Respondent also did. Thus, Danny Burnett, with a hire date of July 1, 1987, was the last, and most senior employee in the connector room to be laid off. By means of the layoffs in April, May, and June 1991, Respondent for the second time removed Burnett and Blades from its payroll, as well as three other known union supporters, Ingram Morgan,³³ Leslie Wood,³⁴ and Randy Orlandini, the latter two having signed the Union's objections to the conduct of the election filed on April 24, 1991.³⁵

An inference that Respondent was motivated by union animus in the layoffs during April, May, and June 1991, may be drawn from Respondent's prior unsuccessful effort to discharge Blades and Burnett because of union animus and union activities by its employees, and its continued opposition to the Union during the period leading up to the April 19, 1991 election. A further inference of union animus can be drawn from the coincidence between the failure of the Union to win a majority in the election of April 19, 1991, and the apparent favorable outcome of the election to the Respondent, and the layoffs which began less than a week after the election. The timing of the layoff policy changes, subcontracting out of plant work, and layoffs, all of which occurred rapidly over a period of less than 2 months following the April 1991 election, supports an inference that the strong union animus displayed by Respondent Special Mine Services during the period from April to July 1990, continued unabated through the election on April 19, 1991,³⁶ and motivated its postelection actions.

It is apparent from the results of the election, the Union's withdrawal of challenges to three ballots, and the Regional Director's recommended Order finding no reason to set aside the election, that the Respondent, which had actively opposed the Union in the election, emerged from the election in a much stronger position than the Union. In the circumstances, the Respondent could reasonably conclude that when the three ballots challenged unsuccessfully by the Union were counted, the Respondent might very well win the election. Further, even if the Board were to reverse some or all of the Regional Director's findings and recommendations

³¹ The layoff notice states that "We have tried to adopt a policy that is both fair and allows the company to operate efficiently," but no reasons are given to explain why the Respondent found it necessary to change the policy previously in effect.

³² Morgan testified that three other connector room employees had less seniority than he. It appears that two of the three employees, Mike Campbell and Bob Dotson, may have had a break in their employment with Special Mine Services, and that their seniority date, as calculated by Special Mine Services, was their original starting date. The name of the third employee named by Morgan, Joe Wagner, does not appear on the seniority list of May 24, 1991, admitted into evidence as G.C. Exh. 12. The name, "Robert Wagner," appears on the list as a warehouse employee. It cannot be determined from the record if "Joe" and "Robert" Wagner are the same person.

³³ Ingram Morgan had attended the union meeting on July 12, 1990, and was known to Rick Orlandini, one of Respondent's foremen, to be a "union man." Morgan and Orlandini lived in the same town, and carpooled to work at Special Mine Services. Orlandini admitted in his testimony during the hearing that he had probably told Morgan that he knew Morgan was a union man and would probably vote for the Union. Orlandini admitted that he had passed that information to Huntsman.

³⁴ Leslie Wood had attended the July 12, 1990 union meeting and was laid off by Huntsman the next day.

³⁵ Huntsman testified that Jeff Kennerly, the fifth signer of the Union's exceptions, quit on April 19.

³⁶ Although the Regional Director found no violations of the Act in Respondent Special Mine Services' preelection activities to which the Union objected, it is evident from the Regional Director's Report that the Respondent opposed the Union, and communicated its opposition to its employees.

at some later time, the Respondent could reasonably conclude that the worst that could happen, from its point of view, would be that the election would be set aside and a new election ordered. If, in the meantime, it was able to eliminate some of the Union's supporters, it would be unlikely that the lesson would be lost on the remaining employees, and that they would risk their jobs by voting for the Union in sufficient numbers for the Union to win a second election. Under these conditions, I find that it is inferable from the evidence that the Respondent felt that after the election was an opportune time to terminate the employment of a number of union supporters, and discourage its remaining employees from engaging in further union activities.

In May and early June 1991, Respondent Special Mine Services moved the specialized equipment used to make certain kinds of connectors from its West Frankfort facility to Smith Machine and Tool's facility in Royaltown, approximately 26 miles distant, and subcontracted out the connector manufacturing work to Donald Smith, the owner of Smith Machine and Tool. The subcontracting of the connector work and transfer of the machinery used in the connector manufacturing process are cited by Respondent as reasons justifying the layoff of employees in the connector room and machine shop in May and June 1991. Although they were called layoffs at the time, it is clear that they were permanent layoffs, because Respondent Special Mine Services had subcontracted out the work that the laid-off employees used to do. I find from the timing of this action, which Respondent took shortly after the apparently favorable to its outcome of the April 19, 1991 election, that it is inferable that Respondent was motivated by union animus.

I find that the General Counsel has produced sufficient circumstantial evidence to establish a prima facie case that in April, May, and June 1991, Respondent Special Mine Services permanently laid off 10 of its employees in the Connector Room and Machine Shop because of union animus. Having failed in July 1990 to terminate the employment of two known union supporters, Fred Blades and Danny Burnett, Respondent, which had communicated its opposition to the Union quite emphatically to its employees, moved quickly following the April 19, 1991 election to change its layoff policy from one based on plant seniority to one based on division seniority, subcontract out most of the work of the connector room, and layoff known union supporters employed in the connector room and machine shop, including Fred Blades and Danny Burnett. Also laid off were Randy Orlandini and Les Wood, both of whom had signed the Union's objections to the conduct of the election, and in doing so, had identified themselves as union supporters. The remaining employees laid off during that period of time were discriminatorily laid off by Respondent in order to reach Fred Blades and Danny Burnett under the newly established layoff policy. Under these circumstances, it is irrelevant whether they favored or were opposed to the Union.

V.

Respondent Special Mine Services contends that it has met its burden under *Wright Line*, supra, by producing evidence establishing that the subcontracting of connector manufacturing work to Smith Machine and Tool and the layoffs in April, May, and June 1991 were prompted by substantial business concerns and would have taken place even in the

absence of its employees' union activities. These concerns included reduced orders for connectors and lack of work for employees in the connector room and the machine shop, a large inventory of various kinds of connectors which could be used to fill new orders, inadequate space and electrical problems which Respondent experienced in trying to put a new oven³⁷ into operation in the connector room, and savings in manufacturing costs (primarily labor costs) and resolution of the problems associated with the new oven which could be realized through subcontracting connector manufacturing work to Smith Machine and Tool.

According to testimony from President Huntsman, after meeting with accountants in December 1990 concerning high operating costs,³⁸ in January 1991, he introduced the use of production sheets³⁹ to determine the labor costs for making connectors. His analysis of the production sheets showed that the labor costs were erratic, with unexplained variances in the time it took employees to make the same parts.⁴⁰ Sometime prior to May 4, 1991, he said, he concluded that one way to obtain fixed manufacturing costs was to subcontract out the manufacturing of connectors. After soliciting a bid from at least one other possible subcontractor, on May 4, 1991, he decided to subcontract the connector work to Smith Machine and Tool for 5 percent less than the amount he estimated that it cost Special Mine Services for labor to manufacture the same part.⁴¹ Huntsman said that he did not sell the equipment used to manufacture connectors to Donald Smith, because he did not want Smith to be able to use the equipment to make connectors for Special Mine Services' competitors. Instead, title to the equipment was retained by Special Mine Services, and Huntsman said that he told Donald Smith that anything manufactured with the equipment had to go back to Special Mine Services.

Huntsman testified that orders were erratic in 1991, showing a steady decline steadily after March 1991. He said that Ingram Morgan and Leslie Wood were laid off on April 26, 1991, not necessarily because there was a lack of work, but because the equipment which they operated, the injection machine, was shut down until the problems in putting the tunnel oven into operation were resolved.

The decision to change from plantwide seniority to department seniority as the method used to determine layoffs was

³⁷ Also referred to as the tunnel oven. This was a new piece of equipment intended to be used to cure urethane connector parts made by the injection machine. There was testimony that the oven used more electricity than was available in the connector room when other electrical equipment was in use, and that the oven was bulky and caused a space problem in the connector room.

³⁸ Huntsman said that the November 1990 financial report showed a higher than normal profit, but the Company was having trouble paying its bills.

³⁹ Similar to production sheets he had used at Anextor Cable Service Company.

⁴⁰ Huntsman testified that he could tell exactly what the costs were for commodity items which Special Mine Services purchased for resale, but not for items which Special Mine Services manufactured. Lack of reliable cost information for products sold by Special Mine Services was of concern to potential buyers of the Company.

⁴¹ Huntsman said that he had shut down the injector machine on April 26, 1991, and it had not run continuously since then, because it was not needed. He said he was not sure if he had enough connector work to subcontract out as of May 4, but he expected that sufficient work would become available.

made before the May 1991 layoffs. Huntsman testified that on the advice of the Company's attorney, he made the decision to change the seniority system jointly with his department heads and his partner, George Kee, in a meeting on May 24, 1991. At that time, Huntsman testified, there was no need for a layoff. He said that he was trying to get things lined up if the need for another layoff should arise.

By the time of the May 31 and June 7, 1991 layoffs, Huntsman testified, he had already moved some of the equipment used to manufacture connectors to Smith Machine and Tool. However, he said, even though the injection machine had been taken to Smith Machine and Tool, there would have been no work for the employees who were laid off because there was a large inventory of connector parts available to fill orders.⁴² He said the employees were surplus and were laid off because the work was transferred elsewhere. Huntsman stated that Special Mine Services did not maintain inventory records for connectors during the April to June 1991 period, and that he did not have inventory figures available to him prior to either the May 31 or the June 7, 1991 layoffs.

Huntsman said that a notice announcing the layoff of four employees was posted on May 30, 1991. He said that work was slow during the week because orders had not come in and the shelves were full. He said that he talked to Rick Orlandini during the preceding week, and concurred with Orlandini that the amount of work available did not justify keeping the number of people left in the connector room and the machine shop.

The layoff of June 7, 1991, according to Huntsman, was prompted by an observation reported to him by George Kee that men were standing around in the connector room without anything to do. Huntsman said that he met with George Kee and Rick Orlandini, the foreman of the connector room, and they jointly decided another layoff was needed. Huntsman said that he did not know how much work was available, but accepted George Kee's input and decided another layoff was needed.

Rick Orlandini, foreman of the connector room, testified that orders declined during the period from March to June 1991. Because of the low number of orders which he received from the salespeople, he had a hard time finding work to keep his employees busy. He kept records of incoming orders on handwritten sheets, but kept no inventory records. His handwritten order sheets for the period from March 13 to June 26, were introduced into evidence. He said that he kept order sheets for 3 months before discarding them, and his order sheets prior to March 13 were not available. He said that 40 to 50 orders a month was good, and that 15 orders in a month was a bad month. He acknowledged that his brother, Randy Orlandini, an injection machine operator, worked overtime 1 hour each day during the week of April 25, 1991. He did not explain why there was a need for one injection machine operator to work overtime during a week when two other injection machine operators were laid off and the injection machine was supposedly taken out of service while the new oven was being installed.

⁴²Huntsman did not explain why a layoff was not needed on May 24, but 7 days later, on May 31, there was such a large inventory of connectors that there was no need to make more and presumably a layoff would have been needed, even if the injection machine had not been transferred to Smith Machine and Tool.

Orlandini's handwritten order sheets afford little support for his testimony that lack of new orders and excess inventory on hand resulted in lack of work for Respondent Special Mine Services' employees in the connector room and machine shop during the April to June 1991 period. The handwritten order sheets which he kept are, at best, inconclusive. They apparently do not reflect all connector orders worked on by Respondent's employees during each of the months from March to June 1991, and they do not show which parts were filled by manufacturing new parts and which were filled from inventory. Further, in the absence of any inventory records, it cannot be ascertained how much inventory was on hand at any point, how rapidly that inventory was being depleted, and how long it would last without being replenished by manufacturing more connectors. To the extent that Orlandini's handwritten order sheets do reflect new orders received during the period they cover, overall they do not show how much work there was to making the parts involved,⁴³ and, in any event, they appear to indicate numbers of orders during the months covered which are closer to the 40 to 50 orders which Orlandini said represented a good month than the 15 orders which he said represented a bad month. Even more significantly, perhaps, Respondent was unable to produce any records of orders in earlier months against which the order sheets admitted into evidence can be compared. For these reasons I find the handwritten order sheets kept by Orlandini are entitled to little weight.

Respondent's contention that orders for connectors, in particular, declined during the March to June 1991 period, appears to be inconsistent with the Company's records of connector sales per month, as reflected in General Counsel's Exhibit 31.⁴⁴ As reflected in that exhibit, which also includes the number of employees and the dollar value of sales per employee, Respondent's connector sales per month for the year ending June 1991 were:

July 1990	\$114,915
August 1990	131,544
September 1990	129,921
October 1990	188,617
November 1990	152,217
December 1990	112,211
January 1991	138,345
February 1991	142,410
March 1991	165,496
April 1991	166,778

⁴³Orlandini gave testimony concerning the amount of work involved in making some of the parts, but not with respect to most of the parts. There is no basis, even when his testimony and the records are considered together, for determining what any particular employees or even group of employees were doing, or not doing, on any particular day or during any particular week.

⁴⁴Huntsman identified G.C. Exh. 31 as the "sales by month and employees that were employed at the end of that particular month." Elsewhere in his testimony he answered in the affirmative to questions posed by counsel for the General Counsel incorporating references to the sales figures as connector sales. The entry for April 1991 reflects sales of \$166,778, 21 employees, and sales per employee of \$7942. G.C. Exh. 29, a seniority list bearing the date "4/22/91," shows a total of 21 employees in the connector room and machine shop, combined. From this, I conclude that G.C. Exh. 31 does represent sales of connectors, which are produced through the combined efforts of the connector room and machine shop.

May 1991	\$166,778
June 1991	112,587

The June 1991 connector sales were in the range of sales in July and December 1990, while the March, April, and May 1991 sales were exceeded only by the October 1990 sales. Although these figures do not indicate which sales were filled from stock and which were filled by manufacturing the ordered part, the linkage of the sales figures to sales per employee in the connector room and machine shop suggests sales are related to manufacturing activities, or, stated differently, to orders. The sales figures, therefore, are inconsistent with Respondent's claim that orders for connectors decreased beginning in March 1991. The sales figures for March through May 1991, show no decline. Since the last layoff occurred on June 7, 1991, the June sales figures, which were not available to Huntsman at the time he made the layoff decision, are largely irrelevant.

It is evident from the record that layoff and subcontracting decisions Respondent Special Mine Services were made by its president, Les Huntsman. It is equally clear from the record that in making the layoff decisions, Huntsman, if his own testimony is to be believed, lacked detailed day-to-day knowledge of how much work was available in the Connector Room and Machine Shop. He testified that he variously looked at Orlandini's handwritten order sheets, queried Orlandini about how much work there was, and accepted "input" from Vice President George Kee. Several attempts by Respondent Special Mine Services to introduce into evidence various business records prepared after the fact and in anticipation of litigation were rejected during the hearing. I find no reason to reverse those rulings, since the issue here is one of the decision-maker's motives at the time he made the decisions based on the information which he had available to him at the time he made the decisions. Although Respondent Special Mine Services now contends that the layoffs were justified by reduced orders, excess inventory, and lack of work, those were not the primary reasons for the layoffs given by Huntsman in his testimony. He testified that he made the decision to lay off Morgan and Wood on April 26, 1991, not necessarily because of lack of work, but because the injection machine which they operated was shut down while a new experimental oven was being installed. And, as he candidly further admitted, by the time of the May 31 and June 7, 1991 layoffs, he had already moved the injection machine to Smith Machine and Tool, and the employees who used to work in the manufacturing process in which it was used, were surplus and were laid off because the work was transferred elsewhere.

The logic of that last statement is, of course, unassailable. Once the machines which they operated were transferred elsewhere, the employees who formerly operated them were, indeed, likely to be surplus. The issue that remains, therefore, is whether Huntsman's decision to lay off Morgan and Wood on April 26, 1991, and his decision on May 4, 1991, to subcontract the connector work to Smith Machine and Tool, thus making a number of employees surplus, were motivated by his employees' union activities. If Huntsman was motivated by union animus to subcontract the work to Smith Machine and Tool, then the employees whom he laid off because they were made surplus by the subcontracting were also laid off for unlawful reasons. It is Respondent's burden,

at this point, to show that Huntsman's motives were not unlawful, or that the layoffs would have taken place even in the absence of protected activities.

Huntsman's explanation that he laid off Morgan and Wood, both of whom were known union supporters, not necessarily because of lack of work, but because the injection machine which they operated was shut down while a new experimental oven was being installed, is insufficient to overcome the inference which can be drawn from the coincidence between renewed union activities and Union's failure to win the election. The timing of the layoffs supports an inference, which at this point is un rebutted, that he laid them off because of their union activities and sympathies at the earliest opportunity after the Union failed to win the election.

The explanation offered by Huntsman for his decision to subcontract connector manufacturing operations to Smith Machine and Tool is not persuasive. The record, particularly the testimony of Rick Orlandini, strongly indicates that Huntsman first brought up the possibility of subcontracting connector manufacturing work in April 1991, long after the Union had petitioned for certification in March. There is some evidence that he solicited a bid from a person named Bill Mooreman, no time was given and no details of the solicitation were offered. According to testimony by Rick Orlandini, he became aware in April 1991 of Huntsman's interest in subcontracting the work, and considered taking it on with his brother before contacting Donald Smith to determine if he was interested. But, by April 1991, Huntsman was well aware of the Union's renewed activities, since the Union had filed its petition for certification on March 8, 1991, and Respondent had entered into a stipulated election agreement with the Union on March 26, 1991, providing for an election to be held on April 19, 1991. Insofar as the record shows, therefore, Huntsman first began considering subcontracting after he learned of the Union's petition for certification, and he carried through with subcontracting the connector work to Smith Machine and Tool on May 4, 1991, approximately 2 weeks after the election in which the Union had failed to gain a majority vote. This chronology does nothing to refute the inference that the subcontracting was motivated by the employees' union activities which can be drawn from the coincidence between the subcontracting and the renewal of the Union's organizing attempt and the election, or that Huntsman would have subcontracted the connector manufacturing work to Smith Machine and Tool even in the absence of his employees' union activities.

Similarly unpersuasive is the economic justification offered by Huntsman for the subcontracting agreement he entered into with Smith Machine and Tool. According to his testimony, his objectives in subcontracting the work were to stabilize his manufacturing costs and reduce his labor costs. While the agreement with Smith Machine and Tool may seem to achieve those goals, the savings realized by Respondent appear to be relatively small, amounting to only a 5-percent reduction from Special Mine Services' production costs. No estimate of the value of the projected savings to Special Mine Services was offered. Compared to the small percentage of anticipated savings, Special Mine Services appears to have made a disproportionate capital investment in Smith Machine and Tool's plant. Under the agreement, Special Mine Services furnished Smith Machine and Tool with all of the machinery and equipment needed to manufacture

connectors, at no cost or rental to Smith Machine and Tool, other than maintenance costs which Smith Machine and Tool agreed to assume. The value of the equipment which Special Mine Services transferred to Smith Machine and Tool was estimated at \$25,000 to \$30,000. The record further indicates that Special Mine Services supplies Smith Machine and Tool with the raw materials necessary to manufacture the connectors. The anticipated economic benefits to Special Mine Services do not appear to be significant enough to overcome the adverse inference which can be drawn from the timing of the subcontracting action, nor do they appear to be so beneficial to Special Mine Services that it would have subcontracted the work even in the absence of its employees' protected union activities.

In addition to anticipated economic benefits, Huntsman testified that subcontracting the connector work and transferring the equipment, including the new tunnel oven, to Smith Machine and Tool solved space and electrical problems Special Mine Services unexpectedly encountered when it attempted to install and operate the new tunnel oven at its West Frankfort facility. According to Huntsman, Special Mine Services did not have adequate space for the oven in the connector room, and its building lacked adequate electrical power to operate it. Smith Machine and Tool, on the other hand, had adequate building space and had, or could easily get, adequate electrical power.⁴⁵

While indeed there is evidence in the record that the oven, as installed, protruded into an aisleway, and that electrical problems were encountered in putting the oven into operation, I find no evidence to support the conclusion that either the space or electrical problems were so vexatious or unanticipated that they could not be solved by Special Mine Services at its West Frankfort facility. It appears from the record that the oven was specially built to Special Mine Services' specifications, at considerable cost, and considering that, it is a reasonable inference that the project was not entered into by Special Mine Services on the spur of the moment, without any planning as to where the oven would be located or what its electrical power requirements might be. Not to have considered such patently elementary factors would seem to be an example of gross mismanagement. There is also evidence in the record that the location of the oven in Special Mine Services' building was temporary, and there is no evidence that adequate permanent space for it could not be obtained by rearranging other equipment and fixtures. While it may be that more heat generated by electrical power than anticipated was needed to reach the desired heat in the oven, there is no evidence that additional electrical service could not be obtained for the building sufficient to meet the electrical current requirements of all of the equipment operated in the building, particularly since Donald Smith did precisely that in order to operate the oven in his building.

I find that Respondent Special Mine Services has not shown that it would have subcontracted its connector manufacturing work to Smith Machine and Tool on May 4, 1991, and permanently laid off a total of 10 of its employees on April 26, May 31, and June 7, 1991, had its employees not engaged in union activities. Respondent has failed to carry

⁴⁵ There is evidence in the record that Donald Smith had to have increased electrical service installed in his building to operate the oven.

its burden under *Wright Line*, and its actions violated Section 8(a)(1) and (3).

CONCLUSIONS OF LAW

1. Respondent Special Mine Services, Inc. and Respondent Smith Machine and Tool Shop are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Southern Illinois Laborers' District Council, Laborers' International Union of North America, AFL-CIO the is a labor organization with in the meaning of Section 2(5) of the Act.

3. Respondent Special Mine Services, Inc. and Respondent Smith Machine and Tool Shop are not joint employers of the employees of Smith Machine and Tool Shop.

4. By laying off employees Ingram Morgan and Leslie Wood on or about April 26, 1991, because its employees joined, supported, and/or assisted a union, Respondent Special Mine Services, Inc. violated Section 8(a)(1) and (3) of the Act.

5. By transferring or subcontracting production of electrical connectors on or about May 4, 1991, to Smith Machine and Tool Shop, because the employees of Respondent Special Mine Services, Inc. joined, supported, and/or assisted a union, Respondent Special Mine Services, Inc., violated Section 8(a)(1) and (3) of the Act.

6. By laying off employees Robert Dotson, Brent Wall, Fred Blades, and Randy Orlandini on or about May 31, 1991, because its employees joined, supported, and/or assisted a union, Respondent Special Mine Services, Inc. violated Section 8(a)(1) and (3) of the Act.

7. By laying off employees David Cain, George Kirk, Danny Burnett, and James Stratton on or about June 7, 1991, because its employees joined, supported, and/or assisted a union, Respondent Special Mine Services, Inc. violated Section 8(a)(1) and (3) of the Act.

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

9. Respondent Smith Machine and Tool Shop has not violated Section 8(a)(1) and (3) of the Act, as alleged.

REMEDY

Having found that Respondent Special Mine Services, Inc., has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that the Respondent be ordered to cease and desist, and to take certain affirmative action designed to effectuate the purposes of the Act.

The Respondent Special Mine Services, Inc., having committed certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, shall be ordered to cease and desist from engaging in those unfair labor practices.

The Respondent Special Mine Services, Inc., having discriminatorily laid off employees Ingram Morgan, Leslie Wood, Robert Dotson, Brent Wall, Fred Blades, Randy Orlandini, David Cain, George Kirk, Danny Burnett, and James Stratton, shall be ordered to offer them full and immediate reinstatement to their former positions, or, if those positions are not available, to substantially equivalent positions, without prejudice to their seniority rights and privileges, and make them whole, with interest, for any loss of earnings and other benefits which they may have suffered by reason of their layoffs, with backpay and interest to be computed in the

manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴⁶

The complaint against Respondent Smith Machine and Tool Shop shall be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁷

ORDER

The complaint against Respondent Smith Machine and Tool Shop in Case 14-CA-21458 shall be dismissed in its entirety.

The Respondent, Special Mine Services, Inc., West Frankfort, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring or subcontracting operations and effectively terminating employees by placing them on indefinite layoff because of the employees' actions in joining, supporting, or otherwise assisting a union for the purpose of collective bargaining or other mutual aid or protection.

(b) Laying off employees because they join, support, or otherwise assist a union for the purpose of collective bargaining or other mutual aid or protection.

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

(a) Offer Ingram Morgan, Leslie Wood, Robert Dotson, Brent Wall, Fred Blades, Randy Orlandini, David Cain,

⁴⁶In accordance with the Board's decision in *New Horizons for the Retarded*, supra, interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 622. Interest accrued before January 1, 1987, shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁴⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

George Kirk, Danny Burnett, and James Stratton immediate and full reinstatement to their former positions or, if those positions are 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 or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy.

(b) Remove from its files any reference to the unlawful layoffs of Ingram Morgan, Leslie Wood, Robert Dotson, Brent Wall, Fred Blades, Randy Orlandini, David Cain, George Kirk, Danny Burnett, and James Stratton, and notify them in writing that this has been done and that the layoffs will not be used against them in any way.

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

(d) Post at its West Frankfort, Illinois, facility copies of the attached notice marked "Appendix."⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 14, 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.

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

⁴⁸If 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."