

Aero Metal Forms, Inc. and District 70, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 17-CA-15539 and 17-RC-10645

February 10, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issues addressed here are whether the Respondent unlawfully terminated two employees and whether it otherwise violated Section 8(a)(1).¹

The Board has considered the decision² and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions to the extent consistent with this decision.

1. The judge found that the evidences was insufficient to show that Respondent discharged employee Janet Lester because she refused to comply with the Respondent's demand that she fabricate an account of events to conceal evidence of an unfair labor practice and that the discharge therefore did not violate Section 8(a)(1). We disagree.⁴

The pertinent facts are as follows. The Respondent hired Janet Lester as a bookkeeper on January 28, 1991. Her duties included maintaining the Respondent's financial records, calculating the weekly payroll based on the employees' timecards, preparing job costs records also based on the timecards, maintaining the accounts payable and receivable records, and invoicing.

On March 8, 1991, at or about noon, the Respondent received two certified letters from the Union, one demanding recognition and the other informing the Re-

spondent of the Union's campaign. Office Manager Tammara Cummins immediately opened and read both letters. When secretary/receptionist Janet Wallace and Lester returned from lunch at or about 12:30 p.m., Cummins read the demand letter to them and let Lester read the second letter. Cummins said that the demand for recognition would "greatly" upset Zaudke and make him "hell to work with." She then asked if Wallace or Lester had heard of any of the employees wanting to form a union. Both Wallace and Lester answered, "no." Cummins said she suspected a couple of employees as being in charge of the organizing and named employee Thomas Wood. Lester responded that Cummins should not jump to any conclusions. Cummins added that she was going to ask the Shipping and Receiving Manager Wanda Fleming if she had heard anything about forming a union. Lester suggested that Cummins read the Union's second letter again "because it clearly states that we could not interfere . . . or discuss anything . . . concerning the union or forming a union."⁵

Shortly after this conversation, Lester overheard Cummins discuss the demand letter with Zaudke. Zaudke said he would refuse to recognize the Union. After Zaudke left, Cummins asked Lester to come into her office. Cummins told Lester that Zaudke was going to lay off Wood because he was only hired on a temporary basis. Lester responded that "temporary" normally meant 60 days, not the many months Wood had been working. Cummins referred to the fact that Wood's father is a "big shot in the Union at Boeing." When Zaudke came back into Cummins' office, Lester told him, "if you're going to layoff Tom Wood, he is going to have to be the first one you rehire. You can't hire someone else in the shop and put them over into . . . welding." Zaudke replied that this was not the law in Kansas. Then, according to Lester's credited testimony, "it was said by [Cummins] and agreed by Mr. Zaudke that I would say what they wanted me to say about when they received the letter and all that." (At the hearing, both Cummins and Zaudke testified that Zaudke did not read the union letter demanding recognition until after he decided to lay off Wood.) Lester replied that she would not lie, and the conversation ended.

Shortly after 3 p.m., March 8, Zaudke met with Wood and Welding Department Manager Walters. Zaudke told Wood he was being laid off due to a shortage of work.

According to Lester, during the week following her refusal to comply with the demand of Zaudke and Cummins that she fabricate an account as to when the Respondent received the Union's recognition demand, Zaudke's and Cummins' attitude toward her became "very hostile." Prior to March 8, Zaudke would say

¹Pursuant to a Stipulated Election Agreement, an election was held in a unit of the Respondent's production and maintenance employees on March 12, 1991. Six ballots were cast for, and six against, the Charging Party, with three challenged ballots. (Two of the challenged ballots were consolidated for hearing with the instant unfair labor practice proceeding.) In the absence of exceptions, we adopt, pro forma, the judge's recommendation to sustain the challenge to the ballot of Ken Southworth. The challenged ballot of Thomas Wood is the sole ballot remaining at issue.

²On June 3, 1992, Administrative Law Judge Burton Litvack issued the attached decision. Both the Respondent and the General Counsel filed exceptions.

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

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

⁴The complaint alleged that the discharge violated Sec. 8(a)(3) and (1), but the General Counsel has excepted only to the judge's failure to find that by this conduct the Respondent violated Sec. 8(a)(1).

⁵The letter quoted Sec. 8(a)(3) and (1).

“good morning” to her on a regular basis, and, if he needed to speak to her, would summon her into his office. During the week of March 11 through 15, Zaudke no longer said “good morning” to Lester, and yelled from his office if he wanted to speak to her. Further, despite Cummins’ earlier friendliness to Lester, after March 8, she would only speak to Lester concerning work-related matters.

At approximately 3 p.m., Friday, March 15, Lester was called to a meeting with Zaudke and Cummins in Zaudke’s office. Zaudke had a stack of timecards on his desk. He said he was going to have to let Lester go because she was making too many errors on the timecards. Lester asked why these had never been called to her attention before but received no response. She then asked why, if she made so many errors, the payroll was coming out correctly. Zaudke and Cummins did not reply. Zaudke reported that the Respondent’s accountant, Ron Marsh, had told him that Lester had no experience in profit and loss, and general ledger bookkeeping.⁶ Lester questioned why, if such was the case, she had been able to correct a recent bookkeeping mistake. Zaudke and Cummins offered no answer.

Zaudke testified that he discharged Lester because of her excessive errors in computing timecards.⁷ According to Zaudke, the timecard errors could cost the Respondent a lot of money and the number of Lester’s errors was increasing. Zaudke testified that he made the decision to terminate Lester on Friday, March 15, the date she was discharged. Cummins’ testimony varied as to when the decision to discharge Lester was made. First, she testified it was on March 8, then said it was the next week, “after payroll had been issued,” then explained that the actual decision to terminate Lester was made on Wednesday, March 13, but not communicated to her until the following Friday, and finally, consistent with Zaudke, testified that the decision had been discussed Wednesday and actually made on Friday.

As for the timecard errors themselves, timecard mistakes could be of two types—incorrectly adding hours or noting improper job codes. According to Zaudke, Lester made both types of mistake. The Respondent offered an exhibit summarizing Lester’s weekly timecard errors from the start of her employment. This document shows that in the initial 3 weeks of her employment, Lester made no errors, then 2, then 4, and,

⁶Marsh testified that he did not give Zaudke an opinion as to Lester’s competency.

⁷The timecards were used for two purposes: to determine the employees’ daily and weekly hours of work for payroll purposes and to maintain accurate job costs records. Consistent with this latter purpose, the employees were required to note on what job they were working during each quarter hour.

during the final 4 weeks, 15, 2, 14, and 18, respectively.⁸ The errors are not broken down as to type.

Each Monday morning, Lester would process the employees’ timecards for the prior week. Each Monday, Cummins would discuss any timecard errors with her and the errors would be corrected but, according to Lester’s credited testimony, this was never done in the form of criticism or discipline. Cummins never noted to Lester the number of errors made. Lester’s errors could have led to overpayment or underpayment of wages or improper allocation of job costs.⁹ However, according to Lester, Cummins never mentioned possible discipline or the need for her to improve her accuracy. The Respondent never warned or otherwise disciplined Lester for the errors. Instead, Lester testified, Zaudke and Cummins praised her constantly for the good job she was doing and thanked her “for doing such a good job in catching things up.” Zaudke admitted he praised Lester’s work during the first week or so in order “to establish a professional rapport with her.” Cummins also stated that she praised Lester’s work a few times when she did something well.

As the judge correctly observed, the proposition that an employer violates Section 8(a)(1) of the Act by discharging a *supervisor* for refusing to commit an unfair labor practice against statutory employees¹⁰ clearly compels the conclusion that an employer also violates the Act if it terminates an *employee* for refusing to facilitate the commission of an unfair labor practice against a fellow employee. In our view, contrary to the judge’s conclusion, the General Counsel has established by a preponderance of the evidence that the Respondent discharged Lester for precisely that reason, i.e., because she refused to participate in facilitating

⁸The exhibit tabulating these errors was prepared in April 1991 in response to the unfair labor practice charge. During Lester’s first 2 weeks, Cummins performed most of the timecard calculations; they both performed them in the third week; and in Lester’s final 4 weeks, she did them herself, with Cummins checking for accuracy.

There were 30 to 31 employees whose timecards had to be processed each week. Many employees would work on different tasks in a day and each time they worked on a different task, they made a time entry, noting a cost code which consisted of a five-digit number and a shop code, a three-digit number. Some employees would have 15 different cost codes on their timecards for a week. The timecards were handwritten, including some with very small handwriting.

⁹The Respondent does not contend or present evidence that any losses were caused by Lester’s errors. The evidence indicates only one error that was not discovered by Cummins. In mid-February, Zaudke called Lester into his office to point out that she had incorrectly coded a timecard as raw material when it should have been labor. According to Lester, she took the code off the timecard which was written as “raw material.” When Lester asked him if he wanted her to correct the error, Zaudke replied it was “no big deal.” He then pointed to a 6-inch high stack of other mistakes that needed to be inputted and corrected on job costs. (There was no evidence that Lester was responsible for those mistakes.)

¹⁰Citing *Phoenix Newspapers*, 294 NLRB 47 (1989), and *Country Boy Markets*, 283 NLRB 122 (1987), enfd. sub nom. *Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989).

the concealment of an unlawful discharge when she declined to fabricate testimony as to when the Respondent received the Union's recognitional demand letter.

First, contrary to the judge, we believe it is not unduly speculative to attribute Zaudke's and Cummins' change of attitude toward Lester to her refusal to engage in the fabrication of testimony. According to Lester, that change of attitude was manifested on March 11, the next workday after her refusal. Zaudke and Cummins who had previously been cordial to her were now "very hostile." Five days of this hostility concluded with Lester's discharge on March 15. The judge's supposition that their hostility might have been generally attributable to the pressures of the Union's organizing campaign is not a logical inference from the record because Lester was not a unit member or active in the organizing campaign. The only reasonable explanation for hostility directed specifically at Lester was her refusal to cooperate with the scheme to cover up Wood's unlawful discharge. We, therefore, infer that their hostility was caused by Lester's refusal.¹¹

The timing of Lester's discharge, 1 week after her refusal to cooperate in the coverup similarly supports a finding that the discharge was in retaliation for Lester's refusal to lie on the Respondent's behalf. We are not persuaded by the judge's suggestion that the timing can be accounted for by "an inordinate number of errors" in payroll calculations committed by Lester on March 11. The errors made on that day were not significantly in excess of those that Lester had made in previous weeks without evoking any indication from her superiors that she was putting her job at risk. In any event, the errors committed on March 11 cannot explain the hostility by Lester's superiors that commenced that morning.

Indeed, it is the disparity between the Respondent's purported reason for Lester's discharge and its supervisors' overt responses to her work prior to her refusal to participate in the coverup scheme concerning Wood's discharge that is the most compelling evidence of an unlawful motive.

According to Lester's credited testimony, at no time did Cummins indicate to her that she needed to improve her accuracy or that these errors were a particular problem serious enough to lead to discipline or discharge. Neither did Cummins report to Lester how many errors were made per week. Lester was never disciplined or warned because of the errors. According to Lester, Cummins told her she "was doing real good since there are so many entries on the time cards" and that it was "very hard to catch everything and to get

them correct." Both Cummins and Zaudke admit they praised Lester during her brief 6-week tenure with the Respondent.

Evidence was presented of only one incident when Cummins did not catch and correct an error. In mid-February, Zaudke called Lester into his office and told her that she had coded some hours into "raw material" instead of "labor." When Lester asked Zaudke if he wanted her to correct the error, he answered that it was "no big deal." He then pointed to a stack about 6 inches high of other mistakes not made by Lester that needed to be inputted and corrected on the job cost.

All the above indicates that the Respondent was not particularly concerned with the number of timecard errors Lester made until after her March 8 refusal to comply with its unlawful demand. We are left with the conclusion that the Respondent's purported reason for the discharge was pretextual.¹²

In view of the pretextual nature of the reason given for the discharge, and considering the hostility directed toward Lester as a result of her refusal to lie for the Respondent in connection with the Wood discharge, we conclude that the General Counsel has established by a preponderance of the evidence that Lester was discharged for unlawful reasons.¹³

The Respondent does not assert any business reason, other than the one which we above have found pretextual, for discharging Lester even if she had not engaged in protected conduct. Therefore, it has not met its burden under *Wright Line*.¹⁴ We, therefore, find that the Respondent's discharge of Lester on March 15, 1991, was in violation of Section 8(a)(1).

2. As described above, on March 8, Cummins told Lester that the Respondent was laying off Thomas Wood because he was only hired on a temporary basis. Lester replied that "temporary" usually meant 60 days, not the many months Wood had been working. At that point, Cummins added that Wood's father is a "big shot in the Union at Boeing."

¹² *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

¹³ Further supporting the finding that the Respondent was searching for a supportable basis for discharging Lester was its shifting testimony as to when it made the decision to discharge Lester. As described above, Zaudke testified the decision was made on March 15. However, Cummins at first testified the decision was made on March 8, which significantly precedes the Respondent's review of Lester's March 11 timecard computation on which it relied in part as the basis for her discharge. Cummins revised her testimony to state that the decision was made "after payroll had been issued," then to Wednesday, March 13, and finally to Friday, March 15. It is well settled that shifting testimony explaining a discharge evinces a discriminatory motive.

¹⁴ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Arthur Young & Co.*, 291 NLRB 39 (1988).

¹¹ The judge referred to changes in Zaudke's and Cummins' attitudes toward the office staff. There is, however, no evidence that Zaudke and Cummins had a change of attitude toward any other office staff personnel.

The judge found that Cummins' statement about Wood's being laid off and her reference to Wood's father as a union officer "were not so closely connected so as to be coercive." However, the judge found that Cummins' comments demonstrated the Respondent's animus against Wood.

We have adopted the judge's finding that Cummins' comments demonstrate animus against Wood. In addition, we find that Cummins' comments linked the lay-off of Wood to the union activity of one of Wood's relatives, and to Wood's union activity itself. This finding is supported by the fact that earlier that same day, Cummins told Lester she suspected Wood of being one of the leaders of the union campaign. We find that Cummins' comments had the tendency to coerce employee Lester in the exercise of her Section 7 rights and were, therefore, in violation of Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 5 and renumber Conclusion of Law 5 as 6.

"5. On March 8, 1991, the Respondent made statements to Janet Lester linking the layoff of employee Thomas Wood with the fact that his father is a union officer and thereby engaged in conduct violative of Section 8(a)(1) of the Act."

2. Insert the following as new Conclusion of Law 7 and renumber the subsequent paragraphs.

"7. On March 15, 1991, the Respondent discharged Janet Lester because she refused to fabricate evidence with regard to the receipt of the Union's demand for recognition letter in order to establish a sham defense for the unlawful layoff of Thomas Wood and thereby engaged in conduct violative of Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Aero Metal Forms, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because of suspicions that they engaged in union or other protected concerted activities.

(b) Discharging employees because they refused to fabricate evidence to create a sham defense of the commission of unfair labor practices.

(c) Interrogating employees about the union activities of their fellow employees.

(d) Demanding that employees fabricate evidence in order to create a sham defense for the commission of unfair labor practices.

(e) Making statements to employees linking the lay-off of an employee with the fact that a relative of the employee is a union officer.

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

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

(a) Offer reinstatement to employees Thomas Wood and Janet Lester to their former positions of employment and, if such jobs no longer exist, to substantially equivalent positions of employment and make them whole for any lost earnings they may have suffered as a result of the discrimination against them as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Expunge from its files any reference to the March 8, 1991 layoff of Wood and the March 15, 1991 discharge of Lester, and notify them, in writing, that this has been done and that evidence of the layoff or discharge, respectively, will not be used as a basis for any further personnel action against the employee.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, 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 facility in Wichita, Kansas, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 taken to comply.

IT IS FURTHER ORDERED that the complaint shall otherwise be dismissed.

IT IS FURTHER ORDERED that the challenge to the ballot of Thomas Wood having been overruled, it shall be opened and counted and a revised tally of ballots be issued and served on the parties. If the tally shows a majority vote for the Union, then the Union shall be certified as representative in the appropriate unit. If the revised tally fails to show that the Union has received a majority of the valid ballots counted, a certification of results shall issue.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT layoff our employees because we suspect that they are involved in union or other protected concerted activities.

WE WILL NOT discharge employees because they refused to fabricate evidence to create a sham defense of the commission of unfair labor practices.

WE WILL NOT interrogate our employees as to the union activities of their fellow employees.

WE WILL NOT demand that employees fabricate evidence in order to create a sham defense for the commission of unfair labor practices.

WE WILL NOT make statements to employees linking the layoff of an employee with the fact that a relative of the employee is a union officer.

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

WE WILL offer Thomas Wood and Janet Lester immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Thomas Wood and Janet Lester, in writing, that we have removed from our files any reference to his discriminatory layoff or her discriminatory discharge, respectively, and that the layoff or discharge will not be used against them in any way.

AERO METAL FORMS, INC.

Lyn R. Buckley, Esq., for the General Counsel.
William E. Dye, Esq. (Foulston & Siefkin), of Wichita, Kansas, for the Respondent.
Donald Stella and Jack R. Nugent, of Bridgeton, Missouri, for the Union.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Pursuant to an original unfair labor practice charge, a first amended unfair labor practice charge, and a second amended unfair labor practice charge, in Case 17-CA-15539, filed by District 70, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), respectively on April 8 and 12

and May 20, 1991, the Regional Director for Region 17 of the National Labor Relations Board (the Board) on May 20, 1991,¹ issued a complaint, alleging that Aero Metal Forms, Inc. (Respondent), had engaged in unfair labor practices, violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Subsequently, on May 22, the Regional Director issued an order, consolidating a hearing on challenged ballots in Case 17-RC-10645² with the hearing in the above-described unfair labor practice matter. Pursuant to a notice of hearing in the consolidated matters, a hearing was conducted by me in Wichita, Kansas, on October 1 and 2. At the hearing, all parties were afforded the opportunity to examine and cross-examine all witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered. Accordingly, based on the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Wichita, Kansas, is engaged in the business of manufacturing spare parts for military aircraft. During the 12-month period preceding the issuance of the instant complaint, which period is representative, in the normal course and conduct of its business operations, Respondent sold and shipped goods and products, valued in excess of \$50,000, from its Wichita, Kansas facility directly to points outside the State of Kansas. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. ISSUES

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee Thomas E. Wood on March 8 because of suspected union activities and employee Janet E. Lester on March 15 because she refused to participate in a scheme to unlawfully terminate Wood. Contrary to the General Counsel, Respondent contends that Wood was lawfully laid off in anticipation of a projected lack of work and that Lester was terminated for poor work performance. In addition, the complaint alleges, and Respondent denies, that it violated Section 8(a)(1) of the

¹Unless otherwise stated, all events herein occurred during calendar year 1991.

²On March 12, the Union filed a petition for a representation election with the Regional Director for Region 17, seeking to represent Respondent's production and maintenance employees. The parties entered into a Stipulated Election Agreement, and a representation election was conducted on April 22. Of approximately 12 eligible voters, 6 cast ballots for and 6 cast ballots against representation, and there were 3 challenged ballots, 1 of which the Regional Director sustained and 2 raised substantial issues of both fact and law.

Act by instructing employees to lie in order to conceal the date on which it learned of the Union's demand for recognition; by interrogating its employees regarding other employees' union sympathies and activities; and by informing employees that other employees would be laid off because of their union activities. Finally, with regard to the challenged ballots, one concerns that of employee Wood and Respondent's contention that he was lawfully laid off, and the other pertains to employee Ken Southworth and the contention that he had no expectation of recall as of the payroll eligibility date.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that approximately 95 percent of the business of Respondent is generated through contracts from the Department of Defense for the manufacture of structural spare parts for military aircraft;³ that Respondent has been in business as a defense contractor since approximately 1981; that Respondent's Wichita, Kansas plant consists of two buildings—a main building housing the office and the welding department, the hard tooling shop, the fabrication department, and the shipping and receiving department and a second building in which the plaster pattern department and a raw material storage area are located; and that Respondent normally employs approximately 20 production workers. The record further establishes that Respondent's president is James Zaudke, who is in overall charge of all business operations and to whom the various production department managers directly report, and that Tammara Cummins is Respondent's contract administrator and purchasing agent and performs the duties of office manager.⁴

There is no dispute herein that, in early July 1990, Respondent's welding department consisted of two individuals—Stephen Walters, who, at all times material herein until April 26, was the manager of the welding shop⁵ and who regularly performed production work, and David Reedy, an employee since September 1986; that, due to production problems and a large backlog of work in the hard tooling department in early 1990, work in the welding department was correspondingly slow and Walters was transferred to the former department to help reduce the backlog; that, as the backlog in the hard tooling department lessened, work began

³ Respondent obtains its business from the Government through a bidding procedure. In this regard, the Department of Defense maintains lists of manufacturers who have, or who desire to, bid for the contracts to produce various spare parts for the military. In order to solicit bids when a particular part is required, the Department of Defense informs these contractors of the solicitation, sending to them the manufacturing specifications, including the production blueprints, so that the companies may determine their manufacturing price for the part and submit a bid for its production. Thereupon, the Department of Defense determines which manufacturer has submitted the lowest bid and awards it the contract to produce the part. The terms of the contract, including the price of the part, must conform to the bid.

⁴ Respondent admits that both Zaudke and Cummins supervisors within the meaning of Sec. 2(11) of the Act and agents within the meaning of Sec. 2(13) of the Act.

⁵ While denying his status as an agent within the meaning of the Act, Respondent conceded that Walters was a supervisor within the meaning of Sec. 2(11) of the Act.

increasing in the welding department; and that, as a result, in July 1990, according to Jim Zaudke, Respondent was "in a bind" in the welding department because "it wasn't feasible to work all the number of hours necessary" to accomplish all the work and the decision was made to hire a temporary employee. Thomas E. Wood, a welder who had been terminated by Beech Aircraft,⁶ passed a welding test for Respondent, and there is no dispute that, during his preemployment interview, he was told by Zaudke "he would be hired in as a temporary welder" for "around" 3 months or longer—until Respondent overcame a work "crunch" in the welding department. Subsequent to the interview with Zaudke, Walters spoke to Wood and formally hired him for Respondent on July 16, 1990.

Wood worked as a welder for Respondent until March 8, a period of almost 8 months. While there is no dispute as the alleged discriminatee's status as a temporary employee at the time of his hire, whether or not his status was transformed to that of a permanent employee at some future point was an issue at the hearing. In this regard, while Jim Zaudke specifically denied any change in Wood's status, Wood testified that, at the time of his hire, Zaudke told him he would get a raise after 2 months if he became a permanent employee, and the record establishes that he did receive a 75-cents-per-hour raise in August 1990.⁷ Stephen Walters testified that, as the welding department manager, it became evident to him that, after the promised 2 or 3 months of Wood's employment, there remained a "need" for additional manpower in the welding shop and that he "pushed" for Wood to be given full benefits, which would elevate him to full-time employee status. Accordingly, he had a conversation with Zaudke at the time Wood was due for a raise, and, after they discussed Wood's performance, "I asked him if we wouldn't be able to go ahead and . . . update Wood . . . to a permanent status. And . . . Zaudke . . . agreed . . . that we would probably be able to do it."

During cross-examination, Walters placed this conversation as occurring in January or February 1991, and Zaudke testified that Wood received a raise of 45 cents per hour on February 18.⁸ As to whether Wood attained permanent status at this time, Zaudke denied any change from his original status as a temporary employee. With regard to the February pay increase, Zaudke attributed this to a commitment to Wood, at the time of his hire, to evaluate him for a raise if he achieved "what we expected of him" and stated that the quality of his work remained satisfactory. Zaudke further conceded that Wood was given the full-time employee health insurance benefits in February but added that such came after

⁶ While working at Beech Aircraft, Wood had been a member of the Union, which represented the production employees at that manufacturer. After his termination, Wood filed a grievance against Beech Aircraft over his discharge. The grievance was pending during his employment with Respondent, a fact known to Jim Zaudke. There is, in fact, no dispute that Zaudke granted Wood time off to appear at various proceedings concerning the grievance. Finally, there is no dispute that Respondent was aware that Wood's father was also employed by Beech Aircraft and that he was involved in the Union's hierarchy at said employer.

⁷ Zaudke maintained that such was as a result of Respondent's normal practice of reviewing employees for raises each February and August.

⁸ Zaudke averred, "We gave everybody raises at that point in time."

Walters had requested such because Wood “had a family” and that he cautioned Wood, at the time, he would remain a temporary employee⁹ Zaudke did not deny the above-described conversation with Walters with regard to Wood’s status. Finally, as to whether Wood had attained permanent status is the testimony of Walters that, in January, “I’d asked [Zaudke] if we couldn’t update Tom Wood’s welder . . . machine . . . to a more up to date version,” such as used by Reedy and himself. Walters estimated the cost at \$3000, “and he had given me the go ahead to solicit bids.” While confirming that he and Walters discussed purchasing a new welding machine for Wood, Zaudke insisted that such was done so that his machine could be used as a portable “maintenance welder.”

There is no contention that Respondent had no need for Wood’s work as a welder beyond the initial 3 months of his employment. In this regard, Wood described the level of welding work, during his entire tenure with Respondent, as “consistent. I mean we were busy all the time.” Further, as was the normal practice, at the end of each month, the three welders worked overtime to complete the work which was scheduled for completion in that month. This seems to have been the state of work in February 1991, with the testimony of the alleged discriminatee being uncontroverted that the welding workload was not less than in previous months and that the welders worked overtime at the end of the month in order to complete the scheduled month’s work. With regard to March, the record establishes that, as was Respondent’s practice, Zaudke met with the department managers, including Stephen Walters, early in that month and distributed the monthly listing of work, which was scheduled for completion that month. The list included welding work, and, in the afternoon after the managerial meeting, as was their normal practice, Walters met with Zaudke to discuss the anticipated welding man-hour requirements for completion of the scheduled March work. According to Walters, who was uncontroverted as to what was discussed at this meeting, “we went over just briefly what I had determined the hours . . . would be needed to meet the monthly schedule and we’d talked about subcontracting some of the work. . . . to Charlie Bozone to be welded.”¹⁰ Walters further stated that his reference was always to three individuals and that the discussion concerned the specific jobs, to which each would be assigned, and the estimated time needed for each job.

⁹Zaudke pointed out that Wood was not given any other full-time employee benefits, such as a paid vacation and the right to participate in Respondent’s 401(k) plan. Later, he conceded that neither of these was available to Wood in February as each required employment for a year to be eligible.

¹⁰The record establishes that, from time to time, Respondent subcontracted welding work to an individual named Charles Bozone, who does such subcontract welding work under the name, Production Welding. Stephen Walters testified, on direct examination, that the welding work, which was to be subcontracted to Bozone in March represented 600-man hours of work at the plant but, during cross-examination, testified that less than 300-man hours of work was given to him at first. Walters identified the part as work order 89005, stating that, originally, “just partial fill-ins” were subcontracted to Bozone “but it could have been completely off loaded depending on how our workload went.” Zaudke conceded that welding on that order was subcontracted to Bozone in February, but stated, “I did not subcontract any welding work during the month of March.”

Walters added that, as the volume of work seemed so great, he recommended “that we probably should move . . . some of March’s work out into April,” and Zaudke said he would consider that.¹¹

The record reveals that Thomas Wood had been a member of the Union while employed by Beech Aircraft; that, continuously while working for Respondent, he wore clothing, bearing the Union’s insignia, and had union emblems pasted on his lunchbox; and that he was the only employee who did so. The record further reveals that, in early February, Respondent’s employees began considering the possibility of seeking representation by the Union; that, given Wood’s open espousal of the Union at the plant, he became a leader of the nascent organizing campaign; that a delegation of employees, including Wood, visited the Union’s office to seek aid in organizing the plant; and that Wood spoke to employees about the Union in aid of the organizing campaign. Further, there is no dispute that Respondent was aware of Wood’s union sympathies. Thus, not only, as mentioned above, was his support for the Union unconcealed but also at the plant’s Christmas party, in December 1990, he engaged in a conversation with James Zaudke regarding the merits of union representation.

The alleged discriminatee was laid off on March 8, 1991. On that day, at approximately noon, a registered letter envelope, containing a demand for recognition letter from the Union and another letter from the Union, informing Respondent of the aforementioned organizing campaign and of the employees’ protected status under Sections 7 and 8(a)(1) and (3) of the Act, were delivered to Respondent’s office¹² and received by Tammara Cummins, who immediately opened the envelope and read both letters. The secretary/receptionist, Janet Wallace, and the bookkeeper, Janet Lester,¹³ returned from lunch at approximately 12:30 p.m., and, according to alleged discriminatee Lester, they found Cummins sitting in the outer office, holding the two letters. The latter read the demand for recognition letter out loud, said it would “greatly” upset Zaudke and make him “hell to work with,” and then “asked if Janet Wallace or myself had heard any of the guys wanting to form a union.” Lester continued, testifying that both women said, “No,” and Cummins said she could not understand why the employees would want a union as Zaudke would loan them money if needed. Lester agreed that such was a fact but pointed out that he charged interest on such loans. Thereupon, Cummins said she suspected “a couple” of the employees as being “in charge” of the organizing and named Thomas Wood. Lester said she should not jump to any conclusions, and the conversation ended with Cummins saying

¹¹According to Walters, the estimated excess hours totaled approximately 200.

¹²The record discloses that Respondent’s clerical staff includes a secretary/receptionist and a bookkeeper both of whom have desks in the outer office. James Zaudke and Tammara Cummins have separate offices.

¹³Lester, who is also an alleged discriminatee, had been employed in her bookkeeping capacity by Respondent since January 28, 1991. Her job duties included maintaining Respondent’s financial records, calculating the weekly payroll based on the employees’ timecard records, preparing job cost records also based on the timecard records, maintaining the accounts payable and receivable records, and invoicing.

she was going to ask the shipping and receiving manager, Wanda Fleming, if she had heard anything about a union. Tammara Cummins admitted that she was reading the Union's letters in the outer office when Lester and Wallace returned from lunch. "I had the letter[s] in my hand and I asked the ladies if they knew anything about union's [sic] or maybe a union letter coming or anything like that." Both denied such knowledge, and Lester asked to see the letter and read it. Cummins asked what she thought, and Lester said it looked like the employees were organizing. According to Cummins, she said she did not know what the letter meant, and both Lester and Wallace again denied any involvement with it. Cummins denied saying there would be hell to pay when Zaudke became aware of the letters and denied any knowledge, prior to March 8, of Thomas Wood's involvement with the Union.¹⁴

Shortly after the foregoing conversation with Cummins, Janet Lester testified, James Zaudke returned to the plant, and he and Cummins met in the latter's office. According to Lester, she overheard Cummins and Zaudke discussing the Union's demand for recognition letter, with Zaudke saying that he would refuse to recognize the Union. Moments later, Zaudke left in order to pick up his daughter, and Cummins came out of her office. Lester asked if Zaudke had calmed down; Cummins asked her to come into her office; and, inside Cummins' office, the latter said, "That Mr. Zaudke was going to layoff Tom Wood because he was only hired on a temporary basis." Lester responded that temporary normally meant 60 days, not the many months that Wood had worked, "and she made reference that Tom's dad is some big shot in the Union at Boeing." Moments later, having returned to the plant, Zaudke entered Cummins' office. "And I said, if you're going to layoff Tom Wood, he's going to have to be the first one you rehire. You can't hire someone else in the shop and put them over into . . . welding." Zaudke responded that Lester did not know what she was talking about and that such was not the law in Kansas. Then, "it was said by Tammy and agreed by Mr. Zaudke that I would say what they wanted me to say about when they received the letter and all that. And I stated to both of them that I would not lie." The conversation ended, and Zaudke left the office.

While neither specifically denied demanding that Lester agree to fabricate her account as to when the Union's demand for recognition letter arrived at Respondent's facility that Friday, the recollections of Zaudke and Cummins are quite different from that of the alleged discriminatee. James Zaudke testified that "I was in and out of the office a great deal that day. . . . and then that afternoon I had told Tammy Cummins that I was going to have to lay Tom Wood off." Stating that this conversation occurred "late in the afternoon . . . around two o'clock" in Cummins' office with Janet Lester present, Respondent's resident continued, stating, "I told her that I was going to lay Tom Wood off and [Cummins] said, before you do that, I've got a letter that you ought to read, and I just stated, I don't have time right now." Then, "Lester made a comment about, something about the Union and that if I laid him off . . . he would have to be the first person rehired or something to that effect. I told her that was not true. That Kansas was a right

to work state." Zaudke insisted that he did not read the Union's demand letter during this meeting as "I had more pressing matters on my mind . . . laying Tom Wood off" but conceded that the comments of Cummins and Lester were an indication that the letter was from the Union. Asked when, that day, he did become aware of the contents of the letters from the Union, Zaudke stated, "I did not actually become aware . . . and actually read [them] until the end of that day."

Tammara Cummins testified that, after sharing the contents of the two union letters with Lester and Wallace, she went into her office. According to her, Zaudke returned to the plant at approximately 1 p.m., and she went to his office with the letters but had no chance to show them to him, for Zaudke left "quickly" as "he had an errand to run," and she did not want to stop him. Zaudke returned half an hour later, and, again, Cummins had no chance to show him the demand for recognition letter from the Union as "he had to pick up his daughter and he was late." Finally, at approximately 3:15 p.m., Zaudke returned to the plant, and, without Lester, Cummins approached and asked if he had a minute. Zaudke said, "That he was going to lay off Mr. Wood and I told him at that time that I thought he should read a letter that I had before he did that. . . . He said that he would take a look at it when he returned. He said he was on his way . . . to get [Wood and Walters]" and left to go out into the shop. Cummins added that she does not know when Zaudke read the Union's demand for recognition letter but that she did discuss it with him after 4 p.m.

Respondent's president Zaudke met with alleged discriminatee Wood and Welding Department Manager Walters in his office shortly after 3 p.m., and there is no dispute as to what was said. Zaudke began, stating that he was going to have to layoff Wood due to a shortage of work and cited his status as a temporary employee. Walters protested, stating that Respondent had several high man-hour jobs in the shop and that he had just given Zaudke a 200-hour estimate above what they could complete with the available manpower in March, and asked if Wood could, at least, finish the month. Zaudke said Wood could not complete the month and that "he was looking in the projection to the next couple of months and there wasn't going to be enough work to support three welders and he had to look out for his senior welders . . ." Walters then asked about severance pay, and Zaudke said, "No." Then, Zaudke asked how Wood would pay off two loans, and the employee said he would try to pay \$25 per week; Zaudke agreed but said he would keep Wood's tools as security. The meeting ended at that point.

Janet Lester testified that, during the week following her refusal to comply with the demand of Zaudke and Cummins that she agree fabricate her account as to exactly when Respondent received the Union's demand for recognition letter, Zaudke's and Cummins' attitude towards her became "very hostile." Thus, prior to March 8, Zaudke would say "good morning" to her on a regular basis and, if he wanted to speak to her, would come into the outer office and ask to speak to her in his office. However, according to Lester, during the week of March 11 through 15, Zaudke never said "good morning" to her and would yell from his office if he wanted to speak to her. Also, Lester testified, Cummins "would only speak to me when she had to concerning work," and the atmosphere was such that Janet Wallace re-

¹⁴Cummins did admit that, prior to March 8, she had heard that Wood's father was an official with the Union at Beech Aircraft.

marked to her that there was much "tension" in the office. Finally, on Friday, March 15, at approximately 3 p.m., Lester was asked to attend a meeting with Zaudke and Cummins in the former's office. There is no dispute as to what was said. Thus, according to Lester, Zaudke, who had a stack of time-cards on his desk, "said that he was going to have to let me go because I was making too many errors . . . on the time cards." Lester asked why these had never been brought to her attention but received no response. She then asked why, if she made so many mistakes, the payroll had been coming out correctly; again there was no response. Thereupon, Zaudke said that Respondent's accountant, Ron Marsh, had informed him that she had no experience in profit and loss and general ledger bookkeeping. Lester responded that, if such was the case, how had she been able to correct a recent bookkeeping mistake. There was no response, and, after saying she was a professional, Lester requested her final check and left. Zaudke did not dispute Lester's version of this conversation, adding that he offered to show Lester all her time-card errors but she refused.¹⁵

Turning to the layoff of Thomas Wood, James Zaudke testified that he made the determination that Respondent no longer required Wood's services "at the end of the the third week of February."¹⁶ According to the witness, at the time, he was going through Respondent's present contractual commitments and discovered that some duct assembly work would not be completed by the scheduled delivery date, and this lead him to closely examine Respondent's entire contractual backlog as "we had to determine when I could fit it in to the work that we had And in so doing, I found that the weld shop work was greatly diminished from what my opinion of the . . . work had been prior to that point in time." Apparently, the foregoing convinced Zaudke that Respondent would need just two welders to perform all future welding work, and Zaudke gave no thought to laying off either Stephen Walters or David Reedy as "they were our long term permanent employees and Mr. Wood was only a temporary employee." Notwithstanding Zaudke's assertion that, by the end of the third week in February, he had decided to layoff the alleged discriminatee, there is no dispute that, prior to March 8, he never communicated the intent to the welding department manager, Steven Walters—not even during their meeting in early March at which time Walters presented Zaudke with the department's estimated man-hour requirements for March, which included hours for Wood.¹⁷

With regard to the amount of welding work in Respondent's plant in March and April, the third welding department

employee, David Reedy, who remained an employee of Respondent as of the date of the instant hearing, testified that, as of March 8, "we had a lot of work" in the weld shop; that, as a consequence of the layoff of Wood, he was required to work on the former's work as well as his own;¹⁸ and that, in mid-April, it remained "very busy" in the welding department. Then, at the end of April, Department Manager Walters quit, and, as a consequence, Respondent had just one employee to perform welding work, and David Reedy testified that not only was he unable to perform the required volume of work but also work never decreased to permit him to catch up. As a direct consequence of the lack of welders and the ever increasing level of work, over the next 4 months, based on their scheduled completion dates, Respondent became delinquent on 38 or 48 percent, of its existing contracts. In order to remedy the ever-worsening backlog of welding work over these months, Respondent recognized the need for additional manpower to perform welding work and, to this end, continually attempted to hire a new welding department manager; however, according to James Zaudke, no fewer than seven applicants for the position failed welding tests and not until August was a replacement for Walters hired. Zaudke rejected any suggestion that, in the above circumstances, hiring a temporary welder would have alleviated the aforementioned difficulty.¹⁹

As evidence, corroborating Zaudke's assertion that, by the end of the third week in February, he was able to ascertain that work in the welding department was decreasing to the point that he no longer required the services of alleged discriminatee Wood, Respondent offered into evidence summaries of the contracts, which required welding work, received by Respondent in 1990 and 1991 along with the estimated welding man-hours required for completion. While these show that Respondent's 1990 contracts required 1672 man-hours for completion and the 1991 contracts an estimated 877 man-hours, the corroborative worth of said documents is problematical at best. Thus, the 1991 information was compiled within days of the instant hearing, and there is no indication as to what, if any, records, Zaudke utilized, in February, to determine welding work would begin to decrease. Further, while 1991 contract welding hours, indeed, may have decreased from the 1990 level, Zaudke admitted that not all the 1990 contractual work had been completed by February 1991, that some 1989 contract welding work remained unfinished, and that Respondent was delinquent on some of the 1990 work. Moreover, the fact that Respondent had fewer estimated contractual welding hours in 1991 seems to have been as a direct consequence of its inordinately high delinquency rate and great backlog of work during the spring and summer months and a resulting decision to limit its bidding on new work. In this regard, while Zaudke assertedly could not recall telling such to anyone, Neva Reid, an employee of the Department of Defense in Defense Contract Management Area Operations, testified that, in July or Au-

¹⁵Zaudke admitted that he mentioned to Lester an earlier conversation with the Accountant Marsh, who expressed a concern for her ability to perform bookkeeping and accounting work. On this point, Zaudke was contradicted by Marsh. Thus, while appearing as a witness for Respondent, Marsh was asked if he had, in fact, given Zaudke his opinion as to Lester's competency, and Marsh replied, "No."

¹⁶There is no dispute that, prior to Thomas Wood, Respondent had never laid off an employee.

¹⁷While Zaudke failed to inform or consult Walters as to the layoff of Wood and did not rely on Walters to announce the layoff to Wood, the record establishes that, with regard to the layoff of employee, Kenneth Southworth, from the plaster pattern department on March 25, Zaudke consulted with the department manager, Gregory King, prior to the layoff and permitted King to inform Southworth of the employment action.

¹⁸Steven Walters testified that Wood had only completed about half of a welding assignment, which, Walters estimated, required another couple of months to complete.

¹⁹Zaudke rejected the hiring of a temporary welder, or recalling Thomas Wood, in order to help reduce the welding backlog as "a temporary person wouldn't be a solution in that I was always of the belief that we would be able to hire a weld shop manager in the near future."

gust, faced with the foregoing situation, Zaudke “said he was bidding on contracts that . . . he had tooling for and similar items. That he wasn’t bidding on any new type items that he would have to develop tooling for. . . . [H]e just said he was slowing down on his bidding.” Finally, it should be noted that the foregoing could not have been anticipated by Zaudke in the third week of February as, by his own admission, such was caused by the lack of manpower in the welding department after Steven Walters resigned and as Walters did not leave Respondent’s employ until the end of April.

With regard to the discharge of Janet Lester, Zaudke testified that such resulted from excessive errors in her computation of the employees’ timecard records.²⁰ According to him,

The time card errors would not cost the company a lot of money but what was evident was that the errors were increasing in quantity. . . . And for that reason, I made the determination that it wasn’t getting any better, it was getting worse. And that’s the reason I made the determination to go ahead and let her go.²¹

He added that he reached the above decision on Friday, March 15, the day he terminated Lester. On this point, Tammara Cummins initially contradicted Zaudke, stating he made the decision to terminate Lester on “the Friday before we terminated her”—March 8. Moments later, she changed her testimony, saying, “Mr. Zaudke made that determination, and it was made that next week, after payroll had been issued.” Elaborating, Cummins said the actual decision to terminate Lester was made on Wednesday, March 13 but not communicated to her until the following Friday. Finally, changing her testimony yet again to corroborate that of Zaudke, Cummins averred, “We had discussed [the decision to discharge Lester] Wednesday and actually made the decision Friday, I guess.” Compounding the uncertainty caused by the foregoing was her absolute lack of recall as to when or where she spoke to Zaudke on March 15; her only recollection was that he “said that we were going to go ahead and let . . . Lester go.” Finally, Cummins testified that the precipitating cause for the discharge was Lester’s payroll performance on Monday, March 11—“There was a large amount of errors in that payroll.”

²⁰The record establishes that the production employees’ timecards served two purposes. First, they were utilized to determine the employees’ daily and weekly hours of work so that Respondent could compute its payroll. Next, employees were required to note each job upon which they were working each quarter hour so that Respondent could maintain accurate job cost records, which was important as each job had its own budget.

²¹Apparently, timecard mistakes could be of two types—incorrectly adding hours or noting improper job codes. Zaudke stated that Lester’s mistakes were of both types. As support for Zaudke’s testimony that Lester’s timecard errors were increasing rather than decreasing over the course of her employment, R. Exh. 8 is a summary of her weekly timecard errors from the start of her employment. This document shows that in the initial 3 weeks of employment, Lester made none, then two and then four errors and that, during the final 4 weeks of her job tenure, she made 15 errors, then 2 errors, then 14 errors, and, in her final week, she made 18 errors. There is no evidence as to which of the foregoing are computation rather than job coding errors. Finally, Lester did not dispute any of the foregoing figures.

Specifically as to the timecard errors made by Janet Lester, there does not seem to be any dispute that, in fact, she made computation and job notation errors; rather, what is in dispute is Respondent’s reaction to them over the course of the alleged discriminatee’s employment. In this regard, Lester testified that, each Monday, Tammara Cummins would discuss any timecard errors with her but never in the form of criticism or discipline—she “never . . . criticized me. She would just show me that this should have been a different number and usually not big deal.”²² While conceding that her errors could have led to over or underpayment of wages or improper allocation of job costs, Lester maintained that Cummins never either mentioned possible discipline or the need for her to improve her accuracy. In fact, according to Lester, “I was praised constantly by Mr. Zaudke and Tammy in the good job that I was doing and thanking me for doing such a good job in catching things up.”²³ Tammara Cummins corroborated Lester that, each Monday, she would point out time card errors to the employee; “I circled where the error occurred, and corrected it, and showed her what she had done and how I corrected it.” As to whether she ever mentioned to Lester the necessity for improving her performance, Cummins disputed Lester, stating, “I would say probably the third or fourth week of her employment as the errors began to grow I would tell her that we need to really watch our times more closely and catch some of these errors that are being made,” asked about warnings to Lester, Cummins replied, “I assumed I was giving her warnings each week I pointed her errors out to her.” Finally, Cummins conceded that she praised Lester’s performance “a few times” when she did something well.

B. Analysis

A determination as to the legality of the March 8 layoff of employee Thomas Wood is governed by the traditional precepts of Board law in 8(a)(1) and (3) discharge cases, as modified by the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the alleged discriminatee engaged in union activities; (2) that the employer had knowledge of such; (3) that the employer’s actions were motivated by union animus; and (4) that the discharges had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697, 703 (1983). Further, the General Counsel has the burden of proving the aforementioned by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 209 (1963). While the foregoing analysis was easily applied in cases in which the employer’s motivation was straightforward, conceptual problems arose in cases in which the record evidence disclosed the presence of both a lawful and an unlawful cause for the

²²Lester testified that, during her first 2 weeks, Cummins performed most of the timecard calculations; that they both did the cards in her third week, and that, for the final 4 weeks, she did them herself, with Cummins checking them for accuracy.

²³Zaudke begrudgingly admitted that he did, in fact, praise Lester’s work—“Oh, I may have, the first week or so. . . . I wanted to establish a professional rapport with her.”

discharge. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established the following causation test in all 8(a)(1) and (3) cases in which motivation is the issue.

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Id. at 1089.]

Two points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie violation of the Act, the Board will not "quantitatively analyze" the effect of the unlawful motive. "The existence of such is sufficient to make a discharge a violation of the Act. Id. at 1089 fn. 14. Second, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (id. at 1084 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.*, 291 NLRB 39 (1989). The instant layoff of Thomas Wood should be viewed as the latter type and, thus, patently violative of Section 8(a)(1) and (3) of the Act.

At the outset, of course, in order to properly evaluate the various factual issues involved in the layoff of Wood, an assessment as to the testimonial credibility of the witnesses is essential. In this regard, Steven Walters, the former welding department manager, appeared to be testifying in an entirely truthful and straightforward manner and impressed me as being a most reliable witness. Likewise, the other alleged discriminatee, Janet Lester, seemed to be testifying in a frank and candid manner with regard to her recollection of the events of March 8 and shall be credited by me. Further, James Wood and David Reedy, who remains employed by Respondent as a welder and was, therefore, testifying against the pecuniary interests of his employer, each appeared to be an honest witness and, as with Walters and Lester, shall be relied on for his account of the events herein. In contrast, Respondent's president, James Zaudke, appeared to be an utterly disingenuous witness, one for whom truth must serve a business purpose. In particular, I found absolutely incredible his asserted failure to recall comments, made to Federal Government agents no more than 3 months prior to the start of the hearing in these matters, concerning Respondent's contract delinquency problems and future contract bidding strategy. Similarly, Tammara Cummins appeared to be a most obsequious witness, testifying in a manner calculated to buttress the position of Respondent and without regard for the truth. The mendacious nature of her testimony was never more apparent than in her efforts to conform her testimony to that of Zaudke regarding the timing of the decision to terminate Lester. Accordingly, unless corroborated by credible witnesses, neither the testimony of Zaudke nor that of Cummins shall be relied on by me in determining what actually occurred herein.

Based on the testimony of the credited witnesses, and the record as a whole, findings are warranted that, Thomas Wood was hired by Respondent in July 1990 on a temporary basis; that Wood was kept consistently busy performing welding work in the plant's welding department and the

workload had not decreased in February; that, in mid-February, Wood's employment status was seemingly changed to that of a full-time employee;²⁴ that, in early March, a surfeit of welding work existed for the three welders in the welding department sufficient to require Welding Department Manager Walters to recommend to Respondent's president Zaudke that 200 previously scheduled man-hours of work be rescheduled for April; that Wood had been a member of the Union at his former employer and remained an open advocate of the Union—a fact known to Respondent; and that, in February, Wood became a leader of Respondent's employees' nascent organizing campaign on behalf of the Union. Findings are further warranted that, on March 8, at approximately noontime, Tammara Cummins, who is in charge of Respondent's office, opened a registered letter and read the Union's demand for recognition letter, and, when the bookkeeper, Janet Lester, and the receptionist/secretary, Janet Wallace, returned to the office from lunch, Cummins read the demand letter to them, said it would "greatly" upset Zaudke and make him "hell to work with," asked if either women "had heard any of the guys wanting to form a union," said she suspected "a couple" of the employees as being "in charge," and named Thomas Wood as one of said suspected organizers. It is further found that, shortly thereafter, Zaudke returned to the office; that Zaudke and Cummins discussed the demand for recognition and the former said he would refuse to recognize the Union; that Lester was summoned to Cummins' office and Cummins said that Zaudke had decided to layoff Wood as he was a "temporary" employee and, later, that his father was a "big shot" in the Union; and that, after Zaudke entered Cummins' office, Cummins, with Zaudke's concurrence, said, "That I would say what they wanted me to say about when they received the [demand for recognition letter]"; and that Lester refused to accede to said demand. At approximately 3:30 that afternoon, Wood was precipitously laid off by Respondent.

Based on the foregoing factual findings, the conclusion is mandated that the General Counsel has established a prima facie violation of the Act with regard to the layoff of Wood. Thus, the foregoing factual matrix reveals that not only was the alleged discriminatee an overt advocate for the Union and a leader of the Union's organizing campaign amongst Respondent's employees but also Respondent was keenly aware of Wood's union adherence. Further, said matrix warrants the conclusions that unlawful animus was a motivating factor underlying Respondent's conduct in effectuating the layoff and that said act was nothing more than a "knee-jerk" response to the organizing campaign and the Union's demand for recognition. Buttressing these conclusions, of course, is the compelling fact that Wood was laid off no more than 3 hours after Cummins disclosed the existence of the Union's de-

²⁴ Although Respondent's employment record card for Wood does not indicate a change in his work status, Steven Walters spoke to Zaudke on that point shortly after Wood received a wage increase in February and believed that the latter would change Wood's status. Moreover, it is rather difficult to believe that Zaudke would have permitted Walters to solicit bids for an updated welding machine for Wood if a change in his status to that of a full-time employee was not contemplated. Finally, whether or not Wood's status was ever changed is beside the point, for, even if temporary, Wood remained an employee entitled to the protection of the Act. Cf. *North Vernon Forge*, 278 NLRB 708 (1986).

mand for recognition letter, said that Zaudke would be upset by such, and made known her suspicion that Wood was one of the two employees "in charge" of the campaign and no more than 2 hours after Zaudke was informed of the demand for recognition letter and Cummins stated Wood was being laid off because he was a temporary employee said his father was a "big shot" in the Union. Moreover, inasmuch as Lester was not a known union adherent or even a member of the bargaining unit, whose representation was sought by the Union and as Cummins was clearly seeking information as to the leading union adherents amongst the plant employees, the latter's interrogation of Cummins, as to which employees supported a union, must be viewed as violative of Section 8(a)(1) of the Act. It has been a long held tenet of the Board, in 8(a)(1) and (3) discharge cases "that the timing of the [employer's conduct] is strongly indicative of animus." *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Structural Composites Industries*, 304 NLRB 729 (1991); *Jamar Coal Co.*, 293 NLRB 1009 (1989). Herein, given Respondent's unlawful interrogation and stated suspicion that Wood was the employee "in charge" of the organizing campaign and the record as a whole, I find no merit to counsel for Respondent's contention that the timing of the layoff of Wood was merely suggestive, and not probative, of unlawful animus. Accordingly, the conclusion is warranted, if not mandated, that a prima facie violation of the Act has been established with regard to the layoff of Thomas Wood.

The conclusion that the foregoing accurately reflects the true version of events herein is bolstered by the sham nature of Respondent's defense to the unfair labor practice allegation. Thus, the key element of said defense is Zaudke's assertion that, at the end of the third week in February, after reviewing Respondent's contractual backlog and the amount of work in the welding department, he decided that, in order to meet Respondent's future needs, only two of the three welders would be needed and that the one to be laid off would be the one with the least seniority—Thomas Wood. However, not only did I find Zaudke to have been a most disingenuous witness and his testimony not worthy of belief but also this version of events cannot be reconciled with what actually occurred herein. Thus, it was undisputed, and defies belief, that, prior to March 8, Respondent's president never communicated his intent to layoff a welding department employee to the individual in charge of the department, Steven Walters—not even when the two met in early March and discussed Walters' estimates of that month's man-hour requirements, a calculation which included hours for Thomas Wood. Surely, Zaudke would have instructed Walters to adjust the work assignments to compensate for the loss of Wood. Moreover, Zaudke's asserted act of ignoring Walters, with regard to the layoff of Wood, must be contrasted to his conduct in the layoff of Kenneth Southworth as Zaudke not only consulted with the former's supervisor prior to the layoff but permitted him to inform Southworth of his layoff. The fact that Zaudke said nothing to Walters warrants the inferences, to which I adhere, that Respondent's president failed to consult with Walters, prior to March 8, inasmuch as no layoff was contemplated and that the layoff of Wood was, indeed, a spontaneous reaction, triggered by the Union's demand for recognition.

Further establishing that Zaudke's testimony, as to his decision to layoff Wood, was dissembled is the credible record

evidence regarding the amount of uncompleted welding work during March and April. Thus, while Zaudke claimed that welding work had diminished from the prior months' levels, the record establishes that, in March, there were in excess of 200 man-hours of work, which Department Manager Walters estimated could not be completed by the three welders and which, he suggested, should be rescheduled to April. Also, according to the credible testimony of David Reedy, there was "a lot of work" in the welding department in March, and, by mid-April, it remained "very busy." Moreover, Zaudke himself admitted that, at the time he allegedly decided that not enough welding work remained to justify three welders, some 1989 and 1990 contractual welding work remained uncompleted and that Respondent was delinquent on such work. Finally, while the record does disclose that, throughout 1991, Respondent had fewer estimated contractual welding hours than in past years, such seems to have been, as claimed by Zaudke, the result of a slowdown in bidding on new work caused by the absence of Welding Manager Walters, who resigned his job in late April—a fact which Zaudke could not have anticipated in the third week of February. Accordingly, based on the foregoing, it is evident that the defense to the layoff of Thomas Wood is nothing more than a fabrication, that his layoff was nothing less than Respondent's "kneejerk" reaction to the Union's demand for recognition, and that, in the circumstances, Respondent violated Section 8(a)(1) and (3) of the Act. *Electromedics, Inc.*, 299 NLRB 928 (1990).

I turn next to the discharge of Janet Lester and note that counsel for the General Counsel's theory, underlying the complaint allegation, that she was discriminated against in violation of Section 8(a)(1) and (3) of the Act because she "joined, supported, or assisted the Union," is a novel one. Citing for support the decisions finding unlawful the termination of statutory supervisors for refusing to commit unfair labor practices, counsel argues that Lester was unlawfully discharged on March 15 for having refused to participate in a "cover-up," regarding the layoff of Wood, by fabricating when Respondent received the Union's demand for recognition letter. In postulating her theory, counsel has not explained how said theory conforms to the tenets of Section 8(a)(3) of the Act in that the necessary factors required for finding violations of this section of the Act, including participation in union activities or suspicion of such participation, are not present in the discharge of Lester. Moreover, neither counsel for Respondent nor me have been able to locate any decisions of the Board, finding violations of Section 8(a)(1) and (3) of the Act utilizing the postulated theory. However, just as in the cited cases involving statutory supervisors who are discharged for refusing to commit unfair labor practices, including *Phoenix Newspapers*, 294 NLRB 47 (1989), and *Country Boy Markets*, 283 NLRB 122 (1987), there can be no doubt that the termination of an employee, who refuses to participate in an unfair labor practice involving fellow employees, who are engaged in protected concerted activities, would have a coercive effect and seriously interfere with the employees' Section 7 rights. In these circumstances, contrary to counsel for the General Counsel, given the theory underlying the complaint allegation, regarding the discharge of Lester, I shall consider only whether the discharge of Lester was violative of Section 8(a)(1) of the Act.

While counsel for the General Counsel contends that Lester was discharged for refusing to participate in fabricating when Respondent received the Union's demand for recognition letter, counsel for Respondent argues that she was discharged for poor work performance during her probation period. Just as in the consideration of the layoff of Thomas Wood, when motivation for discharge is at issue in cases involving alleged violations of Section 8(a)(1) of the Act, a *Wright Line*, supra, analysis must be undertaken, under which the General Counsel must establish a prima facie showing sufficient to support the inference that protected activity by employees was a motivating factor in the discharge decision, and, then, the employer has the burden of showing that the employee would have been discharged absent the protected activity. Herein, based on the credited testimony of Janet Lester, I find that, on March 8, in Respondent's office during the afternoon, Tammara Cummins informed Lester of the Union's demand for recognition letter and named Thomas Wood as being "in charge" of the organizing; that, subsequently, Cummins informed James Zaudke of the letter, and Zaudke said he would refuse to recognize the Union; that Cummins then told Lester that Wood was going to be laid off and referred to the latter's father as being an official with the Union; and that, later, in Cummins' office, Cummins, with Zaudke's concurrence, demanded that Lester follow their instructions about what to say as to when Respondent received the Union's demand for recognition letter; that Lester said that she would refuse to lie for Respondent; and that, 1 week later, she was discharged ostensibly for her lack of accuracy in keeping the timecard records.²⁵

With regard to the issue of animus, there is, of course, no comment by either Zaudke or Cummins to establish that Lester was, in fact, terminated for her refusal to go along with a coverup of the actual motivation for the layoff of Wood. While it is clear that such direct evidence of intent is not required and that unlawful animus may be inferred from the record as a whole (*Country Boy Markets*, supra at 127), one searches in vein for any such record evidence herein. Thus, unlike with the unlawful layoff of Wood, the timing of the discharge, coming 1 week after Lester's refusal to cooperate in a coverup, rather than contributing to a finding of unlawful animus, detracts from such. On this point, inasmuch as Lester failed to controvert evidence pertaining to the inordinate number of errors in her timecard calculations on Monday, March 11, it can hardly be said that Respondent waited a week in order to perfect an unlawful discharge. Moreover, unlike in *Country Boy Markets*, supra, wherein the respondent made continual demands that the supervisor engage in an unfair labor practice only to be met with repeated refusals to do so, not only did Cummins state her demand on just one

²⁵ I agree with counsel for the General Counsel that Respondent's demand, that Lester fabricate in order to conceal the exact time Respondent received the Union's demand for recognition letter, was coercive and violative of Sec. 8(a)(1) of the Act. However, I do not believe that Cummins' statement, as to her belief that Zaudke would be upset on learning of the Union's demand for recognition, was coercive; such seems more a statement of opinion and not unreasonable. Further, Cummins' statements that Wood was laid off as he was a temporary employee and that his father was a "big shot" in the Union were not so closely connected so as to be coercive; however, I do believe such demonstrates Respondent's animus towards Wood.

occasion and never repeated it but also nothing was said to Lester when she refused to accede to Respondent's demand. In urging the finding of the existence of unlawful animus, counsel for the General Counsel points to what she terms "a marked change" in the attitudes of Zaudke and Cummins towards Lester during the week of March 11 through 15—after Lester refused to participate in a coverup. However, to attribute this to Lester's conduct is to ignore external pressures, which might also have resulted in changes in Zaudke's and Cummins' attitudes toward the office staff. Thus, a labor organization was now seeking to represent Respondent's plant employees, and Respondent had just terminated an employee, who appeared to be a leader of the organizing effort. It would, therefore, be speculative to attribute any attitude changes to one particular cause, to the exclusion of all others, absent specific record evidence, which is lacking herein. Accordingly, it cannot be said that the General Counsel has made a prima facie showing sufficient to warrant the inference that protected activity was a motivating factor underlying Lester's discharge, and the undersigned shall recommend dismissal of the allegation of the complaint, pertaining to the discharge of Janet Lester.²⁶

V. THE CHALLENGED BALLOTS

At the representation election, which was conducted by the Regional Director for Region 17 on April 22, the Board agent challenged the ballots of three individuals, whose names did not appear on the voter eligibility list. Two of said individuals were Thomas Wood and Ken Southworth, and I have above concluded that Wood had been laid off by Respondent, on March 8, in violation of Section 8(a)(1) and (3) of the Act. Accordingly, it is recommended that the challenge to his ballot must be overruled. Remaining for consideration is the challenged ballot of Southworth. As to him, there is no dispute that he was laid off on March 22; whether his ballot should or should not be opened and counted depends on whether or not he had a reasonable expectancy of recall as of the voter eligibility date herein.

The record establishes that Southworth was hired by Respondent in January 1989 and worked in the plaster pattern shop, making plaster molds for hammer dye patterns. Three employees worked in that department—Gregory King, the working foreman, Tom Northcutt, and Southworth, and the workload normally consisted of three to four ongoing jobs. There is no dispute that, in January 1991, James Zaudke approached King and informed him that, with the contractual backlog of work diminishing in that department, one of the

²⁶ In finding that the General Counsel has not established the existence of unlawful animus, I have considered the inconsistent testimony of Tammara Cummins with regard to the timing of the decision to terminate Lester and the testimony of James Zaudke, contradicted by the accountant Marsh. While inconsistent and contradictory testimony detracts from Respondent's defense, such does not, without more, establish the existence of unlawful motivation, upon which the General Counsel bears the burden of proof. In this regard, I note that, in determining whether the General Counsel has established a prima facie case for unlawful motivation, "the test is not whether the Respondent has proffered a lawful defense . . . but whether, viewed in isolation, the General Counsel's evidence supports an inference that protected activity was the motivating factor" *Cine Enterprises*, 301 NLRB 446, 447 (1991); *Bali Blinds Midwest*, 292 NLRB 243 fn. 2 (1988).

three pattern shop employees would have to be laid off. However, the necessity for such was avoided with the transfer of Northcutt to the tooling department. The plaster pattern shop workload continued to decrease, and, in March, only one job, with a completion estimate of 3 to 4 weeks, remained in the shop.

In these circumstances, Zaudke again spoke to King regarding the employee complement, giving him the choice of performing the remainder of the work himself or keeping Southworth as a helper and, thereby, shortening the employment for both of them. There is no dispute that Gregory King decided to do the work himself and layoff Southworth. According to the latter, on March 25, King spoke to him, and "he told me that I would be laid off the following Friday" because of a "lack of work." Thereafter, on the Friday of that week, Zaudke handed King his final check, saying he was sorry but there was a "lack of work" at that time. Southworth asked if there would be work "down the line," and Respondent's president replied, "That there would probably be no recall because, as far as he could tell, there wasn't going to be any more work . . . for a long, long time." A day or two after the layoff of Southworth, King quit working for Respondent. The record establishes that, since then, the work for the plaster pattern shop has been mainly repair work and that Tom Northcutt "has done everything up to what he could get done, as far as his ability." Prior to the layoffs of Wood on March 8 and Southworth on March 28, Respondent had never laid off an employee.

The Board has long held that, as a "prerequisite" for voting eligibility, an employee, on layoff status as of the payroll eligibility period, must "have a reasonable expectation of recall as of that time . . ." *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). As to whether an employee has such a "reasonable expectancy," the Board looks to several objective factors including the employer's past experience and its future plans, and the circumstances of the layoff, including what the employee was told as to the likelihood of recall. *Sol-Jack Co.*, 286 NLRB 1173 (1987). Herein, while Respondent had no history of prior layoffs, there is no dispute that work had significantly diminished in the plaster pattern shop at the time of Southworth's layoff and, at the time he was laid off, Southworth was told the reason was a lack of work and that he should not expect recall any time in the future. In these circumstances, it cannot be said that Ken Southworth had any expectancy of recall as of the payroll eligibility date, and, accordingly, it is recommended that the challenge to his ballot be sustained.

CONCLUSIONS OF LAW

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

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

3. Respondent laid off employee Thomas Wood on March 8, 1991, based on its suspicion that he was a leader of the union organizing campaign amongst its employees and, as a result, acted in violation of Section 8(a)(1) and (3) of the Act.

4. On March 8, 1991, Respondent interrogated Janet Lester as to her knowledge of the union activities of her fellow employees and thereby engaged in conduct violative of Section 8(a)(1) of the Act.

5. On March 8, 1991, Respondent demanded that Janet Lester fabricate evidence with regard to the receipt of the Union's demand for recognition letter in order to establish a sham defense for the unlawful layoff of Thomas Wood and thereby engaged in conduct violative of Section 8(a)(1) of the Act.

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

7. Unless specifically found above, Respondent engaged in no other unfair labor practices.

REMEDY

Having determined that Respondent engaged in serious unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from engaging in such conduct and to take certain affirmative action designed to effectuate the purposes and policies of the Act. I have concluded that Respondent unlawfully laid off employee Thomas Wood on March 8, 1991, because of suspicions that he was "in charge" of the Union's organizing campaign. Accordingly, I shall recommend that Respondent be ordered to reinstate Wood to his former position of employment or, if such no longer exists, to a substantially equivalent position. Further, I shall recommend that Respondent be ordered to make Wood whole for any lost earnings, he may have suffered as a result of the discrimination practiced against him, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Isis Plumbing Co.*, 138 NLRB 710 (1963), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁷ Additionally, I shall recommend that Respondent be ordered to post a notice setting forth its obligations.

[Recommended Order omitted from publication.]

²⁷ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.