

W. F. Bolin Co. and James D. Wright and Neal F. Kehl. Cases 9-CA-29404 and 9-CA-29448

June 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The question presented in this case is whether Respondent's layoff of two employees violated Section 8(a)(3) of the Act.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings,³ findings, and conclusions only to the extent consistent with this Decision and Order.

In his exceptions, the General Counsel contends that the judge erred by failing to find that the Respondent violated Section 8(a)(3) by laying off employees Kehl and Wright. We agree with the General Counsel for the reasons set forth below.

The Respondent is a party to a collective-bargaining agreement between the Union and two local contractor associations. Pursuant to the terms of this agreement, the Respondent hired several painters from the Union's hiring hall during the fall of 1991 to perform painting work at a school construction project. During the course of this project, several union members working for the Respondent at this project complained that the Respondent was not fulfilling contract provisions regarding travel pay, extra pay for working with epoxy paint, paycheck distribution, and the allocation of "premium pay" work. With regard to the complaints that the Respondent was not paying travel pay to the employees, the Respondent's owner William Bolin asked James Farley, the Union's business agent, to talk to the employees. Farley told them that the Union had agreed that the Respondent would not have to pay travel pay on this project in order to induce the Respondent to bid on the project. With regard to epoxy pay, Kehl, who did most of the epoxy work, complained to Farley that he was not receiving extra pay as required in the collective-bargaining agreement. Farley agreed with Kehl that he was entitled to epoxy

pay. In subsequent conversations with Bolin, however, Farley did not insist that the Respondent make the additional payments. Despite Farley's agreement with the Respondent's position on travel pay, Wright continued to complain to Foreman Charles Tisher and to talk with his fellow employees about the lack of travel pay. Kehl similarly complained about the lack of epoxy pay and the other contractual issues. Sometime around the beginning of November, Union Steward Edward Minke raised the travel pay issue with Tisher in the presence of several other employees including Wright. In order to illustrate his point, Minke handed him a copy of the contract so that he could examine the pertinent clause. Tisher threw the contract on the floor without examining it.

At different times in the first 2 weeks after he started work on December 12, Kehl complained to Tisher about the Respondent's failure to provide travel and epoxy pay and Tisher's failure to distribute the higher paying spray work more evenly among the employees. Kehl also acted as a spokesman for the employees to protest the Respondent's failure in late December to deliver paychecks to employees on the jobsite. At a meeting of employees with Tisher held on December 24, Kehl acted as the employees' spokesman on a range of issues, including complaints about travel pay, epoxy pay, and the distribution of premium pay, and Wright spoke for the employees regarding the Respondent's failure to give them travel pay.

Shortly after this meeting, Superintendent James Ring and Tisher walked by Kehl and Union Steward Minke while they were painting a wall with epoxy. On Kehl's request, Minke spoke to Ring regarding epoxy pay. Ring replied, "if you guys keep complaining I'm going to fire the whole crew and bring in a new crew."

On January 10, 1992, the Respondent laid off Kehl and Wright, citing the need for fewer workers during the latter part of the project and the two employees' alleged lesser proficiency at trim work (i.e., the painting of doors, doorframes, and other decorative work), the bulk of the painting work remaining on the project.⁴

The judge found that Wright's and Kehl's complaints and statements regarding the Respondent's alleged failure to abide by provisions of a collective-bargaining agreement constituted protected concerted activity. The judge further found that the Respondent violated Section 8(a)(1) by Ring's statement that he would fire the whole crew if they kept complaining.⁵

The judge, however, found that the layoffs did not violate Section 8(a)(3) and (1) of the Act, concluding

¹ On January 27, 1993, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

² No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by Superintendent Ring's statement to two employees that if the employees kept complaining, he would fire the whole crew and bring in a new crew.

³ Charging Party James Wright died between the time he gave an affidavit to a Board agent and the opening of the hearing. The General Counsel excepted to the judge's exclusion of this affidavit as inadmissible hearsay. In finding a violation in this case, we do not rely on that affidavit. Accordingly, we find it unnecessary to the resolution of this case to pass on this exception.

⁴ The Respondent retained employees who had less seniority on the project than Kehl and Wright, including employee George Miller, who began working for the Respondent on December 30, 1991.

⁵ No exceptions were filed to either of these findings.

that there was no basis for finding that the Respondent laid off either Kehl or Wright because of their protected activities. The judge found the absence of “virtually . . . [any] credible evidence of animus” by Respondent toward Kehl and Wright because of their engaging in protected activity. In particular, the judge noted that Ring’s remark was not individually directed at Kehl and Wright and that Ring had no intention of firing anyone at the time he made the remark. Further, with respect to the incident in which Tisher threw down the contract that Minke handed him, the judge noted that Tisher’s action was not directed at Kehl or Wright and that he was unwilling to interpret Tisher’s “expression of irritation” as proof that Tisher would be willing to terminate the employment of an employee because of the employee’s protected activity.

Analyzing the burden of proof issue, the judge concluded that because the General Counsel had not shown that layoffs were unwarranted on January 10, 1992, or that the Respondent ordinarily lays off painters according to seniority on the job, or that the Respondent had shown animus against Kehl and Wright, the General Counsel had the burden of proof “to show that Tisher’s testimony about how he chose Kehl and Wright to lay off was false.” Although the judge credited the testimony of the General Counsel’s witnesses that Kehl and Wright were experienced painters who were “perfectly capable” of performing the trim work, he concluded that such evidence fell short of proving that Tisher “could not reasonably have concluded that, relative to the other painters, Kehl and Wright were not as productive at the particular kinds of work that remained to be done as of January 10.”

In *Wright Line*,⁶ the Board set forth its test for cases alleging violations of the Act that turn on employer motive. First, the General Counsel must 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 shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

In essence, the judge found that the General Counsel failed to establish a prima facie case that the Respondent’s layoff of Kehl and Wright was motivated in part by their protected activities. We disagree.

Contrary to the judge, we find that Ring’s unlawful remark about firing the crew evidences animus toward the protected activities of Kehl and Wright. Discriminatory motivation may reasonably be inferred from various factors, including an employer’s expressed hostility toward protected activity together with its knowledge of the employee’s protected activities. *Turnbull*

Cone Baking Co. v. NLRB, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986), and cases cited there. Ring’s remark clearly expressed hostility toward and contemplated retaliation against employees who voiced further complaints. In light of Kehl’s and Wright’s continued outspokenness on behalf of employees to complain about various working conditions, we find it reasonable to infer that the Respondent was hostile towards Kehl and Wright regarding their continued voicing of complaints. In addition, Tisher’s throwing down a copy of the contract in reaction to the union steward’s complaints further evidences hostility to the employees’ protected activities in general and, by inference, to the protected activities of Kehl and Wright. Based on the foregoing and in light of the timing of the layoffs in close proximity to the employees’ protected activities, we find that the General Counsel has established a prima facie case that a reason for the Respondent’s selection of Kehl and Wright for layoff was their protected activities. See *Equitable Gas Co.*, 303 NLRB 925, 928–929 (1991); *Chelsea Homes*, 298 NLRB 813, 814 (1990).

In order to rebut the prima facie case, the Respondent must demonstrate that it would have laid off Kehl and Wright in the absence of their protected activities. To establish its defense, the Respondent has the burden of presenting “an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Equitable Gas Co.*, supra at 928.

The only witness presented by the Respondent to establish that it possessed a legitimate business reason for the layoff of Kehl and Wright was its Project Foreman Tisher, who testified that “I just chose the best ones to do the job and laid the other two off, or I kept the people I felt were the best qualified to finish the job is what it was.” We find this vague and conclusionary testimony, unsupported by any specific or objective evidence, insufficient to meet the Respondent’s burden, especially in light of the judge’s finding based on credited testimony that Kehl and Wright were both experienced painters capable of performing trim work and that they were “at least as good” as the other painters on the job and the fact that one of the painters retained by the Respondent had started working on the project less than 2 weeks before the layoff.

Based on the foregoing, we find that the Respondent has failed to rebut the General Counsel’s prima facie showing that the Respondent laid off Kehl and Wright

⁶ 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

because of their protected activities. We therefore conclude that the layoffs violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, W. F. Bolin Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Stating to employees that employees will be fired unless they cease concertedly complaining about their wages and working conditions.

(b) Laying off employees in retaliation for complaining about their wages and working conditions.

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

(a) Offer Neal Kehl immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make whole Neal Kehl and the estate of James Wright, deceased, for any loss of earnings and other benefits suffered by reason of its unlawful conduct, with interest.⁷ Backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Post at its office in Columbus, Ohio, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's 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.

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

⁷There is record evidence that the work project in question ended on April 3, 1992. However, we leave the issue of reinstatement and the amount of backpay to the compliance stage of these proceedings.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT respond to concerted complaints by employees about their wages and working conditions by threatening to fire them.

WE WILL NOT lay off employees in retaliation for their making concerted complaints about their wages and working conditions.

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

WE WILL offer Neal Kehl immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed and WE WILL make whole Neal Kehl and the estate of James Wright, deceased, for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

W. F. BOLIN COMPANY

Eric V. Oliver, Esq., for the General Counsel.

Christopher L. Lardiere, Esq. (Kemp, Schaeffer & Rowe), of Columbus, Ohio, for the Respondent.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, W. F. Bolin Company (WFB), is a painting contractor headquartered in Columbus, Ohio.¹ The events at issue here occurred during the course of WFB's work at the

¹WFB admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act (the Act).

Logan Middle School in Logan, Ohio, between September 1991 and April 1992.

According to the General Counsel, WFB's agents made coercive statements to employees, thereby violating Section 8(a)(1) of the Act, and laid off two employees for discriminatory reasons, in violation of Section 8(a)(3) and (1) of the Act.²

I. THE EMPLOYEES' COMPLAINTS

The Local Union of the International Brotherhood of Painters and Allied Workers with jurisdiction over the Logan Middle School site is Local 93, in Marietta, Ohio.³ WFB became a party to the collective-bargaining contract between Local 93 and two local contractor associations. In keeping with the terms of that contract, WFB obtained almost all of the employees it employed at the Logan Middle School through Local 93's hiring hall.

Throughout the course of their employment by WFB at the Logan Middle School, several employees (all members of Local 93) complained that WFB was not abiding by various provisions of the collective-bargaining contract. Those provisions had to do with: travel pay; extra pay for working with epoxy paint; the distribution of pay checks; and "premium pay."

Travel Pay

The Logan Middle School is roughly 60 miles from Marietta, Ohio. The collective-bargaining contract provides that in the case of worksites "in excess of 50 miles" from "the Washington County Court House" (in Marietta), the employer is required to pay 1 hour's pay (about \$20) to each employee for each day's work.

WFB's owner, William Bolin, raised the issue of travel pay with Local 93's business agent, James Farley, before bidding on the Logan Middle School job. Farley, in order to encourage Bolin to submit a bid, agreed that WFB would not have to pay travel pay for work at the Logan Middle School. (It was not unusual for Farley to enter into such agreements regarding travel pay in regard to jobsites in the Logan area. Nonetheless, it is by no means clear that Farley in fact was authorized to enter into such agreements. But since the General Counsel does not contend that WFB violated Section 8(a)(5), nothing in this proceeding hinges on whether the Bolin-Farley agreement concerning travel pay was binding.)

A number of WFB's employees at the Logan Middle School lived in the Marietta area and carpooled each day all the way to the school and back. Travel pay, and WFB's failure to pay it, were favorite topics of conversation during those long car rides. Soon after work began at the school, employee Edward Minke (who was the job steward) brought the matter to the attention of WFB's foreman at the site, Charles Tisher. Tisher told WFB's superintendent, James

Ring, about Minke's complaint. And both Tisher and Ring told Bolin. Bolin responded by asking Farley to talk to the employees. And, on several occasions, Farley did, telling them that travel pay did not apply to the Logan Middle School job.

That, however, did not silence the complaints. In particular, employee James Wright kept complaining to his fellow employees and to Tisher about the lack of travel pay. (The General Counsel contends that Wright's complaints about the lack of travel pay were the reason that WFB laid off Wright. That contention will be considered in part III, *infra*.)

Epoxy Pay

The lavatories in the Logan Middle School were painted with epoxy. Epoxy gives off strong fumes; and there is testimony that such fumes are hazardous. Employee Neal Kehl did most of the epoxy work. It was Kehl's understanding that a 1991 amendment to the collective-bargaining contract called for additional pay for employees using epoxy in any confined area. The record indicates, moreover, that Local 93's business agent, Farley, agreed with Kehl and told the employees that they would be receiving extra pay for epoxy work. Bolin, on the other hand, read the contract as requiring extra pay for epoxy work only when the painting was done inside tanks. After Bolin stated his position about epoxy pay to Farley, Farley did not insist that WFB pay extra for epoxy work.

The contract amendment about epoxy pay was not made part of the record.

Several employees complained about WFB's refusal to pay extra for epoxy work. Kehl complained more than anyone else about it. (The General Counsel contends that these complaints by Kehl were a reason that WFB laid off Kehl.)⁴

Premium Pay

The collective-bargaining contract provided that spray painting paid more than brush and roller painting. The contract also provided that: "All premium pay shall be distributed equally among journeymen on the job." Some of the work at the Logan Middle School did involve spray painting. But initially WFB did not distribute that work among all of the journeyman painters working at the school. Kehl spoke to Tisher about WFB's failure to abide by the contract in this respect.

Paychecks

WFB's weekly pay periods run from Wednesdays through Tuesdays. Paychecks are run off on Wednesdays. Ring (WFB's superintendent) generally took the paychecks to the jobsite on Thursdays. One week in late December, Ring was not able to make his usual visit to the Logan Middle School site. WFB responded by mailing, on Wednesday, the paychecks to the employees. That was a violation of the collective-bargaining contract which specifies that "employees shall . . . receive their pay on the job." Additionally, the paychecks did not arrive at the employees' homes until, at the earliest, Friday (while the employees were at work). And

²James D. Wright filed his unfair labor practice charge (in Case 9-CA-29404) on March 13, 1992. Neal Kehl Jr. filed his charge (in Case 9-CA-29448) on March 26, 1992. The consolidated complaint issued on April 16, 1992. The complaint was amended twice at the hearing. I held the hearing in Columbus, Ohio, on August 18, 1992. The General Counsel and WFB have filed briefs. In addition, WFB filed a reply brief to which the General Counsel filed a reply.

³WFB admits that Local 93 is a labor organization within the meaning of Sec. 2(5) of the Act.

⁴Sometime after Kehl was laid off, WFB sent a check for \$100 to Kehl in connection with Kehl's epoxy work. According to Bolin's credible testimony, WFB paid the \$100 "just to make" Kehl's complaints "go away."

no one from WFB had informed the employees about the one-time change in procedures. As a result the employees were surprised and upset when, as the workday came to a close on that Friday, they were not given their paychecks. (The contract also provides that employees must receive their pay “not later than 4:30 p.m. Friday.”)

On that Friday, Minke (the job steward) complained to Tisher about the employees not receiving their paychecks. When Tisher said that the checks had been mailed, Kehl said, “that’s against the contract,” pulled out a copy of the contract, and showed Tisher the relevant language. According to Kehl, Tisher then “kind of gave me a look.”

The record is clear that WFB mailed the paychecks, instead of handing them out on the job, only on that one occasion.

II. THE ALLEGED COERCIVE STATEMENTS

A. “*There’s Always the Highway*”

Employee Larry Beasley testified that, in the course of a workbreak at the Logan Middle School sometime in November, with all the employees present, Tisher responded to employee complaints about travel pay by saying, “if you don’t like it, there’s always the highway.” No other employee testified that Tisher ever said anything like that. Tisher denied ever using the phrase, whether in response to employee references to travel pay or to any other employee complaints.

There is no doubt that, as understood in the industry, the “there’s always the highway” phrase means something on the order of, “we’re going to continue doing things the way we’re doing them now, and if you are not willing to abide by that, your alternative—your only alternative—is to quit.”

The General Counsel contends that I should believe Beasley, not Tisher, and that WFB violated the Act when Tisher uttered those words.

In many circumstances an employer violates Section 8(a)(1) of the Act by stating, in response to concerted expressions of concern by employees about wages or working conditions, that the employees’ only alternatives are either to put up with what the employer is providing or to leave the employer’s employ. E.g., *Bill Scott Oldsmobile*, 282 NLRB 1073, 1074, 1082 (1987). But here: (1) Tisher had previously explained to the employees that their Union had agreed that WFB need not pay travel pay; (2) the Union’s business agent had told the employees that the Union had indeed entered into such an agreement; and (3) nothing in the record suggests that, even assuming that Tisher did make such a remark, he made it in a threatening or angry manner. (Compare *Bill Scott Oldsmobile*, supra.) Under these circumstances it is not at all clear to me that, had Tisher made the remark, it would have violated the Act.

In any case, I find that the General Counsel failed to prove that Tisher made the remark. Beasley was a very credible witness. But according to Beasley, Tisher made the remark in the presence of several employees, including the steward, Minke. Minke, in turn, showed that he was willing to testify that Tisher made threats (as will be discussed below). But Minke said nothing about any utterance by Tisher about “there’s always the highway.” Further, there was nothing incredible about Tisher’s denial.

I accordingly will recommend that this allegation of the complaint be dismissed.

B. *Ring’s Remark About “Firing the Whole Crew”*

In late December, Ring (the superintendent) and Tisher walked past Kehl and Minke as the two employees were working with epoxy. Kehl asked Minke to ask Ring about epoxy pay. (The record does not tell us how loudly Kehl spoke; thus I am in no position to find that Tisher or Ring heard Kehl.) Minke did raise the matter with Ring. Ring responded something on the order of: “if you guys keep complaining I’m going to fire the whole crew and bring in a whole new crew.”

Kehl testified that Ring’s expression was serious as he made the remark and that the remark was “most certainly directed at me, as he had eye contact with me when he said it.”

Ring did not deny making the remark, but he testified that he said it in jest—“more or less” kidding around.⁵ Ring also testified, credibly, that he had never fired anyone in the 36 years he had been a supervisor for painting contractors. As for Kehl’s testimony about Ring directing the comment at Kehl, Ring testified, again credibly, that he did not even know who Kehl was.

Minke did not testify about the incident.

My conclusion is that WFB violated Section 8(a)(1) of the Act by reason of Ring’s remark.

I find that, in making the remark, Ring had no intention whatsoever of firing anyone. (I credit Ring’s testimony to that effect. Further, given WFB’s contractual arrangement with Local 93, it would have been all but impossible to fire “the whole crew and bring in a whole new one,” as Ring, Minke, and Kehl all surely knew.) I also credit Ring’s testimony to the effect that he did not direct his remark at Kehl.

But Minke’s utterance to Ring concerning epoxy pay was protected by Section 7 of the Act. To say the least, a superintendent responding by talking about firing the whole crew might reasonably be perceived by employees as coercive, however jovially the superintendent intended the remark to be heard and even if the employees understood that a collective-bargaining contract almost surely protected them from such wholesale firing.

C. *Minke’s Testimony About Tisher Threatening to “Hire a New Crew From Columbus”*

According to Minke, while he and Tisher were working together (and away from other employees), they had a conversation about the employees’ complaints—travel pay, dividing up premium pay, and the like. Minke testified that in the course of that conversation Tisher stated, “if the complaints didn’t stop, Bill [Bolin] would lay the crew off and hire a new one from Columbus.” Tisher denied ever saying any such thing.

Minke’s testimony seemed credible to me insofar as his demeanor was concerned. But so did Tisher’s denial. And Tisher (like Ring, Minke, and Kehl) had to have known that WFB’s collective-bargaining agreement with Local 93 flatly precluded Bolin from doing any such thing. That alone makes it difficult to give credence to Minke’s testimony about Tisher. Additionally, Minke’s description of the words Tisher allegedly used closely matches the words used by

⁵ WFB’s brief claims that a statement in an employee affidavit supports Ring’s testimony that his remark was meant as a joke. That claim will be considered in part IV, infra.

Ring in Minke's presence (as discussed above). That suggests the possibility that Minke's memory somehow switched Tisher for Ring as the speaker of the threat.

Under all the circumstances I am unable to find that Tisher uttered the alleged threat. I accordingly will recommend that the relevant allegation of the complaint be dismissed.

III. WFB'S LAYOFF OF KEHL AND WRIGHT

As touched on earlier, WFB's work at the Logan Middle School was not completed until April (1992). But WFB laid off Kehl and Wright on January 10. The General Counsel contends that WFB did that because of the complaints that Kehl and Wright had made to management. WFB's position is that as of January 10 fewer employees were needed than had been the case and that Kehl and Wright were laid off because, in the foreman's judgment, they were less qualified to handle the remaining work than were the other employees.

The dates of employment of WFB's employees at the Logan Middle School, and the number of WFB employees employed there, are as follows:

Table I. Painters Working for W. F. Bolin at the Logan Middle School⁶

<i>Date</i>	<i>Event</i>	<i>Number of Painters on the Job</i>
Sept. 23	Beasley starts work	2
	Minke starts work	
Oct. 4	Wachenschwanz starts work	3
Oct. 10	Wright starts work	4
Nov. 19	Beasley quits ⁷	3
Nov. 20	Spears starts work 4 (from Columbus local)	
Nov. 25	Covey starts work	5
Dec. 12	Kehl starts work	6
Dec. 30	Miller starts work	7
Jan. 10	Wright laid off	5
	Kehl laid off	
Feb. 10	Covey laid off	4
Feb. 27	Spears laid off	2
	Miller laid off	
Mar. 19	Wachenschwanz laid off	1
Mar. 24	Kimberling hired for the 1 day ⁸	
Apr. 3	Minke laid off	0

A. Does the Fact That the Layoffs Occurred While Work Remained Suggest Discriminatory Motivation by WFB

The General Counsel contends that the record shows that, but for WFB's animus toward Wright and Kehl, WFB would

⁶This table refers only to employees. Tisher (the foreman) is not included even though he spent 40 hours per week at the Logan Middle School, much of the time working as a painter.

⁷The General Counsel points out that, in the course of Bolin's testimony, he stated that Beasley had been laid off. In fact Beasley quit. That, argues the General Counsel, suggests that Bolin was not a credible witness. Br. at 5. But I consider that misstatement by Bolin to signify nothing whatsoever about his credibility.

⁸Kimberling was a specialist in electrostatic painting. He was hired for that purpose for the 1 day.

not have laid off any employee on or about January 10. The General Counsel cites, in that respect: employee testimony to the effect that considerable painting work remained as of January 10; testimony showing that the general contractor for the Logan Middle School expressed unhappiness about what the general contractor considered the insufficient number of painters on the job subsequent to January 10; and testimony that the painting work was behind schedule.

As to substantial painting work remaining, all parties agree. Tisher, for example, testified that the painting work was only about 70 percent complete as of January 10. But Tisher also testified (credibly) that one section of the school was not yet ready for painting. As for the other areas of the school, Bolin credibly testified that: "the big spraying was done, the block filling was all done, most of the walls were finish coated. . . . It was mainly trim work that was left to be finished, doors, frames, decorating type work." That being the case, Tisher made the judgment that seven painters were too many for the work at hand.

As for the testimony about the general contractor's expressions of unhappiness and the work being behind schedule: I do not consider the fact that a general contractor expressed a preference for a subcontractor having more employees on the job to be weighty evidence about how many employees could be efficiently employed by the subcontractor; and I credit Bolin's testimony to the effect that while, overall, the Logan Middle School construction was behind schedule because of a late start in building the school, WFB's work was on schedule within the framework of that overall delay.

I conclude that WFB's layoff of two employees was solely a function of Tisher's judgment that WFB needed five painters at the Logan Middle School, not seven, as of January 10.⁹

B. Seniority Issues

If seniority is measured by how long each employee of WFB had been working for WFB at the Logan Middle School site,¹⁰ as of January 10 Wright was senior to four employees: Spears, Covey, Kehl, and Miller; Kehl was senior to Miller. (See Table 1.) Accordingly, if the record showed that WFB tended to lay off employees on the basis of seniority at a jobsite, WFB would have the obligation to explain why it laid off Wright and Kehl prior to less senior employees.¹¹

But nothing in the record suggests that WFB had any such practice. (I note that the collective-bargaining contract does

⁹Kehl testified that, 15 minutes before end of the workday on January 10, Tisher said to Kehl: "This is not my idea, but I have to lay you off." Tisher, however, denied that he told Kehl that the lay-off was not Tisher's idea. I credit Tisher. (Tisher may very well have told Kehl that he (Tisher) did not like having to lay off Kehl. But that, of course, is by no means the same as stating that Tisher was ordered to lay off Kehl.)

¹⁰Another way of measuring seniority would be how much time each employee had worked for WFB at all locations, not just the Logan Middle School. The record tells us very little about that apart from the fact that Wright had previously been employed by WFB as had Beasley and, apparently, Spears.

¹¹See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

not require that layoffs be made in order of seniority.¹²) Rather, the evidence points the other way in that Wright and Kehl were not the only employees laid off out of seniority. Covey was too. (See Table I.)

C. Why Were Kehl and Wright Selected for Layoff

Even though Wright and Kehl had no seniority rights, and even though the work situation at the school called for the layoff of two employees on or about January 10, WFB obviously violated the Act if its supervisors chose Wright and Kehl because the two employees had engaged in protected concerted activities. See, e.g., *City Service Insulation Co.*, 266 NLRB 654 (1983).

Two questions that rise are whether Wright and Kehl engaged in protected concerted activities and whether, if they did, there is any indication that WFB supervisors felt any animosity toward those activities.

D. Wright's Activities

Tisher and Farley (Local 93's business agent) told Wright about the Farley-Bolin agreement by which the union purportedly "gave away" travel pay. Wright, nonetheless, took the position that the travel pay provision of the collective-bargaining contract applied to the Logan Middle School site. Wright expressed that position to Tisher (and to the other employees) throughout his employment at the site.

Wright's complaints to Tisher were plainly protected by the Act. To begin with, several employees, not just Wright, were concerned about travel pay. And on at least one occasion Wright, at a meeting between the employees and Tisher, voiced his travel pay complaint explicitly as a spokesman for the employees. Second, even if Wright had voiced his complaints in an effort to obtain travel pay only for himself, "they still constituted concerted protected activity since they were made in the attempt to enforce the provisions of the existing collective-bargaining agreement." *Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (3d Cir. 1967).¹³ Finally, while Farley claimed that the travel pay provision did not apply because of his agreement with Bolin: (1) as touched on earlier, it is by no means clear that Farley in fact had the authority to enter into that agreement; and (2) even if Farley had such authority, that did not withdraw the protection of the Act from Wright's expression of his "honest and reasonable" position concerning his right to travel pay. *NLRB v. City Disposal Systems*, 465 U.S. 822, 825 (1984).

E. Kehl's Activities

Soon after beginning work at the school (on December 12), Kehl complained to Tisher about WFB's failure to provide travel pay,¹⁴ the fact that WFB was not paying a premium rate for epoxy work, and Tisher's failure to distribute the higher paying spray work more evenly. And Kehl acted

as a spokesman for the employees on the one occasion when WFB failed to deliver paychecks to the employees on the job. Additionally, in late December, Kehl again acted as a spokesman for the employees at a meeting of the employees with Tisher concerning a variety of employee complaints, including complaints about travel pay, epoxy pay, and the distribution of premium pay. All of such activity was, of course, protected by the Act.

F. Evidence of Animus

As discussed earlier, Ring, in response to a remark by Minke about epoxy pay, Ring said, "if you guys keep complaining I'm going to fire the whole crew and bring in a whole new crew." I have found that Ring did not intend to fire anyone. Nonetheless Ring's remark is evidence of, at least, some irritation with the complaints the employees were voicing. On the other hand, this case concerns WFB's actions regarding Wright and Kehl, and I have found that Ring did not direct his remark at Kehl (or Wright). Additionally, at an earlier time, when Minke had raised the subject of travel pay with Ring, Ring's response showed a willingness to consider the matter; Ring said that if travel pay was appropriate, WFB would pay it to the employees.

Apart from the one remark by Ring about firing "the whole crew," there is virtually no credible evidence of animus by WFB towards the employees for engaging in protected activities (or, for that matter, for any other reason).¹⁵

The one exception (or so it could be argued) concerns a meeting of employees with Tisher in October or early November. Farley had already told the employees that they were not entitled to travel pay on the Logan Middle School job. But Minke, trying to make the point to Tisher that travel pay was a contractual right, handed Tisher a copy of the collective-bargaining contract. Tisher's response was to throw the contract down onto the floor without looking at it. But again, if Tisher's action could be said to be directed at anyone, it was at Minke, not Kehl (who was not employed by WFB at the time) or Wright. And I do not interpret Tisher's expression of irritation as proof that Tisher would be willing to terminate the employment of an employee because of the employee's protected activity.

Other evidence of management's responses to employee complaints tends to show a lack of animus. Tisher rarely seemed perturbed by employee complaints about pay or working conditions. Tisher's stock response to employee complaints about travel pay was to say that Farley had given it away. When Kehl first raised the issue of epoxy pay, Tisher said he would check into it. When Kehl told Tisher about the contract's provision regarding the distribution of premium pay, Tisher said "okay," and thereafter, as Kehl testified, "the breakdown was more evenly distributed." At the meeting of employees with Tisher in December, Tisher,

¹² The collective-bargaining contract's only requirement regarding layoffs is that the job steward "will be the last journeyman laid off provided he is capable of performing the work." And, in fact, the job steward (Minke) was the last employee that WFB laid off at the Logan Middle School site.

¹³ See also *Stor-Rite Metal Products*, 283 NLRB 856 (1987).

¹⁴ Tisher testified that Kehl never spoke to him about travel pay. But I do not credit Tisher's testimony in that respect.

¹⁵ Minke testified that Bolin asked him if Wright was complaining about travel pay. But Bolin denied that, and I credit Bolin, not Minke. As noted earlier, Kehl testified that Tisher "kind of gave me a look" when Kehl showed Tisher the provision of the collective-bargaining contract relating to delivering paychecks on the job. But I do not consider that testimony to be evidence of animus. Both Ring and Tisher informed Bolin, while the job was in progress, that employees were complaining that they were not receiving travel pay. But that does not indicate that management felt any animosity toward the employees for voicing the complaints.

according to Kehl, “took it all in. He was not negative in his actions; he was not aggressive.” As for the paycheck distribution problem, it is hard to imagine why Kehl’s complaints would have been unduly troubling to management since WFB’s routine way of handing out paychecks was precisely the same as the procedure that Kehl demanded.

G. The Credibility of Management’s Testimony About Why Wright and Kehl Were Selected for Layoff

As discussed earlier, as of January 10 WFB needed only five painters at the Logan Middle School, not seven, and “it was mainly trim work that was left to be finished, doors, frames, decorating type work” (to quote Tisher’s credible testimony).

It was up to Tisher to decide whom to lay off. As Table I, *supra*, shows, Tisher had to decide between Covey, Kehl, Miller, Spears, Wachenschwanz, and Wright. (Minke was the job steward and thus had to be the last to be laid off.) Tisher’s explanation (in full) for choosing to lay off Kehl and Wright on January 10 (rather than Covey, Miller, Spears, or Wachenschwanz) was: “So I just chose the best ones to do the job and laid the other two off; or I kept the people I felt were best qualified to finish the job, is what it was.”

That brings up a burden of proof issue. Was it up to WFB to prove that Tisher’s testimony about why he laid off Kehl and Wright was credible? Or was it up to the General Counsel to prove that that testimony was false?

I will assume, for present purposes, that it would be WFB’s burden if the General Counsel had shown that no layoffs were warranted on January 10, or that WFB ordinarily lays off painters according to seniority on the job, or that WFB supervisors had shown themselves to be sufficiently angered by Kehl’s and Wright’s protected activities to consider ending the two painters’ employ with WFB. See *Wright Line*, *supra*. But the record fails to show that any of these circumstances obtained. That leaves the burden of proof with the General Counsel to show that Tisher’s testimony about how he chose Kehl and Wright to lay off was false.

The General Counsel failed to carry that burden.

As to Tisher’s demeanor, as I listened to Tisher’s testimony about why he picked Kehl and Wright for layoff, I was not able to conclude either that Tisher was telling the truth or that he was lying.

As for other evidence, the General Counsel’s witnesses testified credibly that Kehl and Wright were both experienced journeyman painters who had been doing good work at the Logan Middle School site and were perfectly capable of handling trim work. But the question is what were the relative capabilities of Kehl and Wright, on the one hand, and of Covey, Miller, Spears, and Wachenschwanz, on the other.

Minke did testify, credibly, that in his judgment Kehl and Wright were “at least as good” as the other painters on the job. But that does not come close to proving that Tisher

could not reasonably have concluded that, relative to the other painters, Kehl and Wright were not as productive at the particular kinds of work that remained to be done as of January 10. And apart from the testimony of Tisher and Minke, the record gives us no basis for making any comparisons between the skills of the painters employed by WFB at the Logan Middle School.

In sum, I have no basis for finding that WFB laid off either Kehl or Wright because either employee engaged in activities protected by the Act. I accordingly will recommend that the complaint’s allegation that the layoffs violated Section 8(a)(3) and 8(a)(1) of the Act be dismissed.

IV. WRIGHT’S AFFIDAVIT

Wright died between the time he gave an affidavit to a Board agent and the opening of the hearing. The General Counsel sought to have Wright’s affidavit made part of the record. WFB objected and, for reasons discussed at pages 10–20 and 149–150 of the transcript, I sustained WFB’s objection. (See, in this connection, the Board’s Order in this proceeding dated August 27, 1992.)

But WFB’s brief raises new issues concerning Wright’s affidavit. WFB has attached to the brief what the brief says is Wright’s affidavit. The brief invites me to use parts of the affidavit as evidence in support of WFB’s position.

I have considered whether I should deem this treatment of the affidavit by WFB to be a withdrawal of its objection to the introduction of the affidavit into the record and should, on that basis, receive the affidavit into evidence.

I have decided that that would be inappropriate. WFB’s brief is clear that WFB continues to oppose the receipt into evidence of the affidavit. (Br. at 15–19.) WFB’s apparent reason for appending the affidavit to its brief is to encourage me to use two short passages as admissions against interest by Wright. (See WFB’s Br. at 18–19; Fed.R.Evid. 801(d)(2).) I see no reason to penalize WFB for making that attempt. On the other hand, the place for WFB to have called my attention to those portions of the affidavit was at the hearing, not in a posthearing brief. I accordingly have not considered any part of Wright’s affidavit in deciding this case.

REMEDY

The recommended Order requires WFB to cease and desist from its unlawful actions and to post the usual notice at its office. In addition, the recommended Order requires WFB to mail copies of the notice to the painters it employed at the Logan Middle School since it appears that: (1) few if any of the painters who were employed by WFB at the Logan Middle School remain employed by WFB; and (2) painters employed by WFB do not routinely visit the Company’s office. [Recommended Order omitted from publication.]