

Teksid Aluminum Foundry, Inc. and Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC. Cases 26-CA-13070, 26-CA-13134, 26-CA-13322, 26-CA-13411, 26-CA-13473, 26-CA-13522, and 26-RC-7180

May 28, 1993

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On December 19, 1991, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent and the General Counsel filed exceptions, briefs, and answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and to adopt the recommended Order as modified.

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

²The judge credited Jeffery Clement's testimony regarding a February 25, 1989 meeting. At the meeting Director of Human Resources Richard Figari told supervisors and coordinators (who are employees) that although "we couldn't come out and openly threaten an employee about the Union . . . [we should keep our] eyes and ears open because Teksid would not allow a union." The judge, however, failed to consider whether this statement was unlawful instruction to supervisors and employees to engage in surveillance of the employees' union activities. We find that the Respondent thereby violated Sec. 8(a)(1) by additionally engaging in, and creating the impression of, surveillance.

We affirm the judge's dismissal of the allegation that the Respondent unlawfully engaged in surveillance by means of a sign-in/sign-out procedure that required employees to state their reason for entering the premises. We find the evidence insufficient to establish an unlawful purpose or effect. There is, for example, no evidence that the statement, "I work here," would not have been an acceptable reason.

Member Devaney finds it unnecessary to pass on whether the Respondent's mid-March 1989 sign-in/sign-out procedure and Richard Figari's remarks at the February 25, 1989 meeting violated Sec. 8(a)(1) of the Act, in view of his adoption of the judge's findings that Figari and Timothy Burton, the production supervisor, engaged in unlawful surveillance of employees' union activities on March 4 and 17, 1989, respectively. Any additional violations would essentially be cumulative and would not materially affect the Order.

The judge found that by posting on August 22, 1989, a notice entitled "THE TRUTH ABOUT NEGOTIATIONS" the Respondent unlawfully threatened wage losses if the Union won the election and, further, that its attempted clarifications on August 29 and 30 (the judge inadvertently wrote September) were ineffective. We agree. The August 22 notice was ambiguous. For the Respondent's subsequent attempts at clarification to have been effective, they would

During a series of employee meetings two days before the election, President Tarantini expressed his opinion about the Union and asked employees not to "make me negotiate against you." The judge found that Tarantini's statement constituted an unlawful threat to adopt a regressive bargaining posture. We disagree. We think that the statement is ambiguous and, at most, reflects the reality of the collective-bargaining process. *Fern Terrace Lodge*, 297 NLRB 8 (1989). Accordingly, we find that the statement did not violate Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Teksid Aluminum Foundry, Inc., Dickson, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 1(g).

"(g) Threatening to discharge, freeze wages and benefits, or otherwise punish employees for supporting the ABGWIU or any other union."

2. Substitute the following for paragraph 3.

"IT IS FURTHER ORDERED that the election, held on September 1, 1989, is set aside and that Case 26-RC-7180 is severed from Cases 26-CA-13070, 26-CA-13134, 26-CA-13322, 26-CA-13411, 26-CA-13473, and 26-CA-13522, and remanded to the Regional Di-

have had to be timely, unambiguous, specific in nature, adequately published, accompanied by assurances against future interference with its employees' Section 7 rights, and free from other contemporaneous illegal conduct. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). The August 29 and 30 notices were ambiguous and were posted at least 5 days after the original coercive notice and no more than 2 days before the election, in an atmosphere of pervasive unfair labor practices, and without the requisite assurances against future unlawful conduct by the Respondent. Accordingly, we adopt the judge's finding that the Respondent's attempts to negate its threats were ineffective.

With respect to the violation based on the August 22 notice posting, Chairman Stephens agrees that the reference to "frozen" benefits is an unlawful threat. He finds this case distinguishable from *Mantrose-Haueser Co.*, 306 NLRB 377 (1992), in which he filed a concurring opinion. In that case, unlike here, the statement was followed in the same document by other statements indicating that benefits could go both up and down in the negotiating process; and there, unlike here, the statement was an isolated remark in an otherwise totally lawful campaign.

In adopting the judge's decision that the suspension and discharge of employee Gary Johnson was unlawful, we note particularly that the Respondent did not except to the judge's finding that the Respondent unlawfully discriminated against Johnson by issuing him an unsatisfactory performance evaluation, placing him on probation, and withholding his scheduled pay increases.

Member Devaney does not adopt the judge's finding that the May 4 memorandum issued to Steve Forcum was not unlawful. Rather, Member Devaney finds that the memorandum was part and parcel of the Respondent's pattern of harassment against the principal employee organizer for the Union and violated Sec. 8(a)(3) and (1) of the Act.

rector for Region 26 for the purpose of conducting a new election.”

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

[Direction of Second Election omitted from publication.]

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 discharge, suspend, issue warnings, withhold earned wage increases, impose more onerous working conditions, give low evaluations or otherwise discriminate against you for supporting Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC or any other union.

WE WILL NOT coercively interrogate you about union support or union activities.

WE WILL NOT announce and enforce overly broad no solicitation/talking rules and unduly limited access-to-company-property rules so as to inhibit, deter, or prevent union organizational efforts.

WE WILL NOT engage in surveillance or create an impression of surveillance so as to inhibit, deter, or prevent union organizational efforts.

WE WILL NOT coercively interrogate you about your union activities, including wearing union insignia, or sympathies.

WE WILL NOT solicit or promise to remedy your grievances in order to undermine union organizational efforts.

WE WILL NOT threaten to discharge you, freeze your wages and benefits, or otherwise punish you for supporting the ABGWIU or any other union.

WE WILL NOT threaten blacklisting or other reprisal to inhibit, deter, or prevent your having recourse to the Board.

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

WE WILL offer immediate, full, and unconditional reinstatement to Randy Crowell, Bobby Dickens, Steven Forcum, and Gary Johnson to (except for Crowell) positions held on the day of their unlawful discharges but as to Crowell, WE WILL offer him immediate, full, and unconditional reinstatement to the position he held prior to his unlawful transfer on March 1, 1989 (and if those positions no longer exist—to substantially equivalent jobs) without prejudice to their seniority and other rights and privileges, and make them, and Wade Ross, whole with interest for any loss of pay they may have suffered by reason of their unlawful discharges and/or suspensions.

WE WILL rescind all adverse personnel actions issued to the above-named employees, and to Bobby Felts, John McElhiney, and Kelly Burgess as a result of the discriminations here found to have been practiced against them, and expunge from our files any reference thereto and notify these employees, in writing, that such actions have been accomplished and that the expunged material will not be used as a basis for any future personnel actions against them or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

TEKSID ALUMINUM FOUNDRY, INC.

Jane Vandevanter, Esq., for the General Counsel.
William A. Blue, Richard O. Brown, Scott Watson, and Bruce P. Crary, Esqs. (Constangy, Brooks & Smith), of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Nashville, Tennessee, over 11 days during the period January 30 through April 11, 1990. The charges were filed by the above-named Union between March 7 and December 14, 1989,¹ and complaints were issued between April 17 and December 8 culminating, on the latter date, with a consolidating order and sixth amended consolidated complaint.² Pursuant to an election petition in Case 26-RC-7180 filed on June 26, an election was held on September 1. The Union lost by a vote of 97 to 60, with 3 challenged ballots. Objections to the election parallel allegations in the consolidated complaint and, on October 12, they were referred for hearing and decision with that complaint.

The complaint alleges numerous violations of Section 8(a)(1) of the National Labor Relations Act, including two methods of unlawfully restricting employee access to Respondent's facilities, three instances of surveillance of union activities, five instances of prohibiting protected activities, multiple coercive interrogations and threats of discharge, re-

¹ All dates are in 1989 unless otherwise indicated.

² General Counsel's request to withdraw allegations in pars. 40 and 41 of the complaint relating to employee Charles Smith was granted at the trial.

praisal, and wage freeze, as well as soliciting grievances, impliedly promising to remedy them and refusing to bargain if the employees chose the Union as their collective-bargaining representative. In addition, it is alleged that Respondent violated Section 8(a)(3) by discriminatory warnings (6), suspensions (4), discharges (4), withholding of earned wage increases (3), and by imposing more onerous working conditions.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,³ I make the following

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

Respondent, a corporation, produces aluminum cylinder heads for automobile engines at a plant in Dickson, Tennessee, from where it annually ships to points outside Tennessee goods and materials valued in excess of \$50,000.⁴ It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED INDEPENDENT VIOLATIONS OF SECTION 8(A)(1)

Background. The plant at Dickson began operations in early 1987 and rumors of union activity surfaced shortly thereafter. Richard Figari, Respondent's director of human resources, states that in the summer of 1988 he received "a lot of information" that union authorization cards were being signed by employees; and he promptly held a series of meetings with employees to counter the campaign. In early February, he "began to get reports from supervisors and other personnel that there was an active campaign going on at the plant." During that period, Supervisor Mike Bullington informed group leader trainee Jeffery Clements that "we're going to have to do something about that guy [mechanic Bobby Felts], because he's pushing real hard for the union . . . we need to get him wrote up or get rid of him." Thereafter, in Clements' words:

[I]t seemed like every day [Bullington] would ask me . . . what have heard in the breakroom, who's talking about the union, has anyone signed cards. On one occasion he asked me about Tony Horner [another employee] . . . and I stated that I knew nothing about Tony. And he said well . . . his Dad was a big union guy at [another company] . . . see what you can do about finding out about Tony because we need to keep our eye on him.

Clements also states that during the course of a safety meeting held on February 25 for supervisors and coordina-

³ Respondent subsequently filed a motion to amend its brief in several respects. Since only editorial changes are involved, the unopposed motion is granted.

⁴ Respondent is affiliated with a firm headquartered in Italy. It has other "competing" affiliated companies in Mexico and Brazil. A number of its supervisory personnel are Italian nationals.

tors,⁵ Figari told them that although "we couldn't come out and openly threaten an employee about the Union . . . [we should keep our] eyes and ears open because Teksid would not allow a union."⁶

The Union formally opened its organizing drive on February 27 when eight or nine employees arrived at work wearing its buttons and other insignia. On observing that development, Richard Figari, in the presence of personnel assistant (Tanya Rochelle), referred to employees who supported the drive as "union slime." Figari did not disavow the comment.

Solicitation/No-Talking Rules. During the first half of February, Felts announced to Supervisor Randy Lankford and coordinator Mike Branch that he supported the Union. On February 23, Maintenance Supervisor Joe Williams approached Felts, accused him of having held a union meeting in the electrical room several hours earlier that day, and said "I got to tell you [that] you can't hold meetings on company property." Shortly before, he had been told by coordinators Mike Branch and Glen Kilgore that they had seen Felts seated in the middle of a group of five employees and that one of the employees (Kelly Santos) told them they had been talking about the Union. Prior to that time no written or oral policy had been announced concerning talking during working hours, and according to uncontradicted testimony of Felts "it was a usual thing for us [maintenance employees awaiting assignment] to sit in that room and just shoot the crap . . . talking] about work or whatever we wanted to, football, basketball, horses, you name it."⁷ Indeed, there was a consensus among employee witnesses that Respondent's plantwide practice concerning talking with other employees during worktime was that employees were free to talk to one another at any time and place as long as it didn't interfere with their work.

An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. *Orval Kent Food Co.*, 278 NLRB 402, 405, 407 (1986), citing *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), enf. 608 F.2d 762 (9th Cir. 1979); *Laird Printing*, 264 NLRB 369, 374, 376 (1982). Here, however, the employer through Williams announced a no-talking rule specifically to prevent perceived discussion of unionization and there is no indication that it was concerned about, or thereafter applied the rule to bar, discussion of other nontask-related subjects during working time. I find the rule was discriminatorily promulgated

⁵ In the RC case, coordinators (team leaders) were deemed employees entitled to vote in the election.

⁶ At the time he testified Clements was no longer employed by Respondent, having voluntarily quit in early March. His account is not disputed and I credit it.

⁷ Williams denies that he accused Felts of holding a union meeting, stating that "someone told him at a later date that it [the meeting] concerned union activities." He admits, however, that the information which prompted him to speak to Felts was given to him by Branch and Kilgore. Since those individuals described the incident, including their conversation with Santos, in a memo to Williams written on February 23, I find it highly unlikely that in initially reporting the matter they did not tell him about a "union meeting." Accordingly, I credit Felts' account in this matter.

and applied in violation of Section 8(a)(1), as alleged in paragraph 12 of the complaint.

Steve Forcum, a trainee chemical technician, told his supervisors that he supported the Union on February 24 and thereafter became the most vocal activist for the Union. On or about March 23, he was in the breakroom at the same time as production supervisor, Timothy Burton, and he asked him if employees could talk about the Union inside the plant. Burton responded “No . . . [as] long as you’re on company time, Teksid can tell you what to do.” A few days later Forcum was testing mold temperatures on a carousel⁸ and, according to custom, he spoke to other employees between rotations.⁹ Burton approached Forcum and told him to stop talking about the Union. Burton did not deny making that directive. And in June, an employee in the tooling maintenance section (William “Kelly” Burgess), who wore a union button, was told by Supervisor Enzo Pagliuzzi that he and other “tooling” mechanics were no longer allowed to talk to employees in the mechanical maintenance section. No reason was given, and Pagliuzzi was not called to testify. The rationale applied above to the Felts incident, is applicable here. Accordingly, I find violations in all three instances, as alleged in paragraphs 9(c) and (d) and 10 of the complaint.¹⁰

On February 28, one day after employees began wearing union buttons, Figari addressed all employees (approximately 150) at a series of small group meetings during which he expressed the company’s firm opposition to unionization and his concern that “the hostility or the level of antagonism that was being created . . . at the plant was really not conducive to a good relationship with employees . . . [needed] to accomplish our goals.” And during the course of at least one of those meetings, he told a group of five or six employees that they were not permitted to hold union meetings or solicit union members “on company property.” The testimony of the four employees¹¹ who appeared in this regard was consistent and apparently free of animus. On the other hand, Figari’s implicit denial is not persuasive. He could not recall whether he made any distinction between “working” and “break” time stating “I don’t recall exactly what I told them . . . [about] that, but I may have. I don’t know.” In this circumstance, and in the absence of any written solicitation or distribution rule, I conclude that the employees either heard or were justified in believing they heard him ban union solicitation on company property at any time. That prohibition is overly broad and therefore unlawful, as alleged in paragraph

⁸A carousel is a large circular platform containing five molds into which molten aluminum is poured. This is accomplished by use of a robotic ladle and there is a 10 to 15 second wait between pourings as each mold is placed in position beneath the ladle.

⁹Current employee Jeff Hogue credibly testified that employees exchanged small talk every once in a while as the carousels changed position, and Burton, the only supervisor who testified on this matter, conceded that circumstance.

¹⁰On brief, the General Counsel cites par. 10 as covering Pagliuzzi’s direction to Burgess in June. That paragraph, however, refers to an incident occurring on March 29 and involving Supervisor Dario Pazzola. Since there was no objection to the variant evidence, the paragraph is deemed amended to conform to the proof. *United Packinghouse Workers*, 416 F.2d 1126 fn. 12 (D.C. Cir. 1969); *Frito Co.*, 330 F.2d 458 (9th Cir. 1964)

¹¹Burgess, John Mark Covington, Mark Wannamaker, and Reuben Smith.

7(a) of the complaint.¹² *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). See also *Our Way, Inc.*, 268 NLRB 394 (1983).

Limited Access Rule. On March 9, Figari posted a memorandum reminding employees that pursuant to a policy posted in June 1988 they were allowed to be on company premises only 30 minutes before and after their scheduled work times; and in the same memorandum he advised them that “corrective discipline” would be taken against violators. Under *Tri-County Medical Center*, 222 NLRB 1089 (1976), an employer may limit off-duty employees access to its outside nonworking areas only where there are specific business justifications. Respondent offered no reason for maintaining this extremely limited access rule or for its republication at the very outset of the union drive. Accordingly, I find that the rule unduly limits the exercise of protected organizational rights as alleged in paragraph 16 of the complaint.

On May 16, employees Forcum and Burgess were distributing pronoun literature at the plant gate. They had parked their cars in the company parking lot approximately 30 minutes before their scheduled 8 a.m. starting time and walked out to where they usually conducted handbilling, on a 20-foot grass strip between the plant gate and the public roadway. The guard was standing in the middle of the road 30 feet from the guard station. Forcum observed that when vehicles stopped by the guard, the guard sometimes made notes. Forcum testified that “we were concerned about what he was writing down so we asked the guard . . . can we come over there beside you and handbill. And he said no you can’t. I believe he [also] said . . . we could go on . . . to the parking lot and handbill.” I find no denial of access to the parking lot area as alleged in paragraph 15 of the complaint. Employee access privileges do not include the right to stand in prying distance of plant guards.

Surveillance. On March 4, employees Gary Johnson and Covington had finished their shift and were approaching the locker room. Both were wearing union insignia. As they passed Manager Figari in the hallway, Johnson, a principal union activist, called out to him “What’s up?” and then proceeded with Covington into the locker room. Figari followed directly behind and then stood at the end of a row of lockers where he had visual contact with the two employees. He remained there for about 5 to 10 minutes while they changed their clothes and when they left to go home he followed them out of the locker room. About 10 or 12 other employees were in the room during the incident. Figari had been silent during his visit except towards the end when he asked employee Jerry Booker whether his foot had healed. Figari recalled speaking to Booker for about 2 or 3 minutes and states that his visit to the locker room was just part of his

¹²Par. 7(a) alleges that Figari on the day in question promulgated the unlawful rule on two more occasions and also threatened plant closure. The only other evidence concerning solicitation on that day is testimony of an employee (Tony Horner) who participated in another group meeting. He “believes” Figari said there was to be no discussion of the Union during “working hours,” but adds: “I can’t recall him saying it exactly.” Since alleged discriminatee Gary Johnson attended the same meeting and could not recall anything being said about the matter, I view Horner’s testimony as insubstantial. There is no evidence of any threatened plant closure. These additional allegations are dismissed.

daily plant walk through. He claims he was not engaged in surveillance, adding its "very counter-productive."

On March 17 Supervisor Burton took breaks coextensive with those of Johnson. Johnson's pertinent testimony reads as follows:

I came in on my morning break . . . and had no sooner sat down than Tim Burton came in . . . and sat down and didn't get a Coke, didn't get anything to munch on . . . from the snack machine or anything. He just came in and sat down at a table. I didn't think much about it. And I got up when my ten minutes were up . . . when I was walking off, I looked over my left shoulder to see if Burton was coming out, and he came right out behind me. Well, he did the same thing when I went in for lunch. He came right in behind me and when I left, he left right behind me. The same thing with the evening break. When I came in, he came in right behind me, and when I left, he left behind me.

Johnson also testified about an incident occurring later in the day, as follows

That evening when I left work, I went in and clocked out and changed clothes and came out into the parking lot, and [employee] John McElhiney's truck had some type of fluid leaking out from underneath it. John was there [with two other employees]. I walked over to ask him what was up, if he needed me to take him somewhere to get parts. And Bobby Felts came up a few minutes after . . . and we was talking about what [McElhiney] was going to do. And Tim Burton come walking out there and he still had his steel-toed . . . shoes on and his safety glasses. . . . He come out and stood right in the middle of us and had his hands in his pockets and said nothing. He just stood there . . . for about four or five minutes before I [and the others] left.

Burton did not advert to this testimony when called as a witness by Respondent. I find the incidents occurred as described by Johnson.

The silent interludes in the locker room, breakroom, and the parking lot constitute attempts by management, through overt surveillance, to prevent known union supporters from engaging in organizational activities at times and places when and where they were lawfully entitled to do so. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). Accordingly, Respondent violated protected rights of employees as alleged in paragraphs 7(c) and 9(a) of the complaint.

Unlawful surveillance also is alleged to have commenced in mid-March when Respondent for the first time posted security guards at its plant entrance and established a procedure whereby persons seeking entrance had to identify themselves to the guards, state why they sought entry, and sign in and out. Figari claims the system was instituted in reaction to a theft of \$5000 worth of copper tubing about a month earlier. Although the proffered reason is not free of doubt because Figari offered no explanation as to why the matter was not reported to the police or why it took a month to respond, the evidence does not show that the new procedure was estab-

lished for any purpose other than security.¹³ *Knogo Corp.*, 265 NLRB 935, 945 (1982). Employers have a right to respond to an organizational campaign by establishing procedures for denying unauthorized persons access to their facilities, and any incidental observation of public union activity by security guards is not unlawful. *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). The allegation in paragraph 13 of the complaint will be dismissed.

Interrogations. In early March two employees (Johnson and Reggie Spurgeon) observed Figari pass out antiunion buttons¹⁴ to workers on the finishing file in early March and another (Bobby Felts) saw Figari distribute them in the breakroom. However, they did not hear what Figari and the employees accepting buttons said to each other, and they did not know whether those employees had previously asked for the buttons. During the same period, another employee (Neal Lallemand) was working at his machine when Figari, without saying anything, tendered him an antiunion button. Lallemand took it, placed it on his machine, and went back to work. He had not previously asked for the button nor had he told any supervisor whether he was for or against unionization. A number of employees in the finishing department, as well as Bubby Felts, testified that they had obtained antiunion buttons by asking Figari or other supervisors for them.

Distribution of antiunion material by an employer is not unlawful absent some form of coercion or pressure on an employee to receive the material. *McDonald's*, 214 NLRB 879, 881-883 (1974). With the exception of the incident involving Lallemand, there is no showing that employees accepting buttons from Figari had not voluntarily asked for them. Lallemand, however, had neither asked for a button nor given Figari any indication of where he stood relative to the campaign; and I find that the act of tendering the button was coercive since he was being asked to declare himself to a high level supervisor whose antiunion views were well known to employees. In that one instance, therefore, I find unlawful interrogation as alleged in paragraph 7(b) of the complaint.¹⁵

On March 1, employee Randy Crowell asked Supervisor Stanley Stewart why he was wearing a nonunion button. Stewart replied by asking Crowell if he wanted one. Crowell demurred stating that he wasn't campaigning either way. Stewart then told Crowell that "employees knew what they were getting into when they started this Union stuff."¹⁶ About 20 minutes later, Stewart relieved Crowell from his assignment on the carousel and told him to get a broom and sweep the basement. He worked there amid clouds of dust

¹³ The fact that a guard on one occasion may have said "shame on you" after observing an employee accept a handbill appears to have been nothing more than an isolated incident reflecting only the guard's personal views.

¹⁴ One of these buttons bore the legend "Union Free And Proud To Be" and another showed the word "Union" with a slash through it.

¹⁵ The incident involving Lallemand is cited in the General Counsel's brief as justification for a finding of unlawful interrogation under par. 7(e) of the complaint. The latter paragraph will be dismissed as multiplicitous.

¹⁶ Stewart claims that Crowell asked for a nonunion button and that he gave one to him. I have credited Crowell's account, finding it consistent with a pattern of unlawful conduct by Respondent's supervisory personnel.

and when he emerged grime-covered 4 hours later, Crowell encountered Supervisor Burton who asked "Where's your Union button?," laughed, and walked off.

Burton did not interrogate or even question Crowell. He simply made a snide observation. Accordingly, paragraph 7(e) of the complaint will be dismissed.

The situation involving Stewart, however, is different. He did not answer Crowell's question. Instead, his counter-question was intended to elicit Crowell's stance vis-a-vis the Union; and when he ascertained that Crowell did not side with the company, he immediately demonstrated the consequences of that dereliction by assigning Crowell to more onerous duties (see the 8(a)(3) discussion infra)—a coercive circumstance which removes any doubt that his riposte was in fact unlawful interrogation, as alleged in paragraph 1 of the complaint. *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Interrogation/Solicitation of Grievances/Promised Remedies. John Harrell, a current employee, actively supported the Union since early June by wearing insignia and distributing literature at the main gate. In mid-August, about 2 weeks before the scheduled election, he was told to leave his work station and report to the office of the company president, Riccardo Tarantini. There, with the door clogged and only Harrell present, Tarantini asked why he was wearing union hats and buttons. Harrell just smiled and said nothing. After a long pause during which he seemed in deep thought, Tarantini changed the subject by telling Harrell he was delighted to learn that his supervisors viewed him as a "picture perfect" employee, able to perform tasks with minimal supervision while getting along with everybody. Tarantini went on to state that he knew there were "problems" in the plant, and he asked Harrell if he had any ideas on how to improve working conditions. Harrell replied that it was very hot in his department and asked for additional fans. At Tarantini's prompting, Harrell went on to mention a number of other improvements which could be made, and throughout this recitation Tarantini made notes. When Harrell stopped, Tarantini encouraged him to go on and asked for ideas in other areas, including plant operations. When Harrell seemed to have nothing more to say, Tarantini assured him that management would try to implement his suggestions. After another pause, Tarantini said he very much wanted Harrell to be part of "the team" and advance in the company. After another pause, Tarantini asked "How do you stand?" In Harrell's words: "I . . . didn't reply again. I just kind of smiled and . . . left it at that."

The meeting ended at that point, having lasted about 2 hours. Before that time, Harrell had never been in Tarantini's office nor had a private meeting with him. Harrell's account of the meeting is uncontroverted since Tarantini did not testify, and I find it credible.

An employer has a right to communicate with employees as a group or individually concerning an ongoing union organizing campaign, but the session must not involve coercion. *Flex Products*, 280 NLRB 1117 (1986), citing *NVF Co.*, 210 NLRB 663 (1974); *Rossmore House*, above.

Here, the circumstances surrounding the meeting are fraught with coercive overtones. Tarantini was Respondent's chief officer and there is no indication that he ever called relatively low level employees such as Harrell to his office or,

indeed that he ever had one-on-one meetings with them. So Harrell had every reason to believe he was being singled out and for being apprehensive when he was directed to go to Tarantini's office. And Tarantini's remarks could only serve to heighten his apprehension. The meeting was held in close proximity to the scheduled election and Tarantini was in effect telling him that the company could and impliedly would remedy whatever conditions had caused him to support the Union and that he had a bright future there if only he would forsake the Union and become a team player. Although couched in gentility, his remarks had a coarse undertone (or suggestion of a "fist in an iron glove") that dire consequences would ensue if he persisted in aligning himself against the company. *NLRB v. Parts Co.*, 375 U.S. 405 (1964).

I find the incident to involve unlawful interrogation, solicitation of grievances, and implied promise of benefits as alleged in paragraphs 17(b) and (c) of the complaint.

Threats. On March 16, just prior to start of the 7:30 a.m. shift, Personnel Director Figari entered the breakroom. He viewed a normal shift change scene with at least 40 employees "screaming" from one end of the room to the other. After obtaining coffee from a machine, he turned around and immediately sensed he made a mistake in entering because the din diminished and the three leading union activists (Forcum, Felts, and Johnson), brandishing note pads, began to ask him questions concerning solicitation/distribution policy. After replying to some questions and perceiving that the session was becoming heated, he told them they were trying to start a fight. Forcum retorted: "We don't want fights, just better benefits"; and when Figari started to leave Forcum taunted him by loudly asking: "Richard, about this hundreds of thousands of dollars that you're investing in a law firm to come in here and bust up this Union campaign, why couldn't the company . . . turn it into benefits for the employees?" Angered, Figari turned, looked at Forcum, and said: "Steve, you won't be around here to enjoy any of the benefits anyway"¹⁷

The latter remark patently was an unlawful threat to discharge Forcum because of his union activism, as alleged in paragraph 7(d) of the complaint. *Midland-Ross Corp.*, 239 NLRB 323, 331 (1978). And the threat was particularly egregious because it was directed at a leading union supporter in the presence of 40 or more hourly employees.

About 2 weeks after the March 16 incident, Respondent's production manager, John Barbaro, sought Forcum out and asked for an opportunity to see him privately. At Forcum's insistence they met and talked for about 20 minutes in an

¹⁷The testimony about the incident given by the three employees was replete with truth-enhancing details and consistent; and I have credited it. Figari, while admitting that he became very angry, denies having made any rejoinder to Forcum. Instead, he claims that just before he left the room he turned to another employee (Richard Stewart) who had spoken against the Union and said to him: "The day that" I hate my employer so much when I come to work, that's the day that I'm not going to come across those gates." I find that indirect and mild response inconsistent with Figari's temperament and improbable. Moreover, it remains uncorroborated. Stewart did not testify; and the only other employee who testified concerning the incident (Respondent witness David Cochran) had but vague recollection of it and states only that Figari, on his way out, kept repeating that "they" could leave if "they" didn't like it here. Cochran was not asked whether Figari made the rejoinder attributed to him.

open area in sight of employees working on the finishing line. Barbaro spoke mainly of his perception that production was down because of “high tension” resulting from the union campaign. At one point, he told Forcum, “I respect your rights [to do] what you’re doing. We have unions in Italy.” He asked, “Can you help me get production up?” Forcum replied, “John, what can I do?” Barbaro did not reply, and apparently sensing that the meeting was going nowhere, he asked Forcum not to tell what they had talked about. Forcum initially agreed but later reneged telling him that his coworkers had seen them talking and had a right to know what was said. At that, Barbaro lashed out angrily telling Forcum “I could lose my job” and “if I go, you go with me!”

Barbaro did not testify; and I find credible and accept Forcum’s account.

In effect, Barbaro was asking a known leader of the organizational drive to back off from such “tension” creating activity and become a player on the company team, and his outburst “if I go, you go with me” when Forcum declined the invitation and refused to remain silent about the encounter, constitutes a threat of reprisal should he choose vigorously to pursue organizational activity. Compare *Honeycomb Plastics Corp.*, 288 NLRB 413, 419 (1988); *Eagle Headers*, 273 NLRB 1486, 1488–1490; *Frito-Lay, Inc.*, 323 NLRB 753 (1977), enfd. 585 F.2d 62 (3d Cir. 1978). I find a violation, as alleged in paragraph 8 of the complaint.

Respondent maintains a bulletin board directly outside its personnel office, access to which is controlled by Director Figari. According to uncontradicted testimony of employee Felts, an item was posted there for at least one day in June—a payday during which all employees had to come to the personnel office pick up their checks—reading as follows:

REMEMBER THIS

IF YOU WORK FOR A MAN, in Heaven’s name, WORK for him. If he pays you wages which supply you bread and butter, work for him; speak well of him; stand by him and stand by the institution he represents. If put to a pinch, an ounce of loyalty is worth a pound of cleverness. If you must vilify, condemn and eternally disparage—resign your position, and when you are outside, damn to your heart’s content, but as long as you are part of the institution do not condemn it. If you do that, you are loosening the tendrils that are holding you to the institution, and at the first high wind that comes along, you will be uprooted and blown away, and probably will never know the reason why.

ELBERT HUBBARD

In *Tower of the Americas Restaurant*, 221 NLRB 1260, 1263 (1975), the same quotation was held not violative, but in circumstances clearly distinguishable from those in this case. There, the employer recited the quoted language to buttress his statement that union supporters were being disloyal, and there was no prior 8(a)(1) conduct. Here, the posting was preceded by a slew of unlawful activity, including separate threats from two top officials to discharge the leading union supporter. In this atmosphere of hostility, the quotation takes on a menacing coloration; and Respondent’s employees could reasonably view it as a threat to “blow away [dis-

charge]” those who “loosen . . . tendrils [put themselves at risk]” by continuing to criticize working conditions. *Southwire Co. v. NLRB*, 820 F.2d 453, 458 (D.C. Cir. 1987). Accordingly, I find an unlawful threat as alleged in paragraph 14 of the complaint.

On August 22, Respondent posted a notice to employees entitled “THE TRUTH ABOUT NEGOTIATIONS” in which, among other things, it stated “If the Union should win the election, all policies and procedures, including wages and benefits, will be frozen until there is an agreement reached. . . .” A prior paragraph contained an observation that “negotiations often last many, many months [and] in some cases, years.” Respondent argues that the quoted language simply paraphrases well-established Board law that an employer is required to maintain the status quo until such time as a collective-bargaining agreement is reached or an impasse occurs;¹⁸ and it goes on to explain that the word “frozen,” in context, meant that its *practice* of granting hourly employees preset “step” increases promptly upon completion of scheduled semiannual evaluations was frozen so that employees would continue to receive those increases pending agreement or impasse. While that is a permissible reading, it represents an attempt to clarify ambiguity. The workers to whom the notice was addressed reasonably could infer from the language used that step increases were frozen indefinitely in the event they chose to be represented by the Union. Accordingly, and especially since the notice was posted in close proximity to the representation election set for September 1, I find it an unlawful threat of resulting wage losses, as alleged in paragraph 18 of the complaint. In that respect, Respondent’s attempt to negate the inference by posting clarifications on September 29 and 30 came too late. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

The August 22 notice posting occurred during a month in which 12 of the 13 scheduled evaluations (and consequent step raises) had been deferred for periods ranging from a few days to 10 days for employee Eddie Kittrell, 13 for Karen Irving, and 18 for Kelly Santos—a circumstance which gives rise to an inference that the delays served to enhance employee apprehension of a wage freeze. Respondent did not attempt to rebut that inference with records showing that delays were normal and when, if at all, raises were made retroactive to the scheduled evaluation dates.¹⁹ I conclude that the delays were intimidating in violation of Section 8(a)(1); and, to the extent that raises were withheld, discriminatory in violation of Section 8(a)(3), as alleged in paragraph 19 of the complaint. *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1219–1220 (1987).

Two days before the election President Tarantini spoke to all the employees during the course of a series of small group meetings each of which lasted no more than 4 minutes. According to credited testimony of management trainee David Baxter, he did not depart from a prepared text which reads as follows:

You will vote on Friday. By now you should all understand that I am totally against the . . . [U]nion. Even so, you will be the ones to decide. You have a

¹⁸ See *Daily News of Los Angeles*, 304 NLRB 511 (1991).

¹⁹ Santos testified only that he was promised retroactivity, while Irving claimed that her raise had not been made retroactive as of April 10, 1990, when she testified.

choice. You can vote for this . . . [U]nion and make me negotiate against you, or you can vote against this . . . [U]nion and help me shape Teksid into a team. Don't make me negotiate against you. I want to work with you. Don't let this . . . [U]nion build a wall between us. Thank you.²⁰

When read in conjunction with the pattern of unlawful surveillance, interrogations, and threats which went before and the notice posted just a week earlier, this statement conveys much more than an prediction of hard bargaining ahead. In the earlier notice, Tarantini told the employees that wages and benefits would be frozen until "contract negotiations [which] often last many, many months . . . and in some cases . . . years." were completed. And now in his cryptic election eve message there is no hint that collective-bargaining is a give-and-take good-faith process. Rather, he twice stated that he would bargain against them, thereby intimating he would bring about long delay by adopting a regressive bargaining posture. I find an unlawful threat of retaliation in the event employees opted for the Union, as alleged in paragraph 17(a) of the complaint. *Madison Kipp Co.*, 240 NLRB 879 (1979).

On September 8, Director Figari called McElhiney, a known union supporter, into his office and informed him that a blood test showing him positive for marijuana had been confirmed by a second test and, in accordance with company policy in such cases, he gave him a choice of resigning with a week's pay and a written recommendation or being fired. After denying he was a user, McElhiney told Figari: "I ain't going to take this . . . I'm going to the doctor." At that, according to McElhiney, Figari became "unglued," rose from his chair, and said: "Look, take my advice. Stay away from the doctor, and stay away from . . . [the Union] and the Board . . . [because] if you go to them . . . I'm not kidding you . . . I'll smear your name so far in the papers that you'll never get another job." For his part, Figari denies making the quoted statement.²¹

I credit McElhiney's account as more probably true, having in mind Figari's hot temper and his awareness of a pattern whereby the Union filed additional charges with the Board promptly on hearing new allegations of further wrongdoing. And I find his threat of reprisal—blacklisting through publication of claimed drug use—unlawful under the Act because of its coercive effect upon exercise of an employee's right of free access, directly or through a union or other representative, to the Board. *Molders Local 453*, 209 NLRB 869, 872 (1974), citing *Operating Engineers Local 138*, 148 NLRB 679 (1964).

III. ALLEGED VIOLATIONS OF SECTION 8(A)(3)

William "Kelly" Burgess. Shortly after reporting to work on February 27 wearing a union button, Burgess, a technician in the tooling maintenance section, was told by his supervisor (J.B. Millard) that the length of his breaks and lunch

²⁰The text is consistent with testimony of employees Brian Young, Mark French, and Johnny Tummins, as well as with that of Kathy Bright. The latter, present at the same time as French, at first stated that Tarantini said he would not negotiate with the Union but later recalled him saying "I don't want to negotiate against you."

²¹There is no allegation that McElhiney's termination was unlawful.

period would be measured from the time he left and returned to his work area. Prior to that time, Burgess had reckoned the time from when he entered and left the cafeteria. When he protested, Millard replied that the "ruling" came not from him but from his superiors. These findings are based on Burgess' uncontradicted²² and credited testimony. I find a violation in that the rule was being more strictly enforced against Burgess because of his pronoun stance, as alleged in paragraph 32 of the complaint.

On March 1, Burgess was using a milling machine to smoothen out a metal insert for a core box. The cutting element of the machine was held in place by a "collett" or collar. The collett began to slip and he immediately shut off the machine but not before the loosened cutter inflicted a small gouge on the insert. He presented the damaged part to Millard, explaining that the slippage occurred because the only available collets were on a metric scale whereas the cutter was standard gauge. Millard appeared unconcerned stating that he had experience the same slippage, and he told Burgess to take the damaged part to the welding shop for repair. Burgess did so and while he was waiting for the weld, Production Supervisor Peppe Garabello came by and asked why he was there. When Burgess explained the situation, Garabello proceeded to the milling machine and examined the collett. There, he asked Millard why a standard gauge collett was not on the machine. Millard replied that none were available. Garabello then turned to Burgess, stared fixedly at his union button, told him that as a "specialist"²³ he should not have let the accident happen, and gave him a "verbal warning."

Neither Millard nor Garabello testified at the trial, and I accept Burgess' account of the incident. I also credit his uncontradicted testimony (corroborated by current employees Mark Wannamaker and Reuben Smith) that mishaps of this kind were common and never before resulted in disciplinary action.

I find that the warning would not have been issued absent Burgess' aligning himself with the Union during the organizational drive and was meant to deter him and others from doing so. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, the warning was unlawful, as alleged in paragraph 31 of the complaint.²⁴

Bobby Felts. Union activist Felts received a verbal warning from Supervisor Williams on February 23 for holding a union meeting in the electrical room. The incident giving rise to the warning was found earlier in this report to involve an unlawfully imposed "no talking" rule; and based on the

²²Indeed, Maintenance Supervisor Joe Williams testified that the rule relative to the duration of breaks was "normally laxly enforced."

²³At the time of the incident Burgess had been employed by Respondent for less than 6 months and was unaware of ever being classified as a specialist.

²⁴Through cross-examination Respondent attempted to show that subsequent to the incident in question Burgess displayed a pattern of carelessness on the job. The effort is unpersuasive. Indeed, it has no relevance to the instant situation involving required use of incompatible parts on cutting machinery.

facts there stated, I find that the warning was discriminatorily issued as alleged in paragraph 28 of the complaint.²⁵

On or about Thursday, March 2, Production Supervisor Garabello told Manager Figari that he saw Felts obtain his paycheck 5 minutes before quitting time. Figari promptly reminded personnel assistant Roehelle of the company policy that employees were to pick up their checks only during non-work time. There is no credible evidence that Figari thereby changed a plant rule;²⁶ and absent any indication that supervisors knew about and acquiesced in past violations, there is no basis for determining that Figari more vigorously enforced the rule after the union campaign began. The pertinent portion of paragraph 32 will be dismissed.

Prior to March 20, employees in the maintenance department often went on breaks in pairs or in groups, and they could go at times of their own choosing provided urgent tasks were not left undone and at least one maintenance man remained on the working floor. On that day, however, union activists Felts and Johnson were told by their coordinator (Branch) and supervisor (Williams) that henceforth all maintenance employees were to take breaks at prescheduled times and that Felts and Johnson were to take their breaks 30 minutes apart from each other. When asked by Felts why the policy had changed, Branch told them that he knew nothing, that "they" had passed the change down to him. Branch did not deny making that comment; and Williams offered no explanation for the timing of the change. I find that the rule was promulgated to impede employees in exercising their right to engage in prounion propaganda during free time; and that by singling out Felts and Johnson and barring them from taking breaks together Respondent unlawfully imposed more onerous working condition on them because of their activism—as alleged in paragraph 33 of the complaint. *St. Agnes Medical Center*, 287 NLRB 242, 254 (1987).

John McElhiney. McElhiney was another of the employees who wore union buttons to work for the first time on February 27. He punched in at midnight and proceeded to work the "graveyard" shift. Toward the end of the shift he was assigned to clean a dry hearth furnace with a skimmer.²⁷ On one occasion, around 3 a.m., when the heat became unbearable he backed off, turned away from the furnace, removed his glasses, and proceeded to wipe sweat from his eyes. At that point, Supervisor Burton passed by and told McElhiney to put on his glasses. McElhiney replied: "Well, wait until I get my eyes wiped out and I'll put them back on." Nothing further was said and, after toweling, McElhiney placed the glasses over his eyes and resumed the skimming operation.

Just before the shift ended Burton told McElhiney to report to the office. There, with Burton present, Figari handed McElhiney a written warning in which he was cited for violating safety rules. The operative portion reads as follows:

²⁵ At the trial and on brief Respondent challenged Felts' credibility by showing that he uttered racially derogatory and bigoted remarks about supervisors on several occasions. Aware of that circumstance, I have credited his testimony only when corroborated by other witnesses and/or documents.

²⁶ Johnson's claim that a new posting of the rule was made in early March is not supported by other testimony or documents.

²⁷ Hearth temperature is about 750 degrees Celsius and during the skimming process dross often splatters. Because of the inherent danger, employees are required to wear safety glasses, gloves, and shoes while working near furnaces.

Several times during the night of 2/27/89 John McElhiney was told to wear his safety glasses. At 3 am. his supervisor saw him without his safety glasses.

McElhiney told Figari that his glasses had been mentioned only once during the shift, and he declined to sign the document unless it was corrected. Figari rose from his chair and told him: "You'll either sign it or you'll hit the gate." McElhiney then acknowledged receipt of the warning by signing.

I have credited McElhiney's account of this incident. Figari did not refer to the matter in his testimony. For his part, Burton provided no details concerning times that day other than 3 a.m. when allegedly he told McElhiney to wear his safety glasses; and as to that time he gave no indication that McElhiney did not promptly comply.²⁸ In these circumstances, I conclude that Burton's report to Figari and the written warning constituted unlawful harassment of McElhiney because he supported the Union, as alleged in paragraph 29 of the complaint. This finding is buttressed by the fact that while Burton claims he warned McElhiney about not wearing glasses on numerous occasions prior to February 27, he chose to report the matter to Figari only on that day and after McElhiney appeared wearing a union button.

Wade Ross. Forklift operator Ross also wore a union button to work on February 27. Two days later he was warned and suspended. The incidents giving rise to those actions are described below.

During the evening of March 1, Ross was operating his lift vehicle in an area just outside the plant. As he turned and went forward, Supervisor Enzo Pagliuzzi opened a door and walked head down directly in front of the moving lift. Ross reacted quickly and stopped about 3 or 4 feet from Pagliuzzi. Startled, Pagliuzzi accused Ross of trying to run over him. A short time later Pagliuzzi returned with Figari. Ross denied any intent to harm Pagliuzzi, explaining that he appeared suddenly, that the horn wasn't working, and that all the other lifts were inoperable. Figari asked if he had filed a written report on the defective horn. Ross replied that he told Pagliuzzi about the defective horn earlier in the shift, and that Pagliuzzi said he'd provide the necessary form but hadn't done so. At Figari's direction, Ross went to the office and obtained the form, returned to the vehicle, made the proper entries, and returned to work.

At the end of the shift, Ross went to the locker room and removed his safety boots and glasses. Pagliuzzi, accompanied by Supervisor Bullington, came in and Pagliuzzi asked Ross for the completed form. Ross replied that he'd left it in the vehicle and he got up as if to leave saying "I don't mind . . . I'll run out and get it." Pagliuzzi told him not to leave until he put on his safety glasses. Ross said "Alright," grabbed his glasses, and moved toward the door. Again Pagliuzzi stopped him saying "You got to put your boots back on." "Irritated, Ross protested that he'd often seen supervisors enter and leave the room without wearing glasses

²⁸ Burton testified generally that "during the hot months" there were times when he told McElhiney to put his glasses on, that McElhiney would say, "Well, I'm just wiping the sweat out of my eyes," and that he'd respond, "That's fine. Wipe the sweat out, but be sure and put them back on when you get through." On those occasions, according to Burton, after wiping his face McElhiney would "just lean up against the rail with them in his hand."

and boots. When Pagliuzzi insisted, another employee, at Ross' request, went and retrieved the form and brought it back to the locker room.

By that time Pagliuzzi and Bullington had left the room and were standing in an aisle about 10 feet from the door. Behind them, about 5 feet away, was a carousel. Again Ross asked the help of another employee who took the paper out to the supervisors only to come back and tell Ross that "they" wanted him to bring it out to them. When Ross opened the door and was about to start out, Pagliuzzi told him to go back and put on his boots and glasses. Ross called the request "bullshit," told Pagliuzzi that he was a "stupid motherfucker," placed the form on the floor by the door, and turned back into the locker room.

After thinking about the matter for a few minutes and sensing that he might be in trouble, Ross donned his safety gear and went out to pick up the paper. Pagliuzzi had already done so, and when Ross found him a conversation ensued as follows:

Pagliuzzi asked me why I threw the paper down on the floor, and I said because you're harassing me. I said why are you messing with me, why are you giving me a hard time, and all he could say was I don't like you throwing paper on the floor . . . [then] he just said well, we'll talk about it tomorrow.

When Ross arrived for work on March 2, he had to report to Figari's office. There he received a written warning and a 5-day suspension for matters occurring on the previous day. The precise reason(s) for the disciplinary action are not of record since Bullington and Pagliuzzi did not testify, and Figari did not address the incident in his testimony.²⁹

Ross is not shown to have intentionally endangered Pagliuzzi or to have operated the forklift in a reckless or even careless manner. Neither is he shown to have violated any safety rule. His operation of the vehicle knowing it had a defective horn appears not to have concerned Pagliuzzi or Figari. They just asked him to list the defect on a form, which he did; and they allowed him to continue to operate. Also, he obeyed their injunctions not to go out on the plant floor without wearing required safety gear.

The sole remaining aspect of the incident concerns Pagliuzzi's rejecting a messenger and insisting that Ross put on his boots and glasses in order personally to deliver the safety form to him 10 feet outside the locker room door and Ross' declining to do so while placing the form on the floor by the door and calling Pagliuzzi a "stupid motherfucker" for insisting on personal delivery.

I find a classic case of provocation in order to induce a punishable response from a known union supporter. By making an unjustified demand, Pagliuzzi was baiting Ross and inviting the result that obtained. Any doubt in this matter is dissipated by the circumstance that standing by him all the while was Supervisor Bullington whose stated objective in February (see p. 2) was to get rid of union supporters by writing them up. Assuming that Ross' response was insubor-

²⁹ Ross states that Figari told him the written warning "was for trying to run over a supervisor . . . not going by the safety rules, cussing out a supervisor," and for a fourth reason he was unable to recall.

inate,³⁰ it provides no lawful basis for discipline because it was provoked. *NLRB v. Mueller Brass Co.*, 501 F.2d 680, 685-686 (5th Cir. 1974); *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974 (5th Cir. 1982). I conclude that Ross was punished because he opted to side with the Union and with a view to deterring him and others from pursuing that course, as alleged in paragraph 30 of the complaint.

Randy Crowell. As found above (pp. 7-8), on March 1 shortly after refusing Supervisor Stewart's proffer of a procompany button, Crowell was told to leave his assigned job on a carousel, get a broom, and sweep a large empty basement area. And when he emerged covered with dirt 4 hours later, he was met by Supervisor Burton who laughed and asked "Where is your Union button?" Thereafter Crowell spent nearly all of his time performing janitorial duties throughout the plant.

Stewart claims that he regularly assigned employees to clean the basement at least once a month and that he usually chose those who were not working on the carousel. Although he further claims that Crowell was not "running production" at the time in question, Crowell states, and I believe him, that he was working on a carousel when given the basement cleanup job. However, this may be, I conclude that he was given the admittedly more onerous basement job and immediately thereafter a janitor's job solely because of his refusal 20 minutes earlier to side with the Company in its efforts to defeat the Union's organizational drive. In this respect, I note that Stewart did not deny following up Crowell's refusal to take a company button by telling him that "employees knew what they were getting into when they started this union stuff," and I regard Burton's denial that he ever inquired of Crowell "Where's your Union button?" as being as incredible as his claim that in his presupervisory days he was given the "opportunity" to clean the basement at least once every week. (Tr. 1611.)

I find that the reassignment constitutes more onerous work imposed to punish and deter Crowell from exercising his right to remain neutral during the Union's organizational drive, as alleged in paragraph 34 of the complaint.

Apparently as a result of his treatment on March 1, Crowell decided not to remain neutral because on March 2 he reported for work wearing a union button and hat. He continued to do so until March 30 when he was discharged ostensibly for frequent unexcused absences.

Respondent's attendance policy involves a point assessment system for unexcused absences and late arrivals or early departures. Employees receiving two points are subject to verbal warning, three points warrant a first written warning, four a second, five a final warning and suspension, and six points can lead to termination.

As of March 1, Crowell had accumulated 1-1/2 points. On that day he received an additional one-half point for arriving an hour late due to a flat tire. The following day he got another one-half point for leaving 1-1/2 hours early to see an attorney about family problems. On March 14 he left his worn safety shoes at home expecting to buy a new pair at work. But the dealer did not have his size so he lost an hour going home to retrieve the worn shoes. Although Supervisor

³⁰ There is no indication that the pejorative expression was anything other than a meaningless commonplace in the environment of the foundry.

Franco Valenza verified the inventory problem, Crowell was assessed one-half point for a then total of three points; and on March 17 he was presented with a first written warning.

Crowell, a single parent, was absent during the entire workweek beginning Monday, March 20 in order to care for his 2-year old son who was hospitalized early Monday morning for a chronic and severe asthmatic condition. Scheduled to begin work at 8 a.m., he called in that morning at 2:30 and left a message for Supervisor Burton in which he explained the emergency and left the hospital phone and room number in case Burton had any questions. Crowell was granted excused leave for the week except on Monday, and he was assessed 1-1/2 points for that day. When he returned on Monday, March 27 he was given a second written warning for having accumulated 4-1/2 points. An unsigned absentee report referring to Crowell and dated March 20 contains a handwritten notation as follows: "No Show—No Call—mother called at 3:21p said son had a relapse." In his testimony, Figari did not refer to the Burton message or the notation, and he provided no explanation as to why points were assessed for Monday but not for the remainder of the week. In the past Crowell had always been granted excused absences to care for his son.

On March 30, Crowell was scheduled to work the mid-night shift. However, on the previous day he had a recurrence of wrist tendonitis. During the evening of March 29 he called the company using the breakroom telephone number as the office was closed. When another employee (Eddie Loftus) answered and told him no supervisor was available, Crowell asked him to relay a message that he'd be absent because of his wrist condition. After going to a doctor on the morning of March 30, Crowell went to Figari's office and handed him the doctor's note recommending 2 weeks' light duty. It was the first time Figari had seen him wearing a union hat. Angry, Figari threw the note aside, told Crowell there was no light duty, and directed that he see him on the following day; and he assessed Crowell one point. In an unsigned absentee report dated March 30 which noted Crowell's call to Loftus, Crowell was faulted for "Not following directions by calling ahead of time and speaking to [a] coordinator." There is no evidence of any requirement that employees calling in regarding absences speak only to a coordinator or supervisor; and on at least one prior occasion Crowell had received an excused absence after relaying a message through Loftus. And in testifying Figari advanced no reason for deviating from Respondent's past practice of excusing absences on receipt of a doctor's note.³¹

When Crowell reported to Figari on March 31, he was given a final written warning and a 3-day suspension for having amassed 5-1/2 points, and he was advised that he would be considered a voluntary quit if he failed to report on April 5.

Crowell did not report on April 5. He was in jail allegedly for failure to respond to a family court subpoena. He states,

³¹ Figari did not claim that his prior approval was a prerequisite for an excused absence. This is understandable in view of undisputed earlier testimony of personnel assistant, Tanya Rochelle, that on March 29 he added the words "in advance" at the end of existing policy which stated that personal leaves "must be of an emergency nature and approved by the Director of Human Resources." She also testified, credibly, that Figari then told her and secretary Janet Gates to shred all copies of the prior policy.

without contradiction, that his mother called and advised the company of his predicament. When he reported in on the following day, Figari told him he was terminated.

Having in mind Respondent's past approvals of absences in similar circumstances and its demonstrated antiunion animus, I find that Crowell's support for the Union was a motivating factor behind the 2-1/2 points assessed against him for absences on March 20 and 30. And since Respondent has provided no rationale for the assessments, it has failed to meet its *Wright Line* burden of showing that they would have been made apart from that support. Accordingly, Crowell had not accumulated the necessary five points to sustain his suspension on March 31; and, even assuming an additional unexcused 1-1/2 point absence on April 5, suspension (much less termination) would not have been justified at that time either.

But I need not make such an assumption. Figari had no basis for determining Crowell's failure to appear at work on April 5 was tantamount to a quit because his mother had informed the company of his unavoidable detention; and other employees (Loftis and Mike Valerio) are shown to have received excused absences for periods of incarceration. No reason for disparate treatment appears, and I conclude that here too the 1 point assessment was antiunion motivated.

I find that the second and final warnings issued to Crowell, as well as his suspension and discharge, were discriminatory and unlawful as alleged in paragraphs 37, 38, and 39 of the complaint. The earlier verbal and first written warnings are not shown to have been unwarranted and, accordingly, the allegations in paragraphs 35 and 36 will be dismissed.

Bobby Dickens. Dickens operated a machine for making cores composed of sand and resins for use in cylinder head molds since June 1988. He began to wear a union button and hat on the job but only in late March and well after others had done so.

When Dickens reported to work for the 4 p.m. to midnight shift on June 21, his machine was out of service; and Supervisor Lankford gave him the job of gluing water jackets on cores. In doing so, Lankford pointed to the union button on Dicken's shirt and commented: "It looks like somebody shot off all over your shirt."³²

Dickens worked on cores for most of the evening. Prior to gluing, he removed burrs or rough spots by light application of an ordinary (1 inch x 1 foot) inexpensive file. Towards the end of the shift he was reassigned to a clean up job; and, expecting to return to gluing cores, he placed the file in his back pocket. However, the shift ended without his being reassigned and he proceeded towards the breakroom to punch out with the file still in his pocket. En route, he stopped briefly to chat with supervisors Perzolla and Bullington and then walked towards the breakroom door.

At that point, another employee (Eddie Loftus, whom Supervisor Burton describes as an antiunion activist) called the situation to Burton's attention saying: "Did you notice that file in that boy's pocket?" Burton looked, and as Dickens went through the breakroom door he saw at least 6 inches of the file protruding from Dickens' back pocket.

³² Although Lankford testified, he did not dispute Dickens' account of the incident.

On entering the breakroom, Dickens punched out, walked to the adjoining locker room, placed his safety glasses and gloves in his locker, washed his hands, and left for the parking lot. He became aware of the file when he sat down in the cab of his pickup truck. Intending to return it the next day,³³ he placed it on the seat and proceeded to the gate. There, Burton was waiting next to the guard, having walked over 200 yards from the plant specifically to inquire about the file. On asking Dickens if he still had it, Dickens explained that he was going to return it on the next day. After Burton replied that he didn't think that was a good idea, Dickens offered him the file. Burton took it and reported the incident to personnel manager, Figari.

Twenty minutes after he reported to work on the following day, Dickens was told to report to Figari's office where, in the presence of Figari, Burton, and Lankford, he recounted the circumstances leading to his possession of the file at the gate. Figari then asked him if he had anything else to say. Dickens said no, adding that he "wasn't trying to steal it." With that, Figari jumped halfway out of his seat, and said loudly: "Steal it? I didn't say you were trying to steal that file Stealing is a very serious accusation You don't know what I'm thinking." Figari ended the session by telling Dickens to return to work.

On Monday, June 26, Dickens was on the day shift. Late in the shift he attended a group meeting in which President Tarantini announced, among other things, that the Union had just filed a petition for a representation election. After the meeting was over, Lankford asked Dickens to work overtime filling in for other employees who were attending similar meetings. After working an hour overtime, Dickens was told to report to Figari's office. According to Dickens, Figari said: "Bobby, we have looked it over and it is not a matter to take lightly . . . [company policy is] very clear . . . I'm afraid I am going to have to dismiss you." Prior to that time Dickens had received no unfavorable actions under the Company's progressive discipline system. In testifying, Figari made no reference to Dickens' discharge or the events leading thereto. For his part, Burton testified that other employees had misplaced or kept tools from one shift to the next without any disciplinary action being taken against them.

Having in mind Lankford's open antiunion animus as manifested by his comment to Dickens on the very day the incident with the file occurred as well as Burton's previously discussed manifestations of such animus and the special exertion he made to recover the file from a known union supporter, I have no doubt that Dinkins' "apprehension" and subsequent termination were motivated solely by a desire to eliminate a likely vote for the Union and deter others from choosing to support the Union.³⁴ This conclusion is bolstered by the fact that similar inadvertent incidents of other employees went unpunished in the past and by Dinkins' lack of any prior disciplinary history. Further, the officer responsible for

³³ According to Dickens' undisputed testimony he inadvertently took a drill chuck key from the premises about 4 months earlier. On returning it on the following day, he told Lankford what happened and no discipline ensued.

³⁴ In an apparent effort to impugn Dinkins' credibility and inferentially to establish an intent to steal, Respondent introduced evidence that cores were so delicate that use of a file to remove burrs would result in damage. Crediting Dinkins, I find that he in fact used a file in working on the cores.

all hiring and firing of Respondent's employees gave no reason for why he terminated Dinkins.

Accordingly, I conclude that Dinkins was discriminatorily discharged, as alleged in paragraph 42 of the complaint.

Steve Forcum. As noted earlier, Forcum was the principal union organizer at Respondent's plant. He was hired in July 1988 as a level I chemical laboratory technician trainee, and his duties included frequently checking the temperature and the chemical composition of molten aluminum, the composition of the resins and granularity of sand used in cores—all to the end of ensuring consistent quality within specific tolerances and to minimize need for discarding castings. Some of the tests required use of instruments such as a spectrometer. He had no prior experience; and after 4 days of instruction he began to function on his own without close supervision. From time to time he would ask for and receive advice from coordinators and from his immediate supervisor, Lorenzo Panzica, and quality control director, Giuseppe (Beppe) Allievi.

On January 10, Forcum received a written evaluation of his performance during his first 6 months on the job. On a scale of 1 to 4, he received 4 for appearance/personal habits, 3 for items such as knowledge of his job, judgment, innovative suggestions, orderliness and reliability; a rating of 2 (or average) for output, mistakes, resolving problems and attendance; and a 1 for courtesy indicating that he was "occasionally impolite to coworkers and others." He received an overall rating of 40,³⁵ a promotion to trainee level II, and an assurance by Allievi that he was doing a "real good job." Notwithstanding this accomplishment, and indicative of an outspoken (feisty) disposition, he wrote the following comment on the evaluation form:

I believe the numerical rating I received was fair. However, when I was given the job . . . I was promised an opportunity to bypass the "Level II" position and to try for the "technician" position in January. In October of '88, I was informed for the first time that this would not be possible. This incident will always be in the back of my mind.

Forcum supplemented his comment with a request for an interview with President Tarantini about the matter and he began to take a more active role in promoting unionization. This entailed urging the signing of authorization cards by fellow employees some of whom (including Eddie Loftus) later declared against the Union; and in early February Manager Figari "began to get reports from supervisors and other personnel that there was an active campaign going on in the plant." And in mid-February when Forcum went to Tarantini's office to pursue (unsuccessfully) his appeal, Tarantini greeted him saying: "Son, there's two things we've got to get straight. One is them is . . . that you have said this is a bad place to work, and [the other is that you said] things need to be changed."

During the same period in February and continuing until his termination on September 13, Forcum experienced a dis-

³⁵ Under Respondent's rating system 30 is a passing grade and 60 is the maximum. In testimony, Panzica described a score of 40 as "about average" among employees in the chemical laboratory, Allievi characterized it as "very good" and to employee John Covington it was the highest grade ever awarded.

tinct change in the attitude of his supervisors and coordinators. Before, they were friendly, answered his questions, gave him pointers on how to do a better job, and simply cautioned him when he made mistakes to be more careful. Now, most were hostile, told him to use his own judgment in resolving problems, and were quick to criticize both the quantity and quality of his work on a daily basis. For his part, Forcum occasionally responded in a manner which he describes as “tacky.”³⁶

On February 17, Forcum received a first written warning for failing on the day before to graph the results of an aluminum analysis, to verify an irregular temperature measurement in a “Wabash pot” of molten aluminum, to perform a regular mold temperature check, and to do a hardness check on finished castings. According to his undisputed testimony, the work was unfinished because he had left work early with the permission of two supervisors (Burton and Pagliuzzi) due to illness. He explained that circumstance to Figari to no avail. He also told him that he had not been given a verbal warning, the first step in Respondent’s progressive disciplinary system. Figari simply stated that he had been given such warning but refused to tell him when and why the warning was given. Figari did not refer to the incident in his testimony.

I find the warning was improperly issued under Respondent’s own rules since it was not preceded by a verbal warning. I further find that Respondent knew of Forcum’s activity on behalf of the Union and that the warning would not have been issued but for that activity, as alleged in paragraph 20 of the complaint.

About 1 hour before the end of his shift on Tuesday, February 21, Forcum misread a mold temperature as 100 degrees centigrade lower than its actual heat, and another trainee (Mark Luffman) made the same error when he began work on the following shift. As a result, a total of 50 to 60 cylinder heads had to be scrapped, of which Forcum was responsible for about 12. The next morning Panzica told Forcum and Luffman about their mistake and cautioned them not to let it happen again. When Panzica left, coordinator Hubert Corlew advised Forcum to do his work carefully no matter how much Panzica pushes you, adding “Its a lot better to go slow and get your butt chewed out [for that] than to make a mistake like this.”

On reporting to work on the morning of Friday, February 24, Forcum made his union affiliation explicit by announcing it to Panzica in the presence of other lab workers. At the end of his shift he was called into the office where Figari, in the presence of Panzica and Allievi, gave him a “final” written warning for the earlier mold temperature incident. He was suspended without pay for 1 week and advised that his next infraction could result in termination. When he asked for a copy of the warning, Figari refused. snatched the document

³⁶For example, Forcum for a brief period wore and distributed a button bearing the name LORENZO with a slash through it. The reference was to Frank Lorenzo who was then having a dispute with Eastern Airline pilots, but it took Lorenzo Panzica (the only “Lorenzo” in the plant) a while to understand the reference. Another time, in leaving the plant after what he felt was a particularly harassing day, he told Panzica in passing that “I go home every night and thank God I wasn’t born Italian.” And on at least on two occasions he used the laboratory log to comment on language deficiencies in instructions left by coordinator Bobby Baggett.

from his hand, and told a waiting guard to “Escort this man out of here!”

While a warning may have been appropriate since Forcum’s admittedly was derelict in performing a routine test and significant consequences ensued, nevertheless find it was unlawfully issued because of disparate treatment. Another trainee, one without union affiliation, committed the same error on the same day and received no formal discipline.³⁷ In this matter, I view as inconsequential Respondent’s explanation that Forcum had been employed for 7 months whereas Luffman had been on board for only 6 weeks, especially since the test was routine and frequently performed on many molds during each shift. Further, Forcum’s error at most would have warranted a verbal warning under Respondent’s progressive punishment system since, as found above, prior formal discipline was unlawfully imposed.

Accordingly, I conclude that this warning also would not have been given absent Forcum’s activism on behalf of the Union, as alleged in paragraph 21 of the complaint.

At the end Forcum’s shift on May 4, Panzica handed him a one-page typewritten memorandum pointing out “discrepancies” in Forcum’s timesheet entries for that day. Listed, among other things, were a misfiling of a report, failure to leave a blank space between certain entries, taking 15 minutes instead of 5 minutes to check the standardization of a spectrometer, and doing four rather than two metal analyses, thereby making himself unavailable for other assertedly more useful work. The memorandum is not a disciplinary action. It simply calls to Forcum’s attention perceived deficiencies of a type which Panzica orally called to Forcum’s attention daily. At best, it is indicative of a pattern of harassment; and it was probably intended as documentation for future adverse action. The allegation of unlawfulness in paragraph 22 of the complaint will be dismissed.

On July 17, Forcum was called into Figari’s office for his second evaluation. The form had been completed, and Figari handed it to Panzica and Allievi telling Forcum that he’d have an opportunity to read it after they had signed. When Forcum jokingly urged them to read it before signing, Figari rose cut short any levity by rejoicing: “I give the orders around here!” On being given the document, Forcum’s jaw dropped when he saw that he’d received a total of only 22 points, 8 less than a satisfactory 30. When Figari inquired whether he had any questions, Forcum said no, adding he’d tried as hard as he could.³⁸ Neither Forcum nor the supervisors offered any explanation of the lower grading, and the meeting ended with Figari telling Forcum that he was on 60-day probation and that if he didn’t bring his score up to 30 within that time he’d be terminated. He was denied an automatic pay increase because of the low rating.

³⁷Although Panzica testified that Luffman received a written “verbal” warning, Respondent did not produce that document; and Allievi made no mention of any discipline being accorded Luffman. For his part, Forcum testified, credibly in my opinion, that on his return from being suspended Luffman told him he had received no discipline other than the initial admonition not to repeat the mistake.

³⁸Concerning this exchange, Forcum testified: “What else could I say. It is their word against mine.”

On September 14, 2 weeks after the Union lost the representative election,³⁹ Forcum was again called into the office. With Allievi present, Figari gave him another completed evaluation form. This time his score was 25, having had his ratings raised one point each in the categories of quantity, accuracy, and attendance. No explanation was given for the continued low score, and Figari announced that he was terminated.

Allievi attempted to justify the precipitous drop in ratings. He states that five of the points deducted in the categories of knowledge, judgment, and alertness were due to Forcum's failure to decide job priorities on his own. Yet in the instance when Forcum, following Respondent's guidelines, rejected as too hot a "Wabash pot" of molten aluminum, Allievi deducted two points under reliability because Forcum failed to recalibrate the spectrometer which produced the high reading. Indeed, on one occasion he had been faulted for excessive time spent doing such recalibration. And although both Allievi and Panzica cited numerous instances when Forcum was guilty of discourtesies, his low rating of one in that category was the same in all his evaluations, including his initial one in January.⁴⁰

In these circumstances, and giving due consideration to the fact that he was being rated under a higher standard as a level II trainee, I am persuaded that Forcum would have received at least a passing grade on his July and September evaluations had he not been active in support of unionization;⁴¹ and I find that his termination was meant to deter him and others from doing so again in any subsequent campaign, as alleged in paragraphs 23 through 27 of the complaint.

Gary Johnson. Prior to being hired by Respondent as a maintenance mechanic trainee in April 1988, Johnson had served 4 years in the military as a mechanic. In October, after only 6 months on the job, he was promoted to technician, earning a score of 38 on his evaluation.⁴² Thereafter, at least through January he enjoyed a good working relationship with his immediate supervisor, Joe Williams. They often discussed the possibility of establishing a preventive maintenance

program and, drawing on his military experience, Johnson offered to make a chart for that purpose.

As noted earlier, Johnson began actively and openly to support the Union in late February and, together with Felts and Forcum, was a recognized leader in the organization drive. Among other things he talked up the Union with other employees, frequently handbilled at the plant gate, and he wore a union—YES button and a union hat at work. Until at least 2 weeks after his union activities began, Johnson's personnel file contained no disciplinary warnings or negative file notes of any kind.

On April 18, Johnson received his second evaluation. He was told by Williams that he received a lower score (33) because he was being evaluated as a technician, rather than as a trainee. When Johnson questioned the decrease by one point in the category of innovation, and reminded Williams of his suggestions concerning the preventative maintenance program, Williams agreed that the point should not have been taken away. In addition, Johnson was reduced one point in the category of courtesy because of an incident on March 23 when, in response to production coordinator Dutch Denker's accusation that he bluffed doing a repair job, he told Denker: "Man, if you don't know what you're talking about, keep your fucking mouth shut."⁴³

Six months passed without any significant incident or adverse personnel action.⁴⁴

On October 14, a Saturday, Johnson was scheduled to work an overtime day. Although he felt sick, he opted to report knowing "there was quite a bit of work to be done." After working about 4 hours, and having been forced to stop several times to throw up, he decided to quit early. While he was filling out a timesheet, coordinator Mike Branch came by and Johnson told him he was going "to the house." Branch queried, "the house?" Johnson said, "Yes, I'm sick." Branch stood by as Johnson completed the sheet and received it from Johnson as he left the plant. Branch then told Williams that Johnson had left without giving any reason for his early quit. On the following Monday, Johnson was called to the office with Williams and Branch and asked by Figari to account for leaving early on Saturday. When he said he was sick and had so informed Branch, Branch claimed he hadn't heard Johnson mention the fact. The incident did not result in any discipline.⁴⁵ It is significant, however, because of ensuing events.

On October 19, less than a week later, Johnson was again called to the office at the beginning of his 4 p.m. to midnight shift. There, in the presence of Williams, Figari gave him a

³⁹ After the election on September 1, Figari and Tarantini went out to the gate to thank several antiunion employees who were waiting there. While they were doing so, Forcum broke away from a group of union supporters and ran toward them. Fearful, they closed the gate. Forcum leaped on it and screamed: "I'll see you in court, buddy!" He was not written up for the incident because, according to Figari, he was "probably exercising First Amendment rights."

⁴⁰ Although two employees (Baxter and Denker) called by Respondent testified that Forcum disrupted two antiunion meetings held by the Company in August, neither Allievi nor Panzica mentioned that matter as having any bearing on the September evaluation. Three other Respondent witnesses (employees Carr, Irving, and Courtney) voiced personal complaints with Forcum, but no evidence was presented showing that Allievi and Panzica knew of those complaints much less factored them into their ratings.

⁴¹ Even if the low ratings had been justified, Respondent in the past had retained employees at the end of unsatisfactory probation periods. For example, it accorded Eddie Loftus and Robert Anderson an additional 60-day probation to bring their problems under control and Jimmy Chandler, a former chemical lab trainee, was given a transfer to a job in the production area when he did not complete his probationary period satisfactorily, and I conclude that Forcum likewise would have been retained but for his union activities.

⁴² Indicative of Johnson's propensity to anger is a comment in the evaluation that he should work on controlling his emotions at work.

⁴³ The incident elicited a first written warning to Johnson on the following day. Earlier, on March 15, he received a verbal warning from Williams for failing to complete an assignment (installing overhead air lines to a shaker machine) by the end of his shift. The warnings as well as the evaluation of April 18 are not alleged to be unlawful in the complaint.

⁴⁴ On May 30 Johnson was given a verbal warning for failing to report to work at 4 p.m. on the Memorial Day holiday. Williams explains: "We felt at that time that the problem wasn't serious enough to issue a written warning, but it did warrant some discussion and there was a need to document the discussion."

⁴⁵ Neither Branch nor Figari mentioned the incident in testimony. Williams, however, verified that Branch told him on October 14 that Johnson had left without giving any reason. I credit Johnson and conclude that Branch's statement to Williams (and later to Figari) was false.

completed evaluation covering the prior 6 months containing an overall rating of 26, 4 points below passing, and asked if he had any questions. Stunned, Johnson said no and told them he felt he was being punished for his support of the Union. Figari and Williams gave him no explanation for ratings in six categories which were lower than those in his April evaluation. The meeting ended with Johnson being advised that he would not get a wage increase because he had not attained a passing grade and that he was on 60-day probation.

Johnson testified, credibly, that his work performance during the April–October period had been the same as before that period, that he had received several compliments (“atta babies”) from Williams on his fabrication work, and that he had been assigned an increased amount of such work in the last 3 or 4 months. Also, he ascribed the decrease in attendance from a rating of 4 to 2 as due to an abrupt change in Figari’s treatment of his requests for leave. In particular, he testified without contradiction that while he had been granted excused absences to take his mother to the hospital and to attend family events (his brother’s wedding) before his union activity began, on July 29 he was given a demerit for taking her to the hospital and in late May he was given another for taking a day off to attend a family reunion for which he had given notice well in advance. Similarly, he was charged for going home sick on October 14—an absence of a type which had been routinely excused in the past. For its part, Respondent provided no explanation as to how his absentee score was calculated.

Concerning job performance, Williams testified that Johnson refused to cooperate and was unwilling to do his job, but the only specific deficiencies cited by him were matters mentioned in footnote 43 and an incident involving a “Friggi” vertical handsaw, all of which occurred during the period covered by the earlier April evaluation. Similarly devoid of pertinent specific detail is testimony of Branch and maintenance technician David Cochran that Johnson was “slow” in performing his duties. Moreover, there is no indication that they communicated that perception to William. Indeed, Williams did not claim to have deducted points for slowness during the period covered by the October evaluation.

Here too, I am persuaded that the unsatisfactory evaluation would not have issued absent the recipient’s prounion activities. Johnson was the last of the three leading union supporters;⁴⁶ and, as with Forcum, I conclude that he was being set up for discharge in order to inhibit any future organizational efforts. Accordingly, I find the evaluation, together with its consequent probation and loss of income, unlawful as alleged in paragraphs 43 through 45 of the complaint.

The final denouement began to play out later in the day on October 19. A short time after Johnson’s evaluation and probation, he was assigned by coordinator Branch to install a gear box on a lift vehicle. Branch told Johnson to be sure to put lacing wire through the bolts to keep them from backing out. After breaktime (around 9 p.m.), they had an encounter on the plant floor over whether Branch had undertaken to bring the wire to Johnson, with Johnson claiming he did and Branch saying he didn’t. According to Johnson,

he kept his temper and simply told Branch “it seems you don’t remember a lot of things lately.” Branch, however, testified that Johnson became very angry and told him: “You’re mine when I get outside the gate.”⁴⁷ Two other employees were nearby. One, David Cochran, testified there was a “heated discussion” and that he overheard Johnson tell Branch they could “settle this . . . outside or . . . right here.” He also states that right after the incident Branch told him Johnson “almost got me mad enough [to] swing at him.” The other, Maurice Estes, saw Branch and Johnson arguing but didn’t hear what was said between them, but as Johnson passed him going to the lift vehicle, he heard him mutter through his teeth: “He’s mine as soon as he gets out the gate.”

The encounter ended with Johnson finishing the job and with Branch reporting by telephone to both Williams and Figari at their homes, the former at 10:15 p.m. and the latter at 11:50 p.m. Williams returned to the plant and, assertedly, found Branch “visibly shaken” and writing out a report of the incident with a “shaking” hand. He claims Branch quoted Johnson as telling him: “When you leave the plant, you’re fucking dead.”

The following day, Johnson was called into Figari’s office. There, in the presence of Williams, Figari asked him what occurred on the previous night. When Johnson gave his version, Figari was quiet for a while and then looked up and said: “Well, we’re placing you on a one-day suspension . . . come back on Monday at 4:00 p.m. . . . there’s been a lot more said and done than you’re claiming,” and he declined to answer Johnson’s request for details. Johnson returned at the scheduled time. With Williams present, Figari told him that a “through investigation” revealed that “there was a lot more said and done . . . [and] we’ve decided to let you go at this time.” With that, he handed Johnson a termination slip which indicated he was being fired “for violation of company rules [and] for threatening and intimidating company employees.” And in reply to Johnson’s inquiry as to who he had threatened and how, Figari repeated: “We had a through investigation . . . and we’ve decided to let you go at this time.” Then, at Figari’s request, Williams escorted Johnson through and out of the plant.

Crediting the accounts of employees Cochran and Estes, I find that there was no death threat and that, at most, Johnson challenged Branch to a fight off the premises. It does not appear that Figari’s (or Williams’) “through investigation” included contemporaneous interviews with the two employees. Had that cautionary action been taken, they may well have agreed with me, especially since they opted not to credit Branch in the earlier (October 14) incident; and, in consequence, they might have tempered their response to Johnson’s outburst by imposing punishment short of termination—particularly because no physical encounter actually occurred and in the past Respondent had been lenient in similar situations.⁴⁸

⁴⁷ Immediately after giving this quotation Branch hesitated, corrected himself, and revised the quote to read: “You’re dead when you get outside the gate.”

⁴⁸ About a month before Johnson was fired, employee Kelly Santos learned that Branch was degrading his work habits to Williams, and he told Williams the charge was false, adding: “if you don’t do nothing about it, I will.” And on June 30, 1988, employee

Continued

⁴⁶ The third union activist, Bobby Felts, was terminated 1 day earlier on October 18 for reasons not of record here. The discharge is not alleged as unlawful in the complaint.

I conclude that Respondent's failure adequately to investigate the incident resulted from rampant antiunion animus found throughout this case and led to overly harsh punishment of Johnson. Accordingly, I find his termination unlawful as alleged in paragraph 47 of the complaint. The 1-day suspension, however, does not appear inappropriate and, therefore, the allegation in paragraph 46 will be dismissed.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above, and it is not shown to have violated the Act in any other respect. Those unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

The Union's objections in Case 26-RC-7180, to the extent they parallel allegations in the complaint found proven, are sustained; and the Respondent thereby interfered with the Board election held on September 1, 1989.

Except to the extent found, Respondent is not shown to have violated the Act in any other way.

REMEDY

Having found that Respondent engaged in unfair labor practices, I find it necessary to order it to cease and desist therefrom and from further infringing upon employee rights,⁴⁹ and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action will include an offer to unconditionally reinstate (1) Bobby Dickens, Steve Forcum, and Gary Johnson to the positions they held on the date of their discriminatory discharges and (2) Randy Crowell to the position he held prior to his discriminatory transfer on March 1, 1989 (or to substantially equivalent positions in the event those jobs no longer exist) and to make them and other employees whole for any loss of earnings or other benefits they may have suffered as a result of the discriminations found to have been practiced against them, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁰

ORDER

The Respondent, Teksid Aluminum Foundry, Inc., of Dickson, Tennessee, its officers, agents, and representatives, shall

Larry Gilbert received a "final warning" but no suspension for making physical threats to a coordinator.

⁴⁹ A broad remedial order is required because of the numerous and overall egregious nature of the violations found. *Regency Manor Nursing Home*, 275 NLRB 1261 (1985); *Hickmott Foods*, 242 NLRB 1357 (1979).

⁵⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging, suspending, warning, withholding earned wage increases, imposing more onerous working conditions, giving low evaluations, or otherwise discriminating against any employee for supporting Aluminum, Brick and Glass Workers International Union, AFL-CIO, CJC or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Announcing and enforcing overly broad no solicitation/talking rules and unduly limited access-to-company-property rules so as to inhibit, deter, or prevent union organizational efforts.

(d) Engaging in surveillance or creating an impression of surveillance so as to inhibit, deter, or prevent union organizational efforts.

(e) Coercively interrogating employees about their union activities, including wearing union insignia, or sympathies.

(f) Soliciting and promising to remedy employee grievances in order to undermine union organizational efforts.

(g) Threatening to discharge, freeze wages and benefits, adopt a regressive bargaining stance, or otherwise punish employees for supporting the ABGWIU or any other union.

(h) Threatening blacklisting or other reprisal to inhibit, deter, or prevent employee recourse to the Board.

(i) In any other 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 immediate, full, and unconditional reinstatement to Bobby Dickens, Steve Forcum, and Gary Johnson to positions held on the day of their unlawful discharges and Randy Crowell to the position he held prior to his unlawful transfer on March 1, 1989, or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them, and Wade Ross, whole with interest for any loss of pay they may have suffered by reason of their unlawful discharges and/or suspensions, in the manner set forth in the remedy portion of this decision.

(b) Rescind all adverse personnel actions issued to the above-named employees, and to Bobby Felts, John McElhiney, and Kelly Burgess as a result of the discriminations here found to have been practiced against them, and expunge from Respondent's files any reference thereto and notify these employees, in writing, that such actions have been accomplished and that the expunged material will not be used as a basis for any future personnel actions against them or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker. (See *Sterling Sugars*, 261 NLRB 472 (1982).)

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

(d) Post at its plant in Dickson, Tennessee, copies of the attached notice marked "Appendix."⁵¹ Copies of the notice, on forms provided by the Regional Director for Region 26, 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

⁵¹ 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."

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, 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.

3. The election previously conducted on September 1, 1989, is hereby set aside, and a new election shall be directed at such time as the Regional Director for Region 26 deems appropriate.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.