

Cla-Val Company and Laborers' International Union of North America, Local No. 1184, AFL-CIO. Cases 21-CA-27747 and 21-CA-27859

October 14, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issue in this case¹ is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by taking several adverse employment actions against employee Ralph Esparza. The National Labor Relations 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,² and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent's actions against Esparza were motivated by antiunion considerations. In this regard, we note that, with one exception discussed below, all the elements of a prima facie case were clearly established. That is, Esparza engaged in union activities, the Respondent had knowledge of this, and the Respondent took various actions against Esparza after acquiring such knowledge. Concededly, the element of antiunion animus has not been established with equal clarity. However, we find that antiunion animus was established by the following:

1. In giving Esparza a poor evaluation, the Respondent cited Esparza's "negative attitude toward management." As the judge found, the quoted language was a euphemism for Esparza's leadership role in the Union. This evidence is not only an indicium of the illegality of the evaluation but also an indicium of the antiunion animus that underlays other actions taken against Esparza.

2. In a speech opposing unionization, the Respondent told employees that "somebody up in Canada would like to have the work that we have." The judge found that this remark conveyed to employees the idea

¹On March 23, 1993, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief.

²The 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.

Finally, we make the following corrections in App. A of the judge's decision. The adjusted workdays available for January 1990 should be 22. The adjusted hours available for December 1989 should be 136. The number of hours absent for April 1990 should be 4.5. The total number of hours absent should be 65.11. These corrections do not materially affect the judge's findings and conclusions.

that work would be lost if the employees chose the Union. The Respondent offered no economic explanation for such a loss of work. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969). The judge concluded, and we agree, that the remark demonstrated "that Respondent was willing to resort to coercion to dissuade employees from voting for union representation." Since the remark was a coercive one, it is not protected by Section 8(c) and can be used to establish antiunion animus.³

In view of the strong prima facie case as to most elements of an 8(a)(3) violation, the adequate evidence of antiunion animus, and the falsity and/or pretextual nature of the Respondent's defenses, we agree with the judge's finding of an 8(a)(3) violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cla-Val Company, Perris, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

³The fact that the General Counsel did not allege the remark as unlawful under Sec. 8(a)(1) does not preclude its use as evidence of antiunion animus.

We do not rely on the Respondent's noncoercive campaign remarks against unionization. We also disavow any implication in the judge's analysis that it is generally improper for an employer to ask an employee for suggestions about how to improve productivity or to ask such questions in a casual conversation.

Peter Tovar, for the General Counsel.

Michael A. Hood (Paul, Hastings, Janofsky & Walker), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Los Angeles, California, on October 20, and November 9, 1992, upon a second amended consolidated complaint issued by the Regional Director for Region 21 of the National Labor Relations Board (the Board), on May 24, 1991. It is based upon charges filed by Laborers International Union of North America, Local No. 1184, AFL-CIO (the Union), on November 29, 1990,¹ and December 20. It alleges that Cla-Val Company (Respondent) has committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).²

¹All dates are 1990 unless otherwise noted. In addition to the docket numbers cited above, the charge in Case 21-CA-27681 was filed on August 21, and supported the original complaint issued November 29. By order of September 24, 1992, the Regional Director dismissed Case 21-CA-27681 in its entirety as well as portions of Case 21-CA-27859.

²Respondent has filed a motion to correct the transcript in certain respects. The motion is unopposed. As it seeks to correct obvious and mostly self-evident transcription errors, the motion is granted. In addition the transcript contains other errors of similar import. A

Issues

As modified by the deletion of certain allegations, the operative complaint alleges that Respondent for reasons prohibited by the Act mistreated its employee Ralph Esparza by issuing him an unfavorable employment evaluation, placing him on probation, denying him a merit pay increase, giving him a warning, and suspending him for a week without pay. Respondent admits the conduct, but denies that it had an unlawful purpose.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both counsel for the General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation and a division of Griswold Industries, manufactures hydraulic valves at its facility in Perris, California, where it annually ships and sells goods valued in excess of \$50,000 to customers outside California. Accordingly, Respondent 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.

II. LABOR ORGANIZATION

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

III. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Pursuant to a petition filed by the Union, a representation election was conducted by the Board among certain of Respondent's production and maintenance employees on June 28, 1990. A majority of the voting unit selected the Union as its collective-bargaining representative and on July 6, the Regional Director for Region 21 certified the Union as the 9(a) representative of those employees.

The alleged discriminatee, Ralph Esparza, was a senior employee at the Perris plant. He had been hired in June 1984 as a lathe operator and had been regularly promoted. He progressed to the CNC (computer numerical control) mill department and had served there as a trainee, an operator, and finally as a setup man. By 1990, he was among the most accomplished employees in that department. Later, after the incidents alleged to be unfair labor practices, he was transferred to the CNC lathe department. All the jobs he held were those of a well-skilled machinist. His skills are unques-

tioned. He left Respondent's employ in early 1992. His departure is not an issue in this case.

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From late 1989 through mid-1990, Respondent was undergoing a management changeover. In 1989, the facility plant manager had been Archie Monson. In September 1989, one Lee Johnson became, on a contract/consultant basis, the individual who actually ran the plant. At the same time, Jess Caperon was appointed to succeed Monson as facility manager. Although onsite at the same time as Johnson, Caperon seems to have been a manager-in-waiting. When Johnson's contract expired at the end of the year, Caperon assumed full responsibility for the plant. His assistant manager was Jay Tuttle.

As part of the changeover process, Johnson and Caperon also replaced some of the firstline supervisors. In May 1990, Caperon hired Jose "Joe" Silva as the machine supervisor for the CNC department machines. He reported directly to Caperon or, in Caperon's absence, to Tuttle. According to Esparza, Silva replaced Russell Davis as his immediate supervisor. Silva had held a similar supervisory job for another company for over 10 years.

B. *Esparza's Union Activity; Management's Response to the Election Drive*

Esparza says he was not one of the employees who initiated the organizing drive. Once it was underway, he joined it having concluded that union representation was appropriate for the production staff. He says in May he passed out about six authorization cards, although there is no evidence that Respondent's management was aware that he was doing so. He says he attended five or six meetings in late May which Respondent conducted designed to dissuade employees from voting for representation. Two or three were conducted in the lunchroom in building #2. Others were held in the work areas.

The first meeting, Esparza says, was in late May or early June. About 30 employees were in attendance. It was conducted by a supervisor named Ron Mladenoff.³ Other management personnel who were present included Tuttle and Silva. Esparza recalls that Mladenoff acknowledged that the staff was experiencing problems which the Company had not addressed, saying he did not believe it was necessary for the employees to go outside the Company to find remedies—that the Company had provisions for those types of things. Esparza publicly disagreed with Mladenoff on the point, saying over the years many problems had been brought to management's attention, but there were no company provisions to solve the problems, only provisions to voice one's opinion.

³Facility Manager Caperon was on sick leave during most of this time due to a back ailment. In his absence corporate staff in either Costa Mesa or Newport Beach issued flyers and letters in his name arguing against the need for union representation. Since Caperon could not personally attend the company meetings, other plant officials, such as Mladenoff, were asked to present management's opposition during the meetings.

He also says there was a great deal of talking between the employees and the managers and that many people had something to say about the need for a union. Esparza remembers addressing the group himself saying he didn't think having a union was such a bad thing in light of the fact that the Company hadn't been able to solve the problems. He stated to the group that he felt it was a valid option.

Although Esparza attended other company-called meetings, he could only remember one other with any detail. That occurred a short time before the June 28 election. Again it was a large meeting in the lunchroom; about 30 employees were present as was the managerial staff, including Mladenoff and Silva but not Caperon. Esparza says Mladenoff continued to try to discourage employees from voting for union representation saying at one point, "Somebody up in Canada would like to have the work that we have." Mladenoff was not called as a witness and Esparza's testimony stands un rebutted.

In addition to the meetings, several items of literature were distributed between June 8 and 22. None of these contains any illegal threats or promises. Nevertheless, they can fairly be described as hard-boiled, attacking the Union's competency as well as its dues structure. Respondent also compared the salaries of certain union officials with the amounts of money actually spent on its membership, pushing the conclusion that little of the dues went to benefit the members, while large sums were applied to the salaries of the officials.

The parties have stipulated that on July 11, the Union notified Respondent that Esparza would be a member of the Union's negotiating team. Pursuant to that appointment, Esparza attended three negotiation sessions. These seem to have occurred on August 2, 14, and 29; at least I so infer from corrections which appear on General Council's Exhibit 16, a time and attendance record. Respondent's only representative at these meetings was Personnel Director Mike Carroll. Other negotiating sessions may have been conducted as well; if so, Esparza did not attend them.

C. Esparza's Annual Evaluation; Discipline

Esparza's anniversary, for appraisal purposes, was June 18 of each year. In 1990, some rather curious things occurred. His supervisor, Silva, who had been hired only 6 weeks earlier, was asked to complete Esparza's evaluation, despite his lack of familiarity with Esparza's circumstances over the past year. The evaluation form covers such matters as quality of work, knowledge of the job, initiative, cooperation, personality traits, judgment, leadership, and the like.

Connected to each blank appraisal form is an annual time and attendance report provided by the personnel department which the immediate supervisor is to use in performing the evaluation. That report is generated by the personnel department computer in Costa Mesa/Newport Beach. It supposedly covers the employee's attendance record for an entire year. In Esparza's case, since the report (R. Exh. 4) was generated during the month before the evaluation was due, it covered neither the month of the evaluation (June) nor the month preceding it (May). Instead, it covered April 1989 to April 1990. This, of course, was a period about which Silva knew nothing since he had just been hired in May.

The evaluation itself is dated June 26 by Silva and June 27 by Caperon. Caperon says he signed it June 26, a day he thinks he came into the office even though still on injury

leave. In context, this occurred 2 days before the Board-conducted election.

A few days earlier on June 20, Esparza with Silva's approval had forwarded a suggestion (G.C. Exh. 25) to corporate headquarters to increase the size of a rough casting used for a particular part so that it could be more efficiently machined. The suggestion was adopted 15 days later on July 5.

When Silva filled out Esparza's form (in evidence twice, R. Exh. 3 and G.C. Exh. 10)⁴ he rated Esparza satisfactory in all but one category. One of the satisfactory ratings, however, tends to damn him with faint praise. The positive remarks include: "Maintains satisfactory level of quality," "Works satisfactory to the capabilities of set-up," "Able to work on his own," and "Works well with fellow workers and supervisor." The last is a rating falling under the category of "Cooperation."

The remaining two comments fall under "Personality Traits" and "Leadership Abilities." Silva rated Esparza's personality traits (which supposedly measures courtesy, enthusiasm, tact, overall conduct, and attitudes) as unsatisfactory saying, "Negative attitude toward management." On leadership abilities, although marked satisfactory (and supposedly rating the employee's capacity to develop, his ability to influence the performance of others and his willingness to assume responsibility), he said, "Has potential of being a leader if direction of attitude would change to the positive."

Silva then asserted, based on a computer printout, that Esparza's absenteeism exceeded 3 percent; that it was 6.27 percent. The initial printout (R. Exh. 4) on its face shows an absentee rate of 7.8 percent. Silva doubted its accuracy and discussed it with Tuttle. As a result of that discussion, a second printout (R. Exh. 7) was run on June 22. As a result the rate was reduced to 6.27 percent. That exhibit covers a period from June 18, 1989, to June 17, 1990, a somewhat later period than Respondent's Exhibit 4. Although a note written on it asserts that an adjustment had been made for a worker's compensation-related absence, even the 6.27-percent absence rate is subject to severe doubt.

In addition to discussing Esparza with Tuttle, Silva also believes he consulted with Caperon about Esparza but he did not describe that consultation. Because Silva regarded Esparza as having exceeded the 3-percent absence rate, he thought Esparza, under the company manual, had rendered himself ineligible for the merit pay increase which was normally connected to a satisfactory annual appraisal. Accordingly, he recommended at the bottom of the form that the merit pay increase be denied.

It is true that any employee who exceeds the 3-percent absence rate becomes subject to the employee attendance rule as set forth in the Griswold Industries Employee Handbook. The rule itself is not very tightly drawn and leaves room for disagreement over its application. It certainly does not, as Silva seemed to believe, automatically disqualify one from the merit pay increase; instead such a deficiency is to be taken into account with other factors before such a decision is made. I quote the rule:

⁴ Both exhibits are identical except that R. Exh. 3 bears Esparza's signature, dated August 1.

Attendance

Griswold Industries must meet production requirements to satisfy our customers. You can do your part by maintaining an acceptable attendance record. The Company defines absence of more than 3% a calendar year as unacceptable. Any absence or tardiness becomes a part of your personnel record and, if excessive, will become a factor when wage increases and promotions are considered.

[Portion relating to newly hired probationary employees omitted].

As an employee, you will be disciplined in accordance with the attendance regulations. Judgment will be exercised regarding unusual circumstances and your past record. The following causes for an employee's absence will not be considered in the application of the attendance policy:

1. Authorized jury duty.
2. Vacations and holidays.
3. Authorized absence due to industrial injury.
4. Company requested leave of absence due to lack of work.
5. Any authorized and approved leave of absence.
6. Death in the immediate family. [Definition of immediate family omitted].

When your attendance becomes unsatisfactory, the following steps will be taken:

1. A verbal warning will be given.
2. Continued unsatisfactory attendance will cause a written warning to be issued. This written warning will become a part of your personnel record for a period of one (1) year. Written warnings will be removed from your personnel record when your attendance is satisfactory for a period of one (1) year.
3. Any additional unsatisfactory attendance after a written warning could result in suspension without pay or dismissal.

The Company depends on you to do your part in producing quality products on time. This can only be achieved when you are here at your assigned times to perform your duties. Your job is important! Your dependability is one of the highest attributes and assets you can provide your Company.

In any event, Silva concluded his review by writing in the comments section of Esparza's evaluation:

Due to your excessive absenteeism of 6.27% your attendance will be reviewed every 60 days until it improves. If it continues at a [sic] unsatisfactory rate further action will be taken. Affective [sic] 7-16-90.

As can be seen from the rule, a verbal warning is the first step in the disciplinary procedure. Silva did not take that step, but went straight to a probationary procedure instead. Caperon says on August 1, he told Esparza that the remark was to be considered "a warning for you to improve your time and attendance." Although in writing it is unclear whether this is warning referred to in the handbook. Such warnings are usually given on a separate form used for that purpose. Whether or not either Silva or Caperon followed the handbook, it is unclear when the matter was actually brought to Esparza's attention.

Silva testified that he has no recollection of actually presenting the completed evaluation form to Esparza, nor, he says, did he ever discuss it with Esparza. Thus, according to him, he never advised Esparza that he was being placed on a 60-day attendance probation.

Esparza's recollection is a little different. He says Silva spoke with him about the evaluation sometime in mid-July, some 4 weeks after it was due and 3 weeks after Silva had filled it out. He says he read it over and concluded that the evaluation portion was contradictory and he didn't feel compelled to sign it.

Silva tried to persuade him that it wasn't all negative, that he was rated satisfactory with respect to cooperating with his supervisor, but agreed that the two factors could be regarded as contradictory. With respect to Esparza's leadership potential, Esparza recalls Silva saying he had the potential of being a leader if he changed his attitude from negative to positive. He said Esparza was "opinionated and influential with regards to the other employees, that they listened to [him] and the things that [he] said, and that [he] was viewed as having a negative attitude towards management, and . . . [he] always seemed to be on a soapbox." Esparza replied that all he was doing was expressing his opinion; that he didn't know there was a law against doing that. He says Silva responded that there was no such law and repeated Esparza seemed always to be out on a soapbox with a negative attitude towards management.

The discussion turned to the attendance matter. Esparza asked him to explain how the Company had determined the 6.27-percent absence rate, because Esparza didn't believe it was accurate. He was, for example, aware that the 2 weeks he had been off in March and April due to an industrial injury might have been wrongfully included in the calculation. He was most upset over the denial of the merit pay increase. Esparza says Silva agreed to look into it.

Nonetheless, Esparza declined to sign the form. He does not recall any specific discussion regarding the 60-day probation. Curiously, given the dates, the probation had already begun or was about to begin. Why does Silva say he had not discussed the evaluation at all with Esparza and why does Esparza corroborate Silva at least with regard to the lack of discussion over the probation? That imposition of limits should have been a large portion of the discussion. Why didn't it happen?

Silva also explained that the reason he determined Esparza had a negative attitude toward management was because Esparza had responded skeptically when Silva had asked him for his ideas about machine relocation. Esparza had opined that the whole thing would come to nothing as had many other ideas which had been begun and abandoned by the preceding management team. Caperon gave similar testimony. It is clear, however, that Esparza was not alone in that response; other employees answered similarly. Furthermore, before the evaluation was written, no supervisor or manager had ever told Esparza that his attitude toward management needed to be improved. And, neither Caperon nor Silva adequately explained why such a response actually demonstrates a bad attitude. More likely it demonstrates that Esparza, a rank-and-file employee, had never given the matter any previous thought and had not considered the matter with any care.

To a large extent the matter is not really an hourly employee's concern; it is a management affair dealing with the production floor's system design which would ultimately be resolved by management, probably after careful study. I find it curious that Esparza, a machinist, albeit a skilled and experienced one, has been held to account for something clearly outside the scope of his daily job. Even if the inquiry is appropriate, it seems to be more of an issue of Esparza's managerial potential than one of his attitude toward management.

Sometime in late July, Silva learned he was to be laid off effective August 3. He actually left the factory several days earlier, having been given permission to take the time to look for other work.⁵

On August 1, Caperon appears to have picked up where Silva had seemingly left off. He sounds as if he was under the impression that Silva had not discussed the appraisal with Esparza at all, so he called Esparza in to discuss it. Caperon believes August 1 is the first time the evaluation was shown to Esparza. He says at some point he had gotten the appraisal which Silva had drawn (certainly he had signed it in late June). Caperon testified he does not recall whether or not he discussed with Esparza any previous conversation Esparza may have had with Silva about the evaluation. It seems likely, therefore that he did not; Esparza, who didn't remember the conversation, was probably operating under the belief, if anything, that Caperon was following up where Silva had left off—having reviewed the accuracy of the absence records.

However, at this point it is clear that no one had performed an audit of the April-to-April attendance records, nor had anyone even looked into it per Silva's apparent promise to do so. Nonetheless, according to Caperon, he presented Silva's evaluation to Esparza on August 1, since Silva was no longer at the plant. He says he told Esparza the merit pay had been denied due to his attendance (in fact it had earlier been denied on June 26 or 27 even though Esparza hadn't been informed); that he was being warned about his attendance; and that he was being placed on a 60-day probationary basis as Silva had outlined.

Caperon remembers Esparza arguing over the accuracy of the 6.27-percent absence rate and says he later asked personnel to verify it. His testimony on what he learned from personnel doesn't really address what the actual truth was. He accepted counsel's leading assertion that the records were marked "appropriately." Frankly, I am unable to understand that answer. Does it mean that the underlying records had been checked and were in fact accurate, or does it mean that the conclusionary paperwork appeared to be in order no matter what the underlying facts were?

Esparza has little, if any, recollection of an August 1 discussion of his evaluation with Caperon. He had been operating under the belief that he had refused to sign the evaluation and seemed surprised upon seeing his August 1 signature on Respondent's Exhibit 3. He, of course, had not signed his

own copy (G.C. Exh. 10). Nor, on either document had he made any contentions of his own, although the form does contain an "employee's comments" space.

At the end of the putative 60-day period, according to Caperon, he asked for a time and attendance record covering Esparza for the probation period. General Counsel's Exhibit 16, generated on September 25, is the document. Among other things, this is the period during which Esparza served 2-1/2 days as a union negotiator. Those days were physically stricken from the sheet by marker pen and seem to have been removed from the calculation. Nonetheless, his activity on behalf of the Union is noted squarely on the document.

In addition, there is the question of what 60-day period was actually granted Esparza. General Counsel's Exhibit 16 begins with July 16, and ends September 24. The period was to have begun on July 16, and Esparza says the evaluation was shown to him around that time, but there is no evidence that Silva discussed the probation period then. In fact, if the absence records were in error, the probation might have been reconsidered. It is unlikely, therefore, that the probation had actually begun on July 16. By the time Caperon began dealing with it on August 1, an additional 2 weeks had passed. Was Caperon really putting Esparza on a retroactive probation period? That seems quite odd if its purpose was to give Esparza the opportunity to improve. A retroactive period would not accomplish the purpose.

General Counsel's Exhibit 16 covers 71 days, 20 of which are weekends. If the probation was workdays, that means only 51 days were covered, assuming the 16 retroactive days should be included. If they were included erroneously, then Esparza was only given 39 workdays (assuming an August 1 start). If Caperon intended to begin the period on July 16 (ineffectual though that might be) why did he use a 71-day period? If the 60-day period was intended to be calendar days beginning August 1, why are 3 tardies in mid-July included in the 10 to which Caperon points?

The printout highlights, in pink shading, 10 tardies, 1 left work sick, and 1 leave early. Caperon showed this document, as highlighted, to Esparza on August 1. Three of the tardies occurred during the retroactive period before Caperon even had his discussion with Esparza on August 1. Two of those three are for lateness of 1/100th of an hour, or 36 seconds.⁶ He was not even docked for those. The third is for 8/100ths of an hour or 4 minutes and 48 seconds.

⁶ Those two tardies are recorded for July 16 and 23. It appears that Respondent also uses job timecards to record the time spent on particular jobs. When Esparza learned that his attendance was in question he asked for and received copies of two job timecards covering those 2 days. One shows him logging on a specific job shortly before the 6 a.m. start time and the other doing the same at 6 a.m. Caperon is unimpressed saying they could have been tampered with. Frankly, given the fact that the time and attendance computer shows only 36 seconds difference, I fail to understand why there is any claim that he was late on those days.

⁵ Silva was rehired about a year later in the same capacity.

The remainder occurred after August 1. Again, one is for being 36 seconds late. Another is for 4/100th of an hour, less than 2-1/2 minutes. Neither was serious enough to warrant a pay dock.

It is true that on 2 days he was nearly an hour late and on 1 day he left about an hour and a half early. The others were tardies of about 4 minutes.

As a result of his review of the September 25 attendance printout, Caperon directed Mladenoff to prepare and give Esparza a written warning. It was prepared on September 27 and given to Esparza the following day. It states:

On your last evaluation you were given a warning about your job attendance and you were told that your job attendance would be evaluated every 60 days . . . This has been done and we find that your habitual tardiness and absence periodically is still keeping your time and attendance in an unsatisfactory level.

Esparza responded by writing on the form: "I will improve my time of arrival."

On October 5, Esparza was 10 or 15 minutes late to work. He had called to say he would be late (such a call does not excuse the lateness but does assist the supervisor in making work assignments). Caperon testified that Esparza was later asked for an explanation. Caperon at first uncertainly said he was the one who asked Esparza, then thought it was Mladenoff; finally he settled on Esparza's new supervisor, Ron Arnold.⁷ Caperon's testimony here is obviously second hand. Anyway, he testified Esparza, instead of explaining his tardiness, evaded, saying, "It's no big deal. What are you worried about?" Esparza denies saying that or anything like it at that time. Caperon says he regarded that response as demonstrating a bad attitude. Accordingly, he decided that a suspension would impress Esparza that the Company was serious about getting his cooperation. He says he chose suspension over discharge because he considered Esparza a valuable employee.

Esparza testified that Mladenoff called him to his office in the afternoon on October 5, and gave him the written suspension notice. He says Mladenoff told him only, "You're not getting it . . . this thing about your time and attendance . . . therefore, you're being suspended." Mladenoff gave him a written suspension form which stated:

Description of Unsatisfactory Performance: Tardiness, late to work on 10/05/90. Ralph, this suspension notice is being issued because of your failure to comply with your last warning on tardiness and absence. Effective October 8, 1990, you are suspended from work until October 12, 1990, without pay. Failure to correct this habit from now on will result in your immediate termination!

Esparza asked Mladenoff if he could see Caperon to clarify some of the instances of tardiness and absenteeism which they had been citing. He did not testify that he actually followed up his request to discuss the matter further with Caperon. Esparza also denied telling Mladenoff that the tardy "was no big deal" or anything like that. After being shown his prehearing affidavit he admitted he told Mladenoff during

the suspension conversation, "I was only late." That, of course, does not repudiate his denial that he had said such a thing earlier, at the time of his tardy arrival.

I note that Mladenoff had already prepared the written form prior to his meeting with Esparza. That demonstrates Mladenoff and Caperon had already made the decision to suspend him. As Esparza's supervisor, Ron Arnold, has not testified, there is no firsthand evidence in the record regarding what remark, if any, Esparza actually made upon his arrival. The only acceptable evidence is his denial that he made such a remark at that time. What, then, triggered Caperon's decision, the lateness or the supposed flip answer? Caperon says it was the answer. Yet, there is no evidence that anything approaching a glib answer was given until after the decision to suspend Esparza had been made. That is an odd sequence to be sure. It forces me to conclude that it was the tardy itself, not Esparza's sidestepping the explanation, which triggered the decision to suspend him.

D. Esparza's Attendance Record

Respondent contends, pointing to Respondent's Exhibit 7, that Esparza's absence rate far exceeded the 3-percent acceptable rate established by the handbook. A cursory review of the absence records, particularly Respondent's Exhibit 4, which totally misclassified Esparza's absence for industrial injury as unexcused and misses an entire pay period (that ending August 20, 1989), made me skeptical of Respondent's records. Accordingly, using a combination of Respondent's Exhibits 4 and 7, I have reconstructed what actually happened. See Appendix A attached hereto. Before discussing my findings, I make several observations.

First, it should be noted that Respondent's Exhibit 4 is what the personnel department gave Silva. Although it is a one-page document, it actually covers 13 months rather than 12 as an annual appraisal might be expected to do. It begins with April 1989 and includes April 1990. It tracks 2-week pay periods, not daily logs. As is common, it utilizes pay periods which end on specific dates, alternating Sundays in this instance. It is somewhat difficult to follow, but the -1, and -2, following the dates refer to the first and second week of each pay period and does reflect days of the week, Monday through Friday. One can, by using a calendar, determine what day of the month is reflected by each entry. On each day of absence a code appears: V for vacation, H for holiday, F for floating holiday, P for paid absence (usually used for sick leave), and A for unexcused absence. Tardies and leave-earlies are shown by the amount of time missed (using the 100-minute hour).

Respondent's Exhibit 7 is a much lengthier document. It is more of a time record and covers an entire year, day by day. Generated later than Respondent's Exhibit 4, it covers June 18, 1989, to June 17, 1990. It contains excused absence columns and shows log-in and log-out times, placed by the employee; if those require correction, the correction is shown. It also shows the amount of paid time earned that day, both straight time and overtime. Unpaid absences are shown only by a "no-entry" for the date.

⁷Arnold did not testify.

Even though the two documents are for somewhat different time periods, they overlap to a great degree. Accordingly, they can be used to cross-check each other.

Because the personnel department chose to send Silva Respondent's Exhibit 4 to use in his annual evaluation of Esparza, I have determined that an accurate version of that same time period is the one which Silva should have been given. It is true that one could use other periods, and Silva eventually was given Respondent's Exhibit 7. He, however, never checked its accuracy, nor was it up to him to do so or even to concern himself with the fact that it was for a different period. Had Respondent done it right, it would have used an accurate version of Respondent's Exhibit 4. Accordingly, I have used that same time period, including the fact that it covers 13 instead of 12 months.

As can be seen from appendix A, Esparza's rate of absence for the 13-month period is 3.1 percent, only slightly above the 3-percent handbook target, but far less than the 6.27 percent he was charged with. If one 8-hour absence whose correctness is in question is deleted, the rate falls below the 3-percent target.⁸

E. Other Employees' Evaluations and Absence Percentage

The parties have stipulated in evidence the personnel evaluations of several other employees, including Carl Hansen, Gary Boone, and Steve Thorne. The first two were offered by the General Counsel and the last by Respondent.

Hansen, like Esparza is a senior employee with excellent skills and experience. His 1991 evaluation shows that his attendance printout also showed an absence rate of over 3 percent. His supervisor noted that the computer rate was erroneous, saying: "Attendance report is incorrect in the coding of absence." He was denied a merit increase only because he was already at the top of the payscale for his job.

Boone's evaluation was performed in February 1990. He is shown to have had an enthusiastic attitude toward his work and was rated satisfactory or better in all categories. Yet he, like Esparza, had an absence rate of over 3 percent. His supervisor recommended him for a raise anyway saying: "Gary has improved his attendance over the last 3 month[s]." The recommendation was followed.

In October 1989, Thorne received an annual appraisal. He was also rated satisfactory or better on all categories. His absence rate was over 3 percent, too. His supervisor recommended no merit increase, but said he was going to work with the employee on the problem. There is no evidence regarding his actual percentage of absence, only that it was over 3 percent.

⁸I have also made a similar calculation for the June 18, 1989, to June 17, 1990 period of R. Exh. 7. It is less certain, for between April and June 1990, there are some corrected entries which have no clear explanation. Even there, however, the percentage absence rate is far below the 6.27 ascribed rate. It was 3.8 percent. I do not consider it both because it is not the period originally leveled and because of the uncertainty connected to corrected entries.

IV. ANALYSIS AND CONCLUSIONS

The General Counsel has easily proven four of the five elements required to prove a violation of Section 8(a)(3) and (1) of the Act. Those sections, of course, prohibit an employer from affecting the hire and tenure of an employee because of his or her union activities. First, there is no question that Esparza was deeply involved with the Union and that Respondent had actual knowledge of Esparza's union sympathies and activities. He had spoken in favor of unionization at one of the early company meetings, clearly stating a position contrary to the official opposition voiced by the Company. Furthermore, it was done in the face of Respondent's spokesman Mladenoff. Shortly thereafter, on July 11, notice of Esparza's appointment to the Union's negotiating team was transmitted to the Company.

I note here that in the annual evaluation, his supervisor had said, adopted by Facility Manager Caperon, that Esparza had the potential of being a leader if his attitude would change from negative to positive; that other employees listened to what he had to say. If other employees were listening to what he had to say about the Union, it follows rather easily that management was not pleased with the direction Esparza's leadership capability was taking them. Management would not have regarded him as being on a soapbox if it wasn't taking notice of his commentary.

And, by giving him the sort of evaluation it did, Caperon and Silva undermined Esparza's tenure with Respondent. If one is performing well, and doing the job for which one is hired, and yet the employer rates the employee more poorly than he deserves, then his hire and tenure has been affected. That is even more true when it comes to denying the employee a pay increase. That is money out of the employee's pocket; money to which his work level has entitled him. The timing, in the midst, not only of the Board election campaign, but afterwards when Esparza was selected to the Union's negotiating committee, warrants the conclusion that the two are connected.

The fifth element is union animus. The evidence here is more subtle. Yet, there is some traditional evidence of that. Mladenoff's undenied remark that there were employees in Canada who would like to do the work is evidence that Respondent was willing to resort to coercion to dissuade employees from voting for union representation. In addition, even some of its lawful speech, as evidenced by the preelection flyers, suggests that it wanted to play hardball on the issue. While that may not be direct evidence of animus, it nonetheless demonstrates a lack of ready acceptance of the collective-bargaining rights enjoyed by employees.

More important than those factors, however, is its lack of honesty in dealing with Esparza. I find that its assertion that he had a bad attitude toward management is based on virtually false grounds. If they wanted him to give them ideas about how to better lay out the production floor, casual conversations were not the way to get him to do it. Moreover, since that was not part of his job, to evaluate him on that perceived shortcoming is entirely unfair. He is not an efficiency expert; he is a machinist. He should be evaluated as such, but was not.

And, the contention that he was not cooperative with management, coming within a week of his having made a valuable suggestion to increase the bulk of a raw casting, discredits the verity of the remark. In fact, Esparza's suggestion is evidence of his enthusiasm and good attitude toward the success of the Company. Management approved his suggestion a week after Silva and Caperon signed the appraisal. This treatment is inconsistent at best and dishonest at worst; on August 1, Caperon had the opportunity to take into account, but did not.

Finally, the analysis afforded Esparza in the absenteeism matter was shabby treatment indeed. I think it is fair to say that no one took the time to determine what the actual truth was because the 6.27-percent rate was a good blind to hide behind. Except for Silva, who doubted the first printout and went to Tuttle about it, not one person in management or personnel cared enough to be certain the absences were properly coded. A year later, in the Hansen evaluation, someone was alert enough to recognize there were problems with the coding. In Hansen's case they recognized it despite the fact that no merit raise was at stake. In Esparza's, it was. Didn't anyone recognize the problem earlier than it did with Hansen? Or was it simply that they didn't want to know, because then they couldn't use it as credibly?

I do not want to minimize the importance of absenteeism. And I think that Esparza has demonstrated that he pushes the limits of the 3-percent rule. He could stand some improvement in this area. Nonetheless, his actual rate of 3.1 percent is within the range of acceptability as evidenced by the fact that Boone got a merit raise with a similar rate only 4 months earlier. Certainly Silva's remark that the raise was denied because the rate exceeded the amount "allowed by company policy" overstated the rule. The rule, of course, only says that the absence rate is a factor to be considered while weighing the appropriate action to be taken. The rate itself is not an automatic disqualifier. Clearly papering Esparza's personnel file and exaggerating a legitimate shortcoming can be seen as a camouflage masking the real motive—to defang a perceived effective union-leaning employee with leadership potential.

It is certainly curious that Respondent never counseled Esparza over either the "attitude" problem or the absenteeism prior to the evaluation. That it was exaggerating his shortcomings and was creating evidence is quite clear. The odd treatment of his probation period is proof of that. It tried to hold Esparza to a probation period about which it hadn't even notified him until August 1, yet which had begun 2 weeks earlier. Furthermore, when it came time to review the probationary period, it charged him with three tardies of 36 seconds, two of which are countered by evidence demonstrating punctuality. That is very petty treatment. If that were not enough, Caperon added, after making the decision to suspend Esparza, that the reason for the suspension was not the tardiness per se, but Esparza's attitude toward it. Why did he gild this lily? The answer is obvious—to make Esparza look much worse than he really was, thereby concealing the real motive.

All of this reveals that Respondent was treating Esparza differently than it would have had he not openly supported

the Union. Such a demonstration is evidence of union animus. I therefore conclude that the General Counsel has established a prima facie case as alleged in the complaint. The negative evaluation, the denial of the pay increase, the probation, the warning, and the suspension are all based on flimsy, and at least partly false, evidence. Such evidence suggests an entirely different motive.

Respondent's defense is principally that the evidence was a fair and accurate portrayal of Esparza's work history over the year.⁹ As we have seen, however, his treatment not fair or evenhanded. I am not even much impressed by the argument that even if the absenteeism report was in error, that supervision was entitled to rely upon it. Even Silva doubted it in the beginning, before he ever showed it to Esparza. Then, from the first time he saw it, Esparza regularly questioned its accuracy. He did so with Silva, he did so with Caperon on August 1, and he did so with Mladenoff when he was suspended. Yet nobody checked it.

In this circumstance, for Respondent to prevail, it must show that this treatment of Esparza would have occurred even absent his union activity. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Respondent's defense fails in this regard for the very evidence upon which it must rely is actually evidence of animus. Had it not papered Esparza's personnel evaluation and had it not relied on obviously inaccurate time records, it may well have met that burden. It has not.

Accordingly, I find that the General Counsel's case stands un rebutted and have no hesitation in finding an 8(a)(3) and (1) violation as alleged and entering an appropriate remedial order.

THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The affirmative action shall include an order requiring Respondent to revise Ralph Esparza's 1990 annual evaluation to accurately reflect his cooperative attitude toward and his willingness to work with management, to properly reflect his absence rate, and to recommend that he be granted the merit pay increase to which he would have been entitled absent the discrimination against him. In addition, Respondent shall be ordered to grant that increase effective June 26, 1990, and make him whole for any loss of earnings and other benefits which he suffered as a result of that discrimination, including losses resulting from his suspension from work without pay on October 5, 1990, plus interest as computed in *Ogle Protection Service*, 183 NLRB 682 (1970).

⁹I do not find that the so-called warning in July 1989 over Esparza's supposed failure to protect his long hair from the machinery to be anything serious. Once warned he took steps to guard against the hazard. His choice of a device other than a hair net and his declination to cut his hair are hardly indicative of a bad attitude.

CONCLUSIONS OF LAW

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

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

3. Beginning on June 26, 1990, Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against its employee Ralph Esparza with respect to his hire and tenure:

(a) By intentionally giving him a misleading, partially false and negative annual evaluation, recommending discipline, and placing him on probation.

(b) By denying him a merit pay increase.

(c) By giving him a warning on September 28, 1990.

(d) By suspending him for a week without pay on October 5, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Cla-Val Company, Perris, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating Section 8(a)(3) and (1) of the Act by discriminating against its employees with respect to their hire and tenure because they have engaged in or are engaging in activities for and on behalf of Laborers International Union of North America, Local No. 1184, AFL-CIO by

—intentionally giving employees misleading, false and negative annual evaluations, and subsequently using that record to recommend their discipline.

—denying them merit pay increases.

—giving them probation or warnings.

—suspending them without pay.

(b) In any like or related manner 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) Revise Ralph Esparza's 1990 annual evaluation to accurately reflect his cooperative attitude toward and his willingness to work with management, to properly reflect his absence rate and to recommend that he be granted the merit pay increase to which he would have been entitled absent the discrimination against him.

(b) Grant Esparza the merit pay increase he should have received on June 26, 1990, and make him whole for any loss of earnings and other benefits which he suffered from that date, including losses resulting from his suspension from work without pay on October 5, 1990, plus interest.

(c) Remove from its files any reference to the unlawful discipline of Esparza and notify him in writing that this has been done and that the discipline will not be used against him in any way.

(d) 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.

(e) Post at its plant in Perris, California, signed copies of the attached notice marked "Appendix B."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁰If 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.

¹¹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Esparza Absence Record

<i>Date</i>	<i>Total Available Workdays</i>	<i>Days Excused</i>	<i>Adjusted Workdays Available</i>	<i>Adjusted Hours Available</i>	<i>Number of Hours Absent</i>	<i>Percentage Absence</i>
<i>1989</i>						
April	20	6	14	112	-0-	
May	23	3	20	160	.03	
June	22	3	19	152	-0-	
July	21	3	18	144	-0-	
August	23	1	22	176	¹ 28.00	
September	21	2	19	152	1.00	
October	22	0	22	176	9.55	
November	22	2	20	160	8.78	
December	21	4	17	120	-0-	

APPENDIX A—Continued

Esparza Absence Record

<i>Date</i>	<i>Total Avail- able Work- days</i>	<i>Days Ex- cused</i>	<i>Adjusted Workdays Available</i>	<i>Adjusted Hours Available</i>	<i>Number of Hours Absent</i>	<i>Percentage Absence</i>
<i>1990</i>						
January	23	1	20	176	8.00	
February	20	0	20	160	³ 25.25	
March	22	7	15	120	-0-	
12 mo. Subtotal				1824	60.61	43.3
April	⁵ 20	8.5	11.5	92	-0-	
13 mo. Total				1916	60.61	3.1

It should be noted that the “Days Excused” column includes the following pursuant to the employee handbook, G.C. Exh. 4: vacations; holidays (both scheduled and floating); absence due to industrial injury; and paid absences. The handbook is unclear on whether the last is to be counted as excused for the purpose of computing the absence rate. However, in two places R. Exh. 4 excludes them. I have therefore followed that model.

¹ R. Exh. 7 shows an 8-hour absence on August 14; that absence is not confirmed by R. Exh. 4. In the latter exhibit the pay period ending August 20 is missing entirely. Although the records do not match, the 8 hours have been included for the purpose of this chart. See fn. 4 for an adjusted total if this 8 hours is deleted from the absence column.

² R. Exh. 4 shows Esparza to have been absent on August 22. R. Exh. 7 shows he worked 8 regular hours and 1 hour overtime that day. Accordingly, the entry on R. Exh. 4 is deemed inaccurate.

³ This figure includes a .25-hour lateness per R. Exh. 4 although R. Exh. 7 shows only a .13-hour tardy.

⁴ If the indecisive 8 hours absence of August 14 is removed from the calculation this total and the 13-month total become 2.8 percent and 2.7 percent respectively.

⁵ April 30 not included as considered in May pay period #1.

APPENDIX B

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 discriminate against our employees with respect to their hire and tenure because they have engaged in or are engaging in activities for and on behalf of Laborers International Union of North America, Local No. 1184, AFL-CIO by

—intentionally giving our employees misleading, false and negative annual evaluations, and then using that record to justify disciplining them.

- denying them deserved merit pay increases.
- giving them undeserved warnings and probation.
- suspending them without pay.

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

WE WILL revise Ralph Esparza’s 1990 annual evaluation to accurately reflect his cooperative attitude toward and his willingness to work with management, to properly reflect his absence rate, and to recommend that he be granted the merit pay increase to which he would have been entitled absent our discrimination against him.

WE WILL grant Esparza the merit pay increase he should have received on June 26, 1990, and make him whole for any loss of earnings and other benefits which he suffered from that date, including losses resulting from his suspension from work without pay on October 5, 1990, plus interest.

WE WILL remove from our files any reference to the unlawful discipline of Esparza, and notify him in writing that this has been done and that the discipline will not be used against him in any way.

CLA-VAL COMPANY