

Smith International, Inc. and Rodney J. Ruiz. Cases
17-CA-15903, 17-CA-16029, and 17-CA-16381

March 2, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On September 30, 1993, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief. The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Smith International, Inc., Ponca City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

² We find it unnecessary to rely on the judge's statement that the Respondent denied Charging Party Rodney J. Ruiz an opportunity to bump into the position of Jay Glowacki, a leg machine operator in department 37, and junior in seniority to Ruiz. It is unclear whether Glowacki held the leg machine operator position after the February layoff was complete. Glowacki, at some point, left this position to bump into the CNC lathe operator position. His employee data record shows that Glowacki was moved on February 9, 1992, the Monday following the February 7 layoff. The judge, however, credited Ruiz' testimony that on February 12 Plant Manager Pat Mulligan told Ruiz that the Respondent would discontinue the use of the leg machine Glowacki was operating and would transfer Glowacki to another department. This suggests that Glowacki had not yet bumped into his new position. Nevertheless, we need not decide whether, after the February 7 layoff, Glowacki held a position into which Ruiz was entitled to bump, because we find, in agreement with the judge, that the remaining evidence supports the judge's conclusion that the Respondent unlawfully discriminated against Ruiz during the February 7 layoff.

Richard C. Auslander, Esq., for the General Counsel.
Kristen L. Gordon, Esq. and *Michael C. Redman, Esq.*, of
Tulsa, Oklahoma, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on November 12, 1991, and February 24 and October 13, 1992, by Rodney J. Ruiz, an individual, against

Smith International, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued complaints dated April 7 and November 18, 1992, alleging violations by Respondent of Section 8(a)(4), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Ponca City, Oklahoma, on June 10, 1992, and February 9, 1993, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in these cases, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having an office and place of business in Ponca City, Oklahoma, is engaged in the manufacture of mining and petroleum drill bits. During the 12-month period ending March 31, 1992, a representative period, Respondent, in the course and conduct of its business operations, purchased and received at its Ponca City facility goods valued in excess of \$50,000 directly from points located outside the State of Oklahoma. In that same time period, it shipped and sold from the Ponca City facility goods valued in excess of \$50,000 directly to points outside the State. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

United Automobile, Aerospace and Agricultural Implement Workers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Respondent's Ponca City facility is its principal plant for the manufacture of mining and petroleum drill bits within its global organizational structure. It also operates such a plant in Italy. Due to a continuing decrease in demand for its product, Respondent's manufacturing plants located in California and in Mexico City were shut down in the 1980s and early 1990s.

Finding itself with an oversupply of inventory at Ponca City and decreasing sales, Respondent, in November 1991, decided to lay off both production and maintenance employees and salaried personnel. At that time, some 400 workers were employed in hourly and production and maintenance jobs.

Respondent effectuated a downsizing of operations on November 15, 1991, laying off 50 people, including a few salaried workers. On December 13, another 50 production and maintenance employees and salaried workers were laid off. On February 7, 1992, a third layoff occurred, involving some 38 people. Thereafter, on March 27, 1992, five to seven salaried engineers were laid off.

Among the production employees laid off on February 7, 1992, was Rodney J. Ruiz. During the 17-month period preceding his layoff, Ruiz had spearheaded an organizational drive, on behalf of the Union, among Respondent's hourly workers. His activities in that regard were well known to Respondent's supervisors and its executive personnel.

In the instant cases, the General Counsel contends that Respondent selected Ruiz for layoff in February 1992, and failed to select him for temporary reemployment in September 1992, because of his union and other protected concerted activities, and because he filed charges under the Act in violation of Section 8(a)(4), (3), and (1) of the Act. Respondent asserts that its layoff and recall decisions were uninfluenced by those matters. Also at issue is whether Respondent violated the Act by issuing to Ruiz, in September 1991, a performance evaluation with low ratings, and by threats and other statements addressed to Ruiz by first-line supervisors and other officials in the months preceding his layoff.

B. Facts¹

Ruiz went to work for Respondent on June 18, 1987, and was assigned to operate a leg machine used in the production of mining bits. Thereafter, he was trained to operate such a machine used in the production of petroleum bits. Ruiz worked as a leg machine operator in department 1, then department 37 and, finally, in department 17.² Within department 17, Ruiz was subsequently classified as a CNC machine operator and, on March 25, 1990, he was promoted to the position of CNC machinist.³

In the fall of 1990, Ruiz obtained literature and authorization cards from the Union. He distributed these items to fellow employees before and after work, during lunch and, also, during break periods. His activities in that regard were observed by Plant Manager Pat Mulligan, Personnel Director Bill Werling, Department Manager Don Hisey, and First-Line Supervisors Art Meyer and Wes Hill. The Company responded, later in the year, with a letter to employees setting forth its views with regard to union representation. On receiving his copy of that letter, Ruiz went to Werling's office and asked him if Respondent would hold his, Ruiz', union activities against him. According to Ruiz, Werling responded, stating that "you were the one that started it by bringing those union cards in this shop." Ruiz further testified that, some months later, he brought to Werling's attention the fact that his tools had been vandalized and threats had been directed against him. Werling again stated that Ruiz was the one who had started it. Werling, in his testimony, specifically did not deny Ruiz' account of the foregoing conversations

and, thus, Ruiz' testimony in these regards is substantially uncontradicted and is credited.

In January 1991, Respondent instituted, on a one-time basis, what it termed an "equity adjustment" of the wage rates paid to hourly employees. This was designed to raise the hourly rates of productive employees who were at the lower end of the pay scale. As a result, Ruiz received a 38-cent- or 42-cent-per-hour wage increase. Dissatisfied with that amount, he approached the plant manager, Pat Mulligan, and asked him why he, Ruiz, had not received more. Mulligan stated that the employee had not been there long enough to warrant a larger increase. Ruiz asked if it was because of his union activities, and Mulligan did not respond. According to Ruiz' uncontradicted and credited testimony, Mulligan thereafter stated that, if Ruiz was so unhappy working there, he was entitled to leave.

Sometime after this conversation, Ruiz conducted a wage survey of and among 10 of the hourly paid employees. He testified that he conducted the survey to help him plead his own case and, also, in order to show other employees "how the wages that were paid for the jobs being performed were way off balance." Ultimately, the survey results were shown to Ruiz' supervisor only. Also, in July, Ruiz filed a complaint with the Oklahoma State Labor Board, charging that Respondent was harassing him because of his union activities.

In August 1991, Ruiz approached his immediate superior, Wes Hill, an acknowledged statutory supervisor. Ruiz told Hill about the wage survey which, in Ruiz' view, showed that Respondent was discriminating against him and, also, about the complaint filed with the State Labor Board. Ruiz stated that Respondent was harassing him because of his union activities. According to the uncontradicted and credited testimony of Ruiz, Hill responded, stating that he, Hill, knew that some members of management held Ruiz' union activities against him. Hill told the employee that he had been in supervisors' meetings at which Ruiz was the main topic of conversation. Ruiz asked if the conversation with Hill would be held against him. Hill assured Ruiz that the conversation would remain between the two of them.

On or about September 20, Hill gave Ruiz a copy of the employee's performance appraisal, which had been filled out by Hill, and the two of them discussed it, item by item. With respect to category 4(c), "Handling Information with Discretion (pay, rumors, personal information, etc.)," Hill gave Ruiz one point, the lowest numerical rating, and, according to Ruiz' testimony, Hill circled the word "pay" on the employee's copy of the appraisal. Hill also gave to Ruiz a low numerical rating in category 4(b), "Attitude toward Company and Department." Ruiz testified that he asked Hill what the one-point rating in category 4(c) was about, and Hill stated that it was because of the wage survey. When Ruiz reminded Hill that he had agreed not to hold that matter against him, Hill said, "but I guess I did anyway." Ruiz stated that he supposed that the poor rating with respect to attitude was because he had filed charges with the State Labor Board. Hill replied that, that was right, that Ruiz thinks that the Company is out to get him and that that is a bad attitude. Ruiz stated that he knew he had a right to discuss wages and benefits. Hill responded, saying that that was so only if such discussions were not against company policy. Hill further stated that it was a violation of confiden-

¹The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*. In general, I have relied on the testimony of the Charging Party, Rodney J. Ruiz, who impressed me as an honest and forthright witness in possession of a clear recollection of events.

²There are variations in the operation of the leg machines found in each department, and the product differs from department to department.

³CNC stands for computer numerically control. A CNC machine operator runs one such machine. A CNC machinist operates two or more machines simultaneously.

tiality requirements to discuss those matters with anyone not in management.

Hill, in his testimony, denied that he circled the word "pay" on the employee's copy of the appraisal. According to Hill, Ruiz was an average worker and his overall point total for the evaluation, 32, placed him in the average, or satisfactory, category. Hill further testified that Ruiz' low score on the category 4, attitude, cooperation, and teamwork, items reflected the fact that Hill had received complaints from other employees that Ruiz did not leave his machine in proper condition, displayed a lack of teamwork, and polled and surveyed fellow employees with respect to their opinions on various issues. Hill further testified, regarding Ruiz, that "his attitude was always negative against everyone, the company, other employees. He showed no cooperation, no teamwork. Anything that was ever said that should have been confidential immediately was told to everyone. He constantly asked everyone how their job reviews were." Hill added that Ruiz constantly disparaged the Company, talked about how the Company was discriminating against him, and stirred up rumors.

At one point in his testimony, Hill stated that neither union activities nor the fact that Ruiz engaged in discussion of wages with other employees was a factor in the Ruiz evaluation or caused a loss of points. However, at another point, he testified that he knew that Ruiz was discussing the subject of wages with other employees and that "that was one of the factors that I was looking at" in preparing the Ruiz evaluation. Hill further testified that he explained to Ruiz that he, Hill, rated Ruiz the way he did "because of his negative views, because of him constantly discussing wages with everyone, just generally being negative towards everyone and the company."

As previously noted, I found Ruiz to be a truthful witness, and I credit his account of the September 20 conversation with Hill concerning the evaluation. Indeed, very significant portions of his testimony were not disputed. On the other hand, Hill's testimony was self-contradictory concerning critical matters and, to the extent it varies from Ruiz' description of the September 20 event, it is not credited, I find that the September 20 conversation occurred substantially as described by Ruiz.

According to Ruiz' uncontradicted testimony, on the next day, September 21, he approached the department manager, Don Hisey, a statutory supervisor, to discuss the appraisal. Ruiz asked about the confidentiality matter, and Hisey responded, pointing to the wage survey.

On September 22, Ruiz went to see the personnel director, Bill Werling, and told him that he, Ruiz, felt that portions of the appraisal were unfair. Werling, according to Ruiz, responded by telling the employee that he, Werling, once found himself working at a job which made him unhappy and, therefore, he quit that job, which made him feel good. He told Ruiz that, if working for Respondent made him unhappy, perhaps it would be better just to leave. Werling added that he felt that Ruiz was a person who thrived on conflict. As Ruiz was leaving, he told Werling that he felt that he, Werling, still held Ruiz' union activities against him. Werling told the employee that he needed to redirect his energies in a more positive direction, and further stated that Ruiz was the one who had started it.

Werling, in his testimony, confirmed the fact that Ruiz approached him concerning the fairness of the evaluation and that, during the conversation, he, Werling, told the employee that, in a previous job, he became dissatisfied and left. Werling denied telling Ruiz to quit his job if he did not like it, or stating to the employee that he perceived Ruiz as one who thrives on conflict.

On the next day, Ruiz approached the plant manager, Pat Mulligan, concerning the evaluation. As Ruiz began to speak, Mulligan asked, well, "what did Werling say?" Ruiz replied, stating that he had not obtained an answer from Werling and, further, that he felt that Werling still held his union activities against him. Ruiz testified that Mulligan then stated, "and rightfully so . . . I'm not very happy about it either." Mulligan, in his testimony, denied that he ever told Ruiz or any other employees that their union activities would be held against them or would result in adverse treatment.

Ruiz, in his testimony, set forth a detailed and believable account of his late September conversations with Werling and Mulligan. I have credited his version of those conversations and rejected the vague account offered by Werling and the general denial by Mulligan. In reaching these conclusions, I have also relied on my observation of the demeanor of Werling and Mulligan as witnesses—neither of them appeared to me to be attempting truthfully to set forth their full recollection of the conversations in question.

Employee Melvin Osborne, who had assisted Ruiz in soliciting the signatures of hourly employees on union authorization cards, testified that, on November 11, he brought to work, and left laying on his bench, charges to be filed with the National Labor Relations Board. Statutory Supervisor John Stout picked up the charges, and started reading them, before Osborne took them back, and an argument ensued. The next day, Stout told Osborne that he had told Osborne's buddy, Ruiz, to stay out of the department. A few days later, Osborne testified, Stout told him that, as far as he, Stout, was concerned, Ruiz was history. Stout, in his testimony, stated that he had not told Osborne that Ruiz was history but, rather, that Ruiz' Union was history.

At the time of the December 1991 layoff, Ruiz was offered the choice of accepting a voluntary layoff or bumping back, within December 17, to the lower classification job, leg machine operator, he had previously held. Ruiz chose the bump back option. Fellow department 17 CNC machinist Mark Martin, who was senior to Ruiz, retained his CNC machinist position. Shortly thereafter, Ruiz, pursuant to instruction, began to train Martin in the operation of the leg machine. Martin, theretofore, had not, at any time, held the leg machine operator position or been classified as a leg machine operator.

On February 7, 1992, Respondent effectuated its third round of employee layoffs. On that day, Ruiz was summoned to appear in the office of the department manager, Don Hisey, who informed the employee that he was being laid off due to poor business conditions. As Ruiz left Hisey's office, he testified, he was followed to the door leading out of the plant by the manufacturing manager, Ike Arnold, and by four or five first-line supervisors. Ruiz testified that he asked them why they were all there, and that Arnold answered that they expected trouble. Arnold, in his testimony, stated that, while he observed Ruiz leaving, he did not escort him to the door and did not speak to the employee. Arnold further testi-

fied that there was not a concerted effort to escort Ruiz out of the building.

Ruiz returned to Respondent's offices later that day and met with Arnold and others of Respondent's officials. The employee stated that he felt he wrongfully had been laid off as there were employees retained who had less seniority and less ability and who had not held the classifications held by Ruiz. Arnold said that he would look into the matter, which would take time and, if a mistake was made, he would correct it. He told Ruiz that the criteria used for layoff were: (1) seniority, (2) ability to do the job, and (3) classification by department.⁴

There is substantial record evidence that Respondent permits employees faced with layoff to remain employed by bumping back to previously held lower classification positions, for which they are qualified, provided they have sufficient seniority to do so. As noted, this option was given to Ruiz at the time of the December 1991 layoff. The option was made available to other employees, but not to Ruiz at the time of the February 7 layoff. In this connection, Arnold testified, employees were permitted to use their bumping rights to claim classifications in departments other than the departments they were working in at the time of the layoff.

As part of its February 7 action, Respondent laid off the two leg machine operators in department 17, Ruiz and the more junior Eric Page. Mark Martin, a CNC machinist in department 17, who, as noted, was trained to operate the leg machine by Ruiz in the days preceding the layoff, was permitted to bump into a leg machine operator position in that department. This, despite uncontradicted record evidence that, theretofore, Respondent had not permitted employees to bump into positions not previously held.

Among the employees unaffected by the February 7 layoff were George Falkenberg, a leg machine operator in department 7, and Jay Glowacki, a leg machine operator in department 37, both junior to Ruiz. Ruiz was not permitted to bump into their positions despite Respondent's willingness to allow other employees to transfer to new departments in order to exercise their bumping rights.

On February 12, 1992, Ruiz met with Mulligan and Arnold. The employee stated that the layoff policy, as explained to him, was not used in his case. Ruiz stated that Mark Martin is now doing "my job" and he had not ever held the leg machine operator classification. Mulligan stated that Respondent would utilize people where it would do the most good for the Company. Ruiz mentioned Glowacki, stating that he had trained him on his machine and that he, Ruiz, had greater seniority than Glowacki. Mulligan said that Respondent would discontinue use of Glowacki's leg machine, and he would be transferred to another department. When Ruiz asked why he was not allowed to transfer to another department, Mulligan said that Respondent was not allowing transfers between departments. Ruiz pointed to Wally Spears, a CNC machinist allowed to transfer from department 17 to department 31, but Mulligan did not respond. Ruiz also asked why Respondent had retained Falkenberg as a leg machine operator in department 7, rather than allow Ruiz to bump into the position, despite the fact that Falkenberg was

junior to Ruiz, and Ruiz had trained him in the operation of his machine. Mulligan stated that Falkenberg was in a department other than Ruiz' department, and Ruiz could not transfer there.

Both Mulligan and Arnold, in their respective testimony, denied that Ruiz' union activities played any role in his selection for layoff. However, neither offered an explanation as to why Respondent, in apparent disregard of its own policies and practices, permitted Martin to bump into Ruiz' leg machine operator position and, then, did not afford Ruiz the opportunity to bump into the positions of more junior operators via departmental transfer.

In September and October 1992, Respondent brought back to work, as temporary employees, a substantial number of laid-off machine operators. This was done, Mulligan testified, in order to meet a temporary "spike in production" requirements, and the employees brought back received wages only and not benefits. However, Mulligan further testified, in December, Respondent decided to grant medical benefits to them as well as Christmas holiday time. In January and February 1993, Respondent began to terminate these positions.

In explanation of Respondent's failure to offer one of the temporary positions to Ruiz, Mulligan testified that, under company policies, as set forth in the employee handbook, laid-off employees have recall rights for 90 days only from the date of layoff. After that period, Respondent may offer positions to whomever it wishes. Indeed, in bringing back employees laid off in November 1991, December 1991, and February 1992 and placing them in temporary positions, Respondent did not assign them, necessarily, to their former departments.

At the time Respondent offered temporary positions to certain of the laid-off hourly machine operators, the recall rights of all of them, including Ruiz, under Respondent's policies, had expired. Yet, Respondent has offered no explanation of why it offered positions to many of the laid-off workers and not to Ruiz. The record evidence shows that, in department 17, machine operators Jim LaBlue, Reggie Getman, and Ted McKee, all junior to Ruiz, and all laid off from their positions in department 17 in December 1991 prior to the Ruiz layoff were returned to their former department. LaBlue was assigned to operate the same leg machine run by Ruiz at the time of his layoff. Getman and McKee ran CNC machines previously operated by Ruiz.

C. Conclusions⁵

As shown in the statement of facts, in August 1991, Supervisor Hill told Ruiz that he, Hill, knew that some members of management held Ruiz' union activities against him. Hill further stated that he had been in supervisors' meetings at which Ruiz was the main topic of conversation. I conclude that, by the foregoing remarks by Hill, Respondent impliedly threatened Ruiz with retaliation because of his union activities in violation of Section 8(a)(1) of the Act.

On or about September 20, 1991, Hill told Ruiz that he had received a low point total in certain areas of his evalua-

⁴Mulligan, in his testimony, described the criteria as: (1) plant seniority by classification, (2) plant seniority by department, and (3) capability.

⁵As indicated, the complaints allege that Respondent laid off Ruiz and refused to reemploy him, because he filed charges with the Board in violation of Sec. 8(a)(4) of the Act. As there is a lack of record evidence in support of those allegations, they must be dismissed.

tion, because he had conducted a wage survey among his fellow employees. Hill further stated that it was a violation of Respondent's confidentiality requirements to discuss such matters with anyone not in management. By so informing Ruiz that he had been penalized for having engaged in protected concerted activities, and by so prohibiting him from engaging in the protected conduct of discussing wages with fellow employees, Respondent, by Hill, further violated Section 8(a)(1) of the Act.⁶

A few days later, Ruiz met with Personnel Director Werling, who, a year earlier, had told Ruiz that he was "the one that started it by bringing those union cards in this shop." This time, Werling told Ruiz that, if working for Respondent made him unhappy, perhaps it would be better if he just left. When Ruiz stated that he felt that Werling still held his union activities against him, Werling told the employee that he was the one who had started it, and that he needed to redirect his energies in a more positive direction. By so encouraging Ruiz to quit his employment because of his union activities, and informing the employee that Respondent held his union activities against him, Respondent, by Werling, engaged in additional violations of Section 8(a)(1) of the Act.

On the next day, when Ruiz advised Plant Manager Mulligan that he, Ruiz, felt that Werling still held Ruiz' union activities against him, Mulligan replied: "And rightfully so. I'm not very happy about it either." By the foregoing statement, Respondent, by Mulligan, violated Section 8(a)(1) of the Act by again telling Ruiz that Respondent held his union activities against him.

The credited testimony of Ruiz shows that, on or about September 20, 1991, Hill told Ruiz that the low ratings contained in his evaluation, in the attitude, cooperation, and teamwork section, were the result of Ruiz' protected concerted activities, including the discussion of wages with his fellow employees. Indeed, Hill's own testimony reveals that Ruiz' activities in that regard "was one of the factors I was looking at" in preparing the evaluation. Werling, in discussing the evaluation with Ruiz, reminded the employee that he was "the one who had started it," that is, engaged in activities on behalf of the Union. In light of this evidence, I conclude that Respondent, in September 1991, issued to Ruiz a performance evaluation with low ratings because the employee had engaged in union and other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

On February 7, 1992, Ruiz was selected for layoff. In establishing a prima facie case of unlawful discharge under the Act, the General Counsel has shown that, at the time of the layoff, Respondent was well aware of Ruiz' extensive activities on behalf of the Union, and other protected concerted activities, and had, repeatedly, over an 18-month period, by its highest officials and its first-line supervisors, expressed its extreme displeasure concerning those activities.

Respondent has not shown that Ruiz would have been selected for layoff even absent the protected conduct. Indeed, although Respondent has set forth its general layoff criteria (plant seniority by classification, plant seniority by department, and capability), it has not explained how the workings of its layoff policies resulted in the selection of Ruiz. To the contrary, there is substantial record evidence that the selec-

tion of this employee for layoff occurred because Respondent refused to apply established layoff policies in his case. Thus, Mark Martin, trained by Ruiz in the weeks preceding the layoff to run the leg machine in department 17, was permitted to bump into that position and displace Ruiz, despite the fact that Martin had never held the position, contrary to existing policies and practices. Ruiz was not permitted to bump into leg machine operator jobs held by junior employees, trained by Ruiz in the operation of their equipment, because its on-site chief executive officer, Mulligan, told him that Respondent was not allowing transfers between departments. Yet, it permitted other employees to do just that and, thereby, to avoid layoff.

In light of Ruiz' extensive union activities and other protected conduct, Respondent's knowledge of same and demonstrated antipathy thereto, the failure of Respondent to show how legitimate and neutral application of its established layoff policies resulted in the selection of Ruiz, and Respondent's disparate application of its policies and procedures concerning bumping, I conclude that Ruiz was selected for layoff in retaliation for his union and other protected activities. By laying off Ruiz, on February 7, 1992, Respondent violated Section 8(a)(3) and (1) of the Act.

I am also of the view that the failure to offer to Ruiz, in September and October 1992, one of the temporary recall positions was violative of Section 8(a)(3) and (1) of the Act. Having laid off Ruiz, for discriminatory reasons, in February, Respondent, in the fall of 1992, chose to offer temporary machine operator positions in Ruiz' former department 17 to junior operators who had been laid off prior to Ruiz. They were assigned to operate the machines previously run by Ruiz. Additional operators were brought in and assigned to departments other than the departments where they had previously worked. In explaining why Ruiz was not offered a position, Mulligan testified only that his recall rights had expired. However, this was also true of every employee brought back.

As Respondent has failed to show that, absent his union and other protected activities, it still would not have offered to Ruiz one of the temporary positions and, as the record evidence so strongly shows the contrary to be true, I conclude that, in the fall of 1992, Respondent again discriminated against Ruiz in regard to hire and tenure of employment because of his activities on behalf of the Union and other protected conduct.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation 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.

⁶See *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989).

CONCLUSIONS OF LAW

1. Smith International, Inc. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Automobile, Aerospace and Agricultural Implementation Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a performance evaluation with low ratings and laying off and refusing to recall Rodney J. Ruiz, because of his union and other protected concerted activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) and (1) of the Act.

4. By threatening employees with retaliation because of their union activities, prohibiting employees from discussing their wages and informing them that they had been penalized for having done so, encouraging employees to quit their employment because of their union and other protected concerted activities, and telling employees that it held their union activities against them, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

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

6. Respondent has not otherwise violated the Act, as alleged in the complaints.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Smith International, Inc., Ponca City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing performance evaluations with low ratings to employees and laying off and refusing to recall employees, because of their union activities or other concerted activities protected by Section 7 of the Act.

(b) Threatening employees with retaliation because of their union activities, prohibiting employees from engaging in the protected concerted activity of discussing their wages and informing them that they have been penalized for having done so, encouraging employees to quit their employment because of their union and other protected concerted activities, and telling employees that it holds their union activities against them.

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

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

(a) Offer to Rodney J. Ruiz immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges.

(b) Reevaluate Rodney J. Ruiz and ensure that the reevaluation is untainted by the events giving rise to this proceeding.

⁷If 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.

(c) Make Rodney J. Ruiz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Expunge from its files any reference to the September 20, 1991 evaluation and the February 7, 1992 layoff of Ruiz and notify Rodney J. Ruiz, in writing, that this has been done.

(e) 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.

(f) Post at its Ponca City, Oklahoma facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, 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.

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

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

APPENDIX

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

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

WE WILL NOT issue performance evaluations with low ratings to employees or lay them off and refuse to recall them, because of their union activities or other protected concerted activities.

WE WILL NOT threaten employees with retaliation because of their union activities, prohibit employees from discussing their wages or inform them that they have been penalized for having done so, encourage employees to quit their employment because of their union and other protected concerted activities, or tell employees that we hold their union activities against them.

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

WE WILL reevaluate employee Rodney J. Ruiz and ensure that the reevaluation is untainted by the events giving rise to this proceeding.

WE WILL offer to Rodney J. Ruiz immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges and WE WILL make him whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the September 20, 1991 evaluation and the February 7, 1992 layoff of Ruiz and notify Rodney J. Ruiz, in writing, that this has been done.

SMITH INTERNATIONAL, INC.