

Ward, Beals & McCarthy, a Division of Trumbull Industries and Robert J. Mahoney. Case 3-CA-16091

July 13, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On April 13, 1992, Administrative Law Judge D. Barry Morris issued the attached decision and on September 30, 1993, he issued the attached supplemental decision. The Respondent filed exceptions, and the General Counsel filed an answering brief to the Respondent's exceptions.

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

The Board has considered the decision in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Orders, as incorporated below.²

ORDER

The National Labor Relations Board adopts the recommended Orders of the administrative law judge and orders that the Respondent, Ward, Beals & McCarthy, a Division of Trumbull Industries, Lockport, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee repudiation of the Union and threatening employees with plant closure and loss of jobs for engaging in protected concerted activities.

(b) Requiring employees to submit to drug and alcohol tests because they engage in protected concerted activities.

(c) Suspending and discharging employees for activities protected by Section 7 of the Act.

(d) 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.

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.

No exceptions were filed to the judge's findings in his original decision that the Respondent violated Sec. 8(a)(1) of the Act by soliciting employee repudiation of the Union and by threatening employees with plant closure and job loss if they engaged in protected concerted activities.

² The judge in his original decision inadvertently failed to include in his recommended Order a provision reflecting his finding that the Respondent unlawfully threatened employees with plant closure. We will include the appropriate provision in our Order.

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

(a) Offer Robert J. Mahoney immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the supplemental decision.

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

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

(d) Post at its facility on Lockport, New York, copies of the attached notice marked "Appendix."³ Copies of the notice on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

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

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT solicit employee repudiation of the Union and WE WILL NOT threaten employees with plant closure and loss of jobs for engaging in protected concerted activities.

WE WILL NOT require employees to submit to drug and alcohol tests because they engage in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT suspend or discharge employees for activities protected by Section 7 of the National Labor Relations Act.

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

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

WE WILL remove from our files any reference to the suspension and discharge of Robert J. Mahoney and will notify him in writing that this has been done and that evidence of the unlawful suspension and discharge will not be used against him in any way.

WARD, BEALS & MCCARTHY, A DIVISION OF TRUMBULL INDUSTRIES

Mary Thomas Scott, Esq., for the General Counsel.
H. Brian Rector (Rector and Associates), of Akron, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Buffalo, New York, on June 24 and 25, 1991. On a charge filed on January 16 and amended on February 25, 1991, a complaint was issued on February 27, 1991, alleging that Ward, Beals & McCarthy, a Division of Trumbull Industries (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with an office and place of business in Lockport, New York, is engaged in the distribution of industrial products. Respondent has admitted that it annually purchases and receives at its Lockport facility goods valued in excess of \$50,000 directly from points located outside the State of New York. Respondent admits, and

I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been stipulated, and I so find, that Freight Drivers, Dockmen, Helpers and Allied Workers Local Union No. 375, a/w IBT, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

On May 1, 1990,¹ Ward, Beals & McCarthy was purchased by Trumbull Industries, Inc. At that time certain changes were instituted, such as discontinuing breaks. Robert Mahoney, who performed duties as a driver and welder, contacted the Union and began soliciting union authorization cards. Bruce Cantara, who at the time was warehouse manager and is an admitted supervisor, testified that H. Brian Rector, a company representative, and Daniel Judge, general manager of Respondent, considered Mahoney and one other individual to be the "ringleaders" behind the Union's organizing campaign. Cantara testified that he was aware that Mahoney was distributing authorization cards. A petition for representation was filed with the Regional Office on July 24. On September 14 the Union was certified as the collective-bargaining representative for Respondent's warehouse employees. The parties have been engaged in collective bargaining since September.

2. Suspension of Mahoney

Daniel Judge, who appeared to me to be a credible witness, testified that on July 24 a message was received on the Company's answering machine from Mahoney's mother saying that he had been involved in an automobile accident and would not be reporting for work. That evening, Judge read an article in the local newspaper which stated that Mahoney was hospitalized after being involved in an automobile accident. The article noted that Mahoney had been charged with driving while intoxicated, speeding, and driving an unregistered and uninsured vehicle.

On the following day Mahoney conferred with the president of Respondent, Murray Miller, as to what course of action to take. Judge testified that in the opinion of Miller, the Company's drug and alcohol policy was to be put into effect, which provided that any employee who is perceived to be under the influence of drugs or alcohol may be removed from service and requested to undergo evaluation and appropriate testing by medical personnel. Accordingly, on July 25 Judge prepared a letter of suspension, addressed to Mahoney, which stated, in pertinent part:

On Monday, July 23, 1990 you were involved in a one vehicle accident The Lockport Union Sun and Journal in Tuesday's edition reported that you were charged with driving while intoxicated, speeding and driving an unregistered and uninsured vehicle. As of today, you are suspended without pay because of your violation of Trumbull Industries' Drug and Alcohol Policy You may seek reinstatement upon submit-

¹ All dates refer to 1990 unless otherwise specified.

ting to a drug screen test and evaluation. Refusal to undergo evaluation and testing will be considered cause for discharge.

Judge asked Cantara to deliver the letter to Mahoney personally. That same afternoon Judge called the Alcoholism Council seeking to make an appointment for Mahoney to be tested. On July 26 a representative of the Alcoholism Council advised Judge that Mahoney could be tested the following day. Since Mahoney did not have a telephone, Judge asked Cantara to personally inform Mahoney of the developments and for Mahoney to call the Alcoholism Council. Judge testified that on July 27 Cantara told him that Mahoney was having difficulty making the appointment.

Cantara corroborated much of Judge's testimony. Cantara testified that on July 25 he delivered the suspension letter to Mahoney. Cantara further testified that on July 26 he again visited Mahoney and gave Mahoney the phone number of the Alcoholism Council and told him to call for an appointment. Cantara testified that on July 27 he received a telephone call from Mahoney who told him that he had tried to call the person he was supposed to call at the Alcoholism Council but that person was not available. He was told it would be 6 to 8 weeks before he could get an appointment to take a test.

Mahoney testified that he came to Respondent's facility on August 6 and brought with him the results of a drug test taken somewhere other than the Alcoholism Council. He attempted to speak to Judge but Judge was not available. He told Cantara that he had been offered a job and that he "couldn't wait any longer" for a job with Respondent. Mahoney acknowledged that Cantara had told him that Judge would not accept the results of the drug screening test which he took. Cantara corroborated Mahoney's testimony. Cantara testified that approximately 2 weeks after the accident, Mahoney came to Respondent's facility and told him "he had to get a paycheck in. His buddy had offered him a job, and he had to take it." Cantara testified that Mahoney never returned to Respondent for employment after August 6 and Cantara had determined that Mahoney "voluntarily quit his job."

3. Events subsequent to the Union's election

During the fall of 1990, William Hufnagel was a warehouse employee at Respondent, a member of the bargaining unit, and the union steward. He testified that after the Union was elected, Judge came to his work station and told him "we could do without the Union there and any problems we had we could work out between ourselves, we didn't need the Union for that." He also testified that Judge said "they could have a vote later on and vote the Union out." In addition, Hufnagel testified that Rector told him "about the things that the company could do to help keep the Union out. One was to extend the negotiations for as long as possible to get the people to feel that the Union wasn't doing anything for them and then try to vote the Union out. They could close the plant, everybody would be out of a job." Rector did not testify. Judge, who did testify, failed to deny the statements attributed to him.

On September 13, Respondent sent a letter to its employees. After referring to an article which appeared in the Buffalo News, the letter stated:

Needless to say, the loss of customers is a serious matter, and it affects each and every one in our organization. The loss of business will not enhance our security nor will it lead to increases in wages and benefits. Historically, we need to look around and remember how many firms have gone out of business due to labor strife. How many jobs have been eliminated due to the continual loss of business which is a result of tactics such as the attached article?

On November 13, Respondent sent another letter to employees, informing them of the status of negotiations between Respondent and the Union. The letter stated, in pertinent part:

[I]t has been rumored that the Union may call a strike if the contract is not settled soon. During negotiations the Union threatened to strike over the Union Shop and Dues Check-Off clause. However, should employees strike over the Union Shop and other economic issues our company has the right to hire permanent replacements for those strikers. Any employee who is permanently replaced will no longer have a job at our company.

B. Discussion and Conclusions

1. Suspension of Mahoney

The complaint alleges that on July 25 Respondent indefinitely suspended Mahoney and on August 6 caused his termination because of his union activities. After the purchase of Ward, Beals & McCarthy by Trumbull Industries on May 1, certain changes were instituted such as the elimination of breaks. Mahoney then met with union representatives and began to distribute authorization cards. Cantara, who was an admitted supervisor of Respondent, testified that he was aware that Mahoney was distributing authorization cards. In addition, Cantara credibly testified that Judge and Rector said that they considered Cantara one of the "ringleaders" in bringing in the Union. I find that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the decision to suspend Mahoney.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct."

Judge appeared to me to be a credible witness. I have credited his account of the events surrounding Mahoney's suspension. For the most part both Cantara and Mahoney corroborated his testimony. On July 24, Judge received a message on the Company's answering machine from Mahoney's mother that Mahoney had been involved in an automobile accident. That evening Judge read in the local newspaper that Mahoney had been hospitalized following an automobile accident and that he was charged with, among other things, driving while intoxicated. The following day, Mahoney called the president of Respondent to discuss what

steps the Company should take with respect to Mahoney. In their view the portion of the employee handbook dealing with an employee who is perceived to be under the influence of drugs or alcohol was to be implemented. That provision provided that the employee may be removed from service and requested to undergo evaluation and appropriate testing by medical personnel. Accordingly, the next day Judge transmitted a letter to Mahoney advising him that he was suspended because of his violation of Trumbull Industries' drug and alcohol policy. The letter further advised Mahoney that he could seek reinstatement on submitting to a drug screen test and evaluation. In addition, the letter informed him that refusal to undergo evaluation and testing would be considered cause for discharge.

Judge arranged to have Mahoney tested on July 27. Through some misunderstanding, however, Mahoney did not contact the appropriate person and instead was told by the testing company that there would be a significant delay in arranging an appointment. While Mahoney had taken a drug test at a different facility on July 26, Cantara had told Mahoney that Judge would not accept that test. On August 6, Mahoney came to the plant and told Cantara that he required employment, that he was offered employment with someone else, and that he "couldn't wait any longer." Cantara testified that at that point he had determined that Mahoney "had voluntarily quit his job."

I find that Respondent has satisfied its burden of demonstrating that the "same action would have taken place in the absence of the protected conduct." One of Mahoney's functions was that of a truckdriver. When Judge read that Mahoney had been charged with driving a vehicle while intoxicated he conferred with the president of the Company and they decided that pursuant to what they perceived to be Respondent's drug policy, Mahoney was to be suspended and requested to undergo appropriate testing. On July 25, Mahoney was suspended and he was advised that he may seek reinstatement on submitting to a drug screen test and evaluation. On the same day Judge arranged for a test of Mahoney on July 27. Mahoney did not take the test and on August 6 he appeared at the plant and told Cantara that he had accepted another job and that he could not wait any longer. Cantara considered that this meant that he was quitting. I find that Respondent has sustained its burden under *Wright Line*, supra, and, accordingly, the allegations in paragraph 8 of the complaint are dismissed.

2. Statements to Hufnagel

Hufnagel testified that after the Union was elected, and while negotiations were taking place, Judge came to Hufnagel's work station and told him "we could do without the Union there and any problems we had we could work out between ourselves, we didn't need the Union for that." In addition, Hufnagel testified that Judge told him "they could have a vote later on and vote the Union out." Hufnagel also testified that Rector, an admitted agent of Respondent, told him that the Company could "extend the negotiations for as long as possible to get the people to feel that the Union wasn't doing anything for them and then try to vote the Union out. They could close the plant, everybody would be out of a job." Judge failed to deny the statements attributed to him and Rector did not testify. I credit Hufnagel's testimony. In *Hearst Corp.*, 281 NLRB 764 (1986), the Board

found that Respondent violated Section 8(a)(1) of the Act when it solicited employee repudiation of the union. I find that Judge's statements to Hufnagel and Rector's statement that the Company could get the employees to believe that the Union wasn't doing anything for them and then "try to vote the Union out" constituted solicitation of employee repudiation of the Union, in violation of Section 8(a)(1) of the Act.

With respect to Rector's statement that "they could close the plant, everybody would be out of a job," in *Engineered Control Systems*, 274 NLRB 1308, 1313 (1985), Respondent's president told an employee that if he had to sign a union contract he would have to "close his doors." The Board stated (id. at 1313):

[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. Here, [the president's] comments were not limited to the consequences of agreeing to any particular contract or contract language, rather in the context of bypassing the Union, he implied that any agreement with the Union would cause him to close his business. I find that Rector's remarks constituted an unlawful threat to close the plant in order to undermine the Union as the exclusive bargaining representative, in violation of Section 8(a)(1) of the Act.

3. Letters to employees

On September 13, Respondent sent a letter to its employees suggesting that the Union was attempting to undermine Respondent's standing with its customers. The letter stated "the loss of customers is a serious matter and it affects each and everyone in our organization." The letter continued "we need to look around and remember how many firms have gone out of business due to labor strife. How many jobs have been eliminated due to the continual loss of business which is a result of tactics such as the attached article?" In *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 (1989), the Board held that a statement suggesting that unionization could lead to loss of business and a loss of jobs had a tendency to coerce employees when viewed against other unlawful conduct on the part of Respondent, and constituted a violation of Section 8(a)(1) of the Act. I find that the September 13 letter to the employees threatened the likelihood of loss of jobs and business due to the Union's election and constituted a violation of Section 8(a)(1) of the Act.

On November 13, Respondent sent another letter to employees which stated, in pertinent part, "should employees strike over the Union Shop and other economic issues, our company has the right to hire permanent replacements for those strikers. Any employee who is permanently replaced will no longer have a job at our company." In *Baddour, Inc.*, 303 NLRB 275 (1991), the Board found that Respondent's statements to bargaining unit employees that "union strikers can lose their jobs" and that "you could end up losing your job by being replaced with a new permanent worker," conveyed to the ordinary employee the clear message that employment will be terminated. Such a statement unlawfully implied a threat of job loss as a result of the strike and thus interfered with employees' Section 7 rights. Although an employer is not required, in accordance with *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982), to fully detail the protections

of striker replacement enumerated in *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), an employer remains barred from threatening employees, as a result of a strike, that employees will be deprived of their rights in a manner inconsistent with *Laidlaw*. I believe that the statement in the letter that "any employee who is permanently replaced will no longer have a job at our company" goes beyond a mere recitation of the Employer's rights to permanently replace economic strikers and, accordingly, constitutes a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Ward, Beals & McCarthy, a Division of Trumbull Industries is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Freight Drivers, Dockmen, Helpers and Allied Workers, Local Union No. 375, a/w IBT, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employee repudiation of the Union and by threatening employees with the loss of their jobs if they should engage in protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Mary Thomas Scott, Esq., for the General Counsel.

H. Brian Rector (Rector and Associates), of Akron, Ohio, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. On April 13, 1992, I issued a decision in this proceeding finding that Respondent violated the Act by soliciting employee repudiation of the Union and by threatening employees with the loss of their jobs if they should engage in protected concerted activities. With respect to the suspension of Mahoney, while I found that General Counsel made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the decision to suspend Mahoney, I also found that Respondent sustained its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and accordingly, I dismissed the allegations in paragraph 8 of the complaint.

On May 26, 1993, the Board remanded this proceeding to me to issue a supplemental decision relating to the alleged 8(a)(1) and (3) violations involving Mahoney. On June 16,

1993, I issued an order affording the parties the opportunity to file supplemental briefs by July 23, 1993. Supplemental briefs were filed by General Counsel and by Respondent. On further review of the record, including the supplemental briefs of the parties, I make the following

ADDITIONAL FINDINGS OF FACT

On July 23, 1990,¹ Mahoney suffered an off-duty alcohol-related automobile accident. As I previously found, on July 25 Judge prepared a letter of suspension addressed to Mahoney. When Judge instructed Cantara to deliver the letter to Mahoney for his signature, Judge told Cantara "hopefully he won't sign the letter and then we'll be done with him." It was also at this time that Judge told Cantara that he believed that Mahoney was "one of the ringleaders of Union organization out in the warehouse." On July 26 Judge contacted a representative of the Niagara County Alcoholism Council (Alcoholism Council or Council) and was told that the Council could administer a test to Mahoney on July 27. Judge did not schedule the appointment but instructed Cantara to deliver to Mahoney the name and telephone number of the representative at the Alcoholism Council with instructions that he should call and arrange a firm appointment. While Mahoney had already submitted to a drug screen test at St. Mary's Hospital on July 26, he agreed to contact the Alcoholism Council. However, when he did so he was informed that the earliest appointment was in approximately 6 to 8 weeks. When Cantara informed Judge of this, Judge called the Alcoholism Council and was informed that the earliest appointment was 2 to 3 weeks away. Judge did not schedule an appointment.

Between July 30 and August 6 Mahoney made several attempts to contact Judge by telephone in order to discuss his return to work but was unable to reach Judge. On August 6 Mahoney went to Respondent's facility but Judge was not available. At that time Mahoney advised Cantara that he had been forced to accept other employment. Mahoney told Cantara, "I wasn't resigning or quitting my job but for economic reasons I was going to take this other job, because I couldn't wait for Mr. Judge to appear miraculously some place and tell me what the next move was."

On July 12, 1990, Judge interviewed another employee, Steve Forsyth, for the position of corporate buyer. In considering whether Forsyth should receive the promotion, Judge took into consideration whether he had a drinking problem. Judge determined that Forsyth did not have a drinking problem and Forsyth was promoted. In addition, the record contains evidence that William Hufnagel, another employee, received a conviction for driving while under the influence of alcohol in December 1987. Hufnagel was never requested to submit to a drug and alcohol screening test.

Discussion and Conclusions

1. Background

The complaint alleges that on July 25 Respondent suspended Mahoney, on July 26 required him to submit to a drug/alcohol test, and on August 6 caused his termination; all in violation of Section 8(a)(1) and (3) of the Act. As I previously found, Mahoney met with union representatives and

¹ All dates refer to 1990 unless otherwise specified.

distributed authorization cards. Cantara, who was an admitted supervisor of Respondent, testified that he was aware that Mahoney was distributing authorization cards. In addition, Cantara credibly testified that Judge and Rector said that they considered Cantara one of the “ringleaders” in bringing in the Union. Accordingly, I find that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the decision to suspend Mahoney, to require him to take a drug/alcohol test and in causing his termination.

2. Application of drug and alcohol policy

Respondent’s employees’ handbook, under the section entitled, “Drug & Alcohol Policy,” states as follows:

It is the Company’s policy to prohibit the unauthorized possession, use, presence, sale of, transfer of, or being under the influence of, drugs or alcohol on *Company property* [emphasis added].

Respondent has maintained that it took the actions it did with respect to Mahoney because it was enforcing its provisions pursuant to its drug and alcohol policy. In my initial decision I agreed with Respondent’s contention. On further reflection and further review of the record, I believe that my initial determination was in error. No portion of the drug and alcohol policy refers to an employee’s off-duty conduct or states that off-duty alcohol-related conduct might cause an employee to be removed from service, induce disciplinary action, or trigger a requirement that the employee submit to screen tests. As quoted above, the drug and alcohol policy applies only, inter alia, to the possession and use of drugs and alcohol on “Company property.” Respondent has not satisfied its *Wright Line* burden of showing that the policy applied to Mahoney’s off-duty accident.

3. Constructive discharge

The two elements necessary to establish a constructive discharge are, first, that the burdens imposed on the employee must cause a change in working conditions so difficult or unpleasant as to force an employee to resign, and second, that the burdens were imposed because of the employee’s union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989). A significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge. *T & W Fashions*, 291 NLRB 137, 142 (1988).

Respondent’s discriminatory conduct in suspending Mahoney and sustaining the suspension indefinitely created just such an environment. Because of the indefinite suspension Mahoney had no source of income. In addition, Judge failed to provide the information and direction to Mahoney for satisfying the requirements for reinstatement. After the July 25 letter Judge did not send any other written communication to Mahoney about how he might satisfy the alcohol test requirement. In addition, after July 26 Judge did not send Cantara with any more messages regarding instructions for complying with the alcohol testing requirement. The lack of income coupled with Judge’s failure to communicate and provide Mahoney with instructions regarding the steps to re-

instatement created conditions so difficult as to force Mahoney to resign.

4. Disparate treatment

General Counsel argues that Respondent’s treatment of Forsyth and Hufnagel in not requiring them to submit to testing, while requiring Mahoney to submit to testing, demonstrates disparate treatment. Hufnagel had been convicted of driving while under the influence of alcohol in December 1987, more than 2 years prior to Ward, Beals & McCarthy having been purchased by Trumbull Industries, Inc. The drug and alcohol policy in question is part of Trumbull Industries employees’ handbook. I do not believe that the fact that Respondent did not request screening of an employee of a predecessor company, for an incident which took place more than 2 years earlier, shows disparate treatment. In addition, in considering whether to promote Forsyth to the position of corporate buyer Judge considered whether Forsyth had a drinking problem and determined that he did not. This is a far different situation than that of Mahoney, who was reported in the local newspaper to have been “charged with driving while intoxicated, speeding and driving an unregistered and uninsured vehicle.” While Judge admitted that no employees other than Mahoney were required to submit to a drug and alcohol test, I believe that the examples cited by General Counsel of Hufnagel and Forsyth do not demonstrate disparate treatment.

5. Failure to rebut the prima facie showings

Under *Wright Line*, supra, once the Board has made a prima facie showing, the burden shifts to the employer to demonstrate that the “same action would have taken place even in the absence of the protected conduct.” On further reflection and further review of the record, I find that Respondent has not satisfied its burden. As stated above, Respondent has not demonstrated that the drug and alcohol policy applied to an off-duty alcohol-related accident. The suspension and the requirement to submit to a drug test were therefore unwarranted. In addition, it was impossible for Mahoney to comply with Judge’s terms for reinstatement inasmuch as they were not communicated to Mahoney and Judge did not communicate or make himself available for resolving the problem. The lack of income due to the fact that he was on indefinite suspension, coupled with Judge’s failure to communicate and provide Mahoney with instructions regarding the steps to reinstatement created conditions so difficult as to force Mahoney to resign. Accordingly, I find that Respondent, not having sustained its burden, has violated Section 8(a)(1) and (3) of the Act by indefinitely suspending Mahoney on July 25, by requiring him to submit to a drug/alcohol test on July 26 and by causing his termination on August 6.²

² At the hearing Respondent’s counsel argued that the action taken by Respondent was mandated by the Drug Free Workplace Act (41 U.S.C. § 701). In this connection in its initial brief, Respondent also cited Federal Highway Administration rules. Sec. 701(a)(1) of the Drug Free Workplace Act provides that a company is required to publish a statement notifying employees that possession or use, inter alia, of a “controlled substance” is prohibited in the company’s “workplace.” The incident involving Mahoney occurred away from

Continued

ADDITIONAL CONCLUSION OF LAW

By indefinitely suspending Robert J. Mahoney on July 25, 1990, by requiring him to submit to a drug/alcohol test on July 26, 1990, and by causing his termination on August 6, 1990, because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

the "workplace." In addition, it appears from the statute that alcohol is not included in the definition of "controlled substance" (21 U.S.C. § 812). With respect to the Federal Highway Administration rules, no testimony or other evidence was offered to show that the rules applied to the incident involving Mahoney. I find that Respondent has not sustained its burden of showing that Mahoney's suspension and mandatory testing were required by the Drug Free Workplace Act or the Federal Highway Administration rules.

THE REMEDY

Respondent, having caused the termination of Robert J. Mahoney in violation of the Act, I find it necessary to order Respondent to make him whole for any loss of earnings that he may have suffered from the time of his discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

³Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.