

Cargill, Inc. (Salt Division) and Rusty D. Davenport. Case 3-CA-17809

December 14, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On July 18, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate the Act by discharging Charging Party Davenport. The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Davenport for his organizing activities on behalf of the Union. The General Counsel also alleges that the Respondent independently violated Section 8(a)(1) of the Act because Davenport's discharge was based in part on its September 8, 1992 warning to him which, the General Counsel alleges, was given in retaliation for Davenport's protected concerted activity of informing another employee, Brown, of an admonition or threat of discipline that Davenport received on September 2.²

The judge found that the General Counsel failed to meet its burden of establishing a prima facie case that Davenport's protected conduct was a motivating factor in the Respondent's decision to discharge Davenport. In addition, the judge found that the General Counsel did not prove the separate 8(a)(1) discharge allegation because the judge found that Davenport's questioning of Haskell on September 2 played no role in the Respondent's decision to discharge Davenport. The General Counsel excepts to the judge's finding regarding the 8(a)(3) and (1) charges and argues that it met its burden of proof for establishing a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989

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

²The September incidents were not alleged as separate violations. We note that they were time barred by Sec. 10(b) of the Act.

(1982). The General Counsel also excepts to the judge's finding regarding the separate 8(a)(1) violation because the General Counsel contends that the judge misconstrued the General Counsel's basis for that allegation.

We adopt the judge's finding that the General Counsel failed to sustain its burden of establishing a prima facie case under *Wright Line* by showing that Davenport's protected conduct was a motivating factor in the Respondent's decision to terminate Davenport. Further, assuming arguendo that the General Counsel had established such a prima facie case, and assuming that the September 8 warning would have violated Section 8(a)(1) if it were not time barred by Section 10(b), we find that Davenport would have been discharged even in the absence of his allegedly protected conduct. The record shows that the Respondent established that Davenport was discharged because of his work performance. Davenport's record reflects that: in addition to the October 19 superbolter incident just prior to his discharge, Davenport damaged other equipment and received warnings for such incidents; he was not straightforward with the Respondent about an alleged "near miss" incident with employee Antrum; he harassed employee Haskell; he had a poor attendance record; and he had a history of poor work performance. In these circumstances, even in the absence of his union activities and in the absence of the September 8 warning for talking to employee Brown, we find that Davenport would have been discharged. Thus, we adopt the judge's dismissal of the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Rafael Aybar, Esq., for the General Counsel.

Albert J. Sufka, Esq. and *Felix Ricco, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 24 and 25 and March 1, 1994, in Ithaca, New York. The complaint herein, which issued on July 30, 1993, and was based on an unfair labor practice charge and amended charges that were filed on April 23 and June 23 and 29, 1993, by Rusty D. Davenport, alleges that Cargill, Inc. (Salt Division) (Respondent), in about October 1992,¹ maintained a rule prohibiting employees from engaging in discussions or activities, whether on or off Respondent's facility, that Respondent considered disruptive behavior, and that on about October 23, Respondent discharged Davenport because he violated this rule and to discourage em-

¹Unless indicated otherwise, all dates referred to herein relate to the year 1992.

employees from engaging in these and other protected concerted activities, and because of his union activities, all in violation of Section 8(a)(1) and (3) of the Act.²

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Lansing, New York, has been engaged in salt mining. Annually, Respondent has purchased and received at its facility in Lansing goods and materials valued in excess of \$50,000 directly from points outside the State of New York. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(5) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that Local 317, International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent operates a salt mine, approximately 2300 feet below ground, in Lansing, New York (the facility), the deepest salt mine in North America. The facility employs about 125 employees, 84 underground and 36 above ground. The employees work on three shifts in teams, with about nine employees in each team; about five are production miners, two are Wagner operators, and one is a support person. "Wagner" is a front end loader that removes the material from the mine. At the time of his termination, Davenport was employed on the first shift as a production miner working from 6 a.m. to 2 p.m. At that time, the relevant employees on his team were Tom Clark, Mitchell Brown, Crystal Haskell, Ted Antrum, and Jim Bushey, all of whom are still employed at the facility. The supervisory hierarchy was Michael Savino and Henning von Klinggraeff, production supervisors, who reported to Stan Pamel and Gregory Smith, general supervisors, who reported to Charles von Dreusche, mine superintendent, who reported to Robert Supko, mine manager.

Davenport began working at the facility in May 1986. At the time, the Machinists Union, which represented the facility's employees, was on strike and Davenport and others were hired as strike replacements. The union was decertified in March 1987. Due to the fact that the winter of 1991-1992 had been a poor one, businesswise, there was a general lay-off of all, or almost all, the production employees from March to mid-July. Apparently, for the same reason, at a meeting attended by several employees, including Brown and Haskell, on about September 1,³ the Respondent announced that there would be no general wage increase for the employees in 1992; rather the employees were given a \$500 lump-sum payment. It was this announcement, that there would be

no general wage increase in 1992, that began a chain of events that resulted in Davenport's termination 7 weeks later. Prior to examining all the incidents that took place between this announcement on about September 1 and Davenport's termination on October 23, I will discuss the union activity at the facility. At the hearing Respondent admitted that it had knowledge of some of the union activities at the facility and that it would not contest the issue of its knowledge of Davenport's union activities.

Davenport testified that he started trying to unionize the employees at the facility "late 1991 all the way to '92." During this period, "which came to a head in August of '92," he spoke to some fellow employees, principally Clark, Brown, and Bill Rusinko, about the Union. These conversations usually took place at the lunchtable at the facility and at a coffeeshop away from the facility during lunch or before and after work. He testified that in mid-1991 he told his then supervisor, John Greuber, that he and some other employees were interested in organizing a union. After Clark contacted the Union in about August, meetings were held at Clark's house with representatives of the Union, Clark, Brown, Davenport, Rusinko, and some other employees. Davenport posted notices of the union meetings on his car and at the nearby coffeeshop. The union representatives gave the employees literature at these meetings and some employees signed union authorization cards; the Union mailed literature to them at other times. By letter dated September 30, the Union sent Davenport, Clark, Brown, and one other employee some union flyers; Davenport distributed them to fellow employees during nonworking time and off the premises from August through October. "Everybody knew" that he was distributing union literature. Davenport testified that he was friendly with Savino (they had been hourly employees together) and Savino initiated "quite a few" conversations about the Union with him: "We were always talking." He asked Davenport: "How the Union was coming, how the meetings turned out, if I had any more." Savino testified that Davenport told him of his union activities beginning in early September; but he did not question Davenport about the extent of these activities. He told Davenport that he wasn't supposed to talk to him about it. Other employees, including Brown, Haskell, and Bushey, also spoke to Savino about the Union.

Brown testified that he began discussing the Union with Clark and Davenport in about August. Clark contacted the Union and he attended a union meeting at Clark's house in early September. Authorization cards and leaflets were distributed at the meeting. There was a subsequent meeting about 2 weeks later attended by six to eight employees. Clark testified that in about August he discussed unions with Davenport, Brown, and Rusinko, usually at the mine office or at the lunchtable at the facility. He called the Union and had a meeting at his house with a union representative in about August or September. Davenport, Brown, and a few other employees attended the meeting. Literature, but not authorization cards, was distributed. There were subsequent meetings as well as where authorization cards were distributed and signed. He spoke to his fellow employees at breaktimes, usually at the lunchtable, about the Union. Von Dreusche testified that over the prior few years the subject of unions came up periodically at the facility. He also testified that although Davenport never spoke to him about the

²The unopposed motion of counsel for General Counsel to correct the transcript, as contained in his brief, is granted.

³There was some testimony as to whether this was an official meeting of the facility's employee relations team or was simply of a meeting of managers with some employees. Due to the nature of the testimony herein, I find it unnecessary to make any finding in that regard.

Union, a fellow employee told him that Davenport had met with union representatives. Clark has admitted to him his support for the Union. Pamel also testified that Clark "volunteered" to him that he supported the Union. Supko testified that during this period he had no knowledge of Davenport's involvement with the Union. In discussions with supervisors, the only employee connected to the Union was Clark. In July 1991, von Klinggraeff wrote a note in a file memo and in his diary that Davenport spoke to Clark about the possibility of bringing back a union. During the relevant period, Respondent held no meetings with its employees about the Union, nor did they send the employees any letters in an attempt to discourage support for the Union. Supko testified that about two-thirds of Respondent's facilities and employees are unionized and that Respondent has approximately 150 contracts with about 30 unions.

The complaint alleges that Respondent maintains a rule against disruptive behavior and that it applies both on and off Respondent's facility. Toni Adams, Respondent's human resources manager, testified that Respondent instituted this rule in about 1987 after incidents of rumor spreading caused disension, as well as decreased production, among the employees: "As a result, we began terming these kinds of issues disruptive behavior, anything that would disrupt another employee from doing their job that didn't necessarily involve them." Supko testified that disruptive behavior is inappropriate actions by the employees: "For lack of teamwork, violence, profanity, failure to follow directions of supervisor, things of that nature." He testified that it would apply off the clock as well as on the clock, and off the property as well as on the property, "Depending on the circumstances." He cited as an example an event that occurred away from the facility that was "brought back into the workplace and cause friction between people." Kenneth Grimm, the surface plant superintendent at the facility, testified that the rule is an unwritten rule which: "Basically prohibits behavior in the form of harassment, horseplay . . . rumors . . . back stabbing . . . violent behavior or possibly profanity." Savino testified that the policy covers harassment or rumor spreading. Von Dreusche testified that the rule originated in about 1987; it includes various kinds of employee misconduct, including, "misconduct that is adverse to good teamwork or employee morale and such things as failing to follow the directives of a supervisor, retaliating against other employees, rumor spreading, harassment, assaults, threats." Counsel for Respondent introduced into evidence numerous warnings and one termination in October for violating this rule. One of these warnings in 1987 was given to Davenport and another employee for using abusive language rather than bringing the situation to the attention of their supervisor. Although this warning does not specifically state that it was a violation of Respondent's disruptive behavior rule, it states: "The manner in which it did happen was not only contradictory to policy and procedure, but disruptive as well, no matter what the reasons." Davenport and Clark each testified that they were not aware that the Respondent had a rule regarding disruptive behavior. Brown testified that he had heard of a disruptive behavior policy prior to receiving his October 19 warning, but didn't know much about it.

Haskell testified that she attended the September 1 meeting with Gerald Thornton, Respondent's mine manager. At this meeting, Thornton asked those present about the morale

of the work force and said that there would be no wage increase that year because of the poor winter that they had. Brown, who like Haskell was a member of the employee relations team in September, testified that he attended this meeting as well. At this meeting (in which safety and other issues were discussed as well) the employees were told that "as of right then" there would be no raises, but that the matter would be reconsidered at a subsequent time. After the meeting, Brown was asked about it by Clark, Davenport, and others, and he told them what occurred. As to the general response of the employees to learning that there would be no general wage increase, he testified: "Some of the people were just glad to come back after layoffs. Some of the people expected it, and some people were upset." By memo to the employees dated August 28, Respondent informed the employees that because of the poor business conditions in the prior season, there would be no wage or fringe benefit adjustment at that time. Clark testified that he and many of his fellow employees were displeased with this memo. The facility has a phone system that is used to page people in the mine. After reading this memo, Clark used this system and made the announcement: "It's time for a union." Shortly thereafter, Smith took Clark to see von Dreusche, who asked him about the statement that was made over the mine phone, and Clark denied making or hearing that statement. Von Dreusche said that a reliable source said that it was him, but Clark again denied making the statement. Von Dreusche testified that although his managers told him that Clark was the one who made the statement over the mine phone, because Clark denied it he was not disciplined.

The morning of September 2 was when the "Haskell incident" occurred triggering the further incidents that, apparently, resulted in Davenport's termination. On that morning Haskell, whose classification is mine support utility, was performing her regular duties. At about 6:30 that morning, she was preparing to water the equipment being operated in the mine by her panel members. She testified that at about that time she was watering Clark's drill and while they were about a foot apart, Clark asked her: "What was your meeting about last night?" She said that Thornton asked them how morale was underground because there was not going to be a wage increase that year, but that she didn't wish to discuss it any further. She testified that Clark was not satisfied with her response and seemed upset and said to her: "I was fucking accused of starting a union." Davenport, who was standing behind Haskell, said that Clark had every right to know what happened at the meeting because she was an employee relations team member. She testified that both Davenport and Clark were speaking with raised voices, and Davenport demanded to know more about the meeting; "he was very persistent." She testified: "I felt I was under pressure. And working down in dark tunnels, it was two men that were hostile toward me." She told them that she didn't wish to discuss it any further, and if they wanted any more information, they should speak to Thornton. She then saw Savino, her supervisor, and told him of the incident and that she couldn't understand why they were questioning her about the meeting when they could have learned about it from others. Savino told her that when she completed the task she was doing she should go to see Smith and tell him of the incident, which she did. She then returned to work.

Savino testified that on that morning Haskell approached him and said that Clark and Davenport had verbally abused her. Later that morning when he saw Smith he told him of the incident and Smith met with Haskell. Shortly thereafter, Smith asked Savino to accompany him to talk to Clark and Davenport. Smith asked them for their side of the story and they said that they asked Haskell about the meeting the prior day. They told Clark and Davenport to "keep it away from Crystal because it would upset her even more." Davenport became upset and began yelling at Smith. Smith ended the meeting by telling them "that they shouldn't go spreading this around." Smith testified that on September 2 Savino stopped him and told him that Haskell was upset and wanted to speak to him. Haskell got into the truck with him, crying and upset. She told him what Clark and Davenport said to her that morning; "She felt that she was getting ganged up on." He sent Haskell back to work and asked Savino to get Clark and Davenport "to talk through this thing." When they got together, Smith told them that Haskell was very upset over the conversation that morning, "and I'd like to know what happened." Clark said that he asked her what happened at the meeting the prior day and she refused to tell him. Davenport got "kind of excited" and said that they didn't harass her. Smith then said that they were not accusing anybody of harassment; he was only trying to determine what got her so upset. They responded that all they did was ask her what happened at the meeting on the prior day and "she got all upset and stormed away." Smith said that he was trying to find out what happened and that he got one story from Haskell and a different story from them. He ended the meeting by saying that the "conversation is going to stay right here between us four . . . Savino, Rusty, Tom, and myself. I don't want you going back and talking to Crystal, and I don't want you talking to your fellow employees about this." He asked if they understood what he was saying and they said that they did. They were not given a warning for what occurred in the morning, although he did write up the incident and their conversation. Von Dreusche testified that after Smith met with Clark and Davenport, he told them "that any other conversations regarding the events of that morning with other employees were to end. This was a dead issue, end it here."

Davenport testified that on the morning of September 2, he asked Haskell what happened at the meeting the prior day. She said that she couldn't say and he returned to work. Later that afternoon, Smith and Savino spoke to him and Clark. Smith said that Haskell was offended by what they said to her and he was giving them a verbal warning for the incident. Davenport responded that he couldn't understand why, when all he did was to ask her what happened at the meeting the prior day. Smith said that they were getting a verbal warning for the incident and told them not to speak to any employee about the incident. Clark testified that on that morning Haskell was in the area watering his drill. While she was doing that, Davenport asked her "how the meeting went last night?" He testified: "I knew Crystal pretty good—I could tell like she was upset." She didn't answer Davenport's question. Clark then asked her the same question, and she said: "You ought to know, it was the same fucking meeting you were in last night." He assumed that she was referring to the mine phone incident and said that it wasn't the same fucking meeting and then tried to calm

the situation by telling her "don't worry about it" and he returned to work. A couple of hours later, Savino and Smith asked him and Davenport to meet with them. Smith said that they had harassed and verbally abused Haskell, that it was creating an uneasy work environment and that he was giving them a verbal warning for it. Clark denied that there was any harassment and told his side of the story. Davenport and Smith "started to have an exchange of words." It got "loud" and "a little rowdy." A few minutes later everything calmed down and Smith told them:

That's all been a misunderstanding. I don't know exactly what happened here . . . but let the whole matter drop right here and now, and he wouldn't go any further. We agreed to it.

Unfortunately, it did not end there. Davenport testified that after leaving the meeting with Clark, Savino, and Smith, he went to the picnic table where employees often eat or take a break; Brown was sitting there and he asked Davenport what was going on? Davenport said that he got a warning for harassment, without saying by whom, but that he couldn't talk about it. Shortly thereafter, while he and Clark were having lunch at the table, Haskell approached them and said: "What's the matter with you guys?" He told her that they got a verbal warning for harassing her and she said that she didn't accuse them of harassment. She went to call Smith. When he came to the area, Haskell started yelling at Smith that they never harassed her and that it was all made up. Smith told them to come to the office to talk about it and Smith, Davenport, Haskell, and Clark went to his office. After they discussed the situation, Smith said that it was his misunderstanding; he apologized and said that they should put it behind them and return to work, which they did. Brown testified that while he was having lunch that day, he saw and heard Savino, Davenport, and Clark arguing: "It was quite heated." When Davenport came to his table, Brown asked him what was going on and he said that "he was turned in," but that he couldn't talk about it. Clark then joined them and "they said" that they had been turned in for harassment of Haskell because they tried to talk to her about the meeting the prior day. Brown then "took it upon myself to go tell Crystal to meet with these guys to get it cleared up and end it because we have a lot of people with heated tempers, and you can't work closely if people are feuding." He told Haskell that, although he didn't really know what was said, that she should meet with Davenport and Clark, and she agreed. He did not attend the meeting. Within the next few days he was questioned about the incident by Pamel, von Dreusche, Supko, and Adams.

Clark testified that later in the morning after the incident with Haskell, he went to the mine office and overheard a conversation between Davenport, Haskell, and Bushey about the incident that morning. Clark joined the conversation and told Haskell that Smith had given them a verbal warning because of the alleged harassment that morning, and Haskell, "just flew off the end of the handle," saying that it was bullshit, and management were assholes, that she would never complain that way. Bushey then suggested that they call Smith and arrange to meet to work out the problem. Davenport, Clark, Haskell, and Smith then went to Smith's office. Haskell told Smith that she didn't do it, presumably

complain about Davenport and Clark harassing her, and Smith said that the matter would be dropped and that there wouldn't be any warning about that morning's incident. At the conclusion of the meeting they all returned to work.

Haskell testified that shortly before noon on that day, Brown told her that Davenport told him that she had filed harassment charges against him. Shortly thereafter, when she saw Davenport at the picnic table, she asked him why he was saying that she filed harassment charges against him. Davenport became hostile, told her that Smith had "jumped all over him," and said that she "owed him a fucking apology." She became upset and called Smith and told him that Davenport was saying that she filed harassment charges against him, and she wanted them to leave her alone. Smith took them to his office, where Clark and Davenport apologized to her and she told them that she wasn't filing charges against them.

Smith testified that at about noon on that day he was paged by Haskell, who wanted to see him. When he got to the mine office, Haskell, who was crying, was with Davenport, Clark, Brown, and Bushey. Haskell told him that they were saying that she had filed harassment charges against them and it wasn't true and that she just wanted to "forget about all this bullshit, do my job and get along with people." He took Davenport, Clark, and Haskell to his office. When they got there, Haskell said that she heard that Clark and Davenport were saying that she filed harassment charges against them, but "I'm not doing that." Smith told them that they were a team and had to work closely together without hostility. When they lose sight of that, people get sloppy and get hurt. He told them that he had heard conflicting stories of the morning's events: "I do know that I expect all of you to put it behind you, forget about this thing for the day, get back to the job and finish out the day and pay attention to your work." He did not issue any warnings to Davenport or Clark at that time. However, he notified von Dreusche and Supko of the incidents.

By memo from von Dreusche dated September 8, Davenport was given a disciplinary warning for disruptive behavior. The memo recited the events of the morning of September 2 and the incident with Haskell and that, at the conclusion of that incident, the parties were told to keep the incident to themselves, but that later that morning, he involved another employee, which caused Haskell to become upset. The memo states:

Effective this date, you are placed on notice, that any future occurrences of disruptive behavior, as that may involve and is not expressly limited to, a lack of teamwork and cooperation between yourself and your co-workers, the spreading of rumors, failure to follow directions by supervision, and any other actions which may create or lead to a hostile or threatening work environment will result in disciplinary action up to and including termination. Any retaliation toward other employees in regard to this investigation or any future incidents will not be tolerated and will result in disciplinary action up to and including termination.

Davenport testified that he was called to von Dreusche's office on September 8 and was given this memo. Von Dreusche read him the memo and Davenport asked why he

was being singled out and von Dreusche laughed. Davenport said that he would like to discuss it with somebody else and went to speak to Supko. He told Supko that he felt that it was unfair that he was being singled out and that 6 days earlier Smith had told him that the matter was being dropped. He said that he felt that this was all due to the uproar about the Union, and Supko told him that he didn't care if the facility got a union. Supko said that he would review the matter and get back to him. On September 17, Davenport was called to Supko's office. Supko told him that the write up would stand because he had spoken to Brown about the incident after being told not to talk about it. Davenport said that this was due to his union activities and that he was going to put in a complaint with the Board. He also asked to speak to somebody at Respondent's headquarters in Minneapolis.

Von Dreusche testified that he gave Davenport the September 8 warning because he failed to follow a supervisor's direction. On the morning of September 2, at the conclusion of the incident with Haskell, Smith told all present that the incident was over and they were not to speak to anyone about it further and, within a number of hours, Davenport told Brown that Haskell was filing harassment charges against him. After von Dreusche read and gave the memo to him, Davenport went to speak to Supko. Supko testified that he met with Davenport on September 9; Davenport took exception to the September 8 warning and asked him to remove it from his file. Davenport never claimed that it was caused by his union activities. Davenport claimed that Smith told him not to discuss the matter further with Haskell and that he did not speak to any other employee about the incident. Supko told him that he would investigate the matter and on September 15, he spoke to Brown, Clark, Haskell, and Savino, none of whom supported Davenport's version of the events and, on September 17, Supko called Davenport to his office and told him that he felt that the discipline was appropriate and warranted. Davenport said that he wanted to speak to somebody in Minneapolis, and Supko made arrangements for him to do so.

The next incident occurred as Davenport was leaving the facility that day (September 17) after speaking to Supko. Haskell was arriving at the facility to get her paycheck and Davenport was leaving when their paths crossed.⁴ Haskell testified that they "met face to face" and Davenport stopped and told her that the Respondent "was only using me as a scapegoat for information and he's going to get a lawyer and he was going to sue everybody and even sounded like he was going to sue me." This made her upset and, after getting her check, she asked to speak to Adams. She told Adams what happened and Adams told her that she would inform Supko and von Dreusche of the incident. A few days later von Dreusche questioned her about the incident and where it took place. Von Dreusche testified that Adams told him of the September 17 incident and asked him to look into it. He spoke to Haskell about it, and she told him that they passed each other in front of the building and Davenport told her that she had not heard the end of the September 2 incident, that she would be hearing from his lawyer and she would be

⁴There was testimony and a diagram by Haskell and Davenport over exactly where they met and whether it was Respondent's property or public property. I find it unnecessary to discuss this testimony or to decide that issue.

sued along with some of Respondent's personnel; as a result, she was very upset. He and Supko met with Davenport on September 22 to get his version of the incident. Supko testified that he observed the September 17 incident because his office window is adjacent to the front door. He observed Davenport and Haskell meet on the sidewalk in front of the building. Haskell spoke to him about the incident and said that Davenport told her that she would hear from his attorney because he was going to sue her.

Davenport testified that as he was going to his car after leaving the building on September 17, he met Haskell and told her that Supko "wouldn't throw the write-up out, and I was going to have to turn it in to Minneapolis." Haskell's response was: "Oh, I wish that they would leave us alone on this." He testified that Haskell seemed concerned, but not upset.

Supko and von Dreusche met with Davenport on September 22 in Supko's office. Davenport testified that he was handed a copy of the September 8 warning and he was asked what happened when he met Haskell on September 17; he said that what he did outside of work was his own business. They told him that he was terminated and he said that he didn't understand how he could be terminated for something that occurred outside of work. He met again with von Dreusche and Supko at 6 a.m. the following day. They again read him the prior warning and asked if he understood the contents of the memo; he said that he did. They said that:

they weren't going to terminate me at that point, but if any . . . further instances of disruptive behavior happened either at work, outside of work, off the clock or on the clock that they considered disruptive, I would be terminated.

Davenport asked Supko what he considered disruptive, but Supko would not respond. Rather, he said that this was a writeup and that he would be terminated for one more instance of disruptive behavior at work or outside of work, on or off the clock. Davenport said to von Dreusche: "Do you hear that? Do you agree with that?" He said that he did and Davenport said that he understood and returned to work.

Supko and von Dreusche testified that the purpose of the September 22 meeting with Davenport was to get his side of the story of the September 17 incident with Haskell. Supko testified that at this meeting he reviewed the September 8 letter, told him what their expectations were for him, and that future similar actions would result in his termination. Davenport refused to discuss the September 17 incident with Haskell, but said that he understood the provisions of the letter. Davenport asked to speak to somebody in Respondent's Minneapolis office and the meeting was adjourned to resume the following day at 5:30 a.m. Davenport reported to the meeting at 6 a.m. the following day. Supko asked him if he understood the terms of the letter and whether he could comply with them; he answered yes to both questions. Davenport asked him for a definition of disruptive behavior and if the provisions applied while he was off the clock. Supko read from the September 8 letter for a definition of disruptive behavior, and the circumstances that would dictate whether it could occur while he was off the clock. At that point, Davenport got excited and asked von Dreusche if he heard what Supko said. Davenport was not terminated at either of these

meetings. Von Dreusche testified that Davenport refused to discuss the September 17 incident except to claim that it occurred off Respondent's premises. They told him that his actions on September 17 were unacceptable and they wanted to know if he understood what disruptive behavior was and Supko asked him if he could abide by the terms of the September 8 warning. When Supko asked Davenport if he met Haskell outside the facility on September 17, Davenport asked to speak to somebody in Minneapolis. At the meeting on the following morning, Davenport asked Supko for the definition of disruptive behavior and asked that it be put in writing. Supko read to him from the September 8 letter. Supko asked him if he understood the letter and whether he could abide by it and he answered yes. Davenport asked if the rule applied both on and off the clock and Supko answered that it applied on as well as off the clock. Davenport grinned and asked von Dreusche if he heard what Supko said, and he said that he did. Davenport was not terminated on either September 22 or 23.

On about October 7, while a number of the employees including Brown and Bushey were sitting at the picnic table at the facility, Bushey (who did not testify) is alleged to have made an antiunion statement. Brown, who was present at the time, testified that Bushey said that he was dead set against the Union, and would do anything that he could do to keep them out of the facility, including driving through their picket line. The next day Brown called Clark at home and told him of Bushey's statement and, a few days later, he told Pamel what Bushey said. Shortly thereafter, Pamel questioned him about the incident. Davenport testified that he was present when Bushey stated that he would run over any union organizer with a Wagner. Shortly thereafter, Pamel asked him about the statement and Davenport said that he heard the statement and felt threatened by it since he was a union organizer at the facility. Haskell testified that Pamel asked her if she heard Bushey threaten to run over supporters of the Union and she said that she did not hear such a threat. Clark testified that Brown called him at home and told him that Bushey said that he would do whatever he could do to keep the Union out, even if he had to run somebody over with a Wagner. On the next day, Clark went to see Pamel and told him of this statement that Brown told him was made by Bushey, and that he felt threatened by the statement. Pamel said that he needed names, and Clark said that he would give him names. He was later told that they interviewed a number of employees, but that they could not find substantial grounds to support the allegation.

Pamel testified that in October Clark came to his office and told him that Brown told him that Bushey said that he would run over union supporters with his Wagner and that he (Clark) was the principal union activist. Pamel said that he would investigate and he spoke to Brown, who said that Bushey made a comment at the break table at the facility that he would do anything he could do in order to keep the Union out, even if he had to run over somebody with his Wagner. Brown said that he didn't know whether Bushey was serious when he made the statement. Pamel also spoke to Bushey, who denied making the statement, to Davenport, who said that he did make the statement, and to Haskell and Kurt Shoemaker. He informed Clark that he was unable to conclude whether or not Bushey had made the statement, al-

though he did conclude that there was a heated discussion of the Union at the time.

The next event to occur herein was an alleged “near miss” by Antrum⁵ that was reported by Davenport in mid-October, and some teasing of Antrum that resulted. Davenport testified that on October 17 he “was almost run over by a Wagner” operated by Antrum. It occurred while he was walking back to the mine office and he was beside a pillar: “Teddy Antrum came sliding with the Wagner, and he slid within a foot of me and came to a sliding stop.” Davenport was startled and scared and spoke to Antrum, who apologized for the incident and told him to report it to Savino, which is required for accidents or near misses at the facility, and he did so. Antrum testified that the alleged incident occurred on October 14, but was not a near miss. On that day he was driving his Wagner (which has a top speed of less than 10 miles per hour) down a tunnel and he observed Davenport walking in the tunnel, but further out in the tunnel than he should have been. In addition, Davenport did not look behind him while he was walking. Antrum passed him by a comfortable margin and stopped his Wagner about 15 feet ahead of Davenport. When Davenport reached him, Antrum told him that he was walking too far out in the tunnel and that he should stop and look around more often while walking in the tunnels because he could have been hit. Subsequently, Pamel questioned him about the incident as part of his investigation of the “near miss” that Davenport reported. Later that day, while Antrum was at the picnic table with other employees, Davenport made a comment to him such as: “I hope you’re not going to run into me.” He did not respond. Later that day, with many of the other panel members present, Davenport made about the same comment to him; again, he did not reply. Before leaving that day, Antrum complained to Savino about Davenport’s comments about his driving and Savino said that he would have a meeting of the panel. The next day, while the employees were on the truck waiting to go into the mine, Davenport again asked Antrum: “Are you going to run into me today?” Antrum answered: “Listen, I’ve heard enough of it. I don’t want to hear it anymore, and we’re going to discuss it with Savino today.” When they met with Savino later in the day, as Antrum began telling his side of the story, Davenport began yelling and screaming and called him a liar, causing him to be unable to complete his story.

Davenport testified that at the picnic table later that day he joined with other employees and said something to Antrum such as: “Be careful you don’t hit me.” Many of the employees were also joking about it. On the next day, while they were in the truck, he said to Antrum: “Teddy, don’t hit me today” and Antrum got angry and said: “You’re a liar. I didn’t hit you.” Later, Savino met with both of them. Antrum claimed that it was not a near miss, that he saw Davenport all the time during the incident. Davenport said that he was scared because Antrum almost ran over him.

Savino testified that in mid-October Davenport told him that Antrum almost hit him with his Wagner. When he discussed it with Antrum, he told Savino that he saw Davenport during the entire period, and that Davenport was walking in

an area of the tunnel where he should not have been and that it was not a near miss. Savino then told Davenport that the two stories were completely different, there were no witnesses, and he therefore could not conclude that there was a near miss. Davenport was not satisfied, and Savino told him to talk to Pamel. On the following day Antrum told him that he would like to meet with Davenport to settle the matter, so Savino arranged for a meeting. It ended up as a “verbal fight” and nothing was resolved. Pamel testified that on October 15 Davenport asked him to investigate the alleged near miss with Antrum. He told Pamel that Antrum came to “a screeching halt within an arm’s length of him” and yelled at him that he should not be walking in the tunnel, that he could have run him over. He also told Pamel that later in the day he made a joking comment to Antrum about hoping that he didn’t run him over, and that Antrum got upset. Pamel’s notes of this conversation state that he told Davenport: “I am happy to investigate this incident, but if this is B.S. [bullshit] and if Rusty is instigating problems, he will be in big trouble. Rusty insisted he had legitimate concerns.” Pamel then spoke to Antrum, who said that there was no near miss, that he drove past Davenport and stopped, and told Davenport that he should not have been walking where he was, that he could have gotten hit, but Davenport ignored him and continued walking. He also told Pamel about Davenport’s subsequent remarks about his driving ability, and that he was bothered by these remarks because they concerned his reputation as a Wagner operator. Pamel then spoke to Brown, Clark, Bushey, Haskell, and Bruce Fellows, and each said that they had no direct knowledge of the incident, but that Davenport had told them of it. He testified: “There was no reason to involve all of these other employees. It was addressed with the supervisors and should have been handled that way.” After his investigation, he was unable to conclude whether or not a near miss occurred. “However, I thought it was strange the way Rusty had chosen to communicate to the other employees in the work group.”

Savino testified that a couple of weeks prior to this incident, at a safety meeting, Antrum suggested that employees in the mine be required to wear the cap lamp on their head. On the day before the Antrum incident, while he was in the mine, he saw Davenport without the lamp on his head and he told Davenport to put the lamp on his head. Davenport commented that it “was all because of that blind mother,” which Savino understood referred to Antrum, who is black. Von Dreusche testified that he received the reports of Savino and Pamel on this alleged incident and they both felt that Davenport’s story was fabricated, for two reasons. The principal reason was that on the day before the alleged incident, Savino had to tell Davenport to wear his cap lamp on his head, a safety idea initiated 2 weeks earlier by Antrum, and Davenport made a derogatory comment about Antrum. In addition, there was no reason to involve Brown and Clark in the incident as Davenport had done. After reviewing this incident, von Dreusche, by memo to Supko dated October 21, recited some of the above-described events of the prior 7 weeks and recommended that Davenport be terminated. An intervening event occurred, however, before that final determination was made.

On October 19, Davenport damaged the Superbolter machine that he was operating. His testimony, and General

⁵ There was some testimony regarding prior accidents that Antrum was involved in. He testified that he had been involved in one recent accident with his Wagner.

Counsel's position, is that this accident was not his fault and was used as an excuse for a final reason to terminate him. Davenport testified that he had to back his machine to a different area and Savino assisted him in this move. During this move, he was "under the direct supervision" of Savino, who was "guiding" him because he could not see behind his machine. After about 15 minutes of this process, while he was backing up his machine with Savino's guidance, he hit another truck causing some damage. Prior to the hit, he did not see the truck and Savino did not warn him that it was there. He testified that Clark, Brown, and Shoemaker were in the area at the time and probably witnessed the incident. Savino wrote a report on the accident and, on the following day, Davenport asked him why the report did not state that he was present during the entire period. He testified that Savino said: "Would you?" Davenport also testified that standard procedure in cases where there is damage to equipment is for the supervisor to take pictures of the damaged equipment; pictures were not taken of the damaged truck on this occasion. Savino prepared a report of this incident, dated October 21, which states that the damage to the truck was \$1000 and, under "Immediate Causes," he wrote: "Operator was aware that the truck was near him, but didn't know how close he was. Operator didn't check where the truck was before moving the Bolter." Clark testified that he was in an adjacent tunnel at the time of the alleged accident. He saw that Savino's truck (the one that was damaged) was parked in the tunnel with its lights out and Savino approached him to borrow crossing ramps to assist Davenport.

Savino testified that he parked his truck with the lights on at the side of the tunnel at about 10:15 while he was making a gas check, which is part of his normal routine. When he saw that Davenport had to get across the panel with his machine, he assisted him by getting crossovers for him.⁶ He gave the crossovers to Davenport and left the area to check the panels for gas. When he returned to the area, he saw that his truck had been damaged by Davenport's machine. He testified that it was obvious that Davenport's Superbolter had done the damage because he could see the tracks from the machine to his truck. He showed Davenport the damage, and Davenport said: "Oh, no, here we go again." Later on, when he investigated the incident, Davenport told him that he knew the truck was there, but he neither admitted nor denied hitting the truck. Savino did not include himself in the incident report because his only participation was that it was his truck that was damaged and he got the crossovers for Davenport. He testified further that picture taking is normally done when an individual is injured or almost injured, but it is not usually done with equipment damage. He notified Pamel and von Dreusche of the incident. Pamel testified that he read the incident report and concluded that the accident was caused by operator error although he never questioned Davenport about the situation. He also testified that they are not required to take pictures of all accidents at the facility. Von Dreusche testified that he was notified of the accident and read the incident report. He was also present at a meeting on October 22 wherein it was decided that Davenport would be terminated.

⁶These are used when heavy machines have to cross over electrical cables. They prevent damage to the cables.

Present at this meeting were von Dreusche, Thornton, Adams, and Supko. Von Dreusche's recommendation that Davenport be terminated because of the Antrum incident and the disruptive behavior incidents involving Haskell in September, as contained in his October 21 letter to Supko was not accepted because of the October 19 accident. Von Dreusche testified that at this meeting it was decided that he should be terminated because of that incident, the Antrum incident and the Haskell incidents of the prior 7 weeks, and his attendance record. Davenport's union activity was not discussed at this meeting. Adams testified that those present decided that Davenport should be terminated. The reasons that were discussed were the Antrum incident, the October 19 equipment damage as well as prior problems that Davenport had with equipment damage, and attendance problems that he had. She could not remember whether the Haskell incidents were discussed at the meeting, but the Union was not mentioned at the meeting. Supko testified that the meeting was initiated by von Dreusche's recommendation that Davenport be terminated. At the meeting they discussed the September 8 warning that resulted from the Haskell incident on September 2, the counseling of September 22 and 23 that resulted from the September 17 incident with Haskell, the Antrum incident, the October 19 equipment damage and Davenport's attendance record, and it was decided that he should be fired. His union activity was not mentioned.

Von Dreusche and Pamel met with Davenport on the following day at which time von Dreusche told him that he was being terminated. He told him that the reasons he was being fired were the equipment damage that he caused, the disruptive behavior that he engaged in, more particularly the Antrum incident, and his attendance record. In addition, he gave him a copy of a written warning for poor job performance that Smith gave him on April 10, 1991. The letter states: "your work performance history reflects incidents of equipment damage resulting in disciplinary actions." It concludes:

Even though your letter of September 1988 stated that continued poor work performance would result in termination, you are *again* being given the benefit of the doubt due to length of time since that letter. However, *no such lapses will be tolerated any longer. The consistency of your work performance must improve for the remainder of your employment with Cargill.* Future lapses will result in further disciplinary action up to and including termination. [Emphasis added.]

Pamel testified that von Dreusche told Davenport that he was being terminated for work performance and the unsafe operation of equipment. "He may have" also referred to disruptive behavior, such as the Antrum incident.

Davenport testified that he was terminated at this meeting, but was never told of a reason for the termination. Von Dreusche mentioned the Antrum incident and gave him two prior warnings, the September 8 warning and, presumably, the April 1991 warning referred to above. Von Dreusche never mentioned the October 19 incident.

As stated above, the parties discussed Davenport's attendance problems and equipment damage problems at the October 22 meeting. Without going in detail, counsel for Respondent introduced into evidence 15 written warnings given to Davenport for absenteeism, excessive absenteeism, or at-

tendance problems, dated from June 1988 to January 1992. In addition, Davenport was given five written warnings for damage to equipment or poor work performance from November 1986 through June 1991, including the April 10, 1991 warning from Smith referred to above. Further, he was counseled by letter about eight instances of poor work performance during the period July 1990 through October 1991.

IV. ANALYSIS

I should initially state that I did not find Davenport to be a particularly credible witness. I found, rather, that he has a tendency toward denial of having done anything wrong; for example, he could not remember most of the written warnings that he was shown by counsel for Respondent. In addition, he tended to explain many of his answers on cross examination, even when not asked to do so. On the other hand, I found Brown a credible and believable witness. Of Respondent's witnesses, the only one whom I found not to be totally credible and believable was Haskell; she seemed evasive, at times, and appeared to not remember events when it was convenient for her. However, I would credit her testimony over that of Davenport. The other witnesses called by Respondent testified in a direct and truthful manner and appeared to be credible witnesses.

It is alleged that Davenport's discharge violated the Act for two reasons; firstly, that he was fired on October 23 because of his activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act. In the alternative, it is alleged that the September 8 warning that Davenport received for his actions on September 2 would have violated Section 8(a)(1) of the Act as retaliation for his protected concerted activities of questioning Haskell about what was said at the meeting on the prior day had a timely charge been filed regarding this allegation. However, General Counsel alleges, since Davenport's October 23 termination was based, at least in part, on this September 8 warning, the termination likewise was due to his earlier protected concerted activities and therefor violates Section 8(a)(1) of the Act.

Respondent, as an affirmative defense in its answer, alleges that the complaint is based on alleged unfair labor practices that occurred more than 6 months prior to the filing of the charge and it should therefore be dismissed in its entirety. This defense should really be separated into two issues: the applicability of Section 10(b) to the 8(a)(3) allegation and its applicability to the 8(a)(1) allegation. Davenport was terminated on October 23. On April 23, 1993, exactly 6 months later, he filed his initial unfair labor practice charge, alleging that he was terminated by Respondent on October 23 because of his union activities. *MacDonald's Industrial Products*, 281 NLRB 577 (1986), cited by counsel for General Counsel in his brief, states that the 10(b) 6-month period "properly begins the day following the commission of the alleged unfair labor practice." Therefore, the unfair labor practice charge was timely filed for the 8(a)(3) allegation. The defense that the charge was untimely for the 8(a)(1) allegation is more complicated. By an amended unfair labor practice charge filed on June 23, Davenport added the following allegation:

Since on or about October 23, 1992, it, through its officers, agents, and representatives, has interfered with, restrained, and coerced, and is interfering with, restrain-

ing, and coercing employees of Cargill Salt, Inc. in the exercise of their rights of self-organization, to form, join, or assist labor organizations . . . which rights are guaranteed in Section 7 of the Act.

Six days later, Davenport filed a second amended charge that was identical except it added the words: "by terminating the employment of Rusty Davenport because of his protected concerted activities."

It was therefore not until June 29 that a charge was filed alleging that Davenport's termination violated Section 8(a)(1) of the Act. However, as stated above, a timely charge had been filed alleging that he had been discharged because of his union activities, in violation of Section 8(a)(3) of the Act. A timely charge can "bootstrap" an otherwise untimely charge when the allegation in the latter charge is "closely related" to the original timely filed charge. All three unfair labor practice charges relate to Davenport's discharge on October 23; the only difference is that the early charge alleged it as an 8(a)(3) allegation, while the latter charges added an 8(a)(1) concerted activities violation. There are therefor closely related, and the charges were timely filed. The affirmative defense is therefore dismissed.

Under *Wright Line*, 251 NLRB 1083 (1980), it is the General Counsel who had the initial burden of establishing a prima facie showing to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. If the General Counsel satisfies this burden, the burden then shifts to the Respondent to demonstrate that the same action would have taken place even absent the protected conduct. Turning first to the 8(a)(3) allegation, I find that the General Counsel has not sustained his initial burden under *Wright Line*. Davenport was active in attempting to build the support for the Union at the facility, but so was Clark (and more so) and Brown (less so). Respondent admits that it was aware of the union movement at the facility during 1992 and some of Respondent's supervisors testified that they were aware of Davenport's support for the Union. However, Davenport testified that he has been active for the Union since 1991, that he told Greuber, his supervisor, in July 1991 that he was interested in having a union at the facility, and von Klinggraeff wrote a memo to the file in July 1991 stating that Davenport spoke to Clark about bringing back a union to the facility. Yet no action was taken against Davenport at that time. More importantly, General Counsel failed to prove any union animus on the part of Respondent. The only evidence adduced at the hearing in this regard was some time-barred discussions about the Union, and these were mainly friendly discussions. More to the point, during this period, Respondent held no meetings with its employees about the Union nor did it mail any letters to its employees regarding the union campaign. When Davenport complained to Supko about the September 8 warning, and said that it was caused by the union uproar, Supko told him that he didn't care if they had a union at the facility. Additionally, two-thirds of Respondent's employees are unionized and are represented by about 30 different unions under about 150 different collective-bargaining agreements. This is not an employer that was giving much thought to the union campaign, much less, an employer who was firing employees for supporting the Union.

Although Davenport was an active union supporter, Clark apparently was the principal spokesman for the Union at the facility, and von Dreusche, Pamel, and Supko were aware of this. Clark called the Union and had the initial union meeting at his house. On about September 1, when Clark yelled into the mine phone: "It's time for a union," Respondent did not punish him for the incident even though von Dreusche said that he had a reliable source who told him that it was Clark who made the statement. An employer with union animus would not have backed off from an opportunity like this to punish a union supporter. The strongest evidence supporting General Counsel's case is the timing: the union campaign was building during September and October and Davenport was terminated on October 23. Respondent, however, presented a strong case to establish that it was not the union campaign, but rather was his problems at work, that caused his termination. At the same time that the union campaign was gaining momentum, so were Davenport's misdeeds. On September 2, he and Clark questioned, or harassed, Haskell about the meeting on the prior day. I find that it should more properly be characterized as harassment. Brown also attended the September 1 meeting and, apparently, heard Thornton speak as well. The unanswered question is why Davenport and Clark were asking Haskell about the meeting when they had already learned from Brown what occurred at the meeting. When Haskell made it clear that she didn't want to discuss it, they persisted. Further, after Smith told them that the matter was over and they should not discuss it any further, Davenport discussed it with Brown. Two weeks later, upon meeting Haskell outside Respondent's facility as she was preparing to enter to get her check and he was leaving after Supko told him that the September 8 warning⁷ would stand, Davenport told her that he was going to sue the Respondent and hinted that he would sue her as well. This further upset her. The next incident was the "near miss" on October 14 that Davenport reported. Based upon my observation of the witnesses and the circumstances herein, I find that Respondent reasonably concluded that this incident did not happen as Davenport reported. The final incident was the October 19 accident with Davenport's Superbolter. General Counsel argues that this accident was not Davenport's fault and occurred while Savino was guiding him while he was backing up his machine. There were apparently no direct witnesses to this incident so my finding as to the cause of the incident must be based upon my credibility finding as between Davenport and Savino. I found Savino to be a totally credible and believable witness while I found Davenport to often be less than credible. Additionally, to believe Davenport's testimony on this incident would require a finding that it was a setup as an excuse to terminate Davenport. However, von Dreusche had recommended that Davenport be fired even before learning of this incident. I therefore find that General Counsel has failed to sustain his initial burden under *Wright Line* and recommend that the 8(a)(3) allegation be dismissed.

General Counsel also alleges that Davenport's termination violated Section 8(a)(1) of the Act. The allegation originates

⁷I do not understand why Respondent gave Davenport this warning after Smith had told all the participants in the September 2 incident to put the matter behind them. However, absent a violation of the Act, it is not within my responsibilities to substitute my judgment for that of another.

with the claim that when Davenport and Clark were questioning Haskell about what happened at the September 1 meeting, that they were engaged in protected concerted activities and that the September 8 warning, which allegedly was based upon this incident, would have violated Section 8(a)(1) of the Act if a timely charge had been filed. However, according to General Counsel's position herein, as Davenport's termination was based, in part, on the September 8 warning, the discharge likewise violates Section 8(a)(1) of the Act as one that was caused, at least in part, by Davenport's protected concerted activities. This allegation requires that two questions be answered: Was Davenport's questioning of Haskell on September 2 an element in his termination and, if so, did it constitute protected concerted activities? The difficulty in answering the first question is that there were so many possible causes for discharge that it is difficult to determine if the questioning of Haskell was one of them. Adams testified that Davenport was terminated because of the October 19 incident, the Antrum incident a week earlier and Davenport's problems with attendance and equipment damage. She could not remember whether the Haskell incident of September 2 was discussed. Supko testified that the September 8 warning, the September 17 incident, the Antrum incident, the October 19 equipment damage incident, and his attendance and equipment damage problem were discussed as the reasons for discharging Davenport. Davenport testified that he was not given a reason for his discharge on October 23, although von Dreusche mentioned the Antrum incident and gave him copies of the September 8 warning and the April 10, 1991 warning. Von Dreusche testified that he told Davenport that he was being fired for the disruptive behavior involved in the Antrum incident, the equipment damage that he was involved in and his attendance problems; he also gave him a copy of the April 10, 1991 warning. Pamel testified that von Dreusche told Davenport that he was being discharged for work performance and the unsafe operation of equipment; he may also have referred to disruptive behavior, such as the Antrum incident.

The above evidence convinces me that Davenport's initial involvement with Haskell on the morning of September 2 played no part in his termination. The evidence establishes that the September 17 and October 19 incidents, the Antrum incident, his attendance and equipment damage difficulties caused Respondent to terminate him. The September 8 warning may have been discussed at the October 22 meeting where it was decided that Davenport would be fired. However, that warning was not for questioning Haskell, which may or may not constitute protected concerted activities, but for disobeying Smith's instructions that the matter shouldn't go any further and they should not discuss it further with anyone. Von Dreusche testified that he gave Davenport this warning because he failed to follow Smith's order. Davenport testified that Supko told him that he got the warning because he spoke to Brown about the incident after being told not to do so. As Davenport's alleged protected concerted activities played no part in Respondent's determination to fire him, I therefore recommend that the 8(a)(1) allegation herein be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

It having been found and concluded that the Respondent has not engaged in the unfair labor practices alleged in the complaint herein, the complaint is dismissed in its entirety.

ommended 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.