

**Neff-Perkins Co. and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC.** Case 8-CA-25869

December 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND COHEN

On September 15, 1994, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

<sup>1</sup>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. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge made prejudicial rulings, or demonstrated bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

In adopting the judge's finding that employees Dianne Cottrill and Rose Avery were engaged in protected, concerted activity when they asked questions and made comments at the Respondent's October 7, 1993 meeting, we note that employee questions and comments concerning working conditions raised at a group meeting called by an employer clearly come within the definition of concerted activity under Board precedent. See *United Enviro Systems*, 301 NLRB 942 (1991), enfd. mem. 958 F.2d 364 (3d Cir. 1992); and *Whittaker Corp.*, 289 NLRB 933 (1988). In this regard, in adopting the judge's finding that the employee activity at issue here was concerted within the meaning of the Act, Chairman Gould declines to rely on, and questions the validity of, *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

<sup>2</sup>In adopting the judge's conclusion that the Respondent unlawfully discharged employees Cottrill and Avery, we disavow the judge's speculation concerning the effect of the employees' questioning at the Employer-called meeting on Harrison Representative Susan Hanson. We further find without merit the Respondent's exceptions concerning the judge's failure to find that it on occasion deviated from its progressive disciplinary system since we adopt the judge's conclusion that the Respondent impermissibly discharged the employees for their union and protected, concerted activity. Finally, we note that under *Mast Advertising & Publishing*, 304 NLRB 819 (1991), the judge need not have engaged in an analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Neff-Perkins Company, Middlefield, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(a) Discharging or terminating or otherwise discriminating against any employee for engaging in union and protected, concerted activity.”

2. Substitute the following for paragraph 2(b).

“(b) Expunge from its files any reference to the discharges of Dianne R. Cottrill and Rose Avery on October 8, 1993, and notify them in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against them.”

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

1981), cert. denied 455 U.S. 989 (1982), to the extent he found that the discharges violated Sec. 8(a)(1). Thus he found that the conduct for which the Respondent claims to have discharged the employees was protected, concerted activity, and rejected the Respondent's defense that the employees engaged in conduct exceeding the protection of the Act during the course of that activity. We do not, however, find that the judge's reasoning is deficient because he cited *Wright Line*.

<sup>3</sup>We shall modify the judge's Order to more closely reflect the violations found. We shall also correct the Order to reflect that the unlawful discharges occurred on October 8, 1993.

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 have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employees for engaging in union or protected, concerted activity.

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

WE WILL offer Dianne R. Cottrill and Rose Avery immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to their discharges, and notify them in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against them.

#### NEFF-PERKINS COMPANY

*Catherine A. Modic, Esq.*, for the General Counsel.  
*Dianne Foley Heary, Esq.* and *Glen Smith, Esq.*, of Cleveland, Ohio, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cleveland, Ohio, on June 28 and 29, 1994. Subsequently briefs were filed by the General Counsel and Respondent. The proceeding is based on a charge filed October 20, 1993,<sup>1</sup> by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC. The Regional Director's complaint dated December 3, alleges that Respondent Neff-Perkins Company, of Middlefield, Ohio, violated Section 8(a)(1) and (3) of the National Labor Relations Act by terminating the employment of Diane Cottrill and Rose Avery on about October 8, 1993, because of their union and/or protected concerted activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is a corporation, engaged in the manufacture of molded rubber products at its facility in its Middlefield facility and it annually ships goods valued in excess of \$50,000 from its location to points outside Ohio. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates two facilities, including its Middlefield plant, which facility is directly managed by three codirectors. Since October 1992, Robert Elly Jr. has held the position of codirector of operations. The other two codirectors are Brian Feimer, codirector in charge of engineering

and Keith Kinkelaar, codirector in charge of quality. Respondent's vice president was Dick Pohl and Respondent's union is Robert Elly Sr.

Union International Representative Craig T. Hemsley was involved in organizing campaigns at Respondent's Middlefield facility in 1992 and 1993. The 1992 campaign occurred in the spring and did not result in a representation petition being filed with the Board. Employee Rose Avery was involved with the 1992 campaign (she signed an authorization card and attended several organizing meetings), and the Respondent was aware of Avery's involvement in the 1992 campaign as evidenced by her following credible testimony. On the Monday following a Saturday union organizing cookout at a coworker's home, Avery was summoned to a meeting conducted by Elly Jr. with Dick Pohl and Keith Kinkelaar in attendance. Elly Jr. had received information that an argument had occurred between Avery and a coworker, a dispute that involved Avery's comments to the coworker to the effect that if she wanted to know about the organizing meeting, she should have attended it. Avery also told her coworker that she had no business reporting back to management about the union meeting.

Elly Jr. repeatedly asked Avery what the dispute with the coworker was about. When Avery repeatedly responded the matter was personal, Elly Jr. pointedly remarked "wasn't it about the cookout?" When Avery responded "What cookout?" Elly Jr. responded "the cookout you had Saturday." Avery denied knowledge of the cookout and Elly Jr. again asked what the dispute was about. Avery said "it was personal" and "nobody else's business," and Elly Jr. gave her a verbal warning and told her "don't let it happen again."

Elly Jr. acknowledges that he was aware of the initial 1992 organizing campaign but was nonresponsive about his knowledge of Avery's involvement in that campaign. His failure and the failure of Pohl and Kinkelaar to respond to Avery's testimony relative to the interrogation supports an inference that the Respondent's knowledge of Avery's union activities and sympathies, and corroborates Avery's testimony.

The Union's second campaign began in March 1993 and the plant organizing committee consisted of employees Rose Avery, Diane Cottrill, and Robert Ziefle (Ziefle subsequently left Respondent's employ in May 1993). Avery and Cottrill signed authorization cards, openly wore, used, or displayed union paraphernalia at work, solicited authorization cards from coworkers at Respondent's facility, attended meetings, advised coworkers of upcoming meetings, openly discussed the Union with employees (including Tammy Kinkelaar, the wife of Respondent's codirector, Keith Kinkelaar) and talked regularly with union organizers.

The Union filed a representation petition in Case 8-RC-14893 on April 15, 1993, seeking to represent Respondent's approximate 80 production and maintenance employees. At that same time the Respondent retained the services of consultant Dennis Crews, who assisted Respondent in putting together employee and management teams.

Pursuant to a stipulated election agreement approved by the Regional Director on May 4, an election at Neff-Perkins was scheduled for June 4, however, insufficient attendance at organizing meetings on May 18 and May 21 induced the Union to request the withdrawal of its petition and the request was approved by the Regional Director on June 3.

<sup>1</sup>All following dates will be in 1993 unless otherwise indicated.

During April or May, Diane Cottrill and Rose Avery attempted to make purchases from a vending machine that became "hung up." The machine was shaken and their purchases and several other items fell down. Cottrill gave a candy bar to a coworker who had originally lost her money and put a bag of popcorn in her purse. Supervisor Tom Hinkle brought the incident to both employees' attention and when Avery explained to Hinkle that their products had gotten stuck in the machine he responded "Well, you know you are going to get in trouble for doing that" and that "you and Diane were caught shaking it." Hinkle did not say who brought the matter to his attention and he did not tell the employees that the matter would be recorded in their files or considered to be a verbal warning. Thereafter, Cottrill and Avery returned a bag containing money and the popcorn to management.

In September, Diane Cottrill injured her back on the press equipment she was operating. (Cottrill and employee Debbie Kimak credibly testified that the location of the control panel on this new press caused back strain, particularly on employees of a certain height.) In late September she was released by her doctor for light duty. She was immediately returned to the same press and Cottrill asked Elly Jr. when Respondent would do something about moving the control panels on the press. Cottrill testified that at this time, Elly Jr. told Cottrill of the upcoming October 7, 1993 meeting with Customer Representative Susan Hanson from the Harrison Division of General Motors, one of Respondent's principal customers and one whose product is produced on Cottrill's press. Elly Jr. urged Cottrill that the upcoming meeting would be a good opportunity to bring up her question regarding moving the control panel (testimony that was not refuted by Elly Jr.).

Meanwhile, beginning in June, monthly meetings had been set up to encourage communication between hourly employees and management, and both Crews and others in Respondent's management encouraged employees to ask questions and raise concerns during the question and answer portion of meetings.

In addition to Elly Jr.'s specific invitation to Cottrill to ask questions at the October 7 meeting, other employees were urged to ask questions at that meeting.

The third shift (approximately 25 to 30 employees), attended the October 7 monthly meeting in Respondent's cafeteria at approximately 3 p.m. Management Representatives Elly Jr., Kinkelaar, Feimer, and Joe Marino were present as were Sales Representative Wesley Hellegers and Consultant Crews. After an introduction by Crews, Harrison Representative Susan Hanson presented a talk highlighted with visual aides. During her presentation, Hanson discussed market competition, past and future production, and efficiency and encouraged Neff-Perkins employees to give 110 percent. At one point during her presentation, Hanson asked the assembled employees what they would look for when buying a new car and in response, employees yelled out their answers and comments, without raising their hands. At the conclusion of the formal presentation the meeting was opened up to questions from employees, however, prior to this time Co-director Elly Jr. had left the meeting.

Between four and eight employees asked questions during the question and answer period and Cottrill asked when the

control panel on the presses would be fixed, noting the current setup hurt employees' backs.

Hanson referred Cottrill's questions to Bryan Feimer. Feimer responded they were working on it. Cottrill asked Feimer for a specific date when the corrective action would be taken. Feimer responded "Do you want me to fix your press or run it for you," and Cottrill replied "I just want to get the press fixed so that there aren't anymore injuries to our backs." Current employee Debbie Kimak recalled Cottrill's question related to redesigning the presses to make it easier for employees to operate. Kimak testified that her observation of Hanson's facial expression showed no indication that she was outraged or embarrassed by Cottrill's question.

Other employees at the October meeting asked questions also not directed to or answered by Hanson. Kimak credibly testified that she asked management why training procedures weren't being followed and that this question was answered by Keith Kinkelaar who indicated they were working on it. Kimak also stated that employees including herself did not raise their hands in this question and answer period but were merely speaking, one after another.

During her presentation Hanson raised the topic of producing less scrap. Cottrill testified that another employee commented in response, that the high scrap rate was due to training which "sucked." Cottrill's recollection on this comment was confirmed by Kimak, who testified the comment may have been made by press operator Melanie Hawn.

Another employee related the subject of scrap production to maintenance on the machines and Cottrill acknowledged that she said at the meeting "if the presses hadn't run like crap, that they also would produce less scrap." Avery acknowledged that she commented during this discussion that the presses were "running shitty."

Avery testified that she asked one question during the question and answer portion of the meeting, asking Hanson whether Harrison had anything to do with wages paid at Neff-Perkins.<sup>2</sup> Hanson responded that Harrison did not control the Respondent employees' wages.

No attempt was made at the meeting by either members of Respondent's management, Sales Representative Hellegers, or outside Consultant Crews to instruct employees that certain questions or comments were inappropriate during this forum could be addressed at another time and the meeting concluded at approximately 4:30 p.m.

Thereafter some employees became concerned that Hanson had indicated that Harrison was a main buyer that kept the Respondent in business and was putting the Respondent on the spot. They became "uncomfortable" and felt that the questions by Cottrill and Avery were uncalled for and thought Hanson was flustered by the questions. In particular, new employee Hollis Stearns-Grondeski felt that it could result in an adverse reaction and the loss of her job and she complained to supervisor Joe Marino. She testified that shortly thereafter, that

<sup>2</sup> Avery explained that her inquiry was related to a comment made by Robert Elly Sr. during the Employer's preelection campaign talks and that Elly Sr. said that Harrison had something to do with employees' wages. Cottrill confirmed that during the campaign in spring 1993, Elly Sr. had related the employees' wages to the customers.

[I]t was break time and that when I went upstairs and I got to talk to Bobby and Bryan and I am not sure—I think it was Denny was standing up there also. I looked at them and I apologized to them. I said, I am sorry what happened. I wasn't even the one that did anything, but I apologized that it kind of got out of hand. That's when we went back downstairs and somehow I ended up talking to Bryan and we decided the best thing to do would be to write a note. We wanted to apologize—I wanted to apologize to her and I wasn't quite sure how, and he said, write a note.

The actual text of the note is as follows:

First we would like to thank you for a very informative meeting. It was enlightening. We now have a much better insight as to how important these parts are and an overall better understanding of the auto industry and the part we play in it.

On behalf of the third shift employees we would like to extend our sincere apologies. We believe that the meeting somehow got off base. We hope that you were not offended in any way and that you will visit our company again soon.

and it was signed by most of the third-shift employees, including Avery.

Before reporting to work October 8, Cottrill met with union organizer Ray Lewis and delivered several signed authorization cards. At the start of their shift, Cottrill and Avery were called to meet separately with Elly Jr. and Supervisor Joseph Marino. Each was accused of jeopardizing one of their largest accounts, the vending incident was mentioned, and each was terminated. Each of their files contain essentially the same statement of termination as follows:

During a monthly meeting with a guest speaker from Harrison Division of General Motors, one of Neff-Perkins Company's largest customers, employee (Dianne Cottrill, C/N 993) potentially jeopardized Neff-Perkins relationship with Harrison by acting in an extremely negative manner. Through questions and accusations employee unjustifiably challenged the operation of both Neff-Perkins and Harrison and their Customer-Supplier relationship. After reviewing employees files and assessing this and other offenses, Neff-Perkins Company is terminating the employment of Dianne Cottrill, C/N 933 effective 10/08/93.

This was prepared by Bob Elly Jr. and he described it as his summary of the investigation and the reason for termination.

During Cottrill's termination meeting, Elly Jr. told Cottrill that she and Avery had jeopardized one of their largest accounts and the jobs of their coworkers. Cottrill testified that she replied that that had not been her intent and that she felt she had a right to ask questions. Elly Jr. noted that while her performance and attendance were excellent, he, Feimer, Kinkelaar, Pohl, and Elly Sr. had unanimously agreed she and Avery were going to be discharged.

During Avery's termination interview Elly Jr. said "Do you know that you jeopardized our contract with Harrison Division?" and Avery responded that she did not see how she had done so. Elly Jr. said that "the questions you asked

weren't important at that time for that kind of meeting," Avery responded, "We were told to ask questions as long as they pertained to our job and Harrison and that's what we did," and Elly Jr. responded "Your question that you asked wasn't appropriate for this meeting," Avery said "Bobby, I only asked one question" and he replied "I felt that you and Diane jeopardized our contract and we have to let you go." When Avery attempted to explain to Elly Jr. that her one question related to Elly Sr.'s comment to employees at a earlier meeting, he reiterated that the question was inappropriate.

Respondent maintained a progressive disciplinary system and neither Avery nor Cottrill had previously received any written warning or suspension. Prior to their termination, they were both unaware that a memorandum to the file had been included in their record relative to the vending machine incident.

### III. DISCUSSION

In a discharge case of this nature, the Board applies a causation test that requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activities were a motivating factor in the employer's decision to terminate.

Here, the Respondent initially argues that there was no concerted activity by Cottrill and Avery (especially with coworkers), that their conduct was not protected, and that management had no knowledge that Cottrill and Avery were involved in the union campaign.

First, I credit the testimony by both Cottrill and Avery about their organizational activities, including Avery's description of her 1992 interrogation by Elly Jr. about attending a cookout that was a union organized event, and they were two of the three members of the 1993 organizing committee who openly promoted the Union at the plant and in the presence of the wife of one of Respondent's codirectors. The Respondent clearly was aware of the Union's representation petition and I find that Elly Jr.'s testimony that he tried to "ignore" "rumors" about the organizing campaign is inherently incredible and does not refute the clear implications that he and other members of management knew of the union activity and that both Avery and Cottrill were prominently involved with the campaign.

Here, the record shows that the alleged discriminatees not only engaged in open union activity but also engaged in concerted activity. The fact that Cottrill had a personal reason, because of her back injury, that related to her conduct and statements at the meeting does not affect the otherwise concerted nature of her comments see *Ohio Valley Graphic Arts*, 234 NLRB 493 (1978). Here, the principal questions asked by Cottrill concerned the arrangement of the controls on equipment used to produce parts for the Harrison Division customer, causing back strain, and poor maintenance of equipment causing or contributing to higher scrapage problems, and the Avery area of questions concerned this customer's relationship with the setting of the employees wage rate, and a comment related to the quality of the equipment, all areas of common concern to all employees.

Despite the showing that Cottrill was the apparent predominant questioner, the Respondent placed Avery on a joint and equal footing with Cottrill in assessing blame and in im-

posing equally severe and maximum discipline, termination. Clearly, the Respondent lumped Cottrill's and Avery's actions together (further corroborating the likelihood that it considered them together because it knew they were the remaining employed members of the Union's organizing committee) and, in both its testimony and its brief, the Respondent consistently referred to Cottrill and Avery jointly as "they" or "these two." More specifically, consultant Crews testified that prior to the October 7 meeting, Cottrill told him "We are ready for them" (referring to questions), an apparent reference to joint action. In fact, when the Respondent's counsel specifically questioned Crews, Crews answered:

Okay, it seemed like a concerted effort was underway to use this situation to embarrass management, that was my perception.

Under these circumstances, I find that Cottrill and Avery engaged in concerted activity and it was not necessary for the other employees to accept their challenge for group action. Moreover, the employees' subsequent letter to Hanson does not act as a repudiation of the activity that would dissolve the concerted character of their action. See *Circle K Corp.*, 301 NLRB 932 (1991). In addition, current employee Debbie Kimik also said that if you were over 5 feet 4 inches you had to scrunch down to operate the press and it would cause a lower back problem and she credibly testified that employee Melanie Halm commented on the press and she or someone else remarked that some machine "sucks." Accordingly, each of these actions tends to endorse Cottrill's and Avery's concerns over various working conditions.

As will be discussed further below, the record here otherwise fails to show that the alleged discriminatee engaged in any conduct that was so egregious as to take it outside the protection of the Act and, accordingly, I find that their concerted activity was a motivating factor in management's decision. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1983). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense is based on its contention that both employees were engaged in insubordinate conduct, used profane and insolent language, and that they were properly discharged because their disloyalty to the Respondent in front of an important customer threatened the economic well-being of the Company and jeopardized their coworkers' jobs.

Here, in effect, the Respondent is claiming that Cottrill and Avery were legitimately discharged for making obnoxious, profane, and disloyal statements that rendered their conduct unprotected. As stated by the Board in *Consumers Power Co.*, 282 NLRB 130 (1986):

The Board has long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of pro-

tected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service. [Citations omitted.]

Here, the conduct engaged in is not shown to be so egregious as to lose the protection of the Act. The alleged statements of both Cottrill and Avery were not only comments by the two principal union activists but also were statements made in the context of questions regarding equipment operations, working conditions, and pay. While some of the alleged conduct may have been rude and profane, I specifically find that Avery's apparent rudeness in saying to codirector Bryan Feimer "hushup and sit down" when he started to interrupt her complaint (as credibly testified to by employee Stearns-Grondeski, who was called by the Respondent and by employee Leslie Bennett, called by the General Counsel), was typical of the way she usually acted (as the "jokester" of the bunch), according to witness Bennett. Also, her comment that something was "shitty" was not egregious in the context of this workplace meeting (others at the meeting including Melanie Halm said something "sucks") and such comments were not uncommon in group settings of employees and managers according to the credible testimony of employee Debbie Kimik (who also credibly testified that none of the managers at the meeting advised any employees that their questions were inappropriate).

I also specifically find that the behavior and comments attributed to Cottrill may have appeared as described by Respondent's witness Kuhns to have "too much snappiness" and as "complaining too much" or as "uncalled for" by Respondent's witness Stearns-Grondeski, but were not egregious in the context of this workplace meeting.

Lastly, I also find that a remedy to the employees' asserted behavior was certainly within the control of several of Respondent's managers and Consultant Dennis Crews as they were participants in some of the exchange yet they made no qualifying statements to limit or control the nature of the exchanges at the time and I find that their silence in this respect indicates that they tolerated this conduct and that no clearly egregious behavior occurred.

After the fact, however, several employees began to express their concerns that Customer Representative Hanson may have been offended by the experience and that it could affect her decisions about business with the Respondent and their job tenure.

Respondent's Consultant Crews, and Sales Representative Wesley Hellegers gave management their opinions of the effect of the event which I find to be highly speculative and overblown and I find that management's concurrence and endorsement of their conclusions are not shown to be supported by the record and I find that it is pretextual in nature. The record shows that at the most Customer Representative Hanson appeared "flustered" at the tone of the questions (referred to or answered not by her but by management) and that she just observed and listened, "kind of joked around and said we were hard on upper management or something like that" and she "was commending management for putting themselves on the spot and being up their with the question and answer session."

Hanson was not called as a witness and I otherwise find that it is just as likely that she and her employer could have

been more favorably impressed by the employees' willingness to participate in problem solving than negatively affected by the apparent crudness in their expression of opinion, especially in view of the employees' letter which referred to an extension of their "apologies"—"that the meeting somehow got off base."

Here, the Respondent purports to have investigated the matter yet it did so essentially by getting statements from Crews, Helleger, or several managers. It made no attempt to get any information from Cottrill and Avery and presented them with conclusory results that they were being terminated without allowing them any meaningful opportunity to give their side of the story. Here, a full investigation could have revealed that employees such as Debbie Kimik asked a question about why training procedures weren't being followed, said they were getting a lot of new people that weren't being trained properly, and asked what could be done about it (Supervisor Keith Kinkelaar responded they would see what they could do about it), that Melanie Halm had said something "sucks," and that Avery's participation in the questions was similar and abbreviated in extent.

The Respondent, however, immediately placed Avery in equality with Cottrill (who was predominant in the questioning), disregarding the questions or remarks of other participants and disregarding or not recognizing that management itself had solicited and encouraged employee participation in a question and answer session for that meeting.

Here, I am persuaded that the Respondent identified Avery with Cottrill together because of their joint union activity and seized upon this incident as an opportunity to rid itself of the two principal union supporters.

As pointed out by the Court in *Transportation Management*, supra:

[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

Here, the Respondent disregarded the established progressive description system and immediately discharged the two principal union supporters for the manner in which they engaged in the concerted activity of asking questions or making comments about terms of employment and working conditions. As discussed above, the employees' conduct was not so egregious as to take it outside the protection of the Act and I find that the Respondent otherwise has failed to show that Cottrill and Avery would have received such extreme discipline absent their union and concerted activities. The General Counsel otherwise has met its overall burden of proof and I further conclude that the Respondent's termination of these employees violated Section 8(a)(1) and (3) of the Act, as alleged.

#### CONCLUSIONS OF LAW

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

2. By discharging Dianne R. Cottrill and Rose Avery on October 8, 1993, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate Dianne Cottrill and Rose Avery to their former jobs or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),<sup>3</sup> and that Respondent expunge from its files any reference to the discharges and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Otherwise, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, Neff-Perkins Company, Middlefield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for activity protected by Section 7 of the Act.

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

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

(a) Offer Dianne R. Cottrill and Rose Avery immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of the decision.

(b) Expunge from its files any reference to the discharges of Dianne R. Cottrill and Rose Avery on September 8, 1993, and notify them in writing that this has been done and that evidence of this unlawful discharge, will not be used as a basis for future personnel actions against them.

<sup>3</sup>In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be 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. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(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 Middlefield, Ohio, facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on

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<sup>5</sup> 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."

forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent 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.