

Cardinal Industries, Inc., International Grooving and Grinding Division and International Union of Operating Engineers, Local No. 542. Case 4–CA–20454

January 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On February 8, 1994, Administrative Law Judge Martin J. Linsky issued the attached decision. Counsel for the General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in the 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, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

The judge found that the Respondent violated Section 8(a)(3) and (1) by terminating employees Martin, James Leroy (Roy) Brown, and James Turner because of their union activities, and that it violated Section 8(a)(1) by threatening that it would never permit a union to represent its employees. No exceptions were taken to these findings. The judge further found that the Respondent lawfully laid off employee Charles Coolbaugh but that it violated Section 8(a)(1) by declaring him ineligible for rehire because of his protected, concerted activity. The General Counsel excepted to the finding that the layoff was lawful, and the Respondent excepted to the finding that the refusal to rehire was unlawful. For the reasons set forth in the judge's decision, we agree with these findings.

The judge concluded that the Respondent's unfair labor practices set out above constitute "category I" conduct warranting the issuance of a bargaining order. *Gissel Packing Co.*, 395 U.S. 575 (1969). The Re-

spondent excepts to the judge's failure to cite evidence supporting such a remedy, and argues that "*Gissel I*" orders are not appropriate in cases where, as here, the union has obtained authorization cards from a majority of unit employees. The Respondent further excepts to the judge's failure to analyze this case under *Gissel* "category II" standards, and it contends that the absence of such an analysis precludes the issuance of a bargaining order. For the reasons stated below, we adopt the judge's recommended bargaining Order.

In *Gissel*, the Court identified two categories of cases in which a bargaining order would be appropriate. "Category I" or "exceptional" cases involve unfair labor practices that are so outrageous and pervasive that traditional remedies cannot erase their coercive effect, thereby rendering a fair election impossible. "Category II" cases are the "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In cases of the second category, a bargaining order should issue where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 613, 614–615. Applying those principles, we find at least arguable that a bargaining order is warranted here under the category I standard, but in any event, the record clearly meets the standards for category II bargaining orders.

On January 2, 1992, the Respondent's four regular full-time grooving crew employees, Steven Baer, Brown, Martin, and Turner, signed cards authorizing the Union to represent them.⁴ On January 4 and 10, they confronted Supervisor Eric Doltz in his hotel room, and complained vociferously about their pay rates and lack of fringe benefits. During each of these confrontations, Doltz telephoned the Respondent's founder and owner, Edward Zuzelo, so that Zuzelo could address the employees' concerns directly. On January 11, 1992, the employees, having completed their final field assignment, returned to the Respondent's shop in Conshohocken to work on equipment. Although there is no direct evidence that the Respondent was aware that the employees had signed authorization cards, Zuzelo conducted a meeting on January 12, at which he told employees he would never allow a union into his company. The judge also found that later the same day, Zuzelo discriminatorily discharged

¹The Respondent and the General Counsel have 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.

²The General Counsel excepted, *inter alia*, to certain errors in the judge's decision. In sec. III,A,4 of his decision, the judge states that Supervisor Eric Doltz told employee Freddie Martin that the Respondent's president, Ed Zuzelo, "would let the Union into his company," when in fact, Martin testified that Doltz told him Zuzelo "would *never* let the Union into his company." Additionally, in sec. III,A,5, the judge refers to Martin as Freddie Brown. These inadvertent errors do not affect the resolution of the case.

³The judge's order is modified to include traditional recognition and bargaining language.

⁴Hereafter all dates refer to 1992. The judge found that the bargaining unit is all grooving crew employees employed by the Respondent. The parties have not excepted to this finding.

Brown.⁵ On January 24, the Respondent received a demand for recognition from the Union by fax, which as noted above, was supported by a card majority. On February 10, Martin went to the shop and found Baer working. Martin confronted Doltz, stating that as the most senior employee, he and not Baer should be working. Doltz response was that it was because of “all of this union business . . . [Zuzelo] said it’s the company decision and that they made the decision. [Zuzelo] will not hear of a union coming in here.” The following day, Office Manager Philip Zuzelo, Edward Zuzelo’s son, called Martin and Turner at home and informed them that they were discharged.⁶

As the foregoing recitation of facts shows, the four employees in the Respondent’s grooving crew signed union authorization cards on January 2, and on January 4 and 10, confronted their supervisor with concerted complaints about wages and benefits. When the president of this small company confronted the men on January 12, he implicitly linked their complaints to union organization, telling them that he “would not stand for” a union in the company. One of the four was fired that day, and two more were fired on February 12, after the Union had made its demand for recognition and when work was scheduled to resume after a weather-caused hiatus. The Respondent does not dispute that the grooving crew constituted an appropriate bargaining unit and that it unlawfully terminated 75 percent of this unit. The “discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative, because no event can have more crippling consequences to the exercise of Section 7 rights than loss of work.”⁷

⁵ As the judge found, it is reasonable to infer from the employees’ collectively voiced complaints that Zuzelo at least suspected that the employees would attempt to organize if they had not already begun doing so. In this connection, we note that although there is no direct evidence that the Respondent knew the employees had signed authorization cards at the time of Brown’s discharge, Zuzelo’s manifestation of his suspicions through his expression of antiunion animus at the January 12 meeting and Brown’s having engaged in union activity in fact warrant a finding that his discharge violates Sec. 8(a)(3). In any event, we note that the Respondent does not except to the judge’s 8(a)(3) findings.

Chairman Gould finds it unnecessary to rely on this discussion of the judge’s findings in the absence of exceptions thereto.

⁶ Although Doltz’ work log indicates that Baer, Martin, and Turner worked approximately 10 days between January 12 and 31 (7 days in the shop and 3 days in the field), the judge found that Martin and Turner did not work from January 12 until they were terminated on February 11. The party has excepted to this finding of the judge, and in any event, his apparent error does not affect the resolution of the case.

Chairman Gould finds it unnecessary to rely on this discussion of the judge’s findings in the absence of exceptions thereto.

⁷ *Apple Tree Chevrolet, Inc.*, 237 NLRB 867 (1978), enf. denied in part 608 F.2d 988 (4th Cir. 1979). Although the court of appeals denied enforcement of the bargaining order in *Apple Tree Chevrolet*, its denial was in large part dependent on its reversal of the Board’s

It would seem beyond dispute that firing most of the union supporters in a bargaining unit soon after they attempted to organize would in the words of the *Gissel* court, “tend to undermine majority strength and impede election processes. 395 U.S. at 614. Certainly the lesson would not be lost on Baer, the sole employee remaining from the crew that had signed up with the Union. Even if the unlawfully terminated employees later accepted offers of reinstatement, we find that the possibility of “erasing the effects” of the Respondent’s swift and brutal response to the concerted activities of its employees and of “ensuring a fair election . . . by the use of traditional remedies” is so slight, that a bargaining order is warranted. Id.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cardinal Industries, Inc., International Grooving and Grinding Division, Conshohocken, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the words “recognize and” before the word “bargain” in paragraphs 1(c) and 2(c).

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

finding that the discharge of four employees violated Sec. 8(a)(3) and (1) of the Act. 608 F.2d at 998. It regarded the remaining 8(a)(1) violations as insufficient support for such an order.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and arguments, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT place employees in a category of not being eligible for hire because they engage in protected concerted activity.

WE WILL NOT discharge employees because they engage in protected concerted activity or activity on behalf of a union.

WE WILL NOT fail or refuse to recognize or bargain collectively with the Union as the exclusive collective-bargaining representative of our employees.

WE WILL NOT threaten employees that we will never permit a union to represent our employees.

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

WE WILL offer to Roy Brown, Freddie Martin, and James Turner reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and WE WILL place Charles Coolbaugh in a category of employees not barred from rehire.

WE WILL make Roy Brown, Freddie Martin, and James Turner whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges and make Charles Coolbaugh whole for any loss of pay and benefits commencing from the date he would have been rehired if not unlawfully barred from rehire.

WE WILL, recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

CARDINAL INDUSTRIES, INC.

David Faye, Esq., for the General Counsel.
David W. Wolf, Esq., of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On February 12, 1992, and January 11, 1993, a charge and an amended charge in Case 4-CA-20454 were filed by Local 542, International Union of Operating Engineers (Charging Party or Union), against Cardinal Industries, Inc., International Grooving and Grinding Division (Respondent).

On January 29, 1993, the National Labor Relations Board, by the Regional Director for Region 4, issued an amended complaint in Case 4-CA-20454. The amended complaint alleged that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), when it discharged four employees and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its grooving and grinding crew employees.

Respondent filed an answer to the amended complaint in which it denied that it violated the Act in any way.

The amended complaint was tried before me in Philadelphia, Pennsylvania, over 11 days in 1993, i.e., February 17,

18, and 19, March 9, 10, 11, 17, and 19, and April 7, 8, and 9.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is a Pennsylvania corporation with an office and place of business in Conshohocken, Pennsylvania, that it is engaged in the grooving and grinding of highways, runways, and bridge decks, that during the past year it purchased and received materials valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania, and that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union, based on the un rebutted testimony of Vincent Masci, which I credit that Local 542, Operating Engineers, exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, and working conditions, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent's Grooving and Grinding Division performs a unique type of work—primarily grooving airport runways—with a machine developed and patented by Respondent's founder, Edward Zuzelo. The large groover operated by Respondent is the only one of its kind and the largest grooving machine known to exist. Respondent has never had a new hire who had experience with Respondent's machine or who did not have to be trained in the operation of the machine. The training was done on the job. The groover uses approximately 115 diamond cutting blades and cost in the area of \$1.25 million to develop when it was designed and constructed; the blades themselves cost up to \$1400 each at retail. Because the grooving process uses a tremendous amount of water to cool and lubricate the cutting heads, Respondent cannot operate the machine in hard freezing temperatures. Respondent cannot choose when to perform a particular job but must instead be governing by the scheduling demands of its airport customers based on the customer's scheduling parameters—since the runway must be closed to allow Respondent to work. Also, the groover must travel under permit as an oversize vehicle and various States restrict such travel on weekends and holidays. These factors all result in Respondent's work being not only somewhat seasonal but also extremely tightly scheduled. If work can be secured in warmer climes to the south then Respondent could groove throughout the year. In 1992 after the events described herein Respondent grooved airport runways in Mississippi, Florida, Texas, and Louisiana. Adding to the pressure is the fact that once a project commences, even if cold weather moves in the company must finish its work as the customer cannot

wait until the end of the winter to have its runway back in working shape.

The groover crew consists of a superintendent and a four person crew. Respondent also does grinding work with a grinder at both airports and on bridges and highways.

Respondent was quite busy in the period September 1991 into January 1992. It did grooving work at several airports during that timeframe to include two big jobs in New York City. One of those big jobs was at La Guardia Airport in Queens, New York, and the other at John F. Kennedy Airport also in Queens, New York. Respondent did work at La Guardia Airport September 24 to November 9, and 23 to 27, 1991, and January 8, 1992. Respondent did work at JFK November 25 to 27, and December 17, 1991, to January 7, 1992.

Respondent had in its employ during this September 1991 to January 1992 timeframe employees in addition to its grooving crew employees. The grooving crew employees were regular full-time employees. The others were temporary and worked as needed.

Respondent's office and shop, where it repairs and maintains its equipment, is in Conshohocken, Pennsylvania, a suburb of Philadelphia.

Eric Doltz was the superintendent of the grooving crew. As of early January 1992 the four grooving crew employees were Freddie Martin, who had worked for Respondent off and on since 1978, James Turner, who had worked for Respondent as a part-time driver since 1984 and full time on the grooving crew since September 1991, Roy Brown, who had worked for Respondent since September 1991, and Steve Baer, who had worked for Respondent since October 1991.

On January 2, 1992, all four of these men or 100 percent of the grooving crew employees signed and dated union authorization cards in the presence of then Union Business Agent Vincent Masci. On January 4, 1992, and again on January 10, 1992, these employees concertedly complained about wages to both Superintendent Eric Doltz in his hotel room at the Best Western near JFK Airport on January 4, 1992, and in his hotel room at the Ramada Inn near La Guardia Airport on January 10, 1992. Both meetings took place late in the evening before the crew would begin their midnight shift at the airport. On both occasions Respondent's president and founder, Edward Zuzelo, spoke with one or all the employees about their complaints concerning wages and benefits. At the meeting on January 4, 1992, an employee named Charles Coolbaugh threatened Eric Doltz that the employees would walk off the job if their complaints were not dealt with in a satisfactory manner. Coolbaugh was, by all accounts, the loudest complainer at the January 4, 1992 meeting.

It is uncontested that the following events occurred:

1. On January 6, 1992, Charles Coolbaugh was told by Eric Doltz that his services were no longer needed; and his file was marked with the entry that he was ineligible for re-hire.

2. On January 12, 1992, Roy Brown was fired.

3. On January 24, 1992, the Union faxed to Respondent and Respondent received a recognition demand from the Union.

4. On February 10, 1992, Freddie Martin saw that Steve Baer had been promoted and Eric Doltz told him that Ed Zuzelo would let the Union into his company.

5. On February 11, 1992, Freddie Brown and James Turner were fired.

6. Respondent at all times refused to recognize the Union, advertised in late January 1992 for new employees, and hired three new employees to replace Roy Brown, Freddie Martin, and James Turner.

It is alleged in the complaint that Respondent violated the Act when it discharged Charles Coolbaugh, Roy Brown, Freddie Martin, and James Turner, that it further violated the Act in failing to honor the union demand for recognition and, lastly, that it violated the Act when it told an employee that its employees would never be represented by a union.

Respondent claims it had good cause to fire the four employees and, in any event, Freddie Martin was a supervisor and not afforded the protection of the Act. This is a classic case for application of the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).¹

I will address the discharges first and then address the issue of whether or not Respondent violated the Act in its refusal to recognize the Union as the collective-bargaining representative of its employees and whether a bargaining order is appropriate in this case.

B. *The Discharge of Charles Coolbaugh*

Charles Coolbaugh was hired by Respondent in late September 1991. Respondent was very busy at this period of time. The Federal Aviation Administration (FAA) had recently released Federal money to be spent on airport improvements. Respondent secured work at a number of airports. In addition to its grooving work Respondent needed a crew of workers to go to La Guardia Airport for about 6 weeks to do grinding work; i.e., a crew of three would operate a grinder which would prepare the runway for the work to be done by the five-man groover crew which used the very costly and unique groover developed by Respondent.

The three-man grinding crew consisted of Charles Coolbaugh, Rex Cranmer, and Martin Ackley. Ackley was in charge. In late November 1991 Rex Cranmer quit Respondent's employ. Martin Ackley later quit Respondent's employ but was brought back as a subcontractor by Respondent for work at Kennedy Airport.

At La Guardia the wage rate for Respondent's employees was more than the wage rate they received at Kennedy Airport for the same work. Because the work was the same and because both projects were being funded by the Federal airport improvement program of the FAA and because both airports were located in New York City it would appear to a reasonable person that a mistake had been made and that the wage rate was wrong either at La Guardia or Kennedy or at both airports. In addition, an FAA inspector named Dana Campbell had told some of Respondent's employees at La Guardia that their pay was substantially less than what it should have been. Respondent produced a thick book which it claimed showed it was not underpaying the men. Suffice it to say the rate of pay for groover crew is not listed but most pieces of equipment used at the airport by the various contractors and subcontractors was listed and rates of pay

¹The Board's rationale in *Wright Line* was approved by the U.S. Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

specified for employees using that equipment. Respondent paid the rate of pay that individuals received who operated a piece of equipment Respondent thought was most like the groover.

All these factors contributed to Respondent's employees having a good-faith belief that they were not being properly compensated.

On January 4, 1992, the employees met with Supervisor Eric Doltz in his room at the Best Western motel where the crew stayed while working at Kennedy Airport. The employees as a group concertedly complained to Eric Doltz about their rates of pay and the lack of fringe benefits. Respondent did offer health insurance but only after 90 days on the job. There was no pension plan.

By all accounts Charles Coolbaugh was the loudest complainer. He told Doltz that if the complaints of the employees were not satisfactorily addressed the employees would walk off the job. In addition, he suggested that James Turner was paid less than Steve Baer because Turner was black and Baer was white. Coolbaugh, Doltz, and Ed Zuzelo are white. Doltz called Ed Zuzelo, Respondent's founder and CEO, at his home near Philadelphia. It was about 10 p.m. The only employee to speak with Ed Zuzelo was Charles Coolbaugh. Zuzelo and Doltz both claimed to be of the opinion Coolbaugh had been drinking. Coolbaugh admits that he had consumed several beers during that day but was not drunk or impaired for work. The men were scheduled to go to work at midnight that night. Ed Zuzelo promised Coolbaugh and, through Doltz, the rest of the men that their complaints would be addressed and indeed Zuzelo conceded that some mistakes regarding pay had been made.

Two days later, Doltz told Charles Coolbaugh that he was no longer needed and laid him off. In addition, Respondent caused Coolbaugh's employment file to be noted to reflect that due to Coolbaugh's drinking problem he was not to be rehired.

The General Counsel maintains that Coolbaugh was fired because of his protected concerted activity in complaining to Doltz and Zuzelo about wages and benefits. Needless to say, the employees must in good faith complain about wages for protection under the Act but they don't have to be correct regarding what the wages should be. Respondent maintains that Coolbaugh was laid off on January 6, 1992, because the work they needed him for was completed as it was for a number of other individuals, all of whom, in addition to Coolbaugh, were laid off on January 6, 1992. Respondent left Kennedy the following day and returned to La Guardia for more work. It worked at La Guardia with a substantially smaller crew. It claims it decided not to rehire Coolbaugh because of his drinking problem.

In point of fact Respondent did have a very large crew at Kennedy in early January 1992 and on January 6, 1992, laid off not only Coolbaugh but also let go David Schaik, who had replaced Rex Cranmer, Martin Ackley, who had been brought back as a subcontractor, two local union employees, Manny Castro and Jose Vila, who had been added to the crew at Kennedy, and the person from RGM, another subcontractor working for Respondent at Kennedy. It did not replace any of these individuals with other people when Respondent returned to La Guardia on January 7, 1992.

Based on all the evidence, I find that Charles Coolbaugh would have been laid off on January 6, 1992, even if he had

not concertedly complained to Eric Doltz and Edward Zuzelo concerning wages and fringe benefits on January 4, 1992.

The question then becomes would Coolbaugh have been permanently barred from reemployment if he had not engaged in protected concerted activity on the night of January 4, 1992. I think not.

Respondent claims Coolbaugh was permanently barred from reemployment because of his drinking problem but Coolbaugh's drinking was no better or worse throughout his employment. At no time was Respondent concerned enough to send him back to the hotel or home. At no time did Coolbaugh's drinking endanger any employee or any equipment. Coolbaugh admits he is an alcoholic and unbeknown to Respondent (so they could not have relied on it) he was arrested for driving under the influence of alcohol in December 1991. I credit the testimony of Roy Brown, James Turner, and Freddie Martin that Coolbaugh was never intoxicated on the job and that his drinking never interfered with production or caused a safety problem.

I contrast the treatment accorded Rex Cranmer and the treatment of Charlie Coolbaugh. Cranmer quit Respondent and left it somewhat in the lurch in November 1991. Although Respondent exaggerates the difficulty it has in securing new employees it was nevertheless inconvenient for Respondent when Rex Cranmer suddenly quit. In addition, the biggest mishap that occurred to Respondent during the fall of 1991 and early 1992 was when the groover was driven off the runway twice in one night in Westchester, New York. The driver in both cases was Rex Cranmer and yet Cranmer was rehired by Respondent in 1993 prior to the start of the hearing in this case.

Coolbaugh struck a nerve when he was the loudest complainer at the January 4, 1992 meeting with Doltz, when he spoke with Ed Zuzelo on the phone, when he threatened to walk off the job, and when he suggested that James Turner might be making less than Steve Baer because Turner was black. Coolbaugh was going to be laid off on January 6, 1992, anyway and he was. He was permanently barred from reemployment because of his protected concerted activity and not because of his drinking which Respondent claims. The failure to recall Charles Coolbaugh was a violation of Section 8(a)(1) of the Act. The remedy for this violation will be to make Coolbaugh eligible for rehire and make him whole for any loss he suffered, which will have to be computed at the compliance stage of these proceedings.

Respondent argues that no charge alleging the discharge of Charles Coolbaugh as a violation of the Act was filed until January 11, 1993, more than 6 months after the January 6, 1992 discharge. Respondent argues that the allegations regarding Coolbaugh are barred by Section 10(b) of the Act. However, relying on *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *Davis Electrical Constructors*, 291 NLRB 115 (1988), I find the allegations regarding Coolbaugh are not time barred because they are closely related to the charge filed on February 12, 1992, less than 6 months after Coolbaugh's layoff on January 6, 1992, which charge alleges the discharge on January 12, 1992, of Roy Brown and the February 11, 1992 discharges of James Turner and Freddie Martin as being violative of the Act. This is so, in part, because Brown, Turner, and Martin participated with Coolbaugh in the protected concerted activity of January 4, 1992.

C. The Discharge of Roy Brown

Roy Brown was hired by Respondent on September 24, 1991. He was hired to be and was indeed a member of the five-man groover crew. The others were James Turner, Freddie Martin, Steve Baer, and Eric Doltz, who was the supervisor of the groover crew.

Brown credibly testified that he contacted the Union on a number of occasions in the late fall of 1991 and along with James Turner, Freddie Martin, and Steven Baer signed a union authorization card at the union hall on January 2, 1992. Brown was hired as a permanent employee. After 90 days an employee became eligible for health insurance and Brown received a written notice in December 1991 advising him to submit information for insurance to Respondent's office on or before December 23, 1991. This indicates that in December 1991 Respondent did not plan to fire Roy Brown.

On January 4, 1992, as noted in section III,B, above, a number of employees met with Eric Doltz and concertedly complained about wages and benefits. Roy Brown was one of those employees. Brown along with the rest of the groover crew returned to La Guardia Airport on January 7, 1992.

On the night January 10, 1992, prior to starting work at midnight, the groover crew went to Eric Doltz' room to again complain about wages and benefits. The crew was now working at La Guardia and staying at a nearby Ramada Inn. They had been paid some extra money since the January 4, 1992 meeting but they in good faith believed the amount they received was insufficient. Each employee spoke over Doltz' hotel room phone with Edward Zuzelo. Zuzelo promised he would straighten everything out. On January 11, 1992, the crew returned to Conshohocken to work on the equipment.

On January 12, 1992, Respondent's management in the person of President Ed Zuzelo, Office Manager Philip Zuzelo, who is Ed's son, and Eric Doltz met with the grooving crew, i.e., Roy Brown, Freddie Martin, James Turner, and Steve Baer. Each member of the crew was asked to state what their complaints were. Martin and Turner voiced some concerns. Brown was asked several times what he had to say but Brown remained silent. I credit Brown, Turner, and Martin as to what occurred at this meeting over others present at the meeting. These three impressed me as honest men. Brown did not yell or raise his voice at any management representative.

In the course of the meeting Roy Brown testified that Ed Zuzelo said "that he did not want a union in his company; he would not have one; he would not stand for one." (Tr. 70.) James Turner testified that he heard Ed Zuzelo say at this meeting, "I don't want no problems with the union. I don't want to be bothered with the union. I don't want no problem with it." (Tr. 680.) Freddie Martin testified that at this meeting "Mr. Zuzelo said he didn't want any parts [sic] of the Union because of what he had went through with union guys on our job from other jobs and with that job, because they were on that job as well." (Tr. 533.)

Doltz, Ed Zuzelo, and Phillip Zuzelo all claim that Ed Zuzelo never said that he would not have a union in his company. I credit Brown and Martin, however, that Ed Zuzelo did say he wouldn't have a union in his company. This is evidence of antiunion bias. It is exceedingly possible that the Zuzelos and Doltz could reasonably conclude that this group of employees who openly complained about pay

on January 4, 1992, and again on January 10, 1992, and who, on January 12, 1992, still had problems with the way they were being treated might be inclined to try to bring in a union.

There is no evidence, however, that Respondent's management knew that the four members of the groover crew signed union authorization cards on January 2, 1992, and no evidence that one of the employees who signed a union authorization card, like Steve Baer, ever told Respondent's management that the employees had signed union authorization cards.

Brown was fired on January 12, 1992. The General Counsel maintains that Brown was fired because of his union activity and because of his protected concerted activity in violation of the Act. Respondent maintains that he was fired because he was a terrible worker and a safety hazard due to his poor eyesight. With respect to Brown being a safety hazard Respondent established that at one time when Brown was off duty he fell in a ditch while crossing a road. He did not miss any work as a result of this incident and unfortunately accidents happen. Eric Doltz, for example, fell on the ice outside the Conshohocken facility and missed work as a result thereof. Doltz was not fired or otherwise disciplined. Respondent also claims that Brown would put his hand on the pulley belt because he couldn't see whether the belt was moving or not without doing that. Respondent claims putting your hand on the pulley belt could cause serious injury. In point of fact, Brown was never injured. I therefore credit his denial that he never put his hand on the belt to see if it was moving. Respondent concedes that it never asked Brown during the 4 months that he worked for them to have his eyes checked. Respondent also claims that Brown ran over and damaged imbedded ground lights on the runway at Kennedy. Brown credibly denies that this occurred. Respondent claims and Brown concedes that there were a couple of incidents when things went wrong. The clear thrust of the evidence, however, is that these were normal expected problems encountered in the work these men did.

Grooving work was done at night. It was cold and dark after midnight in the fall and winter of 1991-1992 in the areas where Respondent operated. Mishaps occur. They were minor. The cost of repair for one incident involving Roy Brown being \$40 and for another incident less than \$200. Downtime was minimal, i.e., 30 minutes or so to make repairs in each instance.

The incidents occurred at the Morristown Airport in New Jersey in mid-November 1991 and at the airport in Chesterfield, Virginia, in the late October early November 1991 timeframe. In other words prior to Respondent sending Brown documents in mid-December 1991 concerning his health insurance since he was coming up on 90 days employment. This clearly reflects that Respondent intended on keeping Brown on as an employee and convinces one that the mishaps on the job were not the reason for his discharge.

With respect to mishaps on the job the greatest mishap of all occurred at the airport at Westchester, New York, in mid-November 1991. On that occasion the groover was driven off the runway twice and got stuck in the ground, and had to be towed out. The driver of the groover on that occasion was Rex Cranmer. Sometime later Cranmer quit Respondent's employ leaving it in the lurch somewhat. And yet Rex Cranmer was rehired by Respondent. The difference between

Cranmer and Brown is obvious. Cranmer did not engage in protected concerted activity on January 4 and 10, 1992, and did not sign a union authorization card while Brown, of course, did all those things. Brown was upset at the January 12, 1992 meeting with Respondent's management and immediately after that meeting Brown was fired.

Brown's position was that of "button man" on the groover. He honestly and in good faith believed he was entitled to operator's pay of \$35 per hour. He received considerably less. He concertedly complained about it with his fellow employees and was fired.

Respondent's claim that it wanted to fire Brown and the others back in November or December but could not because of the press of work and difficulty of interviewing and hiring new employees is not persuasive. I note that shortly after Roy Brown was hired an employee named Dan Hoffman started a fight with him. Hoffman was in the wrong, was fired, and immediately and without difficulty or delay replaced by Steve Baer. When Rex Cranmer quit Respondent's employ in mid-November 1991, he was immediately replaced by David Schaik. When Martin Ackley was hired to do grinding work at La Guardia Airport in September 1991 and needed people to help him, he, without any apparent difficulty, secured the services of Rex Cranmer and Charles Coolbaugh. And, lastly, after Roy Brown, Freddie Martin, and James Turner were fired, Respondent ran a want ad in the Philadelphia Inquirer newspaper. No less than 15 persons applied and Respondent quickly hired three applicants for the grooving crew to replace Brown, Martin, and Turner.

It is clear to me considering all the facts that Respondent fired Roy Brown because of his protected concerted activity in complaining about wages and benefits on January 4 and 10, 1992, and because Respondent thought that Brown and the others may want to bring in a union and Respondent didn't want that based on Ed Zuzelo's antiunion statements to that effect at the January 12, 1992 meeting. Accordingly, Respondent's discharge of Roy Brown was done in violation of Section 8(a)(1) and (3) of the Act. Roy Brown may not be voted into the grooving hall of fame but his work record was not the reason he was discharged.

D. *The Discharges of Freddie Martin and James Turner*

The first issue to decide with regards to Freddie Martin is whether or not he was a statutory supervisor within the meaning of Section 2(11) of the Act and beyond the protection of the Act. It is clear to me that he was no more than a leadman. *Williamson Piggly Wiggly*, 280 NLRB 1160 (1986). Martin had no authority to hire or fire or to responsibly direct the work of his fellow employees. The fall of 1991 was unique in the history of Respondent's grooving and grinding operations. Respondent worked on occasions two crews. This was unprecedented. When Respondent worked two crews Freddie Martin would be in charge of one crew. But even in the fall of 1991 the running of two crews was relatively rare (see R. Exh. 23) and during most of the history of Respondent's grooving and grinding operations only one crew would be in the field. It is clear that if Doltz was not around, Martin was in charge but his infrequent filling in for a statutory supervisor does not make him a supervisor. In other words, Freddie Martin was an employee within the meaning of the Act and entitled to its protection.

Freddie Martin was employed by Respondent from 1978 to 1980 when he was fired. That 1980 discharge was not the subject of any unfair labor practice litigation as far as this record discloses. Martin was rehired by Respondent in 1981 but voluntarily quit in 1984. Between 1984 and 1989 Freddie Martin worked for and with Eric Doltz. In 1989 Martin was rehired by Respondent but again voluntarily quit in 1990. He was hired by Respondent for the last time in February 1991 and was fired on February 11, 1992.

As noted above, a number of employees, to include Freddie Martin, concertedly complained in good faith to Respondent's management regarding wages and benefits on January 4 and 10, 1992. On January 11, 1992, the crew returned to Conshohocken, Pennsylvania, from New York to work on equipment. On January 12, 1992, a meeting was held between Respondent's management, i.e., Ed Zuzelo, Phil Zuzelo, and Eric Doltz, and the members of the grooving crew, i.e., Roy Brown, Freddie Martin, James Turner, and Steve Baer. All four of these men had signed union authorization cards on January 2, 1992, designating the union as their collective-bargaining representative. However, there is no evidence that Respondent knew this except for the fact that Ed Zuzelo, Respondent's founder and president, made antiunion remarks which are set forth above in the section in section III.C, above. At the January 12, 1992 meeting, Martin had complaints, Turner had complaints, and Brown was visibly upset but wouldn't say anything. Brown was fired later that day and Martin and Turner were fired less than a month later. The only member of the grooving crew not fired was Steve Baer and, although Baer was present when the employees concertedly complained about wages and benefits to Eric Doltz on January 4 and 10, 1992, Baer's only contribution to the January 12, 1992 meeting was that he didn't want anything to change. Baer was kept on and the others were all fired.

Martin and Turner did not work from January 12, 1992, until they were fired. Respondent had no work to do due in part to the weather. In any event Martin went to the shop on February 10, 1992, because he had a suspicion that Steve Baer was working. Martin felt that if there was some work to do he, as the senior man, should be doing it and not Steve Baer who was the junior man. Martin saw Baer working in the shop and asked Eric Doltz why Steve Baer was working and not him. According to Martin, Doltz said, "all of this union business and stuff—he said its the company decision and that they made the decision and that's what it would be." (Tr. 545.) Further, according to Martin, Doltz said, "Ed Zuzelo . . . this is his company. He's going to have his own way. He will not hear of a union coming in here." (Tr. 547.)

Doltz' statements are threats in violation of Section 8(a)(1) of the Act because it tells the employee that efforts to secure union representation will be futile. See *Honda of Hayward*, 307 NLRB 340 (1992). Doltz denied making the statements attributed to him by Martin but I believe Martin. If Martin was of a mind to lie he could claim that Doltz told him that Coolbaugh and Brown were fired because they complained about wages and he and Turner would soon be fired because they signed union authorization cards.

On February 11, 1992, Freddie Martin and James Turner were separately called at home by Phil Zuzelo and told they were fired. Respondent claims that Martin was fired for incompetence. Any and all mishaps on the job when Martin

was present were, I find, normal and do not manifest that he was an incompetent employee. The fact is he worked for Respondent on and off for years and indeed worked with Eric Doltz without incident at a time when neither Doltz nor Martin worked for Respondent. The greatest mishap, as noted above, during the fall of 1991 occurred in November 1991 when Rex Cranmer ran the groover off the runway at Westchester, New York, twice and later Cranmer quit Respondent's employ at a time when they needed him. And yet Cranmer has been rehired by Respondent. Although Martin was in charge the night Cranmer twice ran the groover off the runway, it was Cranmer who was operating the groover.

Respondent also alleges that Martin failed to properly maintain the bridge deck groover. But if this was true Respondent knew of it a full 2 months prior to Martin's discharge. And what took place since then, of course, was Martin's protected concerted activity on January 4 and 10, 1992, and his complaints on January 12, 1992. Martin had also signed a union authorization card on January 2, 1992, and Respondent received by fax on January 24, 1992, a demand for recognition by the Union.

When did Respondent first learn of the union activity of its employees? Respondent claims it did not know anything about the Union until it received on January 24, 1992, by fax the union demand for recognition. On January 26, 1992, a Sunday, Respondent ran an ad in the Philadelphia Inquirer seeking applicants for employment. Respondent claims it placed the ad prior to its receipt of the union demand for recognition and submitted after the hearing an ad from the Philadelphia Inquirer dated August 1, 1993, indicating that Sunday employment ads are to be received by the paper by 9 p.m. the Thursday prior to the Sunday when the ad will run. In other words this would tend to support the testimony of Ed Zuzelo that the ad was placed prior to the Friday, January 24, 1992 receipt of the union demand for recognition. This would tend to support Respondent's position that they intended to fire Martin and Turner before they knew anything about the Union.

Steve Baer, the only member of the groover crew who was not fired, signed a union authorization card along with Roy Brown, Freddie Martin, and James Turner on January 2, 1992. He denies that he told Respondent's management about this. Respondent's management claims Baer did not tell them and I will not speculate that Baer told Respondent about this union activity. However, the antiunion remarks made by Ed Zuzelo at the January 12, 1992 meeting which Brown, Martin, and Turner testified about and the antiunion remarks Doltz told Martin on February 10, 1992, and also the receipt of the union demand letter all occurred prior to the discharge of Martin and Turner. I find that the ad placed prior to the union demand letter was to replace just Roy Brown and after the union demand letter was received on January 24, 1992, Respondent determined to discharge both Martin and Turner. The ad itself (R. Exh. 27) reflects that Respondent was seeking to hire just one person. In other words, there is no doubt that Respondent knew of the union activity of Martin and Turner prior to their discharge.

With respect to James Turner, I note that he had worked for Respondent off and on since 1984. He was a temporary employee from 1984 until July 1991 when he went full time. Respondent claims it fired Turner for incompetence as well. It is interesting that he was an okay employee for years and

then becomes a "problem" only after he concertedly complained about wages and signed a union authorization card. Respondent claims that Turner drove over a curb in Winchester, Virginia, and broke the axle on the truck he was driving. Turner claims it was potholes that caused the damage. Whether Turner was negligent or not, the fact is the accident happened 2 months before Turner was fired. Respondent also claims that Turner ran over some hoses at Hagerstown, Maryland, which resulted in some downtime and cost to Respondent. But this accident occurred some 4 months before he was fired.

Turner was fired only after he concertedly complained about wages on January 4 and 10, 1992, and after he signed a union authorization card and after Respondent received a union demand letter. As noted above, Respondent had no difficulty in finding replacement employees and its argument that it had to keep Martin, Turner, and Brown on the payroll until it had some downtime to interview and hire replacements is without merit. If it were true, then Respondent would have fired Martin and Turner on January 12, 1992, because it had no work for them at that time.

It is clear that Respondent discharged Freddie Martin and James Turner in violation of Section 8(a)(1) and (3) of the Act.

E. Respondent Should Recognize and Bargain with the Union

The grooving crew consisted of Supervisor Eric Doltz and four employees, i.e., the operator, the button man, and two truckdrivers. These four employees in December 1991 and January 1992 were Freddie Martin, Roy Brown, James Turner, and Steve Baer. This is the unit appropriate for collective-bargaining purposes. All four signed union authorization cards on January 2, 1992, which authorized the Union to represent them. I credit the testimony of Roy Brown, Freddie Martin, James Turner, and Union Business Agent Vincent Masci that this occurred on January 2, 1992, over the testimony of Steve Baer that he and the others signed union authorization cards after Roy Brown was fired and backdated the cards at Vincent Masci's suggestion. Steve Baer did not impress me by his demeanor as a credible witness.

Within a month and a half after the union authorization cards were signed, three of the four, Roy Brown, Freddie Martin, and James Turner had been fired.

This is a category I case under the Supreme Court's unanimous landmark decision in *Gissel Packing Co.*, 395 U.S. 575 (1969), i.e., the holding of a fair election is virtually impossible because of the outrageous unfair labor practices of Respondent. The best and only way to give effect to the wishes of the employees as expressed by their signed union authorization cards in light of the severity of Respondent's unfair labor practices in unlawfully firing 75 percent of the unit is to order that Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit. Under the circumstances, therefore, Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to recognize and bargain with the Union after it received the January 24, 1992 demand for recognition.

REMEDY

In this case an appropriate remedy would be an order to Respondent to cease and desist from its unlawful conduct, reinstate and make whole Roy Brown, Freddie Martin, and James Turner, remove Charles Coolbaugh from the category of employees not eligible for rehire and make him whole for any loss he suffered as a result of being in that category, recognize and bargain with the Union, and post an appropriate notice.

CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act when it placed employee Charles Coolbaugh in a category of persons not to be rehired because he engaged in protected concerted activity.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Roy Brown, Freddie Martin, and James Turner because they engaged in protected concerted activity and because of their union activity.

5. Respondent violated Section 8(a)(1) of the Act when it threatened an employee by telling him that Respondent would never let a union represent its employees.

6. Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to bargain with the Union as the collective-bargaining representative of its employees.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Cardinal Industries, Inc., International Grooving and Grinding Division, Conshohocken, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Placing employees in a category of not being eligible for rehire because they engaged in protected concerted activity.

(b) Discharging employees because they engaged in protected concerted activity or activity on behalf of a union.

(c) Failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees.

²If 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.

(d) Threatening employees that Respondent will never permit a union to represent its employees.

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

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

(a) Offer to Roy Brown, Freddie Martin, and James Turner full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and place Charles Coolbaugh in a category of employees not barred from rehire.

(b) Make Roy Brown, Freddie Martin, and James Turner whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges and make Charles Coolbaugh whole for any loss of pay and benefits commencing from the date he would have been rehired if not unlawfully barred from rehire. Backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

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

(e) Post at its facility in Conshohocken, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

³If 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."