

**Transmart, Inc. d/b/a Cincinnati Truck Center and White GMC Trucks of Cincinnati and Patrick Stretch.** Cases 9-CA-30114-1, -2

November 8, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

On July 30, 1993, Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel filed exceptions and a supporting brief contending that the judge erred in failing to find that the General Counsel had established a prima facie case of violations of Section 8(a)(3) and (1) of the Act. Specifically, the General Counsel maintains that the judge erred in concluding that alleged discriminatee Patrick Stretch was a supervisor who was therefore not protected from discrimination on the basis of participation in union activity. The General Counsel also contends that the judge erred in concluding there was no nexus between the union activity in which Stretch had openly engaged and his eventual written reprimand and termination.<sup>1</sup> We find merit in the General Counsel's exceptions and affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.

I. SUMMARY OF FACTUAL FINDINGS

The relevant facts are set forth in the judge's decision and are merely summarized here. Patrick Stretch began working as a truck mechanic for the Respondent on January 11, 1984. About 3 months later he became a working foreman, a position he maintained until an unspecified date in 1991, when he was demoted. In early 1991, the Union succeeded in its organizing campaign. Subsequently, unit employees named Stretch and employees Dan Jones and Ronnie Matthews to their bargaining committee. Stretch served on that committee for 6 to 8 months.<sup>3</sup> Former employee Karen Mathis-Seiter testified that the Respondent's owner and president, William Martin III, told her that he was displeased that Stretch had voted for the Union, that he could not have a foreman in the Union, and that he wanted Stretch "out of there."<sup>4</sup> Mathis-Seiter also testified that about 3 months after the election she heard

<sup>1</sup>The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup>In adopting the judge's dismissal of the complaint allegation that the Respondent's president, Martin, told Stretch to resign because he was pronoun, we do not rely on the judge's assertion that because Martin had "previously defended NLRB charges," he would not have made unlawful statements to Stretch.

<sup>3</sup>The parties failed to reach agreement and the Union subsequently lost a decertification election held in April 1992.

<sup>4</sup>His statement leads us to infer that the Respondent demoted Stretch after the 1991 election.

Service Manager Mike Worthington tell Foreman Jeff Abel that he was to record any work-related transgressions committed by any member of the employees' bargaining committee. The Respondent did not dispute Mathis-Seiter's testimony.

Stretch injured his shoulder in an on-the-job fall in October 1991. He remained off work, with the exception of a brief return the following January, until he returned to light duty status on June 29, 1992.<sup>5</sup> Stretch's doctor recommended that he be assigned to an office job or work as a "service writer" and directed that he remain on light duty for 2 months. After about 4 days of performing office work, he returned to repairing trucks.

On July 17, Stretch received a written warning for an unexcused absence, which is not alleged to have been unlawful. Shortly thereafter, according to credited testimony, Martin told Stretch that he would like him to resign, a request that Stretch refused. Instead, Stretch indicated it was Martin's prerogative to fire him. At this meeting, Stretch also accused Martin of having a vendetta against him because he perceived him to be pronoun. Martin claimed, however, that he merely had conveyed his doubts that Stretch was serious about working for the Company.

In August, Stretch's doctor determined that he was suffering from carpal tunnel syndrome and medical epicondylitis of the left elbow. By letter of August 18, the doctor informed the Respondent that he had restricted Stretch to "no repetitive use of his left wrist and elbow [and] no lifting using the left arm/wrist" for the next 4 weeks.

On September 16, a Wednesday, Stretch asked Foreman Abel to be excused the following Monday because he had personal business and a doctor's appointment. Abel said he would advise the service manager and schedule the work accordingly. On Friday, however, Martin conferred with Stretch and asked him what he intended to do on Monday. When Stretch informed him that he had an appointment in the morning on a legal matter and a doctor's appointment in the afternoon, Martin told him they needed him to work in the morning, but that he could keep his doctor's appointment. Stretch then protested that he could not reschedule the morning appointment, but Martin told him that if he was not there on Monday, his absence would be unexcused. Stretch did not report for work that Monday. His visit to his doctor resulted in a form he presented to the Respondent that indicated that he should remain on light duty an additional 6 weeks.

The next day, September 22, Stretch appeared at his regular reporting time and clocked in on an "open ticket" because no supervisor or service writer was at the service desk to give him an assignment. Normally one of those individuals gives the mechanic a work

<sup>5</sup>All dates are in 1992, unless otherwise indicated.

order and the mechanic designates the assignment on the clock-in ticket. An open ticket carries no customer or job identification.<sup>6</sup> After walking through the shop to search for the day-shift foreman, Stretch returned to the service desk, where he found service writer, Carl Weber. He asked Weber for an assignment and Weber told him he was to see Service Manager Burgess. Stretch went to the service manager's office, where Burgess gave him a written warning for an unexcused absence the previous day and informed him of his suspension for 2 days without pay. The General Counsel does not contest this warning and suspension. Burgess then gave Stretch a second warning, which is here in issue, that indicated his clocking in on an open ticket had violated the tardy portion of company rule 1. Regarding the latter matter, Mathis-Seiler testified without contradiction that other employees had not received reprimands when they clocked in on open tickets.<sup>7</sup>

After the 2-day suspension, Stretch was assigned to the night shift where John Coffey, an admitted supervisor, was the foreman. About 5 weeks later, on October 29, when Stretch reported at 4:30 p.m., Coffey asked him to find out what was wrong with the two-speed rear axle of a truck. Stretch soon determined that the motor that operated the axle mechanism was frozen. While he was taking the motor off, Stretch noticed that Martin and Burgess were conversing nearby and looking in his direction. At about 5 o'clock, Coffey informed him that because he was on light duty, he should discontinue working on the truck, and that there was no other work for him. Stretch expressed indignation that he was being given less than 4 hours of work, a matter that Coffey told him he would have to discuss with Burgess. When Stretch indicated he wanted to talk to Burgess, Coffey told him that Burgess had someone in his office. Stretch asked Coffey to tell Burgess that he wanted to talk to him.

Stretch also asked Coffey if he should get a new motor for the two-speed axle. When Coffey indicated that he should, Stretch placed an order for the motor. While he waited for the motor to arrive, Stretch worked on other parts at his workbench for about a half hour and then asked Coffey if Burgess was free. Coffey responded that Burgess had gone home. Stretch then asked if he should finish work on the truck. When Coffey acquiesced, Stretch put the motor in, tested the unit, and discovered a problem in the wiring harness. He told Coffey about the problem and asked him whether he should replace the harness or rewire it manually. Coffey told him to rewire it. Stretch rewired

it and clocked out about 9 p.m. The next day, when Stretch called the shop, Burgess told him that he was terminated because he had not left work when he was supposed to and was thus guilty of insubordination.

On the basis of the foregoing, the judge found that the General Counsel had not established the Respondent's union animus because the Respondent was entitled to be dissatisfied that Stretch, as a foreman, had expressed prouinion sentiments. The judge equated having the title of foreman with having supervisory status. The judge also found that because the Union had lost a decertification election the previous April, there was no connection between Stretch's union activity and the Respondent's decision to terminate him in October. On the basis of those conclusions, he found that the General Counsel had failed to prove a nexus between protected activity and the Respondent's termination of Stretch, and he accordingly dismissed the complaint.

## II. DISCUSSION

Contrary to the judge, we find that the General Counsel established a prima facie case of discrimination against Stretch in violation of Section 8(a)(3) and (1) of the Act, i.e., the General Counsel proved by a preponderance of the evidence that animus against union activity was a motivating factor in the Respondent's decision in September to issue a disciplinary warning to Stretch, ostensibly for clocking in on an open ticket, and its decision in October to terminate him. These findings are supported by evidence of (1) Stretch's participation in union activity, (2) the Respondent's undisputed knowledge of that activity, (3) statements by the Respondent's managers expressing hostility toward unions in general and Stretch's union activity in particular, and indicating that Abel was to record transgressions committed by the bargaining committee members, and (4) the implausibility of the reasons assigned for the warning and discharge at issue. For the following reasons we do not agree with the judge that this prima facie case of discrimination was vitiated either by Stretch's past status as a foreman or by the decertification of the Union in April 1992.

The judge used Stretch's past status as a foreman as a basis for discounting the significance of the Respondent's statements of hostility against his union activities. Thus, the judge credited testimony that after the Union's 1991 election victory, Martin, the Respondent's president, had stated that he was displeased with Stretch's voting for the Union, that he could not have a foreman in the Union, and that he wanted Stretch out of there; but the judge treated these statements as simply lawful expressions of opposition to a supervisor's participation in a union, rather than as animus against protected activity. There was, however, no basis for finding that Stretch, as a foreman, had ever

<sup>6</sup>The Respondent prefers that employees clock in on specific assignments to avoid mistakes in billing their hours to customers.

<sup>7</sup>The Respondent's witness, John Coffey, corroborated Mathis-Seiler's testimony regarding the absence of disciplinary action for clocking in on an open ticket.

possessed the indicia of supervisory status delineated in Section 2(11) of the Act.<sup>8</sup> A job title alone does not confer supervisory status,<sup>9</sup> and the record is totally devoid of any indication of what had been Stretch's duties as a foreman. Indeed, the Respondent, on whom the burden rests to disprove Stretch's employee status, had it asserted that he was a supervisor,<sup>10</sup> never made that assertion.<sup>11</sup>

We also disagree with the judge that, because the Union's April 1992 decertification intervened between Stretch's union activity and his later warning and discharge, there is no nexus between what the judge concedes was the Respondent's dim view of Stretch's protected activity and its subsequent adverse actions against him. Whether or not the Respondent could be said to have had a "union problem" after the decertification, the fact remains that renewed union activity was not impossible; and President Martin was sufficiently concerned about the possible resurrection of union activity that, even after the Union had lost the decertification election, he proclaimed that he would "never have a union" there. Furthermore, Stretch—as one of the three employees who had served on the bargaining committee during the Union's incumbency—was a prime candidate for leadership in any renewed organizational activity.<sup>12</sup>

Finally, we find that the Respondent's reasons for warning and terminating Stretch are so implausible that they not only fail to establish the Respondent's affirmative defense under *Wright Line*,<sup>13</sup> but actually

<sup>8</sup>Sec. 2(11) provides as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>9</sup>*Gem Urethane Corp.*, 284 NLRB 1349 (1987).

<sup>10</sup>*Soil Engineering Co.*, 269 NLRB 55 (1984).

<sup>11</sup>The Respondent's president merely stated that in his experience foremen had not been union members.

Chairman Gould agrees that there is no basis on the record for finding that Stretch was a statutory supervisor when he held the position of foreman. The Chairman, however, also would find that discrimination against a statutory supervisor violates the Act when it reasonably may be inferred that the discrimination will chill the concerted or union activities of statutory employees. He, therefore, disagrees with the Board's decision in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *affd. sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988), to the extent that it limits the reach of the Act to such conduct.

<sup>12</sup>We note that the judge's speculation regarding whether the Respondent had a union problem at the time of the hearing is not relevant to the issue here.

<sup>13</sup>251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

strengthen the case for finding that the Respondent's true motivation was animus against union activity.<sup>14</sup>

First, the warning issued to Stretch for clocking in on an open ticket was not based on any express disciplinary rule<sup>15</sup> and is at odds with the Respondent's treatment of similar conduct on the part of other employees. As indicated in the factual summary above, both General Counsel's witness, employee Mathis-Seiter, and the Respondent's witness, Foreman Coffey, testified that, while clocking in on an open ticket without a foreman's or service writer's direction to do so was not an approved practice, mechanics had on occasion clocked in in this manner when a foreman or service writer was not immediately available. Stretch alone received a writeup for this practice—clear evidence of disparate treatment that strengthens the case for finding that the warning was motivated by the Respondent's animus against his union sentiments.<sup>16</sup>

The Respondent's termination of Stretch, ostensibly for insubordination, has an even less plausible basis. The relevant item in the Respondent's list of rule infractions is as follows:

21. Failure or refusal to follow instructions of supervision or to do your job assignment. (Do your work assignment and follow instructions; any complaint may be taken up later through regular channels.)

The credited testimony establishes that on October 29, the day on which Stretch allegedly violated this rule, he was at all times acting in accordance with the directions of Coffey, his foreman. When Stretch objected to being assigned less than 4 hours work that day, Coffey told him that he would have to discuss the matter with Service Manager Burgess but also indicated that Stretch could not see Burgess then because there was someone else in Burgess's office. Coffey then authorized Stretch to order a new motor. When the new motor arrived and Stretch installed it, he discovered a broken wire in the harness and asked Coffey whether he should replace the harness or rewire it manually.

<sup>14</sup>See *Active Transportation*, 296 NLRB 431, 432 fn. 8 (1989), *enfd. mem.* 924 F.2d 1057 (6th Cir. 1991), *citing Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

<sup>15</sup>One of the exhibits introduced by the Respondent (R. Exh. 4), was a copy of its disciplinary rules—a list of 34 infractions specified as grounds for discipline. None of these rules, including the tardiness rule on which the Respondent relied, prohibited clocking in on an open ticket without specific advance authorization by management.

<sup>16</sup>The General Counsel had issued a subpoena for all disciplinary writeups issued within the period January 1, 1991, to the date of the hearing (May 25, 1993). The Respondent introduced (as R. Exh. 5) those which it had produced, but they were all dated within the period June 1, 1992, to November 23, 1992. Service Manager Burgess, who had commenced his employment with the Respondent on June 1, 1992, testified that he knew of no other writeups. None of the writeups introduced, other than the one issued to Stretch, was for clocking in on an open ticket.

Coffey instructed him to rewire it manually. Thus Coffey apparently not only acquiesced in Stretch's finishing work on the truck, but also authorized Stretch to take certain steps necessary to complete the job. Because Stretch's performance of work on that day was at all times in keeping with the instructions of Coffey, the reason given for his termination was totally baseless. Thus, like the reason the Respondent gave for the warning, it serves as additional evidence in support of our finding that the Respondent was motivated by antiunion animus.

Given our findings that the Respondent's proffered reasons for the warning and discharge of Stretch were mere pretexts for discrimination, it is evident that the Respondent has failed to establish an affirmative defense under *Wright Line*, supra, that, even in the absence of Stretch's protected activity, it would have issued the warning for clocking in on an open ticket and would have discharged him for insubordination. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Accordingly, we find that the Respondent's disciplinary actions against Stretch for clocking in on an open ticket and for completing the repair of a truck on October 29, 1992, violated Section 8(a)(3) and (1) of the Act, and we shall order an appropriate remedy.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in 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. The Respondent violated Section 8(a)(3) and (1) of the Act by writing up and subsequently dismissing its employee, Patrick Stretch, because of his activities on behalf of the Union, including his membership on the Union's bargaining committee, an activity entitled to protection under the Act.

4. The above unfair labor practices have an effect on commerce as defined in the Act.

#### THE REMEDY

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

Having found that the Respondent unlawfully wrote up and dismissed its employee, Patrick Stretch, the Respondent shall immediately reinstate him to his former position, or, if that position is not available, to a substantially equivalent one without loss of seniority or other privileges. In addition, the Respondent shall make Patrick Stretch whole for lost earnings resulting from his dismissal by paying him a sum of money equal to what he would have earned from the date of his dismissal to the date of his return to work, less net

interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also remove from its records any references to the writeup and dismissal found unlawful and shall inform Patrick Stretch and its other employees that those unlawful acts shall not serve as a basis for further personnel actions against him.

#### ORDER

The National Labor Relations Board orders that the Respondent, Transmart, Inc. d/b/a Cincinnati Truck Center and White GMC Trucks of Cincinnati, West Chester, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing written warnings to, dismissing, or otherwise disciplining employees, or otherwise restraining, coercing, or interfering with their rights guaranteed by Section 7 of the Act, because they have engaged in activity on behalf of a union.

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

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

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

(b) Remove from its files any reference to the unlawful dismissal and writeup of Patrick Stretch and notify Patrick Stretch in writing that this has been done and that none of these records will be used against him in any way.

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

(d) Post at its plant in West Chester, Ohio, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Re-

<sup>17</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."

spondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

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

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

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 issue written warnings to, dismiss or otherwise discipline any employee for supporting a union or engaging in union activity.

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

WE WILL offer Patrick Stretch immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any earnings lost as a result of our unlawful conduct against him, plus interest.

WE WILL notify him that we have removed from our files any reference to his dismissal and writeup and that none of these records will be used against him in any way.

TRANSMART, INC. D/B/A CINCINNATI  
TRUCK CENTER AND WHITE GMC  
TRUCKS OF CINCINNATI

*Patricia Rossner Fry, Esq.*, for the General Counsel.  
*William C. Martin*, pro se, of West Chester, Ohio, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed in Case 9-CA-30114 on November 4, 1992,<sup>1</sup> and an original charge filed in Case 9-CA-30114-2 on November 5, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint on December 17 which alleged, in substance, that Transmart, Inc. d/b/a Cincinnati Truck Center and White GMC Trucks of Cincinnati (the Respondent) violated Section 8(a)(1) of the National Relations Act by threatening Patrick Stretch (Stretch or the Charging Party) with discharge because of his activities on behalf of Truck Drivers, Chauffeurs and Helpers Local Union No. 110, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union), and that it violated Section 8(a)(1) and (3) of the Act by issuing Stretch a written warning on September 22, and discharging him on October 30 because he joined or assisted the Union and engaged in concerted activities. Respondent filed a timely answer to the complaint and denied that it had engaged in the unfair labor practices alleged.

The case was heard in Cincinnati, Ohio, on May 25, 1993. All parties attended and they were afforded full opportunity to participate. On the entire record, including consideration of Respondent's closing argument, the posthearing brief filed by the General Counsel, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

Respondent, a corporation, is engaged in the sale and service of trucks at its facility located in West Chester, Ohio. During the 12-month period preceding the issuance of the complaint, it received revenues exceeding \$500,000 and purchased goods valued in excess of \$50,000 directly from points located outside the State of Ohio. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

###### II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

###### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The General Counsel's Case*

Patrick Stretch was hired by Respondent on January 11, 1984. He is a truck mechanic. Approximately 3 months after he was hired, he was promoted to a foreman position. He remained a foreman on the second shift until he was demoted to truck mechanic at some unstated time in 1991.

William Martin III, Respondent's president, purchased the business in 1989. At the time of the hearing, Martin was the general manager, Jay Burgess was the service manager, and

<sup>1</sup> All dates herein are 1992, unless otherwise indicated.

John Coffey was the foreman on the second shift (4:30 p.m. to midnight).<sup>2</sup>

In early 1991, the Union organized Respondent's facility and it was certified as the collective-bargaining agent of its employees. After the certification, Stretch and employees Dan Jones and Ronnie Mathews were placed on the bargaining committee by the unit employees. The record fails to reveal whether Stretch was a mechanic or whether he remained the foreman on the second shift during the 6 or 8 months he served on the Union's negotiating team. In any event, the parties failed to reach agreement and, in April 1992, a decertification election, which the Union lost, was conducted among Respondent's unit employees.

While Stretch failed to indicate that any Respondent supervisor discussed his union sentiments or activities with him before or after the 1991 election, the General Counsel witness Karen Mathis-Seiter, a former service writer/warranty clerk at the facility, testified Martin told her several days after the 1991 election that: he was displeased with Pat (Stretch) voting for the Union; that he could not have a foreman in the Union and wanted Pat out of there.<sup>3</sup> Mathis-Seiter further testified that some 3 months after the 1991 election, she heard Service Manager Mike Worthington tell Foreman Jeff Abel that he was to record any work-related transgressions committed by Stretch, Jones, and Mathews by placing the information in Respondent's computer. At some point after the 1992 decertification election had been won by Respondent, Mathis-Seiter claims Martin announced in her presence that he would never have a union in there.

On October 7, 1991, while road testing a truck he had worked on, Stretch fell and injured a shoulder. He remained off work until the first week of January 1992, at which time he was cleared to return to light-duty status. His light duty consisted of making billing entries in a computer, typing repair orders, and answering the telephone. After 2-1/2 days, he claimed he could not stand the pain and he reverted to inactive status and remained in such status until he once again returned with a light-duty restriction on June 29, 1992.

While Stretch was on inactive status and was receiving workers compensation benefits from the State of Ohio, he obtained a building permit in Dearborn County, Indiana, on May 22, 1992, which authorized the construction of a single family residence valued at \$105,000. Stretch is listed as the "contractor" and the "electrician" in the permit.<sup>4</sup> He testified that he is liable on one-half the mortgage on the property and the house was built for his cousin (Susan Ballard). He claimed he performed no physical work on the building.<sup>5</sup>

Stretch's doctor released him to return to "light duty work" on June 29, 1992. The doctor suggested he perform "an office job" or work as a "service writer."<sup>6</sup> The doctor

directed that the employee remain on light duty for 2 months. Stretch testified he performed office work for about 4 days after he returned on June 29, and then he was asked to go back out in the shop where he was to repair trucks. When he received his first paycheck, he noted his hourly rate had been cut from \$13.50 per hour to \$7 per hour. He asked Service Manager Burgess why his pay was cut and he was informed it was due to the fact that he was on light duty and Respondent was unable to bill all the hours he worked. When Stretch indicated he felt he was entitled to his regular pay, Burgess told him to see Martin about it.

On July 16, Stretch called the facility to indicate he was sick and would not report for work that day. He testified he had gotten sick overnight and had a fever in the morning. Respondent's service manager, Burgess, testified he had a suspicion that Stretch was not really sick and that caused he and Martin to drive to the employee's home to check his assertion. When they arrived at approximately 2 p.m., Stretch was mowing his grass with a riding mower. He informed Burgess and Martin he had been sick but was feeling better. They indicated he was shirtless and was perspiring heavily as if he had been mowing for some time. Stretch claimed during his testimony that he had merely ridden the mower out to his mailbox to get his mail. I do not credit such testimony.

When Stretch reported for work on July 17, he was given a written warning which was placed in the record as the General Counsel's Exhibit 4. It indicated that Respondent had classified his July 16 absence as an unexcused absence which violated rule 1 of the Company's rules and regulations which prohibits "absence from work or tardy arrival at place of work." After he was given the described warning, Stretch asked to speak with Martin.

Shortly thereafter, Stretch met with Martin in his office. Asked what happened, he described the meeting as follows:

A. We had a discussion about this incident and I had asked him if—you know, explaining my side of it. And, again, he kind of accused me of not wanting to come to work. And I explained to him that, you know, I'm sorry, I was ill and I needed the money from work just as much as the next guy. And he basically said, Well, we'd like you to resign, we know how you are and we can agree to disagree, and we'd like you to resign. And I told him I wasn't going to resign. It was his prerogative, if he wanted to fire me. And we went on to other issues.

Q. Was there any discussion of your pay?

A. Yes.

Q. What was the discussion about your pay?

A. I had asked him why my pay was decreased from \$13.50 an hour to seven dollars an hour. And he said, Well, you can file a motion with Workmen's Comp to make up that difference. And again, I reiterated to him that I was, in fact, working on the equipment, on an active R.O., and the customer was being billed for my labor. And I felt that, since I was working as every other Mechanic, that I deserved my regular pay.

Q. What did he say to that?

A. I don't think he said anything at that time about that, other than what I said, that he talked about what

<sup>2</sup>The named individuals are admittedly supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act.

<sup>3</sup>Mathis-Seiter was terminated by Respondent, assertedly due to a need to reduce the size of the work force. After her termination, she filed a sex discrimination claim against Respondent.

<sup>4</sup>See R. Exh. 1.

<sup>5</sup>Respondent sought to establish otherwise by causing Second-Shift Foreman Coffey to testify that, while Stretch was off on workers compensation, he observed him load a number of 30-40 pound pallets on his pickup truck during a visit to Respondent's facility.

<sup>6</sup>See G.C. Exh. 2.

I could do to remedy that through Workmen's Comp by filing a motion to regain part of that loss of wages.

Q. Was there any discussion about anything else during that meeting that you can recall?

A. Yes, I asked him why I hadn't received a pay raise in the last—over two years when, in fact, every other hourly employee had been given a raise. And he said I didn't deserve it. And he said that I wasn't made the Foreman again, as I requested, because he said he can't have a Union person, in favor of the Union, in a position of Foreman.

Q. Did you say anything to that?

A. Well, I told him that I wasn't the one that started the Union activities. I was asked to be on the negotiating committee. And his reply was, We know how you voted and that—We know how you voted and that's why we can't have you as a supervisor in that position.

Q. What did you say to that?

A. I just told him that I hadn't started the activities. And I said, I engaged in it, I was asked to represent the rest of the—be one of the fellows to represent them. And that was, basically, the end of the conversation.

Q. Did Mr. Martin ask you to resign?

A. Yes, he did.

Q. Did he tell you why he wanted you to resign?

A. That we couldn't agree and he couldn't have a Union person with a Union sympathy working for him, and he thought that would be better for all the parties concerned.

On August 13, Stretch visited his doctor and was diagnosed as suffering from carpal tunnel syndrome of the left wrist and medical epicondylitis of the left elbow.<sup>7</sup> By letter dated August 18, the doctor advised Respondent he had "placed him on restrictions of no repetitive use of his left wrist and elbow, no lifting using the left arm/wrist" and the restrictions were to continue for the next 4 weeks. The letter indicated the employee could use his right arm to full capacity.<sup>8</sup>

On September 16, Stretch asked his foreman, Jeff Abel, if he could be excused the following Monday (September 21) because he had personal business in the morning and a doctor's appointment in the afternoon. Abel said okay, indicating he would advise the service manager and schedule the work accordingly. Two days later (Friday), Martin came to Stretch's work station and asked what he intended to do on Monday. When Stretch replied he had an appointment downtown on a legal matter and a doctor's appointment in the afternoon, Martin told him they needed him to work Monday morning, but would give him time off in the afternoon to keep his doctor's appointment. When Stretch protested that he could not reschedule his morning appointment, Martin told him if he was not there on Monday, it would be an unexcused absence. On September 21, Stretch failed to report for work.

When Stretch reported for work on September 22 at 8 a.m., his scheduled reporting time, he clocked in on what is referred to in the record as an "open ticket." The record reveals that the practice utilized at Respondent is to cause me-

chanics to record the time they commence a work assignment on a customer's vehicle by placing a ticket in the clock to record the time started. In a normal situation, the supervisor in charge of the shift or a service writer is positioned at the service desk when mechanics report for work. Either individual will give the mechanic a work order and upon receipt of same, the mechanic designates the particular job he is clocking in to perform. An open ticket contains no customer or job identification, and Burgess credibly testified that Respondent discourages employees from clocking in on an open ticket because they sometimes get lost in the facility after clocking in that fashion. Stretch testified he clocked in on an open ticket on July 17 because there was no foreman or service writer at the service desk. He indicated he walked through the shop looking for the day-shift foreman, Jeff Abel, but failed to find him. When he returned to the service desk, he asked service writer Carl Weber, who had appeared in his absence, for a work assignment. Weber informed him he was to see Burgess in his office.

When Stretch went to Burgess' office, the service manager presented him with a written warning which classified his September 21 absence as unexcused and informed him he was to be given 2 days off without pay.<sup>9</sup> At the same time, Burgess gave him a second written warning which indicated that by clocking in on an open ticket that morning (September 22), he had violated the tardy portion of company rule 1.<sup>10</sup> The General Counsel witness Mathis-Seiter testified that when she worked at Respondent, a number of employees clocked in on open tickets without receiving reprimands.

When Stretch visited his doctor on September 21, he was given a form for presentation to Respondent which indicated that his epicondylitis/carpal tunnel syndrome condition necessitated that he remain on light duty for an additional 6 weeks.<sup>11</sup>

While Stretch had worked the day shift prior to his 2-day suspension on September 22, when he returned to work after the suspension, he, with his consent, was moved to the night shift (4:30 p.m. to midnight). His foreman on the night shift was John Coffey.

On October 29, Stretch reported for work at 4:30 p.m. and Coffey assigned him to a job which required that he find out what was wrong with the two-speed rear axle of a truck. By 5 p.m., Stretch had discovered that the motor which operated the axle mechanism was frozen. Stretch testified that, while he was taking the motor off, he noticed that Martin and Burgess were having a discussion in the doorway of the shop. He recalled they talked about 5 minutes and that they looked in his direction. At approximately 5 p.m., Coffey approached the employee and informed him that Martin and Burgess did not want him working on trucks because they were afraid he was going to get hurt. When Coffey then told Stretch he would have to get off of the job, the employee told him he was not having a problem with that particular job but, if he had light work, he would take it. At that point, Coffey told Stretch he would have to see Burgess about that. Stretch testified that he then told Coffey he thought he was entitled to work because he was the senior employee on the shift. When Stretch indicated he wanted to talk to Burgess, Coffey in-

<sup>7</sup> See G.C. Exh. 5.

<sup>8</sup> See G.C. Exh. 6.

<sup>9</sup> See G.C. Exh. 9.

<sup>10</sup> See G.C. Exh. 10.

<sup>11</sup> See G.C. Exh. 7.

formed he could not do it at that time because he had someone in his office. Stretch claims he told Coffey to inform Burgess he wanted to talk with him.

Immediately after the above events occurred, Stretch asked Coffey if he should attempt to get a new motor for the two-speed axle from parts. Coffey indicated he should. Stretch placed an order for the motor. Respondent did not have one in stock and the parts department had to obtain one from another dealer. While the motor was being obtained, Stretch spent what he estimated to be about one-half hour at his workbench cleaning the axle switch and actuator. He then returned to the parts counter where he asked Coffey if Burgess was free yet. Coffey informed him he had missed Burgess as he had gone home. Stretch then asked, "Well, do you want me to finish this truck and then I'll go home." He claims Coffey said okay. Stretch put the motor in, tested the unit, and discovered a broken wire in the wiring harness. He indicated he informed Coffey of the additional problem and asked him if he wanted to replace the harness or rewire it manually. Coffey told him to rewire it. Stretch rewired the unit, tested it, showered, and clocked out to go home around 9 p.m.

Stretch testified that he knew work was slow in late October and that caused him to call the shop at about 1 p.m. the following day (October 30) to see if there was work available. Burgess answered the call and when Stretch asked if he was needed, Burgess told him "we don't need you because you didn't leave work last night when you were supposed to." Stretch responded that he left work after he finished a job Coffey had given him and asked if Coffey had told him he wanted to see him before he went home the night before. The employee testified he then explained what had happened the night before. He claims Burgess told him it did not matter; that they were going to terminate him. Burgess then told the employee to turn in his uniforms and have his tools cleaned out by the following Wednesday.

#### *B. Respondent's Defense*

William Martin, Respondent's president, elected to represent his business operation during the course of the instant proceeding. When presenting Respondent's defense, he chose not to controvert the vast majority of the testimony given by the General Counsel witnesses Stretch and Seiter.

Respondent's first witness was John Coffey, Stretch's immediate foreman at the time of his termination. While Coffey indicated he had not supervised Stretch very long, he described the employee as a very knowledgeable mechanic. In main, his testimony related to the matter of employees clocking in, and to the events of October 29.

Coffey explained that the work to be performed by mechanics on the night shift is normally determined before he reports for work. Thus, he indicated that Jeff Abel, the day-shift foreman, normally prepared a daily route sheet, which contains an enumeration of the work to be performed on various vehicles during the night shift. He indicated that, when he reports for work, he and Abel go down the list and Abel would tell him the particular persons he wanted on each job. As employees reported for work, he would give them a repair order and they would clock in using the number on the repair order to assure that the time spent on the job could be billed to the customer. Coffey testified employees are to clock in on an open ticket only when instructed to do so by

their foreman. He indicated that, in situations wherein a number of customers appear at about the same time, the foremen will frequently instruct a mechanic to commence work on a truck before a repair order is prepared. In those situations, the mechanic is instructed to clock in on an open ticket to record the time started on the job. At a later time, the time on the open ticket is transferred to the particular repair order with appropriate computer entries. Coffey indicated that when Seiter was a service writer she, as well as the foreman on the shift, could give mechanics work assignments, thus enabling them to clock in on a particular job rather than on an open ticket.

With respect to events of October 29, Coffey indicated that they were running short of work that night and that he decided to send all but two of the mechanics home. Those that were to remain were to clean out the sewers by handling 55-gallon drums of sludge, move equipment around, and clean up the shop. With specific regard to Stretch, he testified he initially assigned the employee to diagnose the problem with the two-speed rear axle of a truck. He indicated that, after Stretch properly diagnosed the problem and started working on the vehicle, he informed him that as he was on light duty, that job was not suited for him. He testified he told the employee they were out of work and he had to go home. At that point, Coffey claims Stretch objected and asked if the Company was going to give him 4 hours' work. He told Stretch that was something he would have to take up with his supervisor. Coffey admitted that when Stretch remained on the job, he agreed he should order a new motor for the axle and he indicated to the employee that he should rewire rather than replace the wiring harness leading to the axle apparatus. When he was asked what he thought he should do when Stretch stayed on after he told him to clock off the job, he responded by saying:

What do you mean, what should I do? Get out and fight with him, kick him in the shins, or tell him to leave? No, that's not my mannerism. He understands. He was Shop Foreman. You tell someone to do something, that's all that needs to be said.

Jay Burgess was hired by Respondent to oversee its parts and service operations on June 1, 1992. He described Respondent's disciplinary system as one wherein rule violations lead to a written warning, a second violation results in a 2- to 5-day layoff without pay, and a third violation is to be punishable by termination. With respect to Stretch, he indicated that, when Stretch called in sick on the morning of July 16, he and Martin suspected the employee was not really sick and that caused them to drive to the employee's home to see how he was. He indicated that when they got there at approximately 2:15 p.m., Stretch was mowing his yard, and he was shirtless and sweating as if he had been at the task for some time. He indicated he decided to treat the absence as unexcused absence and that he gave the employee the written warning placed in the record as General Counsel's Exhibit 4 on July 17 when he reported for work.

Burgess said his next involvement with Stretch occurred on September 21 when he noticed the employee was not on the job. He asked Abel, the foreman, where the employee was and he said he was not there as he had a doctor's appointment. Burgess testified Martin later asked him where

Stretch was and when he relayed the information Abel had given him to Martin, the latter informed him he had told Stretch he could not take off all day; that he could take off for his doctor's appointment. Burgess testified he decided at that time to treat the absence as unexcused and to lay the employee off for 2 days. He indicated that after he had prepared the warning/layoff document placed in the record as General Counsel's Exhibit 9, but before he presented it to the employee, Stretch improperly clocked in on an open ticket on September 22 and that caused him to prepare a "tardy" warning placed in the record as General Counsel's Exhibit 10. Both documents and notification of the layoff were given to Stretch before he was assigned any work on September 22. Burgess testified that when he gave Stretch the above-described documents and informed him of the layoff, Stretch asked, "[W]hy don't you fire me."

Burgess indicated that he, in consultation with Martin, made the decision to terminate Stretch. He testified when he came to work on the morning of October 30, Coffey informed him that he had instructed Stretch to not finish a job and to punch off the job and go home the night before and that Stretch had stayed and finished the job. Burgess acknowledged that Stretch telephoned him the morning of October 30 and he described the conversation as follows:

He had called me that morning and told about the episode the night before where John Coffey, our Foreman, had told him to get off of a job because he didn't consider it light duty. And, actually, John Coffey had already told me about that.

And I asked Pat, I said, Well, did he tell you to get off? And he said, Yeah, but I'm a Lead Man, he's a Foreman, is he really my boss? And I said, Yes, he is. And I said, Did you do it? He said, No. And I said, That's insubordination, you're terminated.

Martin, who elected to give his testimony in narrative form, was Respondent's final witness. The first matter addressed by Martin was the conversation between Stretch and him on the morning after they saw him cutting his grass. Martin testified that at that time he had strong reservations about Stretch's desire to work based on his lengthy workmen's compensation absence, and his penchant for wanting to take a vacation immediately upon return, and taking a sick day to cut his grass when he had not been at work for 9 months. He claimed that Stretch, rather than himself, brought up the subject of the Union during the discussion by accusing him of having a vendetta against him because he perceived him to be prounion. He claims he assured him that was not the case, and he denied he told Stretch that he did not want him to work for him because of his union affiliations. Martin claimed the gist of the conversation was that he questioned whether Stretch was really serious about working for the Company.

Martin acknowledged that he probably said something to Seiter which indicated he was not prounion. He acknowledged he did not wish to see a union in his place, but claimed that he came to learn the law during the process of the organizational campaign and that he abided by the law.

In addition to the building permit obtained by Stretch, which is described, *infra* (R. Exh. 1), Respondent placed additional documents in the record during the course of the

proceeding. Thus, Respondent's Exhibits 2 and 3 are documents signed by Stretch which reveal that he acknowledged receipt of Respondent's rules and regulations and its employee handbook. Respondent's Exhibit 4 is a copy of Respondent's rules and regulations. In pertinent part, they provided:<sup>12</sup>

COMPANY SHOP RULES

Employees are urged to observe rules and to assist in the maintenance of discipline and good working conditions. Obviously in an organization such as ours, discipline and cooperation are desirable and rules to guide all employees are necessary. Committing any of the following violations will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending upon the seriousness of the offense in the judgement of Management.

1. Absence from work or tardy arrival at place of work.

21. Failure or refusal to following instructions of supervision or to do your job assignment. (Do your work assignment and follow instructions; any complaint may be taken up later through regular channels.)

34. Repeated violation of Company Rules and Regulations.

Finally, Respondent's Exhibit 5 is a composite exhibit consisting of seven individual documents entitled "Employee Personnel folder Memo," which document discipline imposed by Burgess upon a supervisor (Coffey) and employees (Jack Brewer, Paul Haefling, Dewitt Bingham, and Steve Gaherty) during the period June–November 1992. The exhibit reveals: (1) that Coffey was placed on probation for 90 days for serving walk-in customers ahead of appointment customers; (2) that Brewer was reprimanded for installing the wrong bearings in a vehicle; (3) that Haefling was threatened with termination for exhibiting a negative attitude when selling an engine overhaul; (4) that Bingham was informed he could be dismissed if his tardiness continued; and (5) that Gaherty was given a 1-week layoff for misappropriating funds, a 30-day probation period for exhibiting a poor attitude with customers, and he was terminated for abandoning his job by failing to return from layoff on July 7, 1992.

Analysis and Conclusions

A. *The Alleged 8(a)(1) Violation*

Paragraph 5 of the complaint alleges that Martin threatened Stretch on July 15, 1992, by telling him Respondent no longer wanted him working for it because of his union activities. I find the allegation to be without merit.

As indicated, *infra*, page 9, Stretch claims that, when he reported for work on July 17, Martin told him, *inter alia*:

That we couldn't agree and he couldn't have a Union person with a Union sympathy working for him, and he

<sup>12</sup> Respondent contends it established that Stretch violated rules 1, 21, and 34.

thought that that [resignation] would be better for all the parties concerned.

Martin denied that he made the statement attributed to him by Stretch. Instead, he testified that Stretch brought up the subject of the Union on July 17 by accusing him of having a vendetta against him because he perceived him to be prounion. Martin claims he assured Stretch that was not the case; that he did indicate to the employee he had strong reservations about his desire to work based on his lengthy workmen's compensation absences, his wanting to take a vacation immediately upon return from a 9-month absence, and his taking a sick day to cut his grass.

Without hesitation, I credit Martin where his testimony conflicts with that given by Stretch. Accordingly, I find that the General Counsel failed to prove the allegation under discussion and I recommend that it be dismissed.<sup>13</sup>

### B. *The Alleged 8(a)(3) Violations*

Paragraph 6 of the complaint alleges that Respondent issued Stretch a warning on September 22, 1992, and terminated him on October 30, 1992, because he engaged in union and/or concerted activities. I find the allegations to be without merit.

The General Counsel's initial burden was to establish that Stretch's participation in protected conduct was a "motivating factor" in Respondent's decision to warn and then terminate him. See *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In an attempt to satisfy that evidentiary burden, the General Counsel first elicited testimony which revealed that, at the time of the 1991 election, Martin expressed dissatisfaction with Stretch because, while he was a foreman, Stretch exhibited prounion sentiments. Next, through testimony given by Seiter, it was established about that 3 months after the 1991 election, Foreman Abel was instructed to record any work-related transgressions committed by Stretch, Jones, and Mathews, the members of the Union's negotiating team. Finally, through Stretch, the General Counsel sought to establish that the employee was threatened with discharge for engaging in union activities on July 17, 1992. As indicated, I do not credit Stretch's claim that such a threat was voiced.

I accord no significant weight to that testimony which reveals that Martin voiced dissatisfaction when one of his su-

perisors exhibited prounion sentiments. He was lawfully entitled to object.

While Seiter's unchallenged claim that Foreman Abel was instructed at some time in 1991 to document any improper behavior engaged in by Stretch or other members of the Union's negotiating team warrants an inference that Respondent was interested in building a file on those employees in 1991, the record reveals that the Union was decertified in April 1992, and that, at the time of the hearing, Respondent had no union problem.

As noted, the only timely evidence which would indicate that Respondent possessed union-related animus against Stretch was the employee's claim that he was threatened with discharge because of his union activities on July 17, 1992. Having accepted Martin's version of the union-related discussion on that date, I have not credited Stretch.

In sum, the record in the instant case reveals that employee Stretch has engaged in two distinct types of conduct which were viewed dimly by Respondent during his tenure of employment. The first was his prounion activity while he was a supervisor and, presumably, continuation of that activity after he was demoted to a mechanic position at some unstated time in 1991. The second consisted of filing a workmen's compensation claim after his October 1991 shoulder injury, his nine 9-month absence thereafter, and his actions while restricted to light duty upon his eventual return to work during the late summer and fall of 1992. While the record shows a clear nexus between the treatment accorded Stretch by Respondent and his disability claims and/or status, I fail to discern any noticeable nexus between Stretch's participation in union activities and the treatment accorded him by Respondent in late 1992, including the issuance of the "tardy" warning on September 22 and his termination on October 30, 1992. Accordingly, I find that the General Counsel has failed to prove that Stretch's participation in protected conduct was a motivating factor in Respondent's decision to issue the employee a warning for clocking in on an open ticket on September 22, or that this participation in such activities was a motivating factor in Respondent's decision to terminate the employee on October 30, 1992.

For the reasons stated, I recommend that paragraph 6 of the complaint be dismissed.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in 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 has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

<sup>13</sup> The General Counsel represented during the hearing that Stretch filed charges against Respondent in November 1991 and in September 1992. Having previously defended NLRB charges, I sincerely doubt that Martin would have said anything to Stretch which even arguably violated the Act on July 17. Noting that Stretch admitted he had filed four workmen's compensation cases while working at Respondent during the last 6 years, I am persuaded Martin was quite concerned over the time missed by the employee.