

**Hughes Christensen Company and United Steel Workers of America, AFL-CIO-CLC.** Cases 16-CA-15754, 16-CA-15795, and 16-RM-723

May 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND COHEN

On December 29, 1993, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, the Union and the General Counsel filed answering briefs, and the Respondent replied to the answering briefs. The Union also filed a brief in support of the judge's decision and a limited exception.

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

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.

This case arises from a decision by the Respondent to relocate operations from its 100-acre Polk Street site in east Houston, to a 25-acre site in the Woodlands, a municipality 35 miles north of Houston. The relocation of operations entailed a reduction in force of approximately 110 employees. Between October and December 1992,<sup>3</sup> the Respondent selected the employees to be transferred to the Woodlands and informed the remaining employees that they would be laid off.

1. The Respondent has excepted to the judge's findings in Case 16-RM-723 that 11 challenged voters had a reasonable expectation of employment in the near and foreseeable future at the time of the election. For the reasons stated by the judge, we agree with her conclusion that the challenged voters are entitled to vote in the election and order that their ballots be

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

We also find no merit to the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in her analysis or discussion of the evidence.

In the absence of exceptions, we adopt the judge's findings sustaining the challenges to the ballots of Wooten, Zalesky, Tubbs, Nelson, Lum, and White.

<sup>3</sup> All subsequent dates are in 1992 unless stated otherwise.

opened and counted. The Board's longstanding test for determining whether laid-off employees are eligible to vote is whether, based on *objective* factors, they have a reasonable expectancy of reemployment in the near future. *Higgins, Inc.*, 111 NLRB 797 (1955). Although, in her discussion of the challenged ballots, the judge referred several times to certain laid-off employees' beliefs that they would be recalled, it is clear from the totality of the judge's analysis that she applied the proper test in ruling on the challenged ballots.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) when it failed to transfer employees Steve Bobino, C. C. Richardson, and T. J. Swan to the new facility because of their advocacy on behalf of the Union. The judge also found that the Respondent unlawfully denied Bobino the chance to work overtime and transferred him to a more arduous position because of his union activities.

In concluding that Bobino, Swan, and Richardson were discriminatorily treated, the judge rejected the Respondent's affirmative defense that the employees waived their rights to file charges with the Board when they executed waiver and release agreements in exchange for enhanced severance payments. The judge, citing *Ideal Donut Shop*, 148 NLRB 236, 237 (1964), enfd. 347 F.2d 498 (7th Cir. 1965), stated that the Board's remedies are public rights that the Board provides in the public interest, and that discriminatees cannot bargain away or compromise these public rights. The judge reasoned that to permit waiver and release agreements to bar employees' unfair labor practice claims would destroy the efficacy of the Act.

Contrary to the judge, we find, for the reasons stated below, that the waiver and release agreements signed by the alleged discriminatees bar their claims for relief under the Act.

The Respondent first proposed the enhanced severance package, including the waiver and release agreement, in its negotiations with the Union over the transfer of employees to the Woodlands. The Union never agreed to the proposal and, following the parties' bargaining impasse on April 5, the Respondent notified the Union that it would implement the selection process contained in its last proposal, including the enhanced severance package. The waiver and release agreement, which the employees were required to sign in order to receive the enhanced severance benefits, reads in pertinent part:

I, [name], waive and release all rights and claims, charges and demands and causes of action against Hughes Christensen Company . . . of any kind [or] character, both past and present, known or unknown, including those arising under the Age Discrimination in Employment Act of 1967, as amended, and any other state or federal statute . . . which relate to my employment or alleged

discriminatory employment practices. I understand that this Agreement shall not serve to waive or release any rights or claims that may arise after the date this Agreement is executed.

The waiver also states that the Respondent has no obligation to reemploy, rehire, or recall the employee. The employee has 45 days from the date he receives the document to consider the terms of the waiver, and 7 days after execution to revoke. By signing the agreement, the employee acknowledges that he has carefully read the agreement, has had the opportunity to review it with an attorney, and that he has entered into the agreement knowingly and voluntarily. In exchange for signing the agreement, the employee receives up to 12 weeks' severance pay, depending on the length of service. Those who do not sign the agreement receive 2 weeks' severance pay.

On September 15 and October 5, 1992, the Union filed charges in these cases. Those charges alleged, inter alia, that the three discriminatees had not been selected for a transfer.<sup>4</sup> On November 17, 1992, the Regional Director dismissed these charges, and the Union filed an appeal to this dismissal on about December 1, 1992. On April 21, 1993, the Union's appeal was sustained and the case was remanded to the Regional Director with instructions to issue a complaint as to the alleged discriminatory treatment of Bobino, Swan, and Richardson.

It is undisputed that Bobino, Swan, and Richardson each executed a waiver and release agreement on December 3, 1992, January 4, 1993, and November 24, 1992, respectively—all within 45 days of their layoffs. The remaining issue then is whether by signing the waiver and release agreements the employees waived their rights under the NLRA with respect to the matters at issue here. Under the circumstances presented here, we find that the validity of the waiver and release agreements executed by the Respondent and alleged discriminatees should be governed by the same standards as private non-Board settlements under *Independent Stave Co.*, 287 NLRB 740 (1987), and, for the reasons stated below, we give effect to the waiver and release agreements and dismiss the complaint in its entirety.<sup>5</sup>

In *Independent Stave*, the Board outlined factors to be considered in determining whether to give effect to a private non-Board settlement. The factors were as follows: all the surrounding circumstances including, but not limited to, (1) whether the parties have agreed to be bound, and the position taken by the General

<sup>4</sup>The complaint alleges that this failure to transfer resulted in the layoffs at issue here, which occurred on October 23, November 30, and December 4. The waiver and release agreements were offered at the time of these layoffs.

<sup>5</sup>The contrary holding in *Ideal Donut Shop*, 148 NLRB at 237-238, was plainly, albeit sub silentio, overruled by *Independent Stave*.

Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or has breached past settlement agreements. The Board recognized in *Independent Stave Co.* that there is an "important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation." 287 NLRB at 742.

The waiver and release agreements entered into by the Respondent and the three alleged discriminatees meets the standards set forth in *Independent Stave* for private non-Board settlements. Thus, we find that the Respondent's agreement to pay enhanced severance benefits in exchange for the employees' agreement to waive and release any preexisting employment-related claims that they may have had against the Respondent was a reasonable adjustment in light of the potential costs and risks inherent in any litigation. At the time the agreements were signed, the charges filed on behalf of the alleged discriminatees had been dismissed by the Regional Director and had not yet been reinstated by the General Counsel. Although the General Counsel and the Union oppose the agreements, there is no contention that the agreements are fraudulent, that the alleged discriminatees signed the agreements under duress or threat of coercion, or that they at any time attempted to revoke the agreements. The alleged discriminatees were advised by the Respondent to consult an attorney and were given sufficient time to consider the release and to revoke the agreement after its execution. Further, the Respondent does not have a history of violating the Act, and there is no evidence that it has breached settlement agreements in the past.

The waiver and release agreement in this case closely parallels the releases found to be lawful in *First National Supermarkets*, 302 NLRB 727 (1991), and *Phillips Pipe Line Co.*, 302 NLRB 732 (1991). In both cases, the Board gave effect to releases similar to those involved here, and emphasized that the releases did not waive employees' statutory rights of access to the Board concerning incidents arising after execution of the release and thus did not prohibit filing of unfair labor practice charges concerning future incidents or employment. In *First National Supermarkets*, 302 NLRB at 727-728, the Board stated that an employer may use a broadly worded release to seek "final repose for all claims which have arisen out of any and all aspects (i.e., the total) of the employment being concluded."

Similarly here, by its terms, the waiver and release applies only to claims, charges, and causes of action against the Respondent which relate to the employee's "employment or alleged discriminatory employment

practices.’’<sup>6</sup> The agreement specifically states that it does not waive any rights or claims that may arise after the date of execution. Participation is voluntary, with no loss of contractual benefits if an employee refuses to sign the waiver and release.

We recognize that, in *Independent Stave*, the charging party entered into the private settlement and requested withdrawal of the charges. In the instant case, the Charging Party (Union) did neither, and opposes acceptance of the withdrawal request. That is only one factor to be considered, however, and, in our view, it is outweighed by the other factors noted above.

Under the circumstances stated above, we find that it will effectuate the purposes and policies of the Act to give effect to the waiver and release agreement and to dismiss the complaint in Cases 16-CA-15754 and 16-CA-15795.

#### *Case 16-RM-723*

Because the judge found that challenged voter C. C. Richardson was eligible to vote based on his status as an 8(a)(3) discriminatee, the judge did not reach the issue of whether Richardson had a reasonable expectancy of recall. Because we have dismissed that 8(a)(3) finding, we must reach the issue of whether Richardson had a reasonable expectancy of recall. In determining whether laid-off employees have a reasonable expectancy of recall, the Board examines several factors, including the employer’s past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.<sup>7</sup> Here, the Respondent had a well-established past practice of recalling laid-off employees. The judge found that the Respondent initially understaffed the Woodlands and the Respondent informed laid-off employees that staffing would increase after the plant began operations. At no time did the Respondent characterize the layoff as permanent or inform laid-off employees that if there were a need for additional employees, it would not recall or rehire them. On our review of the entire record, we find that Richardson had a reasonable expectancy of reemployment in the near future at the time of the election.

Richardson was employed by the Respondent for 24 years as a toolcrib specialist and machine operator.

<sup>6</sup>We do not believe that specific reference to the particular charges on which the complaint is based is required in order to give effect to a general waiver and release. The waiver and release agreement refers to all rights and claims against the Respondent “of any kind [or] character, both past and present, known or unknown, including those arising under . . . any . . . federal statute . . . which relate to my employment or alleged discriminatory employment practices.” This language clearly encompasses the National Labor Relations Act complaint allegations at issue here. See *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 936 (5th Cir. 1994) (waiver of WARN Act claims).

<sup>7</sup>*Apex Paper Box Co.*, 302 NLRB 67, 68 (1991).

The Respondent admitted that Richardson possessed the cooperative attitude and work ethic desired at the Woodlands, and that he was knowledgeable about his job.

Richardson testified that he understood that the employees first selected for transfer to the Woodlands were the initial staffing, and he was advised by his supervisors that more employees would be recalled to the Woodlands after the initial selection. In September 1992, Richardson discussed with Supervisor Robert Lyle the initial phase-in of the first group of employees at the new facility. Lyle said he believed there probably would be more employees going to the Woodlands because the Respondent did not believe it had sufficiently staffed its operations there. Because Lyle participated in the selection process, his comments to Richardson provide a basis on which to find that there was a reasonable expectancy that Richardson would be recalled to work. The record further shows that prior to his layoff in 1992, Richardson had experienced periods when the demand for drill bits decreased and employees were laid off. Richardson testified that in May 1986 he was laid off and recalled after 8 months. Based on the above facts, we conclude that Richardson had a reasonable expectancy of recall in the near future at the time of the election.

#### ORDER

The complaint in Cases 16-CA-15754 and 16-CA-15795 is dismissed.

IT IS FURTHER ORDERED that Case 16-RM-723 is remanded to the Regional Director for Region 16 for the purpose of opening and counting the ballots of C. C. Richardson, Morris McCullough, Carl Reyna, Harvey Smith, Matthew Zellers, Billie Boyd, Robert Carrington, Mack Freeman, Robert Dennis, Harry Hill, and Joe Willis Woodfork. Thereafter, the Regional Director shall prepare and cause to be served on the parties a revised tally of ballots and issue the appropriate certification.

*Robert G. Levy II, Esq.*, for the General Counsel.

*John H. Smither, Esq.* and *Robert L. Ivey, Esq.* (*Vinson & Elkins*), of Houston, Texas, for the Respondent.

*Bruce A. Fickman, Esq.*, of Houston, Texas, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on August 10 through 13, 1993,<sup>1</sup> at Houston, Texas. The charges were filed in Cases 16-CA-15754 and 16-CA-15795 on September 25 and October 5, 1992, respectively, by the United Steel Workers of America, AFL-CIO-CLC (the Charging Party or the Union) against Hughes Chris-

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

tensen Company (Respondent or the Company) alleging Respondent committed violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On April 29, 1993, the Regional Director for Region 16 of the National Labor Relations Board issued the original consolidated complaint and notice of hearing, which was amended at hearing, alleging Respondent violated Section 8(a)(3) and (1) of the Act.

Specifically, the General Counsel asserts Respondent failed to transfer three employees, Steve Bobino, C. C. Richardson, and T. J. Swan to its new facility at the Woodlands, Texas, because of their advocacy on behalf of the Union, and Respondent denied Bobino the chance to work overtime and transferred him to a more arduous position, also because of his advocacy on behalf of the Union. At the close of the General Counsel's case-in-chief, Respondent moved for dismissal of all the 8(a)(3) and (1) claims on the ground the General Counsel failed to meet his burden of establishing by a preponderance of the evidence a prima facie case for there was no evidence of antiunion animus. I deferred ruling on the motion for consideration in this decision. Based on my findings of fact and conclusions of law, I deny Respondent's motion to dismiss.

The Regional Director for Region 16 on May 28, 1993, issued another order directing hearing, order consolidating cases and notice of hearing, which incorporated the Union's objections to conduct affecting the results of the election. At the commencement of this hearing, the Union withdrew its election objections and the issue it is pursuing in these proceedings is the right of 17 laid-off employees to vote in the decertification election in Case 16-RM-723 conducted on October 30. These votes are determinative of the outcome of the election that has a current tally of 91 votes for continued representation by the Union and 94 votes against continued representation by the Union.

The principal issue in Case 16-RM-723 is whether certain laid-off employees had the right to vote in the election. Evidence concerning 13 of these voters, all of whom were laid off on October 23, was presented at hearing. The Union, on brief, only argues the challenges to the ballots cast by the following laid-off employees should be counted: McCullough, Smith, Carrington, Dennis, Zellers, Reyna, Lum, Richardson, Boyd, Freeman, Hill, and Woodfork. The Union notes no evidence was presented on the ballots cast by Wooten, Zalesky, Tubbs, and Nelson. I conclude there is no basis to determine they had a reasonable expectation to return to work in the near and foreseeable future or other basis to find eligibility to vote and I sustain the objection to their ballots. White testified he did not expect to return to work when he was laid off by Respondent on October 23, thus I find his ballot should not be counted for he was not eligible to vote.

Respondent's timely filed answers to the complaints, as amended at hearing, admit certain allegations, deny others, and deny any wrongdoing. Respondent also alleges certain affirmative defenses, including estoppel, accord and satisfaction, waiver, payment, release, fraud, and failure of administrative prerequisite.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

## FINDINGS OF FACT AND CONCLUSIONS

### I. JURISDICTION

Respondent's answers to the complaints admits, and I find, they meet one of the Board's jurisdictional standards and that the Union is a statutory labor organization.

### II. THE FACTS

#### A. Background

Respondent and the Union had a long-term collective-bargaining relationship. Respondent manufactures drill bits, principally for the oil industry. Respondent decided to relocate and update its facility. The relocation plans were publicly announced during the week of June 24, 1991, in the *Houston Business Journal*.<sup>2</sup> This announcement indicates Respondent was only considering moving its Polk Street manufacturing plant and was "considering several sites for a new facility." The Polk Street plant was located in east Houston and Respondent eventually determined to locate the new plant in the Woodlands, Texas, a municipality about 35 miles from Houston.

At one time, Respondent employed about 4000 hourly employees at the 100-acre Polk Street facility,<sup>3</sup> but over the years reduced the employee complement substantially. By 1991, Respondent employed about 800 people at Polk Street. In early 1992, Respondent had only 261 employees in the bargaining unit represented by the Union. Historically, some hourly employees were laid off and recalled as the demand for drill bits rose and fell. It is undisputed the demand for Respondent's product was cyclical, dependent on national and international oil drilling activity.

#### B. Negotiations

On May 23, 1991, the Union informed Respondent it wished to commence negotiations on "the decision on whether or not to move the current operations located at . . . Polk Avenue; and/or the effects of such a move on the bargaining unit." Combined negotiations commenced<sup>4</sup> for a successor collective-bargaining agreement and on the terms and conditions of the contemplated move by Respondent. Respondent had announced its plans to relocate the plant to the Woodlands during these negotiations. Respondent also informed the Union "they were going to have a permanent downsizing."

In the course of these negotiations, the Union sought to have Respondent select unit members for transfer based on a combination of factors, including qualifications and senior-

<sup>2</sup> Earlier, in May 1991, Respondent issued a press release announcing its intent to restructure "Hughes' domestic manufacturing operations." There was no clear evidence the Union or Respondent's employees were informed this plan included additional substantial downsizing of the Polk Avenue facility.

<sup>3</sup> Three different unions represented the hourly employees at Polk Street.

<sup>4</sup> In 1992 Respondent and the Union engaged in negotiations for a new collective-bargaining agreement. The then current collective-bargaining agreement had an expiration date of April 5.

ity. Respondent steadfastly rejected the Union's proposals and stated they wanted "the right to select people based on the people we felt were best suited to perform the operations going forward to the Woodlands."

Respondent's negotiating committee was generally comprised of Charles Hoose, manager of personnel and labor relations, John Cochrun, vice president of human resources for Hughes Christensen Company, and Robert Lyle, who worked for Hoose as Respondent's labor relations generalist. The union negotiating committee was comprised of Fred Mabry, a union staff representative, and employees Swan, Bobino, and Richardson. A. C. McQuieter,<sup>5</sup> the local president, who had been laid off in late 1991, prior to the commencement of negotiations, on occasion, also attended these collective-bargaining sessions. In addition to being on the negotiating committee, Swan, Bobino, and Richardson all acted on behalf of the unit in grievances. Bobino was grievance chairman, Richardson was the first-shift grievance committeeman, and Swan was the third-shift committeeman.

During negotiations, the Union frequently sought clarification of the Respondent's stated method of selecting the employees who would be transferred. For example, an undated union proposal stated:

The Union finds in reviewing its notes with respect to the selection factors, that the Company has often said it "was not out to screw anybody" in the selection process. However, the Company has yet to define how it is going to apply factors such as *attitude, ability to learn new jobs and take on additional responsibility* and the term *and the like* which the Union would take to include (from earlier discussions) Work History, and Productivity.

Respondent also maintained in its proposals a severance package that included an offer of 1 week's pay for each full year of continuous service with a maximum of 12 weeks' pay. This enhanced severance package was available only if the laid-off employee signed the Respondent's waiver and release agreement.<sup>6</sup> If the employee did not sign the waiver

<sup>5</sup>McQuieter was named as a discriminatee in the charge filed by the Union but the Regional Director dismissed the allegation. In fact the Regional Director dismissed all the 8(a)(3) allegations but the Board's Office of Appeals overruled him respecting the 8(a)(3) and (1) allegations under consideration in this proceeding.

<sup>6</sup>The waiver and release agreement provides, in part:

By this "waiver and Release Agreement, I . . . waive and release all rights and claims, charges and demands and causes of action against Hughes Tool Company ("Employer"), its parent, subsidiaries, affiliates, officers, directors, employees and agents of any kind or character . . . including those arising under the Age Discrimination in Employment Act of 1967, as amended, and any other state or federal statute, regulation of the common law (contract, tort or other), which relate to my employment or termination of employment with the Employer, including any alleged discriminatory employment practices. I understand that this Agreement shall not serve to waive or release any rights or claims that may arise after the date this Agreement is executed.

Also, in return for this consideration, I agree and acknowledge that the Employer has no obligation to reemploy, rehire or recall me.

I acknowledge that the Employer has advised me to consult with an attorney prior to executing this agreement.

and release agreement, they would receive only 2 weeks' severance pay. The Union never agreed to the proposed waiver and release program.

Respondent and the Union were unable to negotiate a successor agreement or agree to a method of selecting which employees would be chosen for transfer to the Woodlands. Respondent did not want to use seniority because most if not all the employees had 20 or more years' service. Also, Respondent did not want to base selection on qualifications because around 1991, the Union filed grievances concerning employees selected for layoff based on qualifications.<sup>7</sup>

Respondent presented its last and final offer to the Union on or about April 3, including the proposal for an extended severance package with the waiver and release document, containing the waiver of recall rights. The Union's membership rejected the last and final offer on April 5. Respondent informed the Union by letter dated April 7, that it will implement on April 8 the selection process contained in its last proposal. This selection process was based on Respondent's determination of which employees were "best suited" for transfer and implementation of the waiver and release program. Respondent also issued a memorandum to all production employees at Polk Street,<sup>8</sup> dated April 6, informing the employees the collective-bargaining agreement had expired but Respondent would continue to operate without a contract and the employees "will continue to receive the wages and benefits to which you are accustomed. Normal operations will continue and if you have any problems or questions feel free to ask your supervisor."

Respondent, by Cochrun, issued a position statement dated June 18, 1992. The statement provides, as here pertinent:

1. . . . we have been informed that the Union was not aware of the Company's intention to staff production jobs with Polk Street employees . . . for purposes of clarification . . . initial staffing of production jobs at the Woodlands will be by transfer of Polk Street personnel.

I acknowledge that I have carefully read this Agreement, that I have had the opportunity to review it with my attorney, that I fully understand the provisions and their final and binding effect . . . and that I am signing this Agreement knowingly and voluntarily.

The agreement also granted the employees 45 days from receipt to consider its terms and 7 days after execution to revoke it.

<sup>7</sup>Mabry testified on cross-examination as follows:

Q. Now, if qualifications had been adopted as the criteria, the Union could have filed grievance if they disagreed with the Company's evaluation of qualifications, couldn't they?

A. Yes.

Q. In fact, the Company and the Union had had a rather important grievance and arbitration hearing, hadn't they, about a year earlier relating to the qualifications of people being laid-off?

A. Yes. It was in the prior year.

Q. And so that question of qualifications and whether or not an arbitrator was going to sit in second judgment was a matter of concern to both parties, wasn't it?

A. Yes. It was to the Union, anyway. . . . I think it was to the Company. They had expressed in negotiations that they didn't want to have to deal with an arbitrator in their selection process.

<sup>8</sup>The parties variously referred to the facility as Polk Street or Polk Avenue.

2. As to the selection process, we do not concede to the Union's demand to apply the Polk Street seniority provisions. Instead, we continue to bargain for management's rights to select those employees based upon who is best suited for the job. As stated previously, this includes consideration of such factors as attendance, quality of work, attitude, ability to learn new jobs and take on additional responsibility, seniority, and the like. We place no weighing on any given factor, but look at the totality of circumstances of each individual.

Mabry requested further clarification of Respondent's position on June 19, including the meaning of such terms as "initial staffing," "production jobs," and "attitude" etc. Cochrun responded on June 19, that the term "initial staffing" ran from September 1 through November 1. Respondent did not anticipate any further staffing between November 1, 1992, through March 31, 1993. Further, if demand for drill bits decreases Respondent would adjust plant staffing "accordingly." Respondent did not detail its hiring plans after March 31, 1993; it did not announce its plans differed from those in the past or those to be employed between November 1, 1992, through March 31, 1993.

Respondent made another proposal dated July 15, 1992. Most of Respondent's previously described bargaining tenets were reiterated, including the waiver and release program, which included the purported waiver of recall rights. As item VII, the proposal provided: "Employees laid-off during the period September 1, 1992 through November 1, 1992 who do not sign the *Waiver and Release Agreement* will be considered for recall through June 30, 1993."

The Union had requested Respondent to join with it in requesting discretionary funds for dislocated employees. Respondent indicated its agreement to join in this request and also included reference to this agreement in the July 15 proposal, limiting its applicability "to the period 7/15/92-11/01/92." As of the date of these communications, none of the employees whose ballots are challenged had been laid off. On August 10 and 11, Respondent notified the Union of the employees selected for transfer to the Woodlands. The notices listed 136 employees.

### C. Alleged Violations of Section 8(a)(3) and (1)

The General Counsel argues Respondent did not select Richardson, Bobino, and Swan for transfer to the Woodlands because it wanted to ensure the employees at the Woodlands would not have effective union representation. The General Counsel also avers Respondent further discriminated against Bobino by denying him overtime and transferring him to a more arduous position because of his concerted protected activities as chief steward and a member of the Union's negotiating team. Respondent claims these employees were not selected for they did not meet its "best suited" criteria, and it did not otherwise discriminate against Bobino.

I conclude the General Counsel has made a prima facie case that Bobino, Swan, and Richardson were not transferred because of their protected concerted activities. As noted in *Retail Clerks Local 770 (Carl A. Palmer)*, 208 NLRB 356 (1974), in most cases, the employer's reason for discriminating will determine whether it has committed an unfair labor practice. As found in *Cagle's Inc.*, 218 NLRB 603, 615 (1975), the determinative question is whether Respondent's

refusal to transfer all the union leaders who actively dealt with it is "the result of a desire on its part to create 'a leadership vacuum in the bargaining unit' (*Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1974)), or was the refusal mere happenstance unrelated to union activities?" If it is found to be the former, then it is discrimination motivated by an antiunion purpose with the near and foreseeable effect of discouraging union membership.

Under *NLRB v. Radio Officers*, 347 U.S. 17 (1954); and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); it is unnecessary to demonstrate actual encouragement or discouragement of union membership. The Board can draw reasonable inferences from the evidence and if Respondent's actions could naturally or foreseeable result in an adverse effect on employee Section 7 rights, actual encouragement or discouragement can be inferred.<sup>9</sup> When an employer's conduct has only a "comparatively slight adverse effect on employee rights, if the employer presents evidence of legitimate and substantial business reasons, antiunion motivation must be proven by the General Counsel to support a finding of a violation of Section 8(a)(3) of the Act." See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1991), *cert. denied* 455 U.S. 989 (1982).

As the Board held in *American Packing Corp.*, 311 NLRB 482 fn. 1 (1992):

We disavow the implication in the judge's analysis that only conduct that is alleged to violate the Act may be used to establish union animus. The law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or the underlying character of, other conduct alleged to violate the Act. *Gencorp*, 294 NLRB 717 fn. 1 (1989).

#### 1. Allegations concerning Bobino

In addition to alleging Respondent refused to transfer Bobino because of his advocacy for the Union, the complaint claims he was denied the opportunity to work overtime and transferred to more arduous work on the box line for the same reason. Respondent avers it had legitimate business reasons for its actions. When, as here, both lawful and unlawful reason are advanced to explain an employer's actions, the analysis of the evidence is to be made in accordance with *Wright Line*, *supra*; approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In *Wright Line*, the General Counsel bears the burden of proving by a preponderance of the evidence the affected employee was engaged in protected activity; the employer knew of the activity; and, there was union animus that was a motivating factor in the employer's adverse action or inaction. Once the General Counsel establishes a prima facie case, the

<sup>9</sup>The Supreme Court announced in *Radio Officers*, *supra* at 44-45,

[S]pecific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of Section 8(a)(3) . . . . [A]n employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.

employer must prove it would have engaged in the same conduct even absent the protected activity. The use of the burden shifting analysis has been applied to cases alleging discriminatory refusal to hire. See *Sewell-Allen Big Star No. 52*, 280 NLRB 1244, 1254 (1986). I conclude this analysis is also appropriate in cases involving the refusal to transfer employees.

It is clear Respondent knew of Bobino's union membership and his activities as chief shop steward and a member of the Union's negotiating committee. Respondent also knew of Richardson's and Swan's similar protected activities. Respondent claims it transferred other union activists including union officers. There is no claim the officers transferred by Respondent ever engaged in active negotiations with Respondent by processing grievances, in bargaining for a new collective-bargaining agreement, or in bargaining for the terms and conditions concerning the relocation of the plant to the Woodlands.

The selection for layoffs of all those activists who negotiated with Respondent and engaged in grievance resolution tentatively establishes unlawful motive. The circumstances found in this case require a drawing of the reasonable inference a motivating factor in the layoff of the three alleged discriminatees was their union activism. *Matthews Industries*, 312 NLRB 75 (1993).<sup>10</sup> Respondent, therefore, has the opportunity to refute this finding or establish it would have selected the three alleged discriminatees for layoff despite their union activities. *Steves Sash & Door Co. v. NLRB*, 401 F.2d 676 (5th Cir. 1968); *NLRB v. W. C. Nabors, Co.*, 196 F.2d 272 (5th Cir. 1952).<sup>11</sup>

Bobino was transferred to the box line from his regular position on the assembly department flow line right after the union membership rejected Respondent's offer of April 3. Harlan Brooks, the employee who was working on the box line at the time, was transferred to Bobino's position on the flow line about 1 week later. Brooks was also selected for and offered transfer to the Woodlands along with every other member of the assembly department flow line day shift, with the already noted exception of Bobino.

<sup>10</sup>The Board held at 76:

We find that a reasonable inference to be drawn from the circumstances in this case is that the Respondent was aware of the four discriminatees' support of the Union when they were discharged, and that the discharges were motivated by that support. Although Respondent chose not to present any evidence in the *Matthews* case, this choice did not preclude the drawing of reasonable inferences in alleged discrimination cases, it merely reflects the inherent dangers of a failure to rebut any such inferences.

<sup>11</sup>In the *Nabors* case, the court found at 275:

The Board admits that economic conditions in April 1948, justified a reduction in respondent's working force, but other circumstances surrounding the discharges strongly support the Board's findings that they were discriminatory in nature. . . . Although the evidence is in some respects circumstantial and contradictory, considered in the light of all the circumstances the proof makes a strong case against respondent. Even though the economic conditions did necessitate a reduction in Respondent's employees, the Board's conclusion that those to be discharged were discriminatorily selected is reasonable if not inescapable, when it is considered that 23 of the 26 discharged employees were union men . . . .

I find there is a strong analogy in this case in which all three of the union representatives on the bargaining committee, who were also all the union grievance committeemen, were selected for layoff.

Respondent argues Bobino, as well as Richardson and Swan, underwent an impartial appraisal during the selection process. Respondent also notes all the employees under consideration for transfer to the Woodlands had more than 20 years' experience and all were acceptable employees. Thus, any claim that employees with less seniority who were selected for transfer over Bobino and the other active union representatives indicates less experience or ability and is not demonstrative of antiunion animus.

Hoose, who chaired the selection committee,<sup>12</sup> testified the committee was unanimous Bobino should not be selected for transfer.<sup>13</sup> The committee commenced the selection process about August 1. The committee reviewed all the employees by department. Respondent informed the committee how many employees would be needed to staff specific departments at the Woodlands and they would select that number of employees to fill those positions. Alternates were also selected in the event chosen employees refused transfer or decided to retire.

Hoose described the selection process as one without guidelines. The committee members discussed each individual, evaluated them:

based on their ability to primarily fit within that framework of what we were moving to. And it encompassed their attitude or willingness to change. There were a number of factors. It wasn't limited to a list or a checklist to say, Okay. . . . We looked at kind of how they interacted with the group. We looked at their performance over a period of years to fit into the new concept. We also looked at it from a technical standpoint, what their technical skills were. . . . Versatility of the number of operations was also one of the factors considered in looking at the totality of the employee.

Hoose also claimed Respondent did not use the team concept at Polk Street. Hoose admitted he lacked knowledge concerning the operations and personnel.<sup>14</sup> This claim is credibly refuted by Bobino. Bobino testified without direct or convincing refutation from anyone knowledgeable about the operation of the assembly line:

<sup>12</sup>Hoose described the selection committee as follows:

The selection committee was a group put together. We had the task of reducing our work force, as Mr. Smither mentioned earlier, from 216 employees down to 150 employees going to our new facility. The selection committee was a committee put together representing a group of supervisors, managers, the new plant manager for our facility, myself, Mr. Lyle.

The individuals on the selection committee were Larry Christy, Bob Gunnels, Virgil Herzog, Hoose, Dean Hunt, Bud Jones, Robert Lyle, Ernest McDonald, Jeff Meyer, A. Q. Ramon, and Terry Wheeler.

<sup>13</sup>Hoose also admitted the selection committee used seniority on occasion, testifying:

If, again, the individuals were deemed to be—it was very—it was somewhat easy to pick the top folks to fill the jobs, maybe the top three or four or five, whatever the case may be. But when we got down to where we said people were relatively equal in our minds, then we would use a seniority date.

<sup>14</sup>On cross-examination Hoose admitted his role was that of a facilitator, he did not supervise the employees directly or "on a day-to-day basis." He failed to establish the foundations for his opinions concerning the alleged discriminatees, which impairs his credibility.

We worked as a team. . . . If you were not there, normally somebody would come over and pick up the slack for you. We worked up and down the line, and we covered for each other. If someone was away—if I was in grievances, if I was helping someone else—and it could happen to anybody—the person who was waiting for you would always go down and help you.

Otherwise if you got to—you didn't have anything to do, you would go and help the guy in front of you. So it was—we worked—we covered for each other. Because if I wasn't there, the time would come when someone else wouldn't be there.

According to Hoose, Bobino was not chosen for there was a consensus among the management team making the selections that he did not have the ability to get along with others. Respondent used this factor as one of the selection criteria for they anticipated using more of team operation at the Woodlands.<sup>15</sup>

Much of Bobino's testimony was uncontradicted and unchallenged. He appeared to be attempting to tell the truth. His *mein* did not indicate guile or evasion. Accordingly, his testimony is credited. Hoose's demeanor reflected lack of candor and forthrightness. Based on demeanor alone his testimony is not credited. Moreover, I note, in contrast to Bobino, Hoose exhibited poor recall, engaged in speculation, and was vague in his testimony concerning the selection process. Hoose also engaged in hyperbole, was unresponsive on occasion, and attempted to tailor testimony to meet Respondent's litigation theory.<sup>16</sup> He also gave inconsistent testimony and on occasion admitted making misstatements and engaging in surmise.<sup>17</sup> Accordingly, Hoose's testimony will not be credited unless it is convincingly corroborated or an admission against interest.

The individual who supervised Bobino for the past 4 or 5 years, and was his first-line supervisor for the last 2 years, Terry Wheeler, admitted Bobino was qualified on all jobs in the assembly department.<sup>18</sup> Wheeler also admitted knowing Bobino was engaged in concerted protected activity; testifying Bobino "at different times, throughout his tenure, [was] the first shift grievance man and chairman of the grievance committee, and president of the union. And we had sessions where we were [on] opposite sides in grievances, yes."

Of the nine day-shift employees assigned to the assembly line, eight were offered transfer to the Woodlands. All of the

<sup>15</sup> Hoose testified: "because of the consensus of the selection committee, being Mr. Bobino would not have fit into the new team concept at the new facility."

<sup>16</sup> For example, he had to be asked about five times if Respondent ever withdrew its final proposal, and only after being informed the question could be answered with a yes or a no did he respond.

<sup>17</sup> For example, when asked about his testimony concerning certain marks on a chart used in the selection process, Hoose surmised the notation indicated the entire committee agreed Bobino was not a team player. On cross-examination, he testified he "was surmising, that wasn't testimony. In fact, I indicated I didn't know what it was for."

<sup>18</sup> Wheeler did not know if any of the other supervisors on the selection committee had directly supervised Bobino or had any first-hand knowledge of his skills and abilities as an employee. Only Christie claimed he worked in the same area as Bobino at one time. Christie did not appear and testify. His absence was unexplained; Respondent admitted he was a supervisor as defined in the Act.

flow line day-shift employees were offered transfer except Bobino, and two refused the offer. Wheeler decided to recommend against Bobino's transfer to the Woodlands because:

Mr. Bobino is not what I consider a team player. I had had complaints in the past from other members in the assembly group that he wasn't doing his job, that he didn't—you know, he complained about them working too hard. And in my opinion, Mr. Bobino—Mr. Bobino was a, just a mediocre employee. You know, he did just what he had to do to do his job and not get in trouble.

When asked to specify which members of the assembly group complained, Wheeler could name only one,<sup>19</sup> Glen Thomas Caywood. Wheeler testified:

On more than one occasion, Mr. Caywood, in the—if I may explain—in the flow line, Mr. Caywood was the first operator in the flow line. He worked the precheck area and Mr. Bobino, at one time, worked in the nozzle area which was directly behind the precheck.

And I walked by one day and told Mr. Caywood, just—you know, casually, I said—you know, now let's get these bits moving down the line. And he replied back to me, you know, that Bobino had just got on to him because he was pushing too many bits down.

And I told him he didn't work for Mr. Bobino, he worked for me—you know, and that he needed to keep the bits moving down the line.

Wheeler admittedly did not raise the matter with Bobino or give Bobino an opportunity to dispute the claims of Caywood. The failure of Respondent to inform Bobino or any of the other alleged discriminatees why it was dissatisfied with their performances further supports the finding of proscribed motive. *Robin Transportation Ltd.*, 310 NLRB 411 (1993).

Caywood testified he talked to Wheeler a couple of times in 1992, "about the time of October, around September." Since the selection process began and was completed in August and the assembly department was the first subjected to the process; the evidence establishes Wheeler spoke to Caywood after the decision to not transfer Bobino. Wheeler recalled the conversations occurred in the later part of 1991. Bobino's testimony that he was informed he had been selected for layoff shortly after August 10<sup>20</sup> was unrefuted.

<sup>19</sup> Wheeler and Respondent failed to explain the patent hyperbole of Wheeler's testimony. Only one member of the assembly team was identified as complaining, not "members" as claimed by Wheeler. No other supervisor had a direct complaint about Bobino. (Emphasis added.)

<sup>20</sup> Respondent had prepared a list of employees titled "Unselected, August 6, 1992." The existence of this list corroborates Bobino's testimony. Interestingly, Bobino's name did not appear on this list and the absence of his name could not be explained by Respondent. At later dates, individuals included in this list were selected for transfer to the Woodlands. Some of the named employees were selected as alternates to be transferred in the event some employees selected for transfer refused or chose to retire. Employees were not offered transfers to the Woodlands until "the week of August 10."

When Bobino asked Hoose why he was not selected, Hoose did not give him a direct answer. This failure to explicate Respondent's decision in response to Bobino's question is further evidence of proscribed motive.

Caywood also estimated the time period of his complaints about Bobino were about the time Bobino was absent from work due to his work-related injury. It was also when Bobino was assigned to the boxing line so Caywood could not have observed him. While working on the box line, Bobino was injured and was off from work from about the end of August until his layoff. He was released by his physician to return to work in May 1993. There was no evidence how or if Bobino returned to work after the injury. Thus Caywood's claim he complained about Bobino occurred at a time when there was no showing that Bobino was at work. Respondent does not maintain and no party alleges Bobino was denied transfer to the Woodlands because of his injury.

Caywood told Wheeler that Bobino advised him he needed to slow down<sup>21</sup> or Bobino was going to "inflict physical violence" on Caywood. Caywood understood Bobino was joking and also testified Wheeler knew Bobino was joking.<sup>22</sup> I find Caywood's admission that he knew Bobino was joking and related this to Wheeler at a time which Caywood recalls is probably after the decision to not transfer Bobino does not support Respondent's reasons for its decision to transfer all the day-shift flow line employees to the Woodlands except Bobino.

Further discrediting Caywood's allegations concerning Bobino is his admission he did not know Bobino was injured in August 1992 and did not notice his absence. Caywood failed to resolve the conflict of how Bobino could make daily threats and be absent without his noticing any surcease from such threats. These admissions, joined with Caywood's testimony he talked to Wheeler about Bobino in September or October after the selections for transfer in the assembly department had been made, add further reasons to find Respondent's reasons for not transferring Bobino are pretexts.

I also find Respondent's assertion that Bobino was not a team player to be pretext. Besides the lack of credibility on

This list contained 108 names and 109 individuals, with the addition of Bobino, were selected for layoff on or about October 23.

According to Hoose's unquestioned testimony, "[t]he selection committee started the 1st of August, and we were meeting and addressing that issue from, I believe it was the 1st of August through the 8th, included, I believe, on the 9th, and then made announcements on the 10th."

<sup>21</sup> Bobino credibly denied telling Caywood to slow down he was working to fast.

<sup>22</sup> Caywood testified:

Q. All right. And you are telling Mr. Wheeler that Mr. Bobino has advised you, has told you, has instructed you, whatever term you want to use, that you need to slow down, or he is going to inflict physical violence on you. Is that correct?

A. Yes, sir. That is—the physical violence was more or less joking.

Q. Did you tell Mr. Wheeler he was joking?

A. Well, he knew it. Yes.

Q. How do you know what Mr. Wheeler knew, sir?

A. Well, I will rephrase that. Yes, I told him.

Q. You said, Bobino was joking around with me again, and he has threatened to send me down the road, break my arm, if I don't slow down. Is that—

A. Yes, sir.

the part of Respondent's witnesses,<sup>23</sup> their testimony was inconsistent. For example, Bobino was described as a reticent employee and not a team player. Yet Wheeler taught Bobino how to label boxes at Bobino's request, which relieved Wheeler from performing that task. Asking for more work and asking to learn all the jobs in the assembly department, which Bobino admittedly did, dispels any visions of a reticent employee who was not a team player. Respondent's resort to pretexts raises the inference it failed to transfer Bobino for a proscribed reason.

Respondent also claims to have relied on the complaints of Caywood that Bobino would disappear "for lengths of time, away from the job." Caywood admitted on occasion Bobino would go to the restroom, an activity Caywood also engaged in on occasion. There was no showing by Respondent that Caywood would know when Bobino was performing any of his duties as chief steward or a member of the Union's negotiating committee. I find Caywood is not a credible witness because he appeared to be engaging in dissimulation and hyperbole. While his appearance was sufficient to discredit his testimony, I also note he volunteered information when he perceived it was favorable to his Employer's position, and on one or more occasions, when he thought an answer would hurt Respondent's cause, he was unresponsive.<sup>24</sup> Interestingly, Caywood admitted he rarely helped other employees on the flow line, in contrast to Bobino who testified, without direct contradiction, that he helped out whenever the need arose.<sup>25</sup> Thus, the record demonstrates Caywood was not a team player and Bobino was a team player. Respondent never explained why it chose to transfer Caywood, an employee who admittedly was not a team player while refusing to transfer Bobino, whose unrefuted testimony establishes he was a team player.

Respondent never disciplined Bobino for his alleged failures. There is no evidence Respondent even mentioned to Bobino he had any work deficiencies. Some prior layoffs included, in addition to seniority, qualifications as a consideration in the selection of the employees laid off. Bobino as well as Richardson and Swan was found to be sufficiently qualified to be retained during prior reductions from 4000 to about 250 employees. Only during this last round of reductions were all the most active union representatives deemed "not suited" and selected for layoff rather than transfer. Mabry's assessment "there were people transferred who had less skills than Mr. Bobino" was not credibly refuted by Respondent.<sup>26</sup>

Respondent avers it needed highly skilled and cooperative employees, "team players," in the new plant. The two employees who did not work on the day shift in assembly cho-

<sup>23</sup> Based in his demeanor, I find Wheeler was not credible. He did not appear to be testifying with candor. Wheeler's expression had the appearance of dissimulation and he seemed reticent to admit Bobino had any good attributes.

<sup>24</sup> See for example Caywood's testimony concerning the frequency of his conversations with Bobino, which was struck as unresponsive.

<sup>25</sup> Caywood admitted he observed employees helping one another from time to time, although he personally did it rarely.

<sup>26</sup> Mabry also testified:

There were no documents dealing with the repair department. And the discussions were that Mr. Swan is equally qualified to anybody that went or perhaps better than some. I don't have any independent verification of that.

sen over Bobino were Gamez, a toolcrib attendant, and Spiller, a painter. Gamez worked on the assembly line only as overtime. The frequency of his overtime was not specifically provided by Respondent. Spiller rarely worked on the assembly line “on overtime,” according to Bobino’s unrefuted testimony. Bobino testified he never saw Gamez “run the complete flow line. I would have to say I was more qualified than him, and Mr. Spiller—definitely.”<sup>27</sup> Hoose and Caywood did not clearly explain why Gamez and Spiller were selected for transfer on the assembly line; what attributes they possess that commended them for transfer while Bobino was not selected.

Also not clearly explained was Respondent’s admitted re-employment of laid-off employees at the Woodlands. Respondent telephoned one or more employees who had been laid off from Polk Street and had signed the release and waiver agreement. Admittedly, Respondent did not request any of the alleged discriminatees seek employment at the Woodlands. New hires, rather than experienced employees, were also added to the Woodlands employee complement in the assembly department as well as in other positions at the Woodlands, which further dispels any claim of a need for only highly qualified and experienced employees.

Another factor indicating unlawful motivation is the timing of Bobino’s transfer to the box line on or about the day after the union members rejected Respondent’s last offer. Respondent argues Bobino asked to be trained in all the jobs in the assembly shop. Bobino made this request in the summer of 1991.<sup>28</sup> There was no explanation why Respondent waited about 1 year before meeting this request or why it was met right after the union membership rejected Respondent’s last and final offer. Respondent also gave inconsistent positions on the transfer. In the pleadings, Respondent claimed the transfer was temporary while Wheeler referred to the April transfer as the second assignment to the box line which was a permanent assignment. These shifting positions are also indicative of proscribed motive.

The box line was a more arduous position. Bobino testified he found the flow line “a lot easier.”<sup>29</sup> This testimony

<sup>27</sup> In his affidavit, Bobino opined Gamez was more senior than he and was as qualified. On reflection, Bobino changed his opinion “simply because I have not seen him work all of the flow line. The other people have worked the complete flow line. Mr. Gamez worked strictly overtime in just two areas.” Bobino also candidly admitted all the other flow line employees, except Gamez and Spiller, were as qualified as he on the flow line. Considering Bobino’s testimony and demeanor, this alteration in his opinion of Gamez does not adversely affect his credibility.

<sup>28</sup> Wheeler testified Bobino had been trained on the box line prior to his permanent transfer to the box line. He did not explain when this training occurred, if at all. Respondent argues on brief Bobino asked to be transferred to the box line, in contradiction to Wheeler’s testimony he asked to be trained on the box line and had been trained prior to his transfer in April 1992. Respondent never resolved this conflict in positions. For the previously stated reasons, I credit the testimony of Bobino and consider the inconsistencies in Respondent’s positions probative of pretext, thus probative of unlawful motive.

<sup>29</sup> Bobino explained:

Depending on where you are, you—it is not as heavy; it is not as awkward. You have a crane. If you are on a grease line, for example, you have a crane. At a grease station, you have a crane to pick them up, and you are working on a table; whereas on the flow line, you are working on a rail with rollers. . . . I

was never directly refuted and there is no compelling basis to draw an inference this testimony is inaccurate or not credible. Wheeler reluctantly admitted there were some difficult operations on the box line that did not occur on the flow line.

Also unrefuted was Bobino’s testimony after he completed other training assignments, he “was just automatically put back [on the flow line] after they thought I had received sufficient training.” There was no explanation why Respondent varied in this practice when it assigned Bobino to the box line. There was no claim he was not fully trained at the box line. Wheeler also did not claim that Bobino’s comment concerning letting him take care of the box line led Respondent to alter the routine. The timing of the transfer, joined with the pretexts found above, leads me to conclude Bobino was transferred to the box line in preparation for denying him transfer to the Woodlands.

Respondent notes Bobino did not complain about his assignment to the box line and told Wheeler, “Boss, you just leave me here, and I will take care of the boxing.” Respondent claims these comments by Bobino demonstrate there was no unlawful motive in its assignment of Bobino to the box line. Bobino’s comments do not establish Respondent’s motives, rather, they help establish refutation to Respondent’s claim Bobino was a reticent employee. Bobino willingly performed tasks that admittedly included heavy, difficult lifting. He did not complain about the assignment, rather he asked for additional tasks to aid the department in more efficient operations, including preparing labels. Respondent did not refute or explain this evidence. Accordingly, the credited evidence of record demonstrates Bobino was a willing, uncomplaining worker, a team player anxious to please his employer, learn additional skills, and volunteer for additional tasks.

The General Counsel also avers Respondent discriminatorily refused to grant Bobino’s request for overtime. Near the end of July or beginning of August, Bobino asked co-worker, Anthony “Red” Johnson for overtime assisting Johnson in painting. According to Bobino, he had asked Johnson if he could get him on the painting crew for overtime. Johnson replied, “If a vacancy come up, I will turn your name in.” Johnson in early August informed Bobino “he had turned my name in, and Supervisor Schott had turned me down and said he didn’t want me. . . . Find somebody else. He didn’t want me [Bobino] to work.”

Johnson was a carpenter and painter who, during 1992, was painting machinery destined to be transferred to the Woodlands. Johnson had a regular crew that assisted him while he was working overtime on week ends. On some weekends, Respondent also assigned additional personnel to

mean, not the flow line—the box line. You are working on a rail that has rollers. And you have to be careful, because you have to stoop. You have to pick them up, depending on the size—manually pick them up, because there is—we call it a little rod that sticks up where the part of the bit that has—we call it the shank. But the part where the thread sets on this for the guy to paint it would lift it up and then flip it up over—and be careful it doesn’t slide on you.

And then everything is stooping. You are bending, stooping, pulling, and pushing on the box line. On the flow line, it is not near that strenuous, because the table is up. And depending on where you are, you might not have any strenuous work.

assist Johnson in his painting duties. Johnson testified that prior to one weekend when such additional personnel were needed, Bobino “given me his name as wanting to, you know, work that weekend, so I turned it in” to the following supervisors; “John Kelly . . . Gordon Schott, and I think Fred was in there, and maybe one other person.”

Johnson further testified:

Q. All right. So you turned Mr. Bobino’s name in. What happened after that?

A. Well, they just said they didn’t want to use him at that time.

Q. Who was saying that, sir?

A. I think Gordon Schott was talking.

Q. Okay. Did you have any occasion to report back to Mr. Bobino or anyone else what Mr. Schott had said?

A. Well, yes. I think if I remember correctly, after the weekend passed, Bobino asked me something about why he wasn’t asked that weekend or something. And I said, They said that they didn’t need you at this time—or didn’t want to use you at this time.

Q. All right. Did you—do you remember when you were speaking with Mr. Bobino and you were reporting these things to him, did you mention to Mr. Bobino who said that—We don’t need you at this time—or whatever the words were?

A. I probably did.

Q. All right. And if you probably did, whose name did you use?

A. Gordon Schott.

According to Johnson, additional employees worked that weekend, but Bobino was not one of them.<sup>30</sup> Johnson appeared to be trying to recall events accurately and based on his demeanor his testimony is credited. I also note he is a current employee testifying against his Employer’s interests, which is another reason to credit his testimony. He corroborated Bobino, and such corroboration buttresses the credibility of both witnesses. Schott did not refute Johnson’s testimony. Respondent admitted Schott is maintenance supervisor. His absence was unexplained and an adverse inference is drawn from his unexplained absence. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988).

Respondent never claimed Bobino was incapable of performing the overtime work. In fact his unrefuted testimony is when he worked overtime on the flow line from April to August, he was assigned to work the paint station, which was a higher classification. Respondent failed to explain why this supposedly unsatisfactory employee was assigned to a higher classification during overtime on the flow line, but could not assist a painter for additional overtime. There was no claim

<sup>30</sup> Johnson also testified other employees requested him to seek overtime for them and they were not always assigned such overtime. There was, however, no showing supervisors informed Johnson they did not want to use that particular employee at the time; to get someone else. Johnson’s testimony was confused concerning whether additional employees worked overtime that weekend, attributable in part to the nature of some leading questions. I find, however, Johnson clearly testified Respondent needed additional overtime workers the weekend in question and “They had some additional people” in addition to his regular two helpers that were not part of his customary overtime crew.

the other employees assigned to assist Johnson were more qualified. In fact, Respondent failed to adduce any evidence concerning their failure to assign Bobino the requested overtime in late July or early August.

Respondent, who possessed the records, failed to demonstrate they did not need additional employees to work overtime during late July and/or early August. Respondent also failed to establish the criteria it used to select employees for overtime work with Johnson. The testimony of Johnson, as corroborated by Bobino, requires the inference Respondent’s actions were based, at least in part, on discriminatory motives.

In sum, the credited evidence demonstrates Respondent chose not to transfer Bobino to the Woodlands, to deny Bobino’s request to work overtime, and to transfer him to the box line for proscribed reasons in violation of Section 8(a)(3) and (1) of the Act. The resort to pretext, shifting reasons, adverse inferences, timing, and unexplained and unusual behaviors require the conclusion Respondent’s reasons for these actions were unlawful. I further conclude Respondent has failed to convincingly establish Bobino would not have been selected for transfer to the Woodlands, would have been assigned to the box line permanently a few days after the union members rejected Respondent’s last and final offer, and would have been denied overtime working with Johnson even in the absence of his concerted protected activity.

## 2. Allegations concerning Swan

Swan worked for Respondent more than 25 years and in 1992 he was a machine tool repairman. Swan also was the third-shift “grievance man” and was on the Union’s negotiating committee. Swan was the only repairman working on the third shift. Swan selected the third shift. He was supervised, since 1988, by Burley D. Jones, an admitted supervisor, as well as by Jones’ assistants. Jones was the manager of facilities and maintenance.

Jones was on the selection committee for the transfers to the Woodlands; of the 14 repairman at Polk Street, only 5 were transferred to the Woodlands. According to Jones, Swan was not as technically capable as the repairmen selected for transfer. Jones admitted his evaluation of Swan was based on the information of others, including Fred Orum and Gordon Schott, neither of whom appeared and testified. Their absences were unexplained, warranting the drawing of an adverse inference. *Property Resources Corp. v. NLRB*, supra.

Jones described Swan’s duties as follows:

Mr. Swan was on third shift, he was the only mechanic as far as on third shift, so yes he did have a plant as far as on to cover. So a lot of his duties did not get into the depth that they did as far as on first shift because with him being the only one as far as on the third. He addressed the job and he was instructed, either by me or through one of my supervisors.

Basically to work with production and make a determination as far as on through them, which ones set the priority. That is where he should have been concentrating his efforts towards.

The reasons Jones gave for his decision to not select Swan for transfer to the Woodlands were based on Swan’s per-

formance in rebuilding two machines for sale or use at Respondent's foreign facilities. There were no criticisms of his ability to repair machines in order to maintain production or to perform his other normal duties. Respondent did not claim his regular job duties would change to include the rebuilding of machines if he was transferred to the Woodlands. Swan was given an "A" for attitude. Jones was not present during much of the time Swan was engaged in the rebuilding of these machines but opined he took much too long on these projects.

Admittedly, Swan was engaged in representing the Union during collective bargaining at the same time he was assigned to rebuild machinery. There was no evidence whether these union activities impacted on his performance. There was no evidence of the specific nature of the work Swan was performing on these projects; whether he had available assistance when needed to lift heavy parts. There was no evidence when these machines were rebuilt; during his shift or as overtime work only. If these assignments were to be completed during regular working hours, then there was no showing how much time Swan's regular duties impinged on these rebuilding tasks. Respondent did not attempt to show it investigated the circumstances surrounding the time it took Swan to perform these duties. Because his other duties for Respondent, his working alone without direct supervision and union duties could explain the time it took to overhaul the machines, I conclude Respondent failed to credibly establish its claim Swan was a slow, hence less technically competent, employee.

Respondent permitted Swan to work alone on the third shift; relying on him to maintain production, including repairing broken machinery, without supervision and without assistance. This reliance on his skills during the third shift is not consistent with the assessment he is not technically competent. Of the five repair persons selected for transfer to the Woodlands, two had more seniority and three had less seniority than Swan.

Jones testified Swan regarded himself as less experienced than others during conversations concerning overtime assignments. Jones also admitted he understood Swan was speaking as the employees representative when he inquired if more experienced repairmen would be assisting "less experienced" repairmen. Jones recalled Swan using the term "us less experienced repairmen." The context of the conversation, however, was understood to be when Swan was speaking on behalf of others.

Jones was not a convincing witness. When asked questions that he considered antithetical to Respondent's interests, he was unresponsive. On cross-examination, he exhibited less precise recall. It was not until cross-examination that he admitted he lacked personal knowledge concerning Swan's technical skills and speed in performing his job. When he compared Swan's performance to another employee's in rebuilding similar machines, he did not inquire if there was a major difference in their machines' conditions or other exigencies that would require Swan to expend substantially more time in performing the rebuild. Further, based solely on demeanor, I conclude Jones is not a credible witness. He did not appear to be attempting to answer the questions fully and candidly. He seemed to be attempting to tailor his testimony to meet Respondent's litigation theories.

Respondent failed to convincingly explain why Swan was never informed of his alleged deficiencies. Swan was a long-term employee entrusted with the repair and maintenance of Respondent's machinery during the third shift without supervision or assistance without any demonstrated deficiency in his regular work duties. Not until Respondent was preparing to move to the Woodlands did Swan officially become less technically competent than coworkers who were subjected to supervision and assistance during their workdays.<sup>31</sup> There were no records indicating Swan was ever counseled or disciplined for lack of technical skills or being slow.

Respondent did not claim Swan was merely a bit slower than those selected for transfer, Jones gave an example in which he claimed, under similar circumstances, Swan was twice as slow as another repairman in rebuilding a machine that cost Respondent a substantial amount of money, over \$5000. To leave this asserted deficiency, which was claimed as illustrative of Swan's failings, undisciplined and not the subject of a discussion with Swan, strains credulity. If Swan was so much less competent than coworkers, why was he not selected for layoff previously, when competence was a consideration, along with seniority? This lack of any action by Respondent over the years indicates the reasons given for the failure to select Swan for transfer to the Woodlands were pretexts. This finding is buttressed by Respondent's failure to have any of Swan's direct supervisors who were knowledgeable about his skills and abilities testify.

I conclude Respondent's resort to pretext, the failure to present credible evidence of firsthand knowledge concerning any of Swan's alleged deficiencies, the inconsistencies in Jones' testimony, the failure to inform Swan of any claimed inadequacies on the job, and the selection of Swan along with the other active union negotiating team members and stewards require the conclusion he was laid off for proscribed reasons in violation of Section 8(a)(3) and (1) of the Act. I find Respondent was motivated, in part, by Swan's protected concerted activities. *Cagel's Inc.*, supra. Respondent has failed to convincingly demonstrate by credible evi-

<sup>31</sup> Respondent also claimed Swan was not given a foreign assignment, which demonstrated a long held determination he was less qualified than those who were selected for such assignments. All of the repairmen selected for transfer to the Woodlands has been given such assignments. Respondent failed to establish Swan was available for such assignments because of his union duties and his position as the only repairman of the third shift. Jones' opinion Swan did not have the skills or the ability he needed to take abroad was, admittedly, not based on firsthand knowledge. Further, his basis for selecting employees for these assignments was never fully explicated on the record.

For example, were availability or other work exigencies also a consideration in the selection process? Respondent failed to convincingly establish this factor was a valid criteria in the selection process. On brief, Respondent argues Swan was not selected for foreign maintenance or repair work because Jones did not believe his skills were adequate to work, at times, unsupervised, on machines in plants abroad. He, however, was considered qualified to work on machines at Polk Street unsupervised all the time. Moreover, many times the repairmen on foreign assignments were supervised. Accordingly, I find this argument is not convincing and does not establish a basis for Respondent's decision to lay off Swan. The resort to this unsubstantiated argument, while not informing Swan of any claimed job performance deficiencies, confirms that Respondent is engaging in pretext.

dence Swan would have been laid off absent his concerted protected activities as a union advocate.

### 3. Allegation concerning Richardson

Richardson has been employed by Respondent for 24 years. For the last 6 years of his employment he was a toolcrib specialist in the cone department.<sup>32</sup> Richardson was also first-shift committeeman that included handling “grievances at the initial and second steps, and I handled situations where I tried to get it settled with the shop supervision before putting it in writing.” He was also on the union negotiating committee. When Richardson was informed he was not selected for transfer by admitted supervisor and agent, Mike Danford, Danford was asked about the selection criteria. Danford replied the individuals not selected were not considered “not qualified . . . the company selected the people they felt was best suited, not the best qualified.” Richardson also noted no officer or committeeman of the Union was selected by Respondent for transfer to the Woodlands. Some members of the executive board were selected for transfer however; Dolores Bell (Evans), the recording secretary; Ray Ramirez, the treasurer; and, Bennie Noyes, the financial secretary. These executive board members were not involved in negotiations and did not handle grievances. As the General Counsel notes, the retention of some union employees does not refute their discriminatory refusal to transfer the active union advocates. *NLRB v. Nabors*, supra.

Richardson, in addition to his duties as a toolcrib specialist, operated some of Respondent’s production machinery. Respondent, by Jeff Meyer,<sup>33</sup> claimed Richardson was not selected for transfer principally because there were to be no toolcrib specialists in the cone department. While the move was in transition, however, a toolcrib specialist in the head department, Charles Lara, did some of the toolcrib work in the cone department at the Woodlands and within a week of his transfer to the Woodlands, Lara was assigned as the cone department toolcrib specialist.<sup>34</sup>

There is no evidence or claim Lara was knowledgeable of the requirements of the cone department toolcrib specialists’ duties or that there was an interchangeability between the positions. To the contrary, Meyer testified the jobs were not interchangeable “because of the different tools used in the different department. You had to have a working knowledge of the tooling in that department, so you could locate it in the cribs.” Respondent admitted Richardson possessed that knowledge and was good at his job, had a good attitude, and was a willing worker.

<sup>32</sup> Richardson described, without refutation, the duties of a toolcrib specialist, as follows:

Makes set-ups, the responsibility of keeping inventory, taking inventory on tooling, ordering tooling, scrapping out tooling; making sure the operators have the correct tooling and safety equipment to work with, basically, is most of what the job entails.

<sup>33</sup> While at Polk Street, Meyer was manager of the cone department. At the Woodlands, Meyer became manager of the “shipping and receiving and the scheduling department.”

<sup>34</sup> As noted above, Gamez, a toolcrib specialist in the assembly department, was selected for transfer by Respondent. There were no toolcrib specialists in the assembly department at the Woodlands, and none was created, in contrast to Respondent’s decision to reestablish the toolcrib specialist position during Lara’s first week at the Woodlands.

Respondent never explained why there was a need to transfer Lara. Meyer claimed Lara was knowledgeable in the head department, which had more complex tooling and it was felt he “was an extremely quick worker and a real hard worker, he had a very positive attitude, and that is one of the reasons he was chosen.” Lara did not possess Richardson’s knowledge and skills to work on the cone departments production machinery. Several other transferees did not possess Richardson’s knowledge and experience in running the variety of machines in the cone department.

Meyer claimed Richardson was slow in operating the production machinery testifying “[t]here were people that run the [Gidding & Lewis machine] as a full-time job, and that were also more technically competent on the G&L than Mr. Richardson, that were quicker on set-ups and that were more efficient because they run it on a day-to-day basis.” Richardson was also a qualified press operator who, according to Meyer, had “productivity . . . lower than expectations.” There was no claim Richardson lacked the requisite technical skills, rather, his skills needed more practice. Respondent did not disclaim a need for employees with skills to operate more than one machine, such as Richardson. In fact such talents would seem to fit in the described team player concept and Hoose claimed versatility and knowledge were criteria used in the selection process.

As is the case with all three discriminatees, where a respondent’s reasons for a layoff or discharge fail to withstand examination, the inference is raised the actual reason is an unlawful one which the respondent seeks to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *New Life Bakery*, 301 NLRB 421 (1991).

Moreover, Respondent failed to indicate how long it would take Richardson or any other employee to get up to speed. Respondent did not claim he was not able to learn to produce to “expectations.” When quizzed on cross-examination about the selection process, Meyer admitted to engaging in surmise in his testimony and having poor recall of the specific factors leading to the selections. These factors, as well as Meyer’s demeanor, lead me to not credit his testimony. Meyer was not forthright and his appearance did not reflect a clear intent to testify fully and completely, regardless of the impact of his statements on Respondent’s case. Inasmuch as there are inconsistencies in Respondent’s reasons for not transferring Richardson and it failed to credibly establish Richardson was not selected for transfer to the Woodlands for reasons unrelated to his activities as a union advocate, I find Respondent violated Section 8(a)(3) and (1) of the Act. *Cagel’s Inc.*, supra.

Generally, a company’s need to reduce its work force does not excuse it from an examination of its motives in laying off all the employees who were actively engaged in grievance processing and negotiating collective-bargaining agreements and terms and conditions of the plant relocation. Similarly, financial exigencies do not raise a wall of immunity behind which an employer is free from examination, otherwise, Section 8(a)(3) of the Act would be extremely difficult to enforce during economic downturns.

In conclusion, I find Respondent’s reasons for laying off these three union advocates, for reassigning Bobino to the box line, and for denying Bobino overtime are pretextuous. The resort to false reasons, as well as the timing and other considerations discussed above, establish a prima facie case

Respondent was unlawfully motivated in these discriminatory actions. Respondent failed to meet its burden of showing that even in the absence of their union activities, these three employees would have been selected for layoff and Bobino would have been permanently transferred to the box line and denied the requested overtime. See *NLRB v. E. I. duPont & Co.*, 750 F.2d 524, 529 (1984); *Oklahoma Installation Co.*, 309 NLRB 776 (1992); *Turnbull Cone Baking Co. of Tennessee*, 271 NLRB 1320 (1984), *enfd.* 778 F.2d 292 (6th Cir. 1985), *cert. denied* 476 U.S. 1159 (1986). Thus, I find Respondent violated Section 8(a)(3) and (1) of the Act by these actions.

#### 4. Affirmative defenses

Respondent argues the General Counsel's claims on behalf of Bobino, Swan, and Richardson are barred by their execution of waiver and release agreements, which are claimed to be accord and satisfaction, waiver, payment, and release, and estops the alleged discriminatees from complaining about any alleged unlawful conduct.

It is undisputed Bobino, Swan, and Richardson each executed the above-described waiver and release within 45 days of their layoffs. Respondent claims since the waiver and release agreement was fully negotiated with the union negotiating committee, the alleged discriminatees should be bound, even though the Union did not agree to its implementation. To hold this agreement would bar consideration of unfair labor practice claims would destroy the efficacy of the Act, for it would permit employers to propose employees waive some or all of their rights under the Act and, even if there is no agreement, hold the employees to the proposal.

The Board is not bound by such private proposals, rather, as well established, it pursues enforcement of public rights. Even when the parties reach a private settlement concerning relief for discriminatory discharges, the Board is not bound by such agreements. As the Board held in *Ideal Donut Shop*, 148 NLRB 236, 237 (1964), *enfd.* 347 F.2d 498 (7th Cir. 1965):

Hall's decision to reject reinstatement and accept, instead, the payment of backpay was the result of discussion and bargaining between him and the Respondents; in effect, a settlement agreement.

However, reinstatement and backpay are remedies which the Board provides in the public interest to enforce a public right. No private right to such relief attaches to a discriminatee which he can bargain away or compromise, as Hall did here. If a settlement of charges was desired by Respondents, negotiations for that purpose should have been with the Regional Director, in accordance with well established procedures. [*Wix Corp.*, 140 NLRB 924 (1963); *NLRB v. Threads, Inc.*, 308 F.2d 1 (1962)]. We cannot sanction this bypassing of the Board's processes.<sup>35</sup>

<sup>35</sup> See also *Jones Plumbing Co.*, 277 NLRB 437, 444 (1985), wherein it was held:

As for the other aspects of the remedy normally required to satisfy Respondent's obligation arising from the incident, Albertson's execution of such a release was done at a time when none of the other discriminatory acts to which he had been subjected had been properly remedied. Neither was the Charging

The position of the discriminatees as members of the union negotiating committee does not change the efficacy or applicability of the reasoning in the *Ideal Donut Shop* decision. Accordingly, I find this affirmative defense to be without merit under the circumstances of this case.

#### D. Challenged Ballots

Under consideration here are the challenged ballots of McCullough, Smith, Carrington, Dennis, Zellers, Reyna, Lum, Richardson, Boyd, Freeman, Hill, and Woodfork. White testified he did not expect to return to work after his layoff so the Union does not dispute the challenge to his ballot. Also undisputed are the challenges to the ballots cast by Wooten, Zalesky, Tubbs, and Nelson for there was no evidence presented concerning their reasonable expectation to return to work.

The parties stipulated the individuals whose ballots were challenged were laid off on October 23 and voted on October 30. For the previously stated reasons, the challenges to the ballots of Wooten, Zalesky, Tubbs, Nelson, and White are sustained.

Generally, all employees in the appropriate unit who were employed during the payroll period immediately preceding the date of the direction of election or approval of the consent agreement, are eligible to vote if they are still employed at the time of the eligibility date. *Columbia Pictures Corp.*, 61 NLRB 1030 (1945). As the Board stated in *Monroe Auto Equipment*, 273 NLRB 103, 105 (1984):

The Board has traditionally held that laid-off employees are eligible to vote in a Board-conducted representation election only if they have a reasonable expectancy at the time of the election of being recalled in the near and foreseeable future. *Lennox Industries*, 250 NLRB 58 (1980); *Allied Products Corp.*, 220 NLRB 634 (1975); *Marley Co.*, 131 NLRB 866, 869 (1961). In determining whether laid-off employees have a reasonable expectancy of recall, the Board evaluates "objective factors" which include "the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee[s] w[ere] told about the likelihood of recall." *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983). *Accord: D. H. Farms Co.*, 206 NLRB 111, 113 (1973).

Having found Richardson was discriminatorily discharged, he was still an employee at the time of the election and eligible to vote, therefore the challenge to his ballot should be overruled and his ballot opened and counted. Further, the Union correctly claims Richardson, as an 8(a)(3) discriminatee, is entitled to vote in the election, citing *Tampa Sand & Material Co.*, 137 NLRB 1549 (1962).

There is no convincing evidence the layoffs of the other named employees whose ballots were challenged was based on other than economic factors. That one or a few employees were later recalled does not establish those laid-off in reductions in force had reasonable expectations of rehire at the

Party Union involved in its execution. Under these circumstances, I conclude that the waiver cannot serve to remove from the public remedies of backpay, reinstatement, notice posting, and the like arising from Respondent's discriminatory action.

time of the election or soon thereafter. *Zatco Metal Products Co.*, 173 NLRB 27 (1969).

Respondent claims these employees had no expectation of work increasing that would warrant their recall and they did not have any expectation of recall in the near or foreseeable future at the time of the election. According to Respondent, the layoff of October 23 was similar to the four previous layoffs; merely part of the ongoing permanent downsizing of the work force and relocation of the operation to a much smaller and technologically more sophisticated and automated facility.

Although admitting some of the Polk Street employees were recalled to the Woodlands with retention of their company seniority, Respondent claims these were special circumstances. For example, "Carey Clarey was a supervisor at the manufacturing facility. Mr. Clarey was laid-off and he was rehired back on 6-1-93" as an hourly employee with the title heat treat assistant. Another individual who was a supervisor at Polk Street, Ulysses S. Grant, was also recalled to the Woodlands as an hourly employee on July 1, 1993.

To explain the rehiring at the Woodlands of other employees laid off at Polk Street, Respondent, by Hoose, claimed they were the best source on the dates of their rehire because the administrative offices had not moved to the Woodlands until the end of February or early March, so the best source of new employees were rehires. After the move, the best source became the Texas Employment Commission for the area covering the Woodlands, which was different than the Houston unemployment office where most of the laid-off employees who testified registered.

Respondent never explained why it determined to prefer referrals from the Texas Employment Commission over rehiring laid-off employees. Most of the rehires were made after March 1, 1993; after Respondent completed the move of its administration offices to the Woodlands. Respondent did hire a substantial number of individuals at the Woodlands. Accordingly, I find this defense to be unconvincing. Further, I find this evidence establishes there were openings at the Woodlands for some of the laid-off employees within the near and foreseeable future. This conclusion is supported by Respondent's admission it was in the process of establishing a third production line.

The plant manager, Hunt, would determine there was a need for additional employees. Hunt would relate his staffing needs to Hoose's assistant, Mike Danford. Hoose disclaimed making any of the hiring decisions in response to Hunt's requests. Hunt and Danford did not appear and testify. Their absences were unexplained. Respondent failed to give any specific credible reasons to explain its choice of hiring new employees rather than laid-off employees at the Woodlands starting around May 1993. Whatever its reasons, Respondent does not claim it related to any of the employees whose challenged ballots are here under consideration, any plans to employ predominately or exclusively new hires at the Woodlands. Therefore, Respondent's action in May 1993 of hiring mostly new employees at the Woodlands cannot be used in refutation of any claimed reasonable belief on October 30 of rehire in the near and foreseeable future.

Respondent's business was cyclical, dependent on both national and international drilling activity. Most if not all of the employees laid off on October 23 had previously experienced

layoffs while working for Respondent and had eventually been recalled.

The Respondent appears to have initially understaffed the Woodlands facility and/or experienced an increase in demand for its product shortly after the relocation. Respondent's offers and other communications to the Union indicate it had plans to increase the employee complement at the Woodlands because it repeatedly used the term "initial staffing." When pressed for a definition of the term, Respondent explained it covered the period from September 1 through November 1. Respondent further explained to the Union it did not anticipate additional staffing between November 1, 1992, and March 31, 1993, however, staffing requirements were dependent on business demands. The business demand was dependent on the rig count. Respondent did not inform the Union or the laid-off employees after the startup of operations was completed, if there was a need for additional employees, it would not recall or rehire them after November 1.

Respondent wrote an additional clarification of its position on July 7 which established the intention to use Polk Street employees in the initial staffing of the Woodlands. The parties also agreed to jointly submit a letter "concerning the JTPA reemployment services for dislocated workers." The Union did draft such a letter that included the following language:

Hughes Tool Company is in the process of updating operations and moving to a new location. Since the new facility will require fewer people, we are faced with the unpleasant task of permanently laying off many long-term and loyal employees.

This joint letter does not indicate all laid-off employees will be permanently laid off. To the contrary, Respondent, on July 15, submitted bargaining proposal number 8, including the following language: "Employees laid-off during the period September 1, 1992, through November 1, 1992, who do not sign the *Waiver and Release Agreement* will be considered for recall through June 30, 1993." This was Respondent's last bargaining proposal, which was never withdrawn, nor was this provision ever disavowed prior to or immediately after the election.

Further, there was no evidence the employees whose ballots were challenged were ever informed of the contents of this draft letter. Accordingly, I find this letter does not establish the employees whose ballots are challenged did not have a reasonable expectation of recall in the near and foreseeable future. This letter also did not expressly inform the Union any employees who signed the agreement would be barred from any consideration for reemployment.

After submitting its last proposal, Respondent informed the Union it would proceed "[i]n accordance with our bargaining proposal for shutting down the Polk Street plant, by selecting some individuals for transfer and others for layoff." There is no claim Respondent proceeded under terms other than those contained in the last proposal, including the consideration for recall of laid-off employees who had not signed the waiver and release agreement. Hoose admitted Respondent never withdrew this proposal.

I conclude Respondent clearly related to the Union it considered those employees who were laid off prior to Septem-

ber 1 differently than those laid off after that date; that those employees laid off after September 1 could be considered for recall under certain conditions that were present for 10 of those whose ballots were challenged by Respondent. Accordingly, by Respondent's own last proposal, those employees who voted and had not signed the waiver and release at the time of the vote could, depending on all the other circumstances, have reasonably expected recall in the near and foreseeable future. The employees whose ballots are here under consideration and had met the provision of Respondent's last offer were McCullough, Smith, Carrington, Dennis, Zellers, Reyna, Lum, Richardson, Hill, and Woodfork. These employees' expectations will be individually considered below.

I further find execution of the waiver and release agreement before voting is not preclusive of a determination the employee could have a reasonable expectation of recall. All the factors existing at the time of their voting must be considered. The language of the agreement does not clearly relate to the employees their execution of the document forecloses all reasonable expectations of a recall in the near and foreseeable future. Assuming the agreement worked to waive all these employees' rights and claims, charges and demands, and causes of action against Respondent, it contains the following provisions:

I understand that this Agreement shall not serve to waive or release any rights or claims that may arise after the date this Agreement is executed. . . . Also, in return of this consideration, I agree and acknowledge that the Employer has no obligation to reemploy, rehire or recall me.

The acknowledgment concerning recall rights supports the Union's claim those who did not execute this agreement before they voted had reason to expect recall or rehire, for they did not waive that right. Those who did sign the agreement before they voted could not be necessarily held to have understood they did not have any reasonable expectation of recall, only that Respondent has "no obligation" to recall them. They could have reasonably expected recall based on other circumstances. The agreement did not inform the signatories they would not be recalled, only Respondent was not obligated to recall them. Respondent did recall employees who had executed the agreement.

Supporting these conclusions is the language used by Respondent in the layoff notices issued to the employees on September 4 and all its communications with the Union prior to the election; in none of these missives was the term "permanent layoff" used. Reference was made in the September 4 notice to an enhanced severance package which was offered in negotiations, this reference was to employees who had been laid off not getting the enhanced package due to the failure of the Union and Respondent to reach an agreement. The terms of the announcement do not clearly inform the employees they were being permanently laid off or execution of the waiver and release agreement would abrogate their rights to recall or rehire.<sup>36</sup>

<sup>36</sup>As here pertinent, the notice provides:

The Company still has the same concerns now that it had in early January, i.e., employees will be laid-off without the severance package. Not wishing to go through another layoff without

There is no claim by Respondent that when it informed the employees whose ballots it challenged they were also informed their layoffs were permanent or they did not have a reasonable basis to expect reinstatement in the near future. The use of the phrase "initial staffing" evidently gave these employees the understanding there would be subsequent staffings, as corroborated by Respondent's last proposal that contained hope for some employees of recall through June 30, 1993.

Respondent began to increase its staffing at the Woodlands in March 1983. One employee, Borjas, was reemployed at the Woodlands on December 23. Borjas retained his company seniority, adjusted for the length of his layoff. Respondent claims Borjas was initially offered a position at the Woodlands that he refused. Respondent also claims he was retained on a contract basis only for a short period of time at Polk Street, that he never worked at the Woodlands. Respondent failed to explain, however, why a contract worker who never worked at the Woodlands was included in its list of new hires at the Woodlands and was given a rehire date and an original hire date of September 26, 1968. Hoose did not appear sure of Borjas' status; and I do not credit this explanation. Hoose admittedly engaged in surmise throughout his testimony, and for the previously stated reasons, he was not a believable witness.

Assuming Respondent is correct, however, that Borjas was included on its list in error, Respondent still commenced offering employment to other laid-off Polk Street employees in early March 1993. It reemployed 12 laid-off employees since March 1993; including Thomas E. Caldwell Jr. on March 15, Kerry W. Clary on June 1, David S. Gibson on June 1, Connie Jones Jr. on March 15, Aaron M. Jones on March 4, Keith L. Nehring on March 8, Arnold F. Perez on April 5, David M. Pinder on March 8, Robert L. Richardson on March 1, Ronnie L. Smith on March 8, Clyde B. Steen on March 22, and Van Z. White on March 2. All these rehires were granted their prelayoff hire dates and granted the seniority they earned prior to their layoffs. Not included in this list are any laid-off employees who refused rehire or recall. There was no evidence detailing if any laid-off employees were offered recall and refused.

Between December and June 30, 1993, Respondent hired 26 new employees in addition to recalling about 13 employ-

doing something for the employees affected, the Company has decided to go ahead and implement our enhanced severance package that it proposed to the USWA. Not only will this package be available to employees laid-off from Polk Street in the future, it will also be extended to those employees laid-off last month.

For your information, below is an explanation of how the severance program will work.

1. Employees laid-off from Polk Street will receive one (1) week's pay for each full year of continuous service up to a maximum of twelve (12) weeks' pay.

3. Employees will be required to sign the Hughes Christensen Company Severance Bonus Program *Waiver and Release Agreement* to receive the additional severance package benefits. The *Waiver and Release Agreement* does not negate any rights employees currently enjoy as related to the 1986 Pension Plan.

4. If employees choose not to sign the Hughes Christensen Company Severance Bonus Program *Waiver and Release Agreement*, they will only be entitled to two (2) weeks' pay.

ees who had been laid off from Polk Street. These additions to its staff at the Woodlands further supports the conclusion the statement “initial hiring” anticipated additional hiring once the start up of operations was completed.

Also unrefuted is the testimony of C. C. Richardson relating a conversation he had in September 1992, with Hoose’s assistant, Robert Lyle, as follows:

We were talking about the initial phasing in, the first group of employees going to the Woodlands, how soon it would be, and the fact that in his opinion, he felt that—along with other people, that there probably would be some more people going to the Woodlands other than those people because he didn’t feel like they had put enough out there on the staffing.

Lyle was also laid off by Respondent, however, his statement to Richardson was never directly refuted or disputed. Respondent admittedly added machinery and shifts to the Woodlands operation after the October 23 layoffs. Lyle was a member of the management team that selected the employees to be transferred to the Woodlands.

#### 1. Carl Reyna

Reyna has worked for Respondent for 20-1/2 years. During his employment with Respondent he has been laid off several times. The first time he was laid off was around 1983; he was recalled about 10 months later. Reyna was next laid off in 1986 and it was almost 2 years before he was recalled by Respondent. There were also occasions when he was furloughed for 2 to 4 weeks.

The parties stipulated Reyna signed a waiver and release agreement on or about December, 8, 1992, well after he voted in the election and substantially before he was offered reemployment. Reyna, a machine operator in the head department, testified he believed he would be recalled because:

Q. When did you think you would be going back to work for Hughes Christensen?

A. Well, I know that the work load was down-sized for the move to the Woodlands and they just did not have the work for people to work. But I figured—

.....  
The work load was down considerably. And they were cleaning machines at the time, and they were not operating. So they had no use for operators standing around, I guess.

Q. When did you think that you would be going back to work for Hughes Christensen?

A. I felt that once they—the operation got set up there and was working and they got a full work load that there was a good possibility that I would be called back. I was called back in the past.

Q. Well, why did you think that you would be a person who would be called back by Hughes Christensen?

A. Well, the shift that I was working on was a skeleton crew already; there wasn’t very many people working on it. And I figured once the work load started up, they had to have people to work there. And I was qualified to work it.<sup>37</sup>

<sup>37</sup> Respondent did not refute this testimony. Reyna testified in a forthright and direct manner, he appeared to be attempting to relate

Reyna was offered recall by Respondent’s representative Mike Danford in February or March 1993. Danford identified himself as working with human resources at the Woodlands. Danford asked Reyna if he wanted a job; “He said that I was one of the people on the list that they had and that they would like me to go back to work for them.” According to Reyna’s unrefuted testimony: “[Reyna] asked [Danford] . . . if my seniority would carry over; he told me it would. He told me the package that was offered to the employees out there, as pay and new benefits that they were going to get, that I was entitled to.” Reyna further testified:

He told me I would be working in the head department, as a machinist B, at a rate of pay of \$12.39 plus a shift differential. He went through the benefit package that was offered, since it had been changed.

We discussed the lay-off status, too. I asked him, Well, how would this affect me as far as being laid-off again, because I was not very happy about being laid-off every time I turned around. He told me that it possibly could happen again. I said, Well—I said, I have other things, meaning that I had another job offer.

I said that I had a job—I didn’t actually tell him I had a job; I just said that I needed time to think about it, that I had—I actually said I had something else going on.

And that—at that time, I tried to put him off. He said that he needed an answer and he needed an answer as quick as possible. So I put him off until the next day.

I called him the next day. I told him that, no, I would not take the offer. And that was the end of the conversation.

Well, he said he was sorry that I did not take it, that I came highly—I was high on their list of people they were going to call back.

I said, Well—I said, I hope you keep me in mind; Maybe things will change, that, Maybe down the road, I will accept.

Another reason advanced by Reyna for his expectation of recall is the statements of friends at Polk Street that he “was going to be asked to go to the Woodlands.” Reyna immediately commenced seeking other employment upon his lay-off but has been unsuccessful.<sup>38</sup> If he accepted the Danford offer he would have a 120-mile-a-day commute.

Reyna never informed Respondent he would not accept a job at the Woodlands because of the length of the commute and he never claimed the length of the commute affected his

all the facts without regard to the effect on his cause. For these reasons, I credit his testimony.

<sup>38</sup> As noted below, the Texas Employment Commission requires applicants for unemployment insurance to actively seek work as a qualifying condition for receipt of these benefits. Therefore, the record does not demonstrate Reyna’s looking for work after his lay-off established he did not have a realistic expectation of recall in the near and foreseeable future. The past practices of Reyna and the other employees whose ballots are here under consideration concerning looking for work after past layoffs was not placed on this record. Under these circumstances, the evidence will not support an inference these employees looking for work after layoff manifests a lack of an objectively based reasonable expectation of recall.

reasonable expectations of recall at the time he voted in the election. To the contrary, when he was informed he was to be laid off he was shocked. There is no claim he did not intend to go to the Woodlands if offered the transfer or recall on or about the date of the election. Only when he had the potential of a relative securing employment for him near his residence did he defer accepting Respondent’s offer of reemployment.

Based on Reyna’s past experience, his accurate assessment that Respondent was understaffed at the Woodlands and once full operations commenced after the move, there would be a need for additional employees of his experience, I conclude he had a reasonable expectation of recall in the near and foreseeable future. Accordingly, I find the objection to his ballot should be overruled and his ballot should be counted.

2. Morris McCullough

McCullough began working for Respondent in July 1965 and at the time of his layoff was operating several machines in the head department. There is no evidence these machines were not operated at the Woodlands facility. McCullough had never previously been laid off by Respondent. McCullough gave the following testimony explaining why he believed he was going to be recalled in the near and foreseeable future:

Q. When did you think you would be going back to work for Hughes Christensen?

A. In the near future.

Q. And why do you think, as of October 30, 1992—or why did you think, as of October 30, 1992, that you would be going back to work for Hughes Christensen in the near future?

A. Well, based on the operations that they were doing and the added machines that they put back into operation that they decided they were going to take to the Woodlands, I was familiar with some of those machines.

Q. So that I understand it, were there some machines that you were told would be carried to the Woodlands that had not—initially not been scheduled to be going to the Woodlands?

A. They were added to the list.

Q. And you had worked on those pieces of equipment that had been added to the list to go?

A. Yes.

McCullough’s testimony was not challenged concerning the addition of machinery to the Woodlands facility. He signed a waiver and release agreement in November. McCullough testified in an open and forthright manner and he is credited based on his demeanor. He also was frank and open, readily admitting he attended union meetings where the Respondent’s plans to downsize were discussed. He never heard any union official state there would be a slim chance for the laid-off employees to get recalled, even though Mabry used that term in his testimony in this proceeding. McCullough candidly admitted:

Q. The conditions this time were that the work force expected this to be a permanent down-sizing, didn’t they?

A. Yes.

McCullough also expected to be recalled at the time he voted in the election: “Due to the situation, yes. . . . The conditions that existed there.” Thus, based on Respondent’s change in plans, he understood there was the likelihood of recall in the near future.

Considering the conditions at the time McCullough voted, including his experience on the machines Respondent determined to move to the Woodlands and his long employment without layoff, I conclude he had a reasonable expectation of being recalled in the near and foreseeable future. As a long-term employee, McCullough would have known Respondent had traditionally recalled long-term experienced employees during the protracted downsizing of its operations. There was no showing the conditions were appreciably different with this layoff than layoffs years earlier. If anything, Respondent’s last offer gave the Union and its members greater reason to believe they had a reasonable chance of being recalled since they were laid off after September 1992. This last and final offer indicated Respondent’s future plans included recalling laid off employees as needed to increase or replace the Woodlands employee complement.

Inasmuch as I have found McCullough had a reasonable expectation of recall based on objective factors in the near and foreseeable future at the time he voted, the objection to his ballot should be overruled and his ballot should be opened and counted.

3. Harvey Smith

Smith commenced working for Respondent on May 6, 1968. He had experience in more than one department at Polk Street. At the time of his layoff, he worked in the cone department as a cone press operator and a G&L (Giddon & Lewis)<sup>39</sup> operator. Additionally, Smith was assigned tool grinding and worked in the crib, as a crib specialist. He previously worked in the assembly department as a line operator, has operated “the crowder,” was a quality assurance inspector, has worked as a millwright, and had “several other odds-and-end jobs around the company’s premises.”

Smith had been laid off prior to October 23, he had been laid off in August 1986 and recalled in March 1987. Smith believed he would be recalled from the October 23 layoff “as soon as everything was set up and business had picked up, like it usually would do. It would fall down and pick up; that is the nature of the oil field business.”

Another reason Smith believed he would be recalled is based on his conversation with Jeff Meyers, who he described as the manager of the cone building.<sup>40</sup> According to Smith, the conversation occurred several months before his layoff. Meyer asked Smith for suggestions “on how to better run the shop. So I gave him some expertise and some things that could possibly be done to make the operation more efficient.” During the conversation, Smith inquired if he would be transferred to the Woodlands. Meyers replied he did not know; which Smith testified gave him hope of a transfer or recall because “nothing is etched in stone. So he didn’t

<sup>39</sup> Smith explained the G&L machine “does” the inside dimension of the cones.

<sup>40</sup> The parties stipulated Meyer was the manufacturing manager and a supervisor and agent as defined in the Act.

know, either, whether I would go or not. So he left that question mark there.”

Other reasons Smith gave for his belief he would be recalled in the near foreseeable future were:

Because I was good at what I did, very. . . . I thought they would want experienced employees at the Woodlands in order to get out a good product at a fair market price. So I thought I could be an asset to the company rather than anything else.

Well, it is just human nature to feel that if you have been working at a place for 24-1/2 years, even if you were laid-off one time and recalled, that you have the latitude or the thinking that one day, you might be possibly called back.

Smith signed a waiver and release agreement on November 13, and received 12 weeks’ severance pay, which greatly exceeded the severance pay he received in 1986. Although admitting Mabry characterized the layoffs as permanent in union meetings Smith attended, Mabry did not inform the membership that based on the nature of these layoffs the Union was attempting to get funds for retraining and job development and Smith was not aware of these efforts. The date of the meeting(s) in which Smith heard Mabry refer to the layoff as permanent layoffs was not established on the record, thus it cannot be concluded Smith knew he was permanently laid off prior to his voting in the election.

Moreover, as noted below, other layoffs had been called “permanent” layoff and, in past experience, he and others had been recalled. Respondent never claimed it informed Smith he was to be laid off permanently and he could not expect to be recalled this time. As previously noted, on October 30, Respondent considered by its last and final offer all employees who had not signed the waiver and release agreement as not waiving any rights of recall. The Respondent’s future plans clearly included the recall of at least some of the laid-off employees as Reyna’s experience demonstrates.

Smith testified he signed the waiver and release agreement because “I really knew that some of these things were in litigation. So I just did what I had to do: I signed the waiver.” Smith thought it was possible the agreement would be deemed invalid. Because he signed it after he voted, however, the execution of the agreement did not reflect his reasonable belief of recall at the time of the election. Further, as demonstrated by Reyna’s recall, execution of the waiver and release was not understood by any party to foreclose any possibilities of recall.

There is no evidence Respondent handled the recall procedure differently in the past, save for the waiver and release agreement. The use of the waiver and release agreement in this case, could be inferred to transmit the message that if the employee had not signed the agreement he could reasonably expect to be recalled in the near and foreseeable future, as I find is the case with Smith. His testimony is unrefuted and his demeanor was credible. He testified with a convincing appearance and attitude.

I conclude Smith, based on objective factors, including his past experience and his conversations at the time he voted with supervisors, reasonably believed he would be recalled in the near and foreseeable future. Accordingly, I conclude the

objection to his ballot should be overruled and his ballot opened and counted.

#### 4. Matthew Zellers

Zellers was initially hired by Respondent on October 22, 1968. At the time of his layoff on October 23 he worked in the head building on the flow line. Prior to that assignment, Zellers “worked in tooling, weld, the gear building, special products. I ran mills, the NC lathes, hydro-till mills, radial drills, Natco. I had done quite a few jobs there in that 24 years.”

Zellers had been laid off in 1968 and was recalled about 1 year later. Zellers believed he would be recalled this time because:

Well, looking at 24 years of experience being at the company and seeing how things go, I know that things had slowed down. I knew they was in the process of moving. And quite naturally, I understood that they didn’t need all of us there at that particular time.

But I felt that as they got things together, well, I was more or less certain that they would have to call someone back. And by—I feel that I am a model employee. So certainly I feel that if I have always been called back, why not? . . . like I said, that I felt that I was qualified by the machines, the jobs that I could do, the jobs that I have done.

And some of the operators that they took couldn’t do some of the jobs that—didn’t have the experience that I had. So I felt that I should have a good opportunity to go eventually, if—you know, if not then.

Zellers signed a waiver and release agreement on November 23, 1992. He was not aware the Union was attempting to get job retraining funds but knew the Union did have some training programs and attempted to assist the employees in securing another job. He did take a training course from the Union to “brush up on your skills.” He received training in “math and just the regular general skills that they might have felt that a person might—would be weak in.” He received the training in October, after his layoff. Zellers did not understand the Union offered the training because there was an alteration in the expectation of recall.

As found above, Respondent admittedly treated the employees laid off after September differently than those laid off earlier; the last complement to be laid off, according to the communications, had a different and greater expectation of recall.

Zellers testified he looked for other employment after his layoff to meet the requirements of the Texas Employment Commission to draw unemployment insurance.<sup>41</sup> He did not recall if Mabry informed him the layoff in October would be permanent. In fact, according to Zellers’ unrefuted and credited testimony, past layoffs had been referred to as permanent and in the past there was no pledge the Company would

<sup>41</sup> As previously found, the record established the Texas Employment Commission required applicants for unemployment benefits look for work as a qualifying condition; thus looking for work does not equate with a lack of reasonable expectation of recall in the near and foreseeable future. There is no evidence these laid-off employees did not seek employment in the past.

recall him, yet it did; further, there was no showing Zellers knew the criteria for recall, if any, would be different.

Zellers also testified:

Q. So the fact that the company was closing down Polk, taking—letting about 110 people go in the fall of '92 and moving to a new, high-tech facility, did that indicate to you that maybe this was going to be a different kind of situation?

A. No, sir. The only thing is it showed me, from the rumors that I heard, that it might be just good business. So I don't have—I didn't have any problem with them moving from one location to another. If anything, I had a problem with the way they treated the employee.

What I—you know, them closing down and moving, that just said that when we get situated, when things pick up, well, we are going to do like we always have done. I didn't see nothing differently.

Q. Well, you didn't think this beginning in August, and the lay-offs in September, October and November, cutting the work force by about 40 percent, was just because business suddenly had declined, did you?

A. No. But—. . . No. But what I did think was that even though I didn't know how many people they were going to carry or not, that never was said. So I—you know, I didn't have no opinion one way or another about that.

Respondent never claimed it informed the laid-off employees of the nature and extent of the layoffs or that they were being permanently laid off. Historically, Respondent had recalled Zellers and other employees it laid off, and Zellers, based on his experiences with Respondent, had objective reasons to anticipate Respondent would be increasing the employee complement at the Woodlands. I conclude Zellers believed, based on objective factors, he would be recalled in the near and foreseeable future, as in the past, when he cast his ballot. Thus, the objection to his ballot is overruled, and the ballot should be opened and counted.

##### 5. Harry Hill

Hill was initially hired by Respondent in September 1969. At the time he was laid off, he "was running an NC machine in the head building." During his employment at Polk Street, he "worked all over. I worked in tool and die. I ran die machines in tool and die. I ran a Large & Shipley in assembly. I ran—I just—a lot of different machines when you move from one department to another, some NC, some manual, some lathes."

He was previously laid off in or about May 1986 and recalled in August or September 1987. Hill testified:

Q. Now, on October 30, 1992, when you voted, did you believe you would be going back to work for Hughes Christensen?

A. Yes. I thought I had an excellent chance.

Q. And when did you think you would be going back to work for the company? A I thought once they moved to the Woodlands, they got all the machine lines in and they started operations, that—at that time, I thought I thought and I believed that they would see

that they needed some extra people. And I thought that I would have an excellent chance of being called back.

Q. Why did you think you would have an excellent chance of being called back?

A. Well, my biggest reason was I was an NC operator in Shop 4. And I was running journals, heads, pin-turning operational on the head section in that area.

And at that time, the need in that area was a little more than in some of the other areas of the plant, not only in—at that point of it, but also in other areas of Shop 4 where I had worked.

Hill signed a waiver and release agreement on October 30, after the election. At the time he signed the agreement Hill understood he was agreeing the Company had no obligation to recall him. Hill did not consider the agreement would affect his chances of being recalled, he believed "the waiver was something that they was just using to, you know, get people to sign so when they got ready to call people back, they would have an avenue to pick and choose who they wanted to call back."

There was no showing Hill understood or had reason to understand he was one of the employees Respondent did not intend to recall and was using the agreement to disabuse him of any expectations of recall. There is no evidence Respondent had a list of employees that it would not consider for recall to the Woodlands. The date Respondent determined to employ new hires for some positions rather than recall laid-off employees was not established on the record. At the time of the election, there was no objective evidence Respondent would not hire employees laid off on October 23. As noted above, even if the employee understood the agreement relieved Respondent of any obligation to recall them, the employees who executed the agreement prior to voting could still have had objective reasons for believing they would be recalled in the near and foreseeable future.

Hill did not attend any union meetings prior to voting. Hill knew seniority would not be used in recalls to the Woodlands, but there is no evidence he or others were informed experience and expertise would not be considered if and when Respondent increased the employee complement at the Woodlands.

Hill's and other employee witnesses' perceptions there would be a need for additional individuals with their skills at the Woodlands was undisputed. There was no objective reasons advanced why Hill could not reasonably expect increases in the employee complement at the Woodlands and/or that the need to add to the employee complement would not be met by recalling laid-off employees, as in the past. As Hill noted, Respondent has been downsizing for years and has brought in new machinery over the course of his employment, yet there had been recalls.

Considering the evidence of record, I find Hill had an objectively based reasonable expectation of recall in the near and foreseeable future predicated on his past experience, the lack of any evidence increases in staff would not follow past practices, Respondent's failure to inform him or others he would not be recalled or that signing the waiver and release agreement would preclude him from being recalled. His correct assessment, based on his knowledge of the operation, was Hughes would need additional staffing once the Woodlands plant went into full operation and individuals with his

experience would be needed by Respondent at the Woodlands. Therefore, I conclude the objection to Hill's ballot should be overruled and his ballot should be opened and counted.

#### 6. Billie Boyd

Boyd began working for Respondent in October 1968. At the time of his layoff he was working as a heat treat operator in the heat treat department. He has performed all phases of the work in the heat treat department, operating forklift trucks and working about 3 or 4 weeks in the forge shop. He had been laid off in May 1986 and recalled in April 1987. In 1991 Boyd was furloughed by Respondent. The Woodlands has a heat treat department and employees were transferred from Polk Street to staff this department. Boyd believed he would be recalled by Respondent to the Woodlands based on a conversation he had with a supervisor, Karey Clary, in or around mid-September. He and Clary were discussing what they were going to do after they were laid off; Clary was also laid off. According to Boyd's unrefuted testimony, they were talking about the "type of jobs we were looking for when we get laid off. And he said, 'Well, they are going to be hiring again in the Woodlands probably in April of '93, and if I were you, I would re-apply.' And he said he was going to reapply, too."

Other reasons Boyd had for his expectation of recall is his awareness Respondent had not fully staffed the heat treat department at the Woodlands. Boyd thought he would be "recalled if they recalled anybody" because he had been told by supervisors that he "had done a good job." One supervisor, Glen Stanfield, informed Boyd in September or October, right before the move, that he was one of the best operators.

Boyd signed the waiver and release agreement on October 28 but did not understand such action would affect his chances of being recalled based on the conversations he had with supervisors, including "they needed some people up there that I would be one of the ones they would expect to come back." Boyd has followed Clary's advice and re-applied for a job at Respondent's facility at the Woodlands. Although he attended union meetings in which Mabry explained the negotiations, he did not recall Mabry saying all the layoffs would be permanent layoffs. He admitted knowing there was a retraining program after the October 26 layoff, which did not exist at the time he was laid off in 1986 or furloughed in 1991. In fact, Boyd availed himself of the program.<sup>42</sup>

Boyd understood the situation was different in 1992 than during the prior layoffs and furloughs, but he did not attribute it to the new or assertedly more sophisticated machinery in use at the Woodlands. According to Boyd's uncontradicted testimony, there was new equipment in the heat treat department at Polk Street but he did not know what machinery was being used at the Woodlands. There was no evidence the acquisition of this new machinery diminished his chances of recall.

Further, Respondent did not refute Boyd's testimony the initial staffing of the heat treat department was inadequate, a verity confirmed by the new hire list. Four individuals

<sup>42</sup> Boyd took classes on writing resumes and how to apply for a job. The classes also improved math skills.

were hired in the heat treat department; Thomas Caldwell Jr. on March 15, 1993; Kerry Clary as a heat treat assistant on June 1, 1993; Weldon J. Hill as a heat treat assistant May 19, 1993; and Don A. Wyatt on June 1, 1993. Hill and Wyatt were designated new hires and Caldwell and Clary were rehires. Caldwell was recalled by Respondent despite having signed the waiver and release agreement.

Based on past experience, comments made by supervisors, the knowledge the heat treat department at the Woodlands was understaffed, the understanding signing the waiver and release agreement did not affect his chances of recall, as demonstrated by Caldwell's experience, and Boyd's wide experience and knowledge, I find he held an objectively based reasonable belief he would be recalled by Respondent in the near and foreseeable future at the time he voted on October 30. Accordingly, I find the objection to his ballot should be overruled and the ballot should be opened and counted.

#### 7. Robert Carrington

Respondent initially hired Carrington in January 1969. At the time of his layoff, Carrington was working in the head department, primarily operating a pin grinder and another machine referred to as a Brown and Sharp. On occasion he worked on the flow line. Carrington described his other work experience with Respondent as follows:

During my time at the company, I worked in the heads and special products. And while I was in special products, I was primarily the NC operator, which—I was the only lead man on NCs on first shift. And when they brought the new threading Maches [phonetic], which they took to the Woodlands, they had the factory reps to come out and train me on the large Mach, which threaded the large bits which were initially put in special products when it was first bought by Hughes.

Carrington had been laid off in either April or May 1986 and he was recalled in June 1987. There is no evidence any employee laid off prior to October 23, 1992, had been rehired rather than recalled. Additionally, there is no evidence any employee laid off on October 23, 1992, and later hired at the Woodlands was not given his original hire date. Although those employees rehired at the Woodlands were not given credit for the time between their layoffs and rehire, this fact was not claimed to have changed the nature of their recall or their reasonable expectations. Based on these circumstances, I find these were rehires, not new hires.

Carrington signed the waiver and release agreement on November 24. Respondent's introduction of the waiver and release forms during bargaining did not create a change in historical practices of the nature that would have led the employees to have changed their expectations of recall as of October 30.

At the time he voted, Carrington believed he would be recalled once the Woodlands "gets up and running" because:

Primarily, because, number one, the 14436 pin grinder, which I had run for the past eleven years, they were taking it. And 95 percent of the time that that machine ran on first shift, I was the operator. Okay?

Also, on the Brown and Sharp, which they were taking, I was one of the operators for it. And the operator

they had on it, whenever he got in trouble, I was the one that had to go straighten the machine out.

The individual transferred to the Woodlands to operate the machine was an inspector named Rudy Miranda, who had not operated the machine in 11 years. Carrington thought:

when the machine left the plant, there were no manuals on the machine. They had just recently had the machine rebuilt. And I was the only one trained, you know, on first shift that knew how to effectively set the machine up from scratch and run it. Mr. Miranda hadn't run it prior to leaving, you know, Polk Street after it had been rebuilt. . . . They had basically spent several thousand dollars rebuilding it to make an automatic—you know, essentially, an automatic. . . . I was the only operator on first shift that, when they had had it rebuilt and brought it back and set it on the floor, that—I worked with the factory to learn how they effectively set it up and run it.

Carrington recalled discussions at a union meeting and rumors around the plant that the layoff would be permanent. He understood his recall rights would be different after the results of the election only, not at the time of the election. He was not aware of the training programs offered to the laid-off employees. There is no claim Respondent informed Carrington he was being permanently laid off or that the first employees transferred to the Woodlands was anything other than the "initial hiring" Respondent consistently referred to in its written materials submitted to the Union. In fact, if the Respondent considered the October 23 layoff permanent, it failed to distinguish how this permanent layoff differed from those in the past also denominated as permanent, even though most of the employees testifying had been recalled from those layoffs. Respondent confirmed the employees understanding about the temporary nature of the layoff when it recalled some of these employees to work at the Woodlands.

The circumstances extant at the time Carrington voted, including the training he received just prior to the move to the Woodlands, his past experiences with Respondent of being recalled after layoff, and his understanding the staffing at the Woodlands would be increased, persuade me he had an objectively based reasonable expectation of recall in the near and foreseeable; hence, the challenge to his ballot should be overruled and his ballot opened and counted.

#### 8. Mack O. Freeman

Freeman was hired by Respondent on November 21, 1969. At the time of his layoff he was working as an acetylene journal welder in the head department. Other experience he had with Respondent included operating the "mach" in the cone building, operating the "mach" in the head department, working checkout in the head department, working the flow and box lines in the assembly department, working "the mule train" in the heat treat department, and other jobs he could not recall at the time of his testimony.

Freeman had been laid off in April 1986 and he was recalled 16 months later. He was furloughed in July and November 1991; the first time for 2 weeks and the second for about 5 weeks. When he voted in the election he believed

he would be recalled "shortly after they got the new plant set up" because:

I was the only acetylene journal welder that didn't go initially. And my understanding was that the new machines that they had was going to be putting out more material and they were going to need more welders.

Q. If more material was being put out, why would the company need more welders?

A. To try to keep up with the machines.

Q. Do the welders work behind whatever the machine is putting out?

A. Right.

Respondent did not refute Freeman's testimony, in fact its new hires list reveals it added 11 new welders at the Woodlands, several of whom were rehired laid-off employees. Respondent did not claim there would be no increased need for journal welders after it initially staffed the Woodlands and so informed Freeman. On the day he was laid off, Freeman signed a waiver and release agreement. His execution of the agreement did not alter his expectations of recall, however, because the machines they were using at the Woodlands would increase the demand for journal welders and he demonstrated over the years his ability to perform the work:

In the job that I was doing, just anybody couldn't sit down and do it. In the past history, if you was on a job that there was a demand for and you were the only qualified person to do it, no matter what the situation, you were there.

Respondent did not dispute Freeman's rendition of its past history in recalling employees or advance any reasons why Freeman's expectations were not objective. As was the case with all the employees whose ballots were challenged, there was no claim Respondent informed these employees their layoffs were permanent or that they should have no or almost no expectations of recall. Freeman correctly appreciated that the execution of the waiver and release agreement was just a new formality Respondent imposed on the layoff ritual. There was no evidence Respondent clearly informed Freeman or any other voter here under consideration the execution of the agreement diminished or terminated their chances of recall. The agreement does not so inform the signatories, it merely gives the Respondent the option to recall the employee, it does not commit Respondent to refuse to recall these employees.

Furthermore, Respondent did not inform Freeman at the time of his layoff there was training to assist him in finding a new position. There was no evidence Freeman knew of the training programs prior to his voting in the election. Also missing is any evidence Freeman would have appreciated the establishment of the training signified his layoff was different than past layoffs. I conclude the record does not establish Freeman had information that should have dispelled any reasonable belief he would be recalled in the near and foreseeable future.

Although Freeman heard Mabry tell members attending one or more union meetings the layoffs would be permanent, he recalled Danford, in the presence of Meyers and Hoose informing them at the meetings where they were notified

they were to be laid off: “that if they got out there and got started and saw where they had made a mistake on the count, that we would be the first people considered, up until June, to fill those vacancies.” Freeman therefore considered Mabry’s statement inaccurate, he believed management.<sup>43</sup>

Considering the credited and unrefuted evidence of record, I conclude under these circumstances Freeman had an objective reasonable expectation of recall in the near and foreseeable future. Accordingly, the objection to his ballot should be overruled and his ballot opened and counted.

#### 9. Robert Lee Dennis

Dennis was hired by Respondent on June 6, 1968. At the time of his layoff in October, he was on disability leave because of an injury he suffered at work on August 31. At the time of his injury and layoff, he worked as “a press operator, pressing compacts and cones and finished cones.” Since his date of hire he has worked the following jobs: in the assembly department he operated “the Large and Shipley, the Churchill, the Mach, Gardner grinder, the EB welder in the assembly line. I also worked in tool joints, threading the tool joints that is on the threading machines, the J & Lewis.” In the cone department, Dennis operated the Gardner and Lewis and the Mach in the green cones section; in the finished cones section he ran the Gardner and Lewis and the Landis grinder. At the time he voted in the election, he believed he would be recalled as soon as he recovered from his injury.

Dennis had been laid off by Respondent in 1986 and was recalled 7 or 8 months later. Currently, he remains disabled and is “under workman’s comp. I have had my third surgery for what you call carpal tunnel syndrome from the line that I was working on. And I am still, right now, up under a doctor’s care.” Dennis presumed he would be recalled by Respondent after he recovers from his injuries and has been released by his doctor because:

when I was at Hughes Tool, our supervisor told us that one of the criterias [sic] of people being called, from what he can see, is that you have a good work record. That would be one of the things.

And so he told us to strive to increase our production, try to make at least 100 percent, and that would—you could be in consideration of being called. Well, I took it at its face value, and I ran over 100 percent, and

<sup>43</sup>Based on his demeanor, which was open and direct, I credit Freeman’s testimony. When asked to repeat Danford’s statement, Freeman replied:

That if and when they got to the Woodlands and everything was set up and the company saw where they had misjudged in the count and needed more people, the people that they needed would be chosen from the people that was laid-off, up until June.

As noted above, Freeman believed Respondent misjudged the number of journal welders it would need at the Woodlands because the new machines would increase the need for his skill. The employees previously discussed in this section of the decision held similar understanding that Respondent understaffed the Woodlands and would need to enlarge the staff in the near and foreseeable future. Respondent’s new hires list supports this understanding, which the evidence establishes was based on the objective considerations of personal knowledge and information related by employees supervisors.

most times, you know, running over 100 percent, trying to qualify myself to be one of the ones selected.

Another reason Dennis understood he would be recalled was based on a statement by his immediate supervisor, Dink Barron, at the meeting when Respondent informed a group of employees, including Dennis, they were not selected for transfer to the Woodlands. Barron informed the employees: “this may not be the end because what can happen is that if there is a recall back, we may be considered to be recalled back.”<sup>44</sup>

Dennis appreciated there would be a large downsizing, and that is why he determined to put out over 100 percent and believed he placed himself in a better competitive position. He was informed of his layoff by registered letter. Dennis understood the layoff in October was different from other layoffs, testifying:

Q. You understood that the lay-off this time was going to be different from the one in ’86, didn’t you?

A. Yes, sir.

Q. And part of the difference is that this down-sizing was being viewed as a permanent down-sizing as a result of building a new-tech plant, wasn’t it?

A. Yes, sir.

He only heard rumors that job training was available, like some of the other employees who testified, he was not informed by Respondent about job training. Further, he was not aware any job training was made available because the layoffs were to be considered as substantially different from past layoffs and permanent. As noted previously, even Respondent referred to the program as “initial” selections for transfer.

I find Dennis had a reasonable expectation of recall at the time of the election based on the statements of his supervisor that, while the downsizing was viewed as permanent, he could still be recalled, and he expected such a recall once he recovered from his injury based on his outstanding production. I conclude the record establishes Dennis had a reasonable expectation to return to work in the near and foreseeable future at the time he voted in the election; therefore, the objection to his ballot should be overruled and Dennis’ ballot opened and counted.

#### 10. Bruce O. Lum

Like Dennis, Lum was “off on company injury.” He was injured on January 15 while operating a “10 pin turn on 12-1/4 head sections” in the head department. Lum has been employed by Respondent since May 31, 1967. During the course of his employment with Respondent he has worked in

<sup>44</sup>Dennis further testified that after the meeting, Barron went to several employees, including himself, and in a one-on-one conversation, told him:

that even though we weren’t selected, that—when they—if they have a hiring coming back up, we may be the ones that they call back. He didn’t say definitely that I would be called back, but that we may be one of the ones that was called back, so it may not be the end, because he knew we was dejected.

And he knew that he had told us that—you know, to try to put out the best that we can and work 100 percent. And he knew that I had been putting out 100—more than 100 percent.

several departments including tool grinding. He worked in the toolroom for 8 years running all the machines in the toolroom except one called the Rambodeys.<sup>45</sup> Lum also worked in the assembly department; he “assembled bits from start to finish. I ran the NC, turning the shank, putting the threads on the bits; the Large and Shipleys.” He had worked in the cone department where he operated the NC machine. He also was assigned “numerous jobs in shop 4 head building, mostly numeral control. I have been running numeral control since ’71; that was when they brought in the Maches and head building.”

Lum had been laid off August 1, 1986, and was recalled November 17, 1986. Lum believed he would return to work for Respondent at the Woodlands at the time of the election as soon as his knee “got well enough.” Lum assumed he would be recalled because “there is a lot of machines that went to the Woodlands that I can still run—a lot of them.” He also testified:

because I have always had a good relationship with management. Larry Christie is my boss—was my boss when I got hurt and everything. He was our group manager. I have always had good rapport with all my management, and I don’t think—there is not one person I have ever worked for that will get up here and testify that I wasn’t a good employee and I done my job.

Lum signed a waiver and release agreement on November 9, which he understood meant the Company had no obligation to reemploy, rehire, or recall him. There was no showing he had this understanding prior to the execution of the agreement, such as on the day of the election, October 30. Lum recognized there was to be a large downsizing as part of the move to the Woodlands but he also “knew there was a lot of machines going out there that I could run. . . . But I knew I could learn the new machine, too.” Lum did not know how many employees Respondent anticipated laying off.

Unlike the employees discussed above, Lum understood on the day of his layoff he would be permanently laid off, that the operations at the Woodlands would involve new machines he was not qualified to operate and would result in a substantial downsizing. Lum failed to state objective reasons for any belief he would be recalled. He did claim he knew Respondent had not fully staffed the Woodlands plant, however, he was not informed by any supervisor that after start up there would be additional employees hired at the Woodlands. I conclude the record fails to establish Lum had an objective reasonable expectation of recall in the near and foreseeable future. Accordingly, I sustain the objection to his ballot.

#### 11. Joe Willis Woodfork

Respondent has employed Woodfork since March 28, 1969. At the time he was laid off, he worked in the heads department operating the NC machine. Previously, Woodfork operated an NC machine and Gardner grinders in the cone department. He also pressed the compacts in the cone depart-

<sup>45</sup> These tools included “the 410 grinder, the Hill grinder, centers grinder, all the mills, the hand lathes, the numeral-control lathes, the G & L, and the monomatic.”

ment. He had previously been laid off in 1986 for 14 months.

On the day of the election, Woodfork believed he would be recalled in about 1 year “because of the fluctuation in the rig count.” Also, he heard an unidentified individual in management say “they wasn’t through getting people to work out there in the Woodlands right away until they get all the machines set up and then they could see exactly how they were going to operate.” The statement was made at a meeting of Woodfork’s department in August. During the meeting, the employees were informed they were not selected for transfer to the Woodlands. Woodfork identified the speaker as “top level management.”

Woodfork understood the move to the Woodlands included a downsizing in the work force and the use of new machines. He believed, however, he had a good chance for recall “because I was an NC operator, and all of those new machines they had out there was going to be NC machines.” During the union meetings he attended, Woodfork heard Mabry discuss the waiver and release agreement, but he did not hear Mabry refer to the layoff as permanent. Woodfork signed the waiver and release agreement on November 2. At the time he signed the agreement he understood he had no recall rights. There was no evidence he had a similar understanding prior to his execution of the agreement.

Woodfork also knew there were training classes offered the laid-off employees. According to Woodfork, “[t]hey had the same program in ’86—About filling—learning how to fill out applications and writing resumes.” Woodfork tied his expectations of recall to an increase in the rig count for five other NC operators were laid off on or about October 26. He admitted, “I thought I stood a slim chance of not coming back if the rig count didn’t increase.” He also believed he had a good chance of recall if the Union won the election. Woodfork did not testify he had a reasonable belief the Union would win the election at the time he voted.

I find Woodfork has shown he held an objectively based reasonable expectation of recall at the time he voted in the election for he was informed by management they had not completed the staffing of the Woodlands facility. He also was knowledgeable about Respondent’s past experiences in laying off employees and then recalling them. These considerations raised the likelihood of recall based on objective factors; requiring the determination Woodfork had a reasonable expectancy of recall in the near and foreseeable future. I find the objection to his ballot should be overruled and his ballot opened and counted.

#### 12. Summary of conclusions

In sum, after evaluating the all objective factors in this case, I conclude McCullough, Reyna, Smith, Zellers, White, Hill, Boyd, Carrington, Freeman, and Dennis knew on the date of the election that Respondent had understaffed its operations at the Woodlands and it would need to increase that staff once the facility had completed the start up and commenced full operations. Respondent acknowledged the correctness of this reasonable belief when it used the term “initial staffing” to describe the selection process for staffing the Woodlands in and after August 1992.

Respondent also displayed knowledge it would be increasing its work force at the Woodlands when several of its managers informed some of the employees whose ballots have

been challenged there would be additional hiring at the Woodlands when it commenced production after start up. These statements by the employees supervisors were never disavowed by Respondent and were more than vague comments for they were made in an atmosphere in which past layoffs resulted in recall and the knowledge additional staffing of the Woodlands facility was forthcoming in early 1993.

Respondent acknowledged these plans by noting its intention to increase staffing at the Woodlands after February 1993, which was in the near future. Respondent has not claimed it has lost any business since the move to the Woodlands and there was no demonstration the move and equipment changes were such that the expectations of recall in early 1993 were unrealistic. Danford indicated he was keeping a recall list that further establishes these laid-off employees had a reasonable expectation of recall after their layoff on October 23. The Employer's future plans were not claimed to preclude a need for the skills of these laid-off employees. Respondent did not tell these employees they were not likely to be recalled.

Considering these supervisors' statements combined with Respondent's actions, written documents, and the unquestioned evidence the Woodlands operation was understaffed, I conclude these employees had a reasonable expectancy of recall at the time of the election. The Respondent did not demonstrate that the circumstances of this layoff were such that the employees should have known it would depart from its history of increasing or decreasing its employee complement based on work requirements and recalling laid-off employees if work increased. *Lennox Industries*, 250 NLRB 58 (1980). Respondent, unlike the employer in *S & G Concrete Co.*, 274 NLRB 895 (1985), did not establish it had no future need for the skills of any of those laid-off employees or that any of its future plans foreclosed rehire of these laid-off employees.

Respondent has a history of laying off employees and recalling them as much as a year or more later. Thus, I conclude for these employees there was a definite prospect of Respondent increasing its work force and recalling these highly experienced and qualified employees. Respondent does not refute they are all trained and competent workers. The acknowledgment by some of these employees they were informed by the Union their layoffs were permanent does not make their expectations of recall unrealistic on the date of the election in the circumstances of this case where it is unquestioned the term has been used in past layoffs experienced by these employees and they had been recalled.

Respondent never informed these employees their work records and seniority would not be considered when staff was added to the Woodlands facility. The execution of the waiver and release agreement after voting does not establish these employees did not have a reasonable expectation of recall. Even those who signed the agreements before voting were not shown to have good cause to alter their expectations of recall by virtue of the terms of the agreement. Their understanding of the agreement was shown to be reasonable inasmuch as Respondent recalled employees who executed the waiver and release agreement.

Respondent had a history of recalling these same employees. Respondent never informed them this layoff was going to be handled differently than in the past where it has recalled them. These employees were not informed the number of in-

dividuals laid off altered the Company's policy of recalling laid-off employees. *Birmingham Ornamental Iron Tire Co.*, 240 NLRB 898 (1979), *enfd.* 615 F.2d 661 (1980).

Objections to the elections have been withdrawn and the validity of the election is not in issue. Accordingly, I recommend that the portion of this proceeding dealing with the objections to ballots be remanded to the Regional Director for further processing consistent with this decision.

#### THE REMEDY

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

As I have found that Respondent unlawfully laid off Steven Bobino, Teddy Swan, and C. C. Richardson and unlawfully permanently assigned Bobino to the boxing line and refused Bobino overtime, in violation of Section 8(a)(3) and (1) of the Act, I recommend that Respondent be ordered to offer Bobino, Swan, and Richardson immediate and full reinstatement to their former position or, if these positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any losses of earnings as a result of the discrimination against them, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.<sup>46</sup>

I shall also recommend that any reference to the discriminatory layoffs and discharges of Bobino, Swan, and Richardson and the unlawful reassignment of and denial of overtime to Bobino be removed from their employment records.

#### CONCLUSIONS OF LAW

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

2. United States Steel Workers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by, on June 29, laying off Steve Bobino, Teddy Swan, and C. C. Richardson, who were the only employees that actively represented the unit by engaging in the concerted protected activity of serving on the Union's negotiating committee and on the Union's grievance committee; the selection of all the union activists for layoff was related to their union activities and discouraged union activity.

4. Respondent further violated Section 8(a)(3) and (1) of the Act by permanently assigning Bobino to the box line and refusing his request for overtime work because he was chairman of the Union's grievance committee and served as a member of the Union's negotiating committee.

<sup>46</sup>In accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1989), interest on and after January 1, 1987, shall be computed at the "short-term federal rate" for the underpayment of taxes as set out in the 1987 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987, if any (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

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

[Recommended Order omitted from publication.]