

Dana Corporation and United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC. Case 26-CA-15855

August 14, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On April 11, 1995, Administrative Law Judge J. Pargen Robertson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

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

ORDER

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

¹We note that the sole allegation in the complaint was that the Respondent violated Sec. 8(a)(3) by discharging Wilson, and that the only exceptions filed pertained to the judge's dismissal of this allegation.

We find it unnecessary to pass on whether a prima facie case was established as this does not affect the outcome of the case.

Susan Greenberg, Esq., for the General Counsel.
Michael D. Carrouth, Esq., of Columbia, South Carolina, for the Respondent.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Paragould, Arkansas, on November 29, 1994. A complaint issued on June 15, and was amended on August 11, 1994. The charge was filed on November 1, 1993.

Respondent and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and the General Counsel filed briefs. Upon consideration of the entire record and briefs filed by the parties, I make the following findings.

Counsel for General Counsel filed a motion to receive original tape and transcript and Respondent attached to its brief, its version of the tape transcript.

I. JURISDICTION

Respondent admitted that at material times it has been a corporation with an office and place of business in Paragould, Arkansas, where it has been engaged in the manufacture of sheet rubber and heavy duty conveyor belts; that during the 12-month period ending June 13, 1994, it sold and shipped from its facility goods valued in excess of \$50,000

directly to points outside Arkansas; and, during the same 12-month period, it purchases and received at its facility goods valued in excess of \$50,000 directly from points outside Arkansas. Respondent admitted and I find that at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

II. THE ALLEGED UNFAIR LABOR PRACTICES

The issue in dispute involves Respondent's motivation in its May 10, 1993 discharge of Gaylon Wilson. The General Counsel alleged and Respondent disputed, that Wilson was discharged because he assisted the Charging Party (Union).

At the outset of the hearing the parties stipulated that Gaylon Wilson's personnel file revealed that he was not the worst employee and he wasn't the best of Respondent's employees. There were some records of disciplinary actions in his file before 1993.

Gaylon Wilson worked for Respondent from June 12, 1985, until he was discharged on May 10, 1993.

A. *The Union Campaign*

In June 1992 Gaylon Wilson contacted representative for the Union Bob Anderson. Wilson was sent some union material by Anderson. He passed that material out among employees. In September 1992 there were union meetings with several employees, Wilson, and Bob Anderson.

Wilson testified that he usually carried a union in-plant organizing committee handbook in his back pocket with URW sticking up so people could see that he was a union supporter. He had the pamphlet in his back pocket from June until he was discharged.

Beginning in September 1992, Plant Manager Larry Dean and Human Resources Manager Ray Noel, mentioned the Respondent's position on unions. During the hearing the parties stipulated that Respondent was aware of the union organizing campaign among its employees from September 1992.

Employee Ronald Robinson testified that Gaylon Wilson talked to him about the Union during the fall of 1992. Wilson told Robinson about union meetings. Robinson attended two union meetings. Robinson saw Wilson talk to other employees about the Union and give employees union literature. Wilson passed out union authorization cards to other employees.

Another employee, Keith Stacey, testified that during the first or second week of October 1992, he had a conversation with Foreman Tony McDowell in front of the maintenance shop at the plant:

Tony—basically, what was said was—Tony said I was the only one that had a right to be complaining and wanting a Union out there because of what had happened with reference to my educational reimbursement that the Company refused to pay. Tony made a motion back to the machine that Gaylon was working on at the In Line and said, Those people back there were going to get us all in trouble.

Charles Thrasher has worked for Respondent for 6 years. Thrasher testified that before October 28, 1992, Foreman Tony McDowell was constantly coming up to his machine and asking about who was involved for the Union. On one

of those occasions McDowell asked Thrasher if he was for the Union. Thrasher replied that was his business. Eventually Thrasher told McDowell that he was for the Union.

According to Thrasher, McDowell told him that if the employees' got the Union, they would all lose their jobs; the place would close down and if it did happen to stay, then "we'd all lose our benefits."

Thrasher talked with his supervisor, Tony McDowell, twice on October 28, 1992. The first conversation was at Thrasher's machine. McDowell told him,

. . . someone was causing trouble and that he was going to find out who was causing this trouble and that he was going to help them find another job.

Later that night Thrasher went into the foreman's office and McDowell continued about someone making trouble and he was going to help find them a new job,

. . . and he said that I think I know where the problem is and I think it's right out there. And he was looking right straight at Gaylon and his machine. There wasn't nobody visible but Gaylon and his machine at this time.

. . . .
I said, Tony, that's up to you, and I said, I just want to know why you're accusing me of everything that's going on in the factory.

. . . .
He said that all he knows is that somebody is causing him trouble and they have sent him a warning from the Labor Board or Union that he was harassing people and talking to people about the Union. He accused me of saying to him in this note that he got in the mail and said that he was the only foreman that had got one.

On October 29, 1992, according to Thrasher, McDowell told him that this union campaign has cost him a friendship and that McDowell was going to find out who was causing this trouble and see to it that "they find another job elsewhere."

Thrasher recalled that McDowell said on one occasion that "Gaylon was in deep trouble."

On one occasion McDowell told Thrasher that he thought "Gaylon was a Union leader." Thrasher responded that it was no secret that Gaylon was the union leader.

Foreman Tony McDowell denied that he ever talked to any employee about the Union. He denied saying anything that could be construed as a threat to Gaylon Wilson. He denied saying that Wilson was in trouble.

Credibility

I was not impressed with the demeanor of Foreman Tony McDowell. I found his testimony that he did not talk to anyone about the Union was not credible. In consideration of their demeanor and the full record, I credit the testimony of Keith Stacey and Charles Thrasher. That credited testimony illustrated that Foreman McDowell talked to Stacey and Thrasher about the Union; he interrogated Charles Thrasher about employee involvement in the Union; he threatened Thrasher with loss of jobs, plant closure, and loss of benefits; and he threatened Thrasher that someone was causing him trouble, that the Labor Board or Union had accused him of

harassing people and that he would fire that person. McDowell illustrated that he suspected the troublemaker was Gaylon Wilson.

B. Gaylon Wilson

In November, according to Gaylon Wilson, Division Human Resource Manager Ray Noel told him that he had caused a lot of trouble by raising cane about the 12-hour holiday pay and that Wilson could be fired for causing trouble. Noel said that Wilson was a troublemaker. During July 1992, Wilson and other employees had complained about not receiving 12-hour holiday pay.

Charles Thrasher testified that in November Randy Elston came to him at his machine. Elston told him they did not need outside representation and that Dana was a good place to work with good benefits. Elston said that "we did have a few sour employees" and, as he said that, he uplifted his eyes and looked over towards Gaylon Wilson's machine.

Division Director of Human Resources Randy Elston testified that he may have had a conversation with Charles Thrasher about the Union but he did not recall such a conversation. Elston denied that he said anything that could have been interpreted as a threat to any other employee.

On April 12, 1993, Gaylon Wilson received a disciplinary report (verbal warning) for "improper use of the quality departments, stock problem/batch processing report." Among other things the disciplinary report indicated that Wilson had used the report "for voicing a complaint which is only an opinion and not confirmed facts only show a lack of respect for Company policy, procedures and property. As you know there is a safety committee, safety suggestion program, and a work order procedure which would be the proper channels for this type of complaint. You should only put the information that is ask [sic] for on these forms."

When Wilson was given the disciplinary report, Human Resources Manager Ray Noel said that Wilson was trying to cause problems and that Wilson should not make waves—not cause problems.

Troublemaker was mentioned and Wilson said, "something to the effect that I was for the Union and I said something about headhunting. They said that they wasn't headhunting. Lee Johnson made some statement to the effect that he was dead against the Union. As long as he was working there, there wouldn't be a Union there."

At one point Noel told Lee Johnson to write up Wilson for calling Noel a liar. Wilson told Noel and Johnson that would not stand up because he was tape recording the conversation. Wilson testified that they became agitated and Noel threatened to suspend Wilson. Wilson was sent out of the room. When he was called back, he was told to return to work and they would set up a meeting with Plant Manager Larry Dean.

Human Resources Manager Ray Noel testified that when Gaylon Wilson said that he was recording the conversation he told Wilson that he had not given him permission to record him and that his recording was unauthorized and unacceptable. According to Noel, the meeting was held at the request of Gaylon Wilson. Lee Johnson testified in corroboration of Noel.

Noel denied that he ever threatened Wilson with discharge. He testified that he did not recall ever referring to Wilson as a troublemaker.

Ray Noel testified that before that meeting, he was unaware of Wilson or any other employee using a tape recorder at work.

On May 6, 1993, there was a meeting in the conference room of 12 to 15 employees and others including Plant Manager Larry Dean.

Ronald Robinson attended that meeting. Robinson recalled that early in the meeting Larry Dean asked Gaylon Wilson if Wilson was tape recording the meeting. Wilson replied that he was. Dean then turned away and said nothing else about the tape recording.

After Larry Dean finished he asked for questions. After several questions, Gaylon Wilson said that he had something he would like to talk about. Larry Dean said the meeting was adjourned. Employee Ray Robinson asked if Wilson wasn't going to be able to ask his question. Dean replied that the meeting was adjourned but that Wilson, and if he liked, Robinson, could stay after and talk.

Gaylon Wilson testified that whether a safety violation was in his file was discussed. Larry Dean told Ray Robinson that they were going to talk about "personal stuff regarding [Wilson's] file that he had to ask Ron [Robinson] to leave."

After Robinson left several matters were discussed. Larry Dean asked Wilson what problem he had and Wilson replied that he wanted to see a Union here. Wilson testified that Dean replied with the "usual stuff, that we don't need a third party intervening. It was a pretty long discussion. We batted it around for a while."

Following some additional discussion regarding other matters, Larry Dean asked Wilson if he was recording. Wilson replied, "[Y]es, sir." Dean said something to the effect that he wanted Wilson to turn off the recording. Wilson replied to the effect that there shouldn't be anything to hide. There shouldn't be a problem with a tape recorder. The discussion continued for several minutes and Larry Dean told Wilson "to go back to work and nothing would be said. There wouldn't be any disciplinary action about it."

Subsequently, after 15 to 30 minutes, Wilson was called back into Larry Dean's office. Wilson was asked if he had his tape recorder on.

I said I did have my tape recorder on. They asked me to turn it off, take it out of my pocket and set it outside the office. I said, No, sir. They asked me if—I refused to do that. I said, If you're asking me to take my tape recorder out of my pocket and set it outside your office then I am.

. . . .

I believe I did, yes. I believe I told him that I didn't want to set it outside of his office. I didn't want to turn it off. And I told him that there was—if they had something to hide then there's something wrong anyway. If it was all above aboard then a tape recorder shouldn't be any problem.

. . . .

. . . It was about like it was before when they said the meeting was over. We discussed more things. I can't recall exactly what they were, but we did have a discussion for a few more minutes.

. . . .

Was the recorder on?

A. Yes.

Q. How did the meeting end?

A. They told me to go home call back that afternoon to find out if I had a job or not.

No decision was actually made until the following Tuesday when Wilson was told to come in the following day and get his termination papers.

Former Plant Manager Larry Dean testified that Ray Noel told him that Gaylon Wilson said he was tape recording a meeting on April 12. Noel told Dean that he had instructed Wilson that it was against company policy and tape recording would not be permitted in the plant. Dean did not talk with Wilson about that incident. Dean testified that was the first occasion that he heard about Gaylon Wilson having a tape recorder.

Dean recalled that he became aware of Gaylon Wilson having a tape recorder during the question period following a meeting he held with employees on May 6, 1993. Because of the nature of Wilson's comments, Dean asked if Wilson was recording the meeting. Wilson affirmed that he was recording. Wilson said nothing about recording the meeting before he was asked by Dean if he was recording.

Larry Dean told Gaylon Wilson that it wasn't permitted to record in the plant.

Human Resources Manager Ray Noel testified in corroboration of Larry Dean. Noel admitted that Gaylon Wilson had told him that he favored unions and thought a union would improve the plant.

Dean testified that he subsequently met with Wilson along with Lee Johnson around 6:40. Dean testified that he called that second meeting with Wilson because Wilson had criticized him for not meeting with him over the April 12 incident. Dean asked Johnson to call in Wilson for that purpose.

At the start of the meeting, according to Dean, he asked Wilson if he had the tape recorder and if it was on. Dean testified that he asked that question in part, because Wilson had on the same fatigue jacket he had worn during the earlier meeting and that was warm attire for that time in May.

Wilson acknowledged that he did have his tape recorder on. Dean instructed Wilson to take the tape recorder out and come back so they could discuss the April 12 matter. After Wilson refused to turn off the tape recorder, Dean again asked Wilson about four times to take the recorder out of the room. He asked Wilson if he understood that he was not complying with a direct order. Wilson replied that he understood the significance of his actions. Wilson said he thought he needed the tape recorder to protect himself.

Dean testified that he told Wilson that was not a disciplinary meeting and he would not be disciplined for discussing the April 12 incident. The meeting ended with Dean telling Wilson that he was suspended and they would get back in touch later to discuss Wilson's future employment status.

Dean's testimony was corroborated by Lee Johnson.

Division Director of Human Resources Randy Elston testified that he was involved in the decision to discharge Gaylon Wilson. He was consulted about Wilson's discharge in the routine course of business. He is consulted on disciplinary situations of all employees.

Elston was phoned by Larry Dean and told of the occurrence with Gaylon Wilson. Afterward Elston talked with Respondent's attorney about the matter. Those actions were routine.

As to the basis of the decision to discharge Wilson, Elston testified:

It was an insubordination matter. We had no choice. It was either lift the suspension and let Gaylon come back into the plant and ignore the direct order. And forever ignore the direct order of, you can't do something like this. That was the alternative we had. We really had no other choice but to go ahead and—if we let employees dictate to us what circumstances of employment are going to be we can't run a business.

The disciplinary report of Wilson's termination included the following comments:

On 5-6-93 you were given direct instructions by the plant manager more than once. Each time you refused to follow them.

Due to your refusal to follow direct instructions by the plant manager your employment with Boston Industrial Products is terminated effective 5-10-93.

Elston denied that the union activity had anything to do with the discharge of Gaylon Wilson.

Larry Dean also testified that Wilson was discharged because his actions constituted insubordination. Dean was aware that Wilson had said that he favored a Union at the plant. Dean denied that had anything to do with Wilson's discharge. He admitted that matter was considered because he was afraid that Gaylon Wilson was trying to set them up and that the incident may lead to an NLRB charge.

Dean denied knowing that other employees were tape recording in the plant. Dean denied that any employee has ever been permitted to disobey a direct order.

During cross-examination Wilson admitted that he had tape recorded several meeting at the plant before his discharge. He never did ask permission to use the tape recorder.

Wilson testified that other employees had tape recorders in open view at their work stations during the time he worked for Respondent. He testified that he wasn't aware of anyone being disciplined for having a tape recorder.

Charles Thrasher testified that he carried a tape recorder in his pocket at work from late October or early November 1992 until the first part of April 1993. He testified that the tape recorder stuck out his shirt pocket approximately 2 inches. Thrasher testified that others have carried tape recorders at work. Nothing was said to him about the recorder and to Thrasher's knowledge nothing was said to any of the employees with tape recorders.

Ronald Robinson testified that he has seen cassette recorders in employees' pockets and at work stations in the plant. He was not aware of any employee being disciplined for having a tape recorder.

On cross-examination Thrasher admitted that he never told anyone in management about his tape recorder. No one ever said anything to him about tape recording a conversation.

Keith Stacey recorded conversations and a meeting with Larry Dean. At the beginning of a second meeting, Stacey was asked if he was recording the meeting. He had a recorder but it was not turned on. He replied that he was not recording the meeting. Although he did have a recorder at that time, no disciplinary action was taken against him.

Stacey testified that he was not asked if he had a tape recorder on his person.

Division Human Resources Manager Randy Elston denied that he has ever observed people with tape recorders. He denied being told that employees were tape recording meetings with management.

The parties stipulated receipt of a portion of Respondent's employment guide for employees captioned "MANAGEMENT POSITION ON UNIONS." Among other things that section included the following:

We firmly believe our people should not have to pay a union to see that we meet our obligations.

If you should be approached by anyone who asks you to sign a union authorization card, we are asking you now to refuse to sign it.

Credibility

As shown above I was impressed with Charles Thrasher's demeanor and I credit his testimony. I credit his testimony regarding his November conversation with Randy Elston. Elston did not deny that he talked with Thrasher about the Union. Instead he testified that he did not recall that conversation.

Regarding the testimony of Gaylon Wilson, Ray Noel, Lee Johnson, Larry Dean, and Ray Robinson, I found their testimony was substantially similar about material issues. It appeared from their demeanor and the entire record, that all those witnesses were essentially truthful. Some of their testimony involved matters that are included in the original tape recording that has been offered in evidence as General Counsel's Exhibit 6. I hereby grant the motions of General Counsel and Respondent and receive in evidence General Counsel's Exhibit 6 and the transcript versions of that tape recording offered by General Counsel and Respondent. To the extent there are conflicts between testimony and matters on the original tape, which are not in dispute in the transcripts of General Counsel and Respondent, I credit the tape recording. That recording contains direct evidence of the respective conversation.

I am convinced from the full record that Respondent first learned that Gaylon Wilson was tape recording conversations in the plant during his meeting with Ray Noel and Lee Johnson on April 12, 1993. Although there is some confusion, I am convinced that Noel voiced disapproval of Wilson's use of a tape recorder. I am convinced there was discussion of Gaylon Wilson meeting with Plant Manager Dean over the April 12 incident. The record is not in dispute that no meeting was held involving Dean and Wilson before May 6, 1993.

Regarding the May 6 meeting, Ronald Robinson recalled that early in the May 6 meeting Larry Dean asked Gaylon Wilson if Wilson was tape recording the meeting. Wilson replied that he was. Dean then turned away and said nothing else about the tape recording. I do not credit Robinson's testimony in that regard. Neither the tape recording nor the testimony of anyone else including Gaylon Wilson, supported that testimony. I am convinced from the full record that Dean did not ask Wilson if he was recording the meeting until very late in that meeting and Dean expressed disapproval to Wilson recording.

III. FINDINGS

The parties agree that in accord with applicable law, I should first consider whether General Counsel proved a prima facie case in support of the allegation that Gaylon Wilson was discharged because of his union activities. If the evidence supports a prima facie case, then Respondent may show that it would have discharged the employee in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Here the General Counsel also contends that Respondent engaged in pretext. The Eleventh Circuit Court of Appeals has found:

First, the General Counsel must show by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision to discharge an employee. Such a showing establishes a section 8(a)(3) violation unless the employer can show as an affirmative defense that it would have discharged the employee for legitimate reason regardless of the protected activity. The General Counsel may then offer evidence that the employer's proffered "legitimate" explanation is pretextual—that the reason either did not exist or was in fact relied upon—thereby conclusively restore the inference of unlawful motivation. *NLRB v. United Sanitation Service*, 737 F.2d 936, 939 (11th Cir. 1984); also quoted in *Northport Health Services, Inc. v. NLRB*, 961 F.2d 1547, 1550 (11th Cir. 1992).

In consideration of whether General Counsel proved that Respondent was motivated to discharge Wilson because of his union activity, the Board has held:

. . . in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the alleged discriminatees engaged in union activities; (2) that the employer had knowledge of such; (3) that the employer's actions were motivated by union animus; and (4) that the discharges had the effect of encouraging or discouraging membership in a labor organization. *Electromedics, Inc.*, 299 NLRB 928, 937, affirmed 947 F.2d 953 (10th Cir. 1991).

In consideration of whether General Counsel proved a prima facie case, the evidence established that Respondent strongly opposed the Union, that Gaylon Wilson engaged in union activities and that Respondent was aware that Gaylon Wilson supported the Union. In view of the credited evidence that Foreman Tony McDowell interrogated and threatened employee Charles Thrasher that, among other things, that he was going to help a troublemaker find another job, I find that the record established Respondent's animus. McDowell illustrated that he suspected Gaylon Wilson was the troublemaker. Additionally, as shown above the credited evidence proved that Ray Noel, Lee Johnson, and Larry Dean made comments in opposition to the Union. Despite that evidence Respondent contends that it was not motivated to discharge Wilson by his union activities.

The record does call into question whether there was a causal connection between Wilson's union activities and his discharge. On the other hand, the evidence shows there was a definite causal connection between Wilson's insistence on tape recording his meeting with the plant manager and his discharge.

That evidence established that Wilson's refusal to obey the plant manager's order to turn off and remove his tape recorder, contributed to his discharge. In view of that showing, the question of prima facie proof rest on a finding that Respondent was motivated in part, to discharge Wilson because of his union activities.

In consideration of that question, however, there was no showing that Respondent varied what would have been its decision regarding disciplining Wilson, because it was aware that he had engaged in union activity. There was no showing that Respondent had been faced with similar situations in which it decided on discipline less than discharge. In only two cases was there a showing of insubordination and in both those situations, Respondent discharged the insubordinate employee.

The General Counsel also argued that the record showed that Foreman McDowell knew that Gaylon Wilson had a tape recorder before his discharge and that McDowell condoned Wilson's conduct. I do not agree with the General Counsel about the import of record evidence. It is clear from the full record including testimony of Gaylon Wilson, that the issue joined on May 6, involved Gaylon Wilson tape recording meetings with Plant Manager Dean and others. The simple question of Wilson's possession of a tape recorder was not the issue. The issue was his possession and use of that recorder. Therefore, I find that the record failed to support the contention that Wilson's conduct was ever condoned.

Next the General Counsel questioned the basis for Larry Dean's instructions that Wilson turn off the tape recorder. That particular question has no relevance unless it is shown that either Gaylon Wilson was engaged in union or protected activity by recording the meetings, or that Dean instructed Wilson to turn off the recorder because of his concern that Wilson was engaged in union or protected activity or that the recording had some relationship to union or protected activity. Those matters are matters within the scope of a prima facie case, or perhaps within the scope of proof of pretext. In either event that proof falls within the burden of General Counsel. *NLRB v. United Sanitation Service*, 737 F.2d 936, 939 (11th Cir. 1984); *Northport Health Services v. NLRB*, 961 F.2d 1547, 1550 (11th Cir. 1992).

Concerning the motivation behind Wilson's action, his own testimony shows that motivation was not due to union or protected activity. Instead, as shown above, Wilson testified that he was recording to protect himself. Concerning Dean's motivation, despite the General Counsel's speculation, there is no evidence to support the General Counsel and I may not infer that Respondent engaged in activity out of motivation relating to protected activity, absent substantial evidence. Here there was no such evidence.

To the contrary, the record shows the matters developed on May 6 in the context of the work environment. There was no showing that Dean's reaction to Wilson's several admissions that he was tape recording was uncommon or that it demonstrated disparate treatment. There was no showing that Respondent had ever permitted any employee to tape record

a meeting. To the contrary, the evidence showed that only one other employee was ever questioned about whether he was tape recording a meeting. Keith Stacey testified that when he was so questioned, he truthfully responded that he was not recording the meeting. That testimony tends to support Respondent's position that Larry Dean's reaction to Wilson's recording on May 6, was typical of Respondent's reaction to similar occurrences.

In view of the full record, I am not convinced the General Counsel proved that Respondent was motivated to discharge Wilson because of his union activities.

Moreover, Respondent contends that Gaylon Wilson would have been discharged in the absence of union activities. As shown above, the record supported Respondent's contention that Wilson was discharged because he refused Plant Manager Larry Dean's order that he turn off and remove his tape recorder. The evidence illustrated that action by Wilson constituted insubordination. The record proved that two other employees were charged with insubordination. Both those employees, like Wilson, were discharged. Therefore the record illustrated that Wilson was not treated disparately. He was promptly suspended then discharged, when he continued to disobey the plant manager despite repeated opportunities to correct his conduct. That evidence supports a finding that Wilson would have been discharged in the absence of his protected activity. *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 694-698 (1993); *Purolator Products*, 270 NLRB 694, 695 (1984).

The General Counsel also contends that Respondent's alleged basis for the discharge was a pretext.

There was no showing, however, that the tape recording incident was fabricated. To the contrary, all witnesses agreed that Wilson insisted on tape recording the second May 6 meeting with Larry Dean despite Dean's instruction that he turn off and remove the tape recorder. Additionally, there was no showing that even though the alleged insubordination actually occurred, it normally would not have constituted grounds for discharge. As shown above, the evidence showed to the contrary. There were two prior cases of insubordination according to the record evidence. In both those cases the employees were discharged.

Nevertheless, the General Counsel argued that the reasons advanced by Respondent for Wilson's discharge were not, in

fact, relied on. The General Counsel argued that Respondent called Wilson into the "second meeting on May 6," in order to create a situation that it believed would justify his discharge. I find that the record evidence failed to support the General Counsel. The record shows that meeting was called at the request of Gaylon Wilson.

In fact, the General Counsel's transcript of the tape recording of that meeting shows that Gaylon Wilson stated that he was supposed to have a meeting with Dean. Dean then replied they could hold that meeting "right now as far as I am concerned." Larry Dean then asked if Lee Johnson was in yet. When told that Johnson may not be in, Dean responded:

Why don't we wait until Lee comes in and we will sit down and talk to you. I think we can certainly find time to do that and any time you want to schedule a meeting with me, the only thing you have to do is let somebody know.

I find that the second meeting was called because Gaylon Wilson commented that he wanted such a meeting and it was called at an early opportunity, on the same day, after he made those comments.

Moreover, the record shows that on several occasions after the second meeting started, Larry Dean specifically instructed Wilson to turn off and remove the tape recorder. That evidence shows that throughout that time Gaylon Wilson had considerable input in the direction of the meeting. He continued to refuse to obey Dean's instructions. That evidence tends to illustrate that the meeting was not a set up.

I find that the record does not support the General Counsel's contention that the second meeting was called in order to create a situation to discharge Wilson.

In view of the full record, I find that the General Counsel failed to prove a prima facie case in support of its unfair labor practice allegation and, moreover, Respondent proved that Wilson would have been discharged in the absence of union or protected activity. Record evidence failed to support the General Counsel's contention of pretext.

ORDER

In view of my findings, the complaint is dismissed.