

Concepts & Designs, Inc. and District No. 77, International Association of Machinists & Aerospace Workers, AFL-CIO. Cases 18-CA-13358 and 18-RC-15654

August 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On May 19, 1995, Administrative Law Judge William J. Pannier issued the attached decision. The Respondent filed exceptions with a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Concepts & Designs, Inc., Owatonna, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the challenges to the ballots cast by Keith Siem and Kevin Lawson in the representation election in Case 18-RC-15654 be overruled, and that their ballots be opened and counted, that the challenges to the ballots of Madrene Cupkie and Gary Conlin be sustained, and, further, that objections to the conduct of that election be overruled and that Case 18-RC-15654 be severed and remanded to the Regional Director for Region 18 for further appropriate processing.

James L. Fox, for the General Counsel.

David R. Hols, Esq. (Felhaber Larson Fenlon & Vogt), of Minneapolis, Minnesota, for the Respondent Employer.

Joe Cooper, of Des Plaines, Illinois, for the Union Petitioner.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this matter in Minneapolis, Minnesota, on February 7, 1995. On December 6, 1994,¹ the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on November 3, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On December 14, the Regional Director issued a Report on Challenges and Objections, Order Directing Hearing, Order Consolidating Cases, and Notice of Hear-

ing, Consolidating for Resolution, in this proceeding, issues arising from an objection to conduct of a representation election on November 3 and challenges to ballots which four individuals attempted to cast during that election. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the opening arguments and brief that was filed, and on my observation of the demeanor of the witnesses, I enter the following

FINDINGS OF FACT

I. INTRODUCTION

Concepts & Designs, Inc. (Respondent), is a Minnesota corporation, with an office and place of business in Owatonna, Minnesota, where it engages in the manufacture of custom furnaces and air systems. In conducting those business operations during calendar year 1993, Respondent purchased goods and services valued in excess of \$50,000 which it received at its Owatonna facility directly from points outside of Minnesota. Therefore, I conclude that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

A representation petition, seeking an election among certain employees of Respondent, was filed on September 23 by District No. 77, International Association of Machinists & Aerospace Workers, AFL-CIO (the Union), a labor organization within the meaning of Section 2(5) of the Act. On October 3, the Regional Director for Region 18 approved a Stipulated Election Agreement, between Respondent and the Union, for an election on November 3 in an appropriate bargaining unit of:

All full-time and regular part-time production and maintenance employees employed at Respondent's Owatonna, Minnesota facility; excluding office clerical employees, and professional employees, guards and supervisors as defined in the Act.

Typed after that portion of the Stipulated Election Agreement providing for "Payroll Period for Eligibility-Period Ending" is the date "October 3, 1994[.]" During the election 24 ballots were cast. Ten were cast for the Union. Ten others were cast against representation by it. The remaining four ballots were cast by voters whose right to participate in the election is challenged.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act on September 8 and, again, during the first week of October by implicitly threatening an employee with discharge because of that employee's union activities. In both instances the implied threat is alleged to have been uttered by Respondent's president, Thomas Robert Peterson, an admitted statutory supervisor and agent of Respondent. In addition, Respondent is alleged to have violated Section 8(a)(3) and (1) of the Act by discharging two employees on October 21. One is Keith Siem. Prior to that date he had been employed by Respondent since May 1992, and was classified as an electrical assembler at the time of his discharge. The other is Kevin Lawson, an electrical test technician who had been employed continuously, until his discharge, by Respondent since approximately July 1993.

¹Unless stated otherwise, all dates occurred during 1994.

There is no dispute about the events which preceded the discharges of those two employees. Both had reported for work on Thursday, October 20. Both later left work, Siem punching out at 8:03 a.m. and Lawson at 8:04 a.m. By separate letters, dated October 21, Respondent notified each, in pertinent part: "This is to inform you of your discharge from employment at [Respondent]. The reason for your discharge is leaving your work without permission on October 20, 1994."

That stated reason, argues Respondent, had been the sole reason for those discharges. However, Siem and Lawson had been active on behalf of the Union's effort to become the representative of Respondent's Owatonna production and maintenance employees. The General Counsel alleges that the two employees' union sympathies and activities, as well as a general intent to discourage employees from engaging in union and protected concerted activities, had actually motivated Siem's and Lawson's terminations on October 21. For the reasons set forth in section II, *infra*, I agree that a preponderance of the credible evidence supports those allegations and, further, establishes that Peterson's statements constituted implicit threats of discharge which violated Section 8(a)(1) of the Act.

As to the challenged ballots, two were cast by Siem and by Lawson. Their resolution depends solely on Respondent's motivation for their October 21 terminations. A third was cast by Madrene Cupkie, a clerical employee whose ballot was challenged by Respondent because, it contends, she is a managerial employee who, in any event, does not enjoy a community of interest with the production and maintenance employees. Inasmuch as I conclude that Siem and Lawson were unlawfully terminated, I shall recommend that the challenges to their ballots be overruled. For the reason set forth in section III, *infra*, I however, concluded that the evidence shows that Cupkie is a managerial employee and, consequently, that the challenge to her ballot should be sustained.

The fourth challenged ballot is that of Gary Conlin. His employment situation is also the basis of the lone objection to conduct affecting the results of the election. As stated above, the period ending October 3 was agreed upon, in the Stipulated Election Agreement, as the payroll period for eligibility. Wednesday, October 5 however, was the first date on which Conlin actually clocked in and began working for Respondent. Based on the Stipulated Election Agreement's stated eligibility date, the Union challenged Conlin's right to vote. Were that all that is involved, resolution of that challenge would be straightforward. But to the surprise of probably no one, more is involved.

After the petition had been filed on September 23, a preelection representation hearing was scheduled for October 7. It was anticipated that Conlin would be working for Respondent by that date and, were the hearing to be conducted and an election then directed, Conlin would have been employed by the end of the payroll period designated as the initial date for eligibility.

Respondent wanted to ensure Conlin would be an eligible voter. Conversely, the Union wanted to accelerate, if possible, the date for securing employee names and addresses to which it was entitled under *Excelsior Underwear*, 156 NLRB 1236 (1966). Discussions on September 30 led to agreement on the terms for the Stipulated Election Agreement, signed

for the Union on that same date and for Respondent on October 3, the latter also being the date on which the Regional Director approved it. The *Excelsior* list was then promptly furnished by Respondent.

After the Union had challenged Conlin's right to vote in the November 3 representation election, Respondent filed its objections, stating:

[Respondent] entered the Stipulated Election Agreement on the expressed representation and agreement that Gary Conlin would be permitted to vote. At the election, the Union challenged the eligibility of Conlin to vote. Said challenge was contrary to the specific terms of the agreement, and a central element for the consideration leading to the agreement for an election. [Respondent]'s agreement was thereby obtained by fraud and misrepresentation, and it is void.

Consequently, two questions arise from Conlin's situation: Was he eligible to vote and, if not, should the election be set aside on the basis of Respondent's objection. For the reasons set forth section III, *infra*, I conclude that both questions should be answered in the negative.

II. THE ALLEGED UNFAIR LABOR PRACTICES

When he reported for work at 6 a.m. on October 20, Siem testified, it had been his intention to work for awhile and, then to leave on personal business. As set forth in section I, *supra*, he clocked out at 8:03 a.m. Before leaving, however, he told Lawson, "'Kevin,' I just says, 'I am leaving, I got business to take care of,'" though Siem acknowledged that Lawson "'may not have'" heard what was said to him by Siem: "I didn't get an acknowledgment from him, but I said it loud enough that I assumed he heard me." In any event, Lawson was the only person whom Siem told that he was leaving. But Lawson never got around to relating that information to anyone. For Lawson encountered problems of his own that morning.

Like Siem, Lawson had reported for work at approximately 6 a.m. on October 20. Later that morning he was talking with two or three other workers when Eileen Larson, Respondent's secretary-receptionist, passed by the group. Her inquiry about the status of a particular order led to an acrimonious exchange with Lawson. Angered because he felt that Larson was acting like his boss, without anyone having told him that she had been given any authority over him, Lawson testified, "I was very upset. I filled out my paperwork for the day, punched my time card, and went home."

Once there, he realized that he had neglected to tell anyone that he was leaving. When he telephoned Respondent's facility, however, it was Larson who answered. He informed her merely that he was at home and would be staying there for the rest of the day to take care of personal business. Larson replied that she could not give Lawson permission to do so. She added that he would have to get that permission from Steve Peterson, general manager and an admitted statutory supervisor and agent of Respondent. But Lawson said, "No, I don't want to talk to Steve, you can tell him."

President Thomas Peterson testified that Siem's and Lawson's departures had been the only reason that he had decided to discharge them. He testified that he had learned at 9 a.m. on October 20 that the two employees had left:

“Eileen told me that Kevin had left,” and, “At approximately that same time . . . Steve made an indication that Keith was also gone.” As a result of those reports, testified Thomas Peterson, he then did:

several things. I might not necessarily have the correct order. I first asked Steve if he was aware of anything, any reason that they would have left or whatever. Asked Eileen about what she knew. She related the phone conversation that she had with Kevin. Went out onto the shop floor to see in what condition things were left in, and talked with the electrical assembly people that got their work direction from Kevin, to see where they were at. They didn't know what projects they were supposed to be working on next. At some point, I made two phone calls, one to [Respondent's counsel], and one to Pete Conners, Pete Conners is our human resources consultant.

. . . .
Talked to the people on the floor, asked if anyone knew of any reason that anyone—that Keith and Kevin had left, where they might be, if they were coming back, that kind of thing. Received no answers, just shrugs of the shoulders, and they didn't know. I placed phone calls to both Keith and Kevin. Keith, I got his answering machine and left a message on there to please call me before the end of the business day. Did not receive any answer at Kevin's house and there was no answering machine.

Respondent did not hear from either Siem or Lawson for the remainder of October 20. So, Thomas Peterson “pulled both Keith's and Kevin's time cards,” took them to his office, and waited to see what would happen the following morning, Friday, October 21. By the time that Lawson arrived for work, at approximately 6 a.m. that day, both Thomas Peterson and Human Resources Consultant Conners were waiting in Peterson's office.

There is no essential dispute about what had been said during the ensuing conversation. Peterson asked why Lawson had left work without permission. Lawson asked who was his supervisor and, when Peterson asked what that meant, described the preceding day's exchange with Larson. Peterson assured Lawson that Larson was not his supervisor and, again, asked why Lawson had abruptly left work without permission on October 20. During cross-examination, asked if “the only reason you gave him was personal business,” Larson answered, “I knew we were going to discuss it, so yes, that is what I told him.” However, Thomas Peterson testified, “He said that sometimes it is better just to leave than blow up, or something to that nature.” Peterson instructed Lawson to go home for the rest of the day, saying that Lawson would be contacted respecting continued employment with Respondent.

When Siem arrived at approximately 7 a.m., he was summoned by Peterson to the latter's office where, again, Conners was present. As he walked there, Siem remarked to Peterson, “I see my time card is gone, I guess I am fired then,” but Peterson did not reply. Instead, he asked why Siem had left work on the previous day without permission from a supervisor. Siem answered that he had left on personal business and that he had told Lawson that he was

doing so, asking, “Didn't Kevin tell you?” Peterson responded that Lawson had not done so and, in any event, was not a supervisor. Siem asked, “Why did we used to tell Gary Karst when we were leaving?”² Peterson replied that notice to Karst had been satisfactory during the time that Karst had been shop foreman, but he “no longer held that position and that he [Siem] was to be reporting to Steve Peterson, Steve Peterson was his supervisor.” The conversation concluded with Peterson sending Siem home for the rest of the workday, saying Siem would be notified about his employment future with Respondent.

Thomas Peterson testified that he had been the official who then made the discharge decisions, “late afternoon” on Friday, October 21. As to his reasons for those decisions, he testified:

Keith and Kevin left without any regard to our company, our goals, the other people at [Respondent], or their responsibilities. They left, in my mind, with a defiant or bad attitude. They didn't offer any reasonable reason why they left, no emergencies, no sickness, anything like that. They left, walked off the job.

According to Peterson, “if there was justifiable cause for doing what they had done, then we would have taken that into account in the discipline, if any.”

Although Respondent had no formal rules in existence during October, it is not disputed that it, at least, expected employees to report whenever they would be absent or intended to leave work early. Lawson acknowledged as much when he testified that he had called the plant after arriving home on October 20, because he realized that he had not told anyone that he was leaving. Obviously, all else aside, if early departures without notification or justification had been the actual motivation for the discharges, then it could not be concluded that Section 8(a)(3) and (1) of the Act had been violated by Respondent. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Nevertheless, “mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.” (Citation omitted.) *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980). For, in evaluating discrimination allegations, “the pivotal factor is motive” (citation omitted). *NLRB v. Lipman Brothers, Inc.*, 355 F.2d 15, 20 (1st Cir. 1966), and the ultimate “determination which the Board must make is one of fact—what was the actual motive of the discharge?” *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). In conducting analysis to reach that determination, “The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.” *Inland Steel Co.*, 257 NLRB 65 (1981).

Those principles or guidelines are of special import here for, as the General Counsel pointed out in his opening argument, Respondent's discharges of Siem and Lawson, for their

²Karst had been shop foreman until he requested to be relieved of the responsibilities of that position. Respondent replaced him, as production and maintenance supervisor, with Steve Peterson.

early departures on October 20, was not consistent with its prior treatment of certain other employees who had displayed attendance problems.

One is Doug Moore, an assembly helper. On March 10 Steve Peterson gave a verbal warning to Moore “for excessive tardiness and absenteeism.” During the following month, Steve Peterson issued a written warning³ to Moore for the identical offenses. The text of that notice recited, “On April 4th & 5th Mr. Moore was absent from work. He did not call in [n]or was any reason given for his absence upon his return.” Then, on June 6, a “2nd Written Warning for excessive tardiness and absenteeism” was issued to Moore by Steven Peterson. In this instance, the text recites:

On Thursday June 2nd Mr. Moore asked me if he could work on [F]riday to make up for hours he had missed earlier in the week. I informed him he could do so as long as he didn't have his hours in for the week; he then informed me he would be in on Friday. Mr. Moore failed to report for work Friday the 3rd of June nor did he call in with any explanation for his absence. On Monday, June 6th Mr. Moore again failed to report for work at the designated time. At some point in the day he called in to say he would try to be in yet on Monday. At the time of this report (3:15; Monday, June 6, 1994) Mr. Moore has yet to report in.

Nonetheless, not until a later date, for succeeding offenses, was Moore discharged by Respondent.

Thomas Peterson admitted that, by October 20, neither Lawson nor Siem had received any documented or written discipline pertaining to attendance. Indeed, Respondent presented no evidence that either one had received even a verbal warning regarding attendance. Nor, for that matter, is there evidence that either Lawson or Siem had received any verbal or written discipline pertaining to any other aspect of their work performance. Obviously, that raises an issue as to why each had been so abruptly terminated for single attendance offenses, when Moore had thrice been warned for multiple attendance infractions, within a 3-month period, without suffering the ultimate penalty of discharge on any of those occasions.

Both Steve and Thomas Peterson attempted to distinguish Moore's earlier attendance infractions from those of Siem and Lawson a few months later. The former testified, “Any one of these, in my mind, was not enough of an incident to cause [Moore's] termination, I guess, but added together eventually, yeah, it did.” Of course, “eventually” arrived only after additional infractions were committed by Moore, following receipt of a “2nd Written Warning[.]”

In an effort to explain why a single instance of absenteeism without explanation differed from a single instance of early departure from work without explanation, Thomas Peterson testified, “Absenteeism, there would be some type of reason or ca[use], justifiable reason or cause.” Yet, both written warnings issued to Moore recite specifically that he had failed to advance a reason for either absence for which he was being warned. So, existence of “justifiable reason or cause” cannot truly distinguish Moore's ongoing absentee-

ism from the single early departure from work by Siem and Lawson.

Before advancing that asserted distinction, however, Thomas Peterson had testified:

Concerning absenteeism versus walking off the job, I see—I see walking off the job as being a defiant situation, where there is no regard for the Employer or our customers, in terms of getting the product completed or whatever the case might be

Peterson did not explain precisely what he meant by “defiant.” In fact, it is difficult to ascertain how Lawson's and Siem's early October 20 work departures could be characterized as somehow “defiant,” while not similarly characterizing Moore's above-described unkept promise to come to work on Friday, June 20, without any explanation for his failure to do what he had promised.

Certainly, any purported distinction cannot be based solely on a lack of “regard for the Employer or [its] customers, in terms of getting the product completed. . . .” For, both written warnings to Moore pointed out expressly that his absences “adversely affect” other employees' production, as well as his own. Obviously, those adverse effects delay completion of production and, inherently, adversely affect Respondent's ability to timely complete customers' orders.

A seemingly similar “defiant situation” was presented in connection with a verbal warning for excessive absenteeism given to employee Jeff Herzog by Steve Peterson on “September 31 [sic], 1994.” According to the latter's written account concerning it, Herzog had promised on September 28 that he would report for work on Saturday, September 29, but then failed to either report or call in on that day. In fact, he also failed to report on the following Monday and did not call in until later that day. While the misdated document characterizes the warning to Herzog as “verbal,” the second paragraph of its text states, “This is Mr. Herzog's first *written* warning,” (emphasis added), and goes on to point out that Herzog's conduct adversely affects production. As a result, his failure to report as promised displayed the same type of disregard for “customers, in terms of getting the product completed,” as the October 20 early departures are claimed to have shown. Furthermore, it is difficult to ascertain why those early departures could be characterized as more “defiant” than Herzog's failure to keep his express promise to report for work on a particular day. And neither Thomas nor Steve Peterson made an effort to do so.

Both Petersons testified that it is company policy for employees to request and secure permission from a supervisor, usually Steve Peterson, by October, before leaving work early. Indeed, Thomas Peterson claimed that Respondent has a form which employees must complete when seeking time off. Those forms are kept in various locations, he further testified, and in practice employees make use of them. Still, Steve Peterson never made mention of such a form, nor of a requirement that employees complete one when seeking time off. Nor was a copy of such a form produced during the hearing.

In connection with the subject of practice regarding early departures from work, Siem testified that, “Normally, before [October 20], if I am leaving on personal business, I would just tell someone I am leaving. Normally, it would be

³Although the written warning (G.C. Exh. 4(c)) bears the date “March 10, 1994,” that stated month is obviously inaccurate, as Thomas Peterson acknowledged.

Kevin.” Of course, that had been what Siem had done on October 20. Siem further testified, “I had never been questioned before [October 21], other times when I had left and said I have had personal business they never asked what the personal business was.” Respondent did not challenge that testimony which, obviously, shows that Siem, at least, had followed ordinary practice in connection with his October 20 early departure. Instead, Respondent adduced certain testimony from Steve Peterson which, in the end, conflicted with the objective fact pertaining to the time at which he had replaced Karst as production and maintenance supervisor.

Steve Peterson testified that, in the course of a performance review with Siem during May, he “went through the chain of command with him,” explaining “that if he had any—or if he needed to be gone or leave for some period of time, he needed to talk to me.” The problem with this testimony is that Steve Peterson had not been the supervisor of production and maintenance employees during May. Shop Foreman Karst had not been replaced by Steve Peterson until at least July 19, according to both Thomas and Steve Peterson. Thus, if the latter truly had explained in May that Siem should report to his supervisor, whenever Siem needed to leave work early, then “the chain of command” at that time would have obliged Siem to report to Karst, not to Steve Peterson—at least so far as appears from the evidence underlying Respondent’s defense.

In the final analysis, the most significant inconsistency in Respondent’s defense arises in the first sentence of a “1st Written Warning for excessive tardiness and absenteeism” issued by Steve Peterson on July 19 to employee Jesse Farris. That sentence appears in a paragraph which recites:

On June 14th Mr. Farris left the plant sometime in the morning without prior approval by his supervisor or myself. On June 15th Mr. Farris did not report to work nor did he call in with any explanation. Also on July 18th Mr. Farris failed to report for work.

Now, if leaving work midday without prior approval is regarded by Respondent as “defiant,” as Thomas Peterson claimed, then it should have followed that Farris would have been discharged in June, as were Siem and Lawson during October.

Farris was not terminated during June, however. In fact, he was not even warned during that month about his unauthorized early departure from work. So far as the evidence discloses, nothing was said to Farris about it until a month later, after two separate instances of absence without calling in. In an effort to mitigate that adverse effect on Respondent’s defense, Steve Peterson testified that when he gave the warning to Farris on July 19, Farris claimed “that he had told someone” on June 14 that he was leaving early due to illness. Nevertheless, Steve Peterson left the sentence about that early departure as part of Farris’ written warning. Asked about that fact, Peterson testified, “I asked [Farris] if he wanted me to change that [first sentence] and take it out, and he says, ‘No, you don’t have to do that, as long as we understand what is going on here.’” That particular testimony was not advanced credibly. Moreover, it is inherently incredible that an employee would be so reckless as to choose to leave a report of an infraction maintained as part of his employ-

ment record if, in fact, that infraction had never been committed.

In any event, the fact that Farris’ early departure was not even mentioned to him until over a month after it had occurred is inconsistent with Respondent’s approach 4 months later, when Siem and Lawson were abruptly discharged on the day immediately after they committed identical infractions. Furthermore, failure to even ask Farris for an explanation promptly after June 14, as was done with Siem and Lawson on October 21, undermines, if not obliterates altogether, Respondent’s assertion that unexcused early work departures are regarded as “defiant.” When Steve Peterson was asked ultimately why he had waited 1 month and 5 days to do anything about Farris’ midday unauthorized work departure, Peterson answered somewhat lamely, “I don’t know as if I can answer that question, it has been too long.”

Furthermore, Thomas Peterson’s above-quoted extensive predischarge actions on October 20 and 21 were, so far as the evidence reveals, novel undertakings. That is, so far as the record shows, Peterson had never before gone “onto the shop floor” to check the status of production and to interview employees, such as when Farris had left work early on June 14, nor when other employees failed to report for work as scheduled or as promised.

To be sure, standing alone, evidence of inconsistent treatment does not establish conclusively the existence of unlawful motivation. For, “there must be room in the law for a right of an employer somewhere, sometime, at some stage, to free itself of continuing [an] unproductive [employee practice of misconduct].” *NLRB v. Eldorado Mfg. Co.*, 660 F.2d 1207, 1214 (7th Cir. 1981). Nevertheless, one may not simply ignore altogether evidence of a recent infraction, identical to that committed by alleged discriminatees, for which no discharge was imposed. Nor can one ignore a general pattern of first warning, before discharging, employees who are absent without prior notice or explanation. Such evidence must be weighed when, as here, it is accompanied by other indicia of unlawful motivation.

First, Siem and Lawson had been the two employees who initiated the organizing campaign which led to the petition in Case 18-RC-15654. Although there had been “loose talk” about organizing during 1993, according to Siem, it had not been until late August of the following year that specific action was taken. Siem contracted Ken McInnis, the Union’s area representative. At the latter’s request, Siem spoke with 15 or 16 other employees, to ascertain whether there was support among Respondent’s work force for selecting a bargaining agent. Satisfied from those employees’ responses that there was, Siem and Lawson met with McInnis and obtained authorization cards which Siem asked employees to sign. In addition, McInnis held approximately four meetings with Respondent’s employees at the American Legion Hall. It was Siem who notified employees of the dates and times of those meetings. So far as the evidence shows, no other employee was so active on behalf of the Union as Siem and, to a lesser extent, Lawson.

The fact that Respondent discharged the two leading union proponents is one indicator of possible unlawful motivation. It is a fact which can “give rise to an inference of violative discrimination.” *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also *NLRB v. Des Moines Foods*, 296 F.2d 285, 289 (8th Cir. 1961); *Inter-*

mountain Rural Elec. Assn. v. NLRB, 732 F.2d 754, 759 (10th Cir. 1984), and cases cited therein.

Second, by the time of the discharges on October 21, Respondent obviously knew that activity was in progress among its employees to become represented by the Union. The petition had been filed on September 23. The Stipulated Election Agreement had been signed for Respondent on October 3. An election was set for November 3. True, there is no direct evidence that, by October 20 and 21, Respondent knew specifically about the extent of Siem's and Lawson's union activity and sympathies. There is evidence from which such knowledge can be inferred or, however, at least, from which Respondent's suspicion of Siem's and Lawson's activity and support can be inferred. As to the latter, of course, "the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities, whether or not they actually did so." *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). See also *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1965).

Before beginning work for Respondent, Siem and Lawson each had worked in Owatonna for King Company, a firm engaged in the same industry as Respondent. So, too, did Thomas Peterson from approximately 1981 through some of 1991, when he left King Company's employment to incorporate Respondent. Peterson did not dispute Lawson's testimony that, while both had worked at King Company, Lawson had "[v]ery casually" known Thomas Peterson. Nor did the latter challenge the accounts of Siem and Lawson that Thomas Peterson had been one official who had interviewed each of those employees when he sought to leave employment with King Company and obtain employment with Respondent.

The significance of that common employment at King Company is that the latter's shop employees were represented by the Union. Thomas Peterson acknowledged that he had known that a union represented King Company's employees. Asked if he knew that that union had been the Union, Peterson hedged: "I don't know that I knew that. I do know that now. . . . Yet, during his last 4 years of employment by King Company, Lawson had been a shop steward there for the Union. And Thomas Peterson admitted that, during mid-October, "Kevin related to me his involvement at the King Company as Union steward." Though Peterson claimed that, during that conversation, Lawson had nothing to say about the Union that was good, Lawson disputed that assertion, testifying that he had said "there is [sic] good things about unions and there is bad things, but—and I think I told him an example of a good thing that unions do. . . ." In any event, by the time of the October 21 discharges, Respondent had ample knowledge of Lawson's union activities at King Company and, further, ample basis for believing that Siem had been a member of the Union while working there.

Furthermore, while most of Lawson and Siem's union discussions with other employees were conducted during non-work time, Lawson testified that he "had several people come up to me and ask" for his opinion about the Union and its organizing campaign. In addition, Lawson frequently wore a jacket with the Union's logo or insignia and, also, had affixed the Union's sticker to the back of his personal toolbox, which was placed on top of the roller cabinet that he used while working. It is undisputed that employees regularly wear apparel bearing insignia and, further, that personal

toolboxes are used by a number of employees to display decals and stickers. Moreover, paperwork and tools were placed regularly on Lawson's toolbox and roller cabinet. Accordingly, there is nothing necessarily incredible inherently in Thomas Peterson's testimony that he never noticed the Union's insignia on Lawson's jacket, nor the sticker on Lawson's personal toolbox.

Still, Lawson's work location at Respondent had been near the office occupied by Thomas Peterson. Because of his technical expertise, and because of his responsibility for engineering and sales, Peterson is regularly present on the production floor: "More than one time a day, several times a day, depending on what the product is there," he testified. During an average day, acknowledged Peterson, he could be there "as little as just a few minutes, could be as much as several hours." Given his presence there, he certainly had the opportunity to observe insignia and decals displayed on wearing apparel and toolboxes, especially those indicating union support following receipt of the petition, and to overhear conversations among employees.

Respondent did not dispute Siem's testimony that "it is a small shop and word gets around." In fact, there is evidence of one particular conversation, before the representation petition had been filed, when an employee named John Dodd approached Thomas Peterson and said, according to Peterson, "that Keith Siem was wondering if he [Dodd] was going to a meeting." Appearing as a witness during Respondent's case-in-chief, Thomas Peterson denied that he had attached any connection between that meeting and support by Siem of a union, since "anyone that was in the plant could ask if anyone was going to any kind of meeting, and that wouldn't necessarily indicate that they were on one side or the other side of any issue." That is obviously a logical observation. Yet, while he sometimes equivocated regarding the subject—"I don't know that [Dodd] said Union, necessarily"—it was obvious that, at that time Peterson had at least suspected that the meeting mentioned by Dodd had been one involving a union.

When called as a witness during the General Counsel's case-in-chief, Thomas Peterson was asked if he had some inkling about union activity prior to receiving the representation petition. He answered: "I had one comment from one individual that there was some type of a meeting." Asked if he understood that the meeting, to which Dodd was referring, was a union meeting, Peterson replied, "Oh, or an employee meeting or, you know, a gathering." But when that subject was later raised, as he was testifying for Respondent, Peterson described what Dodd had said as follows: "John asked me if—excuse me—John commented to me, or told me, that Keith has asked him if he—meaning John—was going to a Union or an employee meeting that day or some time around in that time frame."

Dodd never testified. There is no evidence from which it can be inferred that he was naturally disposed to inform Respondent's officials about employee meetings or any other kind of meetings, in general. Indeed, there is no evidence that Respondent's employees usually, or even occasionally, conducted meetings among themselves. In consequence, it appears to be somewhat extraordinary for an employee to suddenly approach Respondent's president and comment about being asked by another employee concerning intent to attend a meeting.

In his answer quoted above, Thomas Peterson started by saying, “John asked me,” and then changed direction. At another point, when referring to what Dodd had said, Peterson testified, “John asked me that question.” But his above-quoted testimony as to the supposed substance of Dodd’s remarks does not include a question having been asked of Peterson by Dodd. Peterson never explained what he meant by “question.” It seems illogical that an employee would abruptly mention to his boss another employee’s interest in meeting attendance and, then, that nothing further would be said between the two of them, leaving the employee’s remark hanging in midair. It seems a more natural conclusion that other words would have been exchanged. Even if not, however, the record supports a conclusion that, from what Dodd admittedly had said to him, Thomas Peterson had understood that a union meeting was going to occur and, further, that Siem had been inquiring if another employee was going to attend it.

In sum, by October 20 and 21, Thomas Peterson knew that a representation petition had been filed, that some of Respondent’s employees were obviously supporting the organizing campaign which led to its filing, that Lawson and Siem had been employed formerly by King Company where the Union—or, at least, a union—represented shop employees such as Lawson and Siem, that Lawson had served as steward while working for King Company, and that even before the petition had been filed, Siem had asked at least one employee if the latter intended to attend a union meeting. So far as the evidence discloses, the name of no other employee had surfaced in connection with union activities. Of course, there are situations where stronger evidence of knowledge is presented. Nonetheless, the foregoing factors—evaluated in a context where Lawson had regularly been displaying union insignia—provide ample basis for inferring suspicion, at least, by Respondent of Lawson’s and Siem’s support for the Union.

Third, Thomas Peterson acknowledged that he was opposed to unionization of Respondent’s employees. To be sure, that acknowledgment does not mean that he was necessarily disposed to commit unfair labor practices to prevent it from occurring. Nevertheless, “[e]ven without direct evidence, the Board may infer animus from all the circumstances,” (citations omitted), *Electronic Data Systems*, 305 NLRB 219 (1991), and Peterson’s acknowledgment about his attitude should not be disregarded completely.

Siem testified that during a lunchtable conversation in the spring of 1993—apparently in connection with the “loose talk” during that year, mentioned by Siem—a discussion regarding what might be gained by unionizing led Steve Peterson to assert that “if we ever tried to start a union that Tom would close the doors.” Steve Peterson denied flatly ever having spoken those words, or anything resembling those words, to Siem or to any other employee.

A year and a half later, on September 8, Thomas Peterson was distributing paychecks to employees and, through a bookkeeping error, discovered that no check had been printed for Siem. There is no contention—nor evidence to support one, had it been made—that the failure to print a check for Siem had been deliberate. In fact, Peterson offered to try to obtain a check for Siem, if the latter felt such an effort was necessary, that same afternoon. It is undisputed that when he first approached Siem about the missing check, however,

Thomas Peterson said, “It would sure be nice to get one of these every week, wouldn’t it? I am sure Katheia [phonetic] would like to know that there is always going to be money there for food and clothing.”⁴ That undisputed remark is the basis for one of the General Counsel’s allegations of unlawful implied threat of discharge because of union activities.

The General Counsel also alleges that an early October statement to Siem by Thomas Peterson constituted another unlawful implied threat. Siem testified that he had been building control panels when Peterson approached and, after asking how things were going, remarked, “We should probably have a professional panel builder build panels,” adding, “a professional panel builder is a person that builds panels for a living and is very good at it.”

Thomas Peterson did not challenge Siem’s description of what had been said that day. Instead, he testified that Respondent subcontracts particular work whenever it falls behind in its production schedules and

[W]e were investigating the possibility of using a panel builder to build some of our panels from that standpoint, and also from a standpoint of product that was too complex, or something of that nature. And we have purchased other complete panels from panel builders.

Peterson denied ever saying or suggesting to Siem that employees would lose their jobs, should Respondent take such action. In fact, he testified, that would not have happened, “Because we are a growing company and we have lots of potential and opportunity for those people that are there. And, you know, the panels that we build we would continue to build them, or some portion.”

In evaluating whether Section 8(a)(1) of the Act has been violated, “the test to be applied is whether a remark can reasonably be interpreted by an employee as a threat. The test is not the actual intent of the speaker or the actual effect on the listener.” *Smithers Tire*, 308 NLRB 72, 72 (1992). In neither of the above-quoted remarks to Siem did Thomas Peterson specifically mention the Union. Nor did he specifically relate the actions mentioned—continued receipt of paychecks and using a professional panel builder—to union or protected activities by employees, in general, nor by Siem, in particular. In short, on neither occasion did Peter make an explicit threat. Still, “threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening.” *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).

Even “words innocent in and of themselves may be understood as threats,” *NLRB v. Crystal Tire Co.*, 410 F.2d 916, 918 (8th Cir. 1969), if uttered in “circumstances [where] the employees could reasonably conclude that the employer was threatening them with economic reprisals.” *NLRB v. Sanders Leasing Systems*, 497 F.2d 453, 457 (8th Cir. 1974). “The Supreme Court has said that coercive threats may be implied rather than stated expressly[.]” *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). Here, despite the absence of explicit mention of the Union and of support of it, certain factors show that Thomas Peterson’s remarks to Siem had constituted implied threats.

In both instances, the actions mentioned by Thomas Peterson were ones that were within Respondent’s complete con-

⁴Katheia refers to Siem’s daughter.

trol. It issued paychecks and it controlled the employment for which those checks were paid. It determined whether or not to bring in someone else to perform production work and it decided the effects of doing so on continued employment by electrical assemblers, such as Siem. Further, continued receipt of paychecks and bringing in a professional panel builder were actions which could be taken in the future, whenever Respondent decided to do so. Moreover, on both occasions the remarks to Siem were made by Respondent's president, an official who obviously possessed authority to determine whether or not to take those actions. And, he could do so for reasons "known only to him," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), should that be his desire.

It is undisputed that Respondent occasionally subcontracts work which could not be performed by its own employees as promptly as desired. But, aside from Thomas Peterson's above-quoted generalized explanation, Respondent has presented no particularized evidence, documentary or otherwise, that it was actually "investigating the possibility of using a panel builder," nor that production was behind schedule on that day in early October when Peterson made the panel builder remark to Siem. Nor, moreover, is there any evidence showing that Siem would have naturally understood that he would continue being assigned panel building, or other work, were Peterson to decide to bring in a professional. Certainly, Peterson never claimed that he had explained as much to Siem.

Of course, by the time of that early October statement to Siem, Peterson was aware from receipt of the petition of the organizing effort. Somewhat less obvious was Respondent's knowledge by September 8, when Peterson made the paycheck statement to Siem. Yet, Siem's initial contact with the Union had occurred in late August, followed by questions to co-workers regarding their support for a union, a meeting with McInnis at which authorization cards were obtained, and distribution of those cards to co-workers. In addition, McInnis conducted four meetings with Respondent's employees. All of these events preceded the filing of the petition on September 23.

There is no evidence as to the extent of that activity prior to September 8. Still, given everything that occurred before September 23, some of those activities had to have taken place before September 8. Furthermore, Thomas Peterson was vague—seemingly, deliberately so—concerning the point at which he had been told by Dodd about the meeting which Siem was asking if Dodd would attend. Peterson did concede that Dodd's statements had occurred before the petition had been filed. Given the sequence of the organizing activity, especially the number of meetings with employees conducted by McInnis, nothing inherently precludes Dodd from having spoken with Thomas Peterson prior to September 8. And in doing so, Dodd had mentioned Siem specifically to Peterson. In fact, Siem was the only name that Dodd did mention during that conversation.

Perhaps the most revealing aspect of Peterson's September 8 remarks to Siem occurred in the second above-quoted sentence. Given the situation, discovering that an employee's paycheck had not been included among those to be distributed, an employer might well be embarrassed and nervous about that situation. Lacking anything else to say to the employee that would be adequate to the situation, an employer

might well remark nervously how "nice" it would be to receive a paycheck every week. Of course, Thomas Peterson never claimed that embarrassment and nervousness had motivated that remark to Siem. So to conclude that those emotions had motivated his statements to Siem partakes somewhat of supplying a reason for Peterson to have done so, which I am not at liberty to do so. *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). "The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, supra.

Nonetheless, had that been Peterson's only remark to Siem that day, it might well be concluded that, given the situation, the remark is too ambiguous and vague to rise to the level of implied threat. However, it was not the sole statement made to Siem at the time. It is undisputed that Thomas Peterson added the statement that he was "sure" that Siem's daughter "would like to know that there is always going to be money there for food and clothing." By no stretch can such a remark—pertaining to an employee's continued ability to feed and clothe his child—be attributed to embarrassment at not having that employee's paycheck, nor to nervousness at having to explain the check's absence to that employee. Instead, it is a quite pointed remark which an employee would reasonably perceive as a warning about the consequences to his child's welfare of not continuing to receive paychecks. Given Siem's unmarred work record, advent of the Union's campaign had been the only proximate event which seemingly could have motivated Peterson to cease issuing paychecks to Siem.

Respondent argues that failure to prepare Siem's paycheck had been inadvertent. That is not the point. The point is that Peterson took advantage of a neutral event—absence of a check—to fire a shot across Siem's bow: to warn him of what could happen in the future. And a month later, after receipt of the petition and agreement for an election on November 3, Peterson took advantage of Respondent's practice of subcontracting work to fire another shot across Siem's bow. Given the totality of the above-described circumstances, I conclude that a union supported hearing Peterson's September 8 and early October statements "could reasonably conclude that the employer is threatening economic reprisals if the employee supports the union." (Citation omitted.) *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 311 (5th Cir. 1988). Consequently, Respondent violated Section 8(a)(1) of the Act as a result of Thomas Peterson's implied treats of discharge to Siem.

Even absent those violations of Section 8(a)(1) of the Act, a preponderance of the evidence supplies an inference that Respondent had been motivated by animus toward perceived union supporters, or likely supporters, when it discharged Lawson and Siem. By that time both had worked for Respondent for significant periods; Lawson for over 1 year and Siem for over 2 years. Both had unblemished disciplinary records. There is no evidence that either's job performance had been less than, at least, satisfactory. When he left on October 20, Siem had reported that fact to Lawson, as Siem had done in the past without repercussion when he left work early. True, Lawson failed to relay that report to Respondent. But it is not contested that Siem mentioned having done so to Thomas Peterson, during the following morning's conversation. Steve Peterson claimed that he had been willing to erase from Farris' work record the early departure portion of

a warning on the basis of a similar later explanation of notice to someone before having left work early. But that was not the course followed with Siem. Instead, he was fired. Furthermore, while Lawson failed to report that he was leaving work on October 20, he did call when he got home and report that he had done so. Nothing in the record shows that the delay in reporting his departure was viewed as a significant difference from having reported to a coworker, that he was leaving, before Lawson left. In the past, such conduct had at most warranted a warning.

So far as the evidence shows, the only difference between Siem and Lawson, on October 20, and Moore, Herzog, and, especially, Farris, on earlier occasions, had been the emergence of the Union's organizing campaign by October 21 and the election scheduled for November 3. As described above, Siem and Lawson had been the leading activists on behalf of the Union and, if it did not possess absolute knowledge of that fact, by October 21 Respondent did possess sufficient knowledge to at least suspect them of supporting the Union. Based upon my observation of his demeanor when testifying, which is confirmed by the above-described review of the record of that testimony, I do not credit Thomas Peterson's "defiant" distinction as his reason for deciding to discharge Siem and Lawson, while others had not been discharged for attendance infractions. Nor do I credit his testimony generally that his discharge decision had been motivated by Siem's and Lawson's unauthorized departures from work on October 20.

Whether Respondent's specific motivation had been to retaliate against Siem and Lawson for supporting the Union or, in light of the then-scheduled representation election, to create the "in terrorem effect on others," identified in *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), a preponderance of the credible establishes that Siem and Lawson were discharged on October 21 because of union activities and, conversely, fails to credibly show that either would have been discharged on that date had an organizing campaign not been in progress and had those two employees not supported, or been suspected of likely supporting, the Union's campaign. Therefore, I conclude that by discharging Siem and Lawson on October 21, Respondent violated Section 8(a)(3) and (1) of the Act.

III. THE REPRESENTATION PROCEEDING ISSUES

A. Madrene Cupkie

Inasmuch as I have concluded that Siem and Lawson were discharged unlawfully, I recommend that the challenges to their ballots be overruled. Respondent challenged Madrene Cupkie's ballot on the grounds that she is a managerial employee and, in any event, lacks a community of interest with unit employees.

Cupkie began working for Respondent in late 1993. Lawson testified that her job title is shipping and receiving clerk. He did not explain however the basis on which he reached that conclusion. At some point during the summer of 1994, before the representation petition had been filed, Respondent published a job description for Cupkie. It identifies her job title as "Purchasing/Inventory Controller."

Cupkie is paid on an hourly basis and, like unit employees, punches a timeclock. During the preelection period, however, her hourly pay rate equaled or exceeded those of

all but approximately seven of the unit employees. Like them, her immediate supervisor is Steve Peterson. But, unlike the unit employees, so far as the record discloses, she was never supervised by Karst, during the period that he had been shop foreman, and before he was replaced by Steve Peterson. Before that happened, Peterson had supervised Cupkie. As a result, she had different supervision from unit employees before Steve Peterson replaced Karst.

Cupkie's work station is a desk located in the receiving and inventory area, in a partitioned section of the production portion of Respondent's Owatonna building. Another desk is also located there. It is occasionally utilized by a small percentage of production and maintenance employees, such as material handlers, for various duties, such as receiving. Although Cupkie's work station is physically separate from Respondent's offices, that appears to be because of the duties which she performs.

She is responsible for ensuring that Respondent has parts and supplies needed to conduct production. Approximately a third of her normal duties involve receiving items and being certain that what has been received corresponds to what has been ordered. Another approximate third of her duties involves maintaining records of supplies and parts. Respondent keeps an inventory of parts normally used to manufacture furnaces and air systems that it sells. A six- or eight-digit number⁵ is assigned to each part in inventory. And a file card is also maintained for each one. On each card are listed the part's digit number, the minimum number of it which should be kept in inventory, the vendor from whom it usually is ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally, the names of other vendors who can supply that same part. Primary responsibility for keeping those cards current is assigned to Cupkie. The cards are filed on a bench located behind her desk. She records receipt of parts from suppliers and their ongoing use by Respondent's personnel in production. Whenever the number of a part appears to be nearing the minimum level set for it, she orders a resupply.

Purchasing occupies the final third of Cupkie's duties. And it is that aspect of her duties that provides the primary basis for Respondent's contention that she is a managerial employee: One who "formulate[s] and effectuate[s] management policies by expressing and making operative the decisions of [her] employer[.]" *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) (quoting *Palace Laundry Dry Cleaning*, 75 NLRB 320, 323 fn. 4 (1947)).

Aside from reordering parts to keep inventory levels stocked above minimum levels, whenever specific unusual products must be manufactured by Respondent, Cupkie will order the parts needed to do so, based upon bills of materials for such projects. If that were the extent of her purchasing responsibility, there would be no basis for concluding that Cupkie is unlike any other buyer whose duties do not elevate her/him to managerial status. See, e.g., *Lockheed Aircraft Corp.*, 217 NLRB 573, 575 (1975); *Sampson Steel and Supply*, 289 NLRB 481 (1988). Such routine purchasing duties would fail to show that Cupkie "represents management in-

⁵Both figures were used by Thomas Peterson when describing these numbers. There is no basis for concluding which figure is the correct one. But resolution of that discrepancy is hardly necessary to resolve Cupkie's status.

terests by taking or recommending discretionary actions that effectively control or implement employer policy.” (Footnote omitted.) *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). But, analysis of the manner in which she exercises her purchasing authority—the extent of unreviewed discretion that she exercises and the magnitude of its impact on Respondent’s overall business—establishes that Cupkie is more than simply a buyer performing routine duties.

As mentioned above, the inventory cards list the vendors from whom parts are ordinarily ordered. However, Cupkie is not obliged to continue ordering from those vendors; she had discretion to change vendors. For example, if a vendor is unable to make timely delivery of a part, she possesses authority to seek an alternative one which can meet Respondent’s delivery schedule. Further, she possesses authority to determine which vendor will provide the best price for a part which Respondent intends to order. And, based upon advice of Respondent’s technically knowledgeable personnel, she possesses authority to evaluate the quality of parts and supplies being provided by various vendors, and can select a particular vendor based upon that evaluation. Finally, whenever parts not ordinarily ordered must be purchased, it is Cupkie who must locate sources for them and select vendors from whom those parts will be ordered.

The discretion which Cupkie exercises in performing those purchasing duties is not ordinarily reviewed by any other official of Respondent. For example, Thomas Peterson testified that he did not independently review Cupkie’s purchasing decisions. Cupkie will confer with Steve Peterson whenever she is unable to locate a supplier who can make timely delivery of a particular part. Still, that does not appear to be an occurrence which arises with any frequency. Of course, even statutory supervisors will confer with superiors whenever unusual situations arise; that does not strip them of their supervisory status based upon powers which they ordinarily exercise.

Cupkie participates in Monday morning meetings with the Peterson brothers: Thomas, Steve and B. Allan Peterson, Respondent’s marketing manager. Yet, there is no evidence that her purchasing decisions are reviewed during those meetings. Instead, Respondent’s anticipated production is discussed and Cupkie is alerted to any need to order parts not usually purchased, as well as to purchases of particular parts that must be made in extraordinary numbers. So far as the evidence discloses, it is thereafter her responsibility to implement those purchasing objectives, exercising her discretion to locate a vendor, or vendors, who will make timely delivery of those parts at the best price.

Indeed, so far as the record discloses, Cupkie is the only individual employed by Respondent who regularly attends the Peterson brothers’ Monday meetings.⁶ Furthermore, whenever there are meetings with vendors, it is Cupkie who represents Respondent at such meetings. So far as the evidence shows, no other individual represents Respondent at meetings with vendors.

Obviously, Respondent’s credit is being committed whenever parts and supplies are purchased by it. Since she is the individual conducting purchasing, it is Cupkie who does so and the dollar amounts of her commitments, in total, are not

⁶There are earlier meetings each Monday attended by lead and supervisory personnel. Cupkie also attends those meetings. Then, the Petersons conduct their own meeting.

insignificant. For example, during the year preceding the hearing, her purchases amounted to approximately \$2 million. Ability to commit an employer’s credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is strong evidence of managerial status. See, e.g., *Swift & Co.*, 115 NLRB 752, 753 (1956), and *American Locomotive Co.*, 92 NLRB 115, 116–117 (1950), both cited by the Supreme Court as illustrations of managerial employee conclusions, in *NLRB v. Yeshiva University* at footnote 16, supra.

There is evidence that unit employees have also contacted vendors or suppliers to purchase parts and supplies. Still, so far as the evidence discloses, that occurs only in limited situations. For example, electrical parts have been ordered by Dave Lipelt and by Lawson. Lawson also has placed orders whenever Cupkie has been busy. Yet, Lawson acknowledged that he had only “sometime” placed such orders. There is no evidence that personnel other than Cupkie possess the extent of authority, and discretion in exercising it, which she possesses and exercises. Even if one or two other employees also did so, that would not change Cupkie’s status. At best, it would show only that there was a possibility that others, as well, might possess managerial status.

Similarly, that Cupkie obtains advice from unit employees regarding “one-time parts” to be ordered does not alter her managerial status. So far as the evidence reveals, she chooses when to obtain such advice and she does so in order to ensure that she selects the best source of particular parts. Those choices are her own, made whenever she deems it necessary to make them. That such choices are made by her does not alter the fact that Cupkie is the individual who exercises independent judgment in determining how purchasing for Respondent will be conducted.

In sum, a substantial portion of Cupkie’s duties require her to exercise unreviewed discretion in performing duties which involve substantial amounts of Respondent’s credit, representing a significant portion of its gross income. In carrying out those duties she “represents management interests by taking . . . discretionary actions that effectively . . . implement employer policy.” *NLRB v. Yeshiva University*, supra. Therefore, I conclude that Madrene Cupkie is a managerial employee, see, *Mack Truck, Inc.*, 116 NLRB 1576 (1956); *Kearney and Trecker Corp.*, 121 NLRB 817 (1958), and recommend that the challenge to her ballot be sustained.

B. Gary Conlin

There is no dispute about the fact that Gary Conlin had been performing unit work by the time that the representation election was conducted on November 3. But, as set forth in section I, supra, the Stipulated Election Agreement provides expressly that the payroll period for eligibility would be the one ending on October 3. Conlin was not then working for Respondent; he did not appear on its payroll until October 5, though Thomas Peterson testified that Conlin had “reported the week before . . . to fill out his paperwork and take his physical.” No evidence was presented regarding the reason for the hiatus between that time and Conlin’s commencement of work for Respondent on October 5.

Because Conlin did not become actually employed by Respondent until after the stipulated eligibility date, the Union challenged his right to vote in the representation election. Respondent counters that it entered the Agreement, rather

than participate in the preelection hearing then scheduled for October 7—by which date, it is undisputed, Conlin would have been employed and eligible to vote, under normal Board eligibility principles—with the specific understanding that Conlin would be permitted to vote. If that understanding had not been part of the election agreement, testified Thomas Peterson, “There wouldn’t have been one.”

There is no dispute about the substance of conversations on September 30 which led to the Stipulated Election Agreement’s execution on September 30 by the Union and on October 3 by Respondent. The Board agent handling the representation case made separate calls to each party, specifically to the Union’s Grand Lodge Representative and to Respondent’s Counsel, both of whom appeared for their respective parties in this proceeding. Respondent’s Counsel was agreeable to an election agreement, according to the Board agent, “So long as Mr. Conlin would be eligible to vote in the election, and then Madrene Cupkie would be challenged.” According to the Board agent’s notes of her conversation with him, Respondent’s Counsel “wants new employee that starts Tuesday, October 3rd [sic] to be eligible to vote, therefore payroll . . . ending date of October 3, 1994. Also thinks Madrene Cupkie is managerial and will challenge. . . .”

The Grand Lodge Representative also was amenable to an election agreement, in lieu of proceeding to hearing, according to the Board agent, because the Union desired the “Excelsior list [to] be sent at an earlier date and time than the Board’s regulated time frame.” When each was informed separately of the other party’s desire, the Grand Lodge Representative “did not agree to Mr. Conlin being eligible to vote, and he wanted the Excelsior list to come at an earlier date,” while Respondent’s Counsel “would not be willing to give an Excelsior list at an accelerated date, but . . . wanted Mr. Conlin to be able to vote.”

A conference call then was arranged that same day. Those two issues, as well as Respondent’s intention to challenge Cupkie’s vote, were covered during that call. Eventually, the Board agent testified, the Grand Lodge Representative agreed to “allow Mr. Conlin to vote in the election . . . if the *Excelsior* list was sent at an earlier date.” According to the Board agent, “In order to make that happen, I would have to change the payroll period ending date to a date that wasn’t a conventional payroll period ending date,” because

Mr. Conlin was being hired on a date which fell between two payroll period ending dates. Our stipulated election agreement was being signed between two payroll ending dates. And I wasn’t going to set the payroll period ending date to the date preceding the election agreement, because then that would have precluded Mr. Conlin from being eligible to vote. And I wasn’t going to set the date on the payroll period after our signing of the election agreement, because I didn’t want there to be any type of concerns where an Employer could pad the list with other employees that we had not discussed. . . .

So, testified the Board agent, “I asked for the date upon which Mr. Conlin was going to be hired so I could set a date that would allow Mr. Conlin to be eligible to vote, but not any other employees who may be hired after the period of time to be eligible to vote.” Responding to the question of

Respondent’s Counsel, the Board agent testified, “I believe you told me that that day would be October 3, 1994.” The Board agent denied specifically that there had been any discussion during that conference call of Conlin being eligible to vote so long as he was employed at any time during the week of October 3 and, further, denied that the Grand Lodge Representative, or anyone else participating in that conference call, had represented that Conlin would be an eligible voter as long as he was working at some point during that week.

As stated above, the Stipulated Election Agreement was signed for Respondent on October 3. It had been communicated by facsimile to Respondent’s Counsel, along with the Board agent’s request, “Please fax *Excelsior* list to my office.” By letter dated October 5, sent to a different board agent than the one with whom he had been dealing so far during the representation proceeding,⁷ Respondent’s Counsel stated:

I wish to have confirmation of the agreements reached in the above matter in writing. We entered into a Stipulation for an election and agreed to accelerate delivery of the employee eligibility list in return for an agreement that Gary Conlin, who was being hired during the week of October 3, would be an eligible voter. The Company complied with its part of the agreement and furnished an accelerated copy of the eligibility list. If either you or the Union have any different understanding about this agreement, I wish to be notified immediately.

Although a copy of the letter was sent to the Grand Lodge Representative, neither he nor any agent of the Board responded to it.

As to the second sentence’s “hired during the week of October 3” the Board agent handling the case testified, “essentially it is correct. Mr. Conlin was hired during the week of October 3rd.” Indeed, when earlier asked by Respondent’s Counsel if it was possible that, during the September 30 telephone conversations, he might have said that Conlin “would be hired during the week of October 3,” the Board agent answered,

Well, I recall—as I recall, when we had our conference call, or at some point during our telephone conversation, I asked you the date on which Mr. Conlin would begin working, so that I could set a payroll period ending date to reflect that date, and I believe that that day was October 3, 1994. So, by your writing, “Was hired in the week of October 3rd,” that is true.

In its brief, Respondent makes a straightforward argument to support its position concerning Conlin’s eligibility, and the Union’s asserted improper action of challenging his ballot:

The Respondent’s case rests on the enforceability of an agreement between the parties concerning Conlin’s eligibility. The evidence . . . is that the agreement that Conlin could vote was unconditional except for the requirement that the Employer expedite providing the *Excelsior* List. This was done and constituted valuable

⁷The reason for sending this letter to a different Board agent was never explained.

consideration for the agreement. This case presents nothing but a bald-faced attempt on the part of the Union to renege on its agreement. It is well settled that where the parties make agreements concerning the eligibility of voters in the course of a consent election agreement, that those agreements are binding and dispositive of those issues. *Television Signal Corp.*, 268 NLRB 633. Moreover, where, as here, the Employer entered the agreement and gave valuable consideration in return for the agreement, the Employer's consent to the election was predicated thereon. If the agreement is defeated, the Employer has valid grounds to have the election set aside. *NLRB v. Granite State Minerals*, 674 F.2d 101 (1st Cir. 1982).

Those cases, however, are not so supportive of Respondent's position as its argument portrays.

To be sure, both cases hold that parties to election agreements must abide by the terms of those agreements. Yet, both cases emphasized that the issues presented were being resolved with reference to the terms expressed in the election agreements being considered. For example, in *Granite State Minerals*, then-Judge Breyer wrote:

The issue is not whether the election was to be held with or without [challenged voter] Nadeau, it was whether the NLRB could proceed with a stipulated election, changing important terms in the agreement without the Company's consent. [674 F.2d at 103.]

Similarly, in *Television Signal Corp.*, supra at 633, where the issue was whether or not a challenged voter's job was embraced by the Stipulated Election Agreement's unit description, it is stated that, "The Board examines the [parties'] intent on an objective basis, and denies recognition to any subjective intent at odds with the stipulation." (Footnote omitted.)

The guiding principle that all parties, including the Board and its agents, will be bound to observe express terms in election agreements is a longstanding one. It is rooted in the significant policy consideration that "parties are far less likely to enter into agreements if they are worth little more than the paper they are printed on." *Community Care Systems*, 284 NLRB 1147, 1147 (1987). In consequence, it was held in *Summa Corp. v. NLRB*, 625, F.2d 293, 295 (9th Cir. 1980);

A party to an agreement authorizing a consent election is entitled to expect that other parties and agents of the Board will diligently uphold provisions of the agreement that are consistent with the Board policy and are calculated to promote fairness in the election. [Citations omitted.]

Only in situations where the terms of the election agreement are unclear or ambiguous, and the intent of the parties cannot be ascertained from examination of those express terms, does the Board proceed beyond those express terms by attempting to interpret them. *Television Signal Corp.*, supra; *S & I Transportation*, 306 NLRB 865 (1992); *NLRB v. Detective Intelligence Service*, 448 F.2d 1022, 1025 (9th Cir. 1971); *New England Lumber Division of Diamond v. NLRB*, 646 F.2d 1, 2-3 (1st Cir. 1981).

Here, as set forth above, the eligibility date is specified exactly in the Stipulated Election Agreement as "October 3, 1994." There is no ambiguity. Furthermore, nothing in the agreement provides specifically, nor even inferentially, for eligibility of Gary Conlin. Nor does the Agreement provide for early submission of the *Excelsior* list, which must be provided in any event, as a quid pro quo for Conlin's unrestricted eligibility. To be sure, Respondent argues that the Board agent and the Grand Lodge Representative understood, when the Agreement was negotiated, that Respondent desired Conlin to be an eligible voter. Nonetheless, it is undisputed that it also was understood that Conlin would begin working for Respondent on October 3.

Although the Board agent seemed to be expressing some uncertainty—"I believe you told me. . . ." (emphasis added)—as to whether she had been told specifically that October 3 would be Conlin's starting date, she appeared to generally recall clearly that she had been given that date as the one on which Conlin would begin working for Respondent. In fact, as also quoted above, it had been that information which led her to select the date specified in the Agreement: to allow Conlin, but no other new hires, to be eligible to vote in the election.

It is difficult to escape the conclusion that, as of September 30, Respondent truly did believe that Conlin, who by then had completed his paperwork and had taken his physical, would be starting work for it on October 3. For some unexplained reason, he did not do so. Still, such an unanticipated consequence does not serve to modify or nullify express terms in an election agreement. The Court held that unanticipated attendance of one employee at "crane school" should not have been allowed to do so in *NLRB v. Granite State Minerals*, supra. Nor did unanticipated inability of certain unit employees to be able to vote on the agreed-upon election date in *Community Care System*, supra. Nor did unexpected failure of a party's designated observer to show up in time for the election permit changes in the election agreement in *Inland Water Pollution Control*, 306 NLRB 242 (1992).

Here, everyone understood that Respondent desired Conlin to be eligible to vote. To accommodate that desire, a bastardized "Payroll Period for Eligibility-Period Ending" date was set. Everyone, including Respondent, agreed to it and signed the agreement in which that date appears. As a result, there was specific agreement to a tailored mechanism for allowing Conlin, but no other new hires, to be eligible. Respondent's personal desire in that respect was frustrated only because, through no fault of either the Union or the Board, Conlin did not start work as anticipated. Nonetheless, the express eligibility date remains a part of the argument and cannot be changed or modified by subsequent communications, such as the October 5 letter. See, e.g., *KCRA-TV*, 271 NLRB 1288, 1289 (1984). The fact that Conlin started work for Respondent later than expected no more justified ignoring the Stipulated Election Agreement's expressed eligibility date than did the unanticipated events in the cases cited above.

Therefore, I conclude that Conlin was not eligible to vote in the November 3 representation election and, accordingly, I recommend that the challenge to his ballot be sustained. Furthermore, the fact that events concerning his employment did not turn out as Respondent anticipated, when it executed

the election agreement, is no basis for setting aside the election, nor for voiding the underlying agreement. Under its expressed terms, production and maintenance employees were eligible if employed by October 3. Any party had the right to challenge a voter whose employment did not commence by that date. Nothing in the agreement, nor in the conversations leading to its execution, establish a waiver by the Union of that right with respect to Conlin. Therefore, I recommend that the objections be overruled.

CONCLUSIONS OF LAW

Concepts & Designs, Inc. committed unfair labor practices affecting commerce by discharging employees Keith Siem and Kevin Lawson on October 21, 1994, in violation of Section 8(a)(3) and (1) of the Act, and by impliedly threatening discharge of an employee for engaging in union activities, in violation of Section 8(a)(1) of the Act. Furthermore, the challenges to the ballots of Siem and Lawson, cast during the representation election conducted on November 3, should be overruled, while the challenges to the ballots cast by Madrene Cupkie and Gary Conlin should be sustained, and the objections to be conduct of that election should be overruled.

REMEDY

Having concluded that Concepts & Designs, Inc. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer immediate and full reinstatement to Keith Siem and Kevin Lawson, dismissing, if necessary, anyone who may have been hired or assigned to the positions from which they were unlawfully discharged on October 21, 1994, or, if one or both of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges. In addition, it shall be ordered to expunge from its files and records any references to their unlawful discharges, notifying them in writing that it has done so, and, further, shall be ordered to make Siem and Lawson whole for any loss of pay and benefits suffered because of their unlawful discharges, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for Retarded*, 283 NLRB 1173 (1987).

On these findings and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Concepts & Designs, Inc., Owatonna, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Threatening, expressly or by implication, discharge or other reprisals against employees for supporting or for engaging in activity on behalf of District No. 77, International As-

sociation of Machinists & Aerospace Workers, AFL-CIO, or any other labor organization.

- (b) Discharging or otherwise discriminating against Keith Siem, Kevin Lawson, or any other employee because of support for or activity on behalf of the above-named labor organization, or any other labor organization.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by 7 of the National Labor Relations Act.

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

- (a) Offer Keith Siem and Kevin Lawson immediate and full reinstatement to the positions from which they were discharged on October 21, 1994, dismissing, if necessary, anyone who may have been hired or assigned to those positions or, if one or both of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make Siem and Lawson whole for any loss of pay and benefits suffered as a result of their unlawful discharges, with interest on the amounts owing, as provided in the remedy section of the decision.

- (b) Remove from its files any reference to the unlawful discharges of Keith Siem and Kevin Lawson, and notify them in writing that this has been done and that their discharges of October 21, 1994, will not be held against them in any way.

- (c) Preserve and make available to the Board and its agents, for examination and copying, all payroll and other records necessary to compute backpay and reinstatement rights as set forth in the remedy section of the decision.

- (d) Post at its Owatonna, Minnesota place of business copies of the attached notice marked "Appendix."⁹ Copies of that notice on forms provided by the Regional Director for Region 18, after being signed by its authorized representative, shall be posted by Concepts & Designs, Inc. immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

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

IT IS ALSO RECOMMENDED that the challenges to the ballots cast by Keith Siem and Kevin Lawson in the representation election in Case 18-RC-15654 be overruled, and that their ballots be opened and counted, while the challenges to the ballots of Madrene Cupkie and Gary Conlin be sustained, and, further, that objections to the conduct of that election be overruled and that Case 18-RC-15654 be severed and remanded to the Regional Director for Region 18 for further appropriate processing of the representation proceeding.

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act gives all employees the following rights.

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

WE WILL NOT threaten, expressly or by implication, to discharge nor to engage in other reprisals against you for supporting or for engaging in activity on behalf of District No. 77, International Association of Machinists & Aerospace

Workers, AFL-CIO, or on behalf of any other labor organization.

WE WILL NOT discharge or otherwise discriminate against Keith Siem, Kevin Lawson or any other employee because of activity or support for the above-named labor organization, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed by the Act.

WE WILL offer Keith Siem and Kevin Lawson immediate and full reinstatement to the positions from which they were discharged on October 21, 1994, dismissing, if necessary, anyone who may have been hired or assigned to those positions or, if one or both of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and WE WILL make Siem and Lawson whole for any loss of pay and benefits they suffered as a result of our discriminatory discharge of them, with interest on the amounts owing.

WE WILL remove from our files any reference to the unlawful discharges of Keith Siem and Kevin Lawson on October 21, 1994, and WE WILL notify Siem and Lawson, in writing, that this has been done and that the discharges will not be held against them.

CONCEPTS & DESIGNS, INC.