

Dunham's Athleisure Corporation and Local Union No. 51, International Brotherhood of Teamsters, AFL-CIO. Cases 7-CA-35437 and 7-CA-35797

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On September 13, 1994, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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.

1. We agree with the judge's finding, for the reasons he set forth, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Roderick Taylor because of his union activities. Taylor, who was hired by the Respondent in November 1993, was an open and active supporter of the Union during its organizational campaign. In December 1993, Taylor began wearing a union hat, pin, and T-shirt at work, and on two occasions he handed out union flyers at the street end of the driveway leading into the Respondent's facility.

The Respondent maintains an attendance program, under which employees accumulate points for being late to work, leaving early, or being absent. The program provides that an employee will be counseled and ultimately discharged after the accumulation of a certain number of points. Employees who work overtime on Saturdays can "buy back Points." During his employment interview with Eileen Picotte, the Respondent's human resources manager, Taylor, informed Picotte that in the first weeks of his employment he would be absent for a few days because he had to appear in court several times in connection with a divorce and child custody dispute in which he was involved. Picotte told him that she would work with him on it and that all he had to do was to bring in some type of documentation from the court to substantiate the reason for his absence.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On January 4, 1994, the Union distributed at the facility a flyer which included pictures of some of the Respondent's employees and their statements of support for the Union. Taylor's picture and statement appeared on this flyer.

On January 5, Taylor was called into Picotte's office. Taylor was wearing a shirt that said, "Vote Yes, Teamsters." Picotte commented on Taylor's shirt by saying to him, "How do you expect the company to do anything for you when you walk around with Union Teamster caps and T-shirts on?" Picotte then told Taylor that he had violated the Respondent's attendance points policy. Picotte asked Taylor what he could tell her to make her change her decision to discharge him. Taylor replied that if Picotte was asking him to vote "no" in the upcoming election, he would not do that, but rather would vote "yes" even if she fired him. Picotte concluded this discussion by telling Taylor he was discharged.

In adopting the judge's finding that the Respondent discriminatorily discharged Taylor, we emphasize that in the meeting in which Picotte discharged Taylor, she specifically tied his discharge to his union sentiments. Picotte's statements in this context clearly reflect a causal connection between the discharge and Taylor's union activity and establish a strong prima facie case that Taylor's union activity was a motivating factor in his discharge within the meaning of *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1982). In addition, we rely on the timing of the discharge, which occurred only 1 day after Taylor's picture appeared in a flyer expressing his support for the Union, and just 2 days before the representation election.

Accordingly, under *Wright Line*, the burden shifts to the Respondent to show that it would have discharged Taylor even in the absence of his union activity. In his answering brief, the General Counsel correctly acknowledges that it is debatable whether Taylor reached the maximum number of points such that his discharge was warranted under the Respondent's attendance program.² What is clear from Picotte's final statements to Taylor, however, is that his discharge was not an inevitability and that she had the discretion to vary that outcome. After initially stating that Taylor's wearing of union insignia made it unlikely that the Respondent could "do anything" for him, Picotte pointedly asked Taylor if there was anything he could tell her that would change her decision to discharge him. In light of Picotte's initial comment on Taylor's pronoun at-

²It is not entirely clear from the record whether Taylor should have been credited with having "bought back" some points as a result of his performing certain Saturday overtime work and whether, in light of his preemployment interview with Picotte, some points should not have been charged for absences necessitated by court appearances.

tire, Taylor reasonably interpreted Picotte's question as referring to his vote in the NLRB election then just 2 days away. Picotte did nothing to correct Taylor's interpretation. We therefore infer that Picotte was seeking to "persuade" Taylor to switch his sympathies and that, if he had answered her question appropriately, she would not have discharged him. Consequently, we conclude that the Respondent has not met its burden of showing that it would have discharged Taylor even in the absence of his union activity. Therefore, we find that the General Counsel has carried his burden of proving that Taylor's protected conduct was a substantial or motivating factor in the adverse action taken against him by the Respondent and adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Taylor.

2. We also agree with the judge that Steven Laycock was discharged for his union activity in violation of Section 8(a)(3) and (1). Laycock, who was a line leader in the receiving department at the time of his discharge, was considered by his supervisors to be an exemplary employee who had not received any warnings or discipline, except for attendance.

Four months before his discharge, Laycock was handbilling for the Union in the parking lot. He was observed by almost all of the Respondent's higher management officials. His picture appeared on union flyers 2 months before his discharge.

On March 18, 1994, the day of his termination, Laycock punched in at the usual time, 6:30 a.m., 30 minutes before the starting time for the rest of his crew. For 10 or 15 minutes, he walked through his area and determined the work to be done that day as part of his usual responsibility. When he had determined the priorities for the day, he sat down on a "slip sheet," which was a 4-by-4 foot piece of plywood on wheels. He heard a conversation between two approaching supervisors, Leslie Riley and Larry Knight. Laycock sat forward and looked out. Riley and Knight asked what he was doing, and Laycock replied that he was waiting for his crew. Knight asked him if he was on the clock, and Laycock falsely answered that he was not. Knight did not believe Laycock's denial and told Laycock to get to work. Laycock complied.

Later that day, Laycock was called to a meeting in Picotte's office at which he was informed that he was seen "curled up" and sleeping, although the record shows that neither Knight nor Riley actually saw him asleep or in a prone position. Laycock denied that he was asleep and related the conversation he heard as they approached him. Laycock was informed that he was suspended for 3 days and told to report to work the following Tuesday.

Later that day, the Respondent's vice president, James Nelson, who had demonstrated significant union

animus during the organizing campaign, including assaulting an employee who was handbilling, changed the suspension to a discharge. The Respondent sent Laycock a letter terminating him and charging him with three "Serious Infractions" under its standards of conduct. Serious infractions are defined as those that could warrant immediate dismissal. Laycock was charged with violating standards of conduct sections prohibiting knowingly providing false information concerning timecards or other employment information, misuse of company or customer property, and sleeping on the job.

Based on the foregoing, we find that the General Counsel has established by a preponderance of the evidence that antiunion animus was a motivating factor in Laycock's discharge. Thus, the record shows that Laycock was a union activist, that the Respondent had knowledge of his sentiments, and that the Respondent exhibited antiunion animus prior to his discharge. Therefore, under *Wright Line*, the burden shifts to the Respondent to show that it would have discharged Laycock even in the absence of his union activity.

The General Counsel does not dispute that Laycock "may have been subject to some form of discipline for his actions on the morning of March 18, 1994." The General Counsel correctly points out that the real issue is whether the Respondent has established that that form of discipline was discharge. For the reasons set forth below, we agree with the judge that the Respondent has failed to meet its burden.

First, the record shows that the Respondent's management initially considered Laycock's misconduct to be relatively minor. Knight admitted that he did not believe Laycock's denial that he was on the clock when Knight ordered Laycock back to work. With respect to the alleged sleeping on the job, Knight and Picotte conferred and determined that a 3-day suspension was warranted.

Second, the Respondent has failed to convincingly explain why it increased the penalty from suspension to discharge. The additional charge that the Respondent leveled at Laycock, that he "misused" company property by sitting on a slip, is not supported by the record. The slips are used to transport heavy loads of stock throughout the warehouse, and Laycock's merely sitting on a slip could not reasonably result in any damage to it. The Respondent's addition of this "serious infraction" suggests that it was searching for a pretextual reason to justify Laycock's discharge.

Third, the management official responsible for the discharge decision, Vice President Nelson, is an individual who exhibited substantial hostility toward the Union and its supporters. In these circumstances, the judge reasonably inferred that Nelson's decision to discharge, rather than suspend, Laycock "is another ex-

ample of how far Nelson is willing to go'' to discourage union activity.

Fourth, we are not persuaded by the Respondent's attempt to justify its discharge of Laycock by presenting evidence of other discharges for violations of the standards of conduct. In all these cases the employees who were terminated had recurring problems and previously had been warned or had engaged in serious misconduct. The only other employee whose termination involved sleeping on the job had been warned for wandering around the warehouse and for threatening to damage the Respondent's property. That employee was not discharged until he was caught sleeping in the women's restroom.

We find that the evidence clearly establishes that Laycock was disparately treated relative to the discipline meted out to other employees. No other employee had been discharged for similar conduct. In view of Laycock's excellent work record, it is apparent that the Respondent seized on this relatively insignificant incident to rid itself of an active and outspoken union adherent. For all these reasons, we find that the General Counsel has carried his burden of proving that Laycock's conduct was a substantial or motivating factor in the adverse action taken against him by the Respondent and we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Laycock.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dunham's Athleisure Corporation, Waterford, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Czubaj, Esq., for the General Counsel.
John Palmer, Esq. and *Denise Remick*, of Waterford, Michigan, for the Respondent.
Kevin O'Neill, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge in Case 7-CA-35437 was filed by Local Union No. 51, International Brotherhood of Teamsters, AFL-CIO (the Union) against Dunham's Athleisure Corporation (Respondent) on January 18, 1994,¹ and the charge in Case 7-CA-35797 was filed by the Union against Respondent on April 8. A consolidated complaint was issued on May 20 alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging employees Roderick Taylor and Steven Laycock on January 5 and March 18, respectively, because they assisted the Union and

engaged in concerted activities. Respondent denies violating the Act.

A hearing was held in Detroit, Michigan, on June 22. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, which is engaged in the retail sale and distribution of sporting goods, athletic wear, and related products, maintains its principal office in Waterford, Michigan, has stores at various locations in Michigan and it operates a distribution center in Livonia, Michigan. The complaint alleges, the Respondent admits, and I find that at all times material here Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent hired Taylor in November 1993. He was interviewed by Eileen Picotte, who was then Respondent's human resources manager, before he was hired. During the interview Taylor told Picotte that he was involved in a divorce and a child custody battle and in the first month and a half of employment with Respondent he would have to appear in court a couple of times. At that time Picotte told Taylor that she would work with him on it and all he had to do was bring in some type of documentation from the court as proof that he had been in court that day.²

²Picotte testified on surrebuttal that it was her policy if someone told her during their interview that they were going to need some time off for a particular reason she "usually would make arrangements to give them that time off without penalty due to the fact that it's a condition of employment." Initially, Picotte testified that she did not recall Taylor mentioning during his interview anything about being in the process of getting a divorce. Then she testified that she was sure that Taylor did not mention needing time off during his interview. Respondent employs between 150 and 200 people at the distribution center and it has about a 150-percent turnover annually. Subsequently Picotte testified that during deer-hunting season she has interviewed two people every half hour for 6 hours in a day, 5 days a week; that she hired about 30 people in November 1993; that she had interviewed several hundred people between the time Taylor was interviewed and the time she testified here; and that as she testified on surrebuttal she could not be sure what she said during her interview with Taylor but

on many occasions when an employee tells me that they are in some sort of a situation where they need some time off, we will discuss it and come up with some options, and it's documented in the file at the time that they are hired.

Respondent did not demonstrate that such documentation was not included in Taylor's file. It is noted that Picotte testified that on "many" and not on all occasions. Taylor testified that he brought this up because he knew he was going to be taking time off and he wanted Picotte to be aware of this. For the reasons set forth below, Picotte did not impress me as being a credible witness. Where her testimony conflicts with that of Taylor the latter is credited. Taylor impressed me as being a credible witness.

¹Unless indicated otherwise, all dates are in 1994.

In the beginning of December 1993 Taylor began wearing a union hat and a union T-shirt.³ He wore them "just about everyday." Also, he wore a pin which endorsed the Union. Taylor attended union meetings and twice he handed out union flyers at the street end of the driveway into Respondent's distribution center.

Under Respondent's perfect attendance program, which is contained in its employee handbook, Respondent's Exhibit 1, employees accumulate points for being tardy, leaving early, or being absent.⁴ After receiving 6 points, the employee receives oral counseling; after 9, written counseling; after 12, verbal counseling; and on receiving 18 points, the employee was terminated. An employee could "buy back" two points by working 4 hours on Saturday after working a 40-hour week.⁵ Employees were also rewarded with a free paid day off and given recognition for perfect attendance. Respondent's Exhibit 4. Picotte, who administered the program, estimated that 80 percent of Respondent's terminations involve this program. See, for example, Respondent's Exhibit 5.

Picotte sponsored Respondent's Exhibit 3(e) which is a form which indicates that Taylor received oral counseling when he had accumulated 8 points. The date of "11/27/93" appears at the top of the form. The date "12-6-93" appears at the bottom of the one-page form where the supervisor and Taylor signed it.

On December 16, 1993, Taylor called in to the distribution center at 7:45 a.m. to indicate that he would be late. Picotte filled out the involved form, Respondent's Exhibit 3(d). She testified that she took Taylor's call; that Taylor told her he would be in as soon as possible; and that her assistant, Kathy White, informed her later in the day that Taylor did not come to work that day.

On December 17, 1993, Picotte called Taylor to her office and told him that on December 16, 1993, he had reached 18 points under the perfect attendance program. When she asked Taylor if there was anything on the point schedule, Respondent's Exhibit 5(c), that was in error he indicated that he had worked on the prior Saturday and his manager must not have informed the personnel office that Taylor had bought back points. Picotte gave Taylor credit for two points.

On January 4, a union flyer which included pictures of Respondent's employees and their statements in support of the Union was distributed. General Counsel's Exhibit 9 and Respondent's Exhibit 6(a).⁶ The following statement appears

³He estimated that eight other people in his department wore union T-shirts and hats.

⁴The tardy point schedule reads as follows:

| | |
|-------------------|----------|
| .01 to 1.00 hr. | 1 point |
| 1.01 to 3.99 hrs. | 2 points |
| 4.00 hours plus | 3 points |

An employee who was absent and did not call in would receive eight points. One who was absent but called in during the first hour of absence received five points. One who was absent and called in past the first hour of absence received six points. And one who was absent and gave notice to the Respondent the previous day or before that received four points.

⁵Points were deducted or bought back at the rate of one for every 2 hours worked on Saturdays.

⁶R. Exh. 6(b) is a similar flyer involving 11 employees, except for Shawn Hill, different from those pictured on R. Exh. 6(a). Picotte left Respondent on May 31. She testified that all the employees pictured on R. Exhs. 6(a) and (b), except for Taylor, Laycock, and Jim Artushin, were still employed at Respondent when she left.

with Taylor's picture: "By voting 'Yes' we not only have the support of Local 51, we also have the support of 1.4 million other Teamsters behind us."

And the following statement appears with Laycock's picture: "I've been at Dunhams long enough to know that management doesn't really care. That's why I'm voting 'Yes' for the Teamsters!"

On January 5 Taylor was called to Picotte's office. Commenting on Taylor's attire, Picotte said "How do you expect the company to do anything for you when you walk around with Union Teamster caps and T-shirts on." Taylor believed that his shirt said, "Vote yes, Teamsters." Regarding this meeting, Taylor testified that Picotte said that he had violated Respondent's "point policy" dealing with attendance; that Picotte said that she could have terminated him at the beginning of December because he was in violation of the point policy then; that Picotte asked him what he could tell her to make her change her decision to terminate him; that he told her that if she was asking him to vote "no" in the upcoming election he would not do that but rather he would vote "yes" even if she terminated him; that she told him she would mail his paycheck and he did not have to come back to the distribution center; and that he told her that he would be back in a couple of days to vote for the Union.⁷

Regarding Taylor's termination, Picotte testified that she asked him if there was anything on the status report, which showed 18 points, that he felt was in error, Respondent's Exhibit 3(b); and that Taylor was in her office the morning he was terminated and it was in January, it was cold, and all she could remember about his attire was that he was wearing a jacket. On cross-examination Picotte testified that she did not recall Taylor talking to her about the fact that the only two absences on the status sheet—Respondent's Exhibit 3(b)—November 17 and December 16, were court dates; that each one of these absences resulted in five points; that Taylor never discussed with her in November or December that he had to go to court because he had a child custody problem; that she did not know if she spoke to Taylor on January 5 or 6; that the date on Respondent's Exhibit 3(a) means she spoke to Taylor on January 6; and that she recalled she terminated Taylor in the morning. Subsequently, Picotte testified that she absolutely did not say to Taylor on the day she discharged him, "How do you expect the company to do anything for you when you wear union T-shirts and caps"; and that Taylor did not ask her if she was requesting him to change his vote in the upcoming election.

Taylor's master payroll and charge request, Respondent's Exhibit 3(a), has an effective date of January 6 for Taylor's termination.

On rebuttal Taylor testified that between November and his termination he received points for two absences; that both

Also, she sponsored a number of documents, R. Exh. 7 which covers recognition for perfect attendance, notices of recognition, and pay raises given to some of the employees pictured, except Taylor and Laycock, on R. Exhs. 6(a) and (b). Many of the documents predate the involved organizing campaign and the involved union flyers with employees' pictures and statements on them. On cross-examination Picotte testified that attendance awards are automatic and there is no discretion with management; that first line supervisors or live leads generally generate notices of recognition and pick associate of the month and upper management does not veto the call.

⁷The election was held on January 7.

absences involved court appearances; that with respect to the second absence listed on Respondent’s Exhibit 3(b) he called Respondent from the courthouse expecting to finish there before lunchtime but he was not able to get to work; that he believed he spoke with Kathy, the secretary, at Respondent’s and he did not speak with Picotte that day; that he brought the documentation Picotte requested for both court appearances and he gave it to his leadman, Don Sutton; that when Picotte spoke to him in December she told Taylor that she had no knowledge of the documents; that he thought that the matter was going to be taken care of; that he was discharged in the early afternoon about 1:30 or 2 p.m.; and that he did not bring up the fact that he had supplied the documentation showing that he appeared in court in his termination meeting with Picotte because Picotte had already decided she was not going to replace the points and he was not the arguing type. On cross-examination, Taylor testified that when he spoke with Picotte in December he told her he worked just about every Saturday during his employment and with respect to the absences Picotte said she could not do anything because she did not have any knowledge of the hearing slips that he brought in and gave to his line lead; that he did not bring the documents covering his court appearances to Picotte because when he was hired Picotte said that he had to use the chain of command and therefore he gave them to his line lead, Sutton.

On surrebuttal, Picotte testified that to her knowledge neither Taylor nor Sutton ever brought her documentation regarding Taylor being in court. On cross-examination, Picotte testified that the first time she heard about Taylor going to court was at the hearing here; that she thought she took either the morning phone call from him regarding his second absence when he said he was going to be late or the phone call he made later that morning to say he would not show up at all; and that court was not mentioned in the phone call she took from Taylor.

As stipulated by the parties, Joint Exhibit 2, on January 14 the Employer filed objections to the election and on March 4 the ballots were counted. The tally showed 61 for the Petitioner Union, 28 against the Petitioner, and 28 challenged ballots.

Laycock, who was hired by Respondent in 1990, was a line leader in receiving at the time of his termination. In 1991 during a prior organizing campaign, Laycock was named as a member of the Union’s in-plant organizing committee in a letter the Union sent to Respondent. General Counsel’s Exhibit 8(a). Laycock testified that about 4 months before he was terminated he was handbilling for the Union at the street end of the driveway into Respondent’s distribution center; that while he was handbilling for the Union at that location he was observed by the following of Respondent’s managers: Larry Knight, Picotte, Jim Nelson, Doby Billingsley, Jerry O’Hullen, Joe Wilson, Leslie Riley, and Cliff Krieger; that once the police came to the site while he and others were handbilling; that as line leader between 6:30 and 7 a.m., which was the starting time of the employees in his department, he was supposed to find orders for them to move when they came to work; that on March 18 when he first came to work he spent 10 or 15 minutes finding orders to be handled; that he then sat down and waited for his employees to come in; that he sat on a “slip sheet,” which is a 4-by-4 foot piece of plywood which rides on rollers and

on which merchandise is stacked; that half of the order was gone off one of the slip sheets on the line so he sat on that slip sheet; that as he sat on the slip sheet he heard Riley and Knight talking about an order that was on ad which order was two spots back from him; that he had looked at the order before and it was for Conventional and he had decided to wait for the area to clear out and it was going to be one the next items moved; that when he leaned out Knight asked him what he was doing and he told Knight that he was sitting and waiting for his people to come in; that Knight asked him if he was on the clock and he said “no”;⁸ that Knight then said, “[w]ell, get to work”; that he then helped someone push an order; that shortly after 7 a.m. Knight called Laycock into his office; that Picotte was present; that Knight said that he saw Laycock “curled up” and Laycock said that he was not curled up; that he was suspended for 3 days; that Knight told him to report back to work on the following Tuesday; that he told his supervisor, Wilson, that he would see him on Tuesday because he had received a 3-day suspension; and that when he returned home on the following Monday he received the following letter from Respondent, General Counsel’s Exhibit 2, which is dated March 18:

After investigating the incident this morning and talking to witnesses, we have decided to terminate your employment effective immediately. The termination is for violating the Standard of Conduct in the Employee Handbook under Serious Infractions Nos. 2, 4, and 13.

Your last paycheck will be mailed to you within 3 business days.⁹

Laycock testified that other than notices regarding attendance, he had never received any other kind of written warn-

⁸Laycock pointed out that there were two other part-time line leaders in receiving and they started at 7 a.m. He had requested to be able to start at 7 a.m. and Wilson had approved his request but upper management denied the request.

⁹The standards of conduct, R. Exh. 20, reads, as here pertinent, as follows:

Standards of Conduct are divided into (2) categories in order to communicate our expectations of all Dunham’s Distribution Center’s associates and to clarify what is meant by a serious infraction of Company policies and standards:

A. *Serious Infractions* are those violations of Company policies or standards that are of such importance to the safe and efficient operation of the Distribution center that an infraction could result in immediate dismissal:

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- 2. Knowingly falsifying records, applications for employment, time cards, or any other information used in conducting Company business. Supplying false, misleading, misrepresentative or distorted information or refusing to provide accurate and complete information when requested.
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- 4. Misappropriation of Company or customer property, or willingly or maliciously causing damage or defacing Company or customer property. Removing Distribution Center or supplier property without receiving proper written authorization. Misuse or unauthorized use of Company property while on or off Company time or Company premises.
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- 13. Sleeping on the job.

ing or discipline from Respondent;¹⁰ and that he was not asleep on March 18 when he was sitting on the slip sheet. On redirect Laycock testified that when he heard Knight and Riley he "sat up and looked out." On recross Laycock testified that when he testified he "sat up" he meant he "sat out" since he was sitting. Subsequently Laycock testified that when he sat down on March 18 the only other work he could have done was to push freight over into the other area but no other line leaders did that; and that he was waiting for his employees to come in so they could start to move the merchandise out of the receiving area.

Joe Wilson, who was Laycock's supervisor in March 1994, testified that his manager, Larry Knight, told him that Knight "found Steve laying down on a slip sheet . . . and he actually discovered him getting up"; that Knight said Laycock was going to be suspended for 3 days; that later in the day on March 18 Picotte told him that Laycock received a 3-day suspension or more specifically "[h]e was found sleeping on the job and we're suspending him for three days"; that later that same day he had a conversation with Knight and Picotte and it was indicated to him that the decision had been changed by Respondent's vice president, Jim Nelson, and Laycock was terminated; that when Laycock left on March 18 he was told to report back to work the following Tuesday; and that Laycock gave a good performance as a worker and he gave Laycock a good review, General Counsel's Exhibits 4(a)-(d). On cross-examination Wilson testified that Knight told him that when Nelson found out about the episode, he thought termination was more appropriate.

With respect to Laycock's termination; Picotte testified that on March 18 Knight asked Laycock "if he was sleeping on the job or if he was sleeping out of his work area, and I believe he denied it, although he did not deny laying on the slip sheet"; that Laycock was told he was on suspension pending further investigation, witnesses would have to be interviewed and she told Laycock "that this procedure normally—our policy is that it does not take more than three days, and that he would be notified as soon as we made a decision"; that it is standard policy at Respondent's distribution center to suspend individuals before termination; that more than one manager had seen Laycock "laying on a slip sheet, and the fact that he looked startled when they confronted him"; that other employees have been terminated for violating Respondent's standards of conduct;¹¹ that the fact that his past appraisals were near perfect was not taken into consideration because of the severity of the incident; that she suggested Laycock be charged with unauthorized use of company property; that Laycock was laying down with his eyes shut; that nobody saw him with his eyes shut but he was seen laying down; that Laycock was terminated for sleeping on the job; that they had reason to believe that Laycock was sleeping on the job; that it was not Nelson's determination to terminate Laycock; that Nelson gave his opinion "but it was not his decision, finally. No, it was not"; that Nelson's opinion was that Laycock should be ter-

minated; that as vice president of Respondent, Nelson's opinion holds a lot of weight; that she did not recall a conversation with Wilson on March 18 during which she indicated Laycock was suspended for 3 days; that she did ask Wilson on the morning of March 18 what he saw; that she never told Wilson what Laycock's punishment would be; that after she had all the reports (see statements of Knight and Riley, Jr. Exhs. 3 and 4, respectively), she, Knight, and Nelson met later on March 18 and all three made the decision to discharge Laycock; and that both Knight's and Riley's written statements indicate that they saw Laycock laying down.

Knight, who is general manager of processing, began his employment with Respondent on July 19, 1993. Regarding March 18, he testified that about 6:50 a.m. he walked the floor with another supervisor, Riley; that he was looking for some merchandise that Respondent had an ad for the following weekend and he wanted to make sure it was moving and would be in Respondent's stores in time for the sale; that as he walked down the aisle between pallets he saw a pair of feet; that he "saw some rustling, rustling about as . . . [Laycock] sat up; that Laycock did not reply when he asked him what he was doing; that he asked Laycock if he was on the clock and Laycock said "no"; that Laycock "seemed a bit disoriented to me, quite honestly, as if he had just opened his eyes"; that he told Laycock to go to work; that he immediately went to the timecards and determined that Laycock had already punched in; that since he had only been with the Company 7 or 8 months he went to Picotte to discuss the appropriate action; that he told Picotte that he had caught Laycock at least laying on the job and it looked to him like Laycock was sleeping and, moreover, Laycock lied; that they spoke to Laycock and he asked Laycock if he was sleeping; that Laycock denied sleeping; that he and Picotte determined to suspend Laycock pending further review; that he solicited input from Nelson; that it was his decision to terminate Laycock; and that he spoke to line leader Winfred Cobb about working prior to the time when other employees came in and he spoke to Wilamoski about reading a newspaper. On cross-examination, Knight testified that Laycock "was in a reclined position is as close as I could tell you"; that he could not recall what specific merchandise he was looking for; that he does not know for a fact that Laycock was sleeping; that Laycock's prior appraisals were not considered; that Nelson "felt like that was a situation that warranted termination; that while Wilson testified that he was told Laycock was given a 3-day suspension, 'I told [Wilson that Laycock] was suspended. I believe that's the only term I gave him because we had not come to a final conclusion and that's all the information I could give him at that point' (emphasis added); that 'I don't think I said [to Wilson] it was a three day suspension. I think I told [Wilson that Laycock] was suspended' (emphasis added); that regarding Laycock's testimony that he was to report back to work on Tuesday, 'I do not believe that's what was said, no' (emphasis added); that he decided to terminate Laycock after Nelson said Laycock should be terminated; that he made the ultimate decision as to what penalty to give Laycock; that before he made his decision Picotte indicated that Laycock should be terminated; that Nelson and Picotte's "thoughts were in line with what I felt"; that while it is his belief that Laycock was sleeping, he could not "unequivocally say that Laycock was sleeping"; that he never saw Laycock with his eyes closed; that

¹⁰ Laycock sponsored past reviews, G.C. Exhs. 5-7, which demonstrated that he constantly achieved a rating of more than acceptable and one year he achieved an outstanding performance rating.

¹¹ It was stipulated by the parties that R. Exh. 22 covers terminations under the standards of conduct occurring between November 1992 and March 1994.

he did not hear any snoring sounds; that he saw Laycock "leaning up but not in a fully flat position"; that when he spoke to line leader Dean Wilamoski, who was terminated "a couple of months [before the hearing here] for job performance," it involved a violation of the standards of conduct since he was on the clock and instead of working he was standing reading the newspaper; that the area in which he found Laycock was Laycock's work area; and that he knew prior to his termination that Laycock was a supporter of the Union. Subsequently, Knight testified that he could not recall whether he indicated in his written statement that Laycock was laying down;¹² and that he believed that when he first saw Laycock his feet were above the slip next to the one that he was sitting on.

Riley testified that on March 18 she saw Laycock "coming to a rising position on a pallet, sitting down"; that Knight asked Laycock, "Are you supposed to be working" and she thought Laycock said "yes"; that Knight asked Laycock if he was on the clock and Laycock said "no"; and that Knight then said, "Well, go ahead and get to work; that to her Laycock appeared "startled, like—like you shock somebody out of their sleep, like, they jump. By the time I saw around Larry and seen him [Laycock] rising to a sitting position, he had taken a deep breath like somebody who had just woke up." On cross-examination, Riley testified that she prepared her statement, Joint Exhibit 4, "[t]he same day [they] found [Laycock] laying down"; that she "only saw him coming to a sitting position. I saw his head rise up"; that she did not know where his body was, but she saw him sit up;¹³ that she did not see Laycock's eyes closed but he appeared to be sleeping; and that on March 18 Knight told her that Laycock would be suspended until they investigated further. Subsequently, Riley testified that there was freight on all slip sheets contiguous to the one Laycock was occupying and there was even some merchandise on the 4-by-4 foot slip sheet that he occupied.

Regarding the conduct of other line leaders between 6:30 and 7 a.m., Laycock testified that "[m]ost of them would come in, find out what they had to do, and then they would just talk"; that Wilamoski, who was a line leader in processing, would sit down and read a newspaper; that twice he saw Knight talking to Wilamoski as he was sitting down; that Billingsley, Respondent's general manager, saw Wilamoski sitting down; and that line leaders Cobb and Ron Marshall asked Distribution Center Supervisor Riley why Wilamoski could sit and read the newspaper and nobody else could.

Cobb testified that for 4 or 5 months line leader Wilamoski would come in at 6:30 a.m. "he would get his paperwork together somewhat, and then he would go back and just sit down and read the newspaper or do whatever he would like"; that he saw Knight observe Wilamoski; and that twice he mentioned to Riley what Wilamoski was doing and one of these times it involved a situation when she talked to him, Cobb, and line leader Marshall about standing around, talking and not doing anything.¹⁴ Subsequently,

¹²In his written statement, Jt. Exh. 3, Knight indicated "WE WALKED UP IN [sic] STEVE LAYCOCK LAYING ON A PALLET."

¹³In her statement, Jt. Exh. 4, Riley indicates "we walked up on Steve Laycock laying down on a slip sheet."

¹⁴Picotte testified that she was not aware of any disciplinary action taken against Wilamoski for this.

Cobb testified that the reason he and Marshall were standing around and not doing anything was because they had already done everything to set up and it was his practice, once things were set up, to view it as free time until the employees came in to work; and that while Riley spoke to him twice for just standing around and not doing anything he never received a written warning or any disciplinary sanction.¹⁵ Riley testified that Cobb did tell her about Wilamoski and she asked another supervisor to watch out for it and she said something to Wilamoski about having a newspaper in his work area; and that she did speak to Cobb when she saw him talking with Marshall.

Timothy Potter, who is a line leader at Respondent's distribution center, testified that on the day of the union election, January 7, he put a union banner on his car which was parked somewhere in the vicinity of the distribution center; that the police arrived at the scene; that Nelson and Billingsley came out into the parking lot;¹⁶ that the police told the union supporters that they had to leave; that Nelson approached Potter and asked him if he was on the clock; that when he said he was not Nelson raised his hand and began to put it on Potter's shoulder saying, "[w]ell, then, in that case, I want you off my property"; that he said to Nelson "I wasn't asked that this was your property"; that Nelson squeezed his hand into his, Potter's, shoulder and, with the snow on the ground Potter slipped and fell up against a nearby truck; that the union representative present told Nelson to take his hands off Potter; that the police told Potter to get into his vehicle and leave; and that when Nelson first found out that the union people were out there again handing out cards he told Potter, "Tim, you've already gotten a little piece of the candy, and if we can keep this union thing out of [here] you'll be getting much more." On cross-examination, Potter was shown Respondent's Exhibit 14 which collectively contains recognition Potter received such as notices of recognition, associate of the month, perfect attendance awards, pay increase, and a gift certificate. When asked about the two perfect attendance awards he received subsequent to this incident, Potter testified that he earned the awards, testifying "[i]t's not because they wanted to give it to me."

As stipulated to by the parties in Joint Exhibit 2, on March 29 a hearing was conducted on the Employer's objections and on May 26, a hearing officer's report and recommendations issued. General Counsel's Exhibit 3. The following appears on page 7 of the report:

At first, Kim Tarovella testified that she did not vote "[b]ecause one of the union employees [Steve Laycock] told me that my vote wasn't going to be counted anyway." At the same time, though, Tarovella said that she was also told by this supporter of Petitioner that "the Union would fight for the right for me to vote. . . ." In the end, Tarovella chose not to vote because, according to her, she considered herself to be

¹⁵Picotte testified that she was not aware of any disciplinary action taken against Cobb for just standing around and not doing anything.

¹⁶Respondent shares space with other entities and it is located second from the end away from the street, which is about a block from the street.

a supervisor and did not want to get involved in the voting process.

There is no evidence in the record that Laycock is an agent of Petitioner. Consequently, his actions must be examined with reference to the third party standard enunciated by the Board in *Baja's Place*, supra [268 NLRB 868 (1984)]. Not only did Laycock's remarks to Tarovella fail to create a "general atmosphere of fear and confusion," but they also do not rise to the level of violating the *Baja's Place* standard for parties to an election, as they did not reasonably tend "to interfere with the employees' free and uncoerced choice in the election." Id.

Tarovella's testimony establishes that she was not in any way coerced or intimidated regarding her right to vote and that she freely chose not to vote for her own reasons.

Contentions

Counsel for the General Counsel, on brief, contends that once a prima facie case is established, the burden shifts to Respondent to show that it would have taken the same action even in the absence of the protected concerted activity and/or union activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 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); that Respondent cannot simply present a legitimate reason for its actions, but must persuade by a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct, *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); that here a prima facie case has been established; that clearly Picotte made an impermissible connection between the proposed personnel action and Taylor's union activity in that Picotte clearly stated to Taylor that the Company could do something for him but not if he continued to walk around wearing union T-shirts and caps and Picotte asked him if there was anything he could say to persuade her to change her mind about releasing him; that while Taylor brought up the union election, Picotte did not disclaim Taylor's interpretation of her question; that had Taylor given Picotte what she considered to be the appropriate answers, Taylor would not have been terminated; that Picotte impermissibly linked Taylor's continued employment with Respondent to his abandonment of his support for the Union and Respondent's actions are thus in violation of Section 8(a)(3) of the Act; that Laycock would not have been terminated but for his activities on behalf of the Union; that Respondent had no evidence that Laycock was asleep on the job; that Laycock was a very good employee who had never been disciplined for any infractions in the years that he had been in Respondent's employ; that both Laycock and his immediate supervisor were informed that Laycock was merely suspended for 3 days immediately after Laycock's disciplinary interview and Laycock was terminated only after Nelson became involved; that had Knight truly believed that Laycock was not on the clock, he would not have ordered Laycock to "get back to work" and, therefore, Laycock's misrepresentation of his status was not a major deception which caused great harm to Respondent; that Respondent took great pains to literally "throw the book" at Laycock; that Respondent's actions are clearly "over-kill" in an attempt to insulate its actions from legal

challenge; that a close examination of Respondent's evidence of other discharges for violations of its standards of conduct reveals that most, if not all, of the employees terminated had recurring problems and had been previously warned, or engaged in very serious misconduct; that in one of the examples, former employee Mario Savino had been caught sleeping on the job earlier and had not been discharged; that these records demonstrate that Respondent had a practice of giving employees an opportunity to correct perceived deficiencies in their behavior before being terminated; that it can only be concluded that, but for his union activity, Laycock would not have been terminated.

Respondent, on brief, argues that the Charging Party has failed to show any evidence that Taylor's union activities were a motivating factor in his termination of employment; that Taylor's employment record speaks for itself, and "timecards do not lie"; that Taylor was consistently absent and/or late beginning 6 days following commencement of his employment; that within 30 days of employment, he had been verbally warned and advised of the attendance policy twice, but continued to accumulate points, and quickly accrued 18 points following 55 days of employment, before his 90-day orientation period had expired; that Picotte reduced Taylor's points on December 16 after Taylor explained he had worked a Saturday, giving Taylor the benefit of the doubt; that when Taylor reached the termination level for the second time in January 1994, he had no excuse; that with regard to Taylor's allegation that he was terminated because he wore union T-shirts and hats, the evidence is clear that the Employer did not single out Taylor on January 5 or on any other date, amongst other active union supporters who wore union T-shirts and hats; that as for Taylor's testimony that Picotte commented on Taylor's attire in the doorway of her office, such statement is unsubstantiated and Picotte denied making such a comment; that the perfect attendance program has been uniformly applied; that the simple fact that Taylor accumulated 18 points within the 14-week period is clear evidence that Taylor's alleged union activities were not a factor in his termination from the distribution center; that Laycock was terminated on March 18 pursuant to the Employer's standards of conduct, serious infractions; that Laycock was found by Knight and Riley "sleeping" on a pallet camouflaged amongst 200 pallets stacked with merchandise 5 to 7 feet high between 6:30 and 7 a.m. on March 18; that following "an interruption of Laycock's nap, and upon opening his eyes (T-153)" Knight asked Laycock if he "was on the clock?" Laycock replied "no"; that Knight then checked Laycock's timecard and found that Laycock was in fact "on the clock"; that whether Laycock was pleasantly dreaming or sitting/resting on a pallet, is a question of credibility; that the weight of evidence, including Laycock's testimony, suggests Laycock was caught sleeping on the job; that it is an undisputed fact that Laycock lied to Knight; that "[i]n similar instances, on October 14, 1993, Employer's employee, Mario Savino, was terminated for sleeping on the job"; that "[i]n the past year, two (2) employees have been terminated for supplying false, misleading or distorted information pursuant to Employer's Standards of Conduct (Ex-E22) which are uniformly and consistently applied"; and that Laycock is using his alleged association with the Union as a veil to cover the mistakes he made.

Analysis

Certain of Respondent's statements on brief cause me concern. Taking the last first, Respondent argues that "[i]n the past year two (2) employees have been terminated for supplying false, misleading or distorted information pursuant to Employer's Standards of Conduct (Ex-E22) which are uniformly and consistently applied." Unlike the preceding sentence in its brief Respondent does not supply the names of the individuals in Respondent's Exhibit 22 who supplied false, misleading, or distorted information. A review of all of the documents in Respondent's Exhibit 22 fails to reveal any evidence of any employee who was terminated for supplying false, misleading, or distorted information. Consequently, I am unable to make any kind of a comparison.¹⁷

Next, Respondent argues on brief that "Savino was terminated for sleeping on the job." As indicated in Appendix C hereto (omitted from publication), Picotte wrote "Mario was terminated at 3:00 on 10/14 for sexual harassment when he was found leaving the ladies room in Bldg. 3." One of five entries on the sheet refers to the fact that Savino was caught sleeping in the restroom. Other entries indicate that he (1) would wander from his department for one-half hour or more, (2) called Supervisor Sutton names behind his back, (3) was a slow worker, and (4) yelled "foul things at Richard Ware and threatened to key his car." Savino was not terminated for sleeping on the job. He did that and a number of other things. But only when he engaged in "sexual harassment when he was found leaving the ladies restroom in Bldg. 3" was he fired.

Also, as noted above, Respondent argues at page 7 of its brief that Laycock "upon opening his eyes (T-153)" at transcript page 153 Knight testified that Laycock "seemed to be a bit disoriented to me, quite honestly, as if he had just opened his eyes." No one testified that they saw Laycock with his eyes closed. And while both Knight and Riley testified that they did not see Laycock laying down both included the same or similar sentence in their aforementioned written statements, namely, "we walked upon Steve Laycock laying [Riley included the word "down" in her statement] on a"

I credit Taylor's testimony that during his job interview in November 1993 he explained to Picotte that he would have to appear in court regarding domestic relations problems, and that Picotte hired him notwithstanding this with the understanding that he would not be penalized for his absences as long as he provided documentation showing that he was in court. While Picotte testified that "on many occasions" such understanding would be documented in the employee's file, she did not testify that a review of Taylor's file failed to reveal such documentation. Additionally Picotte's testimony that "on many occasions" this is the approach taken apparently means that on some occasions this is not the approach taken.

Taylor started wearing union paraphernalia and engaging in activities in support of the Union in the beginning of December 1993. On December 6, 1993, he signed a document

¹⁷R. Exh. 22 covers documents taken from the files of Mario Savino, Eric Spencer, Anna Dascke, Charles Morgan, Kevin Koeppen, Eric Henry, Melanie Grifca, Michael Moore, Carey White, and Justin Hines.

indicating that he had received oral counseling regarding Respondent's absence program.

And 11 days later Picotte spoke to him regarding his absences. As noted above, on brief Respondent points out that "time cards do not lie," Taylor testified that he told Picotte on December 17 that he worked just about every Saturday during his employment. Picotte testified that she gave Taylor the benefit of the doubt regarding working the Saturday before December 17, 1993. Picotte did not specifically deny that on December 17 Taylor not only said that he worked the prior Saturday but he said that he worked just about every Saturday during his employment. "[T]ime cards do not lie." Picotte did not have to give Taylor the benefit of the doubt. The timecards or some other of Respondent's records would have indicated if he worked on the prior Saturday. And if he worked on other Saturdays before that he should have received credit for them. He did not receive credit for them. Picotte did not specifically deny that Taylor worked on those Saturdays and no documents were introduced here to show that Taylor did not work on those Saturdays.

Taylor testified that he gave the documentation for his two court appearances to Sutton. Sutton did not testify to deny this. I credit Taylor's testimony. Picotte was not a credible witness. As Taylor testified, on December 17 Picotte denied receiving the documents showing that Taylor was in court. By then Respondent knew where Taylor stood regarding the Union. His future at Respondent was sealed unless he changed his mind. Taylor assumed on December 17 that Picotte would act in a reasonable manner and straighten out the question of documentation regarding his being in court. What Taylor did not realize at the time was that there was no question regarding the court documentation and that Picotte had no intent of doing anything other than taking those actions which could be used in an attempt to justify the termination of Taylor.

Taylor engaged in union activity. Respondent knew about it. One or two days after Taylor's picture and statement appeared on a union flyer he was terminated.¹⁸ Respondent's union animus was demonstrated not only by the two unlawful terminations involved here but also by the fact that its vice president, Nelson, does not deny that he went so far as to intentionally make physical contact with one of Respondent's employees who supported the Union, causing that employee to lose his balance and fall against a truck. Under *Wright Line*, supra, Respondent has not shown that it would have terminated Taylor but for his union activity. In terminating Taylor, Respondent violated the Act as alleged.

Wilson, who was one of Respondent's supervisors, impressed me as being a credible witness. I credit his testimony that in separate conversations on March 18 Knight and Picotte originally told him that Laycock was suspended for 3 days, and later that same day Wilson, during a conversation with Knight and Picotte, was told that Nelson changed the decision so that Laycock was terminated. Nelson did not testify to deny that he changed the decision. Knight's denial that he told Wilson that Laycock was suspended for 3 days

¹⁸The fact that other employees whose pictures and statements appeared in the union flyers received recognition from Respondent after the union flyers were distributed demonstrates nothing more, in my opinion, than that Respondent continued with its normal routine regarding these other employees since they did not present it with a situation that Respondent could somehow take advantage.

is couched in terms of "I believe" and "I don't think I [told Wilson] it was a three-day suspension." While Knight testified in this manner about his original conversation with Wilson about Laycock's punishment, Knight did not specifically deny Wilson's testimony that in the second conversation about Laycock on March 18 with Knight and Picotte he was told that the suspension decision was changed by Nelson to termination. Since Knight was relatively new at being a supervisor at Respondent he looked to Picotte for guidance. They conferred and a decision was reached to suspend Laycock for 3 days. Laycock was told and his immediate supervisor, Wilson, was told of the 3-day suspension by both Knight and Picotte.

Picotte and Knight engaged in overkill here. Why? As counsel for the General Counsel contends on brief, "Respondent took great pains to literally 'throw the book' at Laycock." Picotte decided to charge Laycock with misuse of company property for simply sitting on a slip sheet or pallet. Laycock was also charged with sleeping on the job, albeit no one unequivocally testified that they saw Laycock sleeping on the job. In the one incident of sleeping on the job cited by Respondent, the individual was not terminated until he subsequently engaged in sexual harassment when he was found leaving a ladies' restroom.

Laycock was not insubordinate to Knight on March 18. Laycock's response that he was not on the clock, in a context like the one here where leadmen before 7 a.m. stand around and talk and read newspapers and are not disciplined, is somewhat akin to a young man being caught with his hand in the cookie jar. He realizes his mother knows what he is doing but when she asks "are you taking a cookie," his survival reflex causes him to say "no" notwithstanding the fact that both know that is exactly what he is doing. Banishing the young men from the family would not be a reasonable approach. Terminating Laycock for this, in the circumstances which existed here, would not be reasonable. This is not why Laycock was terminated.

Laycock engaged in union activity and Respondent was aware of this. At the first opportunity Laycock presented Respondent after the election, it decided to take advantage of the situation and terminate him. As indicated above, Nelson's intentional physical contact with one of Respondent's employees who supports the Union on the morning of the election is one indicia of union animus and it demonstrates how far Nelson would go. Laycock's termination is another example of how far Nelson is willing to go. In terminating Laycock, Respondent violated the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent Dunham's Athleisure Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. By discharging Roderick Taylor on January 6, 1994, and Steven Laycock on March 18, 1994, because of their union activities and concerted protected activities, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Roderick Taylor and Steven Laycock, it will be recommended that Respondent be ordered to reinstate them to their former positions, and make them whole for any loss of earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Dunham's Athleisure Corporation, Waterford, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union activities and concerted protected activity.

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

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

(a) Offer Roderick Taylor and Steven Laycock immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

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

(c) Remove from its files any reference to the discharges of Roderick Taylor and Steven Laycock on January 6 and March 18, respectively, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

(d) Post at its Livonia, Michigan facility copies of the attached notice marked "Appendix."²¹ Copies of the notice,

¹⁹ Under *New Horizons for the Retarded*, supra, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

²⁰ If 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.

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the 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.

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

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

WE WILL NOT discharge employees because of their union activities and concerted protected activity.

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

WE WILL offer Roderick Taylor and Steven Laycock immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.

WE WILL notify Roderick Taylor and Steven Laycock in writing that we have removed from our files any reference to their unlawful discharges on January 6 and March 18, 1994, respectively, and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

DUNHAM'S ATHLEISURE CORPORATION