

**Performance Friction Corporation and United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW). Case 11-CA-16040**

November 30, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On April 6, 1995, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, the Union filed a brief in response to those exceptions, and the Respondent filed a reply 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified,<sup>2</sup> and to adopt the recommended Order as modified.

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

The Respondent has also excepted to the judge's decision asserting that the judge, through his comments at the hearing, rulings, and decision, demonstrated bias and prejudice against it. Upon our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent at the hearing or in his analysis and discussion of the evidence.

In adopting the judge's finding that the Respondent implemented its new disciplinary system in April 1994, we do not draw an adverse inference from the Respondent's failure to call, as witnesses, employees who it alleged attended committee meetings where the new disciplinary rules were formulated.

For purposes of our decision, we find it unnecessary to resolve whether the Respondent's owner, Donald Burgoon, admitted that his truck left tire marks during an April 28, 1994 incident.

<sup>2</sup> Consistent with the judge's analysis we have modified the Conclusions of Law, Order, and notice to provide that the Respondent additionally violated Sec. 8(a)(3) and (1) by: (1) terminating employees Kyle Myers, Leslie Teague, and Bernard Young pursuant to its new disciplinary system; and (2) terminating employee Manuel Montecon for engaging in union activities, and to discourage support for the Union. As to Montecon, it was neither alleged in the complaint nor established in the record that he was additionally discharged under the unlawfully revised disciplinary system.

We have not included Michael Thompson and Nedra Stewart as discriminatees because the record does not establish that they were discharged on or after April 19, 1994, when the judge found that the revised policy took effect. The General Counsel, however, has the opportunity in compliance to establish that Thompson, Stewart, or, indeed, any other employee, was unlawfully discharged on or after April 19 pursuant to the revised disciplinary policy.

Finally, consistent with the judge's proposed remedy, we have modified the recommended Order and notice to specify that all dis-

The Respondent has excepted to the judge's decision to grant the General Counsel's midhearing motion to amend the complaint to add to the list of discriminatees disciplined under its revised disciplinary policy, those "similarly situated employees known to Respondent but presently unknown to the General Counsel." We adopt the judge's decision. Thus, the General Counsel moved to amend the complaint immediately after the Respondent asserted that there were employees, beyond those named in the complaint, who had been disciplined under the revised rule. As this motion was made before the Respondent put on its case, it had an adequate opportunity to address the expanded class issue. Further, although the judge inadvertently failed to rule on this motion until his decision, he notified the Respondent when the motion was made that: he intended to grant it; that the Respondent should consider itself on notice that the General Counsel was broadening the class of discriminatees; and that it should litigate the case accordingly.<sup>3</sup>

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 5.

"5. Pursuant to its new and stricter disciplinary system, the Respondent discharged union activists and employees Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague and others in violation of Section 8(a)(3) and (1) of the Act."

2. Insert the following as a new Conclusion of Law 6, and renumber the succeeding section.

"6. The Respondent discharged Manuel Montecon because of his union activities and to discourage such activity in violation of Section 8(a)(3) and (1)."

ORDER

The National Labor Relations Board orders that the Respondent, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threatening to re-

discipline meted out under the revised disciplinary system, including discharge, is unlawful.

<sup>3</sup> We find that the cases relied on by the Respondent are distinguishable. We also find that *Sumo Airlines*, 317 NLRB 383 (1995), does not require a contrary result. In *Sumo Airlines*, the General Counsel was not permitted, after the hearing, to expand the class of discriminatees to include an additional employee beyond those named in the complaint and stipulated to by the parties. Here, however, the General Counsel promptly moved to amend the complaint, and the Respondent had the full opportunity to litigate the amended allegation at the hearing. In addition, in compliance, the Respondent has the opportunity to show that it would have taken the same action towards any of the additional unnamed discriminatees, even without the revised disciplinary policy.

duce wages if the employees select the Union to represent them; interrogating employees about their union sympathies and activities, and the activities and sympathies of fellow employees; soliciting grievances from employees and expressly or impliedly promising to remedy those grievances in order to discourage union activities among employees.

(b) Instituting a new and stricter disciplinary system in response to employee union activity to discourage such activity or to rid itself of union activists.

(c) Issuing warnings, discharging, or taking other disciplinary action against any employees for engaging in protected concerted or union activities.

(d) 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) Rescind the new and stricter disciplinary system which was instituted by the Respondent in response to employee union activity.

(b) Rescind any disciplinary action taken pursuant to the stricter disciplinary system which system the Respondent instituted in response to employee union activity.

(c) Offer Manuel Montecon, who was unlawfully discharged for engaging in union activities, and Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague, and any other employees unlawfully discharged pursuant to the new disciplinary system, 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 other rights and privileges; and make them whole with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus appropriate interest, for any loss of earnings they may have suffered as a result of the discrimination against them.

(d) Remove from its files any reference to the warnings, discipline, and discharges found unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel actions against any of those individuals.

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

(f) Post at its Clover, South Carolina facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

this notice, on forms provided by the Regional Director for Region 11, 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.

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

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 THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threaten to reduce wages if employees select the Union to represent them; interrogate employees about their union sympathies and activities and the activities and sympathies of fellow employees; solicit grievances from employees and expressly or impliedly promise to remedy those grievances in order to discourage union activities among employees.

WE WILL NOT institute a new and stricter disciplinary system in response to employee union activity to discourage such activity or to discharge union activists.

WE WILL NOT issue warnings, discharge, or take other disciplinary action against any employee for engaging in protected concerted or union activities.

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 rescind the new and stricter disciplinary system.

WE WILL rescind any disciplinary action taken pursuant to the stricter disciplinary system.

WE WILL offer Manuel Montecon, Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague, and any other employees discharged pursuant to the new disciplinary system, 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 other rights and privileges and WE WILL make them whole, with appropriate interest, for any loss of earnings they may have suffered as a result of the actions against them.

WE WILL remove from our files any reference to the warnings, discipline, and discharges found unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that the warnings, discipline, or discharge will not be used against them in any way.

#### PERFORMANCE FRICTION CORPORATION

*Donald R. Gattalaro, Esq.*, for the General Counsel.  
*Weyman T. Johnson, Jr., Esq.* and *Kimberly M. Zywicki, Esq.*  
*(Paul Hastings, Janofsky & Walker)*, of Atlanta, Georgia,  
 and *William Rikard, Esq.* and *Keith M. Weddington, Esq.*  
*(Parker, Poe, Adams & Bernstein)*, of Charlotte, North  
 Carolina, for the Respondent.  
*Marcia Borowski, Esq. (Stanford, Fagan & Giolito)*, of At-  
 lanta, Georgia, for the Charging Party Union.

#### DECISION

##### STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in York and Rock Hill, South Carolina, on December 5, 6, 7, and 8, 1994. The underlying charge was filed on May 23, 1994, and later amended. A complaint and notice of hearing issued on July 8, 1994.

This case concerns allegations Respondent unlawfully threatened employees that it would close its plant before a union would be allowed to represent employees; that it would be futile for employees to select the Union as their representative; that Respondent would reduce wages and benefits of employees if they selected the Union to represent them; that Respondent interrogated employees in order to ascertain their union sentiments; that Respondent solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage unionization; that Respondent instituted a new disciplinary system during the union campaign which was more stringent than its prior policy, and, pursuant to the new policy, discharged various employees in order to thin its ranks of union supporters.

In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of United Automobile, Aerospace, Agricul-

tural Implement Workers of America (UAW) as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.<sup>1</sup> Following the close of the trial, all parties filed timely briefs which have been duly considered. On the entire record in this case and from my observation of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Performance Friction Corporation is a South Carolina corporation which manufactures and sells nonasbestos disk brake pads. In the course and conduct of its business, Respondent annually purchases and receives at its South Carolina facility goods and materials valued in excess of \$50,000 directly from points located outside the State of South Carolina. Respondent also annually sells and ships from its South Carolina facility products valued in excess of \$50,000 directly to points located outside the State of South Carolina.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

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

###### A. Background

At its facility in Clover, South Carolina, Performance Friction manufactures nonasbestos disk brake pads and other friction materials. Performance Friction sells its brake pads directly to automobile manufacturers such as Ford Motor Company and to wholesalers and retailers in the replacement parts market. Other customers include many of the Nascar Winston Cup, Indianapolis 500, and IMSA racing teams.

Respondent's president and production manager is Don Burgoon, who acquired the company from his father. Burgoon moved the manufacturing facility from its former site in Ohio to the current facility in Clover, South Carolina.

<sup>1</sup>At the conclusion of counsel for the General Counsel's case, he moved to amend the complaint in certain particulars. Respondent objected to the amendment. When I stated that I was prepared to grant the motion, Respondent's counsel specifically requested that I not rule on the motion to amend the complaint until Respondent had concluded its evidence. I informed Respondent that I would not grant counsel for the General Counsel's motion to amend the complaint at that time, but only because of Respondent's request. I informed Respondent that it should assume for purposes of putting in its evidence that it was required to address such issues. I inadvertently failed to grant the motion at the conclusion of the trial, and therefore counsel for the General Counsel's motion to amend the complaint is now granted.

Since that time, Respondent has grown from approximately 25 employees in 1986 to nearly 400 employees in 1994.

There is no dispute about the fact that long before any union organizing activity at Respondent's facility, and in spite of extremely high employee turnover, Respondent produces what is recognized as a quality product. Otherwise, it would not be so widely used under such extreme racing conditions. An article on the Company that appeared in *Under Car Digest*, a magazine/trade publication, shows that a commitment to quality has long been touted by Respondent.

The Union began its organizing activities at Respondent in early February 1994. Burgoon himself admitted that he became aware of those activities in February. When asked if he was against the Union, Burgoon also admitted, "I am. I was, I am." Burgoon admitted that he did not hesitate to let his employees know he was against the Union. Assistant Production Manager Michael Ford also admitted being against the Union and that he was disturbed by employees distributing union handbills on Respondent's premises. Burgoon and Ford also admitted trying to keep track of the employees who supported the Union. Burgoon testified, "We were always trying to be aware if there was a vote, where we would stand." Ford testified that he heard numerous rumors about who was active on behalf of the Union, and that he consistently passed that information on to Burgoon. Burgoon recalled specifically that he heard employees Susan Hudson, Jerry Kennedy, and Manuel Montecon were engaged in union activities.

#### *B. March 1994: Respondent's Meetings with Employees*

Martha Hinson and Susan Hudson testified that on or about March 2, Burgoon and Assistant Production Manager Ford conducted a meeting in Respondent's warehouse for all first- and second-shift employees where they addressed the union campaign. According to Hinson, the meeting included everyone on first and second shift, totaling approximately 100 to 150 employees. Hinson and Hudson testified that Burgoon told the assembled employees he had heard a rumor that the Union was trying to organize the plant. Burgoon stated that he wanted to "nip it in the bud." Hinson testified that Burgoon stated he would do everything in his power "legally or otherwise" to stop the Union. Hinson testified that Burgoon asked rhetorically what the Union could do for employees, and then replied himself "that it wouldn't do nothing for us because the plant would be closed, that there was no union coming in there, [and] that he would close the plant before a union would come in."

During the meeting, an employee asked about the negotiation process. According to both Hinson and Hudson, Ford answered, "We'll negotiate wages. How much do you want to lower them," adding, "Yes, we'll negotiate. No, no, no." Hudson admitted that somewhere in the context of those remarks, Burgoon made the statement that in negotiations, "Pay could go either way, up or down." Hinson also testified credibly that Ford or Burgoon said employees would be required to pay union dues, that they would be paying someone else to do their talking for them, and that Respondent "could lower wages" as a result of the collective-bargaining process. Apparently it was then, according to Hudson, that Burgoon said, "Here's my negotiations. No, no, hell no."

Burgoon and Ford both denied that Burgoon threatened plant closure in the event of unionization. Burgoon testified

that in one of the meetings he held with employees, not necessarily this meeting, he simply opined that one of the reasons unions were not beneficial to employees was because they could not prevent a plant closing. Burgoon denies threatening that he would close the plant if employees became unionized. Burgoon admits simply that he told employees of a Ford plant he knew which was unionized, and was closed. Similarly, Ford testified, "Don [Burgoon] gave an example of a company going out of business in Canton, Ohio when the [union] came in. [Burgoon] just said that he remembers as a child, or when he was younger that the Union came into a plant and then later the plant shut down." Burgoon denied ever threatening to reduce wages, and both Burgoon and Ford denied Burgoon saying he would negotiate simply by saying, "no, no." Burgoon admitted telling employees that if there were negotiations, Respondent would begin with a clean sheet of paper, but denies the other statements reported by Hinson and Hudson regarding negotiations and/or the reduction of wages.

As between Hinson and Hudson on the one hand, and Burgoon and Ford on the other, I have absolutely no hesitation crediting Hinson and Hudson. The demeanor of both Burgoon and Ford in particular left much to be desired, and both impressed me as being rehearsed to support the other.

Respondent offered, and I admitted over objections from both counsel for the General Counsel and counsel for the Union, an audio tape recording of what Burgoon said was a captive audience meeting he allegedly held with employees on February 9, 1994. The tape was offered, and specifically received by me, simply for the stated purpose of allowing the parties to evaluate for themselves the purported contents of at least one of Burgoon's meetings with employees. Now in its posttrial brief, counsel for Respondent argues for the first time that since the February 9 meeting was the first captive audience meeting with employees, it is the one at which unlawful speech allegedly occurred, and on the basis of that tape, I should conclude that nothing unlawful took place. I reject that argument for numerous reasons.

To even make this argument now suggests that Respondent was engaged in trickery when it offered the tape. I admitted the tape for the stated purpose of it being merely an example of a single meeting precisely because Respondent made no claim that it was the actual meeting testified to by Hinson and Hudson. I would never have admitted the tape for that purpose because Respondent offered only the barest foundation for its admission. Had there been any suggestion that Respondent was offering the tape to rebut Hinson and/or Hudson, I would never have admitted the tape without Respondent laying a proper foundation, including evidence concerning the recording device, the operator of the device, the authenticity of the recording, and custody and preservation of the recording. In short, I would not have admitted the tape based on a lack of foundation had Respondent shown even the slightest inkling that it was being offered to rebut the testimony of Hinson and/or Hudson. For example, Burgoon testified that the tape was a tape of the February 9 meeting, but Burgoon did not even make the tape. Burgoon testified that he had Darrick Moss make the tape. Even though Moss testified, he was never asked to identify or authenticate the tape that Burgoon testified Moss made. The tape which I received was offered by Respondent, and received by me, specifically

as simply an example of a meeting. It in no way stands to rebut the credible testimony of Hinson and Hudson.

Last, but not least, even the tape as admitted does not serve to rebut Hinson and Hudson because of the numerous gaps in the tape, and in Respondent's own transcript of the tape, where the tape is altogether unintelligible. Literally anything might be contained in those unintelligible portions of the tape.

Hinson and Hudson also testified credibly concerning a second meeting which Burgoon and Ford held with employees on or about March 9. Hinson testified that at the beginning of this second meeting, Burgoon asked employees to tell him why they wanted a union to organize his plant at that time. A discussion ensued concerning the fact that employees wanted better benefits. An employee asked if wages would increase with a union representing them. Ford replied that if employees selected a union to represent them, Respondent would negotiate with the Union, and then asked the rhetorical question, "How much lower do you want them to go?" Ford denies stating that wages would go down, but admits he told employees that negotiations would "start from scratch." Burgoon likewise admitted that he told employees, "We'd negotiate with a clean sheet of paper."

Hinson testified credibly that Burgoon then resumed asking employees why they wanted a union. In response to various employee comments, Burgoon stated that he would look into a 401(k) plan for employees, and he would rent a tent for smokers and put it up out back for them.

Hudson testified very similarly to Hinson. Hudson recalled Ford saying, "So you want a union. Let's negotiate pay. How much do you want it cut?" Hudson acknowledged that at some point Ford stated that pay could increase or decrease. Hudson testified credibly that Burgoon also interrupted Ford, stating, "Here's my negotiations, no, no, hell no." Hudson also recalled that after asking employees why they wanted a union, and one employee mentioning raises, Burgoon offered an employee a brake shoe in lieu of a raise. The employee complained about the flippancy of Burgoon's remark. Burgoon then said that he did not mean the remark "that way" and that he would try to work things out.

#### *C. Early April 1994: Conversations Between Management and Employees*

Susan Hudson testified credibly that in early April 1994, she was called by Supervisor Bill McBride to the training room, where the two of them met privately. McBride asked Hudson why employees were so unhappy, why they wanted a union, and specifically, why she wanted a union. Prior to this meeting, Hudson had not told anyone that she supported the Union, but she had handed out union literature to other employees.

Hudson told McBride that the only reason he was asking her those questions was because Burgoon had asked him to do so. McBride denied this, telling Hudson that Burgoon was unaware of their conversation. Hudson told McBride that people were treated poorly, especially by Burgoon. McBride said that Burgoon did not realize how badly he treated his employees. McBride told Hudson that he had almost resigned because Ford and Burgoon had treated him in a similar fashion. Hudson then detailed a number of employee concerns about working conditions. McBride assured Hudson that he "was there to help make changes."

McBride did not deny this conversation with Hudson. When asked whether he had any conversation with Hudson in which he "attempted to tell her that you were going to take care of any problems that she had," McBride answered, "As I have with every other employee on first shift." I credit Hudson entirely.

Martha Hinson testified credibly that on or about April 7, McBride approached her while she was working in the warehouse. Hinson and fellow employee Rocky Holloway were working in the warehouse with a ladder, and neither of them were wearing safety glasses, a fact which becomes significant later. Hinson testified credibly that McBride was holding a union flyer in hand and, as he approached, asked angrily, "I thought this stuff done stopped. What is this mess still going on?" Hinson answered the obvious, that it was a union flyer. McBride asked why the Union was still trying to organize. Hinson replied that Respondent needed to make some changes. McBride then encouraged Hinson to speak freely and promised that their conversation would be "off record." McBride asked why so many employees were unhappy with working conditions. Among other things, Hinson expressed some safety concerns. McBride told Hinson that Respondent was planning to start a safety committee in the immediate future and that its first meeting would be the next week. Hinson, who had previously volunteered to act on that committee and been told that the committee was for team leaders only, complained that no employees were involved. McBride then responded that he was appointing Hinson to the committee. McBride's denial of this conversation, including his denial that he ever held any "off-the-record" conversation with an employee because he did not know how a conversation could be "off-the-record," was less than convincing. I find that the conversation occurred as described by Hinson.

Hinson also testified credibly about a meeting held by Supervisor Steve Keegan and team leader Belinda Dailey on April 17 with various employees, including Hinson and employee Rocky Holloway in Keegan's office. Keegan told Hinson and Holloway that he wanted to know what made them happy and what made them unhappy concerning their jobs and working conditions. Keegan said he wanted to know how he could make their jobs better. Hinson replied that Dailey had problems communicating with employees, a problem Dailey acknowledged. Hinson told Keegan and Dailey other problems which had caused employees to want a union. Respondent did not call either Keegan or Dailey as witnesses, and Hinson's credible testimony stands totally unrebuted.

Later that same day, employee Holloway and team leader Dailey had a confrontation. Hinson, who witnessed the confrontation, remarked to Holloway that things would be different after the Union became their bargaining representative. Dailey, overhearing Hinson's remark, returned and said angrily, "Union. That's all I've heard is union, union, union. I am so sick of union, union, union. There's no union coming in here."

#### *D. April 19, 1994: The New Discipline System*

The complaint alleges, and counsel for the General Counsel contends, that on April 19, 1994, Respondent instituted a new and stricter disciplinary procedure in response to employees' union activities. During the investigation of this

case by the Board's Regional Office, Assistant Production Manager Ford admitted that Respondent instituted a new disciplinary system on April 19. At the trial herein, however, Respondent asserted that in fact it changed the disciplinary system in November 1993, prior to the advent of union activity, and that Ford's affidavit was simply "an error."

As is often the case, it helps to understand what is not in dispute, as well as what is. What is not in dispute is that at some point Respondent instituted a new and stricter disciplinary system. Under both systems, various rule infractions are considered either "minor" or "major." Under the "old system," supervisors used their discretion to classify infractions as "minor" or "major." Three minor violations within a 30-day period equaled one major violation. Two major violations within a 30-day period resulted in a 3-day suspension without pay. Three major violations within a 30-day period resulted in discharge. Under the "new system," three minor violations within a 30-day period still equals one major violation. Two major violations, however, within a 90-day period results in demotion of one pay level or, if demotion is impossible, then dismissal. Further, three major violations within 6 months also results in demotion or, if not possible, dismissal. This stricter system resulted in more discharges, including numerous union supporters. As noted, Respondent now argues that it instituted the new system in November 1993, prior to any union activity, in conjunction with a change in pay scales and the method for employees receiving raises by going from one pay scale to the next.

Just as there is no dispute that at some point in time Respondent instituted this new and stricter disciplinary system, likewise there is no dispute that it was in November 1993, Respondent revised its pay scales and method for progression. The dispute, at least as defined at the trial stage herein, is whether Respondent instituted the new disciplinary system in November 1993, as it now contends, or whether it introduced that system in April 1994, in response to employees' union activities. For reasons fully described below, I find that the evidence shows the new disciplinary system was instituted in April 1994.

During the investigation of these unfair labor practice charges by the Board's Regional Office, Assistant Production Manager Mike Ford, who is second only to Burgoon in Respondent's chain of command, stated in a sworn affidavit that Respondent instituted this new system on April 19, 1994. This was not an affidavit taken by an investigating Board agent who might have misunderstood, misinterpreted, or perhaps even arguably misquoted Ford. This was an affidavit prepared by and submitted through Respondent's own counsel to the Board as a part of Respondent's position statement. Nor did Ford say in this affidavit only once or in passing that Respondent introduced this system on April 19. Rather, in this affidavit Ford stated unambiguously over and over that Respondent revised its disciplinary system on April 19, and offered a lengthy justification for doing so at that time. Respondent's counsel even sent a position letter to the Board's Regional Officer wherein he confirmed the same date.

At the trial herein, Ford testified that the new disciplinary system was instituted in November 1993, and that his affidavit to the contrary was simply in error. Ford asserted that Respondent experienced problems with the old system being ineffective because employees viewed the 3-day suspension as

"sort of a vacation." Ford admitted that part of the purpose for changing the system was to discharge more employees. As Respondent's counsel paraphrased Ford's testimony in his posttrial brief, "Given the high number of violations required in a relatively short period of time before an employee could be terminated, PFC had been unable to eliminate poorly performing employees from the work force."

Ford testified that beginning in late summer 1993, a group of management employees, supervisors, and hourly employees began meeting to consider revising Respondent's pay structure. As a result of these meetings, in November 1993, Respondent instituted a new pay system with various pay levels whereby an employee could advance from one to the next by taking and passing certain tests. There is no dispute about this limited aspect of Ford's testimony.

Ford also claimed, however, that it was in conjunction with these changes in the pay scales that Respondent changed its disciplinary system. Tom Davis, Respondent's controller, claimed to be able to pin down the precise date of the change in the disciplinary system by referring to payroll records which showed that the change in pay scales occurred on November 15, 1993. Davis' assertion, however, is circuitous and begs the question since there is no dispute that pay scales were changed at that time. The fact that Respondent held meetings with employees to explain the new pay scales is similarly of no help. Employee witnesses testified credibly that while such meetings were certainly held to discuss the new pay system, there was absolutely no discussion and no change in the disciplinary system at that time.

Both Ford and Burgoon testified under oath that they attended numerous meetings with supervisors and hourly employees which resulted in the changes in Respondent's pay system and, they alleged, its disciplinary system. Both Ford and Burgoon claimed repeatedly that notes were kept of these meetings. Ford, for example, claimed that he attended 15 to 20 such committee meetings prior to November 1993, at which he took notes, during which the new disciplinary system was devised. Ford testified also that he spoke to employees on 15 to 20 other occasions about the new disciplinary procedure. Ford even claimed that prior to giving his June 1994 affidavit through counsel, he reviewed a file which contained notes of the aforementioned meetings. Ford claimed that he simply erred in giving his affidavit. Burgoon and Controller Davis similarly testified that they attended such committee meetings at which notes were kept. In spite of all this testimony, Respondent did not offer one single note from any of these meetings to prove that a new disciplinary system was ever discussed during that time frame. Nor did Respondent offer a single hourly employee witness, a group of whom allegedly attended these committee meetings, to testify that a new disciplinary system was ever discussed, even though Burgoon testified that the employees who served on that committee were still employed by Respondent. I draw the adverse inference that if such notes or employee witnesses had been produced they would not support Respondent's position.

Assistant Production Manager Ford and Controller Davis testified that in November 1993, Respondent posted two documents which were introduced as exhibits herein,<sup>2</sup> which show that Respondent changed not only job rates but the dis-

<sup>2</sup>R. Exhs. 1 and 7.

ciplinary system. One of these documents, Respondent Exhibit 1, purports to be an actual copy of a notice posted by Respondent on bulletin boards in and about its facility in November 1993. The other, Respondent Exhibit 7, is the document which Controller Davis testified was prepared to inform employees of the job rate changes. On further inspection it quickly becomes obvious that the second of these documents has no substantive weight whatever in deciding when the new discipline system was imposed. Davis testified that what was posted was posted on November 1, yet when Davis was shown that Respondent Exhibit 7 contains entries for employees hired after November 1, Davis simply declared that the exhibit was a document updated from the original. Davis testified that Respondent Exhibit 7 was "not [posted] exactly in this format . . . but, this sheet here was prepared from the same computer spread sheet as what was posted." One must ask, if Respondent did prepare a document to inform each employee on the payroll prior to November 1 what changes there would be in their wage rates as a result of the new pay scales, why would Respondent ever have reason to update such a document to include employees hired after that date. Respondent Exhibit 7 contains the names of at least 21 employees whose hired date is listed as occurring after November 1, 1993. It is highly unlikely, therefore, that Respondent Exhibit 7 was ever posted on or near November 1. Even if it was, however, Respondent Exhibit 7 simply shows the names of the employees and their hourly wage rate. It does not contain anything on its face which makes any reference to a new disciplinary system, and therefore I find it to be of no help in resolving the issue.

The other document, Respondent Exhibit 1, which Respondent claims was posted on or about November 1, 1993, is in reality the lone document which Respondent offers as evidence that employees were notified of a new disciplinary system in November 1993. A careful analysis of this document gives me good reason to believe it should be viewed very suspiciously. The document itself is not dated, and no one testified to creating the document. An employee witness, Merri Rowe, testified credibly that she had never seen that document before, but rather she had seen another document posted in November 1993, which showed only the upper portion of Respondent Exhibit 1, in enlarged type, without the lower one-third of the document being a part of the original. Even without Rowe's testimony, careful scrutiny of Respondent Exhibit 1 raises more questions than it answers.

At the top, the document contains a section with the heading "Pay Levels" and then lists seven specific pay levels and their base rate. Below that, it contains a second section captioned "Definition Of Levels." Although there are seven pay levels enumerated in the first section, only four pay levels are described in any detail in the second portion. Further scrutiny reflects that the document, as presented, appears to have been altered in some way so that it now reads in a reverse format. Nearest the top of the second section is an entry which reads "Level 4 includes:" after which 10 skills or apparent qualifications are listed. Then below that, not above it as would be normal, is an entry which reads, "Includes all items in level 3 and the following:" Immediately below that is the entry which reads "Level 3 includes" and lists skills or qualifications for level 3. In other words, as presented, this middle section of the document makes sense only if read from the bottom up, rather than from the top

down as is normal, and as is true with the rest of the document. The critical language which Respondent now relies on is contained in a third section of the document near the bottom. This third section contains 11 specific items which are not enumerated, however, and are preceded merely by asterisks. Unlike the top two portions, which contain specific captions, the bottom third section of the document contains no caption or heading. Thus, this third and very important section is presented in a format altogether different from the rest of the document.

Given the format in which it exists, I simply cannot believe that the document was ever intended for publication to employees or ever used to be posted to notify them of either new pay levels or new discipline. Not only does a major part of this document read backwards, from bottom to top, it describes skills and qualifications for only four of the enumerated seven pay levels. If this were posted in the format in which it now appears for general employee consumption, at the very least it would almost certainly lead employees to conclude that as a practical matter they should not expect to rise above level 4. In the final analysis, in the format in which it now appears this document simply makes no sense. I cannot help but wonder if in preparation for this trial someone did not borrow portions of some other document or documents which they somehow managed to rearrange in such a hurry that it now has a completely nonsensical format.

My suspicions about Respondent Exhibit 1 are by no means the only reason, or even the primary reason, why I conclude that the new disciplinary system was instituted in April 1994, and not in November 1993. It is simply one of many factors, as is the adverse inference drawn by Respondent failing to provide purportedly existing notes of meetings which might support Respondent's position. Yet another factor is a careful scrutiny of Ford's testimony. Ford testified not only that the new disciplinary system was installed in November 1993, he also testified as follows:

When we changed the disciplinary system in November of '93, we updated the packets that we gave out to all the new hires that had our new policy in it, our policy on both disciplinary and wages, so the information that the employees were given was the new information that was revised in November of '93 . . . .

The Respondent, however, never produced any such "updated packets" given to new hires between November 1993 and April 1994. In fact, from documents produced pursuant to counsel for the General Counsel's subpoena and introduced as exhibits by him, Ford's testimony was shown to be utterly false, and in fact employees hired between November 1993 and April 1994 were simply given the 1993 handbook which describes the "old system" of discipline. Employees hired between November 1993 and April 1994 were even required to sign a document encoded with the date "9/22/93," which makes reference to the old disciplinary system.

What is more, the disciplinary documents themselves issued between November 1993 and April 1994 show that during that period, supervisors were continuing to mete out discipline pursuant to the old system. No fewer than 11 instances of discipline were issued during that period not only on forms used under the old system, but clearly utilizing rules of the old system. The old forms allowed supervisors

discretion in categorizing offenses as major or minor. In contrast, all disciplinary forms in evidence dated after April 20, 1994, are on new forms which rigidly and inflexibly set out violations by category and severity. The evidence, including numerous disciplinary reports in Respondent's own records, shows that the old disciplinary system was very much in use until at least mid-April 1994. I conclude that Respondent's new disciplinary system was put into effect on or about April 19, 1994, exactly as Ford testified in his June 1994 affidavit.

#### *E. Discharges Pursuant to the New Disciplinary System*

##### April 20: Discharge of Martha Hinson

Martha Hinson began working for Respondent in January 1994.<sup>3</sup> Hinson worked on first shift in packing, shipping, and receiving.

Hinson was one of the most active union supporters. Assistant Production Manager Ford admitted he was aware of Hinson's union sentiments and was disturbed by her distributing union handbills. As previously discussed, Supervisor McBride approached Hinson with a union flyer and asked Hinson angrily what it was. Hinson stood up for the Union to McBride. On April 19, Hinson's team leader, Dailey, heard Hinson mention the Union, became angry, and said there would be no Union coming in to represent Respondent's employees. On that same day, Respondent instituted its new disciplinary system. The very next day, Hinson was discharged pursuant to that new system. As Respondent states in its posttrial brief, Hinson was "terminated for committing three major violations in 6 months," a standard imposed by the new system.

During the morning of April 20, Supervisor Steve Keegan and team leader Belinda Dailey, neither of whom testified, met with Hinson and Rocky Holloway. Keegan issued Hinson and Holloway major violations because certain parts had been mislabeled and shipped to an incorrect address. Hinson protested the discipline because she had merely selected parts for shipment, and had not even handled the shipping label. Keegan told Hinson, however, that she was responsible because she was a member of the team that misshipped the parcel. Hinson asked if team leader Dailey would also be punished since she too was a member of the team. To this Keegan replied no, that Dailey "didn't have nothing to do with these here parts." Holloway resigned rather than accept a pay cut under the new disciplinary rules. Walker asked Hinson if she also intended to quit. Hinson refused to quit.

Later that day, Assistant Production Manager Ford summoned Hinson to meet with him and Supervisor Keegan. Ford began the conversation by focusing on the previously described shipping error. Hinson asked Ford if he intended to issue her two warnings for the same incident. Ford then said that he was issuing a second warning to Hinson for failing to wear safety glasses. Ford said he had seen Hinson 2 days before that entering the plant from the warehouse with her safety glasses propped on top of her head, and that she brought the glasses down to her face while Ford was looking at her. Hinson asked Ford why he had waited 2 days to discipline her. Ford replied that he had been too busy. Ford then

discharged Hinson for having two major violations within 90 days.

Several witnesses testified that it was common practice not to wear safety glasses in the warehouse, and the record establishes that wearing safety glasses in the warehouse was not strictly enforced. Hinson testified credibly that Ford himself wore no safety glasses when he conducted captive audience meetings in the warehouse. Further, Burgoon himself had seen Hinson not wearing safety glasses in the warehouse and had not written her up. Respondent's witness Walker first testified that the rule requiring wearing of safety glasses referred just to the plant floor, not the warehouse. On redirect, however, Walker changed course and agreed with Respondent's counsel that the warehouse was part of the plant.

##### April 27: Discharge of Merri Rowe

Merri Rowe began working for Respondent on September 21, 1993. Rowe became an active union supporter from the very beginning of the campaign by collecting names of interested employees to pass on to the union organizer.

On April 21, Supervisors Ed Brewer and Jimmy Walker held a meeting with six employees, including Rowe and Haywood Steel. Brewer and Walker began the meeting by first discussing safety and job related issues. After discussing these issues, Walker asked Rowe directly why the Union was trying to organize Respondent. Rowe responded in detail regarding what she considered to be employee concerns, including holiday pay, vacation schedules, and the testing program whereby employees could move from one pay scale to the next. Rowe said that it was hard for her as a third-shift employee to take the pay raise test which was given only during first shift. Walker responded that as of that day, Rowe could take the test for the next pay level during her own work shift. Steel testified credibly that Walker then asked the group in general, "What can we do to make your jobs run better? If you have any gripes you can bring it out now." Steel testified credibly that prior to this meeting, no one from management had ever solicited his or other employees' concerns, nor ever promised to remedy any problems.

On April 27, Rowe was discharged pursuant to Respondent's new disciplinary system. During February 1994, Respondent had issued a major violation to Rowe for passing defective work on to the next process. On March 8, Rowe received a major violation for not wearing her safety glasses while on the plant floor.

On April 26, Rowe telephoned the plant and informed her supervisor that she could not come to work because her estranged husband had suddenly refused to care for their children and she was unable to secure a babysitter so late at night and on such short notice.

On the next day, April 27, Respondent issued Rowe a major violation for the previous days' unexcused absence. Rowe was then discharged for accumulating three major violations within 6 months.

The record reflects that at least two other employees who had unexcused absences within a week of Rowe's were not written up and thus not terminated. Rowe's own supervisor admitted that he had given other employees excused absences for reasons not specified on the form.

<sup>3</sup>Due to Respondent's high turnover, few employees have any significant tenure.

#### F. April 28: The Truck Incident

On April 28, 1994, union organizer Janice Landis, employee Susan Hudson, and recently discharged employee Martha Hinson were distributing union literature outside Respondent's facility prior to the beginning of first shift. After some time, Hudson left to report for work on first shift. At one point, while Landis and Hinson were sitting in Landis' car parked on the side of the road, a policeman came out of Respondent's plant and stopped near Landis' car. The policeman explained that Respondent had called to complain about their leafleting activities. Burgoon admitted that he had called the police. The policeman told Landis and Hinson that they were not doing anything wrong and that they could continue to stay there, just so long as they did not go on plant property. The policeman left. Landis and Hinson then resumed positions standing on Carbon Metallic Road, which leads away from Respondent's plant, about 25 feet from the intersection where it meets a stop sign at Highway 55. Landis and Hinson stood in the middle of the road in order to pass out handbills to employees coming in to the first shift as well as employees leaving from the third shift who had to stop at the stop sign.

Employee Haywood Steel left the plant from third shift, stopped and accepted literature from Landis and Hinson, and drove off. Immediately after Steel drove off, a truck being driven by Burgoon approached Landis and Hudson, then served toward them, and slammed on its brakes. Landis, Hinson, and Steel, who witnessed the incident in the rear-view mirror of his vehicle, all testified that the truck stopped so abruptly there was much screeching of tires, and even some smoke. Although Burgoon denies there was smoke, even Burgoon admits that he left tire marks in the road. The truck came to a halt just short of where Landis and Hinson were standing. Burgoon then continued on to the stop sign, abruptly made a U-turn, and returned to where the women had been standing.

Steel also turned around and returned to where the women had been standing to see if they were all right. Steel noticed Burgoon driving the truck, and Mike Ford was in the passenger's seat. Burgoon asked Landis and Hinson, "What the hell do you think you're doing?" Burgoon claimed that Landis called him a "mother fucker." Landis denied using that expression, and although he was the passenger in the truck, Mike Ford did not testify regarding this incident. In view of Burgoon's conduct, it would certainly not be surprising if Landis cursed Burgoon, particularly in view of both Landis' and Hinson's credible testimony that Burgoon's truck would have hit them had they not jumped out of the way to the side of the road. Landis told Burgoon that he knew she had a right to be there distributing literature. Burgoon responded that Landis' car was illegally parked, drove up behind it, and tried to telephone police from his car phone. When Burgoon was unable to reach the police, Burgoon telephoned the plant and told them to call the police. Burgoon then left.

After the incident, Landis, Hinson, and Steel all went to the local police station where Landis swore out a warrant against Burgoon. Steel testified that he witnessed a police report which charged that Burgoon had intentionally driven toward Landis and Hinson. At the time of the trial herein, this police matter had not yet come to trial.

#### G. Other Discharges Pursuant to the New Disciplinary System May 6: Discharge of Haywood Steel

Haywood Steel began working for Respondent on November 22, 1993. Steel was employed on the third shift as a mold line press operator.

In March 1994, Steel attended an employee meeting during which Third-Shift Supervisor Ed Brewer showed employees an antiunion film. Steel testified credibly that during this meeting, he asked Brewer why he was only showing the negative side of unions. Steel stated that he had worked for a unionized company for 9 years, and that the union had helped him.

During April 1994, Steel became active in the union organizing drive at Respondent's facility. Steel passed out union flyers and collected employee signatures on a union petition during his breaktime at the plant.

On April 18, Steel received a major violation for failure to properly complete quality control paperwork.

On April 28, Steel witnessed Burgoon's narrow miss of Landis and Hinson as they were standing in the road handing out union literature. Steel gave a statement to the police concerning the incident.

On May 5, Steel was given a second major violation, again for failing to properly fill out quality control paperwork. According to Supervisor Walker, Steel had written down the wrong code numbers on a first-piece inspection. Walker, however, refused to show Steel his mistakes as he had done in the past, and instead, wrote over what Steel and his partner had done. As a result of being given this second major violation, Steel was discharged pursuant to Respondent's new disciplinary system for having received two major violations in a 90-day period.

#### May 27: Discharge of Susan Hudson

Susan Hudson began working for Respondent on August 9, 1993. From August 1993 until April 28, 1994, Hudson worked in Respondent's shipping department on the first shift. During that time, Hudson became known as a very good employee. She received no discipline whatever and several "Attaboys," a form of reward which can be accumulated to equal a cash bonus.

Hudson also became one of the most active union supporters. Burgoon, Ford, and McBride all admitted they knew Hudson was an active union supporter. In fact, on the morning of April 28, just prior to the incident in which Burgoon and Ford narrowly missed Landis and Hinson as they were distributing union literature on the roadway outside of Respondent's plant, Hudson had been out there too with Landis and Hinson distributing union flyers. Hudson had left just prior to the incident in order to report for work on the first shift.

On the very same morning as Burgoon and Ford's narrow miss of Landis and Hinson, in fact at almost the very same time, Respondent transferred Susan Hudson from her job in the packing department to the mold line. Respondent transferred Hudson and three other employees to the mold department allegedly to help relieve a "bottleneck situation."

Hudson testified credibly that when she was transferred to the mold line, she was inadequately trained, given poor machinery to work with, and frequently transferred from press to press. In his testimony, McBride testified that employee

Larry Wright was trained on the mold line for a "couple of weeks" before being turned loose on his own, and this was considered rapid advancement. McBride further admitted that a new mold operator would need to be trained on more than just quality in order to function properly on the mold line. Be that as it may, McBride admits Hudson's testimony that she was trained for only 3 days before being assigned to operate a press by herself. McBride also admitted that the press to which Hudson was assigned was often broken, and in fact was even broken on the day Hudson was discharged as described later. Finally, McBride admitted that in her short time on the mold line, Hudson operated at least five different presses. Nevertheless, even under these adverse circumstances, Hudson earned several "Attaboys" for exceptional performance while on the mold line.

On May 6, less than 2 weeks after being transferred to the department, Hudson and fellow employee John Colvin were working on a press making experimental brake prototypes. Hudson discovered that she and Colvin had made a defective pad, which Hudson described as being "taller" than other pads, and Hudson brought this to the attention of team leader Earnest Miller. Hudson testified credibly that a short while later, McBride approached and told Hudson, "You have a good eye. That's why we wanted you on the mold line." Hudson asked McBride to give her an "Attaboy" commendation, and McBride agreed to do so. McBride claimed in his testimony that he was only being sarcastic, and that Hudson should have known this.

Later that day, team leader Miller told Hudson that he would be issuing discipline to her for making the pad which Hudson had called to his attention. Hudson asked Miller why she would be getting discipline for something which McBride had earlier commended. Miller told Hudson that he did not know, and invited Hudson to talk to Mike Ford. Miller, Hudson, and Colvin then met with Ford. Hudson told Ford that she believed the discipline to be unfair. Nevertheless, both Hudson and Colvin were given a major violation for making this defective part.

On May 17, McBride issued Hudson a second major violation for failing to indicate on the "work in progress ticket" the next process to which certain parts were to be sent. Hudson admitted making this error.

On May 24, McBride placed a third "major violation" in Hudson's personnel file for an incorrect first-piece inspection and for failing to properly fill out quality control paperwork. McBride testified that he found mistakes on Hudson's first-piece inspection report following her shift on May 24. There is no indication on this discipline that it was ever shown to Hudson. She did not sign for its receipt, and there is no indication on the form that she refused to do so, as there were on other such forms.

On May 27, Hudson received another major violation which resulted in her dismissal in accordance with Respondent's new disciplinary system. On that day, Respondent summoned Hudson to the personnel office where McBride met Hudson and told her that she was being disciplined and discharged for passing bad parts on to the next operator. Hudson denied doing so. Hudson told McBride that they both knew the press she was working on was defective and had been consistently producing bad parts. Hudson stated that they both knew that, but that she had not passed on bad parts

to the next process. McBride disagreed, issued the major violation to Hudson, and Hudson was discharged.

According to McBride, following McBride's meeting with Hudson, McBride reinspected the defective parts. He concluded that in order for so many defective parts to have been passed on, Hudson must have acted intentionally. Even though she had already been discharged, McBride then wrote up an additional employee action report dated May 27, for making scrap unnecessarily and for intentionally passing defective work to the next process.

Throughout Respondent's case, it emphasized repeatedly its demand for a quality product and its incredibly high employee turnover of almost its entire work force annually. McBride acknowledged that Hudson had been an exemplary employee in the shipping department, indeed, "a master packer, and a quality inspector over in packaging." McBride asserted that this was the very reason why Respondent transferred Hudson on April 28. McBride acknowledged that outstanding employees are hard to come by and are a valued asset. Consequently, I asked McBride to explain why Respondent did not transfer Hudson back to packing if it detected that she was not working well as a mold operator. McBride, clearly uncomfortable with this question, at first attempted to avoid answering. McBride made no assertion that Respondent has any policy or practice against taking such action. I therefore prodded McBride for an answer, who finally responded simply, "Sir. I can't answer that."

#### May 30: Discharge of Manuel Montecon

Manuel Montecon began working for Respondent in August 1992. At the time he was hired, Montecon informed Respondent that he could only work third shift because he had to drive his children to different schools each morning. From August 1992 until February 1994, Montecon worked the entire time as a "wobble riveter operator." During his employment, Montecon received only one instance of discipline, in February 1993, more than a year prior to his termination.

At the beginning of the union campaign during February 1994, Montecon began to canvass third-shift employees regarding their interest in having the Union represent them. While Montecon had not attended any union meetings by the time he was injured on the job as more fully discussed below, Montecon did actively solicit names and addresses of interested employees to pass on to union organizer Janice Landis. Montecon testified credibly that during February 1994, team leader Jamie approached him while at work and initiated a discussion about the Union. Jamie, who worked under the direction of Supervisor Jimmy Walker, was Montecon's team leader. Jamie told Montecon that he had heard about the union activity among employees and wanted Montecon to fill him in. Montecon did so. Burgoon himself identified Montecon as one of the people whose names he had heard were engaged in union activity.

I do not credit Assistant Production Manager Ford's claim that he was unaware of Montecon's support of the Union when Montecon was discharged in May 1994. Ford's credibility is suspect on many levels for reasons discussed throughout this decision, and this is but one example. It is simply outrageous for Ford to claim he was not aware of Montecon's reputation for being involved in union activity when Corporate President Burgoon himself named Montecon

as one of those who he had heard were among the primary union activists.

On the evening of February 28, not long after Montecon was interrogated about the Union by team leader Jamie, Supervisor Walker transferred Montecon from the riveter to the powder coater machine. Montecon protested the transfer, pointing out to Walker that he could not possibly work at the powder coater machine removing parts from the moving conveyor belt because he is simply too short at 5 feet 3 inches to reach parts moving along the backside of the conveyor belt. Walker, however, refused to relent.

On the very first evening at the powder coater machine, Montecon was injured by the conveyor belt system as he was stretching to reach some parts. While the injury seemed slight at first, the following morning Montecon's finger was swollen and throbbing. During the day, Montecon attempted to telephone Respondent with no success. That evening, Montecon telephoned Supervisor Walker who told Montecon to see a doctor, which Montecon did on March 3. Dr. Michael Heinig diagnosed Montecon as having a tendon separated from the bone. Heinig advised Montecon to remain off work for at least 1 week. Heinig placed a splint on the finger and advised Montecon to return to him on March 8. On the way home from the doctor's appointment on March 3, Montecon stopped at Respondent's facility and delivered Heinig's note to Supervisor Walker.

On March 8, Montecon returned to see Dr. Heinig. Heinig wrote a note allowing Montecon to return to work on March 10, "light duty using right hand only next 8 weeks." On March 10, Montecon brought the note to Supervisor Walker ready to report for work. Walker, however, told Montecon that there was no light duty work and that Montecon should stay off work until he was fully released by his doctor. Montecon protested, pointing out that other employees were assigned to light duty work in the past. Walker insisted that Montecon not return until he could work without restrictions.

Montecon's convalescence took longer than Dr. Heinig first predicted. On May 3, Montecon had an appointment with Heinig during which Heinig extended his convalescence until at least May 18, a date at which Heinig set a future appointment for Montecon. Heinig gave Montecon a written excuse to remain off work from May 3 until May 18. When Montecon left Heinig's office, he drove directly to Respondent's plant, where he went to the personnel office and asked to see Personnel Manager Tom Davis. Unable to meet personally with Davis, Montecon left a copy of the written excuse from work with the receptionist, who said she would give it to Davis.

Because of a death in the family out of town, Montecon rescheduled his May 18 appointment with Dr. Heinig to May 24. At that appointment, Heinig released Montecon and gave him a slip stating that he was able to return to work "full duty." As before, Montecon immediately took the note to Respondent's plant. On this occasion Montecon met with Davis. Davis noticed that Heinig's release was technically incomplete in that Heinig had failed to check a box before the phrase "Return to Full Duty." Davis instructed Montecon to return to Heinig and have Heinig check the box authorizing a return to full duty. As Montecon was ill, he went home, telephoned the doctor's office and received permission from the nurse to check the box. Montecon telephoned Supervisor Walker about returning to work. Walker informed Montecon

that the plant was closed for Memorial Day and instructed Montecon that he should return to work on May 30 with the doctor's note.

As instructed by Walker, Montecon returned ready to work on May 30. Montecon met with Supervisors Walker and Ed Brewer. Brewer told Montecon that Heinig's note was irrelevant because Montecon had already been terminated on May 7. Montecon protested, saying that he had been recuperating from a work-related injury. Brewer responded that Montecon was trespassing and that he should leave immediately, which Montecon then did.

#### Analysis and conclusions

The record shows that after Respondent learned of union activity among employees, it held several meetings with employees where Burgoon and Ford attempted to "nip" that activity "in the bud." Martha Hinson, Susan Hudson, and Heywood Steel all testified credibly concerning various statements made by Burgoon and Ford at those meetings. I have no trouble crediting their testimony over Burgoon and Ford. Be that as it may, I do not credit Hinson that Burgoon stated he would do everything in his power, legally "otherwise to stop the Union. That specific statement is not corroborated by any other witness, including Hudson or Steel. Similarly, I find it impossible to rely on Hinson's sole testimony that Burgoon made an outright threat of plant closure. Even though more than 100 employees were at the meeting where that statement was allegedly made, counsel for the General Counsel offered no corroboration of Hinson's testimony. Moreover, it would appear that Heywood Steel actually disagrees with Hinson on this limited point. Hinson was by no means incredible, and I simply find she was inaccurate in these limited particulars.

On the basis of Hinson's and Hudson's credited testimony, I find that in these meetings with employees, Burgoon and Ford both clearly expressed to employees that it would be futile for them to select a union to represent them. While Burgoon paid lip service to the fact that pay could go either up or down, Ford told employees, "We'll negotiate wages. How much do you want to lower them? Yes, we'll negotiate. No, no, no." Similarly, Burgoon told employees, "Here's my negotiations. No, no, hell no." Even Burgoon admits telling employees that if there were negotiations, Respondent would begin with a "clean sheet of paper." Similarly, Ford admits he told employees that negotiations would "start from scratch." I find, however, in crediting Hinson and Hudson that Burgoon and Ford did far more than that, and clearly communicated to employees that Respondent would simply negotiate by saying "no, no" to any union proposals. Moreover, I find that Burgoon's and Ford's comments constituted an implied threat to reduce wages if employees selected the Union to represent them. In making this finding, I am fully mindful that Burgoon paid lip service to the fact that wages "could go up or down" in negotiations. The statement, however, that Respondent could lower wages, coupled with statements that Respondent "would start from scratch" and "would start with a clean sheet of paper," and then coupled with the statement that Respondent would simply bargain by saying "no, no" carries with it the implication that Respondent would reduce wages. I find that Respondent thereby violated Section 8(a)(1) of the Act.

At the same time, Burgoon and Ford interrogated employees generally about why they wanted a union, and followed that by various promises to employees to attempt to dissuade them from supporting a union. I credit Henson and Hudson that at an employee meeting on or about March 9, Burgoon asked employees directly to tell him why they wanted a union to organize his plant at that time. As will be discussed in greater detail below, this was simply the first in what soon became a pattern of Respondent interrogating employees about their union sympathies, soliciting grievances from employees, and promising to remedy these grievances in order to dissuade employees from continuing such activities. I find that when a discussion ensued concerning the fact that employees wanted better benefits, Burgoon stated he would look into a 401(k) plan for employees and would erect a tent for smokers. Similarly, when Burgoon offered one employee a brake shoe in lieu of a raise and the employee complained about the flippancy of Burgoon's remark, Burgoon promised that he would try to work things out with employees. I find that Respondent threatened employees with the futility of having a union represent them, that Respondent systematically interrogated the entire group about why they wanted a union, and made various promises to employees to dissuade them from selecting a union, all in violation of Section 8(a)(1) of the Act.

Burgoon himself admitted trying to keep track of which employees supported the Union. Similarly, Ford admitted he heard numerous rumors about who was active on behalf of the Union, and that he consistently passed that information on to Burgoon. One of the earliest instances of what soon became a pattern of interrogation incurred with employee Manuel Montecon. Montecon testified credibly that in February 1994, before he had done anything to openly support the Union, he was approached by team leader Jamie who told Montecon he had heard about union activity among employees and wanted Montecon to fill him in. Montecon did so. Jamie worked under the direction of Supervisor Walker, who in turned reports to Assistant Production Manager Ford. Ford is second in command only to Burgoon. Burgoon himself identified Montecon as one of the people whose names he had heard were engaged in union activity.

Similarly, Susan Hudson, who had not told anyone she supported the Union but had simply handed out union literature to other employees, was called to a private meeting by Supervisor Bill McBride. McBride asked Hudson why employees were so unhappy, why they wanted a union, and specifically, why she wanted a union. During the conversation about the way employees were spoken to and treated by Burgoon and Ford, McBride promised Hudson that he was "there to help make changes."

Similarly, employees Martha Hinson and Rocky Holloway were approached and interrogated by McBride. As they were working in the warehouse, McBride approached holding a union flyer in hand, and then asked angrily, "I thought this stuff done stopped. What is this mess still going on?" McBride then proceeded to ask Hinson why the Union was still trying to organize employees. McBride encouraged Hinson to speak freely and promised their conversation would be "off the record." When Hinson told McBride that Respondent needed to make some changes, and specifically expressed some safety concerns, McBride proceeded to

promise Hinson that she should immediately be placed on a safety committee that was being formed.

Hinson and Holloway were also interrogated by Supervisor Steve Keegan and team leader Belinda Dailey in Keegan's office. Keegan told Henson and Holloway that he wanted to know what made them happy and what made them unhappy concerning their jobs and working conditions. Keegan said he wanted to know how he could make their jobs better. Hinson's credible testimony stands totally un rebutted that she then told Keegan and Dailey various problems which had caused employees to want a union.

Employees Merri Rowe and Haywood Steel were interrogated by Supervisors Walker and Brewer. On April 21, just 2 days after Respondent instituted the new discipline system, and the day after Respondent discharged Martha Hinson, Brewer and Walker held a meeting with six employees which they began by first discussing safety and job-related issues. After discussing these issues, Walker asked Rowe directly why the Union was trying to organize Respondent. While Rowe was certainly an active union supporter by that time, there is no indication that Rowe had made that known to Respondent. In response to Walker's question, however, Rowe responded in detail regarding what she considered to be employee concerns, including holiday pay, vacation schedules, and the testing program whereby employees could move from one pay scale to the next. When Rowe explained that it was hard for a third-shift employee such as herself to take the pay raise test which was given only during first shift, Walker responded that as of that day Rowe would be able to take the test during her own work shift. Haywood Steel testified credibly in this same meeting, Walker then asked the group in general what Respondent could do to make their jobs better. Steel also testified credibly that prior to this meeting, no one from management had ever solicited his or other employees' concerns, nor had they ever promised to remedy any problems. Rowe and Steel were both discharged by Respondent a short time after this interrogation.

The Board has long held that whether interrogation is unlawful depends on surrounding circumstances, including the time, place, personnel involved, purpose, and information sought. Even the employer's known preference has been recognized as one consideration. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984); *Blue Flash Express*, 109 NLRB 591 (1954). I find the totality of circumstances shows each of these instances of interrogation to be unlawful. From the outset, Respondent had made it clear that it was absolutely opposed to its employees becoming organized. Burgoon and Ford were not just opposed to unionization, but violently opposed, as shown by the incident in the pickup truck when they served toward, and only narrowly missed, hitting Landis and Hinson as they distributed union flyers on the roadway outside of Respondent's property. None of these instances of interrogation suggest that the circumstances were casual or informal, that they all occurred at work, and in each instance it was a supervisor who initiated the conversation. The record here shows that once Respondent learned of union activity among employees, it began what eventually became a pattern of interrogating individual employees who it suspected of supporting the Union, both about their own individual union sympathies and those of employees generally. It did more than simply interrogate employees. In almost every instance it also went on

to solicit grievances from those employees and then promised to remedy those grievances. Respondent's assertion that it ever maintained an active "open door policy" is simply without merit. The record shows that employees have been encouraged to make suggestions about improving the product itself, but there is no evidence such a policy ever existed to encourage employees to discuss complaints about working conditions. Indeed, as I have found above, Haywood Steel testified credibly that prior to the advent of union activity, no one from management ever solicited employees' concerns about working conditions, nor ever promised to remedy any problems.

Nor can I overlook the fact that shortly after each of these instances of interrogation, the employees interrogated who expressed sympathy for the Union were discharged. That fact is discussed in greater detail below. I find that Respondent unlawfully interrogated employees concerning their union activities and sympathies, and the union activities and sympathies of other employees, in violation of Section 8(a)(1) of the Act. I also find that in these same conversations Respondent unlawfully solicited grievances from employees and promised employees various improved benefits and working conditions in an attempt to dissuade them from supporting the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

On April 19, 1994, Respondent instituted a new and stricter disciplinary system. This new system took away the discretion of supervisors to categorize rule infractions as major or minor. Under the new system, two major violations within a 90-day period results in demotion of one pay level or, if demotion is impossible, then dismissal. Further, three major violations within 6 months also results in demotion or, if not possible, dismissal. Respondent admitted that part of the purpose for changing the system was to discharge more employees. As Respondent's counsel states in his posttrial brief, "Given the high number of violations required in a relatively short time before an employee could be terminated [under the old system], PFC had been unable to eliminate poorly performing employees from the work force." Respondent's desire to discharge more employees is somewhat remarkable in and of itself in view of the fact that Respondent already turned over almost its entire work force annually.

The timing of Respondent instituting this new discipline system is obviously critical, which is why Ford tried so hard to disavow his earlier sworn affidavit. For all the reasons already expressed above, however, the evidence shows that the new discipline system was instituted in April 1994, in response to employee union activity. Respondent instituted this system at a time when it was becoming more and more clear to Respondent as a result of the answers it was getting to its unlawful interrogation of employees, that there was indeed a significant prounion movement among the employees. It was no accident that the first people caught in the new policy's web were known union supporters. Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, and Manuel Montecon were all discharged pursuant to the new system not long after being unlawfully interrogated by Respondent about their union activities and sentiments. Jerry Kennedy, another of the three main union activists named by Burgoon, was also discharged just a day or two after the new system was instituted.

I find that Respondent violated Section 8(a)(1) and (3) of the Act by instituting this new disciplinary system both to discourage union activity and to rid itself of union activists. *Joe's Plastics*, 287 NLRB 210 (1987); *Robinson Furniture*, 286 NLRB 1076 (1987); *International Business Systems*, 247 NLRB 678 (1980), enfd. 659 F.2d 1068 (3d Cir. 1981), and cases cited therein. In *Joe's Plastics*, the Board went on to specifically state that having concluded the new disciplinary system was unlawful, the corresponding discipline meted out under that system was also unlawful. I find that such is the case here as well.

One of the primary arguments advanced by Respondent in support of its position regarding the institution of the new disciplinary system, as well as various individual discharges at issue here, is that Respondent applied the new disciplinary system equally against union supporters and other employees in a nondiscriminatory manner. The record is not as clear on this point as Respondent would have one believe. In fact, a review of various individual discharges reflects that Respondent went to considerable extremes to ensnare some of the union activists in this new disciplinary system. For example, Martha Hinson was issued a major violation on April 20 when certain parts were mislabeled and shipped to an incorrect address although Hinson had nothing whatever to do with preparing the shipping labels. Also on April 20, Assistant Production Manager Ford issued Hinson a second major violation by reaching back 2 days prior and issuing Hinson a warning for not wearing safety glasses in the warehouse. The record, however, clearly reflects that it was not common practice to wear safety glasses in the warehouse and that Respondent's own supervisors did not consider the warehouse to be covered by the rule.

Similarly, in order to support the discharge of Merri Rowe on April 27, Respondent issued Rowe a major violation for an unexcused absence the previous day even though Rowe's own supervisor admitted he had given other employees excused absences for reasons not specified on Respondent's forms and even though other employees had unexcused absences within a week of Rowe's and were not even issued discipline. A similar example is shown in the case of Haywood Steel's discharge. When Steel was given a major violation on May 5 and discharged, Supervisor Walker refused to show Steel his mistakes as he had done in the past.

The discharge of Susan Hudson represents an extreme example of Respondent reaching out to ensnare a union supporter in its new disciplinary procedure. Respondent touted Hudson as a superlative employee in its shipping department, which it states was the very basis for Respondent transferring Hudson to another position on April 28, the very day when Burgoon and Ford narrowly missed hitting union organizer Landis and recently discharged employee Martha Hinson as they were distributing union literature outside Respondent's plant. Although Hudson was inadequately trained, frequently transferred, and given poor equipment, she nevertheless earned recognition for exceptional performance in the new position. Yet, on May 6, when Hudson caught her own work error and pointed it out to Respondent, Respondent seized on this as an opportunity to issue Hudson discipline pursuant to the new system. Other discipline was placed in Hudson's personnel file without even being shown to Hudson. Then, only 3 days later Respondent issued other discipline to Hudson for allegedly passing on bad parts even though this ex-

emplary employee denied having done so. Respondent then discharged Hudson quite obviously without even considering transferring Hudson back to the shipping department where she had established herself as such an exemplary employee.

Last but not least, is the case of Manuel Montecon. Montecon is one of few employees who worked for Respondent more than 1 year. From the beginning of the union campaign in February 1994, Montecon actively solicited names and addresses of interested employees to pass on to the Union. Montecon was interrogated by his team leader about the union campaign, and Burgoon himself identified Montecon as one of the people whose names he had heard were engaged in union activity. Not long after being interrogated about the union campaign, Montecon was transferred from the only position he had held while employed by Respondent to a position on the powder coater machine where it was extremely difficult for him to work due to his short stature.

On the very first evening at this new position, Montecon was injured. Though the injury would have allowed Montecon to perform light duty work, as other employees had in the past, Respondent refused to allow Montecon such duties, insisting that Montecon not return to work until he could work without restriction. Throughout the time Montecon was off work due to this injury, he faithfully kept Respondent informed about his condition. Each time he was given a new written status report by Dr. Heinig, Montecon immediately took a copy to Respondent. On May 24, when Montecon was finally released to return to work full duty, Montecon also took this note to Respondent. Personnel Manager Davis, however, refused to allow Montecon to return to work because a single box had not been checked by Dr. Heinig. A few days later, Montecon was instructed by Supervisor Walker to return to work on May 30, which he did. Then and only then was Montecon informed that he had already been terminated on May 7.

Assistant Production Manager Ford testified that Montecon was terminated on May 7 because he failed to report for work 3 days in a row. The purported logic of this decision is that at one time Montecon was scheduled to complete his convalescence on May 3. Only if one ignores the fact that Montecon's convalescence was extended by Dr. Heinig on May 3, and that Montecon personally delivered Heinig's written report to that effect to Respondent's personnel office that very day, can one argue that Montecon was expected to report for work on May 4, 5, and 6, and therefore in a position to be discharged on May 7. Ford's testimony on this point, as on so many others, is absolutely incredible. If Montecon was terminated on May 7, why was he not told this on May 24 when he met with Personnel Manager Tom Davis and gave Davis Heinig's release for Montecon to return to work full duty. Why was Montecon also later told by Supervisor Walker to return to work on May 30. It is apparent that Ford simply concocted a claim Montecon was terminated on May 7 because he thought that might fit one possible factual scenario, without having the slightest inkling that the actions of Respondent's own personnel manager and another supervisor would belie this concoction.

Respondent's assertion that it treated union supporters like all other employees pursuant to the new disciplinary system is completely undermined when actual circumstances of various discharges are scrutinized in detail. What becomes more

and more clear, instead, is that Respondent not only instituted the new disciplinary system as a response to employee union activity, but that it then went to great extremes to ensnare those union activists in Respondent's web. I find that by all of these actions, Respondent violated Section 8(a)(1) and (3) of the Act. *Joe's Plastics*, supra.

#### CONCLUSIONS OF LAW

1. The Respondent, Performance Friction Corporation is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent threatened employees that it would be futile for them to select the Union as their collective-bargaining representative; impliedly threatened to reduce wages if employees selected the Union to represent them; interrogated employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage union activities among employees; and Respondent thereby violated Section 8(a)(1) of the Act.

4. Respondent instituted a new and stricter disciplinary system in response to employee union activity both to discourage such activity and to rid itself of union activists, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

5. Pursuant to its new and stricter disciplinary system, Respondent discharged union activists Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, and other employees, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Counsel for the General Counsel argues that all discipline meted out and all discharges pursuant to Respondent's new disciplinary system are unlawful. Counsel for the General Counsel cites *Joe's Plastics*, supra. Respondent argues otherwise, but cites no authority for its position. I agree with counsel for the General Counsel. The Board specifically stated in *Joe's Plastics*: "Having concluded that the Respondent's warning system was unlawful, it follows that the warnings . . . and the discharge . . . being premised on warnings received under the unlawful system, also violated Section 8(a)(3) and (1)."

As to discipline issued to and the discharges of Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, Michael Thompson, Kyle Myers, Bernard Young, and Leslie Teague, all specifically named in the complaint herein, Respondent has already had the opportunity and failed to show that it would have taken the same actions against these individuals even in the absence of union activity and even in the absence of Respondent's new and unlawfully imposed disciplinary system. As to discipline meted out to other individuals and other discharges pursuant

to the new disciplinary system, however, Respondent shall be afforded at the compliance stage of this proceeding the opportunity to show that it would have taken these same actions even if Respondent had not instituted the new disciplinary system for unlawful reasons but had retained the old system. The burden of proof on such issues is clearly on Respondent. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[Recommended Order omitted from publication.]