

Gravure Packaging, Inc. and United Paperworkers International Union, AFL-CIO, CLC. Cases 5-CA-23994, 5-CA-24114, 5-CA-24116, 5-CA-24148, 5-CA-24216, 5-CA-24293, 5-CA-24589, and 5-RC-13944

August 27, 1996

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On July 31, 1995, Administrative Law Judge Michael O. Miller issued the attached decision.¹ The Respondent and the Charging Party filed exceptions and supporting briefs. The General Counsel filed a brief in answer to the Respondent's exceptions. The Respondent filed a brief in response to the Charging Party's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

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

² 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge's recommendation to set aside the election we find it unnecessary to pass on the judge's recommendation that Petitioner's Objection 6 be sustained.

Further, in agreeing with the judge's recommendation to set aside the election, Member Cohen would not sustain Petitioner's Objection 5. As stated in his dissent in *North Macon Health Care Facility*, 315 NLRB 359 (1994), Member Cohen would not apply that case's "full name" requirement retroactively.

The Respondent filed a motion with a supporting brief to reopen the record to introduce evidence concerning its business relationship with one of its clients. The General Counsel and the Charging Party oppose the motion. Pursuant to Sec. 102.48(d)(1) of the Board's Rules we deny the Respondent's motion as lacking in merit.

In adopting the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating employees with respect to their union activities, Chairman Gould notes that the interrogations were preceded by threats. Accordingly he finds it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984). See *AK Steel Corp.*, 317 NLRB 260 fn. 1 (1995).

In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Charging Party's Objections 7, 15, 17, 18, 20, 24, 25, and 26.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Gravure Packaging, Inc., Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to use unlawful means to keep the Union out, to sell or close the plant, to make the employees' organizational efforts futile, to reduce or eliminate benefits in the event the Union won representational rights, or to discharge or eliminate employees who support the Union.

(b) Interrogating employees concerning their union activities and sympathies.

(c) Soliciting and impliedly promising to remedy employee grievances.

(d) Discriminatorily discharging employees because of their union activities and support for United Paperworkers International Union, AFL-CIO, CLC.

(e) 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) Within 14 days of this Order, offer Eric Chandler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Eric Chandler whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Eric Chandler, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's au-

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Charging Party's Objections 2, 3, 4, 5, 6, 10, 12, 13, and 14 be sustained and that its Objections 7, 15, 17, 18, 20, 24, 25, and 26 be overruled.

IT IS FURTHER ORDERED that the election held on January 14 and 15, 1994, in Case 5-RC-13944, is set aside and that this case is severed and remanded to the Regional Director for Region 5 for the purpose of conducting a new election.

[Direction of Second Election omitted publication.]

APPENDIX

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

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

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

WE WILL NOT threaten to use unlawful means to keep the Union out, to sell or close the plant, to make the employees' organizational efforts futile, to reduce or eliminate benefits in the event the Union wins rep-

resentational rights, or to discharge or eliminate employees who support the Union.

WE WILL NOT interrogate employees concerning their union activities, sympathies, and desires.

WE WILL NOT solicit or impliedly promise to remedy employee grievances.

WE WILL NOT discriminatorily discharge employees because of their union activities and support for United Paperworkers International Union, AFL-CIO, CLC.

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, within 14 days from the date of the Board's Order, offer Eric Chandler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Chandler whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Eric Chandler, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

GRAVURE PACKAGING, INC.

James P. Lewis, Esq., for the General Counsel.
Lynn F. Jacob, Esq. and *M. Peebles Harrison, Esq.* (*Williams, Mullen, Christian & Dobbins*), for the Respondent.
James J. Vergara, Esq. and *David W. Rhodes, Esq.* (*Vergara & Associates*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Richmond, Virginia, on 7 days between February 13 and 23, 1995, based on charges and amended charges filed by United Paperworkers International Union, AFL-CIO, CLC on various dates between October 25, 1993, and October 31, 1994, and complaints, amended complaints, and orders consolidating complaints issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board) between March 31, 1994, and January 27, 1995. The consolidated complaints allege that Gravure Packaging, Inc. (Respondent, the Employer, or Gravure) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily discharging or refusing to hire five employees and by engaging in other conduct which interfered with, restrained, and coerced its employees in the exercise of their statutory rights. Respondent's timely filed answer denies the commission of any unfair labor practices.

The unfair labor practice complaints were consolidated with certain of the Petitioner's objections to conduct affect-

ing the result of the election which was conducted on January 14 and 15, 1994, in Case 5-RC-13944.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs² filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture and nonretail sale of paper cartons at its facility in Richmond, Virginia. Jurisdiction is not in dispute. The complaint alleges facts sufficient to establish, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background—Animus

Respondent cuts and prints the paper cartons used by tobacco and fast food companies. It was started in the mid 1980's, and is owned and managed by former executives of another packaging company. Its approximately 150 employees are not currently represented by any labor organization; indeed, its founders purposely left a unionized business environment to own and operate one which did not deal with unions.

The Union's campaign began in the late summer or early fall of 1993.³ When it came to management's attention in September, they quickly retained counsel. Its counsel instituted training sessions to educate the supervisors as to what they could and could not do in opposing the Union's efforts. Respondent candidly acknowledges its strong opposition to the Union's campaign.

That opposition was expressed by Jack Waring, Respondent's president and CEO, in a speech to the supervisors which he delivered sometime in November, more than a month into the campaign. The notes from which he delivered that speech (G.C. Exh. 2) provide unusual insight into his state of mind. In those notes, Waring refers to the campaign as a "personal insult" to management, a statement by the employees that management cannot be trusted. In urging strenuous efforts to defeat the Union, he made the following statements:

You [the supervisors] will be an integral part of running this union campaign and afterwards helping me to get rid of the problems and, if necessary, the people that caused this mess.

¹The unopposed motion of counsel for the General Counsel to correct the record is made part of this record as ALJ Exh. 1 and is granted. Additionally, certain corrections in the transcript are noted and corrected.

²Counsel for the General Counsel's motion of May 9, 1995, to strike certain references in Respondent's brief to a 1985 misdemeanor conviction pertaining to Eric Chandler, and to reject a proffered exhibit, is granted for the reasons stated at hearing and in that motion.

³All dates are between September 1993 and June 1994, except as otherwise indicated.

I am not asking you to beg some employees to do their job or to spend time continually listening to people who have bad attitudes, and are never satisfied. I have another plan for those people: if you don't like it here, we'll give you a chance to find someplace better.

I promise that if we are not successful, then this union and the people that it represents will regret what they did to Gravure Packaging. In my opinion, we cannot survive in the long term in today's market as a unionized company.

In discussing what they may have done wrong, and why they are facing an organizing campaign, Waring notes that they have "cover[ed] up and carr[ie]d people who don't belong here." Included among these were employees who were afraid of, or afraid to talk to, management, those who felt that they were being picked on when criticized for poor performance, those who "are more excited about getting a union in here than doing a good job," those who "think that a union will compensate for their lack of effort," those who are "anti-establishment" or "anti-Gravure" and those who put themselves first and the Company second. As to such people, his notes reveal:

As a partner and president I don't want them working here and I will no longer help or tolerate people who think that way, and I don't expect you to do it either.

His notes conclude with a promise and a guarantee that the employees will make a big mistake if they vote for the Union. In those notes, he urged the supervisors to "do everything within your power to win this election."

Waring claimed that he did not read this speech verbatim. Those notes, however, represent his "key thoughts." As he recalled what he said, "a large part of [what he said] was centered around people whose attitudes and performances were poor." The fear that Gravure could not survive in a competitive market if it were unionized was a recurring theme in that speech and throughout the campaign.

In the course of the campaign, Waring addressed groups of employees at specially called meetings at press 4, in the quality control lab, and elsewhere; he also spoke with some individual employees. Similarly, the supervisors spoke with the employees in their departments, both individually and in groups.

B. Alleged 8(a)(1) Violations⁴

1. Jack Waring

a. Speeches

Waring gave two essentially identical speeches in mid-October, at press 4 and in the quality control lab. He expressed his dismay that the employees would seek representation and made it clear that management strongly opposed the organizational effort. Waring followed the theme described above,

⁴After the close of hearing, counsel for the General Counsel conceded that the record lacked evidentiary support for a number of the 8(a)(1) allegations. Those allegations [Pars. 5(a)(iii), 5(b)(i), 5(e)(ii)(iii), 5(I), 6(d), 6(e)(i)(iii)(iv)(v)(vi), 6(f)(i), 7(a), 8(a)(i), (b), 9(c)(ii)(iii), 10(a)(ii)(iii), 10(b), 12(b),(c),(d), 13, and 15(a)] are dismissed.

that Gravure would have difficulty competing if it were unionized. In pursuing that theme, he pointed out that at least some of its customers required Gravure to complete questionnaires concerning the extent of unionization among its employees as well as other factors, such as the number of plants it operated, which might reflect on its ability to fill orders.⁵ It is clear that, at the least, Waring stressed that those customers might be less willing to do business with a unionized Gravure and that the presence of a union would impinge on the flexibility needed to meet the demands of its customers. In the course of this discussion, I find, he suggested that business which could be lost because of union representation might adversely affect overtime and profit-based bonuses. He also sought to make the employees skeptical of what he believed were union promises of better pay, less overtime, and a more lenient attendance policy.

Waring's statements of opposition to union representation, while possibly misunderstood by the employees to convey more than the words' bare meaning, are not unlawful. *Best Plumbing Supply*, 310 NLRB 143, 148 (1993). Neither are his suggestions that unionization might adversely affect Gravure's ability to secure business which, in turn, would adversely impact on the employees' earnings or job security. These were predictions of possible outcomes, based on objective fact (the customers' questionnaires) and contained no implication that Respondent would take action on its own initiative or otherwise retaliate against the employees for selecting the Union as their representative. They were thus permissible under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 518 (1969); compare *CPP Pinkerton*, 309 NLRB 723 (1992), with *Metatite Corp.*, 308 NLRB 263, 271-272 (1992).

The employee accounts of those speeches are fragmented, vague, and not entirely consistent. They also reflect some confusion as to what was said at which meeting. James Thompson, Kenneth Sokol, and Ada Williams recalled Waring as saying that he would not negotiate with a union. Others, including Williams, Sharon Wilkerson, Kelly Irby, and Dawn Cotman, tend to confirm Waring's claim, which I credit, that he described the bargaining process as one in which you might gain or you might lose various benefits.⁶ The testimony of his description of the bargaining process is inconsistent with the claim that he threatened never to negotiate with a union.

In the course of these meetings (and possibly others), I find, Waring told employees that he would do everything in his power to keep the Union out. By so stating, he could reasonably be understood to have threatened to use unlawful means, if necessary, to defeat the Union. His statement also constituted a threat that the employees' efforts to gain representation would be futile. As such, it is violative of Section 8(a)(1). *Caterair International*, 309 NLRB 869, 879 (1992); *Soltech, Inc.*, 306 NLRB 269, 272 (1992).⁷

⁵ See R. Exhs. 20 and 21, questionnaires from Proctor & Gamble.

⁶ Even if the credible evidence supported the contention that Waring told the employees that bargaining would begin at "zero," as some employees claimed, I would find that he did no more than lawfully inform them that benefits could be lost through the bargaining process. *Jordan Marsh Stores*, 317 NLRB 460 (1995), citing *Bi-Lo*, 303 NLRB 749, 750 (1991).

⁷ Waring denied expressing this thought in precisely this way. He claimed that he stated, in various meetings, that he would do everything "legally" within his power to keep the union out. Noting that

Several weeks after the press 4 and quality control lab speeches, Waring and the other owners addressed two groups of employees in the maintenance shop. His remarks were similar to those made in the earlier speeches. Waring told the employees of his history of working in a union environment before starting Gravure and of his opposition to being involved with a union again. He explained his belief that the presence of a union would hurt the Company's ability to respond to the customers' needs. Because there had been rumors of a threat to close the plant, Waring expressly denied any such intention; he also denied rumors of an exorbitant profit in the prior year. Rather than threatening never to bargain with a union, he again described the bargaining process as one in which either party could gain or lose. I find insufficient credible testimony to support 8(a)(1) allegations arising out of these speeches.⁸

Finally, Waring addressed all the employees in the warehouse in a "25th hour" speech, the day before the election. This speech, which Waring read verbatim, reiterated many of the themes of his more extemporaneous speeches. It denied any intention of selling or closing the business, it described the bargaining process, and it forcefully stated management's opposition to the Union. There was no contention that anything said there violated the Act.

b. Individual conversations

According to Eric Chandler, then a press operator, Waring attended a weekly operator's meeting in late September. Chandler attributed to Waring, in the course of that meeting, statements to the effect that Waring knew about the union activity, that he "wasn't going to have it," and that the employees could lose benefits with a union. Chandler also claimed that Waring instructed the supervisors to talk to employees individually to find out why they wanted a union. In the course of this same meeting, Chandler claimed to have spoken up to tell Waring why the employees desired representation.

Waring credibly denied attending operator's meetings. Those who did attend them, including both supervisors and employees, other than Chandler, corroborated that testimony. They further contradicted the claim that Chandler disclosed his support for the Union at an operator's meeting. I find insufficient evidence to support the complaint allegation that Waring, in the presence of employees, solicited supervisors to interrogate employees about their union sympathies.

the statement attributed to him by employees is consistent with the notes he prepared for his speech to the supervisors, I find that he did not so limit his remarks, at least not every time he made such a statement.

⁸ Ada Williams, John Thompson, and Mark Greene recalled Waring threatening to close or sell the plant if a union came in. I find each of them somewhat less persuasive in this regard than Waring and those witnesses who corroborated his testimony, particularly Brett Hawkins and Pamela Clements. Sharon Wilkerson, a generally credible witness, did not recall him making such threats. However, she recalled him threatening to escort any employee who wanted to work for a union company to the door. Her recollection of that statement, though similar to Waring's thoughts as recorded in his notes for his speech to the supervisors, was not corroborated by any other employees. (John Thompson attributed that statement to Wayne Mullican, as discussed, *infra.*) It was disputed by Waring, and other supervisors. I find that the General Counsel has not sustained his burden of proving this allegation.

Prior to the press 4 meeting described above, Waring observed Chandler in the plant at a time when he was not scheduled to work, dressed in street rather than work clothes. Waring asked him, "What are you doing here, recruiting for the union? I'm not going to have this shit here." Chandler explained his presence and, as they parted, told Waring, "You know . . . I don't think this union is a very good idea."⁹

In the same period, mid-October, Waring approached Dawn Cotman on her work station as a Kluge operator. He asked her what she thought about the Union and suggested that she bring any questions about it to management.¹⁰

Kenneth Sokol also claimed that he was approached by Waring, sometime in October, in the quality control area where he worked. Waring allegedly told Sokol that he had heard that Sokol had signed a union card, disclaimed any intention of intimidating him, and claimed that he just wanted to know Sokol's opinion on the matter. Sokol claimed to have acknowledged signing a card and to have replied that he just wanted to hear what the union representatives had to say. Waring had no recollection of having any conversations with Sokol in regard to the union authorization cards; he denied asking Sokol why he would be interested in a union or asking any employees whether they had signed cards. He testified further that he would not be troubled by Sokol's statement that he just wanted to hear what the Union had to say.

Sokol's testimony in this regard is inconsistent with his admission that he never told anyone that he was a "union supporter." It is also inconsistent with a statement he admitted signing to the effect that "no one with the company ever asked employees if they signed cards." I therefore credit Waring.

Several days before the election, Ramona Riley had two conversations with Waring in the quality control lab. In the first, they discussed her son's (also an employee) absenteeism. When she returned to clarify something Waring had said about her separate roles as mother and employee, he commented, "I heard you [were] for the union." She denied that she had made up her mind at that time. He concluded their meeting by reminding her that he was the owner, that the Union had nothing to do with the Company, and that it was his decision whether she continued to work or was fired and

⁹Waring admitted asking Chandler what he was doing in the plant on a day when he was not scheduled to work but denied the reference to recruiting for the Union. Chandler, in testifying about this conversation on both direct and rebuttal, did not deny the parting comment attributed to him by Waring. That comment makes the most sense in the context of a remark about the Union by Waring. I credit each of the witnesses to the extent reflected above.

¹⁰Waring did not expressly deny this interrogation. Rather, he denied ever asking anyone how they were going to vote or whether they had signed a union authorization card. He acknowledged asking employees whether they had anything they wanted to discuss with him or any questions he could help them with. I credit Cotman and find that he prefaced his offer to answer questions with a query as to what the employee thought about the Union. In so finding, I reject Respondent's counsel's contention that Waring was too intelligent to interrogate employees. Many employers, with as much intelligence as he, and levels of opposition to the unionization of their employees equal to his, have similarly violated the Act. Management's reaction to organizational activity is frequently more emotional than intellectual.

told her not to tell anyone what had been said between them.¹¹

Waring's remarks to Chandler, Cotman, and Riley, as credited, were calculated to elicit responses which would disclose the union sympathies of employees who were not known or open union supporters. The questioning of Riley, in particular, occurred in the coercive context of Waring reminding Riley of his power over her job tenure and the Union's inability to affect his exercise of such power. As such, these statements by Waring constitute interrogation in violation of Section 8(a)(1) even though they were not necessarily couched as questions. *McCullough Environmental Services*, 306 NLRB 345, 348 (1992), *enfd.* 5 F.3d 923, 929 (5th Cir. 1993). *Rossmore House*, 269 NLRB 1176 (1984).

2. Brett Hawkins

Brett Hawkins, the plant manager, acknowledged talking to all of the hourly employees, generally in small meetings, some one on one. He denied asking any whether they supported the Union or were engaged in union activity. He admitted asking them, rhetorically, why any employee would want to be represented by a union.¹²

In mid-September, Sharon Wilkerson was in Hawkins' office to discuss a work-related matter. At the end of that conversation, Hawkins said, "I understand that somebody's trying to bring a union in." She denied any knowledge of such activity (although she had been involved at its outset). Hawkins concluded the meeting by telling Wilkerson what a valuable employee she was, one whom they did not wish to lose and suggested that they were going to give her further training.¹³

Hawkins was more direct with Eric Chandler, saying that he knew Chandler was involved with and wanted the Union. Chandler replied, as he did with other members of supervision, that other companies had succeeded with unions, that he saw nothing wrong with it, and that he favored the Union's campaign.¹⁴ In what was apparently this same con-

¹¹Waring acknowledged the conversations with Riley but denied that he made any mention of the Union. I credit Riley, who appeared to have a better recollection of all that was said in this exchange. Contrary to Respondent's contention on brief, her testimony was not contradicted by the portion of an affidavit read into the record. The conversation quoted in the affidavit was the first of the two conversations Riley had with Waring that day; the interrogation took place when she returned to clarify a remark he had made in that first conversation. Similarly, counsel for the General Counsel only disclaimed an intention of alleging a violation based on what had been said in the first conversation. He did not waive the interrogation allegation.

¹²During the small meetings held early in the campaign, Hawkins also told employees that the Employer would know who voted for the Union. He corrected that misinformation in a December 15 memo to all employees, after he learned that he had misspoken. (R. Exh. 24.) The complaint does not allege his misstatement as a violation.

¹³Hawkins admitted talking with Wilkerson on a one-on-one basis about the Union; he denied asking "who is trying to bring the Union in." Noting the narrow scope of this denial, and his view that rhetorical questions were permissible, I credit Wilkerson. As in Waring's conversation with Riley, Hawkins' comments put a coercive cast on the exchange.

¹⁴I credit Chandler for the same reasons as those applicable to the Wilkerson-Hawkins conversation set forth above.

versation, Hawkins suggested that because other companies did not want to do business with firms which were unionized and faced potential strikes, the Union might cost the company business and slow its growth. This was consistent with what Waring had been saying, and permissible campaign rhetoric.

On the same day as the press 4 speech, Hawkins approached Dawn Cotman. He asked her what she thought about the Union. She replied that she didn't know anything about it and wished they would go away. Hawkins said that he felt the same way.

At one of Hawkins' small meetings, employee Mark Greene volunteered that he had friends who had negative experiences working in unionized shops. He offered to bring these friends in to relate their experiences to the Gravure employees. Thereafter, Hawkins and Robin Smith, assistant personnel director, repeatedly asked Greene whether he had arranged for his friends to come in and when they could do so. He never brought them in.¹⁵

At some point, some employees and supervisors began to wear "Vote No" buttons. Hawkins came up to Greene at his machine, noted that Greene was not wearing one, and asked, "Where is your button?" He asked, Hawkins said, because he was puzzled that this purportedly procompany employee was not wearing a "Vote No" button.

Hawkins thought it permissible to ask rhetorical questions. The way those questions were phrased, however, placed employees in the position of having to disclose their union sympathies or lie to their supervisor. I find, for the reasons stated above, that such questions violate Section 8(a)(1). I find, for the same reason, that Hawkins' query as to the "Vote No" button violated Section 8(a)(1). It tended to probe into whether Greene was really pro-Employer. However, I find no violation based on the alleged pressure, by Hawkins and Smith, on Greene to campaign against the Union. He volunteered to bring in friends to speak against the Union. It was not coercive for management to seek to take advantage of this offer.¹⁶

3. Charles Clements

In September, Charlie Clements, the gravure manager, came over to Chandler's press and asked him and two other employees why they would want a union in the plant. When they gave him their reasons, he purportedly said that he hoped they did get it because if they did, he wouldn't have to do their jobs anymore.¹⁷ As his question elicited a re-

¹⁵The foregoing facts are not in dispute. Greene admitted volunteering to bring in friends to speak against the Union; he claimed to have done so for fear that his job would otherwise be in jeopardy because of his known union support. Greene also claimed, and Hawkins denied, that, for some unexplained reason, he was selected by Hawkins and Smith to tell other employees to vote "no" and that he was repeatedly asked if he had done so. I find that all of these conversations related only to his offer to bring outsiders in to proselytize against the Union.

¹⁶I also find no evidence to support the complaint's allegation that Hawkins promised employees improvements if they rejected the Union.

¹⁷While the other employees allegedly present were not called to corroborate Chandler's testimony, I have found Chandler to be a more credible witness than Clements. The question attributed to him,

sponse disclosing their union sympathies, I find that it constituted interrogation in violation of Section 8(a)(1).

4. John Lenkus

Shift Supervisor John Lenkus told Chandler, "[You] dumb asses better get it right before [you] lose it all. Jack [Waring] is not going to have this shit." I credit Chandler over Lenkus' denial and find that by this statement, Lenkus threatened reprisals for, and the futility of, union activity.

Kenneth Sokol claimed that Lenkus asked him if he had been to any union meetings and suggested that no one would want to go to such meetings. Lenkus denied this statement, claiming that he suggested that employees attend union meetings, in order to make up their own minds. Sokol confirmed that Respondent had distributed lists of questions which, he believed, were for employees to ask the union representatives at meetings.¹⁸ Lenkus' testimony in this regard was credibly offered and more persuasive than that of Sokol. His references to employees attending union meetings, I find, were not such as to elicit responses indicating employee union proclivities. I shall therefore recommend that this allegation of coercive conduct attributed to Lenkus be dismissed.

5. David Sleuder

During December, Finishing Department Supervisor David Sleuder approached Mark Greene on three or four successive Mondays. Each time, he asked whether Greene had attended the weekly union meeting, held on Sunday. Greene acknowledged that he had and, on several of those occasions, was told that Sleuder did not think that it would be a good idea to bring a union in. A union, he said, "would take our [yearly] bonus away from us." In January, Sleuder asked John Thompson for his opinion of the Union.¹⁹ By these statements, I find, David Sleuder interrogated employees concerning their union sympathies and activities and threatened reprisals in the event the Union won the election.

6. Ray Taylor

Ray Taylor is a shift supervisor in the press department. In September, he stopped Chandler and asked why he was for the Union. When Chandler explained his support, Taylor told him, "You know, Jack [Waring] is not going to allow it."

Several days before the election, Taylor called Dawn Cotman, who was at home recovering from surgery. He reminded her of the upcoming vote and asked whether she

moreover, is the same as questions other supervisors deemed proper to ask employees.

¹⁸Those questions, R. Exh. 2, were phrased so as to suggest possible negative consequences stemming from union representation, such as strikes, boycotts, violence, expenses, and lost income, and ineffective representation. They were, however, legitimate campaign rhetoric.

¹⁹Sleuder admitted talking to employees about the Union. He denied asking employees if they were going to union meetings and asserted that the extent of his conversations with them was to encourage them to attend so as to be well educated before they made any decisions. He did not deny asking any employees whether they had attended a meeting; neither did he specifically deny referring to the bonuses or asking employees for their opinions of the Union. Given the limited nature of his denials, and the specific testimony of the employees, I find the employees' testimony more accurate.

would be able to make it in. He also asked her what she thought of the Union. She told him that she hadn't given it much thought and he suggested, "If I was you, I would vote 'no' for the Union . . . you're a grown woman. I can't tell you what to do." He concluded by telling her that "Jack [Waring] was not gonna sit down to negotiate with the Union . . . Jack would rather sell the Company than negotiate with a union."²⁰ By the foregoing statements, I find, Taylor interrogated employees and threatened them with reprisals or with the futility of voting for the Union, in violation of Section 8(a)(1).

7. Robin Smith

Robin Smith was the newly hired assistant personnel director at the time of the campaign. Shortly after she came on to the management staff, she met with Sharon Wilkerson, in the conference room; no one else was present. Smith asked Wilkerson why the employees were interested in bringing in a union. Wilkerson explained her own reasons for wanting representation. Smith then asked her to meet with Waring, apparently to repeat what she had said to him. Wilkerson declined. When asked why, Wilkerson explained that as the person who had initiated the union activity she did not want to be seen as giving in to Waring in any fashion. This testimony is uncontradicted.

The General Counsel alleges that by the foregoing conduct Respondent solicited employee grievances and promised employees improved terms and conditions of employment if they rejected the Union. I agree. The essence of such a violation is the express or implied promise to remedy the grievances and "the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances." *Capitol EMI Music*, 311 NLRB 997, 1007 (1993). *Gurley Refining Co.*, 285 NLRB 38 (1987). Here, in the midst of an organizational campaign, a manager directly concerned with employee relations asked the initiator of the union activity why the employees wanted representation. She then sought to have those reasons repeated to the officer who had the authority to take remedial action. The implications were clear and no express commitment to take corrective action was required. *Columbus Mills*, 303 NLRB 223, 227 (1991). Moreover, nothing said or done by Respondent rebutted the inferred promise to take corrective action. Smith's solicitation of Wilkerson, I find, thus violated Section 8(a)(1).

In early January, employee John Thompson was called to the gluing department office where he met with Smith. She asked Smith how he felt about the Union and he told her that he hadn't thought much about it. She then advised him to vote "no," stating that they "really don't need a union." Several times before the election, she came back to him in the gluing department to ask whether he had made up his mind as to how he would vote. He continued to maintain that

²⁰ Taylor understood that he could ask employees how they felt about the Union. However, he denied asking Chandler why he would want a union or saying that Waring would not "allow a union." He also denied saying anything to Cotman other than to remind her that she could come in to vote if she wished to express her opinion but did not deny the specific comments she attributed to him concerning what he would do or what Waring might do if the Union won the election. I credit Chandler and Cotman, noting that their testimony is consistent and mutually corroborative.

he had not made up his mind. After the election, she checked with him to see whether he had voted. This uncontradicted testimony establishes repeated interrogation, in violation of Section 8(a)(1), by Smith.²¹

8. Phil Lea

In September, Phil Lea, shift supervisor in the press department, called a succession of employees into his office for private conversations. One was Eric Chandler. Lea asked Chandler why the employees would want a union and related that, having worked in a union environment, he knew that unions did nothing for employees. Chandler explained his reasons for supporting the Union, i.e., his desire for better pay and benefits and an improved working atmosphere. Lea directed him to send another employee in.

Lea, who testified on other matters, did not contradict Chandler's credibly offered testimony. I find that his question why employees wanted union representation effectively probed the employees' union sympathies, was conducted in a coercive context and manner and thus violated 8(a)(1).²² Lea was, of course, free to tell employees how he felt about unions.

9. Ross Lewis

Ross Lewis, the quality control manager, spoke with Kenneth Sokol and at least two others in the lab about the effect of unionization upon his communications with them. As he recalled the discussion, he told them, in response to their questions, that if there was a union, there would be a contract "and we would go by whatever the contract was. So I couldn't decide, for instance, you're going to get paid this, or you're going to get paid that. It would be whatever the contract spelled out." I find nothing violative in Lewis' conversation with these employees.²³

10. Don Martz

The record is devoid of evidence to support the allegation that Warehouse Manager Don Martz, threatened employees with the loss of benefits if they selected the Union as their collective-bargaining representative. I shall therefore recommend that this allegation be dismissed.

11. Tyrone Chapman

In November, as she was returning from a break, Ada Williams was approached by Ink Technician Supervisor Tyrone Chapman. He stated, "I heard that you was one of the people that was trying to bring the union in." She asked where

²¹ Smith's participation in the discussions with Mark Greene, concerning his offer to bring in friends to talk about their negative experiences with unions was also alleged as violative. As I have previously found Hawkins' involvement in that activity not to be improper, I shall recommend the dismissal of the similar allegation attributed to Smith.

²² The question also has overtones of the solicitation of grievances.

²³ Lewis credibly denied telling them, as Sokol related, that he could not talk to them about their problems with a union in the facility, that they would have to deal through their union representative. Even if I found Lewis' statement as described by Sokol, I would find no violation in this permissible campaign rhetoric. *United Artists Theatre*, 277 NLRB 115 (1985); *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

he had heard it, but he did not respond. As they parted, Chapman told her, "Well, just don't vote for the Union." I find that this undenied conversation constituted interrogation, in violation of Section 8(a)(1), for the reasons set forth above.

12. Wayne Mullican

Wayne Mullican, vice president and one of the four owners of Gravure, spoke to the employees, along with his partners, at the maintenance shop meetings. The basic tenor of his remarks concerned the threat he believed a union posed to Gravure's competitive position. In the course of those remarks, I find, he told the employees that "if we wanted to work for a unionized company, we could hit the door and go work for someone unionized . . . there's the door, go work for a union."²⁴ A suggestion that union supporters should quit conveys the impression that such support is incompatible with continued employment and implicitly threatens discharge. As such it violates Section 8(a)(1). *Tualatin Electric*, 312 NLRB 129, 135 (1993), and cases cited therein; *Stoody Co.*, 312 NLRB 1175, 1181 (1993).

14. Alleged disparate enforcement of attention to duty rule

In late September, as he was leaving work, Eric Chandler stopped by James Thompson's work station to discuss the next union meeting. Thompson was on the clock working. Charles Clements, the Gravure manager, came up and told them that they were to limit their conversations to their own crews at their own work stations as long as they were on the clock. When Chandler protested that he was on his way out, Clements told him to leave.

Subsequently, the employees from all three presses were called into the supervisors' office. Clements, with two press department supervisors present, told them that "we were no longer allowed to walk around and talk to others. When we were there to work, we were to work." Violations of this rule, he said, would result in progressive discipline up to possible termination. According to John Lenkus, this meeting was held because certain individuals had been wandering about the plant more since the start of the campaign. Ray Taylor also observed certain employees, particularly James Thompson and Sharon Wilkerson, walking around and/or talking to other employees more during the campaign. He also observed Thompson wave to people walking by his press, motioning them to come over and talk to him.

On October 19, Thompson left his work station at the Kluge and went to the warehouse, purportedly to secure materials. He observed the Warehouse Manager Don Martz talking to some employees about the Union and interjected him-

self into the conversation with a remark favorable to unionization. Martz ejected him from the meeting. On October 27, he was given a written warning and 3-day suspension for his conduct (G.C. Exh. 12).²⁵

On December 22, Thompson stopped by another employee's press. He wasn't there for more than 30 seconds when he saw Waring waving him off. A week or so later, he received a warning for having "engaged in distracting and disruptive behavior." The warning noted that he had been warned before about being at other employees' work stations when he had no reason to be there (G.C. Exh. 15). He was not otherwise disciplined at that time. At a meeting he was called to concerning this incident, Thompson met with Waring, Robin Smith, and Ray Taylor. Waring told Thompson that "he had a real problem with talking to people in the plant." When Thompson asked whether he was expected to work all day without talking to anyone, Waring said, "Now you're getting the picture."

According to Waring's uncontradicted testimony and a memo he prepared regarding the incident, he had observed Thompson go to that press and engage in a conversation which included "backslapping" and other animated gestures. Thompson appeared to be ignoring Waring's gestures to move on.

Ada Williams had an occasion to talk to Thompson, during the fall of 1993, when Clements came over, placed his arm around Thompson's shoulder, and pushed him away from her. To her observation, Clements and Lenkus appeared to be watching Thompson.

Similarly, when James Thompson went over to John, his brother, on his way to the breakroom, merely to borrow some lunch money, Clements came over. He told James that he was out of his work area, that he was not supposed to be there, and questioned why he was. Thompson explained his presence, Clements repeated that he was out of his work area and told him to leave. Clements then accompanied Thompson to the breakroom. Sharon Wilkerson recalled a similar incident involving both Thompson and Clements.

Thompson recalled that on December 30, the same day that he received the warning for the December 22 incident, Ron Hoover, another employee, came over to his machine and talked to him for 40 minutes, pressing the antiunion position. One supervisor, Thompson did not recall who, observed but did not interrupt them. Charles Clements, however, recalled seeing them and telling Hoover to move on. When Clements came back by Thompson's press, Hoover was gone. There is no indication that Clements knew what they were discussing.

The Company maintains a rule which prohibits employees from leaving their work stations other than to go on break or use the rest rooms. That rule, contained in the employee handbook (G.C. Exh. 7), prohibits "Loafing or doing other than Company work while on Company time [or] other neglect or inattention to duty." Notwithstanding that rule, employees were permitted to talk to one another while at their work stations and, prior to the campaign and after the election, would talk briefly to each other as they went on their breaks. Employees, other than Thompson, have been rep-

²⁴ The foregoing is based on the uncontradicted testimony of John Thompson. Where, as here, a witness specifically denies having made certain statements and fails to deny or explain others which were attributed to him, I must infer that the testimony as to the uncontradicted statements is credible. I note, too, that Sharon Wilkerson recalled such a statement being made in that meeting but attributed it to Waring. John Thompson also claimed that Mullican threatened to close the plant. (Ada Williams only testified that his remarks were similar to those by Waring.) I have chosen not to credit the latter evidence inasmuch as it was not corroborated by Sharon Wilkerson and it was credibly and specifically denied.

²⁵ As will be discussed in relation to his discharge, Thompson had received a warning and 2-day suspension for being in the warehouse, not at his work station, on October 15 (G.C. Exh. 9).

rimanded or disciplined for violating this rule.²⁶ Further, operators and other employees were not supposed to leave their machines to go to the warehouse; if they needed materials, they were to call for the supervisor, who would send a floor man to the warehouse.²⁷

Based on the foregoing, I cannot conclude that Respondent adopted new rules prohibiting employees from engaging in conversations or disparately enforced its rules against those who engaged in union activities. It is clear that they had rules regarding employee movements and conversations during worktime, some employees (particularly James Thompson) breached these rules more often during the campaign and Respondent increased its emphasis on, and enforcement of, them as a result. I do not find the enforcement generally or as to Thompson violative of the Act.

C. Alleged 8(a)(3) VIOLATIONS

1. Analytical mode

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. As stated in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), under that test, the General Counsel must first:

make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. mem. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198,

²⁶As early as September and October 1990, Thompson's brother Lloyd was given two warnings for failing to stay on his assigned press.

²⁷Considering the close attention expected of the machine operators, I cannot credit Thompson's claim that he was free to leave the Kluge and go to the warehouse for supplies.

204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

Once the General Counsel has made out a prima facie case, the burden shifts back to the Respondent. The Board in *Merrilat Industries*, 307 NLRB 1301, 1303 (1992), stated that burden requires a

Respondent to establish its *Wright Line* defense only by a preponderance of the evidence. The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. [Citation omitted.]

2. Eric Chandler

Chandler began working for Respondent in April 1988 as a catcher on the press. Thereafter, he held positions of increasing difficulty, becoming an apprentice press operator in 1991 and a press operator in 1992.

Chandler was involved in the union campaign, passing out some literature and acknowledging his support when questioned by various supervisors. I have found that, as the victim of interrogation, his union activity was known to management.

Although he rose through the ranks on the press to the highly responsible position of operator, Chandler's work record, prior to any union activity, was marred with repeated warnings.²⁸ He received a verbal warning for poor job performance, a moderate infraction, as a slitter operator in June 1991 before becoming an apprentice press operator. As an apprentice, he received a written warning in October 1991 for the same offense. He was suspended for one day in February 1992, again for the moderate infraction of poor work performance, another verbal warning for a minor infraction in July 1992, and a 2-day suspension for a major infraction involving poor work performance in August 1992. (R. Exh. 33-36.)

After he was promoted to press operator, he received a written warning in January 1993, a written warning and 16-hour suspension on February 12, 1993, and written warnings and additional 24-hour suspensions on March 1 and April 1, 1993. All of these were for poor work performance. On April 8, 1993, he was issued a "Last and final warning for poor work quality" with another 3-day suspension. That warning threatened that "[a]ny further incidents with poor work quality can result in demotion to lower classification." (R. Exh. 37-42.)

Additionally, he received a written warning on April 15 for missing a mandatory operators' meeting.

Chandler's attendance was similarly flawed. By January 1992, he had accumulated 13 points under Respondents' attendance policy, a level mandating discharge. However, on January 30, 1992, he was put on a "last chance" program and warned that if he reached the level of 13 points again, he would be terminated. Chandler was the first employee given such a "last chance."

²⁸While Respondent purported to have a progressive discipline system, that system was not strictly adhered to. The severity of offensive or improper conduct was weighed and, in the past, not all prior disciplines were reviewed to determine whether progressivity was being followed.

Chandler received no further warnings for work performance until October 18, after the union campaign had begun. He claimed to have made efforts to be more careful. That is not to say, however, that his work was perfect throughout this period. The record reflects some production errors by Chandler during this timespan; they were not brought to his attention and did not result in discipline. It is not uncommon for errors to be made in the course of production. Waring acknowledged that such errors occur with regularity; perhaps one to three times per day an error is made which is significant enough to require that the product be scrapped. A more serious problem exists if faulty production escapes inspection and is rejected by the customer.

Respondent's supervisors claim that Chandler received no warnings after April 8 because they believed that the warnings had been ineffectual. Chandler was the son of a former employee of Waring whom Waring had hired as a favor to that individual and, they claim, was considered "Jack's boy," receiving favored treatment. Several claimed to have recommended Chandler's discharge on repeated occasions both before and after April 8, to no avail. None of those recommendations was in writing. I cannot accept this testimony. Noting the absence of any written recommendations for discharge, the evidence establishing that Chandler had received the discipline which the supervisors had recommended in each of his warnings, that his supervisor, Lenkus, had given him a "last and final warning" on April 8, threatening him with demotion for further incidents, and the contrary testimony of Lenkus, I cannot credit Production Manager Clement's claim that, after the April warning, he told the supervisors that they did not have to write Chandler up any more because to do so was futile.

On October 18, Chandler was working on press 2, printing a short run of product for Brown & Williamson. He reported problems with the cylinder printing gold on Kent cigarette packages to the supervisors, Lenkus and Lea, and was told to continue running the product with frequent wiping of that cylinder. Upon completing the pallet, he filled out a critical defect sheet, putting the product on hold and sending it to be picked over in quality control. While he had checked certain problems with the work on that pallet, his critical defect sheet did not mention certain others, notably missing print. All defects are supposed to be noted. The additional defects were caught by the pickover department and shown to Chandler.

Quality Control Manager Ross Lewis brought the matter to Manufacturing Manager Brett Hawkins' attention. He noted that, while sorting through the pallet for missing varnish (which Chandler had reported), they found 2000 cartons with missing buff lines and 10 cartons with missing print (which Chandler had failed to report). (R. Exh. 47.)

Hawkins prepared a memorandum, dated October 19, addressed to file, relating Chandler's error in failing to properly complete the critical defect sheet. In that memorandum, he recommended that Chandler be terminated for continuously "demonstrat[ing] no responsibility as an operator . . . not following press procedures and not documenting missing print." In that memo he referred to the potential for loss of a valuable customer (about whom there was concern because of other complaints Brown & Williamson had brought to Respondent's attention) (R. Exh. 47). He also brought this mat-

ter to Waring's attention; Waring said he would talk to Chandler.

On October 20, Chandler was called to a meeting with Waring. In the course of this conversation, Waring discussed Chandler's recent failings on the Brown & Williamson order. As Chandler related their conversation:

[H]e stated that he knew I was probably part of the union that was trying to get in there . . . [that] I knew that we didn't need it . . . that I needed to figure out what I was going to do to be a team player with this company. And I needed to revise and review myself, or take inventory of myself. And he would get back to me.²⁹

On one workday after this meeting, Chandler failed to show up for work on time. He had not called in. A supervisor, Ray Taylor, called him at home and believed that he woke Chandler up. Chandler came in to work late, receiving points which brought him just short of the 13 which would have resulted in his discharge. At the time that he called Chandler, Taylor knew that Chandler was under the "last chance" program but did not know the status of his accumulated points.³⁰

In the days that followed his meeting with Waring, Chandler missed another operator's meeting.

Waring denied that he had decided to fire Chandler on October 20. Rather, he had expected Chandler to get back to him on what Chandler would do to improve his performance.³¹ He decided to terminate Chandler, he claimed, when Chandler failed to get back to him and after his failure to attend the operator's meeting and his late arrival at work, only after being called by a supervisor.

Chandler was informed of his discharge by Clements, who disclaimed any involvement in it. Clements told Chandler that he would have to speak to Waring.³² Chandler went to

²⁹ Other than to deny knowledge of Chandler's union activity and to deny making reference to the Union in that meeting, Waring offered little detail as to what was said between them. Rather, he relied on a memo prepared 9 days later, after he had decided to discharge Chandler, and testified generally as to his alleged concerns with Chandler's performance and attitude. I find that memorandum to be self-serving and Chandler's recollections more accurate than those of Waring. I note that Brett Hawkins recalled that Waring made a reference to Chandler not "being on the team" in the discharge interview.

³⁰ Given that Taylor did not know of Chandler's accumulated point count, and may not have known of a desire to terminate him, I reject Respondent's contention that, by calling Chandler rather than letting him accumulate more points for an absence without calling in, and thus reach more than the 13 points which would have required his discharge, Respondent demonstrated that it had no unlawful motivation to fire him.

³¹ I believe that there was a failure of communication between Waring and Chandler, each expecting the other to initiate the next contact.

³² Respondent adduced the testimony of James Robinson to the effect that, as he was relieving Chandler on the press "right before he got dismissed," Chandler told him, "Well, I don't think Jack [Waring] will be able to keep me after this last one" [referring to a Brown & Williamson job for which Chandler had been written up and disciplined.] Given that more than a week had passed since the October 18 incident, and that no discipline had yet been assigned for

Continued

Waring's office and met with Waring, Hawkins, and Personnel Director Guy Rouse. Chandler defended his performance, questioned how he could be blamed for the errors of his crew,³³ and asked to be demoted rather than discharged. Waring refused to demote him, referred to his understanding that Chandler would get back to him on how he would improve and again made reference to Chandler not being a team player or on the team. He was discharged effective November 4, 1993.

While the matter is certainly not free of doubt, I am convinced that General Counsel has sustained both the initial and subsequent burdens of proof with respect to Chandler's discharge. There was union activity, knowledge, animus, and an adverse action which would impinge on the exercise of that union activity.

The Respondent has shown that Chandler was, at best, a marginal employee whose performance continued to be wanting during the union campaign. The difficulty with Respondent's case is twofold. First, on the record before me, Chandler had shown improvement since his last and final warning of April 8. He received no additional warnings in nearly 6 months and I have rejected Respondent's claim that the supervisors merely gave up on issuing warnings to him. Moreover, Respondent has failed to follow its own recommendation that Chandler be demoted, rather than discharged, upon a future mistake.

Second, and most significant, Chandler was always a marginal employee. Yet, he had been both retained for more than 5 years and promoted to the most responsible position on the press notwithstanding his faults. The only thing that had changed was the advent of the Union. That new circumstance is particularly significant given Waring's state of mind as revealed in the notes for his speech to the supervisors, a speech delivered close to the time of Chandler's discharge. In those notes, Waring refers to his plan to get rid of those employees who brought about the union campaign and eliminate those employees considered to be "anti-Gravure" or to have bad attitudes.

Union activity will not save an employee who commits an offense for which he would have been discharged absent such activity. The obverse of that axiom, however, is that an employer may not seize upon union activity to justify a change in policy so as to bring about the discharge of an employee who would otherwise have been retained. That is precisely what I find to have occurred here. I find that Respondent changed its prior tolerant policy toward Chandler because of his union activity and discharged him because of that activity, in violation of Section 8(a)(3) of the Act.

3. Kenneth Sokol

Sokol was hired in March 1989. He worked as a catcher and palletizer on the press crews for a couple of years and then became a quality control inspector, the job he held at the time of his discharge. His immediate supervisor was

that error, I find it less than probable that Chandler would have made such a remark or otherwise acknowledged that he had committed an offense for which he would be discharged.

³³This was consistent with what Respondent deemed to be Chandler's refusal to accept responsibility for his own failings, another alleged factor in the discharge decision.

Pamela Clements; the manager of quality control was Ross Lewis.

As the General Counsel acknowledges, Sokol "did not have a high union profile." There was no credible evidence that Respondent was aware that he had signed an authorization card.³⁴ The only credible evidence that links Sokol to the Union is Ramona Riley's observation of Ross Lewis' open notebook, shortly before Sokol was terminated. In that notebook, in Lewis' handwriting, were the names of Sokol, Riley and one other employee, with the notation "union." Lewis did not deny that he had maintained lists during the campaign. They were, he claimed, lists of employees either to be talked to about the campaign or those whom he had determined were not worth talking to (because they had already made up their minds, for or against the Union.) As far as this record reveals, nothing adverse befell Riley or the other employee identified in the notebook.

If anything, it appears that Sokol was an employee believed to be inclined against the Union. He had been overheard by Pamela Clements to say that he did not support the Union and that it could not help him. Sokol admitted that, at the time of his discharge, he had not yet made up his mind. In light of that credible testimony, I find that Lewis' notation is too ambiguous to establish knowledge.

Quality control inspectors, such as Sokol, inspect each pallet of product that comes off the presses to ensure its quality. In doing so, they complete an "SPC" form (R. Exh. 59). On that form, they record the pallet number and indicate that it has been inspected. If there are defects or problems with the product, they so indicate, checking off the appropriate boxes, and the pallet is put on hold for pickover. They also are required to check the ink colors before a run of product starts.

Respondent contended that Sokol was a capable employee given to taking shortcuts, sometimes skipping inspection procedures but marking the SPC sheet as if they had been performed. It was allegedly a second such instance of "falsification" for which he was terminated.

According to Lewis, there had been an instance in 1992 when Sokol had failed to check that the correct boards had been used for a food container (McDonald's Chicken McNuggets) but had indicated on the SPC sheet, and, when questioned, assured Lewis that the tests had been made. The failure to make that inspection resulted in substantial product loss. Lewis considered this to be a falsification and recommended to Waring that Sokol be terminated. Waring opted to give him another chance. Lewis threatened Sokol with discharge if it happened again³⁵

³⁴Sokol asserted that Lenkus was nearby when he signed that card at James Thompson's car in the parking lot. However, he did not know if Lenkus observed him signing the card. Lenkus, who played no role in Sokol's termination, credibly denied seeing Sokol sign a card and offered a reasonable and uncontradicted explanation for his presence near Thompson and Sokol.

³⁵The record contains no documentation of this incident. However, Lewis' testimony was credibly offered and Sokol essentially corroborated it, merely putting it in a different light. He denied that he had intentionally falsified the SPC sheet or that he had been threatened with discharge for repetitions of such conduct. He claimed that he had been the only inspector for three or four machines that night and extremely busy. Lewis recalled that this occurred in 1991 or 1992, Sokol stated that it was in the year before his discharge.

On September 18, 1993, Sokol failed to catch that the wrong spout had been used on a detergent box, something he should have been found in a copy check. Three pallets went through with the wrong spout. According to the warning, Sokol admitted that he had failed to follow procedure. He was given a written warning and threatened with a 2-day suspension for a similar violation. On October 22, Sokol performed the copy check but failed to note missing copy on cartons for Kent cigarettes. He was suspended for 3 days.³⁶ That warning threatened him with possible discharge for any further violations (R. Exh. 61).

Sometime in October, according to Sokol's memory, Lewis asked him if he wanted to remain in quality control. Lewis added that he would be out of that department if he made one more "screw-up."

On November 2, Sokol's copy checking again failed to pick up a defect, the addition of an optical brightener to 24,000 cartons for Kent cigarettes, resulting in the scrapping of the entire run. He was written up and again given a 3-day suspension (R. Exh. 62). Lewis scheduled a meeting of the quality control department for the morning of November 6 and specifically asked Sokol to come in. He intended to speak to Sokol at that time about his performance and give him the suspension. Sokol did not show up. Sokol apparently received the written warning and suspension later that day.

On December 3, Sokol was responsible for checking pallets two through four of a run of cartons for Kool Ultra Lights, a Brown & Williamson product. The first pallet had been David Redford's responsibility. When Pamela Clements checked the work, she determined that all four pallets had been run with the wrong shade of gold. Sokol's SPC sheet indicated that the color had been checked and when confronted, Sokol claimed that he had checked the color; Pamela Clements took him to the color chart and showed him that he had not done so. She reported this to Lewis, who was on vacation. On his December 15 return, Lewis examined the samples and asked Sokol if he had checked the colors. Sokol again insisted that he had. When confronted with the color samples, Sokol ultimately admitted that he had forgotten to make the color check.

As a result of this error, Lewis recommended Sokol's termination to Waring and Hawkins. One element in that recommendation was Sokol's repeated falsification of the SPC sheets. Waring agreed that termination was appropriate and he was discharged. David Redford, who had committed a similar violation with respect to pallet number one, was given a 3-day suspension inasmuch as he was at a different stage in the disciplinary progression (R. Exhs. 64 and 65).

Even assuming that there had been evidence of company knowledge of union activities by Sokol, I would have been inclined to recommend dismissal of this allegation. Sokol committed repeated errors within a short time, including a serious offense, falsification, for which he had been threatened with discharge previously. However, I need not reach that question. I am compelled to conclude that the General Counsel has failed to establish knowledge of Sokol's union activity, an essential element in putting forth a prima facie case. I shall, therefore, recommend that the allegation of Kenneth Sokol's discriminatory discharge be dismissed.

³⁶There is no explanation why the 2-day suspension level was skipped.

4. Lamont Lewis—Refusal to hire or discharge

Respondent utilized workers referred by a temporary employee service when it had a high volume of work and insufficient employees of its own to perform that work. After a period of time, it sometimes hired those employees as its own but they had no automatic entitlement to Gravure employment no matter how long they remained.³⁷ In the 18 months from January 1, 1992, to the end of June 1994, it had used 186 temporaries, hiring only 23 (R. Exh. 86).

Lamont Lewis³⁸ was an employee of a temporary employee service who was referred to Gravure. He began to work in the pickover department, along with five others similarly referred, on September 21, 1993. The work leader on his table was Ada Mae Williams, a known union supporter. His immediate supervisor was Pamela Clements. One of the temporary employees working with him at that table was Penny Kane, a sister of Pamela Clements.

L. Lewis signed an authorization card on September 28. There is no evidence that any manager or supervisor knew that he had done so. While working on the pickover table, he talked about differences in working conditions between DuPont, a prior unionized employer where he had been employed, and Gravure. However, he never expressly stated which he favored, that he supported the Union, or that he had signed a card.

R. Lewis placed a good deal of pressure on Ada Williams to get the pickover work done more quickly. Williams told both him and Pamela Clements that L. Lewis was a good, but slow, worker and that he was holding them back. Williams spoke to L. Lewis about his speed and attentiveness; he would improve for a while and then revert.³⁹

As they approached 90 days of employment, the temporaries heard a rumor that they were going to be let go. Pamela Clements assured them that it was just a rumor, that there was plenty of work, and that, when the time came, she would do her best to see that they were placed elsewhere in the plant. During that same time period, the temporaries were asked by Rouse and Williams, where they might want to work if the pickover work was completed. L. Lewis expressed an interest in going on the washup job on the presses; he received no assurance that he would be given that, or any other, job.

On Friday, January 14, during the election, Pamela Clements noticed L. Lewis missing from his table. On the following Monday, she asked him where he had gone. He told her that he had gone to vote. Noting that only the regular employees were eligible to vote, she asked him why he had done so. The Union had told him to, he replied.⁴⁰

³⁷It would appear, from what the employees were told, that Gravure could not place them on its own payroll before the end of 90 days.

³⁸In this section, Lamont Lewis will be identified as L. Lewis, to distinguish him from Ross Lewis (R. Lewis), the quality control manager under whom L. Lewis indirectly worked.

³⁹Williams, a union supporter, had no reason to misrepresent L. Lewis' performance. I credit her over L. Lewis' less persuasive denial that she had criticized his performance.

⁴⁰I credit his recollection that he told her this over her testimony that he walked away, without replying, when she asked him who had told him he could vote. At best, the refusal to answer would have

After the election, R. Lewis told Williams that pickover was to be eliminated as a separate department, with those employees being dispersed through the plant. Some would continue to do pickover work in quality control. He asked her which three or four she would want to keep in pickover. She named several, including Kane, and told Robin Smith, the human resources assistant, that L. Lewis would not do a good job in pickover. She recommended him for the washup position.

On January 21, L. Lewis was called to the office and told that he was not being retained as a Gravure employee. He argued that there were openings and was told that there was no job for him. There were openings on the press and gluer; Pamela Clements had recommended that he was too slow for either of those positions. Indeed, she had recommended against his retention on the basis that he was too slow for any of the then-available positions. The record reflects that five temporaries were converted to regular Gravure employees on January 24, three to continue doing pickover, one as a gluer-feeder and one as a palletizer (G.C. Exh. 8).

Based on the foregoing, I am compelled to conclude that the General Counsel has failed to establish knowledge of L. Lewis' union activity, a critical element in putting forth a prima facie case. At no time did L. Lewis reveal any union proclivities, he merely compared conditions at a unionized employer where he had worked with those at Gravure. The record does not reflect which one he thought preferable; neither does it reflect management awareness of these discussions.⁴¹ That he attempted to vote, even at the Union's urging, does not establish knowledge of who he supported or how he voted. Accordingly, I shall recommend that this allegation be dismissed.

My conclusion would be the same even if it could be said that management knew how he felt about the Union. He was a temporary employee and, while all of the temporaries who worked with him were retained, he was considered a slow employee, unsuitable for any then-available opening even by his work leader, who was avowedly prouion. Moreover, the record established that Respondent retained only a small percentage of those referred to it as temporary employees. Temporaries had no right to permanent jobs, no matter how long they worked for Gravure. This evidence, I find, is sufficient to overcome what would, at best, be a weak prima facie case.

5. Steven White

White was hired as a palletizer in February 1988. Thereafter, he held various positions on the press, becoming an apprentice operator in 1991 or 1992.

During the organizing campaign, White assisted in the distribution of authorization cards apparently unobserved by management. He attended, but did not testify at, the representation hearing on October 20 and 21, sitting with other

been deemed an admission that it had been the Union; at worst, it would have appeared insubordinate.

⁴¹ *U.S. Soil Conditioning Co.*, 235 NLRB 762, 768 (1978), cited by the General Counsel, is inapposite. In that case, knowledge was found on the basis of circumstantial evidence including timing, inconsistent treatment of the discriminatee, the absence of reasons for the termination, and the knowledge of a son of a supervisor, where that son had been deeply involved in the union campaign, in a small unit.

employees and a union representative. At that hearing were management representatives Guy Rouse, Pamela Clements, and Brett Hawkins. On one occasion, Press Department Shift Supervisor Ray Taylor spoke with White about the Union. In that conversation, White told Taylor that he felt that the Union "could help him out." From this, Taylor acknowledged, he knew that White favored the Union.⁴² White was not subjected to any 8(a)(1) conduct.

On about February 25, approximately 5 weeks after the representation election, White was working on the late shift, 11 p.m. to 7 a.m., with Charles Miffin as his operator and Phil Lea as the shift supervisor. At about 1 a.m., Miffin saw White leaning against the table on both arms with his head down, apparently asleep. Miffin brought Lea over to the press to observe White; White was still in the same position when Lea came up, 2 or 3 minutes later. Lea slammed a stack of cartons down on the table, startling White who then opened his eyes. Lea concluded that White had been asleep.

Lea reported this incident to John Lenkus. On February 28, Lenkus, in turn, recommended to Brett Hawkins that White be terminated. He based his recommendation on this incident as the culmination of a number of incidents of White sleeping on the job and otherwise displaying a "lackadaisical attitude toward his job," with no observable improvement even after a recent conference with his supervisor (R. Exh. 69).⁴³ Hawkins agreed with the recommendation.

White was terminated in a meeting with Hawkins, Lenkus, Rouse, Clements, and Lea. He was told that he was being discharged for poor work performance and, I find, the recent incident of sleeping on the job.⁴⁴ He accused them of discharging him because of his union activity; they did not respond.

Both supervisors and the press operators with whom he worked considered White to be a slow or below average employee. James Robinson and Kelly Irby both described him as "too slow," with "a problem of sleeping on the press" and overstaying his breaks by sleeping in the breakroom. Irby, at least, had reported this to Lenkus. Miffin related that incidents of White sleeping while on his press had been occurring since White had been assigned to his press, on the night shift.

About 2 or 3 weeks before White's termination Miffin had complained to Ray Taylor about the pace at which White worked. That complaint resulted in a meeting between Taylor, Miffin, and White at which Miffin referred to White's "nodding off." At that time, Taylor told White that "we could not have it" and that, if it happened again, White would be written up.⁴⁵

⁴² Based on this evidence, I must reject Respondent's contention that it was without knowledge of White's union activity.

⁴³ Lea referred to a note that he had written concerning this incident; that note did not find its way into this record. A memorandum addressed "To whom it may concern," prepared by Miffin, detailed this incident (R. Exh. 76).

⁴⁴ That he had denied sleeping on the job during this interview is inconsistent with his claim that there was no reference of such conduct when he was fired.

⁴⁵ Taylor also referred to incidents of walking up on White when White appeared to be sleeping. On some occasions, the other employees made noises to alert White that a supervisor was coming; on others, Taylor asked White "if he was praying." Taylor took no formal action on any of those occasions because he was not sure that White had, in fact, been asleep.

Complaints about White's performance were longstanding. In September 1990, Lea had written a memo to White's personnel file, noting that he had spoken to White about taking long breaks and failing to properly inspect boxes coming off the press (R. Exh. 80). In February 1991, Lea gave him a written warning for the "moderate infraction" of sleeping at the delivery table (R. Exh. 81).

White had also received warnings for production errors and work quality. For a work quality violation resulting in scrap on February 15, 1993, he was given a written warning and 3-day suspension, with a threat of further suspensions or discharge if similar violations occurred. He was given a written warning, again for work quality resulting in scrap, on March 31. On April 15, he was given a "last and final warning for poor work quality" with another 3-day suspension and threat of demotion for additional violations. He apparently worked without any further violations warranting a warning until September 30. On that date, he ran two thirds of an 18,000 carton order without a top laquer, requiring that they be rerun, and he was given a written warning. All of these warnings were issued by Lenkus (R. Exh. 42, 66-68). Lenkus, who considered White to be "way below average" throughout his employment, testified that he was tolerated for so long "[b]ecause we give so many people so many chances."

Respondent has terminated other employees for sleeping on the job. Taylor named two, one in 1989 or 1990 and the other in 1991 or 1992. The latter was terminated after three such incidents, the last when he was caught sleeping in a trailer.

More recently, Ramona Riley recalled an incident where Pamela Clements came up on David Redford, apparently asleep in the lab and appeared to wake him up. Clements, however, denied that Redford had been asleep. When she came up to him, he had his head down. Suspecting that he was asleep, she asked him if he was. His immediate response dispelled her concern. I do not find that her failure to discipline Redford, under these circumstances, establishes that White received disparate treatment.

Respondent points out that sleeping on the job violates its rule against loafing on the job and also presents a safety hazard, with the possibility that the sleeping employee will inadvertently place a limb in the press.

I am satisfied that the General Counsel has established a prima facie case of discrimination. In particular, I note that Respondent's long toleration of marginal employees, its inconsistent application of discipline and Waring's stated intention to eliminate union adherents and others with "bad attitudes" raise questions over the discharge of Steven White. However, given White's low level of union activity, Respondent's history of discharging employees for sleeping on the job, the recent warning he was given for this same conduct in the meeting with Miffin and Taylor and his overall work record, I am satisfied that Respondent has carried its burden to rebut that prima facie case. I shall therefore recommend dismissal of the allegation that Steven White was discriminatorily discharged.

6. James Thompson—Discipline and Discharge

Thompson began his employment at Gravure in 1989, in pickover, an entry level job. He progressed to the press, as a catcher and apprentice operator, and then became an opera-

tor on the Kluge, a die cutting machine which cuts and forms the boxes. Thereafter, he also worked in the die shop, as a die man.

Thompson was an open union supporter and advocate.⁴⁶ Respondent does not dispute its knowledge of his activities. Indeed, it argues that that knowledge, and its reluctance to be exposed to additional unfair labor practice charges, delayed rather than hastened Thompson's termination.

Thus, Respondent points to a long history of work-related problems with Thompson, beginning well before employer knowledge of the union activity and continuing long after the election. In mid-August 1993, Guy Rouse had prepared a memorandum to file, based on reports of Thompson's supervisors, detailing Thompson's absenteeism, unwillingness to work the night shift, rudeness, and argumentativeness. It concluded that

His general demeanor is one of rebellion. He constantly looks for someone else to blame his faults on. Although these types of behaviors are difficult to categorize, the behavior should not be allowed to continue. If it continues, he should be written up for poor cooperation or insubordination.

This was the start of a process of documenting Thompson's failings.

Thompson's 6-month evaluation, prepared on August 24, rated him as commendable on the quantity of his work, his adaptability and his job knowledge, satisfactory on the quality of his work, his job attitude, and his judgment, and only fair on dependability, initiative, and effectiveness in dealing with people. Thompson, commenting on the evaluation, asserted that he should have been rated as commendable in the last category because he had no problem with anyone except "Charlie Clements and that only voicing my [opinion]."

There were, according to Hawkins, discussions about discharging Thompson between Hawkins, Clements, and Lenkus prior to September. He was not discharged earlier than he was, according to Waring, because of the volume of work and the lack of sufficient die men in the shop.

One, John Farmer, had health problems and was absent for extended periods of time. The other, Woodrow Gleave, was learning the work. Waring testified, generally, that Gravure's rapid growth and its need to keep people who could get the product out precluded more discharges until they succeeded in developing a better training program and built a cadre of trained apprentices. With respect to Thompson, he noted that an experienced die man was hired in the spring of 1994, before Thompson was terminated.

The General Counsel alleges that Thompson was discriminatorily disciplined in October, December, February, April and May, once the union activity became known to Respondent. Some of these concern his absenting himself from his work station, discussed in section II.B.11, above, with the conclusion that Respondent's enforcement of its rules regarding such activities were neither disparate nor discriminatory.

⁴⁶ Union advocacy is a legitimate and statutorily protected activity. The references by Respondent's counsel to those who would engage in such activities as "pushers" and "ringleaders" are unnecessarily derogatory, demeaning, and unwarranted, suggesting that counsel endorses its client's animus.

Those and the other warnings issued to Thompson will be briefly reviewed.

On October 15, Thompson was cited by Roy Sleuder for being in the warehouse and not at his work station; he was given a written warning and 2-day suspension (G.C. Exh. 9). It was not contended that he was engaged in any union activity at that time. He was cited again, and given a 3-day suspension on October 22 for the October 19 incident in which he disrupted Martz' meeting in the warehouse (G.C. Exh. 12).⁴⁷

Thompson was cited and given a 2-day suspension on October 19 for failing to run the Kluge at its quoted speed on October 15. The General Counsel did not dispute the speed at which it had been run but argued that there was no quoted speed on the Kluge. That contention is without merit. Each product had an expected speed or quota, shown on the daily production reports (R. Exh. 53). Operators were expected to start the Kluge up slowly and bring it up to speed; they had discretion to adjust the speed to prevailing conditions. He acknowledged, in conversations with Sleuder and Waring, that he had assumed that the prior operator had determined the appropriate speed and had continued to run it at that operator's slow speed.

On October 27, Thompson was given a written warning for running 9700 Lorillard cartons with a skewed cut, resulting in their rejection (G.C. Exh. 11). General Counsel acknowledges that this was a genuine production error but disputes that the product was rejected. The document on which he relies to establish that, a complaint form, indicates that Lorillard complained of the skewed cut, noting that "100 % of the incoming samples were defective." I cannot draw from that that Lorillard complained but accepted the product. Neither do I consider this a meaningful distinction.

The two foregoing warnings were for documented and/or undenied production errors or violations. The record is replete with unchallenged warnings given to other employees for similar conduct. I find no basis to conclude that the October 19 and 27 warnings were discriminatorily issued to Thompson.

On December 30, Thompson was given a warning (apparently with no time off) for stopping at another employees' work station after he was off the clock. This discipline has been discussed, *infra*, with the conclusion that it was neither discrimination nor harassment. No further discussion is warranted.

Thompson next ran afoul of Respondent's disciplinary procedures on February 10 when he received a die on which Woodrow Gleave had begun the work. Gleave, however, had started it with the wrong size of cork. Rather than correcting Gleave's work, Thompson finished it, using the correct cork on the portion he completed. He then sent the die to the press, resulting in downtime to correct the problem. When confronted, Thompson first stated that he wanted to see if Gleave would get written up, indicating that he knew that the die was wrong when he sent it to the press. He then claimed, according to the supervisor's memo, that he thought perhaps that Clements had wanted to try the die out this way. For

⁴⁷ Contrary to the General Counsel's contention, these were separate incidents, not separate warnings for the same occurrence. That is made clear in Martz' memo of October 26 to Hawkins, describing both incidents (R. Exh. 74).

this misconduct, deemed intentional by Hawkins, Thompson received only a written warning, on February 25, with a threat of 3-day suspension for any additional violation. Gleave was given a verbal warning (R. Exhs. 54 and 56). I cannot find this discipline discriminatory under these circumstances.⁴⁸

On March 14, Thompson locked up a die 1/2 an inch off center, causing downtime and lost production. He did this, he testified, under the direction of Farmer, whom he described as his leadman. The mistake resulted in downtime on the press. On April 5, Supervisor Scott Keller gave him a written warning and 3-day suspension. That warning stated that Thompson had lied about the incident, telling Keller that this was how the die had been set up before. In giving him that disciplinary notice, Keller said that he understood what had happened but that he had been required to write Thompson up. Given that Keller did not testify, I am unable to conclude that this incident was more than a mistake on Thompson's part. Respondent's evidence does not support the conclusion that he lied about it. As an error, it warranted some level of discipline under Respondents' procedures. Given his prior discipline, I cannot conclude that a 3-day suspension was discriminatory.⁴⁹

On April 6, Keller and Hawkins met with Thompson with respect to the March 14 error. According to Hawkins' memo documenting that meeting, Thompson denied responsibility for his mistakes.

On May 25, Thompson locked in a McDonald's die backwards and failed to prepare the necessary paperwork. He claimed that it was not his fault in that there was nothing in writing on how to install the die, the cork which would indicate how it was to be installed was confusing, and he had been unable to locate John Lenkus to check on the proper installation. Hawkins did some investigating and determined that this was a die regularly used, one which Thompson had installed correctly before.

On the following day, when setting up a die, Thompson failed to remove the counterplate, and again failed to sign off on the paperwork, as required by Respondent's procedures. He had little recollection of the incident but believed that he had taken the counterplate up.

On what appears to be June 15, when he went to get his check, Thompson was sent to the office where he was confronted by Hawkins and Keller. He was given two disciplinary notices (G.C. Exhs. 17 and 18; R. Exh. 54) concerning the May 25 and 26 events and told that he was discharged. He explained his side of the occurrences, as set forth above, but to no avail.

The General Counsel adduced warnings given to Gleave and Farmer, subsequent to Thompson's termination, for simi-

⁴⁸ Although this warning is alleged as discriminatorily issued (Complaint 24), the General Counsel did not adduce evidence concerning it, neither did he brief it.

⁴⁹ Keller did not testify and no explanation was given for his absence. He had prepared a memorandum to Thompson's personnel file, dated March 31, in which he stated that Thompson had lied about prior lockups of that die and then attempted to pass the blame off on Farmer and Gleave. Keller's memo asserts that Farmer had denied involvement. (Farmer was not a witness herein for either party.) Hawkins claimed that the delay between the incident and issuance of the warning was caused by the necessity of getting all the facts straight.

lar conduct. Gleave received a written warning for failing to record proper documentation on a die which was returned from the press in June 1994 and another, in November, for locking up a McDonald's die backwards (G.C. Exhs. 27). Farmer received a written warning and a 16-hour suspension for locking a die in backwards and attaching the wrong counterplate in September 1994. Hawkins distinguished this discipline from that given Thompson on the basis that they were at different stages of the disciplinary procedure, had not intentionally done work wrong and accepted responsibility for their own mistakes. There is nothing in this record to contradict Hawkins' explanation. The ultimate discharge of James Thompson is consistent with the treatment accorded his brother, Lloyd Thompson, who was discharged for repeated production errors and failures to prepare documentation, prior to any union activity.

Thompson's leading role in the union campaign, Respondent's knowledge of that role, and its animus combine to establish a strong prima facie case with respect to both the discipline and discharge of James Thompson. I note, in particular, that Waring's notes speak of getting rid of the people who caused "this mess" after the conclusion of the campaign. The question is whether Respondent has rebutted that prima facie case with its evidence of Thompson's failings, both intentional and inadvertent.

I am constrained to conclude that it has. Thompson had a negative employment history antedating the union campaign and, even before there was knowledge of his union activity, Respondent had begun to document his failings. In the 4 months following the election, he committed four serious errors, the first of which was knowing and intentional. Respondent may have been glad to get rid of this prouction employee but his work, at this point, warranted discharge. Unlike Chandler, Thompson had shown no improvement in the months before his discharge; rather his work appeared to worsen. Neither had he been a favored employee, like Chandler, who fell from favor when he showed support for the Union. I find no discrimination in either the warnings given James Thompson or his discharge.

III. THE OBJECTIONS

In the election which was conducted on January 14 and 15, 1994, the Union failed, by a vote of 114 to 28 (with 5 challenged ballots) to secure a majority of valid votes counted. Thereafter, the Union filed timely objections to the conduct of the election. The majority of those objections paralleled the unfair labor practice allegations of this complaint and, to the extent that they were not withdrawn by the Petitioner-Union, were consolidated for hearing with the complaint allegations.

Without repeating the discussions set forth at length above, the violations which I have found to have occurred during the critical period require that Objections 2 (threats and coercion), 3 (interrogations), 4 (threats of loss of benefits), 10 (creating the impression that selecting the Union will be a futility), 12 (threat of plant closure or sale), 13 (threat to escort union supporters to the door), and 14 (the discriminatory discharge of Eric Chandler) be sustained. *Diamond Walnut Growers*, 316 NLRB 36 (1995); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

I have found insufficient evidence to support the complaint allegations which parallel Objections 7 (isolating known

union supporters), 15 (discriminatorily discharging Kenneth Sokol), 17 (discriminatorily disciplining James Thompson), 18 (threatening to "bargain from scratch"), 24 (telling employees that they could not talk to each other during the campaign), and 25 (forcing known union adherents to leave the plant immediately after work while allowing other employees to remain and talk to their fellow employees. No evidence was adduced to establish that Respondent formed or assisted employee opposition to the Union, Objection 20. I shall recommend that each of these objections be overruled.

In Objection 26, it was contended that Waring and other supervisors stationed themselves near the entrance to the polling place during the balloting and prevented the voters from having a free choice. The only evidence supporting this objection comes from Ada Williams, who observed Waring in the area of the door which lead upstairs to the breakroom where the balloting was being conducted, between 3:30 and 4 p.m., talking to employees at the guard rail.

The election was conducted upstairs, in the breakroom. That room is accessed from a stairway near the plant entrance which, itself, is separated from the plant floor by a doorway. The balloting was scheduled to begin at 3 p.m. and the Employer had made arrangements for employees to leave their work stations at scheduled times in order to vote. However, the election was late getting started and the line of employees began to back up down the stairs, from the entrance to the breakroom. On one occasion, Waring admits, he walked to the door from the plant floor to the downstairs hallway to inquire whether the voting had started yet. He did so, he explained, in order to determine whether he should stop shutting down the machines. I credit his uncontradicted explanation and find no interference with voter free choice in this conduct. I shall, therefore, recommend that this objection be dismissed.

Objections 5 and 6 assert that the Employer provided a faulty or misleading *Excelsior*⁵⁰ voter eligibility list. The list provided by the Employer contained 145 names and addresses (P. Exh. 1). Although the Employer's records listed the full names of those employees, it provided only their last names and first initials. On January 4 and 5, 1994, Respondent's counsel provided the Board's Regional Office with the names and addresses of two employees who had been inadvertently omitted from the list, similarly identified by the last names and first initials (P. Exhs. 3 and 4).

Additionally, there were 39 incorrect addresses on the *Excelsior* list, as provided (P. Exh. 2). Those errors included omitted apartment numbers and zip codes, noncurrent addresses, erroneous street numbers, and misspelled street names. Of these, 25 appear to accurately reflect what the Employer had on file for that employee. The remaining 14 would seem to be inadvertent typographical errors or mistakes resulting from copying off of a faintly printed list.

In its recent decision of *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994), the Board held that an employer's failure to include the complete first and last names of the employees on an *Excelsior* list warrants that the election be set aside and a second election be scheduled. It stated that such a failure "is a deviation from the Board's policy that an employer must 'substantially comply' with the *Excel-*

⁵⁰ *Excelsior Underwear*, 156 NLRB 1236 (1966).

sior rule and tends to interfere with a free and fair election.” The Board stated:

Thus, we find that, in ruling that employers must provide the names and addresses of eligible voters, the Board intended that employers provide the employees’ full names. There is no language in the *Excelsior* decision that even suggests that an employer has “substantial[ly] compli[ed]” with the rule where the employer has deliberately deleted the employees’ first names in working up the *Excelsior* list from its payroll or other records. Consequently, we find that the Employer here was not in “substantial compliance” with the *Excelsior* rule, and we clarify the “substantial compliance” standard accordingly. Further, although . . . a finding of bad faith is not a precondition for the conclusion that an employer has failed to comply substantially with the rule, we shall view the submission of an *Excelsior* list containing only last names and first initials as evidence of a bad-faith effort to avoid the obligations the *Excelsior* rule imposes. [Citation omitted.]

The Board also noted that “evidence of bad faith and actual prejudice is unnecessary because . . . the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply.” It further held (Member Cohen dissenting) that retroactive application of this rule furthered the purposes of the Act and was appropriate.

Respondent argues that *North Macon* was wrongly decided and, in any event, should not be applied retroactively. I am bound to follow Board precedent unless and until it is reversed by the Supreme Court. Accordingly, I must sustain Objection 5 and find that Gravure’s omission of the full first names of the employees from the *Excelsior* list requires that the election be set aside and a second election scheduled.

The *Excelsior* list as provided by the Employer included incorrect addresses for approximately 10 percent of the employees. Although these appear to have been inadvertent errors in transcribing the list, I find that, under *North Macon*,

these errors warrant that the election be set aside. I shall therefore sustain Objection 6.

CONCLUSIONS OF LAW

1. By threatening to use unlawful means to keep the Union out, to sell or close the plant, to make the employees’ organizational efforts futile, to reduce or eliminate benefits in the event the Union won representational rights, and to discharge or eliminate employees who supported the Union, by interrogating employees concerning their union activities and sympathies, and by soliciting employee grievances and impliedly promising to remedy those grievances, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discriminatorily discharging Eric Chandler, the Respondent has violated Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any manner not specifically found here.

4. Union-Petitioner’s Objections 2, 3, 4, 5, 6, 10, 12, 13 and 14 parallel the unfair labor practice conclusions set forth above and must be sustained.

5. Union-Petitioner’s Objections 7, 15, 17, 18, 20, 24, 25 and 26 are without merit and must be overruled.

REMEDY

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

The Respondent having discriminatorily discharged Eric Chandler, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Remmended Order omitted from publication.]