

Schaeff Incorporated and Darren McCleary, Richard Pedersen and Tom Massey. Case 18-CA-13341

May 16, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 5, 1995, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

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, Schaeff Incorporated, Sioux City, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against Tom Massey, Darren Ray McCleary, Richard A. Pedersen, or any other employee because of actual or suspected union activity, or because of any other activity protected by Section 7 of the Act.

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

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

(a) Within 14 days from the date of this Order, offer Tom Massey full reinstatement as material handler 3 in the first-shift weldry department as it existed on October 12, 1994, 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 Massey whole for any loss of earnings and other benefits suffered as a result of the discrimination

¹ 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.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB No. 23 (May 8, 1996).

against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, offer Darren Ray McCleary and Richard A. Pedersen full reinstatement as final assembly positions on the first shift as those positions existed on October 13, 1994, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Darren Ray McCleary, and Richard A. Pedersen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from Tom Massey's, Darren Ray McCleary's, and Richard A. Pedersen's files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its Sioux City, Iowa facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized 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 20, 1994.

³ 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."

(i) 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.

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 discharge or otherwise discriminate against Tom Massey, Darren Ray McCleary, Richard A. Pedersen, or any other employee because they engage in union activities or because we suspect that they are engaging in union activities, nor because they engage in any other activity protected by Section 7 of the Act.

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 this Order, offer Tom Massey full reinstatement as material handler 3 in the first-shift weldry department as it existed on October 12, 1994, 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 Massey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL within 14 days from the date of this Order, offer Darren Ray McCleary and Richard A. Pedersen full reinstatement as final assembly positions on the first shift as those positions existed on October 13, 1994, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Darren Ray McCleary, and Richard A. Pedersen whole for any loss of earnings and other

benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of this Order, remove from Tom Massey's, Darren Ray McCleary's, and Richard A. Pedersen's files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

SCHAEFF INCORPORATED

Florence I. Brammer, Esq., for the General Counsel.

Gerald M. Richardson (Greensfelder, Hemker & Gale), of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Sioux City, Iowa, on April 4 and 5, 1995. On January 19, 1995, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 20, 1994,¹ alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence,² to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following findings of fact.

¹ Unless stated otherwise, all dates occurred during 1994.

² I excluded an, in effect, summary of "demographics . . . of terminations" (R. Exh. 9), on objection of the General Counsel. According to a witness for Schaeff Incorporated, the summary had been prepared "for purposes of the hearing." However, the official who had prepared it was not called as a witness, nor was she even in the hearing room, at least so far as I could ascertain. The summary was offered near the end of the final day of hearing, at the conclusion of direct examination of the final witness for Schaeff Incorporated. The documents underlying the summary had not previously been made available to the General Counsel for examination and, indeed, all of those documents may not have been even in the hearing room. Fed.R.Evid. 1006 allows presentation of summaries, but only on condition that "originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place." Not only was there noncompliance with that condition, but the offer of such a summary at so belated a point in a hearing, and without making available the individual who compiled it, is disruptive and unfair to other parties. Thus, I sustained the objection and excluded R. Exh. 9.

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case presents an issue of motivation for terminations of three employees—material handler 3, Tom Massey; and final assembly employees, Darren Ray McCleary and Richard A. Pedersen—on October 12 and 13. When they were terminated, each one received a letter dated October 12, the first paragraph of which reads:

Due to restructuring in the Operations Department there are several positions that will be eliminated at this time. We regret to inform you that your position is one of those being eliminated. These changes are effective immediately.

Schaeff Machine Fabrik GMBH and company manufactures in Germany construction loaders, lift trucks, excavators, and scrap handlers. Its president is Carl Schaeff. It is the parent company of Schaeff Incorporated (Respondent), which is an Iowa corporation with an office and place of business in Sioux City, Woodbury County, Iowa. There, it engages in the manufacture and in the nonretail sale and distribution of industrial electric forklift trucks.³ For example, Respondent manufactures Models E3, E4, and E5 Electric Stand-up Counterbalance Lift Trucks, Model MT50 Electric Material Transport Vehicles, and Models TT400 and TT600 Electric Sit-Down Tow Trucks.

In June 1992, Carl Schaeff appointed Isaac Avitan as Respondent's executive vice president and general manager. Avitan continued to occupy those positions to the time of the hearing in this matter.

During the hearing Respondent produced an organizational chart (G.C. Exh. 20) effective as of October 6. It lists everyone, employees and supervisors, employed by Respondent as of that date. Shown on that chart are 168 names. However, the chart is not altogether accurate.⁴ Nevertheless, the chart, augmented by certain testimony and other evidence, is useful for certain purposes, including as a basis for describing Respondent's supervisory structure during the period immediately preceding the allegedly unlawful terminations.

At that time, reporting directly to Isaac Avitan had been Respondent's controller, vice president for sales and marketing, human resources manager, and operations manager, as well as an administrative assistant.⁵ From August 1992 through December 1994 the human resources manager had

³It is admitted that, in the course and conduct of those business operations during calendar year 1994, Respondent purchased goods valued in excess of \$50,000 which were received at its Sioux City facility directly from points outside of Iowa and, moreover, that it sold goods valued in excess of \$50,000 which were shipped from that facility directly to points outside of Iowa. Therefore, at all material times, Respondent has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

⁴For example, it lists Phillip Dyke as a "Welder 4." However, an abstract of "JOBS ELIMINATED IN 1994" (R. Exh. 5) recites that Dyke is a "Material Handler 3" and, further, that his job had been eliminated on "9/13/94."

⁵In addition to being Respondent's executive vice president and general manager, Isaac Avitan chose to serve as its director of engineering and product support. In that capacity, a number of people in that department reported directly to Avitan, though their names and titles are not material to the issues posed in this proceeding.

been Sherrie Avitan, the wife of Isaac Avitan. Thereafter, she became assistant human resources manager, a position that she continued to occupy at the time of the hearing, and has been succeeded as human resources manager by Diane Gibson. According to the organizational chart, on October 6 Gibson had been technical publications manager.

Tom Winner became operations manager in mid-May. He continued to occupy that position at the time of the hearing. Reporting to him are, he estimated, 13 department supervisors. As of October 6, two of them were First-Shift Production Manager Leo Simsic, who left Respondent's employment during November, and Second-Shift Production Manager Steve Benson. In addition to the electronics manufacturing supervisor, as of October 6 four foremen reported to Simsic. Two were Weldry Foreman Mike Hofer Jr. and Assembly Foreman Brian Rawlings. During December the fabrication foreman's position was combined with that of weldry foreman. Hofer then occupied that consolidated position and continued doing so at the time of the hearing. Notwithstanding his title of "Asst. Foreman" recited on the October 6 organizational chart, Rawlings testified that he had been production foreman since July 18.

Respondent admits that Isaac and Sherrie Avitan, Winner, Hofer, and Rawlings had each been a statutory supervisor and agent of Respondent, within the meaning of the Act, at all material times. Those five supervisors were the only witnesses called by Respondent to testify about the mid-October terminations of Massey, McCleary, and Pedersen. To better understand the facts of those terminations, it is necessary to describe, at least generally, the forklift production progression at Respondent's Sioux City facility.

According to Winner, before the mid-October terminations, the steps in that process were what "we call a phase one, phase two. At the same time we do a mast assembly. We hang the truck together, test it. From testing it went to final assembly, QA, and out the door." So far as it goes, that description was essentially corroborated by Rawlings. For, he testified that, as production foreman, he supervises the assembly department which includes phase one, phase two, masting, and subassembly. Before reaching the assembly department, however, certain preliminary processes are undertaken.

Before reaching the assembly department, electronic components are built and, as described by Rawlings, moved to the assembly department "for us to either preassemble or put on the trucks." In addition, certain components are fabricated, by employees classified as fabricators and drilling, by drill press, is performed in the machine shop. Certain components are welded by employees classified as welders. Those employees worked under the supervision of welding foremen, such as Hofer, during October. Components are also painted.⁶

Once those components reach the assembly department, phase one employees install all major hydraulics and steering

⁶The record concerning painting is not altogether clear. McCleary testified that "the body comes out of the paint house" to phase one of the assembly department. Rawlings testified that painting "is not" part of the assembly department: "Paint shop is under the paint foreman." Still, Respondent's October 6 organizational chart lists no paint foreman and, moreover, lists painter 1 and painter 2 classifications under the assembly foreman, Rawlings for first shift, and a then unoccupied assembly foreman position for second shift.

components. Employees in phase two install the major electrical systems and the overheads where lights will be mounted. Masting works on the fork portion of the trucks. Employees there assemble rails or forks to their carriages. Then, employees in subassembly, according to Rawlings, "assemble the different parts or motors that go onto the truck itself." Testing for pressure is conducted and, before the mid-October terminations, forklifts would then move to final assembly.

There, as the title implies, work on forklifts was finalized. According to Rawlings, corporate and operator's manual warning decals were affixed, floor pads were mounted on floor panels, and touchup painting was performed. Rawlings also testified that final assembly employees sometimes bolted hose reels to the masts and, "[o]nce in a while," mounted or bolted lights on overhead brackets. McCleary and Pedersen testified that, when working in final assembly, they had regularly installed all lights, according to McCleary both safety lights and, also, rear and headlights. Moreover, both testified, without actual contradiction by Respondent's witnesses, that they put control tops on electrical panels, installed freezer conditioning for the SER board, and installed the backup alarms and push-pulls. In addition, testified Pedersen, they did some hydraulic work and McCleary testified that they installed relay switches, side shifters, and limit switches. From final assembly, forklifts went to quality assurance and, after clearance there, were shipped to customers.

By the time of Isaac Avitan's appointment as vice president and general manager, during June 1992, Respondent's financial situation had deteriorated as a result of dwindling sales and losses. According to Avitan, Carl Schaeff directed him to "[r]ebuild the company." Over the course of the succeeding 2-1/2 years, Avitan attempted to do so. Respondent argues that the mid-October terminations had been nothing more than one aspect of that continuing extended effort to improve Respondent's financial situation. In that regard, Respondent points out that, in addition to Massey, McCleary, and Pedersen, mid-October terminations had been effected also of Production Inventory Control Manager Bruce Tomes, of Manufacturing Projects Engineer Ty Miller, and of Special Projects Coordinator Dave Wiffen. The fact that those latter three individuals had been terminated at the same time as the alleged discriminatees, contends Respondent, evidences that there had been no unlawful motive for the terminations of Massey, McCleary, and Pedersen. Still, the latter three individuals had been the only production employees of the six whose positions were eliminated during mid-October.

McCleary began working for Respondent during early April 1989. He worked continuously for it until his mid-October termination, always on the first, or the day shift. For the first 6 months he had worked in phase one. Then, he was transferred to final assembly. He worked there until terminated. Over the course of that approximately 5-year period, he worked temporarily, for brief periods, in subassembly, in the machine shop, operating a drill press, and in quality assurance.

Pedersen began working for Respondent during late June or early July 1993, based on information contained in the October 6 organizational chart and on information recorded in the only performance planning and appraisal review received by Pedersen, during January (G.C. Exh. 8). After "a

couple of days" working as a painters's helper, he had been transferred to final assembly where he worked until he sustained an injury during October 1993. Toward the end of 1993 he was assigned to work on the MT50 assembly line, still in the assembly department. He continued to work there during the first couple of months of 1994, in the process receiving the above-mentioned appraisal. He then returned to final assembly where he worked until his termination. Like McCleary, when work was slow in final assembly, Pedersen worked temporarily elsewhere: in subassembly, in the machine shop, operating a drill press, and in quality assurance.

Apparently the effects of his 1993 injury continued to plague him throughout 1994. By letter dated September 20, Pedersen's chiropractor stated that Pedersen should be assigned work involving no bending or twisting and, moreover, involving lifting of no more than 10 pounds. Those restrictions remained in effect at the time of his termination during the middle of the following month.

Massey had been employed by Respondent since June 21, 1993, working continuously as a material handler until his termination. For over a year after being hired, he worked on the first shift in the warehouse. There, he moved parts to other departments and maintained inventory. During the summer of 1994 he was transferred to the second-shift weldry department where he moved components to locations in that department where they would be welded and, then, moved welded components to the next area for continued production. After working approximately 2 months on second shift, Massey was transferred back to first shift, remaining in the weldry department. He worked there for a brief period until terminated on October 12.

B. Events Preceding the Mid-October Terminations

It was Massey's transfer to second shift which led to protected concerted activity by the alleged discriminatees. That transfer had been accompanied by a pay reduction. Both upset him. During a conversation with a former employee of Respondent, Massey learned of an organization called Workers Have Rights, Too,⁷ headed by Richard Sturgeon. During a telephone conversation, Sturgeon suggested that a meeting could be arranged if Massey could persuade a few coworkers to attend it.

Massey testified that, over the course of the next month and a half, he spoke to a few employees: McCleary, Pedersen, Kendall Hopwood, and two machine shop employees whose first names are Terry and Jason, but whose last names Massey did not know. Pedersen testified that, after learning about "Workers Have Rights, Too" from Massey, he also spoke to other employees about meeting with Sturgeon. Although he was not able to name many of those employees, and for others was able to supply only a first name, Pedersen did testify that he spoke with Roland and "a new guy" in the masting; two employees on day-shift phase one and one employee on day-shift phase two; four or five machine shop employees, including Steve Cook and an employee whose first name is Jason; Scott Gilbertson who was working in final assembly at that time; three painters in the back area, one of whom has the first name Rick; Dave Markowski in quality assurance; and welding department employees, two of

⁷ There is no contention that "Workers Have Rights, Too" is a labor organization within the meaning of Sec. 2(5) of the Act.

whom are brothers with the last name Jackson. Respondent has not contended that any of these identifications were of individuals not employed by Respondent during that period.

A meeting with Richard Sturgeon was eventually arranged for 5 p.m. on Saturday, October 8. Before it occurred, however, another series of events unfolded during the period between Massey's initial telephone call to Sturgeon and that Saturday meeting with him. By letters to all employees, dated August 26, Avitan gave notice, inter alia, that Respondent would "be dropping the dependent health insurance coverage as a company paid benefit to our employees," although health coverage for employees, themselves, would continue to be paid by Respondent. On August 31, 5 days later, Avitan authored another letter to all employees, giving notice that, instead of completely ceasing to pay for dependent health insurance coverage, "I have decided to subsidize your dependent health coverage by contributing 25% to the cost of the dependent coverage between now and the end of the year." Avitan explained, when testifying, that this second letter had been written because "I wanted to help the employees not take such a big hit. So I decided that I would contribute 25 percent of that number so as to help them—help them out with the expense." Nevertheless, Avitan's second letter made plain that, "Starting 1995, the employee will be responsible for 100% of dependent coverage."

There was a negative reaction among Respondent's employees to the August 26 letter. Sherrie Avitan testified, "I think people were unhappy about having to pay the dependent coverage," although she added that "when [it was] pointed out the conclusion if [Respondent] continued to pay, you know, most people understood." Yet, she did not explain precisely what she meant by employees being placated when shown the results of Respondent having to continue to pay for dependent health insurance coverage.

Apparently, at that time, Respondent was not so certain that "most people understood," given the text of a letter, dated September 14, which it sent to all employees:

From time to time many manufacturing companies find that there is a small but vocal group among their employees who seem motivated to alter employee relations with their employer, regardless of facts and circumstances. [Respondent] is no exception. It has come to our attention that this kind of talk may be going on here. Sometimes the talk from a few vocal individuals tries to portray having a union as an automatic cure for all perceived problems, whether real or not. At times, the motivation for unionization is more self-serving to these individuals.

Because your relationship with [Respondent] is important to you and us, we know that this subject is an important one. We want to be sure that our employees are well informed when this kind of talk occurs. This way you can analyze such talk, and reach your own conclusion based on the facts.

After referring to an attached chart, comparing Respondent's benefits package to those of other area companies, and stating that Respondent's medical coverage is very attractive in comparison with that of those other companies, the letter continues:

An attractive and very competitive package of benefits has been put in place through the efforts of the existing relationship between the [Respondent] and its employees. We observe from the information shown above, and the comparison with other companies, that the presence of a union does not guarantee added benefits.

In conclusion, if the influence of a small but vocal group leads to a union vote, please exercise your right to vote. Base your decision on the facts, and your own sound judgment. We encourage you not to let a small group decide your future for you.

The letter is signed by Isaac Avitan.

Despite the statement, "It has come to our attention that this kind of talk may be going on here," Avitan denied that he had actually been aware of union organizing at the time of his September 14 letter. He testified that he had prepared that letter,

in anticipation of a potential discomfort and certainly turmoil it could cause and underlying activities that could potentially arise from it I was trying to head it off at the pass and tell people that, look, we understand that we are taking benefits away. We understand that this could cause activities to occur and we just want to let you know that while we understand these, if you look at [the attachments] this is what you have as benefits. Make an informed decision and as always I always tell my people to go out and vote. Don't let other people decide your future for you.

Yet if Avitan truly had anticipated "discomfort" and "turmoil" among employees, as a result of his late August letters, he never did explain why he had waited until mid-September, by which time support for a meeting with Sturgeon was being discussed among at least some of Respondent's employees, "to head it off at the pass" by sending the above-quoted letter. Nor did Avitan explain why he had been concerned about employees making "an informed decision" about unionization, and choosing to advise them to "go out and vote," if he had been unaware when he wrote the September 14 letter of the existence of any concerted activity among Respondent's employees.

The fact is that, so far as the record discloses, in over 2 years, by September 14, of serving as Respondent's executive vice president and general manager, Avitan had only once sent a letter to employees similar to the one of September 14. That had occurred during November 1993 when he informed them, inter alia:

We understand that there is a movement to unionize the shop. While the choice is yours we thought that you should have more facts in order to make an informed decision.

. . . .

Please take the time to read the comparisons on the following pages. The information contained in these pages has been compiled to help you make an informed decision.

. . . .

The information attached speaks for itself.

In conclusion, if and when it comes down to a vote, exercise your right to vote. Don't let the vocal minority decide your future for you.

Avitan admitted that the November 1993 letter had been sent because "we were told that there were cards being handed out and that the employees were going to go out and vote on a union." It also should not pass unnoticed that Avitan apparently believed that his 1993 letter had been effective. For he testified that after it had issued, "some employees came and told me that they did have a sort of vote, and I don't know what that really means, but that it didn't fly." That is, there were no formal election proceedings later conducted under the auspices of the Act.

Isaac Avitan never did explain why he had chosen to begin his September 14 letter by stating that it "has come to our attention that this kind of talk may be going on here," if, in fact, he had no knowledge of such activity when he drafted the letter. Pressed during cross-examination for an explanation of that choice of words, in light of his testimony that he had merely anticipated that such activity might occur, Avitan never claimed that he did not appreciate the difference between his letter's language, asserting actual awareness of such talk, and his testimony that he supposedly only anticipated that such activity might occur. Certainly, it would have been difficult for him to do so, given the fact, as discussed in subsection I,C, infra, that he possesses advanced degree which presumably fitted him with awareness of the distinction between words and phrases. Eventually, he appeared to be trying to avoid any further questioning about the difference, testifying finally that he had used that language in the September 14 letter, "Because it is simply a letter in anticipation of what might occur." No further explanation could be extracted from him.

Only Massey, McCleary, and Pedersen attended the October 8 meeting with Sturgeon. Discussed during it were employment conditions, particularly mandatory overtime, with which the three employees were dissatisfied. They also discussed the possibility of forming an in-house organization to deal on their behalf with Respondent, as would an outside, established union. Before the meeting ended, Sturgeon gave them copies of "Workers Have Rights, Too's" monthly newsletters for the months of July, August, and September. All three of those monthly publications begin with articles pertaining to employee organizing. Thus, the one for July starts with the heading "WHY HAVE AN EMPLOYEE ORGANIZATION?" The one for August begins with an article entitled, "CHOSE [sic] THE RIGHT EMPLOYEE ORGANIZATION." The lead article in the September issue is headed, "HOW TO FORM AN EMPLOYEE ORGANIZATION."

In addition, Sturgeon distributed during the October 8 meeting copies of a red booklet which describes rights of workers who suffer injury on the job. Printed on that booklet's cover is the following:

HURT
ON THE JOB?
KNOW
YOUR RIGHTS
PREPARED AND PUBLISHED
BY WORKERS HAVE RIGHTS, TOO
712-233-3663
SUITE 306 TERRA CENTRE
P.O. BOX 3372
SIOUX CITY, IOWA 51102

IN COOPERATION WITH
ATTORNEYS RUTH M. CARTER,
ROGER L. CARTER
AND ATTORNEY AL STURGEON

=====

WORKING HARD
FOR HARD WORKING
PEOPLE

It should be noted that Attorney Al Sturgeon is the brother of Richard Sturgeon.

On returning to work on Monday, October 10, McCleary testified that he said nothing to his coworkers about the meeting with Sturgeon. Massey testified that he spoke about it to Kendall Hopwood and to a welder whose first name is Terry. However, Pedersen, who had seemingly become the most outspoken of the three, testified that a number of employees questioned him from October 10 through 12 about what had occurred during the October 8 meeting. Moreover, he testified that he had "passed out some of [the Workers newsletters] at work on our time. Our breaks or lunch periods." Though his answers during cross-examination showed that Pedersen had inflated the number of employees with whom he had spoken, Respondent admits that he did testify accurately about one post-October 8 incident.

Pedersen testified that, on October 11 or 12, he had taken his copy of the red booklet to Sherrie Avitan and the two of them referred to it, in the course of a conversation about payments due an injured worker. He further testified, "She asked if she could use that book to make a copy so that she could send it to her lawyers" and he consented. At the time that he had given her the booklet, testified Pedersen, written on the inside back cover was the name and telephone number of Richard Sturgeon.

Sherrie Avitan agreed that, during a meeting to discuss his workers compensation claim, "several days prior . . . to October 12th," Pedersen had produced the red booklet, referring to portions on pages 3 and 4, pertaining to payment by employers for time and mileage for therapy. Avitan denied that Pedersen had referred to any other portion of the booklet. She further testified, "I did not" ever look at any portion of it other than those two pages. She did concede, nonethe-

less, that “I believe that [Pedersen] stated that there was” Sturgeon’s name and telephone number handwritten in the booklet. By mid-October, Sherrie Avitan acknowledged, she had known who Richard Sturgeon was, because, “I was at . . . an employment hearing with him” on June 1, involving “employee Darrel Lundquist.”

She also acknowledged that Pedersen had left the booklet with her and “I made two photocopies.” Sherrie Avitan testified, “I gave one to Isaac Avitan and I sent one to our lawyer highlighting pages [3 and 4] . . . just checking up on it.” During direct examination, when asked if she ever had participated in any discussion about the booklet with her husband, Sherrie Avitan responded flatly, “No.” However, she retreated from that unequivocal negative response during cross-examination: “I told him that Rick Pedersen had been in my office and was discussing this issue and I told him I made a photocopy of the book for [Isaac], and I told him the section that we discussed.” According to Sherrie Avitan, her husband had said only, “‘Put it face down on my desk.’ He was on his way out the door.”

Isaac Avitan acknowledged having received a photocopy of the red booklet from his wife as he had been leaving his office. At that point, he testified, he had not participated in any conversation with her about the photocopy. However, as to how the booklet came to be photocopied, Isaac Avitan testified, “I asked her to make two copies and make sure that she faxed one to our legal counsel here in Sioux City and then give me a copy.” As had his wife, Isaac Avitan denied having read over the photocopy.

C. The October 12 and 13 Terminations

Though the termination letters are each dated October 12, some of the six employees were terminated on that date, while others were terminated on the following day. Thus, Massey testified that he had been notified of his termination, and handed his termination letter, following the afternoon break, at 2:30 p.m. on October 12—at a time when, he testified without contradiction, “There was another hour left of” his shift that day. McCleary and Pedersen had been working for over an hour on the following day when, at 7:15 a.m., they were summoned to an office where Winner handed each his termination letter. It is uncontested that the two employees inquired why they could not be moved to other work locations, instead of being terminated, but were told that their jobs were eliminated and they “were no longer needed.”

As stated above, those terminations were but three of a total of six October 12 and 13 terminations. And, as stated in subsection A, Respondent argues that the jobs elimination which led to those six terminations had been motivated by nothing other than Isaac Avitan’s ongoing effort to restore Respondent’s profitability.

Avitan had seemed well qualified to accomplish Carl Schaeff’s direction to “[r]ebuild the company.” For 16 years preceding 1992 his employment had involved “[p]retty much” engineering functions. He possesses a bachelor’s degree in mechanical engineering and master’s and doctorate degrees in electrical engineering. Based on that experience and education, during 1992 he formulated a business plan to redesign the product then being manufactured at Sioux City “for manufacturability, quality, reliability and cost of manufacturing”; tried to “revive the marketing and distribution of the company, the company’s products”; “redesign[ed] the

products in their entirety,” including designing “‘a new product . . . referred to as Sherman’”; and “‘brought selected unique pieces of machinery from my parent company[,] as well as’” from another division of that parent, “‘that we determined was competitive, had the unique differentiation and was competitive in the North American market[.]’”

Unfortunately, those measures did not succeed in restoring a healthy financial situation for Respondent. “Since when Mr. Avitan came to” Respondent, testified Operations Manager Winner, it had lost money. To be sure, Winner had only been employed by Respondent since February 1994, when he had become eastern regional sales manager and, in mid-May, operations manager. Still, he is an admitted agent of Respondent and, further, Respondent never produced any evidence contradicting that testimony by Winner. Accordingly, that testimony is entitled to reliance, even though it encompasses the period before Winner began working for Respondent.

In fact, Isaac Avitan acknowledged that during 1994 he was continuing to address Respondent’s adverse financial situation “to optimize on job functions where possible, eliminate waste and loss of productivity, and that could be anywhere form [sic] paper clips, recycling paper to looking at long distance telephone calls, utilizing of vendors, to the utilization of people and their job functions.” For approximately 6 weeks, during late 1993 and early 1994, he had reduced the workweek from 5 to 4 days. He chose not to continue participating in the Iowa State Consortium program, with the result that Respondent ceased employing engineering students in temporary positions. In fact, he testified that he chose not to fill any vacancies for temporary positions.

Respondent chose also to eliminate certain positions. Its “JOBS ELIMINATED” chart shows that when grinder 1, Johnny Evans, left Respondent’s employment on July 14, and when grinder 1, Mike Washington, also did so on August 11, their position was eliminated. According to the “JOBS” chart, “Welders began doing their own grinding[.]” “I think it was about the same time,” Winner testified, that Respondent made a decision to have welders do their own grinding. In fact, the October 6 organizational chart shows no one classified as grinder in the first and second-shift weldry department. In evaluating the reliability of Isaac Avitan’s testimony concerning events from late August through mid-October, the disappearance of the grinder position by August 11 should not be overlooked.

In addition, Respondent eliminated the assistant foreman position, transferring occupants to other positions during July and August and, further, combined the reliability test engineer and industrial engineer functions with those of two other positions, thereby eliminating those two named positions. On July 14 and on August 30, third-shift positions were absorbed into the second shift, thereby permitting the third shift, and the overhead costs connected with it, to be eliminated altogether. On September 13 material handler 3, Phillip Dyke’s, position was “‘Absorbed by welders and shop floor control personnel,” according to the “JOBS” chart. That particular elimination also should not pass unnoticed in evaluating the below-described testimony in support of Respondent’s defense.

Interestingly, after September 13 no further job eliminations or consolidations occurred until those of October 12 and 13. Isaac Avitan testified that, “[i]n September. Towards

the end of September of 1994," he had received audited financial statements for the 19-month period ending July 31. Those statements revealed a total loss of \$5,672,411 for that period, of which an assertedly unanticipated \$1,490,780 was caused by inventory adjustments which, testified Isaac Avitan, "literally doubled the losses in 1994 for the seven—for the first seven months of the year."

According to Avitan, the magnitude of the total loss did not come as a complete surprise, since he had received preliminary reports during August as to what the final audited statements would show. Those preliminary reports included a report concerning the inventory adjustment. And the preliminary reports led Avitan, he testified, to make the decision to eliminate—and, then, to reduce—Respondent's contributions for dependent health insurance coverage, as described in subsection B. Avitan also testified that he began to consider, "Across the board cuts of some form or another," by

Looking at expenses, looking at departmental expenses, expenditures in marketing, sales, engineering, operations, requirements of people in different functions, whether they can be consolidated into other functions and either head count reduced or directed to—to productivity.

With regard to the latter, Avitan testified, "I had hinted to my operating staff all the way back to August that we were in a situation that we need to restudy our business" and, during August, "put it to my managers [Sherrie Avitan, Winner and Sales & Marketing Vice President Nenarella] that I wanted them to go back and look at their functions and tell me what they thought was productive versus what was not productive." Although Respondent provided no evidence whatsoever as to what, if anything, Sherrie Avitan and Nenarella reported back to Isaac Avitan concerning that subject, the latter testified that when Winner reported back during the "September time frame," the two of them discussed eliminating "[t]he nonproductive jobs" of "Material handling, grinding, final assembly. Those jobs specifically."

Inclusion of grinding among those classifications enumerated by Avitan was no slip of the lip. For, he characterized the above-enumerated jobs as "nonproductive," because they "only add[] cost, not value" to forklifts manufactured by Respondent. With regard to grinding specifically, he explained:

For example a pet peeve of mine was grinding and material handling. It got to a point where welders thought that all they needed to do was weld and not care so much about how much they weld, and the work then shifts over to grinding and we have a booth now full of grinders all trying to grind down too much weld, slag and spatter and so on, that that—that is unacceptable because if the individual was responsible—more responsible for his work, in other words, if he had responsibility for the outcome and that included grinding, he would also take more care as to how much weld he put on a component.

As to,

[t]he other part, material handling, we talked about Just in Time, Kanban. Move a product—move a material

once and only once from point of source to point of use. Not into the warehouse or onto a rack and then back and forth and back and forth. Every time we handle it we add more cost.

By way of explanation of his testimony about material handling, Avitan testified:

That is just unacceptable if we are going to be competitive in a competitive environment, and so what we look to do is to get the fabricators and the welders which is a natural progression of material to move their product when they finish with it to the point to which it is going to be used or have the user go and retrieve it and bring it back but it is only moved once, and that in itself also results in a lot less material handling and cost of production.

With respect to work then being performed in final assembly, Isaac Avitan complained:

It's a simple task. It's—there is not a lot of complexity to it although some would like to have you believe that it is a lot more complex than it is, but the matter is—the point of the matter is that tagging of decals can be put on by painters. The electrical lights and so on can be put on by phase two and it is not that much more complexity because it is simply a nut and a bolt that you run through the light. You put it through the guard, you tighten the nut and it's done and you have two wires to connect.

And in the masting while we talk about push-pull, clamps and all the fancy names, all they are is an attachment that you take a chain to, you clamp it, you hang it on a carriage that is already on the mast. Takes maybe ten—five, ten minutes. A more complex unit might take maybe as much as half an hour such as fork positioners, but that's as simple as it is. The bolts and clamps come at the bottom of attachment and it's done. There is not a lot of complexity to an attachment of that nature.

According to Avitan, when he reported back during the "September time frame," Winner recommended eliminating all three of those positions and Avitan agreed with that recommendation: "To eliminate final assembly, to absorb it in the assembly department. To eliminate material handlers anywhere we could. To reduce or eliminate all grinding as best we could."

As to which employees would be selected for termination, Respondent argues that that determination followed naturally from the positions that were being eliminated. Avitan testified that he and Winner discussed that subject "about a week to ten days at the very least before we made the decision. I think we eliminated the jobs on the 12th–13th so it would put it at the very beginning of October." In the end, Respondent settles on Monday, October 3, or Tuesday, October 4, as the date on which a final decision was made as to who would be terminated.

During that conversation with Winner, testified Isaac Avitan, the two of them selected the six employees who were eventually terminated on October 12 and 13. As to the selection of Pedersen, Avitan testified, "[H]e had a restric-

tion, weight restriction. He complained about—literally about everything, didn't really want to work." Avitan testified that McCleary had been selected because:

. . . we tried him in several other locations and all we got from that was really grief. We put him in sub-assembly and pretty much everything he did had to be redone. We tried him there at a couple of slack times. We tried him in the machine shop as a drill press operator and he complained grievously about that too.

The other part of that is that we had numerous, numerous shall we say discussions with Mr. McCleary about his productivity. In fact it was why we hired Rick Pedersen. When we put Rick Pedersen next to Mr. McCleary in final assembly lo[w] and behold he was doing two times—he was doing two trucks to one of McCleary's in final as a general rule, sometimes three, and we had had numerous discussions with Mr. McCleary about the fact that he needed to do his job a little quicker.

It was for Massey, however, that Isaac Avitan advanced the most extreme description of supposed unsatisfactory conduct. For, it was Massey who Avitan blamed, along with Dyke, for what led to a significant part of the inventory adjustment:

With Mr. Massey he just simply could not progress beyond where he was. He couldn't read blueprints as was stated here earlier. He could not operate the computer. When we had him in inventory taking we found numerous, numerous mistakes. Part of the problem of the [\$]1.4–\$1.5 million worth of inventory adjustments were as a result of both him and Phil Dyke in the warehouse as material handlers cycle counting where the numbers were so far that it led one to absolutely question whether they even knew how to count.

. . . .
We had to recount. That is why we retook the inventory of July because we had to throw away the inventory count of the end of the year 1993 and could not close the books at the end of 1993 as a result—partial result of that. We had so many deviations that by the time we would go out the computer printout was so tall that we would have to then go audit those places, figure out was the count right, was the computer right, you know, was it in the right location. By the time we started going through that and got through it it took us almost a month and a half at which point we couldn't reconstruct the inventory at the end of the year situation.

We said the hell with it. Let's plan it a little better. Let's make sure we know who the people are that we are going to let count and how to give them tickets and instruct them and so on and so forth, and then we only took people we trusted knew how to count and we staffed it with management and everybody rolled their sleeves and went out there and did inventory recount.

In sum, testified Avitan, "[W]e didn't feel we could train Massey for another task. We tried."

II. DISCUSSION

In evaluating allegations of unlawful termination, the ultimate "determination which the Board must make is one of fact—what was the *actual motive* of the discharge?" *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). Thus, "the pivotal factor is motive" (citation omitted), *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15, 20 (1st Cir. 1966), and "the employer's motive becomes the focal point." *NLRB v. Oberle-Jodre Co.*, 777 F.2d 1119, 1121 (6th Cir. 1985).

Analytically, motivation is evaluated within the framework enunciated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Doing so in the context of this case requires that certain general principles be focused at the outset. First, even where there is no evidence of knowledge of actual union activity, a violation of Section 8(a)(3) of the Act can be established by evidence of employer belief that union activity is being conducted by its employees. That is, "the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities, whether or not they actually did so." (Citations omitted.) *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). "Proof of an unfair labor practice does not require proof of actual union activity." *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1965).

Second, the existence of unlawful motivation is not inherently negated by a showing that union activists had been only some of a greater number of employees terminated or laid off on a particular occasion. Even where economic conditions justify a work force reduction, an employer violates the Act if it "discriminate[s] because of union activity in the selection of those to be terminated." *NLRB v. Midwest Hanger Co.*, 474 F.2d 1155, 1158 (8th Cir. 1973), *cert. denied* 414 U.S. 823 (1973). The Act does not permit an employer to "exploit[] worsening economic conditions to rid itself of union supporters" (footnote omitted). *NLRB v. Daniel Construction Co.*, 731 F.2d 191, 197 (4th Cir. 1984), nor, for that matter, of suspected union supporters. *Turnbull Cone Baking Co.*, 271 NLRB 1320, 1355 (1984), and cases cited there. As a result, even though an employer shows justifiable economic need for a reduction in work force, it violates the Act if it selects some employees for elimination because of their union support or, alternatively, if that employer expands the number of employees whose jobs are to be eliminated, so that it appears that the selection of union activists is a natural consequence of that total expanded number of jobs eliminated.

Finally, inasmuch as motive is the "pivotal factor" or "focal point" of analysis where there are discrimination allegations, of necessity analysis must center on the testimony of the official who actually made the decision or decisions alleged by a complaint to have been unlawfully motivated. For, it is that individual whose "motivation was critical on the question of Respondent's reason for," in this case, the mid-October terminations of Massey, McCleary, and Pedersen. *American Petrofina Co. of Texas*, 247 NLRB 183, 192 (1980). Isaac Avitan admitted that he had been that individual. Accordingly, it is to his testimony that analysis turns first.

Having observed him as he twice testified—once called by the General Counsel and, then, called during Respondent's case-in-chief—it was my conclusion that Isaac Avitan was not testifying candidly and that his testimony cannot be credited. Rather than trying to be forthright concerning the actual reasons which led to selection of Massey, McCleary, and Pedersen for termination, Avitan appeared to be tailoring his testimony in an effort to construct legitimate reasons for those terminations, using as vehicles for doing so Respondent's adverse financial situation, his own superior knowledge of the production process at the Sioux City facility, the duties which must be performed in that process by employees working there, and a skewed description of those three employees' work histories.

To be sure, his subordinates—his wife, Winner, Rawlings, and Hofer—dutifully attempted to support that effort. Indeed, viewed from a superficial perspective, it was an effort which does appear to create a plausible explanation for the allegedly unlawful terminations. As summarized in Respondent's brief:

The undisputed evidence establishes that [Respondent]'s severe financial problems. [sic] In response to such problems, it terminated six employees as one of many remedial actions. Even if Schaeff knew of the Charging Parties' protected activities, it had no choice but to eliminate Charging Parties' positions. The duties involved in those positions could be readily transferred to other positions, as was done. The elimination of their jobs both cut costs and increased efficiency. Once [Respondent] determined the lack of any economic justification for the Charging Parties' positions, its poor financial condition dictated the elimination of their jobs irrespective of any other considerations. In addition, the dismissal of the Charging Parties was justified by Mr. Massey's poor performance record, Mr. McCleary's failure to adapt successfully to any work other than final assembly work, and the incompatibility of Mr. Pedersen's light duty restrictions with any of [Respondent]'s remaining jobs.

Yet, when the surface of that generalized defense is pierced by a careful examination of Isaac Avitan's testimony, and of that given by Respondent's other officials, numerous inconsistencies and contradictions are disclosed, both between accounts by two or more of those officials and, also, by objective evidence and uncontradicted testimony. Given that situation, it is simply not possible to reach conclusions of legitimate motivation for those terminations. I do not credit the accounts of Isaac Avitan, nor those of Respondent's other officials, as to the Respondent's supposed reasons for selecting Massey, McCleary, and Pedersen for termination.

At no point was the unreliability of Respondent's defense perhaps more evident than with regard to Isaac Avitan's testimony about Massey and the inventory adjustment. As quoted in subsection I.C, supra, Avitan attributed to Massey a significant measure of blame for an inventory adjustment amounting to \$1.5 million, because of purported counting mistakes by Massey, as well as by Phillip Dyke. There can be no dispute about the fact of the inventory adjustment and, also, about its amount. And there was evidence about counting mistakes made by Massey during the course of his em-

ployment by Respondent. But, there is no evidence that such mistakes were other than occasional and, certainly, not that they rose to the magnitude which Isaac Avitan tried to portray.

Furthermore, not one supervisor, nor any documentary evidence, supported Isaac Avitan's assertion about management and trusted personnel having "rolled their sleeves and [gone] out there and did inventory count," after having to "throw away the inventory count of the end of the year 1993[.]" True, supervisory and trusted personnel might not have been made aware of the magnitude of the inventory adjustment, nor of the reason for it. That is not necessarily the type of information which top management might be inclined to share. Still, supervisors and trusted personnel would surely have been aware of, and remembered, having to retake an entire inventory, had that actually occurred. Absence of corroboration about such a seemingly significant incident tends to undermine the reliability of Isaac Avitan's testimony and, moreover, tends to demonstrate a willingness to enlarge on situations, such as Massey's occasional miscounts, to tarnish the reputations of the alleged discriminatees.

Any miscount of inventory by Massey during 1993 would have occurred while he had been working in the warehouse, before he was transferred to the weldry department during the summer of 1994. Yet, from the time he started working in the warehouse during June 1993, Massey had received largely favorable comments about his work, as shown on a series of "PAYROLL CHANGE NOTICES" which he received while working there on the day shift. One dated "9/1/93" rates his performance as "Good" for "Ability," "Conduct," and "Production." That notice rates his "Attendance" as only "Fair" and a handwritten notation on the notice states that Massey "has received documented counseling re: possible attendance problems." Nonetheless, that notation goes on to state, "He is a good consistent worker," and his next such notice rates his "Attendance" as "Good." In fact, that notice, dated "10-8-93," rates his performance as "Good" in all categories.

A notice dated "3/14/94" states, "LEO PUT TOM TO MATERIAL HANDLER I FROM II ON FEB. 28. DONE A GOOD JOB." It is seemingly inexplicable that Massey would have been promoted to the highest material handler position if, in fact, he had been encountering severe miscounting problems in the warehouse. And Respondent made no effort to explain that apparent inconsistency. Moreover, 15 days after that notice, Massey received another one which rated his "Ability" as only "Fair," but which awarded him "Good" ratings in all other categories. Massey acknowledged that he had trouble reading blueprints and operating the computer system. Still, those periodic mostly favorable ratings and comments tend to show that, whatever his blueprint reading and computer problems, they did not impair the caliber of his overall performance.

In an effort to show subsequent declining performance, Respondent makes much of the fact that, in a similar notice dated "6/15/94," Massey had been listed as a "(Mtl handler 2)" and, in a notice dated "8/1/94" had been classified as a material handler 3, progressively lower skilled and lower rated classifications. Based on that seeming downward progression, Respondent argues that Massey's work must have been deteriorating since March. Yet, in so doing, Respondent relies exclusively on inference which must be drawn solely

from what is recited in those notices. For, it introduced no direct evidence that Massey's performance had deteriorated, under standards ordinarily applied by Respondent to employee performance, during the last 7 months of his employment.

While in the warehouse, Massey had been supervised by Warehouse Supervisor Ray McDonald. He is listed on the organizational chart as still occupying that position as of October 6. There is no evidence that he left Respondent's employment thereafter. Even if he had, Respondent presented no evidence, nor ever represented, that McDonald was not available to it as a witness. But it did not call him to testify why Massey had been listed as "(Mtl handler 2)" on the "6/15/94" notice. And it should not be overlooked that the full handwritten "Remarks" on that particular notice read: "1 yr progression (Mtl handler 2) OK" (emphasis added), without any ratings being shown in the printed spaces for them. Thus, even if Massey had been demoted by June 15—that is, even if his performance as a material handler 1 had not proven satisfactory—so far as the evidence shows, he had been performing "OK" in the material handler 2 position.

To be sure, Massey did receive a wage reduction when transferred to second-shift weldry department. That had been one of the factors which led him to Sturgeon. However, Respondent provided no evidence regarding why he had been transferred there—no evidence that supervision had done so because of unsatisfactory performance in the warehouse during the spring and early summer—and no evidence as to why his pay rate had been reduced. The absence of such evidence is particularly significant in the context of Respondent's financial situation. For, while transfer and pay rate reduction, of themselves, could be a basis for inferring deteriorating performance, in the circumstances of this case they also could reflect aspects of the ongoing effort by Respondent to save money. That is, a pay reduction accompanying a transfer could have resulted from Respondent's ongoing effort to reduce costs, by taking advantage of the need for a material handler on the second shift to reduce the rate of pay which Massey had been receiving. Beyond that "(Mtl handler 2)" could also reflect mere indifference by Respondent, and its officials, to precise job classifications.

Massey's final immediate supervisor, Mike Hofer, conceded that he was not always certain whether material handlers reporting to him were classified as two or three. Apparently, he did not regard the distinction as a significant one. Indeed, Hofer admitted that, prior to 1995, employees' job responsibilities "never used to be" neatly categorized by job classification and, more specifically, that it had not been unusual for an employee classified as a material handler to perform tasks of other classifications. Perhaps that explains why Hofer testified that Phillip Dyke was a material handler, while Respondent's October 6 organizational chart lists him as a "Welder 4." Perhaps that also explains why a "PAYROLL CHANGE NOTICE" shows Gary Hansen being hired on November 29 as a "Material Handler 3" in weldry, while Respondent's summary of hires from September 6, 1994, through March 13, 1995 (G.C. Exh. 15), shows Hansen having been hired as a "WELDER" on "11/28/94."

In view of the foregoing evidence, mere recitation on "PAYROLL CHANGE NOTICES" that Massey had been a material handler 2 or 3 cannot, standing alone, be utilized to

conclude that his performance had deteriorated after March. Given the imprecision in Respondent's use of job classifications, such a conclusion would constitute speculation, not inference.

Indeed, Hofer's own efforts to match job classification and duties resulted in testimony which contradicted Respondent's other evidence about changes in job duties which allowed consolidation of positions and elimination of work which Massey could perform. As highlighted in section I,C, supra, Isaac Avitan testified that one position he had made a final decision to eliminate, in early October, had been that of Grinder—that he had made a final decision to consolidate the duties of that position with the duties of welders, to improve work performance of employees in the latter classification. As discussed further below, other evidence shows that such a decision had been made before October and, apparently, Avitan placed it as having been made in the fall to shore up his general assertion of "Across the board cuts" during the fall.

The point here is that when asked what duties Hansen had performed, after having been hired in late November, Hofer answered, "Grinding, material handling. You know, whatever" and, further, denied that Hansen had been assigned to any particular area in the weldry department. There is no evidence that Hansen had ever been assigned responsibility for welding which, of course, is the position which was supposed to have become responsible for grinding work.

Furthermore, when asked what duties were being performed by a welder 1, after Respondent's jobs "got better classified" as of January 1, 1995, Hofer responded, "Grinding, material handling, bringing parts in and out of departments." Hofer never claimed that a welder 1 actually did any welding. That task, he testified, is performed by higher rated welders—those classified upward from welder 2. So, if only employees who welded performed grinding, and if a welder 1 does no welding, then it seems to follow that welders 1 do no grinding. At least, Respondent presented no particularized evidence to contradict that conclusion. As a result, that leaves welders 1 performing "material handling, bringing parts in and out of departments," work which Massey obviously could perform, inasmuch as he had been doing so for over a year prior to his termination.

Significantly, neither Hofer nor any other witness for Respondent claimed specifically that welders 1 needed to be able to read blueprints or to operate the computer, under the revised "better classified" system introduced by Respondent. It also should not pass without notice that, after mid-October, warehouse work remained for employees to perform.

The October 6 organizational chart shows that Warehouse Supervisor McDonald and five material handlers had been employees there on first shift. Respondent adduced no evidence that employees in any other classification worked in the warehouse. According to the summary of hires, Barry Saxon started working for Respondent in the warehouse on November 7. Of course, as discussed above, the evidence shows clearly that Massey had been a highly regarded warehouse material handler. Consequently, to conclude, as Respondent argues, that there was no other position for Massey, when the material handler position in the weldry department was eliminated, is contrary to the existence of material handler positions in the warehouse and, also, to the evidence that Respondent hired another employee to work there shortly

after terminating Massey. Moreover, there is additional evidence, though somewhat sketchy, that material handling work continued to be performed in the weldry department by at least one other employee.

The reliability of Isaac Avitan's testimony did not improve when his attention was directed to McCleary and Pedersen. Presumably, Respondent would tread carefully concerning McCleary. By the time of his termination, it had employed him for over 5 years. Not that many employees had been employed by Respondent for so long a period. Nevertheless, Avitan forged ahead, accusing McCleary of inadequate performance when assigned work in other departments and, moreover, accusing McCleary of poor productivity and of "needing to do his job a little quicker" in final assembly. Indeed, Avitan went so far as to claim that Pedersen had been hired to improve production in final assembly—an assertion not supported by any other testimony or evidence.

McCleary did acknowledge that his work had been criticized and, in fact, he had been issued a written warning for "Substandard Job Performance," "Damage to Company Property," and "Waste of Company Time." Still, that warning issued on April 15, 1993, over a year before McCleary's termination. Despite off and on comments about his unsatisfactory performance, there is no evidence that McCleary's performance had been regarded as so deficient that Respondent took any type of disciplinary action against him. That is, he was never suspended, nor was another written warning notice issued to him. So far as the evidence shows, McCleary may not have been an ideal employee, but his performance had been satisfactory between April 15, 1993, and October 13, 1994. Most significantly in that respect, Rawlings—the last immediate supervisor of both McCleary and Pedersen before their terminations—testified, "I had no problem with them at all" and, further, "I thought they were good people." Obviously, that testimony contradicts Isaac Avitan's portrayal of ongoing dissatisfaction with McCleary's performance.

Rawlings did make an effort to buttress Avitan's testimony concerning not assigning McCleary to another position, rather than terminating McCleary on October 13. According to Rawlings, "Neither [McCleary nor Pedersen] had any hydraulic tooling mechanical experience at all" and, in consequence, were not qualified for transfer to phase one. That testimony is contradicted, however, by the undisputed testimony that, while working in final assembly, both men had performed some hydraulic work. More significantly, it is contradicted by the uncontested testimony that McCleary had worked for 6 months in phase one, when he initially began working for Respondent. There is no evidence that his performance there had been deficient. And there is no evidence that there had been any significant change in the work performed in phase one since McCleary had worked there. Accordingly, contrary to the testimony by Rawlings, McCleary was not without experience in hydraulics work.

Furthermore, both McCleary and Pedersen had been assigned temporarily to work in other departments, when there was no work for them in final assembly. Respondent was critical of their performance on those occasions. Yet, inherently, someone assigned temporarily, to work not ordinarily performed, will not likely perform it as proficiently as will an employee who performs that work, day in and day out, on a regular basis. In effect, those considerations were ac-

knowledged by Rawlings. Although he testified that when he had assigned McCleary to subassembly, McCleary had "put things together incorrectly," as Isaac Avitan also testified, Rawlings went on to concede that McCleary "did a very little bit really. I didn't have him do too much." And, more importantly, Rawlings admitted, "[I]t's kind of hard to say exactly what the problems were. I don't know whether it was the way he was told or just being able to learn it that quickly or what the problem was." In other words, while McCleary's performance when working temporarily in subassembly had been less than satisfactory, Respondent had no idea of what the problem had been and, as a result, has no basis for attributing fault to McCleary. At no point did Rawlings corroborate Isaac Avitan's assertion that Respondent had suffered "grief" because of McCleary's performance in subassembly. And at no point did Rawlings claim that he did not believe that McCleary could not learn to perform the duties of subassembly, if given proper training and some time to familiarize himself with performing those duties.

As to the drill press work in the machine shop, Operations Manager Winner claimed that, "[w]e tried [McCleary] on the drill press and he made a number of errors and was very slow." But Rawlings, McCleary's immediate assembly department supervisor, voiced no complaints about the quality or quantity of McCleary's drill press work. Instead, Rawlings testified that when placed in that job "for the day," McCleary "ended up quitting" that job "because of his back" and having to sit or stand too long. Significantly, Rawlings gave that testimony at the same time as he was testifying about drilling performed occasionally by Pedersen. Pedersen did have a back problem during 1994, as mentioned in subsection I,A, supra. But there is no evidence that McCleary also had back problems and it appeared, as he testified, that Rawlings was attempting to extend to McCleary Respondent's defense concerning Pedersen, based on the latter's physical problems.

Importantly, when McCleary had been temporarily operating a drill press in the machine shop, the supervisor of that department, at least since May 31, had been Leo Simsic, who also served as first-shift production manager. By the time of the hearing Simsic was no longer employed by Respondent. Still, there is no evidence, nor representation, that Simsic had not been available to Respondent as a witness to describe McCleary's most recent drill press performance. But he was never called by Respondent to do so.

With respect to Pedersen, as set forth in subsection I,C, supra, Isaac Avitan pointed out that Pedersen had a "weight restriction" on lifting and, also, testified that Pedersen "complained about—literally about everything, didn't really want to work." However, Avitan gave no examples of supposed complaints by Pedersen. Nor did Avitan testify with particularity about Pedersen's supposed desire not to work. To the contrary, when Avitan was testifying about McCleary's supposed deficiencies, as quoted above, he gave a glowing description of how production purportedly improved in final assembly after Pedersen had been hired. Further, Avitan's accusations were contradicted by the testimony of Rawlings, Pedersen's immediate supervisor during September and October, that "I had no problem" with Pedersen and, both as to him and McCleary, "though they were good people."

Of course, by mid-October Pedersen's doctor had notified Respondent about a weight-lifting restriction of 10 pounds. And Respondent utilizes that restriction, in this proceeding, as a reason for not reassigning Pedersen to other work. Winner testified, "[T]here isn't any job in the company that he can do—in the manufacturing part that he can do that is not more than ten pounds." Similarly, Rawlings testified that while that weight restriction could be accommodated somewhat before final assembly had been eliminated in mid-October, "in my assembly area I really don't have anything that constitutes five or ten pounds." During cross-examination of Isaac Avitan, however, this string to the bow of Respondent's defense came unraveled in the face of a prior inconsistent position taken by Respondent in another proceeding.

During proceedings initiated by Pedersen before the Iowa Industrial Commissioner, referred to by Isaac Avitan as "Mr. Pedersen's attempt to—how shall we say it gently—defraud workman's compensation," certain interrogatories were answered by Respondent's insurance carrier. Those answers were based on information supplied primarily by Diane Gibson, by then Sherrie Avitan's successor as director of human resources. The answer to interrogatory number 15, conceded Isaac Avitan, was that the October work reduction and lack of openings had nothing to do with any injuries allegedly received by Pedersen. Although Avitan denied having "written that statement," he admitted that "as it is represented there, yes," that answer reflects his position, although he equivocated before making that admission. Ultimately, as he appeared to be trying to evade the implication of that interrogatory answer, Avitan testified that had Pedersen "been fit I guess I would say that we would have looked to utilize his skills elsewhere. He did show intelligence and did show, you know, some skills but we wouldn't have invested in him for example in managerial training."

That final part of his answer should not escape notice. Isaac Avitan did not explain what he meant by it. It is undisputed, however, that by mid-October Respondent already had invested in that type of training for Pedersen. That is, it is not contested that Respondent had already sent Pedersen to 10 courses in supervisory training, during the time that it had employed him, and that Pedersen had received a certificate on completion of each of those courses. In light of those undisputed facts, Avitan never explained why, given the training in which it had already invested, Respondent had given no consideration to Pedersen for a supervisory position.

Certainly, the reason could not have been lack of need for supervisors, nor lack of interest by Respondent in locating individuals interested in filling managerial positions. Rawlings testified, "[W]e are always looking for people that want to move up and advance and hopefully take—take our position so that we can move up through the company."

During redirect examination, Rawlings provided an extended explanation of that answer:

Well, I guess that in every company you've got your people that are going to be standstills. They enjoy being exactly where they are at and I guess for the most part there is not harm in people like that. Then again you want people that are going to, I think anyway, going to want to improve themselves, want to grow with the company, not only increase the money they make but increase the company on a whole.

Surely, that description would appear applicable to an employee who took the time and made the effort to participate in 10 courses of training for supervision. Yet, while not disavowing that he shared that attitude expressed by Rawlings, and that the latter's testimony accurately reflected Respondent's overall position concerning its employees' attitudes, Isaac Avitan never explained why Pedersen had not been considered in mid-October for promotion to a supervisory position or, at least, to be tried out in one, based on training already received and paid for by Respondent.

Instead, as they did with regard to McCleary, Respondent's officials focused on other jobs which Pedersen had performed temporarily, claiming a lack of qualification for transfer to another job. But Rawlings never actually claimed that Pedersen had not successfully performed those temporary jobs. For example, according to Rawlings, Pedersen had said that he preferred to stay in final assembly, rather than be assigned to be a painter. Of course, that is a preference based on existence of final assembly positions. So far as the evidence discloses, Pedersen was never given a choice between painting and no job whatsoever, in light of disbanding the final assembly.

Similarly, while Pedersen's back may have been bothered when he temporarily operated the drill press, that might have been pain he would have been willing to endure if he knew there was no final assembly job to which he could return. However, in mid-October, he was never afforded a chance to exercise such an election, even though, it is not contested, Pedersen and McCleary specifically asked Winner about being transferred to other work, instead of being terminated, on October 13.

In sum, it was the relative informality of job classifications, and ability to shift duties among them, which has allowed Respondent to construct facially logical defenses for the selections of Massey, McCleary, and Pedersen for termination. Yet, for the reasons described above, that facial logic evaporates on closer analysis of those defenses, in the circumstances of Respondent's operations and the work histories of those three employees. There are other aspects of Respondent's overall defense which further displays the unreliability of Isaac Avitan's testimony.

For example, if one simply reviews Isaac Avitan's testimony, it appears that consolidation and elimination of jobs had been a course on which Respondent began to embark only in August and September, based on the preliminary and final financial statements which led to a supposed decision to make, "Across the board cuts[.]" However, such a conclusion would not be accurate.

As disclosed by Respondent's "JOBS ELIMINATED IN 1994" summary, position consolidation and elimination had been in progress since at least June, for almost 4 months before the terminations of Massey, McCleary, and Pedersen. Thus, the position of material requirements planning coordinator was eliminated on June 29. Assistant foremen functions were transferred to production positions during July and August. The duties of reliability test engineer were consolidated with those of quality assurance manager during July. And the industrial engineer's duties were consolidated with "other manufacturing functions" during early August. Of course, those eliminated positions cannot necessarily be properly characterized as production positions. Two positions that Re-

Respondent considers properly so categorized, however, are those of grinder and material handler 3.

As quoted in subsection I,C, supra, Isaac Avitan testified that, as a result of the financial statements, during late August and September he raised the possibility of eliminating classifications that were “not productive.” As to those, Avitan enumerated three. One was that of grinder. Yet, its inclusion was an obvious effort to expand his purported August–September evaluation of production and, thereby, to fortify Respondent’s defense that preliminary and final financial statements had led to a natural, very major appraisal of Respondent’s overall operations. For, the “JOBS ELIMINATED” chart recites that as early as July 14 “Welders began doing their own grinding.” On that date grinder 1, Johnny Evans’s, job was eliminated and so, too, was grinder 1, Mike Washington’s, job eliminated, when he resigned, on August 11, because “Welders began doing their own grinding.”

The “JOBS ELIMINATED” chart shows no grinder positions eliminated after August 11. Respondent’s October 6 organizational chart does not show anyone then occupying the position of grinder. As a result, it can only be inferred that all grinder positions had been eliminated by August 11, and the work of that position had been consolidated by then with that of welder. That being so, there would have been no purpose for initiating discussion later in August, and during September, about elimination of that position, and consolidation of its duties elsewhere, when that decision had already been made and accomplished. Indeed, Winner made no mention whatsoever of the grinder position when he described his August–September conversations with Isaac Avitan about eliminating positions.

Equally illogical was Isaac Avitan’s inclusion, in late September and early October conversations and decisions, of the material handler position. At the time of the decision to eliminate that position, testified Hofer, there had been three material handlers employed in the weldry department: Massey, Ralph Wilson, and Phillip Dyke. But that testimony is contradicted by the “JOBS ELIMINATED” chart. It shows that Dyke’s material handler 3 position had been eliminated on September 13 and, further, that the duties of that position had been, “Absorbed by welders and shop floor personnel[.]” Respondent has advanced no evidence which would show why in early September it had been implementing a decision supposedly not finalized until the very beginning of the following month. Furthermore, inasmuch as Massey continued to work after Dyke’s material handler 3 position had been eliminated, and absorbed by other personnel, that is some evidence that Respondent had not contemplated eliminating Massey’s job at the time that it actually made a decision to absorb material handler duties into other positions.

There is another timing aspect that should not escape notice. Respondent claims that the final decision, regarding the mid-October terminations, had been made on October 3 or 4. Of course, that would place that decision before much of the alleged discriminatees’ statutorily protected activity. However, no terminations were effected until the latter half of the workweek following the one during which that supposed final decision had been made. Assuming that Respondent truly believed there was a need to achieve savings through those terminations, presumably they would have

been effected at the earliest possible opportunity. The delay—and its eventual implementation during the middle of a workweek—is puzzling.

In the final analysis, that over 1-week delay was never actually explained. Sherrie Avitan gave testimony which comes as close to an explanation for the hiatus as was provided by Respondent. According to her, she had been informed of the identities of the six employees to be terminated, “About eight or nine days prior to” October 12 and she was made responsible for setting up “the paper work involved.” That, she acknowledged, required no more than drafting language for the first paragraph of the termination letters, quoted in subsection I,A, supra: “I can’t recall doing really anything else other than restructuring that letter.” Her problem, she testified, was that the mid-October letters differed from similar prior termination letters, since she had to do “more of an explanation in those letters than the usual because it was a restructuring[.]” That is the only explanation which Respondent advanced for the delay between the purported final decisions and their implementation.

On its face, that explanation is ridiculous. The first paragraph of the termination letter consists of three straightforward sentences, the longest of which is but 18 words. Like her husband, Sherrie Avitan is a degreed individual: a bachelor’s in psychology and another in education. By the time of the hearing she was enrolled in a program to obtain a master’s degree in business administration. Before starting work with Respondent, she had been “a Head Start director of seven schools.” She is an intelligent, literate, and experienced person. It is simply implausible that it would take such a person of her educational and professional background almost a week to draft and finalize so relatively straightforward a message.

Furthermore, it should not be overlooked that the very cornerstone of Respondent’s entire defense is not so plausible a basis, as it now argues. According to Isaac Avitan, he made the decision regarding the mid-October terminations as a result of preliminary and final financial statements for the 19-month period ending July 31. Yet, when Winner testified about conversations leading to mid-October position elimination decisions, he made no reference to financial statements nor, even, to any factor before September. Rather, he testified that his discussions, leading to those terminations, had been bred by unsatisfactory sales during September and October—an assertion from which he spent portions of his remaining testimony retreating, inasmuch as Respondent is contending that the final discharge decisions had been made on Monday, October 3, or on Tuesday, October 4, well before any meaningful October sales figures could have been available. The main point, however, is that while Winner based the sequence of events, leading to the terminations, on events during September and October, Isaac Avitan based that sequence of events on events before then, on losses which had occurred before July 31.

No other supervisor mentioned losses during the period ending July 31 as even a consideration in the events leading to the mid-October terminations. The closest any one of them came to doing so was Sherrie Avitan. She described “extreme financial pressures” during the summer and fall. But she made no specific mention of abnormally high losses for the period ending July 31.

To be sure, the final audited financial statements, for the 19-month period ending on that date, do show a multimillion dollar loss during it. Yet, no evidence puts that loss in context. Ever since 1992, at least, Respondent had been losing money. That situation had led to Isaac Avitan's appointment as executive vice president and general manager. Given that background, to say that Respondent lost \$5.7 million, caused in part by an inventory adjustment of almost \$1.5 million, for a given 19-month period is to leave unanswered the question of how that particular loss compares to Respondent's ongoing losses. That is, the situation is a relative one. Absent figures for a more extended period, it cannot truly be said that even so large a loss over 19 months represents a significant difference from the period which preceded that 19-month one. That is especially so where, as here, the testimony by Respondent's witnesses did not appear to advanced with candor.

In sum, I do not credit the testimony underlying Respondent's defenses. Its witnesses did not appear to be testifying credibly. The foregoing considerations, among numerous others disclosed by examination of the record, support that conclusion. That conclusion, in turn, forms the background for evaluating the unlawful discharge allegations.

As to the employee activity, Massey initially contacted Sturgeon because of a shift transfer and a wage reduction. Discussed during the October 8 meeting were employment conditions, particularly mandatory overtime. Before that meeting, Massey and Pedersen, particularly, discussed with coworkers attending that meeting working conditions. Therefore, the evidence does establish that, prior to their terminations, the three alleged discriminatees had engaged in "concerted activities for the purpose of . . . mutual aid or protection," within the meaning of Section 7 of the Act.

The evidence also shows that those three employees had engaged in union activities. During their meeting with Sturgeon, all three participated in a discussion about the possibility of forming an in-house union. During the beginning of the following week Massey and Pedersen discussed with coworkers what had been said during the October 8 meeting. Pedersen, at least, distributed to other employees literature with articles about organizing a union. True, Pedersen may have overstated the number of employees with whom he spoke. Still, he and Massey had no reason to conceal from their coworkers the substance of their meeting with Sturgeon. To the contrary, if they intended to form an in-house union, they would need to secure support from at least a majority of the other employees.

Respondent's supervisors acknowledged having heard from employees about Massey, McCleary, and Pedersen's activity. Thus, Hofer testified that he had learned, from "talk around the shop," that those three employees had met with Sturgeon. Hofer acknowledged that he had known since December 1993 who Sturgeon was. Rawlings testified that he had been informed by employee Bill Worrell that McCleary and Pedersen had talked about a union with Worrell. If nothing else, the "talk" heard by Hofer, and Worrell's report to Rawlings, support the discriminatees' testimony that, following the meeting with Sturgeon, two of them had discussed that meeting with their coworkers.

Hofer denied having known about Massey's meeting with Sturgeon at the time of the decision to eliminate Massey's job and to terminate him. Indeed, he testified that the "talk

around the shop" had not been heard by him until after the mid-October terminations: "They were no longer with the company when—when that was around the shop." Similarly, Rawlings testified that Worrell did not report the union discussions by McCleary and Pedersen until "Monday the week after" termination of the alleged discriminatees. Yet, the reliability of that testimony was diminished greatly when Rawlings attempted to recreate the circumstances of Worrell's report.

According to Rawlings, Worrell said that he wanted to quit, because "he had problems with Rick and Darren" who "didn't really teach him properly" and "were more or less having him do the extreme menial jobs." Asked why Worrell had said he wanted to quit because of McCleary and Pedersen, given Rawlings's testimony that McCleary and Pedersen supposedly had already been fired by the time Worrell made his remarks, Rawlings first answered, "Well, he had told me that's why he wanted to quit. He thinks he was being abused by them. He wasn't being treated correctly. He wasn't being trained correctly." Asked, "So he quits after they leave?" Rawlings responded: "Well, I think he had plans to quit anyway except that I wasn't here for most of [the preceding] week."

An account of an employee wanting to quit because of past mistreatment by already terminated coworkers, on its face, is seemingly implausible. Worrell was never called to corroborate that testimony by Rawlings, especially as to the purported date of their conversation, though there was neither evidence nor representation that Worrell was not available to Respondent as a witness. As discussed above, I do not generally credit Respondent's witnesses and this testimony by Rawlings serves to reinforce the correctness of that conclusion.

Another factor pertaining to knowledge is certain testimony by Isaac Avitan. He acknowledged that he regularly mingled with employees on the Sioux City facility plant floor, "walking around and talking to every employee, observing job tasks." Asked about the frequency of his trips to production areas, Avitan testified, "I do that normally approximately anywhere between five and ten times a day. . . . as a method of exercise too," spending "anywhere between fifteen minutes and several hours depending on the—what is going on." Given the frequency and sometimes lengthy duration of those daily trips to the plant, it is not unlikely that Isaac Avitan would have overheard "talk around the shop," as Hofer characterized it, about Massey, McCleary, and Pedersen's contacts with Richard Sturgeon. Nor is it beyond the realm of possibility that Avitan could have seen one or more of the pieces of literature being distributed on behalf of Workers Have Rights, Too.

As set forth at the beginning of this section, "belief that [employees] have engaged in protected activities," *Henning & Cheadle, Inc. v. NLRB*, supra, suffices under the Act to establish unlawful motivation, obviously other requirements being satisfied. As described in subsection I,B, supra, as early as September 14 Isaac Avitan had suspected that union activity might be occurring. To be sure, he appeared to be testifying about his letter in a manner that would preclude such a conclusion. But, that testimony was not advanced with seeming candor and, moreover, the September 14 letter contains language strikingly similar to his November 1993

letter, issued at a time when he admittedly had received reports of organizing activity.

A conclusion of, at least, suspicion about union activity is further supported by the pretermination incident involving the red booklet which Pedersen submitted to Sherrie Avitan. Concededly, that was brought to her husband's attention. Concededly, Sherrie Avitan was made aware that Sturgeon's name and telephone number were handwritten in the booklet. Concededly, photocopies of it were made and one was left with Isaac Avitan. The front cover of the booklet contains the name of Workers Have Rights, Too, the same organization whose literature, with articles about union organizing, was then being distributed in Respondent's facility.

In sum, there is considerable evidence from it which it can be inferred that, as of October 12, Respondent suspected that union activity was occurring and, further, of knowledge sufficient for it to conclude, or at least suspect, that Massey, McCleary, and Pedersen were involved in it. Indeed, so far as the record shows, there were no other employees who were ever involved in the union-related activities which Isaac Avitan's September 14 letter shows that he suspected. Accordingly, while Respondent may not have possessed sufficient knowledge to be aware of all details of Massey's, McCleary's, and Pedersen's statutorily protected activities, the evidence shows that it possessed sufficient knowledge to, at least, suspect them of union-related activities and to take action to "scotch the lawful measures of the employees before they progressed too far toward fruition." *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954)—to "so extinguish seeds, it would have no need to uproot sprouts." *Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975).

To be sure, as Respondent points out in its brief, there is no evidence of unlawful antiunion statements by Respondent's officials. Nevertheless, even where animus is not expressed, it can be inferred from the circumstances. See, e.g., *Douglas Aircraft Co.*, 308 NLRB 1217, 1220 (1992), and cases cited there. Here, there is ample objective indicia from which not only animus, but unlawful motivation, as well, can be inferred.

All three employees who had met with Sturgeon were terminated, a factor which, of itself, tends to "give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also *NLRB v. Des Moines Foods*, 296 F.2d 285, 289 (8th Cir. 1961). In fact, of approximately 160 employees working for Respondent during mid-October, the three employees who met with Sturgeon represented half of the total number terminated on October 12 and 13.

Massey, McCleary, and Pedersen were terminated within days of meeting with Sturgeon, and within even less time after two of them began reporting about that meeting to their coworkers, began distributing copies of Workers Have Rights, Too's newsletters, and, in the case of Pedersen, submitted a copy of the Workers' red booklet to Sherrie Avitan. That close relationship between those events and the terminations tends to show that their proximity "was really no coincidence at all." *NLRB v. Jamestown Sterling Corp.*, supra. "Timing alone may suggest antiunion animus as a motivating factor in an employer's action." (Citations omitted.) *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

The terminations occurred abruptly, in the middle of a workweek and, in Massey's case, before the workday on October 12 had even ended. "[A]bruptness of a discharge and its timing are persuasive evidence as to motivation." *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). Accord: *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971), and *United Dairy Farmers Coop. Assn. v. NLRB*, 633 F.2d 1054, 1062 (3d Cir. 1980).

To be sure, lest there be doubt, no one of the foregoing objective factors dictates a conclusion of unlawful motivation. Yet, collectively—and considered in conjunction with the evidence of statutorily protected activity, of knowledge about at least some of that activity and of belief that union activity was occurring, and of unreliable defenses—they do serve to establish a prima facie showing of unlawful motivation. As I do not credit the testimony advanced in support of those defenses, Respondent has failed to meet its burden of going forward with credible evidence showing that the job classifications of Massey, McCleary, and Pedersen would have been eliminated, and they would have been selected for termination, absent their statutorily protected and suspected union activity. Therefore, viewing the evidence in its entirety, I conclude that a preponderance of the credible evidence establishes that Respondent terminated Massey, McCleary, and Pedersen for an unlawful motive, thereby violating Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

Schaeff Incorporated has committed unfair labor practices affecting commerce by terminating Tom Massey, Darren Ray McCleary, and Richard A. Pedersen because of their union, or suspected union activities in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having concluded that Schaeff Incorporated engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer immediate and full reinstatement to Tom Massey, Darren Ray McCleary, and Richard A. Pedersen, by restoring the job classifications from which each of them was unlawfully terminated on October 12 and 13, 1994, and by reinstating each of them to the restored job classification from which he had been terminated on those dates. In addition, it shall be ordered to expunge from its files any reference to the unlawful discharges of Massey, McCleary, and Pedersen, notifying each one in writing that it has done so, and, further, shall be ordered to make Massey, McCleary, and Pedersen whole for any loss of pay and benefits suffered because of their unlawful terminations, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]