Yenkin-Majestic Paint Corporation *and* Teamsters Local Union No. 284, International Brotherhood of Teamsters, AFL–CIO. Cases 9–CA–31629, 9–CA–31779, 9–CA–31919–1, –2, 9–CA–32079, and 9–CA–32250

May 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 20, 1995, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

In affirming the judge's finding that the Respondent violated Section 8(a)(4) by issuing a written reprimand to employee Larry Brown on July 13, 1994,[4] for leaving work without permission, we stress that Brown's credited testimony establishes that he remained under subpoena. Thus, although the judge's statement that securing the employer's permission to attend a Board hearing is never necessary because ''an employee has the right to attend [such a] hearing or otherwise participate in the various stages of the Board's processes'' is overbroad, the judge correctly stated that under Board law obtaining permission is not required when an employee is compelled to appear pursuant to a subpoena. *Walt Disney World Co.*, 216 NLRB 836 (1975).[5]

Although the judge found in section II,G of his decision that the Respondent violated Section 8(a)(1) by issuing a warning to Brown on April 8 for interfering with employees' work, his Conclusion of Law 7 incorporates the finding that this conduct also violated Section 8(a)(3), as the complaint alleges. We find this omission from the text inadvertent, and accordingly we find that this conduct violated both Section 8(a)(1) and (3) as alleged.

In affirming the judge's finding that Brown was unlawfully suspended in September for displaying a prounion placard on his forklift, we note that the record establishes that the Respondent engaged in a pattern of coercive conduct against him that began soon after being notified by the Union that he was a member of the in-plant organizing committee. In particular, we note that the Respondent unlawfully advised at least one other employee not to talk with Brown, transferred Brown away from his coworkers to an isolated warehouse, and would not let him return to the main plant without being escorted by management. Further, a display of union support such as Brown's is generally a protected activity permissible under Section 7 of the Act, and the Respondent has not shown special circumstances that would validate its prohibition. *Control Services*, 303 NLRB 481, 485–486 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).[6]

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, Yenkin-Majestic Paint Corporation, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' activities in support of Teamsters Local Union No. 284, Inter-

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

The Respondent contends that the judge's decision evidences bias and prejudice. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case or demonstrated bias against the Respondent in his analysis and discussion of the evidence. Additionally, having examined the decisions of the judge in the cases cited to us by the Respondent, as well as having examined the record here, we find no basis for the Respondent's contention that the judge ''brings a biased approach to his cases.''

[2] We find it unnecessary to pass on the agency status of Leadman Randy Schirtzinger in order to ascribe to the Respondent knowledge of the union activity of Larry Brown, in view of other evidence clearly establishing that the Respondent was well aware of Brown's involvement in the union organizing campaign almost from its inception.

[3] The Order modifies the recommended Order to include the cease-and-desist language customarily used by the Board in broad orders and to conform with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Interest on the make-whole relief to be paid to employees Cecil Jewett and Larry Brown as a result of their unlawful suspensions shall be paid as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] All dates are in 1994 unless otherwise indicated.

[5] Member Cohen agrees that an employer cannot refuse to allow an employee to honor a subpoena. However, he believes that a subpoenaed employee has an obligation to notify the employer that he/she will be absent from work because of the subpoena. In the instant case, Brown gave that notice to a person whom the Respondent told Brown to regard as his supervisor.

[6] Member Cohen does not pass on this ''further'' contention. In this regard, he does not necessarily subscribe to the notion that the placing of a placard on a forklift is the same as the wearing of small insignia.

national Brotherhood of Teamsters, AFL–CIO or any other labor organizations.

(b) Creating the impression that employees' activities in support of the Union are under surveillance.

(c) Threatening employees with unspecified reprisals if they support the Union.

(d) Threatening employees with reduction of benefits if they select a union to represent them.

(e) Prohibiting any discussion between employees about wages.

(f) Unlawfully prohibiting any discussion between employees and an employee supporter of the Union.

(g) Scheduling overtime for the purpose of discouraging employees' attendance at a union meeting.

(h) Issuing warnings or reprimands to employees because of their support for the Union.

(i) Transferring any employee out of the plant to a remote location in order to isolate the employee from other employees because of the employee's support for the Union.

(j) Suspending Cecil Jewett, Larry Brown, or any other employees because of their support for the Union.

(k) Discharging Glenn Robey or any other employee for engaging in activities in support of the Union.

(l) Disciplining any employees because the employee attends a Board proceeding.

(m) In any other 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 Glenn Robey immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Glenn Robey, Larry Brown, and Cecil Jewett whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, reprisals, suspensions, and discharge, and within 3 days thereafter notify Robey, Brown, and Jewett in writing that this has been done and that none of the actions against them found unlawful in this decision will be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its Columbus, Ohio facility and place of business, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, 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 March 1, 1994.

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

[7] 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.''

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 engage in surveillance of employees' activities in support of Teamsters Local Union No. 284, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization or create the impression that we are doing so.

WE WILL NOT threaten employees with unspecified reprisals if they engage in union activities.

WE WILL NOT threaten employees that we will reduce employment benefits if they select a union to represent them.

WE WILL NOT unlawfully prohibit discussion between employees and any employee who supports the Union.

WE WILL NOT schedule overtime to discourage employees' attendance at a union meeting.

WE WILL NOT instruct employees not to discuss wages or other employment conditions.

WE WILL NOT issue warnings or reprimands or take other disciplinary actions against employees, because they support the Union or because they attend a Board proceeding.

WE WILL NOT suspend Cecil Jewett, Larry Brown, or any other employee, because of their activity on behalf on the Union.

WE WILL NOT discharge Glenn Robey or any other employee for engaging in activities in support of the Union.

WE WILL NOT transfer Larry Brown or any other employee out of the plant to discourage union activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer Glenn Robey immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or the other rights previously enjoyed.

WE WILL make Glenn Robey, Cecil Jewett, and Larry Brown whole for any loss of wages and benefits suffered by them by reason of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings, reprimands, suspensions, and discharge, found in this case, and WE WILL, within 3 days thereafter, notify the employees involved in writing that this has been done and that none of the unlawful actions will be used against them in any way.

YENKIN-MAJESTIC PAINT CORPORATION

James E. Horner, Esq., for the General Counsel.
Fred G. Pressley Jr., Esq. and *Kimberly C. Shomate, Esq.*, for the Respondent.
Bruce E. Pence, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. I heard this consolidated case in Columbus, Ohio, on June 29 and 30 and July 1, 1994,[1] and January 31, and February 1, 1995, based on charges dated in March, April, June, and October 1994 filed by the Union. An original consolidated complaint issued on May 11 in Cases 9–CA–31629 and 9–CA–31779; a single complaint issued on June 29 in Cases 9–CA–31919–1, –2; a consolidated complaint issued on September 19 combining the latter case with Case 9–CA–32079; and a second consolidated complaint issued on November 15 taking in Case 9–CA–32250 with the other two cases. Finally, I issued an order consolidating all cases not yet heard for hearing scheduled to begin on January 31, 1995. (ALJ Exh. 5.)

The complaint alleges that Respondent threatened employees with loss of benefits if they engaged in union activities, curtailed discussion among employees about union activities and employment conditions, caused the cancellation of a union meeting scheduled on February 12, transferred Larry Brown from the plant to a distant work location to isolate him from other employees and prevent employee organizing efforts, and issued warnings and suspensions to Brown and Cecil Jewett and discharged Glenn Robey because they supported the Union and in Brown's case in addition because he attended a hearing in the United States District Court pursuant to a petition for injunctive relief under Section 10(j) of the Act against Respondent's conduct.

Based on the entire record, including briefs filed by the General Counsel and Respondent, and credibility resolutions, I find that the allegations are mainly supported, and recommend appropriate remedial action be ordered. I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent manufactures and sells paints, resins, and allied products at various facilities in the United States, including its facility in Columbus, Ohio, where Respondent annually purchases and receives products valued in excess of $50,000 directly from points outside Ohio. I find that Respondent is an employer engaged in commerce within the meaning of the Act. The Union is admittedly a labor organization under the Act's definition.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs 110 production and maintenance employees at the Columbus facility. These employees are unrepresented by any union. Respondent president, Merom Brachman, unequivocally says the Company gives its employees a teamwork extra bonus in wages for straighttime and overtime as part of its nonunion productivity program. He describes a difficult past period with a union and how things improved since the Company took steps to identify ''our shop'' as a nonunion shop; how it has been able to grow without a union unlike the organized and therefore no longer viable companies. He says the company position is that a nonunion shop is beneficial to employees; a conviction giving rise to the payment to employees of an annual Christmas bonus equal to union dues for not joining the Union, paid in 1993 and 1994. This is an additional payment to the

[1] All dates herein occurred in 1994 unless otherwise indicated.

extra money paid employees under the nonunion productivity program entitled as such in the company handbook.

Brachman gets phone calls from three employees sometime during the first 3 months in 1994; it could have been the second week in February—who say they are being asked to sign a union card or talk to a union representative and do they have to pay attention. He tells them about exercising their rights but that it was not the most beneficial thing for the Company. He cannot recall whether anyone informed him of the identity of the persons involved and cannot remember the exact day or ''exactly'' the names of any one of the three callers. Nor can he recall being told afterward the names of the employees engaged in union activity until later in correspondence from the Union also in February, discussed below. He says that he prepared a letter to employees the same day, and the record indicates this day is payday—a Thursday. If the date on a second letter February 15 referring to the prior Thursday is accurate, the first letter, which is undated, issued February 10. (G.C. Exhs. 3(a)–(b).)

B. *The February 10 Letters*

Brachman and Company Personnel Director Michael Cianflona lost little time in responding to the reports with antiunion campaign literature.

Brachman writes employees February 10 with dire warnings:

> Those suckers (union supporters and representatives) are clever with their game: If they trick you into reaching for their sign-up card then they can try to stop Y-M (Yenkin-Majestic) from putting in your new annual 3-year pay increases this month.
>
> . . . .
>
> When you look around at the continued closing of big-name companies and local long-time industry, it's those unionized throwing thousands out of work in Columbus. But, not at Yenkin Majestic.
>
> . . . .
>
> [Sic] (Dean and Barry went down the tubes because they had the Teamsters chewing them up, and they were in Hanna which got sold off twice and cut to half the employees, cut overtime and no annual pay incr.) [Sic]
>
> . . . .
>
> . . . don't let some guy sweet talk you into putting their noose around your neck. Let'em choke by self. [Sic]
>
> . . . .
>
> . . . and all the Y-M Bonuses—lost under unions at others—still will go in your pocket years more if [we continue] our way together.
>
> . . . .
>
> *Thanks for keeping close with Mike (Cianflona) and me and supervisors. Be alert. Don't get snookered. We're here to help*. [Emphasis added.] [G.C. Exh. 3(a).]

Brachman and Cianflona write employees on February 15 highlighting the existence of numerous employee benefits including the special bonus mailed to employee homes annually and other bonuses paid to employees ''always as long as you have had no—union mess it.'' (sic) The letter states, ''You can bet our 3-year package will be more than before, heading for a 30-year reward of no—union and no dues, moving up together.'' (G.C. Exh. 3(b).)

Cianflona writes a memo to all employees on February 21 again listing employee benefits including vacation pay and flexible schedules stating, ''these flexible schedules, as with extra paid workdays last year come *only* in nonunion workplace like Y-M.'' (G.C. Exh. 3(c).)

The message in these antiunion communications to employees is clear, unambiguous, and intentionally threatening, devoid of conditions, no coulds, ifs, ands, or buts. You lose employment benefits, wage rates would not be as good, bonuses openly characterized as nonunion benefits thus only present if the employees reject the Union, job security, flexible scheduling, vacations, and the like are inevitably lost unless the employees and the Company remain nonunion. This threat making by Respondent designed to discourage employees from freely exercising their rights under Section 7 of the Act to engage in protected concerted and union activities is an obvious egregious violation of Section 8(a)(1) of the Act.

Brachman tells employees in the February 10 letter that ''[s]everal tell me there is a bug being put in some ears about some Dues-Collectors asking some folks here to take your time Sat.,'' a reference to a union meeting scheduled for February 12, information which Brachman understands to be true. The meeting is not publicized in print, only by word of mouth are employees notified. Three employees already know how receptive Brachman is to their inquires and reports concerning employee union activities because he takes time during phone calls from them to discuss such matters, cautioning them to avoid support for the Union, as described above. Plant employees next read in the February 10 letter that Brachman knows about an employees' union meeting because ''several'' tell him about it. Yet still further, after he threatens employees with benefit losses if employees support a Union, which further confirms his antiunion sentiments and manifests a strong determination to oppose the union, he thanks employees for keeping ''close'' with him, the personnel director and plant supervisors—an obvious suggestion fairly inferable to the readers that reports concerning employees' union activities are being received and scrutinized by management. He encourages the practice by thanking employees who have been ''close'' and solicits employees to be alert about such matters, that ''[w]e're here to help.'' I conclude that Respondent created an impression of surveillance because employees would reasonably assume from this literature that their union activities have been placed under surveillance, that reports are coming in, and that management scrutinizes such reports of employee union activities. This conduct is a further violation of Section 8(a)(1) of the Act. *United Charter Service*, 306 NLRB 150, 151 (1992).

C. *Respondent's Threat of Benefit Loss to Employee Chafin on February 14*

Respondent's officials, Cianflona and Plant Manager John MacLauchlan, summoned employee Darrell Chafin to the personnel office on February 14 allegedly to question him concerning why he told an employee his name is on a list for the Union. During the questioning Cianflona talks about the Union and tells the employee that if a union comes in negotiations would start at $4.35, minimum wage, no bene-

fits, and we would start from scratch, that negotiations could go on for a while. Chafin expresses the concern that he cannot afford a strike or something like that and Cianflona says, ''[W]ell, it happens that way when unions try to come into a plant.'' Neither company official is asked to testify concerning Chafin's account in this respect leaving it untouched and credited. The cryptic threat of no benefits if the Union comes in is the employee's uncontested version, which may or may not arise in the context of an effort by Cianflona to explain how bargaining works. There is ambiguity here because neither he nor the plant manager are asked to shed light and therefore such responsibility for any possible ambiguity lies at Respondent's doorstep. Under this view the credited account, at least as to benefits, is that Respondent informed Chafin of no benefits if the Union comes in. After all, the threat loudly echoes and arises in the midst of Respondent's other threats of benefit loss found above and therefore is identical with its other unlawful antiunion campaign tactics. Moreover, no effort is made by Respondent in the record or on brief to show, even if one concludes arguendo, that this was merely an explanation of bargaining's possible and natural and foreseeable results, that such prediction is based on objective fact or foreseeable consequences beyond Respondent's control. Respondent blurred the distinction between telling an employee likely economic consequences of unionization that are outside his control and making threats of economic reprisal to be taken solely on his own volition. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). I find the employee is confronted with an unlawful threatened loss of benefits if the Union comes is made in violation of Section 8(a)(1) of the Act. Respondent, when it confronted the employee, was keenly aware of any suggestion that involves the loss of benefits and had the duty to *clearly* inform him it could possibly result from the collective-bargaining process. This neither company official is shown to do. *Child's Hospital*, 308 NLRB 340, 343–344 (1992).

D. *Respondent Orders Chafin not to Talk to a Union Supporter*

The Union sends two letters to Brachman in February notifying him that Glenn Robey and Larry Brown are on the Union's organizing committee of company employees. Brachman admits receipt.

In late February—early March, Production Superintendent Fred Nagy comes across Chafin and Brown chatting as it later turns out about fishing. Brown is pumping latex and Chafin is pumping up a batch and therefore has 15 to 20 minutes' leeway time. They are 30 yards apart. Without preamble Nagy orders Chafin not to talk with Brown—that Chafin has work to do. Chafin recalls that he and Brown spent 4 to 5 minutes talking when Nagy appears and gives the order, that it is very common for employees to chat at that time in the pumping process, that in 5 years he is never told it is prohibited, and that he discusses sports with Nagy during work. Not only do other employees' accounts, such as Harry Cline's, corroborate Chafin about the practice; Nagy himself says he talks about nonbusiness matters with employees during work sometimes, that the policy is if its interfering with work performance employees should not be doing it. Nagy also does not contradict Chafin's testimony that the employees had leeway from immediate work demands for their brief exchange; therefore, by his own account of the rule's proscription, Chafin's conduct is blameless and a common occurrence. Brown is known to Respondent by this time as a prominent union supporter as discussed further below. This leaves Nagy's interference with the normally permissible contact between Nagy and the known union activist employee Brown open to the inference that Nagy took action lest Brown contaminate Chafin with prounion ideas; an inference strongly supported by the record especially Respondent's failure to offer any reason other than a false one for its disparate treatment against Chafin. Respondent thereby further violated Section 8(a)(1) of the Act.

E. *Respondent Disrupts a Union Meeting Scheduled on February 12*

Respondent's president, Brachman, knows a union meeting for his employees is scheduled to take place at noon on Saturday, February 12, and warns of dire consequences if the Union gets in, as described above, in correspondence to employees sent out on February 10 wherein he refers to the meeting. For the first time since the prior year, at a time when it is not a busy season for filler employees, Respondent suddenly offers overtime to its employees shortly before they leave work the very day before the union organizing meeting where employees expect to sign cards seeking representation by the Union. Nagy asks mixer Thomas Sowards whether he wants overtime at 2:10 p.m., Friday, February 11, and Sowards declines, because he wants to attend the union meeting on Saturday, having been invited by Brown for the purpose of signing a card. Yardman Ronald Taylor testifies it is normal in his particular position to be asked in this manner, but usually for all the employees in building 1920 the production house management posts a sheet at least 3 to 4 days ahead of time and gives employees more time to sign up to see who is going to work. He accepts the offer by his supervisor and says he was told by someone unidentified that ''they'' were organizing that Saturday. Nagy asks Glenn Robey also toward the last hours in his shift if he wants to work Saturday overtime and when he declines, Nagy just looks at him, grins, and walks away. Robey testifies he does not believe the Company follows this procedure in the past 5 years for assigning Saturday overtime. He corroborates views of others that the Company usually puts up a signup sheet on the board above the timeclock at the beginning of the week or usually Wednesday to give employees time to plan ahead for the weekend. Employee paint mixer Chafin says Nagy also late in the shift asks him about overtime for the next day unlike the normal procedure. Confirming this long-established practice, personnel director for Respondent Cianflona testifies to the many times Respondent posts the notice of overtime on Tuesday or Wednesday prior to the Saturday in question. The largely unique manner in which Saturday overtime is scheduled for February 12 is made even more suspicious by uncontroverted testimony from employee Taylor that ''[j]ust on that Friday to my knowledge did Company managers go up to people and ask them if they wanted to work overtime.'' Robey testifies the meeting is canceled because many employees accepted overtime on Saturday and nobody would show up.

Plant Manager MacLauchlan relies on company records dated January 10 for the decision to schedule overtime the day before the canceled union meeting without more than a

cursory, conclusionary, and unspecific unsupported comment that he just knew the Company would be ''shipping out product we'd be out of the following week'' and that the last 2 pages in brief page 15 showed he was fully behind, that 12 or 15 orders passed the required ship date. He offers no reason why this is not addressed until February 11, over a month later than the records inform him. No reason at all is offered why Respondent sends its managers and supervisors scurrying around its operation toward the close in the first shift, ending at 3 p.m., on Friday to offer the extra pay in overtime opportunities to its employees as if a dire emergency situation exists.

The record shows the union meeting is known to management, Brachman's interse animus toward the employees' union activities especially the meeting, and the marked departure taken by the Company in its usual method for assigning overtime without any persuasive reason as well as the unexplained and suspicious timing for its action. A prima facie case for finding that the action is motivated by Respondent's desire to interfere with the scheduled meeting is thereby established, and it becomes Respondent's burden to prove it would have offered employees overtime on this Saturday even apart from the scheduled union meeting, and this it fails to do. I find Respondent offered employees extra pay to work on Saturday to discourage their attendance at the union meeting scheduled that day, and thereby interfered with employees' exercise of their rights to engage in protected union activities thereby violating Section 8(a)(1) of the Act. *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

F. *Respondent Warns and Discharges Glenn Robey*

Respondent issues warnings to Robey on February 17 and 18 then discharges him on February 25.

Robey begins employment for Respondent 14 years ago as production line stacker, then paint filler; rises to a second-shift leadman; and acquires skills as a material handling forklift driver. Nagy, Respondent's production superintendent, supervises him for 8 years and says from the very start into January 1994 Robey is a good employee, a conscientious employee who reports to work on time and, some mistakes aside, works efficiently. Nagy recalls no adverse writeups while Robey is under his direct supervision prior to the beginning in the employees' union organizing efforts in January. Employee Thomas Sowards credibly testifies to working close or beside Robey, calls him a safe forklift operator who drives with lights on, honks going around corners, unloads trucks in a safe manner, and is an overall good driver and very good employee. Filler employee William Mullins observes Robey driving the forklift daily in a safe orderly manner, without speeding—that Robey stops at stop signs and uses the horn before backing up. Employee forklift operator Ronald Taylor works beside or near Robey and says he was a good employee as well.

1. Union activity by Robey

Employees ask Robey if he wants to organize a union in January and an organizer sets up a meeting after Robey contacts him. Robey, Brown, and three others meet with the union representative January 22 and learn how to go about seeking representation for the employees, and obtain literature, and union authorization cards, which are given to Robey—who signs a card. Robey and the others talk to employees about signing cards in the parking lot and inside the plant during breaks.

2. Respondent's knowledge and animus

The Union sends Brachman a letter February 14 identifying Robey as a member of the Union's organizing committee—and shortly later sends him another also naming Brown as a committee member. (G.C. Exhs. 6 and 16.) This is admitted by Brachman who further admits writing the letter he promptly has attached to employee paychecks on February 10 and other campaign literature containing numerous examples of intense antiunion animus and unlawful threats found above. (G.C. Exhs. 3(a)–(c).)

3. The alleged cause for the warnings and discharge

Respondent gets the Union's letter in which Robey is identified as an employee organizing committee member on February 17 and calls Robey into the front office that afternoon where it issues him two written reprimands. The first is an afterthought-like resurrection of a trivial incident involving Robey and Leadman Randy Schirtzinger which occurs February 2—15 days before—which Robey reasonably explains is not his fault both to respondent officials and in credible, persuasive testimony before me. Schirtzinger is not called by Respondent for his version, which means Respondent fails to offer a cogent or persuasive reason for any reprimand at all, let alone turning an oral one into a written reprimand placed in the file of a hitherto before then very good employee; especially significant is the fact that Respondent does not inform Robey he is to receive a written warning during the oral reprimand by company officials on February 2. Respondent officials at the same time then tell Robey in an out of the blue manner that the Company is giving him another written reprimand, this time because Robey does not fill out a personal medical history form to their liking. Robey fills out the form (G.C. Exh. 8(b)), January 23 without answers on personal family medical history, and explains his reasons based on privacy concerns to the supervisors, who are not impressed at all and quickly issue another written reprimand in one-two punch-like actions. No reason why the action took so long to take—January 23 to February 17—is advanced by Respondent or is the necessity for doing both reprimands so soon on the heels of Respondent's knowledge about Robey's support for the Union advanced. Even more revealing of Respondent's determination to set up Robey for unfavorable action is the fact that Nagy and MacLauchlan call him into the office again the next day, February 18, and issue him a third reprimand allegedly required by him to ''improve his work performance''; the latter based on the assertion he is not performing job duties according to a job duty list never given to him, and which both Robey and employee witness Larry Brown credibly testify are outside the duties of a material handler.

4. Respondent discharges Robey

Respondent brings its plan to rid the Company of the leading union proponent to completion on February 25, 2 weeks after identifying that employee as Robey, when he is driving a forklift and Respondent alleges he nearly hits Nagy. Re-

spondent fires Robey, alleging for his ''poor attitude,'' failure to improve work performance and the so-called near miss the same day. Brown is a close witness who calls out to Robey to alert him to Nagy's presence on the wrong side of the forklift's intended passageway inasmuch as that side is designated unsafe by the company rules on safety as Nagy cannot therefore be seen. Undeniably there is no contact, and Robey testifies he is able to stop 5 feet from Nagy by normally applying his brakes. Nagy himself testifies that Robey sounds the horn as he comes around the corner and no one credibly contradicts Robey's account that the speed he is traveling is 3 to 4 miles an hour. In fact, Robey says Nagy only said slow down, and since this, a reasonable speed, is already the case in Robey's experienced view he merely kept going after the uneventful stop without any actual incident. His record contains only one reprimand clearly attributable to his work performance in the 14 years on the job prior to the baseless warnings described above, and that one has nothing to do with his excellent driving performance attested to by employees described above; moreover, there is a plethora of employee chapter and verse testimony that leadman Randy Schirtzinger and numerous other employees operate forklifts in a hazardous and unsafe manner causing actual damage to plant property without being discharged, suspended, or even disciplined, both before and in some instances after a government inspection led to safety violation findings which assertedly caused Respondent to tighten up its supervision by memo to employees on January 28, yet forklift driver Charles Thorton unsafely drives his forklift on January 31 only 3 days later, carries a double skid of pigment inside a trailer in danger of tipping over, and punctures two holes in the trailer's roof. Nagy photographs the damage and an accident report is written. Nagy merely advises Thorton not to engage in any further conduct of this sort else disciplinary action result. Respondent cannot shore up justification for the discharge by referring to a graduated or progressive disciplinary procedure which Company President Brachman says the personnel department follows inasmuch as the three warnings given Robey beforehand are found unlawful. Thus, the discharge is not in line with a progression of valid disciplinary actions. In addition, Respondent's efforts to show multiple causes for the firing manifest a desire to cover tracks and hide the real reason. Finally, the timing in this discharge so quickly on the heels of the Respondent's identification of the employee as the leading union proponent tends to further confirm an unlawful motive behind the action.

For the specifically described reasons noted above, his exemplary work performance and record, his union activities known to Respondent, the Company's intense antiunion animus, the timing of the actions, the outright failures asserted as reasons for the disciplines to hold up to scrutiny or to bear any persuasive weight, including the disparate enforcement of safety rules regarding forklift operation, and the fact that Respondent's manager is to blame for any alleged near miss, I find that the General Counsel establishes a prima facie case that Respondent issued warnings to and discharged Glenn Robey because of his activities in support of the Union. It then becomes Respondent's burden to prove it would have taken the actions even aside from the employee's protected activity and this it does not do. Accordingly, I find by the above discipline and discharge Respondent violated Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

G. *Respondent's Written Warning to Brown on April 8*

Respondent enters a written warning into Brown's personnel file on April 8 which describes two incidents: one on April 6 and another on April 7. The first alleges Brown interrupts employee Tom Voss from doing his work because Brown is on the shading deck talking to Voss that day around 8:30 a.m. (G.C. Exh. 15.) The April 7 incident at 1:15 p.m. alleges Brown talks to Harry Cline, resin plant employee ''interrupting work.'' (G.C. Exh. 15.) The official warning informs Brown that recurrences can lead to further discipline, including discharge.

Respondent illegally warns employee Darrell Chafin not to talk to known union backer Larry Brown in March, described above; Respondent is continuing to clamp the lid on union talk in April. Thus, employee Voss testifies without contradiction that on April 6 Brown comes in from the cold to warm up slightly before 8 a.m. Voss sets down some labels and only a second later Nagy appears and demandingly asks, ''Don't you guys have anything to do?'' Voss is stunned by Nagy's confrontational nature because Nagy never talks like that to him, and leaves the scene to pull orders. Brown goes into the breakroom after telling Nagy he came in to warm up and have a cup of coffee during the 8 a.m. break. Nagy does not talk to Brown in the breakroom and after a few minutes Brown leaves. Employee Donnie Harrison places Nagy's appearance some 2 or 3 minutes after the employees are talking but places the encounter inside the room. At the hearing, Respondent's own counsel elicits from Nagy that he places a memo in some office file, his own, not necessarily the employees' personnel files regarding four other employees involved in being in the breakroom at an unauthorized time (R. Exhs. 20, 21, 22, and 23), but does not talk to the employees about the incident. The notes are handwritten and not labeled as written warnings as is Brown's. As noted further below Brown is singled out to be seen and formally asked to sign his official warning.

On April 7, Brown is hauling trash to the dump and enroute drives near press operator Harry Cline while Cline is loading a truck. Cline flags Brown down and asks him questions about the Union. Brown says he will get back to him later and drives off—the talk lasts 30 seconds. Cline corroborates Brown but also recalls another time 2 days later when the two speak 3 to 4 minutes about the Union after Cline flags Brown over. The record fails to indicate which incident is the subject of the warning against Brown, nor does this warning itself provide clarification. Respondent calls Brown in and refuses to say whether Cline is also being disciplined. Cline testifies that it is commonplace for employees to talk to anyone at anytime; that he knows no barriers to doing so at the paint or resin plant, where you are sure to talk to somebody—and asserts there is no rule against doing so. Nagy's only basis for the warning is, he says, an undescribed, unoffered complaint from the resin plant supervisor about Brown interfering with ''one'' of the employee's duties; it is noted further on the warning that the area is outside Brown's normal work area or traffic pattern though Brown is delivering trash to the dump on this occasion.

Brown is the identified second most prominent union supporter in the plant. Respondent, at the time of the warning, already warned an employee not to talk to Brown, whose last warning is 5 or 6 years ago for not wearing safety glasses in the production area. Moreover, Cline testifies that Re-

spondent gives him no discipline, either orally or in writing; yet if Respondent is truly concerned about work interruption then both Brown and Cline are equally culpable and the disparity in treatment is obviously traceable to Respondent's enmity against union backer Brown.

The disparity in treatment in both incidents is obvious as is the completely unpersuasive and unproven alleged reasons for the discipline based on both incidents. No further comment is needed. I find that Respondent disciplined Brown on April 8 in order to squelch Brown's talking in favor of the Union to employees thereby discouraging protected union activity and violating Section 8(a)(1) of the Act.

H. *Respondent Transfers Brown*

Not satisfied it fully isolates employees from Brown's disruptive influence by the unlawful warnings, Respondent promptly transfers Brown to a warehouse 4 to 5 miles away from the plant where he is to work with only one other employee, John Frederick disposing of old paint. Frederick tells Brown early on he does not want anything to do with talking about the Union or wages. Respondent does not inform Brown how long the transfer will be. There are no other production and maintenance employees assigned there. Respondent takes pains at the hearing to explain that it selects Brown for the allegedly urgently mandated immediate need to get rid of its old product out of the warehouse rather than employee Thorton who allegedly picks up Brown's plant duties because the latter, a probationary employee, is not as well trained as Brown for the work. It fails to explain why the universe of candidates for the assignment is so pitifully few—only 2 out of its 110 employees. But Respondent adds the additional reason that Brown is ''experienced'' in reading paint can numbers because of his material handling work which assertedly also involves experience in quality control. However, little such skills are shown by Respondent to be required, let alone even desirable for the work involved at the warehouse which is dumping dead paint, and Brown has little or no prior experience in quality control and never worked there. Suspicion is fueled by the fact that the record shows there is a steady compelling need for the performance of material handling duties in the plant where such employees are always rushing to keep up so that Brown is normally more valuable there. Moreover, while Respondent explains the hasty transfer on an ''immediate'' need to quickly clean out the warehouse, Brown testifies without contradiction that Frederick—who appears to Brown to be his overseer at the warehouse—sometimes says to take the rest of the afternoon off from the monotonous work, which belies any urgency. Brown's skill at driving a forklift is wasted because no forklift can be operated at the warehouse since the ceilings are not high enough. Adding considerably to the resulting suspicious scenario, Brown is tightly constricted in his movements between this distant warehouse and the plant, despite 10 years employed there. Thus, he is ordered to secure any personnel information or needs or material by phone to Nagy and when Brown does visit the plant he is not allowed entry until being screened by the guard, and except in the Company and escort of Nagy, which prompts Brown to ask Nagy why he is being treated like a prisoner Nagy replying curtly he does not know. Respondent requires no escort for Frederick when he visits the plant nor does it require employee James Vines to have an escort during Vines' 10-day assignment to the warehouse in January when he goes back and forth for supplies. Respondent also denies Brown his request to work overtime with other employees at the plant as is needed there in this period. Respondent's rational for the constriction of Brown's freedom of movement is offered as an insurance-based need to know where employees are at all times, yet such need is easily met by asking Brown to merely report his movements between the locations ahead of time—yet this is not an option accorded to Brown who must check in with the guard and be under escort at all times in the plant by the production superintendent.

The asserted reasons for the transfer lack merit and therefore justify the inference that Respondent's reasons for the move of Brown is discriminatory. The General Counsel therefore establishes a prima facie case that Respondent moved Brown out of the plant as part of its continuing efforts to block him from talking to other plant employees lest he encourage their support for the Union. Respondent fails to prove it would have so transferred Brown apart from Brown's protected union activity. Accordingly, I find Respondent's removal of Brown from the plant discriminates against Brown on April 11 and afterward because of his union activity, thereby violating Section 8(a)(3) of the Act. *Wright Line*, supra.

I. *Respondent's Surveillance of Employee Handbilling*

On April 13, Robey and another discharged employee Steve Gregory handbill employees at changes in the first and second shift at the plant gate from about 2:30 to 3:15 p.m. (G.C. Exhs. 24(a)–(c).) When the employees arrive to do so, along with Union Organizer Ken Foster, Respondent's plant manager, John MacLauchlan, stands beside the gate 3 feet from Robey and Foster and right across the driveway from Gregory. The Company Personnel Manager Cianflona stations himself at the guard shack and patrols back and forth there to watch; he talks to a few employees from the resin plant and remains about 25 feet away from employees Robey and Gregory. MacLauchlan remains at the handbillers' sides all the time, between 45 minutes to an hour. Maintenance Supervisor Pete Peters and a security guard, an admitted Respondent agent, are also watching events. MacLauchlan also places Maintenance Manager Thomas Fletcher and even the Company's general manager of plant operations at the handbilling during this time.

Robey testifies he sees 30 employees in the shift change movements but that only 3 take the handbills offered to them. He says he tried to give them materials from his hand but they don not take them. Employee Jewett is walking out at the shift change, observes the handbilling, and sees the supervisors watching. He says to his companion employee, Ken Gregory—after noticing his brother Steve Gregory trying to pass out the bills, let's get one, but Ken Gregory says no, look around you. Jewett notices that Cianflona and MacLauchlan have their note pads. Jewett asks Supervisor Peters why he is standing next to Jewett's car and Peters replies he is watching to make sure nothing goes wrong; and sees Cianflona standing around, looking around walking toward MacLauchlan. Robey sees Peters at one point obtain a walkie talkie in Robey's presence and give it to a security guard. He recalls that resin plant employees took no bills, some 12 to 15 employees; then about 3:25 p.m. maintenance employees exited without accepting any; and at 3:30 p.m. the

paint plant employees came out and only a few, already involved in the organizing effort, took a handbill. At about 3:45 p.m., everybody left, Robey noticing that the supervisors return inside the building.

Robey cannot recall supervisors standing at plant entrances during shift changes in his 10 years at the plant. MacLauchlan admits it is not his normal duty to direct traffic nor any supervisor's duty to do so as some did that day, including Peters who further has no duty to be in the parking lot across the street from the plant entrance next to Jewett's car ''watching'' the handbilling. MacLauchlan says either Mark (general manager of plant operation) or Mike (Cianflona—personnel director) told Peters to station himself there. Employee Jewett can only recall once before in his 11 years with the Company seeing supervisors there in 1989 or 1990 during a union organizing drive when the Company gave employees dark glasses for protection in case the Union tried to take photos. Supervisors normally take their breaktimes in the plant. Respondent contends it needed to watch out for traffic congestion at the gate yet offers no proof that its top supervision is required for this purpose either for truck deliveries or any unusual need to direct everyday traffic even if handbilling is to occur—which takes a moment or so at best to conclude.

Respondent relies on the Board's decision in *Metal Industries*, 251 NLRB 1523 (1981), later noted in *Springfield Hospital*, 281 NLRB 643, 651 (1986), wherein—in both cases, allegations of unlawful surveillance are dismissed on the principle that ''management officials may observe public union activity . . . on company premises . . . unless such officials do something out of the ordinary.'' Heavily relied on in both cases is the fact that the management officials presence in *Metal Industries*, supra, and *Springfield Hospital*, supra, at the scenes of employee protected union activities are not something out of the ordinary. Pointed reference is made to such presence as being part of the officials' normal duties; or likely to bring them in the view of employees' activities as a normal occurrence. Here, Respondent's core supervision and upper level hierarchy absent themselves from accustomed positions in the plant, head out en masse to the employees' parking lot, and MacLauchlan stations himself next to and close by the employee handbillers and the union organizer, direct employee traffic, one supervisor standing next to employee Jewett's car across the street from plant property, patrol the area in which handbilling is underway (or at least is being attempted), and admittedly tell employees they are there to watch, and remain in this close proximity the entire time the employees' activity is underway. The absence from their normal high managerial and supervisory locations for so long a time of midday in company operations cannot be better calculated to intimidate employees' minds with the understanding that they are under unsettling surveillance than this, and the failure in employees' efforts to communicate with the other employees is expectable. The conspicuous conduct engaged in by Respondent's officials in such close proximity to the employee handbillers and plant employees so as to reasonably interfere with their activities is clearly not normal; nor is it satisfactorily explained. Further it is a continuation of Respondent's earlier conduct herein found to constitute creating the impression of surveillance and this is of like ilk. I find these circumstances unlike the factors in the cited cases which are therefore clearly distinguishable and not controlling. Accordingly, by engaging in surveillance of employees protected union activities Respondent further violates Section 8(a)(1) of the Act. *Carry Companies of Illinois*, 311 NLRB 1058, 1073 (1993). *Impact Industries*, 285 NLRB 5, 19–20 (1987).

J. *Respondent Orders Employee Jewett not to Talk to Employees About Wages on June 3*

Paint filler Cecil Jewett, union organizing committee member, gets a subpena to testify at the Board hearing before me scheduled for June 29. He takes it to Plant Manager MacLauchlan's office on June 3 so he will know his status that day. The manager accepts the subpena and says Jewett must know something if being called to testify and asks what that is. Jewett replies, ''fairness'' and leaves. Later that day MacLauchlan summons Jewett back and asks him what is eating him. Jewett communicates some warnings given him by Personnel Director Cianflona in discussions in 1992 that the Company will fire him if he asks anymore employees about their hourly wage rates; that Jewett made the inquiries of other employees because the Company denied him a merit 10-cent raise. MacLauchlan tells Jewett that such order could be company policy and not to be asking anyone else because that is their personal business. Jewett says further that Cianflona tells him in the described earlier talks he does not want his nose in it. MacLauchlan and Cianflona are fed leading questions about this account despite my cautionary advice to the contrary and their responses therefore lack probative value; moreover, the questions do not track the employee's account so that Jewett's account, credibly rendered is left untouched. It is axiomatic that a blanket unlimited proscription against employee discussion about their wages and other employment conditions severely handicaps and discourages employees informed exercise of their rights under Section 7 of the Act to engage in protected union activities thereby violating Section 8(a)(1) of the Act, and I find Respondent's order an infringement of the employee's rights in such regard. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 981 F.2d 62 (2d Cir. 1992).

K. *Respondent Suspends Jewett for 3 Days*

Filler employee Cecil Jewett usually collects used aluminum cans around the plant before work to recycle for cash to supplement his Yenkin-Majestic wages. He arrives at the plant before the first shift begins at 7 a.m. on September 8. Third-shift paint plant employees are at the time nearing the end of their 11 to 7 shift under the direction of Supervisor Paul Ulrey who, for his part, earns extra compensation by mowing company lawns. About six other first-shift employees usually arrive to work early as is Jewett's custom.

Jewett says he talks to third-shift employees before 7 a.m. in the filling, mixing, and industrial departments a lot from January into September; and that on this date he is spreading word about a forthcoming union election scheduled for October 14 to third-shift employees, including John Eric Davis, who is 12 or 15 feet away, when Ulrey walks over and orders Jewett to the breakroom as he is allegedly interfering with his help. Jewett asks Ulrey if he is interfering with the help then can he talk to Ulrey and he says, ''[Y]es, you can talk to me,'' Jewett believing that Ulrey is semi-joking. Jewett inquires whether Ulrey intends to use the lawn mow-

ing equipment on his truck to cut the Company's lawn. At this point, Ulrey is allowing Jewett permission to have the discussion, still in a light vein and answers yes. Jewett then suggests that Ulrey needs to earn extra money since he is cutting the Company's lawn. Ulrey says he does not need to earn more and Jewett remarks that Ulrey is not doing it for his health as he is not getting any lighter. So far this can only be described as good natured banter. Then Jewett says to Ulrey, ''Well why don't you join the Union and earn extra money?'' and Ulrey says I told you to go to the breakroom, which order Jewett obeys after asking an employee if he hears the earlier order—the employee says no—and telling Ulrey after mischievously throwing Ulrey a kiss that he still loved him.

Under oath before me third-shift employee John Eric Davis described the event much like Jewett does, except recalling Ulrey also saying Jewett really should go upstairs, and that Jewett also said employees really needed help. Davis says he thinks the whole thing is silly at best off of both parties. Respondent Supervisors Ulrey, Nagy, and Respondent's second in command general manager, Mark Holliger, jump all over the silly matter interviewing Davis for his version and suspend Jewett for 3 days. (G.C. Exh. 23.)

The Company bases the heavy suspension on Jewett's conduct described above on different reasons alleging it results in a disruption of work, constitutes prohibited prounion talk during working time, and is insubordination by Jewett. There is yet again a distinct pattern in Respondent's continuing use of multiple reasons to justify its unusual actions against employees in the context of employee organizing efforts, forming the basis to infer an improper actual motive. Further lending suspicion about the bona fides in Respondent's action is the lack of any proof whatever that Jewett's brief conduct interfered with or disrupted employees' work at all. Employee John Eric Davis is not even asked by Respondent on the stand whether his work is in any way disrupted by Jewett's discussion with the supervisor and is unable to concentrate on his work, and he is the only one Ulrey can identify as so situated and allegedly ''disrupted.'' The suspension action, according to Respondent's own records is rarely used except for serious offenses (R. Exhs. 35c–e), unlike Jewett's conduct here, which brings its propriety into further question. The humor and whimsy in this brief, silly incident casts it in a nonthreatening, noninsubordinate light and it is unlifelike and absurd to consider Jewett's conduct as insubordinate in the context developed by the record. The penalty imposed and Respondent's rush to exaggerate things so as to cast Jewett's involvement into a punishment-deserving mode lends further weight to the conclusion Respondent harbors a discriminatory motive. I find the General Counsel establishes a prima facie case that Respondent suspends Jewett because of his prounion sentiments and therefore Respondent has the burden of proving it would have suspended Jewett even aside from the employee's prounion sentiments and this, based on all the alleged unproven reasons advanced for the suspension, it does not do. Accordingly, I find Respondent discriminatorily suspends Jewett on September 8 because of his support for the Union, thereby violating Section 8(a)(3) and (1) of the Act.

L. *Respondent's Written Reprimand Against Brown on July 13*

Brown is subpoenaed to and attends a district court hearing instituted under Section 10(j) of the Act seeking injunctive relief against the conduct alleged in the complaint before me on July 12 but is not called to testify. The next day, Respondent enters a written reprimand in his file disciplining the employee because he left work without permission because he allegedly is released from the subpena beforehand and therefore there is no need, in Respondent's plant managers view for him to be present. (G.C. Exh. 21(b).) There is no clear or probative evidence before me that Brown is released from the subpena officially by the General Counsel, who subpenas him to the hearing, before Brown attends; in fact there is sworn and credited testimony by Brown to the contrary. Brown testifies that the General Counsel tells him to report at 9 a.m. on July 12 to the courthouse. Whether or not Brown secures Respondent's permission to attend is irrelevant as a matter of law, for the employee has the right to attend a Board hearing or otherwise participate in the various stages of the Board's processes. *Southern Foods*, 289 NLRB 152 (1988). This obviously includes a formal hearing in a United States district court addressing a petition by the Board's the General Counsel for injunctive relief against unfair labor practices then being addressed under Board processes. Brown absented himself from work to attend the hearing briefly in the morning at 8:50 a.m. walked 10 minutes to the courthouse and back later the same morning immediately on the conclusion in the hearing, and resumes working by 10:58 a.m. It is at least reasonable to conclude that Frederick, considered by an executive, Jerry Askew, at the warehouse to be in charge over Brown, because MacLauchlan so informs him, I find, and to be Brown's immediate supervisor who works with Brown that morning—the two being the only ones dumping dead paint—knows about Brown leaving and returning to work and makes no objection to Brown's departure and on the employee's return makes no supported mention of what transpired. Moreover, Respondent knows that the reason for Brown's departure is a subpoena by the General Counsel before it prepares the disciplinary reprimand. (G.C. Exh. 21(b).) In any event Brown also testifies that the General Counsel assures him beforehand that the Company is informed Brown will be a witness at the July 12 hearing. Isolated and undeniably treated as a prisoner-like outcast at the warehouse where he works at a dull job as a penalty for his union activity Brown is very much noticed at the courthouse by Respondent and urgently requires a respondent written reprimand to his file because he walked to the hearing concerning the illegal treatment meted out to him and his fellow employees, since he did not get what Respondent considers official authorization under its rules.

As quoted in *Southern Foods*, supra at 155:

> The issue here is, however, exactly that of *Walt Disney World Co*., 216 NLRB 836, 837–839 (1975). The following extensive quotation expresses the law on point in full, and is on all fours with the matter herein:
>
> > The Act and the Rules and Regulations of the Board clearly provide that a person served with a subpena is required to appear and to give testimony pursuant to the subpena . . . . A respondent employ-

> er's ''obligation with respect to subpoenaed employee witnesses is one of noninterference, nonrestraint and noncoercion as to such employees' right and obligation to attend scheduled hearings as subpoenaed witnesses, and one of nonreprisal to such employees because they are subpoenaed witnesses.'' ''Once an employee has been subpoenaed,'' the Supreme Court has said, ''he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified.''
>
> Respondent contends that it disciplined Davis and Winkler not because of their attendance at the NLRB hearing or for responding to an NLRB subpena, but because they violated established and recognized company rules concerning the proper procedures for seeking an authorized leave of absence. But Respondent's rules of procedure cannot limit or restrict an individual's obligation to respond to a Board subpena.
>
> . . . .
>
> As this conduct had the tendency to deprive the employees of vindication by the Board of their statutory rights, it violated Section 8(a)(1) of the Act. Moreover, as Respondent's disciplinary action against Winkler and Davis tended to restrain them and other employees from participating in Board proceedings, we find that by such conduct Respondent also violated Section 8(a)(4) of the Act.

The United States Court of Appeals for the First Circuit recently addressed the ambit of protection provided for employees by Section 8(a)(4). The decision notes:

> ''Section 8(a)(4) should be read broadly in favor of the employee,'' *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), *NLRB v. Globe Manufacturing Co*., 580 F.2d 18, 20 (1st Cir. 1978), and the Board's reading, if permissible, is entitled to substantial deference. *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–67 (1974).
>
> *Scrivener*, held that § 8(a)(4) protected employees who gave sworn statements to a Board field examiner investigating an unfair labor practice charge filed against their employer, although they had neither personally ''filed charges'' nor literally ''given testimony.'' 405 U.S. 117, 121. The Court found this liberal approach justified by the congressional purpose to allow ''all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board,'' id. at 121 [citation omitted], and ''to protect the integrity of all investigative stages of Board proceedings and an employee's participation in them, regardless of whether it falls somewhere between an actual filing and formal testifying. Id. at 122–124.'' *National Surface Cleaning, Inc. v. NLRB*, ____ F.3d ____, 149 LRRM 2407 (C.A. 1, May 15, 1995).

Clearly, this freedom from coercion against reporting information about unfair labor practices to the Board extends to reporting such information to a United States district court proceeding instituted as part of the Board's proceedings.

I find that Respondent's written reprimand of Brown on July 13 because he attended the hearing violates Section 8(a)(1) and (4) of the Act, as it tends to deprive employees of vindication by the Board of their statutory rights and to restrain Brown and others from participating in Board proceedings.

M. *Brown's 3-Day Suspension on September 12*

Respondent continues remarkably vigilant attention to Brown's conduct, suspending the employee 3 days on September 12 for displaying a prounion sign on his forklift at the plant—where he rests an elbow on the cardboard placard as he drives the lift, the sign saying vote yes for better wages, retirement, and health benefits. The record shows however, that Respondent's treatment of another employee Edward Hisle who displays a sign on his lift while driving around his work area, the sign saying neither the Company nor the Union is right, only God is, is merely told to take down the sign; no official investigation is undertaken, no pointed interviews with top management grilling the employee are conducted, no reprimands oral or written are conveyed, and no discipline at all is taken against the employee though the conduct is nearly identical.

The unlawful reprisals taken against Brown because of his support for the Union are already established by the time the September 12 suspension—action taken rarely for only the most serious of reasons including assault for example by the Company—is imposed on him. The employees' union activity is known to Respondent throughout the period of the employees' organizing efforts, both by letters to Respondent naming Brown and Robey as members on the employees' organizing committee, and by admission as well. Thus, Nagy tells Robey February 2 that when leadman Randy (Schirtzinger) tells him something that Fred (Nagy) told him, its as if Fred told him himself. Strengthening the point further is the written warning issued to Robey (G.C. Exh. 7) which states, ''Glenn was instructed that a task assigned by the Leadman is the same as if a supervisor had assigned the task.'' While there is insufficient proof to support the complaint allegation that Schirtzinger is a supervisor within the meaning of the Act, I find that he is invested with sufficient authority to represent the Respondent before employees so as to constitute an agent. *Great American Products*, 312 NLRB 962, 963 (1993).

As the Board notes:

> Although the record does not sufficiently establish that Frias is a statutory supervisor, the record does show that Frias acted as an agent of the Respondent and that his acts are therefore attributable to the Respondent. The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp*., 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees ''would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management.''

> *Waterbed World*, 286 NLRB 425 (1987) [citations omitted]. As stated in Section 2(13), when making the agency determination, ''the question of whether the specific acts performed were actually authorized or subsequently ratified should not be controlling.''

Employee Robey is told that when leadman Schirtzinger tells him something its the same as if Production Superintendent Nagy told Robey himself. On the written warning (G.C. Exh. 7) Robey is instructed further that a task assigned by the leadman is the same as if a supervisor assigned the task. Schirtzinger's disclosure to employee Chafin that Respondent knows Robey and Brown are union organizers discussed below is consistent with other proof establishing Respondent's knowledge. Employee Chafin testifies that on February 12 Schirtzinger tells him at work he would not believe what Schirtzinger learned—that Foreman Jim McGiver tells him his boys, Larry Brown and Glenn Robey, was the union organizer. (Sic.) This constitutes a further confirmation that Respondent knows about Brown's activities. Further, Respondent's animus against such employee conduct is heavily documented. The disparate harsh treatment accorded union activist Brown in contrast to Respondent's closing its eyes to Hisle's like conduct strongly manifests discriminatory treatment against Brown due to his prounion efforts. The General Counsel establishes a prima facie case of unlawful discrimination. Under the authority noted above, Respondent then has the burden of proving it would have suspended Brown aside from his protected union conduct and this it does not do. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Brown on September 12.

Conclusions of Law

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

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

3. Leadman Randy Schirtzinger here found to be an agent of Respondent as defined by Section 2(13) in the Act is not a supervisor as defined by the Act.

4. By creating the impression that employees' activities on behalf of the Union are under surveillance, threatening employees with unspecified reprisals if they support the Union, threatening employees with a reduction in their employment benefits if they select a union to represent them, prohibiting employee discussions about wages, prohibiting discussion with an employee who supports the Union, discouraging employees' attendance at a union meeting by scheduling overtime, and by engaging in surveillance of employees' activities on behalf of the Union, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By discriminatorily suspending Cecil Jewett thereby discouraging membership in the Union, Respondent violated Section 8(a)(3) of the Act.

6. By three times discriminatorily warning Glenn Robey and discharging him on February 25, Respondent in each instance violated Section 8(a)(3) of the Act.

7. By discriminatorily transferring, warning, and suspending Larry Brown, Respondent in each instance violated Section 8(a)(3) of the Act.

8. By discriminatorily reprimanding Larry Brown on July 13, Respondent violated Section 8(a)(4) of the Act.

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

The Remedy

The order requires certain affirmative action to effectuate the purposes of the Act, including the requirement that Respondent make Cecil Jewett and Larry Brown whole for losses resulting from their unlawful suspensions, plus interest as set forth by the Board in *Ogle Protection Service*, 183 NLRB 682 (1970). It also includes an order that Respondent immediately offer Glenn Robey immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and benefits that he may have suffered from the time of the termination to the date of Respondent's offer of reinstatement. The Respondent will also be ordered to remove from its records any reference to the unlawful warnings and discharge of Robey, the suspensions of Jewett and Brown, and the warnings against employees hereinabove found unlawful. Further, Respondent is required to rescind the unlawful transfer of Brown, return him to his former position in the plant, and make him whole for any loss of earnings and benefits which he may have incurred as a result of the transfer. Respondent is ordered to inform Robey, Jewett, and Brown in writing of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] The Company shall be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due.

The record demonstrates that Respondent harbors a broadly encompassing disregard for employee rights accorded them by Federal law. Respondent's settled deep animus leaves the clear impression that an order limited to only enjoining a repetition of the enumerated offenses against employees in this case which constitute a virtual fusillade of coercive conduct threatening, punishing, and hamstringing employees from engaging in protected union and concerted activities, does not suffice to provide employees a satisfactory guarantee of their rights in the future. Because the militantly conducted attacks on employees' protected activities here ''demonstrates a general disregard for employees' fundamental statutory rights,'' I recommend a broad cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[2] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment of 26 U.S.C. § 6621.