

McCarty Foods, Inc. and United Food and Commercial Workers Union, Local 1529. Case 26-CA-16186 and 26-CA-16214

May 17, 1996

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On February 24, 1995, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief. On June 1, 1995, the National Labor Relations Board issued an unpublished Order remanding the proceeding to the judge for further findings, including credibility resolutions, and a more explicit analysis. On August 21, 1995, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

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

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

In its exceptions, the Respondent contends, inter alia, that the judge misconstrued the dates and circumstances of its warnings to employee Cedric Davis for "harassing" other employees. It further argues that its actions in this regard were lawful. We disagree. The judge found that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing a written warning to employee Cedric Davis for "harassing" other employees to sign union authorization cards and by threatening to discharge Davis if he continued to "harass" employees. As the judge found, the Respondent warned and threatened Davis because of protected union activities. Testimony regarding the Respondent's discussions with Davis concerning his supposed "harassment" of other employees is somewhat confusing. Nevertheless, the record supports, as the Respondent submits, that the first of these discussions occurred on April 21, 1994.³ At that

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²We will modify the judge's recommended Order in the supplemental decision in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³All dates hereafter refer to 1994.

time, Davis was issued a written warning, as discussed above, which the Respondent contends was for "harassing" other employees.⁴ The warning was, as described in the judge's decision, based on the complaint of another employee that Davis had asked her to sign a union authorization card and then started explaining to her why the employees needed a union after she told Davis that she did not want to sign a card. Subsequently, about April 28 (in a discussion the judge placed on April 21), Personnel Director Kathy Lankford informed Davis that he would be discharged if he continued to interfere with other employees. The Respondent did not explain the circumstances that precipitated the April 28 discussion other than saying that another complaint had been received that Davis was "harassing" employees.⁵ Regardless of the exact dates of these discussions and the individual supervisors and management personnel involved in them, the record amply supports the judge's conclusion that Davis' alleged "harassment" of fellow employees was protected union activity.⁶ Further, as the judge found, these events strongly support the General Counsel's prima facie case that the Respondent's actions directed at Davis (i.e., the April 22 suspension and April 25 warning purportedly for an incident that occurred on April 22; the May 23 warning purportedly for paperwork that was missing for a delivery received on May 18; and the June 1 discharge) were imposed for unlawful reasons.

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, McCarty Foods, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴According to the Respondent, Personnel Director Kathy Lankford instructed Employment Manager Teresa Key to issue a warning to Davis about harassing employees. The warning stated that "[t]he personnel department has received several complaints about Cedric Davis interfering with employees' rights. This is a violation of work rule #4 under job conduct (interfering with another employees' rights) and will not be tolerated. Cedric must follow his work detail. Any further violation of work rules will lead to additional disciplinary measures which could include discharge."

⁵The General Counsel introduced a statement from Davis' personnel file, dated April 28, signed by one of Respondent's supervisors. According to the statement, an employee had informed the supervisor, on March 27, that Davis had approached him on two occasions regarding the Union.

⁶The Respondent used the terms "harassing" and "interfering with employees' rights" to justify warning and threatening Davis for "subjective offensive activity" without regard to whether or not the activity was protected by the Act. See, *Almet Inc.*, 305 NLRB 626, 628 (1991), affd. 987 F.2d 445 (7th Cir. 1993); and *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988).

(a) Issuing warnings to employees or otherwise discriminating against them because of their union activities in support of union affiliation for purposes of collective-bargaining representation or otherwise engaging in protected concerted activities.

(b) Suspending or discharging any employee for activity protected by Section 7 of the Act.

(c) 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 Cedric Davis 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 Cedric Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's supplemental decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the warnings given between April 21 and May 23, 1994, the suspension of April 22, 1994, and the unlawful discharge of Cedric Davis on June 1, 1994, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge, suspension, and warnings will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at Jackson, Mississippi, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 26, 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 employ-

ees employed by the Respondent at any time since May 12 and June 3, 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.

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 issue warnings to employees or otherwise discriminate against them because of their activities in support of union affiliation for purposes of collective-bargaining representation or otherwise engaging in protected concerted activities.

WE WILL NOT suspend or discharge any employee for 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 the Board's Order, offer Cedric Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the warnings given between April 21 and May 23, 1994, the suspension of April 22, 1994, and the unlawful discharge of Cedric Davis, and WE WILL, within 3 days thereafter, notify him in writing that this has been

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."

done and that the discharge, suspension, and warnings will not be used against him in any way.

MCCARTY FOODS, INC.

Jack L. Berger, Esq., for the General Counsel.

Andrew C. Partee, Esq., of New Orleans, Louisiana, for the Respondent.

Roger K. Doolittle, Esq., of Jackson, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Jackson, Mississippi, on December 1 and 2, 1994. Subsequent to an extension in the filing date, briefs were filed by all parties. These consolidated proceedings are based on charges filed May 12 and June 3, 1994,¹ respectively, by United Food and Commercial Workers Union, Local 1529. The Regional Director's complaint, dated July 8, 1994, alleges that Respondent McCarty Foods, Inc., of Jackson, Mississippi, violated Section 8(a)(1) and (3) of the National Labor Relations Act, by threatening an employee with discharge and by issuing warnings, suspending, and discharging him because of his protected concerted activity on behalf of the Charging Party Union.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in processing frozen poultry products. It annually ships goods valued in excess of \$50,000 from its Jackson, Mississippi location to points outside Mississippi and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Mississippi. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent began production at its new Jackson, Mississippi facility, located near Interstate 55, in 1981 and currently has approximately 625 to 650 employees on its two-shift operation. The Union or its predecessor, the Amalgamated Meatcutters Union, has unsuccessfully attempted to organize this facility for over a decade (Tr. 115). There has never been a union and no petition has been filed, nor has an NLRB election ever been held, at this facility.

Donald Flynt is the director of materials management for this facility (as well as a second plant in nearby Warren County) and, as pertinent, is the supervisor of Materials Superintendent Bill Anderson, who, in turn, is over Line Supervisor Debra Bell. Employees Cedric Davis and Kenneth

Weathers were both second-shift employees who generally worked as forklift operators in the "box room" for ingredients and Packaging Supervisor Bell. Kathy Lenkford is the facilities personnel director and Teresa Key is an employment manager in Lenkford's department.

The most current union organizing campaign at the Interstate 55 location began in January or February of 1994. Cedric Davis was the leading advocate for the Union in its current campaign and passed out and obtained between 125 and 150 union authorization cards. Additionally, Davis was the only rank-and-file person to address the union meeting held for employees of Respondent. Davis also handbilled the plant and was recognized by all upper management as being active on behalf of the Union. On January 21, Davis received an informal, verbal warning from Bell for taking the wrong product labels to the production line. On April 21 (after McCarty management knew of his union activities), Davis was given a formal warning for interfering with other employees. This formal warning, however, was not considered as a basis for his subsequent discharge. On April 22, Davis received a formal warning, ultimately dated April 25, "for poor job performance and insubordination." On May 23, Davis received another warning for an incident that had occurred on May 18, 1994, concerning missing paperwork. On June 1, Davis was terminated for unsatisfactory and careless job performance for allegedly failing to label certain pallets, and because he was said by Lenkford to be at the fourth step of the Company's progressive discipline program, which calls for discharge.

The Respondent's "Orientation Handbook for Wage Employees" contained the following provision:

Solicitation Policy

McCarty Farms has a solicitation policy that protects employees from unnecessary solicitation. Employees should not be bothered or needlessly embarrassed by personal solicitation. For this purpose, work time is the time to perform assigned tasks. Any exception to this rule must be approved by the Personnel Director.

And the Respondent has referred to this policy as the basis for reprimanding Davis for "harassing" other employees about signing union authorization cards.

The handbook also lists:

Counseling and Discipline

Disciplinary action will normally follow the sequence listed below. However, certain offenses may be cause for immediate suspension or dismissal.

1. Informal Warning. This is an oral warning.
2. Formal Warning. This is a written, unfavorable report which becomes a part of the employees record.
3. Second Formal Warning or Suspension. Suspension is a disciplinary lay-off without pay.
4. Discharge. After an employee receives any combination of two (2) formal warnings or suspensions within a twelve (12) month period, he/she may be discharged for the next occurring rule violation within the same twelve-month period.

¹ All following dates will be in 1994 unless otherwise indicated.

III. DISCUSSION

The Alleged Threat

In early April, Davis was called to Lenkford's office and in the presence of Anderson, Bell, and Key told him she was getting complaints about him "harassing" people about signing union cards. Davis explained he was doing it on his own time, but on April 21 Davis was again called to Lenkford's office, and I specifically credit Davis' testimony that she said:

I am still getting complaints that you are harassing people to sign Union cards, this is your final warning or we will terminate you.

Lenkford offered no details of what Davis' alleged harassment was and told Davis that Teresa Key would call him. Later that same day, Bell took Davis from his work to Key's office where Davis was given a formal warning for interfering with other employees' rights.

Lenkford testified merely that "it was reported to me that he harassed an employee" and she then told Key that he needed to be written up. Lenkford also testified that a supervisor had told her that an employee was "upset" and became "angry" because Davis had "tried to get her to sign an Union card" and she told him that "she didn't want to." Lenkford also said she was told the location of this event was while the employee "was out of the plant," away from his work station and near the box room where Davis is often located.

Although Key denied that she used the term "suspended," or that Davis was suspended, Respondent's handbook rules state: "Suspension is a disciplinary lay-off without pay," and Davis was not paid for Friday and Saturday, which would have been a workday for him. Key also confirmed that company policy required that an employee is supposed to be told to do something a second time to make sure he heard correctly and a third time to reinforce that it can result in disciplinary measures before someone is charged with insubordination for "refusal" to perform and she admits that Flynt said he asked Davis only once.

Under these circumstances, I am not persuaded that the Respondent's stated reasons for the majority of Davis' written warnings are supported by persuasive, credible evidence. The alleged offense of dropping \$9.20 worth of boxes was escalated into a \$92 cost to the company and insubordination. This resulted in suspension and loss of pay for a day and a half plus the warning and it was based on the say so of the facilities highest official who said he wanted Davis out of there "whatever it takes." This action also is not comparable with the discharges of others for more serious losses. An incident of one missing invoice was blamed on Davis and despite an investigation that at the very least showed ambiguous circumstances, the fault was not attributed to the person behind the desk where the paper had gone (although the Respondent thereafter changed the procedures for handling this paperwork), but discipline was assessed to Davis even though other copies became routinely available and the only problem was a temporary incorrect inventory count (that would have placed them out of compliance with the American Institute of Baking rules).

The series of warnings occurred in a short time when the facilities personnel director had illegally warned Davis about his union solicitation activities and the facilities highest ranking official has expressed a desire to get him out of there "whatever it takes." Finally, the Respondent seized on a minor mixup that resulted in part of an inbound shipment being unlabeled with the Respondent's code, and it immediately called Davis, not to investigate, but to give him his termination notice and escort him out of the plant.

Here the Respondent has not overcome the strong prima facie showing by the General Counsel and I conclude that the Respondent otherwise has failed to show that Davis would have been discharged under these circumstances absent his union activities. The General Counsel has met its overall burden of proof and I further conclude that Respondent's warnings, suspension, and discharge of this employee is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

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. By giving disciplinary warnings to Cedric Davis between April 21 and June 1, 1994, suspending him, on April 18, 1994, and discharging him on June 1 1994, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below that is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate Cedric Davis to his former job or a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),² and that Respondent expunge from its files any reference to the discharge and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

²Under *New Horizons*, interest is computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, McCarty Foods, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to employees or otherwise discriminating against them because of their union activities in support of union affiliation for purposes of collective-bargaining representation or otherwise engaging in protected concerted activities.

(b) Suspending or discharging any employee for activity protected by Section 7 of the Act.

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

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

(a) Offer Cedric Davis 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, and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section of the decision.

(b) Remove from its files any reference to the warnings given between April 21 and June 21, 1994, the suspension of April 18, 1994, and the discharge of Cedric Davis on June 1, 1994, and notify him in writing that this has been done and that evidence of the unlawful discharge, suspension, and warnings will not be used against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(d) Post at its Jackson, Mississippi facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 26, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

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 issue warnings to employees or otherwise discriminate against them because of their activities in support of union affiliation for purposes of collective-bargaining representation or otherwise engaging in protected concerted activities.

WE WILL NOT suspend or discharge any employee for 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 offer Cedric Davis 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 and make him whole for the losses incurred as a result of the discrimination against him with interest.

WE WILL expunge from our files any reference to the warnings, suspension and discharge of Cedric Davis and notify him in writing that this has been done and that evidence of the unlawful discharge, suspension, and warnings will not be used as a basis for future personnel actions against him.

MCCARTY FOODS, INC.

Jack L. Berger, Esq., for the General Counsel.

Andrew C. Partee, Esq., of New Orleans, Louisiana, for the Respondent.

Roger K. Doolittle, Esq., of Jackson, Mississippi, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Jackson, Mississippi, on December 1 and 2, 1994. Subsequent to an extension in the filing date, briefs were filed by all parties. These consolidated proceedings are based on charges filed May 12 and June 3, 1994,¹

¹ All following dates will be in 1994 unless otherwise indicated.

respectively, by United Food and Commercial Workers Union, Local 1529. The Regional Director's complaint, dated July 8, 1994, alleges that Respondent McCarty Foods, Inc., of Jackson, Mississippi, violated Section 8(a)(1) and (3) of the National Labor Relations Act, by threatening an employee with discharge and by issuing warnings, suspending, and discharging him because of his protected concerted activity on behalf of the Charging Party Union.

A decision was issued on February 24, 1995, the Respondent filed exceptions and on June 1, 1995, the Board issued an Order in this proceeding remanding the proceeding to me for a Supplemental Decision. A review of the decision dated February 24, 1995, shows that two full pages (after p. 3), which contained the conclusion to part III,A (the alleged threat), of the "Discussion" and the first several paragraphs of part B, the 8(a)(3) violations), were accidentally deleted or omitted, however, the subsequent pages were automatically numbered in sequence. Inasmuch as no draft or base of the missing page could be found, the parties were provided the opportunity to file supplemental briefs in response to the Board's Order and such briefs were filed by all parties on July 31, 1995. This supplemental decision will address the Board's Order by utilization of the prior decision with certain additions or corrections and a reconstruction of the material accidentally omitted from that document.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in processing frozen poultry products. It annually ships goods valued in excess of \$50,000 from its Jackson, Mississippi location to points outside Mississippi and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Mississippi. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent began production at its new Jackson, Mississippi facility, located near Interstate 35, in 1981 and currently has approximately 625 to 650 employees on its two-shift operation. The Union or its predecessor, the Amalgamated Meatcutters Union, has unsuccessfully attempted to organize this facility for over a decade. There has never been a union and no petition has been filed, nor has an NLRB election ever been held at this facility.

Donald Flynt is the director of materials management for this facility (as well as a second plant in nearby Warren County) and, as pertinent, is the supervisor of materials, Superintendent Bill Anderson, who, in turn, is over Line Supervisor Debra Bell. Employees Cedric Davis and Kenneth Weathers were both second-shift employees who generally worked as forklift operators in the "box room" for Supervisor Bell. Kathy Lenkford is the facilities personnel director and Teresa Key is an employment manager in Lenkford's department.

The most current union organizing campaign at the Interstate 55 location began in January or February 1994. Cedric Davis was the leading advocate for the Union in its current campaign and passed out and obtained between 125 and 150 union authorization cards. Additionally, Davis was the only rank-and-file person to address the union meeting held for employees of Respondent. Davis also handbilled the plant and was recognized by all upper management as being active on behalf of the Union. On January 21, Davis received an informal, verbal warning from Bell for taking the wrong product labels to the production line. Near the end of March Lenkford called Davis to her office and orally warned him that she was getting complaints that he was harassing people for signing union cards. On April 21, Davis was given a formal warning for interfering with other employees. This formal warning, however, was not considered as a basis for his subsequent discharge. On April 22, Davis was sent home and received a formal warning, dated April 25, "for poor job performance and insubordination." On May 23, Davis received another warning for an incident that had occurred on May 18, 1994, concerning missing paperwork. On June 1, Davis was terminated for unsatisfactory and careless job performance for alleged failing to label certain pallets, and because he was said by Lenkford to be at the fourth step of the Company's progressive discipline program, which calls for discharge.

The Respondent's "Orientation Handbook for Wage Employees" contained the following provision:

Job Conduct 4.

Intimidation or interfering with another employees rights.

Working Responsibly 6.

Solicitation during work or at a time when it interferes with another employee's work.

Solicitation Policy

McCarty Farms has a solicitation policy that protects employees from unnecessary solicitation. Employees should not be bothered or needlessly embarrassed by personal solicitation. For this purpose, work time is the time to perform assigned tasks. Any exception to this rule must be approved by the Personnel Director.

The Respondent specifically referred to the policy under "Job Conduct" as the basis for reprimanding Davis for "harassing" other employees about signing union authorization cards.

The handbook also lists:

Counseling and Discipline

Disciplinary action will normally follow the sequence listed below. However, certain offenses may be cause for immediate suspension or dismissal.

1. Informal Warning. This is an oral warning.
2. Formal Warning. This is a written, unfavorable report which becomes a part of the employees record.
3. Second Formal Warning or Suspension. Suspension is a disciplinary lay-off without pay.

4. Discharge. After an employee receives any combination of two (2) formal warnings or suspensions within a twelve (12) month period, he/she may be discharged for the next occurring rule violation within the same twelve-month period.

III. DISCUSSION

A. *The Alleged Threat*

In late March or early April, Davis was called to Lenkford's office and in the presence of Anderson, Bell, and Key Lenkford told him she was getting complaints about him "harassing" people about signing union cards. Davis explained that he was doing it on break, on his own time, but on April 21 Davis was again called to Lenkford's office, and I specifically credit Davis' testimony that she said:

I am still getting complaints that you are harassing people to sign Union cards, this is your final warning or we will terminate you.

Key confirmed this when she testified that Lenkford: . . . told Cedric that we had received another complaint about him harrassing employees, and that his type of conduct would have to end.

Key did not testify in a very clear manner, however, she agreed that Davis defended himself by saying that he only got people to sign cards on his breaktime and that he was told a further violation of the rules about harassing employees could result in discharge.

Lenkford testified she told Key to issue a write up and that Key knew (without being told) what needed to be included. She also said that when the company receives a complaint from an employee "about another employee harassing them, we investigate and the person would be written up for harassment." Lenkford also said she was told by the complainant that she puts things in a little room that is next to where she works during the day, that the little room is next to the box room where Davis is located and has no wall separating it from the box room. She said she was upset because Davis has come over some boxes and asked her about signing a union card and then started explaining why they needed a union when she said she didn't want to. Lenkford agreed that his writeup was for harassing employees about signing union cards and that she didn't want a warning for this reason to be considered as one of the cumulative warnings that would justify a discharge. Otherwise, however, both she and Key failed to describe any investigation that might have occurred.

Here, I conclude that no actual investigation was made. Lenkford merely took the complaint and called Davis in and communicated the warning without questioning the possible ambiguities in the complainant's statements, or getting Davis' side of the story and without evaluating Davis' rights.

Davis asserted that he knew that he could only solicit card signatures during his breaks and here the complainants statement implies that she was away from her workstation in an adjacent room where she "puts things." It would appear that these "things" were personal, not work related but this was not questioned. There was no investigation or objective determination of why one simple request for union support accompanied by a brief explanation should be considered to be harassment and, moreover there is nothing in the Respond-

ent's rules about harassment, per se. The rules, however, have a common theme i.e., "should not be bothered or needlessly embarrassed by personal solicitation (Solicitation Policy), no solicitation—when it interferes with another persons work" (Rule 6, Working Responsibility), and intimidation or interfering with another employee's rights (Rule 4, Job Conduct) the rule Davis is said to have violated.

It appears that Lenkford belatedly realized she had not properly handled this incident when she declined to use the warning that resulted as part of the progressive disciplinary pattern. Otherwise it appears that Lenkford herself had violated company rules by intimidating Davis with a warning and by interfering with his rights to solicit authorization cards, rights otherwise codified under Section 7 of the Act.

Here, the record shows that the Respondent made no responsible or objective investigation, an investigation that would have likely shown that no intimidation or interference occurred. Instead the Respondent chose to follow up on Lenkford's prior verbal warning along the same line and to leap to the exaggerated conclusion that Davis' conduct was harassment. It made no attempt to recognize Davis' personal rights or his Section 7 rights to solicit authorization cards.

Although an employee can lose the protection of the Act by engaging his own extreme conduct, the Respondent can not merely use the term "harassment" and expect to abrogate Davis' rights. Davis' personality and demeanor at the hearing did not display intimidating or threatening characteristics and the mere asking about signing a card together with a brief explanation is not harassment (the lady who precipitated the warning of April 21 is not the same person who generated the first warning). The Respondent otherwise did not establish that any harassment occurred and the subjective claim that one person was "upset"² clearly is insufficient to show that Davis should be denied the protection of the Act.

Under these circumstances, I find that the Respondent warned Davis and threatened discharge for his engagement in protected activity, and that its claim that he was disciplined for harassment is pretextual.³ I further find that Respondent's conduct in this respect violated the employee's Section 7 rights and that it is shown to be unlawful and in violation of Section 8(a)(1) of the Act, as alleged.

B. *Additional Warnings, Suspension, and Discharge*

In a proceeding involving discharge, suspension and disciplinary warnings, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activity were a motivating factor in the employer's decision to discipline or terminate them. Here, the record shows that the Respondent was well aware of Davis' union activity and that it also engaged in certain unfair labor practices by threatening Davis with discharge for his involvement in solicitation of union authorization cards.

² A memo recounting the complaint made on April 21 was prepared by the Respondent for the employees signature and was signed April 21 and used the term "offended" rather than "upset."

³ The employee complaint that generated the initial warning was made on March 27, however, a memo describing the incident was not signed until April 28.

Under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to give him warnings and to terminate him for receiving a combination of four warnings. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

The Respondent contends that Davis' discharge was the result of its progressive disciplinary system and that it had a past practice of discharging employees with similar records. The General Counsel, however, contends that the warnings dated April 25 (and the related suspension), and May 23 were not legitimate but were issued because of his union activities.

Davis' first written warning issued on January 24, 1994, and was an informal/verbal warning for taking the wrong product bar code labels to the production line from the box room. This mistake was acknowledged by Davis, it occurred prior to his union activity and it was Davis' first infraction since he had been employed.

The next warning considered by Lenkford as counting in the progressive system was dated April 25 and related to an incident that began when Davis was moving a pallet of cartons containing klik-klak boxes from the production line to the box room. Klik-klak boxes are die-cut, flat-coated packages that measure 10 x 13 inches that are opened to hold packaged chicken parts or products. As Davis backed down a ramp, an overhead fan blew out 25-30 loose klik-klak packages onto the floor. Don Flynt, director of materials management, was near Davis and helped him pick up boxes and throw them away, after he first asked Davis what he was going to do with them. Davis told Flynt that the U.S.D.A. requires that they be thrown away. He testified that Flynt said nothing else to him and that he continued on to the box room without further incident.

Flynt, on the other hand, testified that 100-125 boxes had fallen on the floor and that he told Davis to secure the boxes that remained loose on top before moving his forklift. Flynt said he carried a few boxes to the garbage can and went to get a larger box for the loose boxes but when he returned Davis was gone and had left a trail of boxes on the floor all the way to the box room. He then got Production Manager Eddie Sanford who was near the ramp, telling him that he needed him as a witness. They went directly to the personnel office where he told Key what had happened, told her it was insubordination and told her that Davis needed to be terminated.

Key testified that Flynt told her about the boxes, said that he had told Davis to secure them and that when he came back had found a trail of boxes leading to the box room. Key said he acted upset and said, "this is insubordination, isn't it, [this] is discharge." After saying she was attempting to recall his exact words Key testified that Flynt then said: "[W]hatever it takes I want him out of here."

Key said she would investigate. She got a statement from Sanford and then called Davis and asked him why he did not

secure the boxes as Flynt asked. Davis told her that Flynt never said anything to him.

Key acknowledged that Flynt was her superior in management but that she was aware that under the Respondent's policy an employee must be asked three times to make sure they understand before they can be disciplined for insubordination. Her immediate supervisor, Lenkford, was not at work that day and as she had been instructed to wait until the next day if she was ever unsure about anything, she decided to wait for Lenkford to investigate further. She then instructed Davis to go home and to call Lenkford on Monday, April 25.

Davis testified that Key spoke about the fallen boxes, and that it cost the company money. Then after repeating her story several times, she said:

I will tell you what, I am going to suspend you the rest of Friday and Saturday and you call Kathy (Lenkford) Monday morning at 11.

Davis went home, then called as instructed and was told to go to her office. He did so and told her what had happened. Lenkford said she would investigate further. Thereafter, he was called to Key's office where he was given a warning and he again denied that Flynt had told him to secure the boxes.

Key testified she didn't specifically say Davis would be "suspended" for the rest of Friday and Saturday but she admitted that the plant was scheduled for work on Saturday, April 23. She also said she was instructed by Lenkford that just a writeup for performance and insubordination would be sufficient, that it wasn't a dischargeable offense.

Sanford gave Key a statement that said Davis came down a ramp (near where he was standing) and "lost several boxes that were lose." He then stepped around the corner and when he came back he saw Flynt helping Davis pick up boxes and talking to him. Later Flynt got Sanford and told him there was something he needed to see. The typed statement then notes that "there were 4 or 5 more boxes scattered from the freezer area to the boxroom," and that Flynt told him that he had told Davis to secure the boxes.

On direct examination by Respondent's counsel, Sanford said he was observing the shutdown of the first shift and first saw Flynt having a conversation. He was 30-40 feet away and could not hear any words but observed that they had boxes in their hands and that some boxes were on the floor. He went to his office and within 5 minutes was approached by Flynt to observe the area where Davis had been. He testified that he saw a box laying in four or five different places. On cross-examination he repeated that his only awareness of the incident was when he saw them picking up boxes, that he wasn't paying attention to that area before then, that he did not see the boxes fall or know how many fell (he said it would be hard to guess, probably half a case). Then when he was shown the statement, he recalled that he saw Davis on the ramp when the boxes came off.

The Respondent's statement of position to the Board asserts that the dropped boxes cost the Respondent \$92, based upon the estimate that he had dropped 100 klik-klak boxes at a cost of 9.2 cents per box. This, of course, actually amounts to only \$9.20.

The Respondent also introduced several disciplinary records of other employees including those of Donald Burns

who was terminated January 12, 1994, for an incident with a calculated loss to the Respondent of \$645.93; Frederick Gray, discharged March 28 (after prior paperwork counseling sessions), for paperwork errors costing Respondent \$826.20; and Kevin Hobbs, discharged February 28 after cumulative warnings including the dropping of boxed products with a cost to the Respondent of \$266.

Davis' next warning was issued May 25, when he was written up for an invoice that was missing. Davis told Supervisor Bell, that he had put the invoice on the desk where he normally did. At this time Will Turnbo, an employee on light duty work who does not ordinarily work in the department, was working at the desk where Davis put the invoice that subsequently turned up missing.

The Respondent contends that it was not part of Turnbo's duties to do the paper work for goods received, however, it was admitted by Bell that Turnbo had done inventory control sheets, and she was aware that Turnbo had been doing the paperwork at the desk when he was assigned there for light duty work. It was only after Davis was written for the missing paperwork that Anderson and Bell both informed Turnbo, Weathers, and Davis that Turnbo was not to do the invoices for trucks they were unloading. Davis was written up for missing paperwork on the Stone Container order for May 18, the very day that Turnbo was on the desk. Turnbo did not testify (it is asserted that he would not cooperate with the General Counsel in this investigation), but he did supply Respondent with a statement given to Kathy Lenkford regarding the events of May 18, on June 1. This information, however, was not given to Lenkford until 13 days after the event and 9 days after Davis was written up.

Davis' writeup also covered a Mississippi Plastic invoice of May 18 that was found on the floor by Weathers and replaced back on the desk. This invoice was not lost. There was no paperwork done on the Mississippi Plastic order and both Davis and Weathers testified that they had never done inventory control sheets on orders from Mississippi Plastics, only the invoices had to be signed.

As noted, Turnbo, who was on the desk doing paperwork, was not asked to give a statement on this matter until 9 days after the writeup and he was shown only a faxed copy of the Stone Container invoice of May 18 that had Davis' signature circled. Davis and Weathers were only shown the copy of the invoice that had Davis' name circled when Respondent had another copy without the signature circled on it. The existence of two documents led to some confusion when both Davis and Weathers testified that Davis had signed for the invoice in question and it had been put on the desk in Turnbo's hands. Weathers supported Davis in this matter and he was written up for the incident also. Weathers testified that Anderson told Weathers he was written up for this "because he got involved." The matter was complicated even more by the fact that Respondent received a second identical shipment from Stone Container on May 19, that was handled by Weathers.

On May 31, Davis and Weathers were working as a team and divided the work with Davis unloading and Weathers writing up the inventory control sheet. (However, when they worked alone unloading, the person alone was responsible for both duties). Weathers breaktime came and he left. Davis finished but failed to label the last pallets. Both employees were written up for this incident, Weathers for mislabeling

the boxes received and Davis for admittedly not labeling the boxes Weathers left undone before going on break.

On June 1 Davis was called to Lenkford's office where Anderson, Key, and Bell were already present, he was asked about the marking or labeling of the boxes then was asked to step out. He returned in 5 minutes and was told his work performance was poor and that they had to terminate him. He was asked if he needed to get anything from the box room and he said no. He put his hard hat on the desk, turned to see a security guard waiting at the door, and left.

Here, Flynt was aware of Davis' union involvement, and he was clearly annoyed at Davis. I find that his extraordinary effort to get Sanford as a witness and his effort to impress Sanford with a recitation of his alleged instructions about securing the boxes does not carry the ring of truthfulness. Davis on the other hand appeared to be inclined to admit his mistakes and under the circumstances I find Davis' description of their conversation to be more credible than Flynt's. Also, Davis has recently been warned by Lenkford and I find that it is highly improbable that Davis would defy the plant manager under those circumstances and I find that he truthfully testified that he did not hear any instructions from Flynt.

In any event, it is clear that Flynt did not make an effort to make sure that Davis heard and understood his asserted instructions and he did not repeat them or attempt to satisfy the Respondent's own requirements that a person be told three times before he can be held responsible for insubordination. Flynt and the Respondent then exaggerated the nature and cost of the incident and demanded Davis' termination for insubordination.

As pointed out by the Court in *Transportation Management Corp.*, supra:

[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity conduct.

Here, I am not persuaded that the Respondent has met its burden and I conclude that Davis would not have received warnings and a suspension for the two discussed incidents in the absence of his union activity.

Although the Respondent denies that Davis was "suspended" he was sent home near the start of his shift on Friday and missed his expected, scheduled Saturday work. Regardless of Respondent's terminology this sending home from work is the equivalent of suspension and, as discussed below, it was premised on Flynt's illegally motivated complaint and instructions and I find that the suspension violated the Act, as alleged.

Under all the involved circumstances, I am not persuaded that the Respondent's stated reasons for the majority of Davis' written warnings are supported by persuasive, credible evidence. The alleged offense of dropping \$9.20 worth of boxes was escalated into a \$92 cost to the Company and insubordination. This resulted in suspension and loss of pay plus the warning and it was based on the say so of the facilities highest official who said he wanted Davis out of there "whatever it takes." This action also is not comparable with the discharges of others for more serious losses. An incident of one missing invoice was blamed on Davis and, despite an

investigation that at the very least showed ambiguous circumstances, the fault was not attributed to the person behind the desk where the paper had gone (although the Respondent thereafter changed the procedures for handling this paperwork), but discipline was assessed to Davis even though other copies became routinely available and the only problem was a temporary incorrect inventory count (that would have placed them out of compliance with the American Institute of Baking rules).

The series of warnings occurred in a short time when the facilities personnel director had pretextually and illegally warned Davis about his union solicitation activities and the facilities highest ranking official has expressed a desire to get him out of there "whatever it takes." Finally, the Respondent seized on a minor mixup that resulted in part of an inbound shipment being unlabeled with the Respondent's code, and it immediately called Davis, not to investigate, but to give him his termination notice and escort him out of the plant.

Here the Respondent has not overcome the strong prima facie showing by the General Counsel and I conclude that the Respondent otherwise has failed to show that Davis would have been discharged under these circumstances absent his union activities. The General Counsel has met its overall burden of proof and I further conclude that Respondent's warnings, suspension, and discharge of this employee is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

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. By giving disciplinary warnings to Cedric Davis on April 21 and 25 and May 23, suspending him, on April 22,

1994, and discharging him on June 1, 1994, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below that is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate Cedric Davis to his former job or a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned during his suspension and from the date of the discharge to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),⁴ and that Respondent remove from its files any reference to the warnings, suspension, and discharge and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

⁴ Under *New Horizons*, interest is computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).