

Eaton Technologies, Inc., A Fasco Company and Region 1-C, International Union United Automobile, Aerospace and Agricultural Implement Workers of America (AFL-CIO). Case 7-CA-37714

January 10, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

The issue presented in this case is whether the Respondent violated Section 8(a)(1) and (3) of the Act by coercively questioning employees about their union activity, by threatening employees with retaliation because they engaged in protected activity, by discriminatorily removing and destroying union literature or otherwise disparately enforcing its bulletin board policy, and by placing an employee on involuntary leave status because of her union activities.¹

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Eaton Technologies, Inc., A Fasco Company, Eaton Rapids, Michigan, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Within 14 days from the date of this Order, offer Judith Greening full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.”

2. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

¹On August 26, 1996, Administrative Law Judge Judith Ann Dowd issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in answer to the Respondent's exceptions.

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

²The 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.

³We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Further, we have added a provision for the removal of files that the judge inadvertently omitted.

“(b) Make Judith Greening whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

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

3. Substitute the attached notice for that of the administrative law judge.

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 create the impression of surveillance of employees' union activities.

WE WILL NOT threaten employees that it would be futile to select the Union as a collective-bargaining representative.

WE WILL NOT threaten employees with loss of benefits for supporting the Union.

WE WILL NOT impliedly threaten employees with plant closure if they support the Union.

WE WILL NOT threaten that we will bargain from scratch if the employees choose to be represented by a union.

WE WILL NOT coercively question employees about their union support or activities.

WE WILL NOT remove and destroy union literature or otherwise disparately enforce our bulletin board policy.

WE WILL NOT place any employees on involuntary leave status or otherwise discriminate against them because they engaged in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

WE WILL make Judith Greening whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

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

EATON TECHNOLOGIES, INC., A FASCO
COMPANY

Richard F. Czubaj, Esq., for the General Counsel.
D. Michael Linihan, Esq. and *Terry L. Potter, Esq.*, of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Lansing, Michigan, on April 10, 1996. The charge was filed September 22, 1995, and an amended charge was filed on October 30, 1995, by Region 1-C, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (the Union).¹ On November 2, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint). The complaint alleges that Eaton Technologies, Inc., A Fasco Company (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating the impression that employees' union activities were under surveillance, by coercively interrogating its employees about their union activities and sympathies, by informing employees it would be futile for them to select the Union as their bargaining representative, by threatening employees with loss of benefits and plant closure if they selected the Union as their bargaining representative, and by threatening to bargain from scratch. The complaint alleges that the Respondent further violated Section 8(a)(1) of the Act by, about September 8, removing and disposing of union campaign literature from an employee bulletin board; by, at various times in August and September, removing union campaign literature from the employees' bulletin boards located in the cafeteria and near the timeclock; by, about mid-September, promulgating a rule prohibiting employees from posting any item on the bulletin boards which had previously been open to all employees; and by, about September 18, encasing the employees' bulletin boards in locked glass cases and promulgating a rule requiring that employees receive permission from the Respondent before posting anything on the bulletin boards. The com-

plaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, about August 24, placing employee Judy Greening on an involuntary workers' compensation leave of absence because she had assisted the Union and engaged in union activities. On November 13, the Respondent filed an answer denying the commission of any unfair labor practices.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Eaton Technologies, a corporation, manufactures and sells electric motors and controls for the automobile industry at its facility in Eaton Rapids, Michigan, where during a 12-month period ending September 30, 1995, it purchased and received goods and materials valued in excess of \$50,000 shipped from points outside of the State of Michigan. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer admits, and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent manufactures motors for the automobile industry, including antilock braking system motors, seat actuators, and electric starters. Respondent's Eaton Rapids facility consists of three plants located close to each other, one of which is attached to the Respondent's administrative headquarters. In August 1995, Respondent employed about 375 employees at its Eaton Rapids facility. In addition to Eaton Rapids, the Respondent has manufacturing facilities in Hillsdale, Michigan, Knapaknee, Indiana, and Parsons, Tennessee.

Respondent's officers include its president, Brian Ennis, and a vice president for operations, Steve Larkin. James D. Verville is Respondent's safety and environmental control manager. David Warfield is Respondent's first-shift plant supervisor and Don Dowding, Michael Kundy, and Joseph Brown are all supervisors. All of these individuals are supervisors within the meaning of Section 2(11) of the Act.²

B. *The Alleged Threats and Coercive Interrogation Addressed to Employee Judith Greening*

Beginning in June 1995, employee Judith Greening began meeting with representatives of the Union to discuss organizing the Eaton Rapids facility. Greening was employed as an assembler but she was assigned to a special "light duty" job because of work-related injuries she sustained in 1989. Greening's special job duties included moving throughout the plant collecting scrap metal and working in the cafeteria or-

¹ All dates hereafter are in 1995 unless otherwise indicated.

² The Respondent's counsel so stipulated during the course of the hearing.

dering supplies, keeping track of productivity statistics on a computer, repairing scrap, and performing some light cleaning. Sometime during the first part of August, Don Dowding, who was Greening's immediate supervisor, approached Greening in the cafeteria and said, "I understand that you're trying to organize a union." Greening asked him where he had heard about it and Dowding responded as follows:

Well, rumor has it that this is what you're trying to do and I think it's stupid and I don't think you should be doing this because . . . they aren't going to allow a union in there, they'll close the doors first, they will not negotiate, they'll take all your benefits, everything, away and start you down at square one . . . and you can jeopardize your job if you keep doing this. . . . You'll lose profit sharing . . . you're making a big mistake and . . . you're going to end up losing your job . . . this job that we've made available for you.

The general test applied to determine whether employer statements violated Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996). In weighing the likely impact of an alleged threat by an employer, the trier of the facts "must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Greening testified credibly concerning statements made to her by Dowding. Dowding is an admitted supervisor who was not called by the Respondent to testify. His statements are therefore uncontroverted. I find that Dowding made the statements imputed to him by Greening. I further find that Dowding's statements tended to coerce employees in the exercise of their Section 7 rights and that they violated Section 8(a)(1) of the Act, as alleged in paragraph 7 of the complaint. See *Flexsteel Industries*, 311 NLRB 257 (1993) (creating impression of surveillance); *Tube-Lok Products*, 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative); *Conagra, Inc.*, 248 NLRB 609, 615 (1980) (threatening employees with loss of benefits); *Stride Rite Corp.*, 228 NLRB 224, 230-231 (1977) (implied threats of plant closure if employees support a union); *TRW-United Greenfield Division*, 245 NLRB 1135, 1138 (1979) (threat that employer will bargain from scratch if employees vote for unionization); and *House Calls, Inc.*, 304 NLRB 311, 319 (1991) (coercive interrogation).

The Respondent, citing *Rossmore House*, 269 NLRB 1176 (1984), contends that Dowding was a friend of Greening, that he knew she was a union supporter, and that under these circumstances, his statements did not constitute an unlawful inquiry into Greening's union activities. In *Rossmore House*, the Board held that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." *Id.* at 1177. In evaluating whether

an interrogation violated the Act, the Board has considered such factors as "the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation," *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). There is no evidence showing that Greening was, at the time of her discussion with Dowding, an open union adherent. It does not appear from his remarks that Dowding knew with any certainty that Greening was a union supporter, he merely stated that he had heard a rumor that she was organizing a union. Dowding was Greening's supervisor and his interrogation of the employee took place during working hours, in the cafeteria, where Greening performed some of her job duties. The fact that an employee's supervisor approached the employee about union activities at the workplace, during working time, would lead a reasonable employee to infer that the inquiry was official and therefore add to the coercive effect. Dowding gave no reason for his inquiry and he offered no assurances that there would be no reprisals if Greening admitted to engaging in union activities. Accordingly, the finding of a coercive interrogation in this case comports with the Board's decision in *Rossmore House*.³

C. The Alleged Discriminatory Placement of Greening on Involuntary Workers' Compensation Leave

On August 23, Respondent's president, Brian Ennis, received a letter from the Union stating that it was conducting an organizational campaign at the Respondent's Eaton Rapids facility. On August 24, Ennis held a meeting of all of the employees to discuss the campaign. Following the meeting, Dowding called Greening into the office and said, "I don't know why I got elected to tell you this, but as of today, you're put off on comp." Greening asked, "[W]hy?" Dowding told her that another girl was coming over to do her job. Greening asked Dowding for paperwork documenting her leave status. Dowding left the office and said that he would get the paperwork for her. Greening followed Dowding out of his office and asked who had authorized the leave. Dowding told her that he could not divulge that information. Dowding entered the cafeteria and spoke briefly to Steve Larkin, Respondent's vice president for operations. Dowding then told Greening that she would have to speak to Jim Verville, Respondent's safety and environmental control manager.

Greening spoke to Verville either on the phone, or in his office, and asked him why she had been placed on leave. Verville, who was in charge of workers' compensation claims, told her that he knew nothing about it.⁴ Greening ap-

³ The fact that Greening may have had a friendly relationship with Dowding does not negate the coercive impact of his interrogation and threats. See *PPG Industries*, 251 NLRB 1146, 1155 (1980).

⁴ Greening testified that she spoke to Verville on the phone in the presence of Steve Larkin and Respondent's personnel administrator, Julie Compton. Respondent's witnesses denied that they had observed such a call. I find it unnecessary to resolve this conflict in the testimony, since it is undisputed that Greening spoke to Verville sometime that afternoon. Whether Greening spoke to Verville on the phone or in his office is an unessential detail. The important question is what was said by Greening and Verville. I credit Greening's testimony that when she talked to Verville he told her that he knew nothing about her layoff, over Verville's denial that he made that statement. I found Greening to be the more credible witness, as dis-

pealed to Larkin for help in obtaining documentation authorizing her leave, and in her presence, Larkin spoke to Verville on the phone and asked him about her paperwork. When the call concluded, Larkin told Greening that Verville did not know about any paperwork. Greening told Larkin that she would be ready to work the next day at her regular starting time and that she intended to keep working until she had paperwork authorizing her leave. Larkin initially said, "[O]h, no, you can't do that," but then agreed.

About 9 p.m. that evening, Verville called Greening at her home. During the course of the conversation, Greening asked Verville why he knew all about her leave now, when he knew nothing about it earlier in the day. Verville responded, "Well, Judy, don't ask me questions I don't know answers to."⁵ He also told her that it was not the Respondent who was putting her on leave but her own doctor. Greening said that she was working within her restrictions and doing fine. Greening told Verville that she was going to report to work until she had paperwork in her hand that stated that she was on leave. Verville agreed to have the paperwork waiting for her when her shift began the next morning at 4 a.m. Paperwork documenting her workers' compensation leave was waiting for Greening when she reported to work. Greening was kept on workers' compensation leave status until December 4.

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the burden of showing that protected conduct was a motivating factor in the employer's employment action. In order to meet this burden, the General Counsel must prove that the employee engaged in union activities, that the employer had knowledge of these activities, and that the employer undertook an adverse employment action against the employee because of animus towards the employee's union activities. As the Board has recently explained, the General Counsel's burden is one of persuasion and not merely production. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). If the General Counsel's case is established, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

There is no question that Greening was engaged in protected activity. The evidence unequivocally shows that she was an active member of the union organizing committee. Uncontradicted evidence further shows that Respondent's supervisor, Don Dowding, learned about Greening's organizing activities in early August. Dowding reacted to Greening's union activities by threatening her, inter alia, with plant clos-

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cussed in greater detail, infra, with respect to Verville's phone call to Greening that evening.

⁵ I credit Greening's testimony about her evening phone conversation with Verville. Greening testified about the phone call in a calm and assured manner. I find her testimony to be convincing and her memory good. I did not find Verville to be a credible witness. Verville claimed that he did not remember the specifics of what was said. However, he became visibly nervous and his manner became defensive when the General Counsel attempted to refresh his recollection in that regard. Verville finally acknowledged that some of the phone conversation "could have happened" as Greening testified.

ing, bargaining from scratch, and loss of her special "light duty" job. Dowding's knowledge of, and hostility toward, Greening's union activities is imputable to the Respondent. See *Pinkerton's Inc.*, 295 NLRB 538 (1989), and cases cited; *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).

Respondent contends that the decision to place Greening on workers' compensation leave was made solely by Respondent's president, Brian Ennis, and that Ennis had no knowledge of Greening's union activities at the time that he made that decision. I do not credit Ennis' claim of ignorance of Greening's union activities on August 24. Respondent's supervisor, Don Dowding, accused Greening of organizing the union movement in early August. As noted above, Dowding was not called to testify at the hearing. Moreover, there was no assertion by the Respondent that Dowding was no longer employed. Under the circumstances, I draw the adverse inference that had Dowding been called to testify, he would not have supported Ennis' claim that he learned about Greening's union activities sometime after her layoff. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987), and cases cited; *Appalachian Power Co.*, 253 NLRB 931, 933 (1980).

In addition to proving that Greening was a union activist and that the Respondent had knowledge of, and animus toward, her union activities, the General Counsel produced persuasive evidence that Greening's protected activities were a motivating factor in the Respondent's decision to place her on leave. The timing and circumstances surrounding Respondent's decision to put Greening on leave are highly suspect. Greening was placed on leave the day after Respondent received a letter from the Union announcing an organizational drive and the same day that Ennis held an employee meeting in response to the Union's notice.⁶ Immediately following the employee meeting, Dowding told Greening about the decision to place her on workers' compensation leave and refused to reveal the identity of the individual who had made the decision.

The haste with which Greening was removed from the plant raises further questions about the validity of the Respondent's actions. No paperwork documenting Greening's leave had been prepared in advance of her being informed about her change of status. Indeed, the credited evidence shows that James Verville, the manager in charge of workers' compensation claims, had no knowledge of the decision to place Greening on leave at the time that she was told about it. Greening reasonably insisted that she be given some written documentation before going on leave. Although Verville testified that no paperwork had been prepared because none was necessary, he nevertheless worked until after 9 p.m. to prepare documentation that Greening could pick up as soon as she reported for work. Respondent has offered no explanation for its insistence that Greening leave the plant immediately. Greening had not experienced any sudden worsening of her condition at the time of her layoff and she was performing her job duties without complaint. It appears that the Respondent wanted to keep Greening out of the plant to limit her contacts with other employees. Since a major portion of Greening's special job entailed moving throughout the plant collecting scrap metal, she enjoyed daily contact

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⁶ Greening testified without contradiction that the meeting was antiunion in character.

with her fellow employees. By keeping her out of the plant, the Respondent isolated Greening at the critical beginning of the union campaign and effectively prevented Greening from seeking the support of other employees in opposition to her enforced leave.

I find that the General Counsel met his burden of proving that Greening's union activities were a motivating factor in the Respondent's decision to place her on involuntary workers' compensation leave. The burden therefore shifted to the Respondent to prove that it would have taken the same action, even if the employee had not engaged in union activities. The Respondent contends that its decision to place Greening on involuntary workers' compensation leave was based solely on its concern that Greening's job was exacerbating her medical problems, for which the Respondent had full financial responsibility.

The evidence shows that Greening sustained on-the-job injuries in 1989 from a fall in Respondent's plant. Over the next few years, Greening was treated for ongoing pain and problems with the use of her arms by her personal physician, Dr. Gerhart Smith. At the time of her original injury, the Respondent was insured by AETNA, which paid all of Greening's medical bills. On March 21, 1995, Greening consulted Dr. Smith about increasing pain in her left hand and recurrent numbness in her right hand. Dr. Smith diagnosed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and an ulnar cyst in the right hand, which he had not previously observed. Dr. Smith recommended further testing and that Greening "work with a wrist splint and avoid any repetitive motion of the hand and wrist." The bills for Greening's 1995 medical expenses were submitted to AETNA, which refused to pay for Greening's medical tests, claiming that her current complaint was not attributable to her old injury.

Respondent's president, Ennis, had a particular interest in workers' compensation cases because the Respondent had been incurring higher than average compensation costs over the last few years. Moreover, the Respondent's current insurance carrier, CIGNA, was merely the administrator of Respondent's plan and financial responsibility for workers' compensation claims rested with the Respondent. On August 11, Ennis and Verville met with representatives of CIGNA who told them that for the first time that CIGNA had accepted liability for Greening's 1995 claims. Following the meeting, Ennis instructed Verville to give him a copy of Greening's current medical restrictions.

Verville testified that when he checked Greening's workers' compensation file he found that the last report of medical restrictions was dated in 1994. Verville further testified that he immediately requested current restrictions from Dr. Smith, but that they were not received by Respondent until August 24. Verville and Ennis both claimed that it was the receipt of Dr. Smith's March 21 restrictions, which they assert were more limiting than any previous restrictions, coupled with the recognition that the Respondent was financially responsible for Greening's medical bills, that precipitated the Respondent's decision to place Greening on leave. I discredit this testimony by Verville and Ennis for the following reasons:

The evidence shows that CIGNA has been the Respondent's insurance carrier since 1992. The possibility that the Respondent might be financially responsible for Greening's

or any other employee's workers' compensation claim would therefore not have been totally unforeseen by 1995. The evidence further shows that the Respondent was aware that AETNA was contesting its financial liability for Greening's current medical bills months before the layoff decision was made. Respondent admittedly was sent a notice of a mediation hearing of the dispute before the state Bureau of Workers' Disability Compensation in June 1995. Verville acknowledged that he discussed the case with CIGNA representatives at that time. Since AETNA was disputing its financial responsibility for Greening's 1995 medical treatment and, if AETNA was not liable the Respondent was, I find it incredible that Verville would not have checked at the time to make sure that he had Greening's up-to-date medical information in his files. The General Counsel introduced into evidence copies of Dr. Smith's 1995 restrictions, including his March 21 report, and Greening credibly testified that she submitted her 1995 restrictions to the Respondent in the same manner that she had submitted her previous medical reports. Verville also acknowledged that the Respondent would have been sent a copy of a medical report from a workers' compensation physician who examined Greening on August 3, in conjunction with the insurance dispute. Verville's only explanation for current medical information being missing from Greening's file was that the reports may have mistakenly been filed in another employee's records. I find it difficult to believe that Greening's 1995 medical records were missing from her file and that, if so, Verville was unaware of it until August 11. This is particularly true in light of the activity in the insurance dispute prior to August, and the importance Ennis and Verville assertedly attached to the unfavorable outcome of the dispute, after the results were reported to them.

Even assuming, *arguendo*, that Verville only realized that there were no recent medical restrictions in Greening's file on August 11, his explanation for failing to obtain a copy of Greening's restrictions until August 24, also stretches credulity. Verville claimed that he faxed Dr. Smith's office on August 11 requesting a copy of Greening's latest restrictions but that the office failed to respond at the time, and only did so when Verville again contacted the office on August 24. Since Greening admittedly had been providing copies of her medical reports to the Respondent through 1994, it would appear that Verville easily could have obtained Greening's current restrictions simply by requesting them from her.

The Respondent's claim that Dr. Smith's March 21, 1995 restrictions were new and more limiting than anything he had previously issued is unfounded. Aside from recommending the use of splints, which the Respondent never claimed would prevent Greening from working, Dr. Smith recommended nearly the same set of restrictions in 1995 that he had issued every year since 1992—essentially no repetitive use of the hand and wrist bilaterally. The Respondent contends that when it obtained a copy of Dr. Smith's March 21 restrictions—"avoid any repetitive motion of the hand and wrist"—they were so limiting that Greening was unable to perform her "light duty" job or any other work in the plant and stay within them. The evidence shows that although Greening's "light duty" job involved some repetitive use of the hands and wrists, Greening had been performing that job since 1992, without any significant difficulty. On the contrary, a report from Dr. Smith dated July 12, 1994, which

was admittedly in the Respondent's files, states that Greening's "light duty" job was beneficial and that she should continue to perform that work. At the very least, Dr. Smith's 1994 opinion that Greening's job was beneficial should have raised some questions about the need to place Greening on immediate leave. However, the Respondent made no effort to resolve the apparent inconsistencies between Dr. Smith's clear statement in 1994 that Greening's job was beneficial and Verville's interpretation of Dr. Smith's 1995 report to mean that Greening's job was making her condition worse. The Respondent's haste to lay off Greening without seeking clarification is puzzling, since placing Greening on leave only added to the Respondent's workers' compensation costs which it was urgently trying to reduce.

The Respondent contends in its brief that its nondiscriminatory motive for Greening's layoff is shown by its decision to reemploy Greening in December. While it is true that the Respondent recalled Greening to work in December, she was not reinstated to her former "light duty" job.⁷ The job Greening was offered in December was similar to the assembly work that she was performing in 1989, when she sustained her original injury. The physical demands of this work are clearly more stringent than those of the job Greening was performing when she was laid off, since that job was created because Greening was unable to perform assembly work following her injury. Predictably, Greening soon reported that she was unable to perform the assembly work without aggravating her symptoms and she accepted layoff status. Even if Greening had been able to perform the assembly line work, the Respondent risked little in reinstating her because she no longer was performing a job that afforded her access to employees all over the plant.⁸

D. The Alleged Unlawful Removal of Union Leaflets and Disparate Enforcement of Respondent's Bulletin Board Policy

For about 10 years, the Respondent's employees have used two bulletin boards—one in the cafeteria and one by the time clock—for posting a variety of notices. The bulletin boards were open and notices were affixed directly to the boards. The employees posted such notices as babysitting requests, items for sale, and apartments for rent. Although there was a rule in the employee handbook requiring the employees to obtain the permission of the personnel department before posting notices on a bulletin board, the rule was not en-

⁷The Respondent contends that Greening's "light duty" job was no longer available in December, but the evidence shows that the job had not been abolished. Rather, the duties were divided up between another employee and a supervisor.

⁸The Respondent correctly contends that it obtained a statement in November from its own examining physician that Greening's condition was not work related and that her treating physician privately agreed with that view. This statement may well have been another reason why Respondent offered Greening reinstatement in December, since it allowed the Respondent to recall Greening to perform the more strenuous assembly line work, while reducing the prospect that it would be liable for any exacerbation of her symptoms. However, Greening's recall is only relevant insofar as it reflects on the motive for her involuntary layoff in August. I find that Greening's December recall does not support the Respondent's contention that the decision to place her on layoff status was unrelated to her union activities.

forced.⁹ Employees regularly posted items without permission.

Some time in late August, Ennis met with his supervisors and instructed them to remove offensive union-related material from the bulletin boards, whether it was pro or antiunion. Thereafter, Supervisors Don Dowding, Mike Kundy, and David Warfield removed union postings from the bulletin boards.

On one occasion in August or early September, employee Gloria Martin observed Dowding remove and rip up a union notice she had posted. Martin asked Dowding why he had done so. Dowding told her that as of that date they were company bulletin boards. Dowding also directed her to talk to Mike Kundy. Kundy told Martin that the bulletin boards were for the company and that employees were not allowed to post anything on them. When Martin pointed out that there were numerous personal notices on the boards, Kundy merely reiterated that they were company bulletin boards.

In mid-September, Respondent installed new glass enclosed bulletin boards. Thereafter, Respondent's supervisors told employees that no notices could be posted without the permission of the personnel department. Sometime after the bulletin boards were enclosed in glass and locked, employee Jerlene Prater observed that a letter signed by Steve Larkin had been posted, giving information about how employees could revoke their union cards.

It is well established that there is no statutory right of employees or a union to use an employer's bulletin board. Accordingly, the Board has held that an employer may "uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes." *Vincent's Steak House*, 216 NLRB 647, 647 (1975). However, if an employer permits the use of its bulletin boards for nonwork-related messages the employer cannot discriminate against the posting of union messages. As the Board has stated (*Container Corp. of America*, 244 NLRB 318 fn. 2 (1979)):

[I]t is also well established that when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin boards receives the protection of the Act to the extent that the employer may not remove notices which the employer finds distasteful.

In certain cases the Board has found that "special circumstances" exist where the interests of the employees in communicating a union's message are outweighed by an employer's legitimate interest in maintaining discipline, safety, or efficient production in the workplace. *Midstate Telephone Corp.*, 262 NLRB 191, 192 (1982). The employer must es-

⁹The employee handbook states as follows:

BULLETIN BOARDS

Bulletin boards have been placed in convenient locations throughout the plant and office. Please check them frequently for information regarding work schedules, work rules, and other such matters important to you. The bulletin boards are the responsibility of the Personnel Departments and all material must be approved by Personnel before posting. No one may put up or take down anything which has been posted on the bulletin boards without the permission of the Personnel Departments.

ablish by objective evidence that its prohibition was necessary to maintain decorum and discipline among its employees. *Id.* The Board has found that employee speech retains the protection of the Act unless the remarks are egregious. *Timpte, Inc.*, 233 NLRB 1218, 1224 (1977). As noted in *Container Corp. of America*, supra, 244 NLRB at 321, quoting from *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029 (6th Cir. 1974):

In the context of a struggle to organize a union, "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth," so long as the allegedly offensive actions are directly related to activities protected by the Act and are not so egregious as to be considered indefensible.

It is uncontested that the Respondent permitted two of its bulletin boards to be used for the posting of personal notices by employees. There is also no dispute that Respondent never enforced its policy requiring permission to post notices until after the commencement of the union campaign. Shortly after the union campaign began, Respondent's supervisors began removing union-related notices from the bulletin boards. Uncontradicted evidence shows that other personal notices were not removed. Thus, when Supervisor Don Dowding removed a union notice that employee Gloria Martin had posted, she protested to Mike Kundy that her notice had been removed but personal employee notices had been allowed to remain posted.¹⁰

The Respondent contends that it was justified in enforcing its bulletin board policy against union campaign literature because some of the Union's flyers contained personal attacks on employees which posed a threat to safety and productivity in the plant. Respondent offered into evidence two flyers as examples of the type of union postings that were removed by its supervisors for reasons of safety and order. The printed flyers show a familiar cartoon of "Uncle Sam" pointing his finger, juxtaposed above a dictionary definition of the word hypocrite. Above and below the picture are remarks that appear to be hand-printed. One flyer states: "Even Ron Korloff wants to be in a union sho[p]. . . . Just ask him about his future with GM." The other states: "Even Steve Haite belongs to a union. . . . You should too! . . . Just ask him about his other job." The flyers contain no threats, no foul language, and no suggestion of violence. They constitute nothing more than ordinary campaign rhetoric which is to be expected in any organizing effort.

The Respondent presented credible testimony that papers and records were found scattered on the floor of a laboratory in which employee Ron Korloff works. However, Respondent presented no evidence showing that the alleged act of vandalism had any connection with Korloff or the poster. Moreover, the flyer which mentions Korloff by name is not the inflammatory type of poster that is likely to incite others to acts of retaliation. I therefore find that there were no spe-

¹⁰Mike Kundy was not called to testify by the Respondent. Counsel for the Respondent indicated that Kundy was no longer employed by Eaton Technologies. However, even the line supervisors who did testify at the hearing did not contradict Martin's testimony that personal notices were allowed to remain posted, at least until the bulletin boards were enclosed in glass. They generally testified that they were instructed to remove notices supporting or opposing the Union.

cial circumstances which justified the Respondent's actions in removing union postings from its bulletin boards.¹¹

The Respondent contends in its brief that after strict enforcement of its bulletin board policy was undertaken it permitted only work-related notices to be posted. The evidence supports the Respondent's position insofar as it shows that once the bulletin boards were enclosed and locked, the Respondent has denied permission to employees to post personal notices. However, employee Jerlene Prater credibly testified that after the bulletin boards were locked the Respondent posted a letter from Steve Larkin informing employees how to revoke their union cards. This evidence was not contradicted by the Respondent's witnesses, one of whom was Steve Larkin.

I find that the Respondent violated Section 8(a)(1) of the Act by removing and destroying union literature and by otherwise disparately enforcing its bulletin board policy. See *Severance Tool Industries*, 301 NLRB 1166 (1991); and *Central Vermont Hospital*, 288 NLRB 514 (1988).¹²

E. The Alleged Threat Directed Toward Employee Gloria Martin

Sometime during the period from August to October, Supervisor Dowding approached employee Gloria Martin as she was working on the assembly line. Dowding said, "I'd like to speak to you about this union deal because I have had a lot of experiences and I've gone through a lot of things about a union." Martin objected saying that she did not think it was appropriate to discuss the Union with him. Dowding continued and told Martin that at a place where he or his wife had worked the union was "bad" and "no good" and that the business had closed down because of the union.

I find that Dowding's undenied statement to Martin constitutes an unlawful implied threat of plant closure in violation of Section 8(a)(1) of the Act. See *Russell Stover Candies*, 221 NLRB 441 (1975).

¹¹The antiunion leaflet in evidence is no more threatening or provocative than the union propaganda. Taken together the pro and antiunion postings do not support the Respondent's contention that the level of hostility in the plant was reaching a dangerous point. The antiunion flyer, unedited for punctuation and spelling errors, states as follows:

[I]t's time to wake up and smell the coffee. UAW say's we will get more money, come on people get real, if the union comes in you will be lucky to keep what you have. If you people wont a union so bad go find a union job. Union's are for people that wont stand up for them selves. so go stand behind your uaw's legs like a little pup, or stand up with us and things will happen faster then with a union, so be smart. Vote no

¹²The complaint includes an allegation that the Respondent violated the Act by promulgating a rule requiring employees to obtain permission before posting any item on the bulletin boards. Respondent's rule requiring permission to post items on the employee bulletin boards was promulgated well before the Union began its organizing campaign and there is no evidence to suggest that the rule itself was discriminatory. The evidence shows only that Respondent's nondiscriminatory rule was disparately enforced, after the union campaign commenced. Neither party argues this issue in their briefs and I find that the rule printed in the handbook prior to the union campaign does not constitute a separate violation of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Eaton Technologies, Inc., A Fasco Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

2. Region 1-C, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (AFL-CIO) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

3. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee about her union activities, creating the impression that employees' union activities were under surveillance, and threatening an employee or employees that it would be futile to select a bargaining representative, that the Respondent would bargain from scratch, that employees would lose their benefits, and that the plant could be closed if employees chose to be represented by the Union.

4. The Respondent further violated Section 8(a)(1) of the Act by unlawfully removing and destroying union campaign literature and by otherwise disparately enforcing its bulletin board policy.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily placing employee Judith Greening on workers' compensation leave because she had assisted the Union and engaged in union activities.

REMEDY

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

The Respondent having placed an employee on involuntary leave for discriminatory reasons, it must offer her reinstatement to her former position, without prejudice to her seniority and other rights and benefits previously enjoyed and make her whole for any loss of wages and other benefits, computed on a quarterly basis from the date of layoff to date of proper offer of reinstatement, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Eaton Technologies, Inc., A Fasco Company, Eaton Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of employees' union activities.

(b) Threatening employees that it would be futile to select the Union as a collective-bargaining representative.

(c) Threatening employees with loss of benefits for supporting the Union.

(d) Impliedly threatening employees with plant closure if they support the Union.

(e) Threatening that the employer will bargain from scratch if the employees choose to be represented by a union.

(f) Coercively interrogating employees about their union activities.

(g) Removing from employee bulletin boards and destroying union campaign literature and otherwise disparately enforcing its bulletin board policy.

(h) Placing employees on involuntary leave status because they engaged in union or other protected concerted activities.

(i) 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 Judith Greening full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. Make whole Judith Greening for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) 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.

(c) Within 14 days after service by the Region, post at its facility in Eaton Rapids, Michigan, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 1995.

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

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

¹³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴If 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."