

Dynatron/Bondo Corporation and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC. Cases 10-CA-25736, 10-CA-25943, 10-CA-26926, 10-CA-27167, 10-CA-27856, 10-CA-28029, 10-CA-28061, 10-CA-28061-2, and 10-CA-28315

July 16, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 28, 1996, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

Following an election held September 8, 1989, the Board certified the Union as the collective-bargaining representative of the Respondent's production and maintenance employees on June 5, 1991. On November 8, 1991, the Board ordered the Respondent to bargain with the Union.³ Thereafter, the Respondent (1) in May 1993 discontinued giving merit increases to employees; (2) in October 1991, 1992, 1993, and 1994 increased the amount of money its employees paid for insurance premiums; and (3) immediately prior to the first bargaining session in July 1993 announced that it was changing its smoking policy effective the day after bargaining began. The Respondent instituted these changes without notice to or bargaining with the Union. We agree with the judge, as explained below, that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing its employees' terms and conditions of employment.

1. The judge found that the Respondent violated the Act by discontinuing its practice of granting merit increases to employees after a 90-day probationary period and at the anniversary date of hire thereafter. The

Respondent asserts that it had no such practice. For the following reasons, we agree with the judge.⁴

The record shows the following respecting 90-day probationary merit increases:⁵

- In 1990, 64 percent of eligible employees received a 90-day merit increase.
- In 1991, 91 percent of eligible employees received a 90-day merit increase.
- In 1992, 53 percent of eligible employees received a 90-day merit increase.
- In 1993, 40 percent of employees eligible to receive a 90-day merit increase before the Respondent ceased giving raises in May, received a 90-day merit increase.

The record shows the following respecting annual merit increases:

- In 1988, approximately 54 percent of eligible employees received merit raises on or about their anniversary dates.⁶
- In 1989, approximately 86 percent of eligible employees received merit raises on or about their anniversary dates.⁷
- In 1990, in addition to an across-the-board wage increase to all employees on June 25, approximately 58 percent of eligible employees received merit raises on or about their anniversary dates.⁸
- In 1991, in addition to an across-the-board wage increase to all employees on June 24, 100 percent of employees who were hired in 1990 and who were eligible to get their *first* annual merit raise in 1991, received merit raises on or about their anniversary dates.⁹
- In 1992, approximately 83 percent of employees who were hired in 1991 and who were eligible to get their *first* annual merit raise in 1992, re-

⁴The judge suggests that the employee handbook was relevant to finding there was a past practice with respect to unit employees. The handbook, however, applied only to certain employees of the Respondent who are not part of the bargaining unit. We do not rely on the handbook as a basis for finding these violations.

⁵The General Counsel and the Respondent introduced, without objection, similar evidence summarizing employee pay information. The General Counsel's exhibits cover a greater period of time, which explains what appears to be discrepancies between the parties' statement of facts, such as the two anniversary date pay increases Arnold Akers and Vanessa Arnold each received, not one as the Respondent asserts. We have relied on the General Counsel's evidence because it is more complete.

⁶Raises ranged from less than 1.5 to 8.3 percent, with most falling between 1.5 to 4.5 percent.

⁷Raises ranged from 1.5 to 8.5 percent, with most falling between 1.5 and 6.3 percent.

⁸Raises ranged from 2.4 to over 6 percent, with most falling between 2.4 and 4 percent.

⁹Raises ranged from 2.2 to 4 percent.

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

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

³*Dynatron/Bondo Corp.*, 305 NLRB 574 (1991), enfd. 992 F.2d 313 (11th Cir. 1993).

ceived merit raises on or about their anniversary dates.¹⁰

- In 1993, 40 percent of employees eligible to receive a merit raise before the Respondent ceased giving raises in May, received merit raises on or about their anniversary dates.¹¹

In sum, from 1990 to May 1993, approximately 59 percent of the eligible employees have received merit pay increases at the end of their 90-day probationary periods¹² and since 1988, a majority of employees have received merit increases on or about the anniversary date of their hire.

The Respondent does not dispute that the raises were granted solely on the basis of merit, but the Respondent argues that it did not have a settled practice of granting such increases. In support of this argument, the Respondent makes the following points. Some employees received increases that do not correspond to either the end of a 90-day probationary period or anniversary-of-hire date; and some employees received increases on every anniversary date, some did not receive increases on every anniversary date, and some received no increases.

We find the Respondent's reasoning unpersuasive. The fact that employees on occasion received wage increases that were not tied to their probationary or anniversary dates is insufficient to convince us that the Respondent did not follow a settled practice respecting probationary and anniversary increases. Between 1988 and May 1993, the Respondent granted 127 individual raises linked to probationary and anniversary dates. The only other wage increases granted during that period were two across-the-board increases in 1990 and 1991, and 33 individual raises granted to employees at times which do not coincide with their probationary or annual anniversary dates. Thus, of the 160 individual wage increases granted during that period, 79 percent were linked to the employees' probationary or anniversary dates. In our view this is not mere coincidence but persuasive evidence of an established pattern and practice. That the Employer may also have chosen to grant increases at other times does not negate the existence of such a practice respecting probationary and anniversary increases. See, e.g., *Oneita Knitting Mills*, 205 NLRB 500, 502 fn. 2 (1973).

Because the increases were awarded on the basis of merit, the fact that not all employees received increases after their probationary period or on their anni-

versary dates is not, as argued by the Respondent, evidence of a lack of a pattern of granting merit increases at those times. The Respondent's plant manager and its human resources manager confirmed that the Respondent annually evaluated all employees pursuant to the same set of merit-based criteria and that it determined an appropriate increase, if any, based upon an employee's evaluation.¹³ Furthermore, there was no evidence that the Respondent's managers and supervisors were free to ignore merit-based criteria in deciding whether to award wage increases. Thus, in these circumstances, the failure to award an employee a merit increase is evidence only that the employee's performance did not merit an increase, not that the Respondent had no established practice of granting merit increases.

We find that the Respondent had an established "pattern and practice" of granting increases based on merit, and we find that the employees have come to view these increases as fixed terms and conditions of employment. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enf. 73 F.3d 406 (D.C. Cir. 1996). We base this conclusion on the following factors: (1) the sole, fixed criterion for granting a raise was merit; (2) the timing of the increases was fixed at the end of an employee's 90-day probationary period and annually thereafter at the employee's anniversary date; (3) the amount of the raises, although discretionary, fell within a narrow range;¹⁴ (4) the majority of eligible employees, in fact, received such raises; and (5) the increases had been granted over a significant period of time. *Daily News*, supra.

The Respondent's granting of increases, pursuant to fixed, merit-based criteria, with sufficient regularity, at similarly timed intervals, over a number of years, therefore has become part of its employees' existing wage structure and is a term and condition of their employment which the Respondent cannot change without bargaining with the Union. *NLRB v. Katz*, 369 U.S. 736, 743 (1962), and *Daily News*, supra.¹⁵ Accord-

¹⁰ Raises ranged from 2.1 to 9.9 percent, with most falling between 2.1 and 3.7 percent.

¹¹ Raises ranged from 0.9 to 5.3 percent.

Although the Respondent discontinued annual merit increases, it continued to provide employee evaluations.

¹² Of those 49 employees who were eligible to receive a 90-day raise during this 3-1/2-year period, 29 employees actually received such a raise.

¹³ In fn. 5 of its brief, the Respondent implies that it did not have a policy of evaluating all employees annually because the exhibits in this case contain information about annual evaluations for many, but not all, employees from 1990 through May 1993. However, as mentioned above, the testimony of the Respondent's own officials refutes this implication. In addition, there is no contrary testimony by any witness to suggest that the Respondent did not, in fact, do evaluations for every employee every year. Furthermore, there is no testimony that the exhibits, which were referred to by the Respondent in its fn. 5, represent or were intended to represent all of the evaluations done by the Respondent during this timeframe. Thus, in light of the Respondent's testimonial admission, we do not find that the documentary evidence supports a finding that the Respondent had no practice of evaluating employees annually.

¹⁴ The majority of probationary and anniversary raises were from 15 to 50 cents an hour.

¹⁵ In *Acme Die Casting v. NLRB*, 93 F.3d 854 (D.C. Cir. 1996), denying enf. in part 317 NLRB 1353 (1995), the court rejected the Board's finding that the employer unlawfully changed a past practice involving wage increases. Unlike the instant case, *Acme* involved

ingly, we find that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union over discontinuing its merit increase program.

2. The judge found that the Respondent violated the Act by unilaterally increasing unit employees' contributions to group health insurance premiums after the Union was certified in 1991. For the following reasons, we agree with the judge.

The Respondent maintained a health insurance policy for its employees who contribute to the cost of the premium. In October 1991, 1992, 1993, and 1994, the Respondent changed the dollar amount employees contributed for the health insurance program. The percentage of the total cost of premiums allocated between the Respondent and employees remained the same after 1991. The Respondent asserts that passing on the dollar increases to employees is consistent with a practice established in the 3 years before the Union was certified.

In the 3 years before the Union was certified, the record shows the following:

- A single employee paid 18 percent, 13 percent, and 15 percent of the insurance cost in 1988, 1989, and 1990, respectively.
- An employee with one dependent paid 46 percent, 35 percent, and 39 percent of the insurance cost in 1988, 1989, and 1990, respectively.
- An employee with a family paid 45 percent, 34 percent, and 39 percent of the insurance cost in 1988, 1989, and 1990, respectively.
- The percentage of the total cost of premiums an employee paid for "HMO with dental" also changed each year from 1988 to 1990.
- The Respondent passed along increased costs to its employees in only two of the three pre-certification years.

These facts, contrary to the Respondent's assertion, do not show that in 1988-1990 employees' health insurance contributions were based on a fixed percentage of the total cost of insurance premiums. The percentage of employee contributions differed each of the 3 years preceding the Union's June 1991 certification, and the Respondent passed along increased premium costs to its employees in only 2 of those 3 years. The only "pattern" we discern in the 3-year period is that the Respondent retained total discretion over what it required employees to contribute.

across-the-board increases and, in the court's view, their "timing . . . was by no means fixed." Here, in contrast, we are dealing with a situation more like that presented in *Daily News*. In *Daily News*, as in this case, the raises were based solely on merit and were granted at fixed intervals. However, mindful of the court's criticism of the Board's analysis in *Acme*, we have delineated the factors showing an established past practice in this case.

The Respondent's reliance on *A-V Corp.*, 209 NLRB 451 (1974), is misplaced. In that case, the employer allocated the cost of insurance premiums on a fixed pro rata share basis. In 1 year, when the employer changed insurance carriers, the employer absorbed the dollar cost that employees would otherwise have paid, which led to a decrease in the percentage of the total cost of premiums allocated to employees. The employer maintained the lower percentage thereafter. The Board found that, under the circumstances, the reallocation of percentages represented a continuation of the past practice rather than a unilateral change.

In the instant case, from 1988 through 1990 when the Respondent claims it followed a settled practice, the employee contribution percentage changed annually. Thus, rather than following a settled practice of allocating costs, the Respondent exercised substantial discretion in allocating premium costs between it and employees. Accordingly, in the absence of a past practice and in light of the Respondent's substantial discretion, we find that the Respondent violated Section 8(a)(5) when it did not bargain with the Union about increasing employees' contributions to their health insurance program. *Garrett Flexible Products*, 276 NLRB 704, 706 fn. 4 (1985).

AMENDED REMEDY

The record fails to support the Respondent's contention that its prior smoking policy created a dangerous safety hazard. Nevertheless, in adopting the judge's recommended Order requiring the Respondent to reinstate its prior smoking policy, we, of course, do not require the Respondent to permit smoking in areas where the Respondent can now show that smoking would create a safety hazard. Any disputes about whether the Respondent is complying with this Order may be resolved in compliance.

With respect to the increased contributions for health insurance coverage, the amounts due current and former employees shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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, Dynatron/Bondo Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in electronic or any other kind of surveillance of the distribution of union leaflets to its employees, or of any other union activity of its employees.

(b) Discouraging membership in Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, or any other labor organization, by discharging employees or by converting employee resignations into immediate discharges, because of their Union or other protected concerted activities, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment, or any other terms and conditions of employment.

(c) Unilaterally, and without bargaining with the Union, (1) discontinuing its past practice of granting merit raises to unit employees considered eligible to receive them, upon their completion of a 90-day probationary period, and annually thereafter on the anniversary date of the employees' employment; (2) increasing its unit employees' contributions to their health insurance program; and (3) changing its past practice from a limited ban on smoking to a complete ban on smoking.

(d) 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 Floyd Robin 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, in the manner described in the remedy section of the judge's decision.

(b) Make Floyd Robin Davis, Mark Pepper, Dessau (Gene) Bennett, and Bob Moss whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner described in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Floyd Robin Davis, Mark Pepper, Dessau (Gene) Bennett, and Bob Moss, and within 3 days thereafter notify them in writing that this has been done and that these actions will not be used against them in any way.

(d) On request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, as the collective-bargaining representative of the employees in the appropriate unit as to their terms and conditions of employment, including discontinuing its past practice of granting merit raises to employees considered eligible to receive them, upon their completion of a 90-day probationary period and annually thereafter on the anniversary date of the employees' employment; increasing its employees' contributions to their health insurance program; and changing its past practice from a limited ban on smoking to a complete ban on smoking. The appropriate unit is:

All production and maintenance employees employed by the Employer at its Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act.

(e) Make its unit employees whole for any losses they may have suffered by reason of the Respondent's discontinuance of its program of making merit pay raises, in the manner set forth in the remedy section of the judge's decision and, on request, bargain with the Union about the granting of merit raises in the future.

(f) Make its unit employees whole for any losses they may have suffered by reason of the Respondent's unilateral increase in their contributions for a health insurance program, beginning on or about October 1, 1991, in the manner set forth in the remedy section of the judge's decision, and continue making the payments currently required without any such increased contribution from its unit employees, until agreement or impasse is reached with the Union on this issue, and notify in writing all current and former unit employees of their entitlement to these rights.

(g) Reinstatement its prior smoking policy, in the manner set forth in the amended remedy section of this decision, until agreement or impasse is reached with the Union.

(h) 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.

(i) Within 14 days after service by the Region, post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

¹⁶If 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."

and former employees employed by the Respondent at any time since December 26, 1991.

(j) 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 engage in electronic surveillance or any other surveillance of the distribution of union leaflets to our employees, or of any other union activity of our employees.

WE WILL NOT discourage membership in Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, or any other labor organization, by discharging employees or by converting employee resignations into immediate discharges because of their union or other protected, concerted activities, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment, or any other terms and conditions of employment.

WE WILL NOT unilaterally, and without bargaining with the Union, discontinue our past practice of granting merit raises to unit employees who are considered eligible to receive them, upon their completion of a 90-day probationary period and annually thereafter on the anniversary date of our employees' employment.

WE WILL NOT unilaterally, and without bargaining with the Union, increase our unit employees' contributions to their health insurance program.

WE WILL NOT unilaterally, and without bargaining with the Union, change our past practice from a limited ban on smoking to a complete ban on smoking.

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 Floyd Robin 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.

ment 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 Floyd Robin Davis, Mark Pepper, Dessau (Gene) Bennett, and Bob Moss whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, 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 references to the unlawful actions taken against Floyd Robin Davis, Mark Pepper, Dessau (Gene) Bennett, and Bob Moss, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL, on request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, as the exclusive collective-bargaining representative of our employees in the appropriate unit, concerning their terms and conditions of employment, including discontinuing our past practice of granting merit raises to employees considered eligible to receive them upon their completion of a 90-day probationary period and annually thereafter on the anniversary date of their employment; increasing our unit employees' contributions to their health insurance program; and changing our past practice from a limited ban on smoking to a complete ban on smoking. The appropriate unit is:

All production and maintenance employees employed by us at our Atlanta, Georgia, facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act.

WE WILL make our unit employees whole for any losses they may have suffered by reason of our discontinuance of our program of granting merit raises and WE WILL, on request, bargain with the Union as to the granting of merit raises.

WE WILL make our unit employees whole for any losses they may have suffered because of our increase in their contributions for their health insurance program and WE WILL continue making the payments currently required without any increased contribution from our employees, until agreement or impasse is reached, and WE WILL notify in writing all current and former unit employees of their entitlement to these rights.

WE WILL reinstate our prior smoking policy as required in the Board's decision until we reach agreement or impasse with the Union.

DYNATRON/BONDO CORPORATION

Lesley A. Troope, Esq., for the General Counsel.
Douglas H. Duerr, Esq. and *Walter D. Lambeth Jr., Esq.*
 (*Elarbee, Thompson, & Trapnell*), of Atlanta, Georgia, for
 the Respondent.
David Prouty, Esq., of New York, New York, for the Charging
 Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Union of Needletrades Industrial and Textile Employees, AFL-CIO, CLC¹ (the Union) filed various charges between July 2, 1991, and November 23, 1994. After issuance of two prior complaints, a third amended consolidated complaint issued on December 1, 1995. It alleges that Dynatron/Bondo Corporation (Respondent or the Company) engaged in electronic surveillance of distribution of union leaflets to company employees, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

The complaint further alleges that Respondent received 2-week notices of resignation from employees Mark Pepper, Dessau E. Bennett, and Bob Moss, and converted them into discharges because of the employees' protected concerted activities, in violation of Section 8(a)(3) of the Act. Respondent further violated the Act by discharging employee Floyd Robin Davis for the same reason.

Finally, the complaint alleges that Respondent violated Section 8(a)(5) by increasing employee contributions to health insurance premiums contrary to past practice, by discontinuing merit pay increases for employees who have completed a 90-day probationary period, by discontinuing merit pay increases to employees who have received favorable annual evaluations, and by imposing a total ban on smoking.

These matters were heard before me on December 18, 1995, and on March 4 and 5, 1996, in Atlanta, Georgia. Thereafter, the General Counsel and the Charging Party filed briefs.

The record requires clarification. Subsequent to the hearing, the General Counsel and the Respondent submitted motions to correct the record. I thereafter issued Orders to Show Cause requiring the other parties to show why the motions should not be granted. No response was received from any party to my Order pertaining to Respondent's motion. The latter avers that the exhibit file does not contain copies of Respondent's Exhibits 171-205, which were received at the hearing. No response having been received to my Order to Show Cause, Respondent's motion is granted, and the exhibits are added to the exhibit file (copies enclosed with Respondent's motion).

Respondent filed a response to the General Counsel's motion. Respondent argues that the General Counsel's motion should be denied because of improper service:

It appears from the Certificate of Service that Counsel for the General Counsel filed her Motion by hand. Rule 102.114(a) requires that if a party files a motion by hand, the party notify the other parties by telephone and take steps to ensure delivery the next day. Counsel

for the General Counsel failed to notify Respondent's counsel of the hand filing.

The certificate of service shows that copies of the General Counsel's motion were served by hand upon the administrative law judge on March 20, 1996, and that copies were mailed on the same date to the other parties by first class mail.

The Board's Rules provide that "when filing with the Board is accomplished by personal service, the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail or by telegraph." Rule 102.114(a).

The validity of Respondent's assertion that the General Counsel did not make telephonic notification of service cannot be determined without a hearing. There is no showing of prejudice to Respondent—it has filed objections to the General Counsel's motion. Accordingly, this argument is rejected.

The General Counsel's motion argues that the cover sheet of the exhibit file inaccurately lists December 12, 1995, as the first day of the hearing, rather than the correct date, December 18, 1995. The motion also argues that the transcript erroneously states that the following exhibits were not received: 4, 5, 12, 29, 140-220, 223. The General Counsel's motion also avers that the exhibit file cover sheets inaccurately assert that the following exhibits were "not mentioned:" 15, 21, 35, 36, 135, 137, 226, 227, 233-241, 244-249, 251-254, 257-299, and 303. In fact, all except Exhibit 227 were received.

Respondent's response does not dispute that the exhibit cover sheet inaccurately lists the first date of the hearing, or that General Counsel's Exhibits 12, 29, 140-220, and 223 were admitted.

Respondent's only specific arguments are directed to General Counsel's Exhibits 4 and 5, being prior decisions by the Board and the Court of Appeals for the Eleventh Circuit. Respondent argues that although the administrative law judge did take judicial notice of these decisions, the General Counsel made no effort to have them "admitted into evidence." This argument has no merit, since judicial notice does not require that a physical copy of the decision which is noticed be admitted into evidence. In any event, I deny Respondent's factual assertion, and receive these exhibits.

Respondent argues that, although it conducted voir dire with respect to General Counsel's Exhibit 227, the "ALJ did not permit the Respondent to register any objection," and that no ruling was made on the exhibit. However, counsel was asked whether he had "any objection" to the exhibit, and did not voice an objection after voir dire examination. I now correct my omission of a ruling on General Counsel's Exhibit 227, and receive it in evidence.

Finally, Respondent argues that the General Counsel's motion does not contain a copy of "Exhibit 2." The General Counsel's motion states that Exhibit 2 was a letter to the court reporter requesting that the above corrections be made. Respondent is not prejudiced by any omission of a copy of this letter to the court reporter since the motion itself lists all the errors and requested corrections.

Accordingly, the General Counsel's motion is granted in its entirety.

¹ The Charging Party's name appears as amended at the hearing.

On the basis of the entire record as corrected, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a Georgia corporation with an office and place of business in Atlanta, Georgia, where it is engaged in manufacturing automobile filler and other automobile products. During the 12-month period preceding issuance of the complaint, Respondent sold and shipped from its Atlanta, Georgia facility goods valued in excess of \$50,000 directly to points outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

On April 12, 1991, with judicial approval, the Board found that Respondent discharged employee Ernestine Baskins because of her union activities, in violation of Section 8(a)(1) and (3). *Dynatron/Bondo Corp.*, 302 NLRB 507 (1991), *enfd. per curiam* (11th Cir. 1992).²

The pleadings establish that the Board certified the Union as the exclusive collective-bargaining representative of all unit employees on June 5, 1991. On November 8, 1991, the Board with judicial approved found that Respondent had refused to bargain with the Union and had refused to supply relevant information in violation of Section 8(a)(1) and (5) of the Act. *Dynatron/Bondo Corp.*, 305 NLRB 574 (1991), *enfd. per curiam* (11th Cir. 1993).³

B. The Alleged Electronic Surveillance

1. Summary of the evidence

The entrance to and exit from the Company's plant lead up a hill to a public right of way. Windows in the front of the building make this area visible from inside the plant. The Company maintains seven cameras for security purposes. Two of these are located outside the building, one in front near the top of the building. These two cameras can be operated automatically so as to pan the parking lot and other outside areas. They can also be operated manually so as to direct the cameras to a particular location. An outside agency operates the security system from a security office with monitors near the employee entrance. Personnel Manager Fred Tomkowicz also has a monitor in his office, and can observe what the cameras are recording.⁴

Anthony Martin, an organizer and union business agent, testified that he distributed handbills to employees between 1:30 and 2:30 p.m. on February 28, 1992. As he did so,

some employees said, "Hey, you're on candid camera." Martin turned and looked at the security camera, which normally rotated across company property. The camera changed from its normal function of observing company property below it, and pointed upwards towards Martin on the elevated roadway. It remained fixed in this position. Martin stated that he handbilled on four or five occasions. On two of them, he walked from the roadway to the company sign. As he did so, the security camera, instead of panning the parking lot and adjacent areas, followed Martin as he walked.

Martin testified that employees leaving the plant looked into their rear view mirrors as he attempted to distribute the handbills. Employees arriving at the plant drove in rapidly after taking a handbill, or refused to accept one.

Personnel Manager Tomkowicz denied that he ever directed a security officer to focus the camera on union handbilling activities. He denied that he could direct the focusing of the camera from his office. Asked whether he had any "control" over which view came up on his monitor, Tomkowicz replied, "None, whatsoever." Yet Plant Manager Lee Fragnoli testified that Tomkowicz could pick up a telephone and tell the security officer what to do.

Martin testified that he observed figures in the Company's windows watching him. He could not identify them.

2. Factual and legal conclusions

Martin's testimony is un rebutted. He was a believable witness and I credit his testimony.

I infer that the selective focusing of the security camera on these occasions did not occur by accident. There is no evidence that the security officer would independently decide to interrupt the viewing of the customary areas it covered, and, instead, record the activities involving Martin and the employees. Although Personnel Manager Tomkowicz denied that he directed it to do so, he was a less than candid witness. Plant Manager Fragnoli contradicted Tomkowicz' denial of control over area the camera could be directed to cover. I conclude that Tomkowicz utilized existing technology to direct the security officer to point the camera on Martin and the employees. There is no other explanation for the change in the camera's focusing on the view being recorded.

It is well established that absent legitimate justification an employer's photographing its employees while they are engaged in protected concerted activities constitutes unlawful surveillance.⁵ Although the Company had a legitimate interest in viewing its parking lot and adjacent areas, it had no legitimate interest in the activities of Martin and the employees. I conclude that Respondent engaged in unlawful surveillance of its employees' protected concerted activities, and violated Section 8(a)(1).

C. The Alleged Discrimination

1. Floyd Robin Davis

a. Summary of the evidence

Floyd Robin Davis was present on behalf of the Union at the first bargaining session, July 27, 1993, and remained a

⁵ *Brunswick Hospital Center*, 265 NLRB 803, 807 (1982); and *U. S. Steel Corp.*, 255 NLRB 1338 (1981).

² G.C. Exh. 138

³ G.C. Exh. 5.

⁴ The description above is based on the testimony of Personnel Manager Fred Tomkowicz, Plant Manager Lee Fragnoli, and Union Business Agent Anthony Martin. The pleadings establish that Fred Tomkowicz was a supervisor within the meaning of the Act.

member of the Union's negotiating committee until his discharge on June 1, 1994. Personnel Manager Tomkowicz and Plant Manager Fragnoli testified that they knew this. Tomkowicz stated that the Company opposed the Union in the 1989 campaign. In its employee handbook, Respondent speaks of union solicitation and states that its employees do not need anyone to speak for them.⁶

Davis was a bulk receiver for Respondent, and was responsible for paperwork involving deliveries. He normally used a "Bic" pen in this process, supplied by the Company. In late July 1994, he took four green ink pens from a box near his workplace. Davis used three of the pens in his work at the plant, and gave one pen to a fellow employee, Eric Clemmons, who also used it for company work. When Davis left work, he stored the three pens in his unlocked locker at the plant. He did not remove them from the plant. The pens were unremarkable in description, except for their color. They were not expensive, and Respondent's witnesses did not know their cost.

Respondent's witnesses testified that Clemmons was detected with one green ink pen and said he got it from Davis. On June 1, Davis was called to a meeting with Personnel Manager Tomkowicz and two other supervisors, and was asked whether he knew anything about pens. After briefly denying it, Davis admitted that he took four pens. He used them in his work for the Company, and kept them in his unlocked locker at the plant, where other employees leave tools. Davis gave one pen to Eric Clemmons, who also used it for company work. Davis offered to return the pens, but the Company rejected this offer and discharged him for theft of company property.

The Company's rules state that theft of company property will result in "disciplinary action or discharge."⁷ Plant Manager Fragnoli initially testified that Davis admitted stealing the pens. However, on cross-examination and review of his notes, Fragnoli admitted that Davis only admitted taking the pens.

Plant Manager Fragnoli listed two other "incidents" concerning Davis. One was a shipment of china to a company employee, which disappeared. Davis was "associated" with this disappearance, because he was in receiving. According to Fragnoli, Davis was not disciplined because the Company had no proof that he took the china. The second incident involved a Federal Express envelope with a check to the Company. Davis gave the envelope to Fragnoli, saying that he found it in the bathroom. Fragnoli considered this action in deciding to discharge him.

Respondent attempted to show that it did discharge employees for theft. Thus, Sherman Billingsley was discharged in August 1987 for stealing one or two cases of body filler, worth \$50 to \$60. Billingsley was detected by the security camera removing the product from the plant through the dock door. He admitted attempting to steal the product.

In September 1994, Respondent gave a documented verbal warning to Pat Hodo and Martha Edwards as follows:

On September 16, 1994, you were seen removing product from the shipping racks. This is NOT your work area nor did you have any authorization to take this

product. Only at such time that you realized that you were observed did you proceed to replace the mdse. and offer a half hearted excuse for your actions. Please note that any subsequent actions of this nature will be subject to further disciplinary action.⁸

Despite the foregoing language of the warnings, Plant Manager Fragnoli testified that the employees were simply taking product to their own work areas to keep their lines running, and that this action was "commendable."

Fragnoli defined "theft" as possession of property one should not have. Under this definition, Eric Clemmons "stole" the one green ink pen which Davis gave to him. Clemmons received no discipline at all despite his possession of the pen.

Fragnoli also testified that if he detected a supervisor outside the plant with a company pen, he would not discharge the supervisor.

b. Factual and legal conclusions

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.⁹ The General Counsel must provide persuasive evidence that the employer acted out of antiunion animus.

Respondent's animus is established by its other unfair labor practices detailed in this decision, by Tomkowicz' stated opposition to the Union, and by similar statements in the Company's employee handbook. Davis was present at the first bargaining session, and the Company knew that he continued to be a member of the Union's negotiating committee. Accordingly, the General Counsel has established a prima facie case.

Respondent has not sustained its burden of proving that it would have discharged Davis in any event. The alleged offense, taking four ink pens for use in his work at the plant, is trivial. The pens were unremarkable in cost—the Company could not even state their value. Davis never removed them from the premises and kept them in his unlocked locker. Fragnoli candidly admitted that if he caught a supervisor outside the plant with a company pen the supervisor would not be discharged.

The Company's example of its discipline of other employee theft does not support its case. Sherman Billingsley was caught trying to take \$50 to \$60 worth of the Company's product from the plant, and admitted trying to steal it. Although Davis admitted taking the four pens, he denied stealing them, and never took them from the plant. He intended them for use in his job, something which Billingsley obviously did not intend to do. The disparity between the value of what Billingsley took, and four ink pens, further distinguishes the cases.

⁸ U. Exhs. 1, 2.

⁹ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

⁶ G.C. Exh. 34.

⁷ G.C. Exh. 37.

Group health insurance is a mandatory subject of bargaining. *Pioneer Press*, 297 NLRB 972 (1990). I conclude that, by unilateral increases in employee contributions to health insurance premiums in 1991, 1992, 1993, and 1994, Respondent violated Section 8(a)(5) and (1) of the Act.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Dynatron/Bondo Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in electronic surveillance of the Union's distribution of leaflets to its employees, Respondent violated Section 8(a)(1) of the Act.

4. Respondent violated Section 8(a)(3) and (1) of the Act by

(a) Discharging Floyd Robin Davis on June 1, 1994, because of his Union and other protected concerted activities.

(b) Converting 2-week notices of resignation into discharges of Mark Pepper on August 1, 1994, Dessau (Gene) Bennett on November 14, 1994, and Bob Moss on February 3, 1995, because of their Union and other protected, concerted activities.

5. All production and maintenance employees employed by the Respondent at its Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

6. On September 8, 1989, in an election by secret ballot, conducted under the supervision of the Regional Director for Region 10 of the Board, a majority of the employees in the unit described in paragraph 5, above, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. On June 5, 1991, the Board certified the Union as the exclusive collective-bargaining representative of all the employees in the unit described in paragraph 5, above.

8. At all times since June 5, 1991, the Union has been, and is, the representative of a majority of the employees in the unit described in paragraph 5, above, for the purpose of collective bargaining and, by virtue of Section 9 (a) of the Act, has been, and is, the exclusive representative of all employees in the unit for the purpose of collective bargaining.

9. Respondent violated Section 8(a)(5) and (1) by engaging in the following conduct unilaterally and without notice to or consultation with the Union:

(a) On July 28, 1993, by changing its past practice from a limited ban on smoking to a total ban on smoking.

(b) On about May 10, 1993, by discontinuing its past practice of granting a merit pay raise to employees who completed a 90-day probationary period.

(c) On about May 28, 1993, by discontinuing its past practice of granting a merit pay increase to employees on the anniversary date of their employment.

(d) On about October 1, 1991, and on about the same date in 1992, 1993, and 1994, by raising the dollar amount of its employees' contributions to group health insurance.

10. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Having found that Respondent unlawfully discharged Floyd Robin Davis on June 1, 1994, I recommend that Respondent be ordered to offer Davis reinstatement to his former position without prejudice to his seniority or other rights and privileges previously enjoyed or, if any such position does not exist, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the time of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁷ I shall also recommend that Respondent remove from its records all references to its unlawful discharge of Davis and inform him in writing that this has been done, and that such records will not be used against him in any way.

Having found that Respondent unlawfully converted 2-week notices of resignation from Mark Pepper, Dessau (Gene) Bennett, and Bob Moss, into discharges prior to expiration of the notice periods, I shall recommend that Respondent be ordered to make them whole by paying each of them a sum of money equal to the amounts they would have earned had they been allowed to work during the entirety of their notice periods less net interim earnings during such periods, plus interest as specified above.

Since Respondent withheld merit wage increases to which bargaining unit employees were entitled and would have received but for Respondent's unilateral conduct in violation of Section 8(a)(5) of the Act, I shall recommend that each of the affected employees in the bargaining unit described above be made whole for the increases they would have received from the date such increases were discontinued, by payment to them of the difference between their actual wages and the wages they would otherwise have received, with interest according to the formulas described above. *Daily News of Los Angeles*, 304 NLRB 511 (1991). I shall further recommend that Respondent be ordered to continue to make such raises in consultation with the Union.

I have also found that Respondent unlawfully increased its employees' contributions for their health insurance coverage.

¹⁷ Under *New Horizons*, interest is computed in at the "short term Federal rate" for the underpayment of taxes as set out in the 1988 amendment to 28 U.S.C. § 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).

I shall recommend that Respondent be ordered to reimburse current and former employees for contributions in excess of those which they would have made absent Respondent's unlawful increase in the contributions. The amounts due shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent be ordered to notify in writing all current and former employees of their entitlement to these benefits. *Turnbull Enterprises*,

259 NLRB 934 (1982). I shall further recommend that Respondent be ordered to reduce the amount of future contributions from its employees for insurance coverage to the amounts they were paying prior to the increases. The Company shall continue to pay the amounts currently required until such time as it reaches agreement with the Union on these issues.

I shall also recommend the posting of notices.

[Recommended Order omitted from publication.]