Fredericksburg Glass and Mirror, Inc. *and* International Brotherhood of Painters and Allied Trades, Glaziers Local 963. Case 5–CA–24957

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

The issue presented in this case[1] is whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule prohibiting employee discussion about their earnings and violated Section 8(a)(3) and (1) of the Act by terminating employees Louis Wayne May and Ronald Stepp.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fredericksburg Glass and Mirror, Inc., Fredericksburg, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute paragraphs 2(a), (b), and (c) for paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

"(a) Rescind the unlawful no-discussion rule.

"(b) Remove the unlawful no-discussion rule from any copies of the employee manual that the Respondent distributes to its employees.

"(c) Either distribute manuals so revised to incumbent employees, or make such revisions in the copies which they now possess."

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

[1] On October 21, 1996, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Respondent filed an answering brief and a reply brief.

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

[2] We deny the General Counsel's motion to strike the Respondent's exceptions and answering brief. We find that the exceptions are sufficiently specific to meet the requirements of Sec. 102.46(b)(1) of the Board's Rules and Regulations and that the answering brief does address issues raised in the General Counsel's exceptions. We also deny the Respondent's motions to strike the General Counsel's exceptions and reply brief. Contrary to the Respondent's argument, both documents were timely filed.

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

The Respondent has also asserted that the judge's decision manifests her bias and prejudice against it. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or exhibited impermissible bias against the Respondent in her analysis and discussion of the evidence.

[4] In exceptions, the Respondent contends for the first time that Sec. 10(b) of the Act bars litigating the legality of the rule prohibiting employee discussion about their earnings. The Respondent, however, has waived this affirmative defense by failing to plead or litigate it at the hearing. *Laborers Local 324 (AGC of California)*, 318 NLRB 589 fn. 1 (1995).

[5] The General Counsel excepts to the judge's failure to order the Respondent to rescind its unlawful rule prohibiting employees from discussing their earnings with each other. The General Counsel argues that the judge's determination that recission already had occurred is erroneous and inconsistent with her earlier findings that, among other things, the Respondent's posting of a hand-corrected copy of the rule for 2 weeks was: (1) less than the Board routinely requires; (2) did not comport with the Respondent's own practice of issuing and distributing corrected copies of the rule to its employees; and (3) there was no evidence that the Respondent ever deleted the invalid rule from its printed employee manuels. We find merit to this exception and will order the Respondent to rescind this rule.

On another remedial matter, we do not adopt the judge's express direction that backpay be computed by reference to rates set by Federal authorities under the Davis-Bacon Act. We leave the computation of the appropriate gross backpay rates to Board agents in the compliance stage of this proceeding. Finally, we find no merit in the General Counsel's request that litigation fees be assessed against the Respondent and sanctions imposed on its counsel.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all parties had the chance to present evidence and state their positions, it has been found that we violated the National Labor Relations Act in certain respects. 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.

WE WILL NOT maintain a rule which forbids employees to discuss their earnings with each other.

WE WILL NOT terminate you, or otherwise punish you, because you have engaged in activity protected by the Act.

WE WILL NOT discourage membership in International Brotherhood of Painters and Allied Trades, Glaziers Local 963, or any other union, by terminating you, or otherwise discriminating in regard to your hire or tenure of employment or any term or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL rescind the no-discussion rule.

WE WILL delete from the employee manuals which we distribute to new employees the rule that forbids employees from discussing their earnings with each other; and WE WILL either distribute to current employees copies of the manual with this deletion, or make such deletions in the copies which they now possess.

WE WILL, within 14 days from the date of the Board's Order, offer Louis Wayne May and Ronald Stepp reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Louis Wayne May and Ronald Stepp whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of their termination.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Louis Wayne May and Ronald Stepp, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the terminations will not be used against them in any way.

FREDERICKSBURG GLASS AND MIRROR, INC.

James R. Rosenberg, Esq., for the General Counsel.
Lynn Swan, of Fredericksburg, Virginia, for the Respondent.
Timothy G. Edney, of College Park, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Washington, D.C., on October 30 and November 1, 1995, pursuant to a charge filed on December 12, 1994, and amended on October 11, 1995, against Respondent Fredericksburg Glass and Mirror, Inc., by International Brotherhood of Painters and Allied Trades, Glaziers Local 963 (the Union); and a complaint issued on January 27, 1995, and amended on October 13, 1995. The complaint in its final form alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a rule which prohibited employees from discussing earnings with each other; and violated Section 8(a)(1) and (3) of the Act by discharging employees Wayne May and Ronald Stepp because Respondent believed that they formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Shortly after the beginning of the second day of the hearing (November 1, 1995), James R. Rosenberg, counsel for the General Counsel (Rosenberg or the General Counsel) and the Union's representative rested their case. Thereafter, Lynn Swan, a layman who is Respondent's president and represented it at the hearing, called as a witness Dale Sherry, an admitted supervisor (see fn. 6, infra). After that, Swan called himself as a witness. Swan authenticated, and isought to introduce into evidence to show the truth of the contents, an affidavit from Karen Bost, who is Swan's secretary and who at that moment was at Respondent's office in Fredericksburg, Virginia, about 50 miles from the hearing room in Washington, D.C. I sustained the General Counsel's objection to the receipt of this affidavit into evidence, on the ground that it was hearsay, but asked Swan whether he wished to put it into the rejected-exhibit folder; this was in fact done. Then, the following colloquy occurred:

> MR. SWAN: How do I get it considered as evidence?
>
> JUDGE SHERMAN: Well actually I'm not sure that you can. It seems to me that you've got to call Ms. Bost.
>
> MR. SWAN: Can I have her submit it as evidence later?
>
> JUDGE SHERMAN: You could have called her as a witness.
>
> MR. SWAN: Well she's not here.
>
> JUDGE SHERMAN: Well if she's not here, she still works for you, I suppose you could bring her in tomorrow.
>
> . . . .
>
> MR. ROSENBERG: . . . Mr. Swan has had ample opportunity. We missed a whole day yesterday. He was an hour and a half late today . . . I would object to continuing the hearing tomorrow, if it's only to hear Ms. Bost's testimony. . . .
>
> . . . .
>
> MR. SWAN: Maybe I can get it in through her giving to me and explaining to me these circumstances as just testimony [. That's] what she did when she gave it to me.
>
> JUDGE SHERMAN: Well, you still have to call Ms. Bost as a witness, however. And, normally she would just testify orally as everyone else did as to what happened that day in relation to that particular document.
>
> Anyway it's quite clearly inadmissible and I will [continue] to reject it. Please continue Mr. Swan.
>
> [Document marked R.Exh. 1 was rejected.]
>
> MR. SWAN: Does that mean I can have her come up tomorrow?
>
> JUDGE SHERMAN: We'll see. [Do you] have any further testimony?
>
> MR. SWAN: Yes. . . .

After this exchange, Swan put an exhibit into evidence and gave testimony on Respondent's behalf. Then, Swan stated, "My testimony is over at this time. I would like to make some closing statements at this time." I advised him that after he had rested, and because the General Counsel stated that he had no rebuttal evidence, the General Counsel would argue first if he wanted to, and then Swan could argue. Swan stated at this point that he had no other testimony. The General Counsel then presented an oral argument, after which Swan also presented an oral argument. Also, a discussion was conducted on the record in connection with the preparation and filing of posthearing briefs. During this discussion,

and with the General Counsel's consent, I undertook to provide Swan with copies of briefs I happened to have in my office (which is in the same building as the hearing room) as samples which would give him some idea of the nature and format of briefs; after closing the hearing, I brought a few of such briefs to Swan. The hearing closed with the following exchange:

> JUDGE SHERMAN: Anything else that anybody wants to state on the record?
> MR. ROSENBERG: No, your honor.
> MR. SWAN: I believe that's all. Thank you ma'am very much.

At 4:32 p.m. on Friday, November 3, 1995, about a half hour before my normal quitting time, Swan faxed to my office a letter to me dated November 2, which read in part:

> I am a little confused at how I go about entering the testimony and written affidavit of Ms. Karen Bost. As you will recall, I tried to enter her written statement into the record as an exhibit and I was instructed that I would have to produce her as a witness. I approached to do so the next day, and the general [counsel] of the NLRB did not want to go into the next day and it was simply left hanging with the comment that "we will have to see later."
>
> . . . .
>
> Any help that we . . . can provide in settlement of this issue before briefs are prepared [is] welcomed and we appreciate the court's and your Honor's help in the processing of this case.

I did not see this letter until Monday, November 6. A letter dated November 6 from me to Swan, Rosenberg, and Union Representative Timothy Edney reads in part as follows:

> As to Mr. Swan's desire to enter Ms. Karen Bost's affidavit and testimony into the record, he is hereby advised as follows:
>
> Respondent's motion at the hearing to put her affidavit into the record as Respondent's Exhibit 1 was denied upon Mr. Rosenberg's objection to its receipt; and except under unusual circumstances, her affidavit cannot be received, to prove the truth of the contents, on Respondent's motion and over Mr. Rosenberg's objection. Section 10(b) of the National Labor Relations Act, and Section 102.39 of the Board's Rules and Regulations, require that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." Rules 801–802 of the Federal Rules of Evidence provide, in part:
>
> Rule 801.Definitions
>
> The following definitions apply under this article:
> —Statement—A "statement" is (1) [a] written assertion . . .
>
> (b)—Declarant—A "declarant" is a person who makes a statement.
>
> (c)—"Hearsay" is a statement, other than one made by the declarant while testifying at the . . . hearing, offered in evidence to prove the truth of the matter asserted.
>
> . . . .
>
> Rule 802. Hearsay Rule
>
> Hearsay is not admissible except as provided by these rules. . . .
>
> If Mr. Swan wants Ms. Bost to testify, he should file a motion with me, with copies to Mr. Rosenberg and Mr. Edney, requesting me to reopen the record for this purpose, stating what Mr. Swan expects her to say, and explaining why he neither called her to testify before the record was closed, nor moved at the hearing to keep the record open until she testified. If Mr. Swan expects her to testify in accordance with her affidavit (R. Exh. 1, rejected), his attention is drawn to the last three sentences on page 2 of his letter to Mr. D'Amico [Regional Director of the Board's Region 5] dated January 26, 1995, which was received into evidence as part of General Counsel's Exhibit 8; according to my recollection, Mr. Swan testified at the hearing that this January 26 letter was drafted by Ms. Bost and was sent out without his having read it.[1]

This letter was mailed to Swan by certified mail, in a correctly addressed envelope, on November 7, 1995.[2] By letter to me dated November 16, 1995, and received by me on November 20, Swan inquired, in effect, why I had not answered his November 2 letter. On the assumption that Swan had failed to receive my November 6 letter without any fault on his part, in the morning of November 21, I sent him by certified mail an explanatory letter, dated November 21, which contained another copy of my November 6 letter to Swan plus other material. In the afternoon of November 21, I received from our mailroom the envelope which had been sent by certified mail to Swan on November 7, unopened and together with its contents. The Postal Service had marked on the envelope that it had been "refused" on November 9, 1995. In view of the possibility that Respondent would also refuse to accept my letter (with enclosures) dated November 21, by covering letter dated November 28 and mailed by both certified and regular mail, I sent Swan copies of my November 6 and 21 letters and of the attachments to my November 21 letter. My November 21 letter and enclosures were received by Respondent by certified mail on November 27; my November 28 letter and enclosures were received by Respondent by certified mail on November 30.

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[1] G.C. Exh. 8 includes only the fourth page of this January 26 letter; the complete letter is included in G.C. Exhs. 7 and 9. As to the contents of this letter and Ms. Bost's affidavit, see infra, part II,C,2d. As to the drafting of the January 26 letter, Swan initially testified that it was "a letter that I sent to the NLRB, on January 26th." Then, he testified that he did not recall whether it was he or Bost who wrote it, that if she wrote it he would not have reviewed it before it was sent out, and that he did not recall whether it was he or Bost who sent it. Then, he testified that his purported signature thereon had been written by Bost.

[2] Because the addressees of my November 6 letter included Rosenberg and Edney, and because Swan's November 2 letter to me did not indicate that they had received copies, I attached copies of his November 2 letter to all the mailed-out copies of my November 6 letter.

As noted, when I inquired just before closing the record whether anyone had anything else to state on the record, Swan did not claim that he wanted an opportunity to bring in Bost to testify. Further, Swan has never replied to my November 6 letter describing the steps he should take in order to have Bost testify, nor has he ever requested that the record be reopened for that purpose. In early December 1995, timely briefs were filed by Swan and Rosenberg; Swan's brief was accompanied by a covering letter dated December 1, 1995. In addition to contending that the complaint should be dismissed, because it was not supported by the evidence, Swan's brief contends that the complaint should be dismissed, because Respondent did not receive a fair trial—a contention disputed by the General Counsel in his March 22, 1996, "General Counsel's Response to Respondent's Assertion that the Case Should be Dismissed Because it Did Not Receive a Fair Trial." As to this latter contention, Swan's brief relies partly on various rulings by me which allegedly constituted legal error. For the reasons discussed, infra, part II,C,2b, I do not believe such rulings were in error; but, even if they were, they would not normally call for dismissal of the complaint.[3] In seeking dismissal of the complaint, Swan further relies on the following colloquy, at the outset of the hearing:

> JUDGE SHERMAN: Mr. Swan, I told you, before you went on the record, that you might be better off if you had no lawyer. And you indicated you couldn't afford one. Is that . . . accurate?
> MR. SWAN: That's correct.

This constituted a slip of the tongue by me which I do not think misled Swan into not retaining counsel where he would otherwise have done so. Thus, both the December 15, 1995 letter from the Regional Director which accompanied the copy of the charge served on Respondent ("Attn: Mr. Lynn Swann [sic]") and the material which accompanied the copy of the January 27, 1995 complaint served on Respondent drew Respondent's attention to its right to counsel. However, by letter to a Board agent dated May 26, 1995, Swan stated that Respondent was "unable to afford representation" in connection with the complaint. Furthermore, Swan was not accompanied by counsel when Swan made an appearance for Respondent on the first day of the hearing (October 30, 1995). Swan's posthearing brief (with a covering letter dated December 1, 1995) claims (p. 3) that Respondent would have retained an attorney "had [Respondent] known that the ALJ would greatly assist [the General Counsel] and would allow both documents and verbal testimony into the record in disregard of the rules of evidence"—in other words, that it was my conduct of the hearing which allegedly led Swan to conclude that he should have been represented by counsel. However, until this day Respondent has not chosen to be represented by counsel. Swan's understanding at all relevant times that Respondent had the right to be represented by counsel and might be advantaged by such representation is further shown by some of his remarks at the hearing.[4] In any event, even if Swan really did not understand at any relevant time that Respondent had a right to representation by counsel and might benefit by its exercise, such ignorance would not normally call for dismissal of the complaint. See *American Industrial Clearing Co.*, 291 NLRB 399 fn. 1 (1988), and cases cited supra, fn. 3.

For the foregoing reasons, Respondent's posthearing motion for dismissal of the complaint for procedural reasons is denied.

On the basis of the record as a whole, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by the General Counsel and Respondent and their oral argument on the record after all parties had rested, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation with an office and place of business in Fredericksburg, Virginia. At all material times, Respondent has been engaged in the business of furnishing and installing architectural glass and aluminum framing to commercial and residential buildings. During the 12-month period before the issuance of the complaint, a representative period, Respondent's gross revenues exceeded $500,000, and Respondent purchased and received at its Fredericksburg, Virginia facility goods and materials valued in excess of $50,000 directly from points outside Virginia. I find that Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act. *NLRB v. Denver Bldg. Trades Council (Gould & Preisner)*, 341 U.S. 675, 683–685 (1951); *NLRB v. Carpenters Local 74 (Watson Co.)*, 341 U.S. 707, 711–712 (1951); *R.W. Van Auker Construction Co.*, 173 NLRB 1474 (1969); *Siemons Mailing Service*, 122 NLRB 81, 85–86 (1958).

The complaint alleges, Swan admitted, and I find that the Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegedly Unlawful Rule*

Respondent has an employee manual which, at least since about October 1992, has been given to many or all employees upon or shortly after being hired. Until at least February 28, 1995, Respondent included in this handbook the following rule:

> EMPLOYEE EARNINGS
> An employee's earnings are a confidential matter between the employee and his earnings supervisor. Earnings may not be discussed among fellow employees and any such discussion will result in dismissal and/or disciplinary action at the supervisor's discretion.

Swan testified that this rule was "never really a company policy." The first page of the booklet which contains this

[3] *Ribbon Sumyoo Corp.*, 308 NLRB 956 (1992); *Patrick Cudahy, Inc.*, 288 NLRB 968 (1988).

[4] Thus, at one point, after reminding Swan that he had wanted to testimonially authenticate and to put in some exhibits, I stated, "You're finding out the hard way what lawyers get paid for;" to which he replied, "I understand that. I sure do understand." Moreover, when I asked at the end of what Swan now contends was an unfair trial whether anyone wanted to state anything else on the record, Swan stated, "I believe that's all. Thank you very much."

rule states, "This manual has been prepared to inform you of our basic personnel practices." When glazier Charles Chick was hired by admitted Supervisor Dale Sherry about October 1992, Sherry gave him a copy of the manual and told him, "You don't discuss your wages with anybody in the Company." As a reason for these instructions, Sherry told Chick that he "was one of the highest paid men there, so it was not very good for [him] to discuss [his] wages with anybody else. It could create hard feelings with other people who had already been there longer than [he] had." Further, Chick credibly testified that in October and November 1994, he did not discuss wages with employees May and Stepp on the Fort Belvoir job, because Chick was not supposed to discuss wages with anybody on that job. As discussed infra, in December 1994, Sherry and Swan told Chick to discharge May and Stepp because they were telling their fellow employees that May and Stepp were not being paid the "daily wage" called for by the Davis-Bacon Act (40 U.S.C. § 276a), some of the other persons on the job were not being paid the "daily wage" either, May and Stepp were "starting to talk about it," and if Respondent could get rid of them, this would not get down to the rest of the employees that were working there and would not create a problem. Swan testified that the rule did not apply to the discussion of salaries with personnel who participated in administering the Government contract, although an employee was expected to request other employees to absent themselves during such discussions. Swan further testified that employees were forbidden to reveal their wages to other employees because some employees wanted to conceal their wages from other employees.

On October 11, 1995, the Union filed its amended charge in this proceeding, which charge specifically alleged for the first time that this rule was unlawful. An allegation to this effect was added to the complaint by an amendment issued on October 13, 1995. Swan stated on the record that during the investigation of this case, a Board agent said to Swan that it would be wise to omit this rule from Respondent's employee manuals, that the investigator thought it might be improper or illegal, and that Swan should probably let the employees know through posting on the bulletin board. Thereafter, Respondent photocopied the page of the employee manual on which this rule appears, crossed out the rule, and inserted the following entry, written by one of Respondent's clerical employees; "2/28/95 You may [omit] this, as above from your employee handbooks." About February 28, 1995, this document was posted on a bulletin board, just above the timeclock, where notices for field employees are posted, and which the employees are instructed to check every day when getting their timecards. The notice remained there for 2 weeks.[5] While this notice was on the bulletin board, some employees may have been working out of town, in locations where they do not punch the timeclock. So far as the record shows, the notices were not mailed to any employees.

[5] This finding is based on the testimony of admitted Supervisor Dale Sherry. Swan stated on the record that the notice was posted "about a month or two."

B. *The Allegedly Unlawful Termination of May and Stepp*

1. Background: the hiring of May and Stepp

Between about late September 1994, and at least May 1995, Respondent performed a contract calling for the installation of glass and aluminum on a building in Fort Belvoir, Virginia. Swan testimonally described Respondent as a nonunion contractor. However, under the Davis-Bacon Act (40 U.S.C. § 276a), Respondent was required to pay the "prevailing rate" on this job. In late September or early October 1994, when Union Field Organizer Timothy G. Edney visited the job, he ascertained that as to classifications connected with the glazier trade, the only classification which had been posted on the job was "glazier," and that the posted rate for this job was $22.06 an hour—$17 in wages and $5.06 in benefits. When Edney asked Respondent's employees what they were being paid, they stated that they were being paid the prevailing rate. Edney asked how many employees Respondent was expected to have on the job; they replied 10 to 12. On the basis of this information and some October 9–3 help-wanted advertisements in a local newspaper for "Glass Mechanics—3 yr. min. commercial experience" with Respondent's telephone number, Edney advised union member Ronald Stepp and, perhaps, union member Louis Wayne May, that Respondent was looking for glass mechanics on a "prevailing wage" job. Both Stepp and May are journeyman glaziers.

Thereafter, May telephoned Dale Sherry, who is admittedly a supervisor for Respondent,[6] and told him that May was a glazier and was interested in working for Respondent. Sherry asked what type of experience he had; May said, about 10 years.[7] At Sherry's request, May came to Respondent's facility for a personal interview. Sherry said that he was looking for experienced people (see supra, fn. 7), and that May would be installing metal and glazing. May asked to be paid $15.50 an hour. Sherry said that May would be paid $14 an hour, and would get a raise later if his work warranted it.[8] Sherry told him that he was being hired specifically for the Fort Belvoir job; that this was a "scale" job; and that if he worked out well and if Respondent had jobs coming up, there was a possibility that he could do some other work for Respondent depending upon location and if he was willing to travel. May accepted the job, and began working for Respondent at the Fort Belvoir job on October 21, 1994, at $14 an hour. Respondent's payroll records list his classification as "semi-skilled laborer," a classification not listed on the notice posted under the requirements of the Davis-Bacon Act implementing regulations. Sherry did not ask May if he were a union member, and May did not reveal his union membership to Sherry.

In late October 1994, union member Ronald Stepp was advised by Edney and May that Respondent was hiring glaziers at the Fort Belvoir job; Edney further advised Stepp that this was a "prevailing rate" job. Stepp thereupon telephoned

[6] He is variously described in the record as the field operations manager, the shop manager, and the shop and installation manager.

[7] This finding is based on Sherry's prehearing affidavit (see infra, part II,C,2b).

[8] His wages remained the same throughout the 6-week period during which he worked for Respondent.

Swan, who said that Respondent was looking for people who had worked in the trade before.[9] Stepp said that he was a glazier, that he had been in the trade for 10 or 12 years, and that he had done store fronts, curtain walls, and all aspects of glazing. Swan asked how much Stepp wanted to be paid. Stepp said that he thought it was a "scale job." Swan said that only two men on the job got that, and again asked how much Stepp was looking for; Stepp said 16 or 17 dollars. Stepp eventually started to work on November 11, 1994, at $16 an hour; Respondent's records classified Stepp (like May) as a "semi-skilled laborer." Swan told Stepp that the Fort Belvoir job would last "a couple" or "a few" months. When Stepp asked about future employment after the Fort Belvoir job had been completed, Swan said that "he had a couple million dollars of work on the books . . . he had plenty of work."[10] Swan said that either he would send an employee manual and various forms to the job site for Stepp to pick up, or he could pick them up at the office. Stepp said that he would pick them up at the jobsite.[11] Stepp never told anyone in management that he was a union member.

May and Stepp both credibly testified to the belief that the work they were assigned to perform on the Fort Belvoir job was journeymen glaziers' work.[12] Shortly after May started to work on that job, some of his fellow employees told him that it was not a "prevailing rate" job. Stepp had known this when he started the job. Both of them discussed this matter with each other and with the other employees on the job. Also, both of them brought the prevailing-rate matter to the attention of Edney, who said that he would look into it and take care of it.

2. The termination of May and Stepp

The general contractor on the Fort Belvoir job was W. M. Schlosser Co., Inc. (Schlosser). On November 7, Edney went down to the job and approached Schlosser's job superintendent, Woodrow Mossburg, who at that time was standing with Field Engineer Porter, a major with the Army Corps of Engineers (the ACE). Inferentially after identifying himself as a representative of the glaziers' union, Edney asked Mossburg whether Respondent was submitting certified payrolls for the job. Mossburg asked why. Edney said that he had been notified by an individual on the job that Respondent's employees were not being paid the prevailing rate. Mossburg asked why this was any of the Union's business on a nonunion job. Edney said that it was the Union's business to see that whether people were union or nonunion, they were paid what they were supposed to be paid by law. Edney asked if the rates were posted. Mossburg or Major Porter said that they had not seen any wage determinations for the glazier classification. Edney asked if he could take a look at the wage determinations. Mossburg said that he did not have the time that day to "mess with" Edney, but he was free to take a look at the determinations. Major Porter suggested that Mossburg should answer Edney's questions and "avert a whole lot of problems down the road. If there truly isn't any problems at all."

Edney thereupon walked over to where the wage determinations for the job were posted, and took the determinations document down in order to find the page with the glazier rate. This rate was the same rate as the one which had been posted when Edney had first visited the job, and there was still no determination listed, other than glazier, for workers associated with this trade. On seeing Edney flipping through this document, Mossburg and Major Porter approached him. Mossburg said that he had just remembered that glazier rates had in fact been posted. Mossburg went on to tell Edney that Mossburg did not have time to talk any more that day, but said that if Edney came back the next day, Mossburg would answer any questions that he had. Edney did not meet with Stepp and May that day, nor did Edney tell Mossburg or Major Porter that some union members were on the job.

On the following day, when Edney came down to the job, Mossburg said that his office had instructed him not to answer any more questions, and that Edney was to direct any such questions to Major Porter.

Returning a call from Edney, Major Porter told him that Major Porter would look into the problem if the employee who had complained to Edney spoke with Major Porter about it. Edney said that he wanted to keep the identity of the complaining employees from their employer, "for fear that something might happen to them"; and asked Major Porter to conduct a "labor interview" of Respondent's employees on the Fort Belvoir job, to ascertain if they were being paid the amounts required by law; Major Porter said that he would. When Edney thereafter telephoned Major Porter's office to remind him of this undertaking, Edney was told that Major Porter was on vacation. On November 23, Major Porter returned Edney's call, said that he would get started on the labor interview process that afternoon, and further said that on finishing this process, he would contact Edney. On November 27, having heard nothing from Major Porter, Edney telephoned Stepp and asked whether any interviews had been conducted on the job. Stepp said no, not to his knowledge. The two men discussed setting up a picket on the job.

On November 28, 29, or 30, Major Porter came to the job and asked May and Stepp, who were working together that day, the name of their employer. When they identified their employer as Respondent, Major Porter pulled out a notebook and recorded their responses to questions as to their own names, their classifications, and their hourly rates. Thereafter, May and Stepp told Chick, who was the leadman on the Fort Belvoir job,[13] that May and Stepp had told "someone with the Army" that this was a scale job and they were not being paid scale wages. Chick reported to Sherry that some employees at the jobsite were asking him if they were getting the prevailing wage rate, but Chick did not give any

[9] My finding that Swan said this is based on his prehearing affidavit (see infra, part II,C,2b).

[10] My findings in these two sentences are based on Stepp's testimony. Swan testified, in effect, that he told Stepp that Respondent was "looking for some temporary help while we get [the Fort Belvoir] job closed in." Because Swan's prehearing affidavit states: "I told him that I had work coming up," and for demeanor reasons, I credit Stepp.

[11] My findings in these two sentences are based on Swan's prehearing affidavit. Swan testified that so far as he could recall, he did not tell Stepp that Sherry would give Stepp a manual.

[12] As to this issue, I have disregarded Chick's second affidavit. See infra, part II,C,2b.

[13] The General Counsel contends, and Respondent denies, that Chick was a statutory supervisor. This issue is discussed, infra, part II,C,2a.

names.[14] On November 30, May told Edney that Major Porter had conducted a job interview on the Fort Belvoir job, and had conducted it in such a fashion that a lot of the different employees were aware of who had spoken to him and who had not.

At 3 p.m. on December 1, 1994, Edney faxed to Swan a letter, under the Union's letterhead and signed by "Timothy G. Edney/Organizer, Glaziers Union Local 963," which read as follows:

> It recently was brought to our attention by our members, Wayne May and Ronald Stepp, currently employed by you at CIDC Headquarters Building in Fort Belvoir, Virginia, that the proper rates are not being paid to these and several of the other employees at the site. It is our understanding that the R.O.C.C., Captain Porter [sic], has completed wage interviews and has come to the same conclusion and will be taking the appropriate action to rectify the under payment of wages.
>
> We would like to advise you that if any employees receive unfair treatment for cooperating with Captain Porter [sic] or are discriminated against as a direct result of their involvement to pursue what they rightfully are entitled to by law, we will reserve the right to bring such matters to the attention of the National Labor Relations Board and file the appropriate charges for any such misconduct.
>
> Additionally, you can be assured that any protected activity in which any Union activist or sympathizers may choose to engage in will be conducted strictly within the guidelines established by law and the National Labor Relations Board, and will not interfere with their efficiency and productivity as an employee.

The transmittal cover which accompanied this fax states that its subject is "Union salts at CIDC Headquarters Bldg."[15] Swan read this fax on December 1, the day he received it.[16]

When Chick came to Respondent's office on the following morning preliminary to starting work on the Fort Belvoir job, Swan and Sherry told Chick that they wanted to let May and Stepp go because May and Stepp were not being paid the "daily wage," a lot of the other people on the job were not being paid the "daily wage" either, May and Stepp were "starting to talk about it," and if Respondent "could get rid of them or let them go, this would not filter to the rest of the employees that were working there and it wouldn't create a problem . . . [Swan and Sherry were] afraid that word would get down to the rest of the people there and it would create a bigger hassle for the Company." In addition, Sherry showed Chick the letter which Edney had faxed to Swan the previous day. Sherry told Chick to let May and Stepp go; Chick said that he would not.[17]

Then, Sherry told Chick to tell May and Stepp to call Sherry at the end of their shift.[18] Chick conveyed this message. At the end of the shift, one of these two employees telephoned Sherry, conversed with him, and then handed the telephone to the other employee. During these telephone conversations, Sherry told May that he did not need May and Stepp any more because of a lack of materials; and told Stepp that Sherry did not have "anything else for" Stepp.[19]

Respondent's payroll records show that during each of the 5 weeks after May and Stepp were let go, Respondent employed between six and eight persons on the Fort Belvoir job.[20] Paragraph 13 of the October 12, 1995 subpoena served on Respondent calls for "All documents, including, but not limited to, weekly or bi-weekly payroll records and/or time sheets, that would show the names of all Respondent's employees who performed installation of architectural glass and/or aluminum framing, the dates and hours they work, the wages and fringe benefits they were paid, as well as the names and addresses of the work sites in which this work was performed." Swan testified that at the end of 1994 and in early 1995, Respondent's employees were working on four to eight jobsites.[21] In response to this subpoena, Respondent did not provide any timecards from July 30, 1994, until the end of 1994 (the discharges took place on December 2, 1994), or between March 21 and May 13, 1995 (the Fort Belvoir job was not completed until May 18, 1995, at the earliest). These timecards did not show wages or fringe benefits. The certified payroll records which Respondent submitted to Schlosser as to the Fort Belvoir job were received into evidence as one of the General Counsel's exhibits.[22] When prior to the hearing Edney compared these records with the pay stubs which were brought to him by some of Respond-

[14] This finding is based on Sherry's prehearing affidavit (see infra, part II,C,2b). As to this matter, I have disregarded Chick's second affidavit (see, infra, part II,C,2b).

[15] See *NLRB v. Town & Country Electric*, 116 S.Ct. 450, 456 (1995), referred to in Swan's posthearing brief.

[16] This finding is based on his prehearing affidavit and on other evidence; see infra, part II,C,2d.

[17] My findings in this paragraph are based on Chick's testimony, which I credit for demeanor reasons and the other reasons set forth infra, part II,C,2d. Much of this testimony stands undenied. More specifically, neither Swan nor Sherry testimonially denied Chick's testimony that they gave him certain reasons for wanting to let May and Stepp go. Sherry did testify that he did not "recall" Swan's being present that morning; and that Swan's presence was "very unlikely," because he did not "normally" show up until 7 a.m. or later, whereas Sherry usually comes to the shop at 5:30 a.m. because it is his responsibility "to get the guys going." However, Swan himself did not testimonially deny being present in the office at the critical time. Moreover, Sherry was admittedly a statutory supervisor who terminated May and Stepp.

[18] This finding is based on Sherry's prehearing affidavit (see infra, part II,C,2b).

[19] My findings in this sentence are based on the employees' testimony. Sherry testified to telling them that "we didn't need them anymore." However, Sherry's prehearing affidavit states that he told both of them that Respondent was running out of materials and was not going to need their help any longer (see infra, part II,C,2e). To the extent that the evidence may be in conflict, I credit the employees.

[20] The payroll records which Respondent initially certified to Schlosser stated that on Saturday, December 3, the day after May and Steep were discharged, three persons worked a total of about 17 hours on the Fort Belvoir job; these persons included Chick, who testified for the General Counsel. However, no work on December 3 is set forth on the "Revised" payroll records, which mistakenly specify that date as "11/3."

[21] Swan's prehearing affidavit, dated January 6, 1995, states that "there are about 20 projects presently."

[22] The record fails to show whether the General Counsel obtained these records from Respondent or from another source.

ent's employees on the Fort Belvoir job, he observed that the rates of pay did not correspond.

3. Aftermath

a. *Events involving Charles Chick, a witness for the General Counsel*

The initial charge in this case was received by Respondent on December 19, 1994. On a date or dates not clear in the transcript of testimony, but before Chick gave the NLRB Regional Office his first affidavit on January 17, 1995, Swan learned that Chick was to be interviewed by a representative of that office. Swan told Chick to tell the Regional Office that May and Stepp were let go because of lack of material, because of their lack of motivation in their work, and because they had lost a lot of time on the job. In addition, Swan told Chick to be careful not to say anything "in the line that they were being dismissed because of the idea of [their] not being paid the scale wages." Also, Swan told Chick not to discuss the faxed letter which Swan had received from Edney on December 1.[23] The contents of the affidavit which Chick gave the NLRB agent on January 17, 1995, are consistent with Swan's instructions.[24] Chick testified that he obeyed Swan's instructions, because Chick has a wife and two children and did not want to lose his job.[25]

About April 1995, Chick voluntarily resigned his employment with Respondent, without notice, because he had obtained a job elsewhere. Sherry credibly testified that he and Chick had gotten along very well. At about 3:30 p.m. on October 25, 1995, Chick gave to Attorney Rosenberg, who represented the General Counsel during the hearing, a second affidavit which as to Chick's December 2 contacts with Swan and Sherry, and Chick's conversation with Swan before Chick gave his first affidavit in January 1995, is substantially the same as (although somewhat more detailed than) his testimony before me.[26]

Respondent contends that I erred in receiving Chick's affidavits into evidence, because of statements at least allegedly made during a settlement conference on October 24, 1995 (the day before Chick was interviewed by Rosenberg and signed the second affidavit), with Deputy Chief Administrative Law Judge Bernard Ries, who was acting as a settlement judge.[27] About halfway into Chick's examination, and after Rosenberg offered Chick's affidavits into evidence, Swan claimed before me (although he never so testified) that when he and Rosenberg "spoke with [Judge Ries] and everything [Rosenberg] didn't say anything about [Chick] and all this stuff. [Judge Ries] asked [Rosenberg] about Mr. Chick and if [Rosenberg] was going to enter into any of this information, if we were going to have all this, and [Rosenberg] said that he wasn't going to at that time . . . [Rosenberg] said [he wasn't] going to and so did I say I wasn't going to." Rosenberg denied Swan's version of the conference (although Rosenberg did not testify about it either),[28] and stated that what he had said was that he did not know whether he was going to call Chick as a witness or not, "which was true at the time."

Assuming arguendo that Swan's representations accurately set forth what was said at the settlement conference, such statements could not have affected the admissibility of Chick's second affidavit, because it was not in existence when the settlement conference was held, and because Chick had already testified (and authenticated that affidavit) before Swan contended that Chick was precluded from testifying. In any event, I am unaware of any authority for the proposition that an attorney is precluded from calling a particular individual as a witness after that attorney has expressed to his opponent an intention not to call that individual. Application of any such rule as to Chick would be particularly inappropriate in the instant case, where, on the day after this representation was allegedly made, Chick advised Attorney Rosenberg (and stated in Chick's affidavit) that Respondent's president had instructed him to perjure himself when giving an affidavit to a Board agent, Chick thereafter so testified, and such testimony is undenied. I note, moreover, that there is no evidence or claim that Respondent acted to its detriment in reliance on Rosenberg's alleged representations.

b. *Investigation of wage rates on the Fort Belvoir job*

During a period whose dates are not clear in the record, but which included February 10, 1996, Respondent and ACE representatives engaged in discussions regarding whether Respondent was paying the legally required wage rates on the Fort Belvoir job. Also, during a period whose dates are not clear in the record, the Civil Investigation Division of the Department of Defense conducted an investigation of General Contractor Schlosser and several subcontractors on the Fort Belvoir job; Respondent was questioned during this investigation. A letter from ACE to Schlosser with respect to "Contractor Request for Additional Wage Classifications and Rates on the Fort Belvoir job," dated December 12, 1994, was supplied to Respondent by Schlosser on an undisclosed subsequent date. This letter at least purported to confirm the following at least alleged statements by an ACE representative to Schlosser Superintendent Mossburg: Schlosser's November 22, 1994 request for additional wage classifications and rates could not be officially forwarded for action because, among other reasons, a wage decision incorporated

[23] My findings is these three sentences are based on Chick's undisputed testimony. Swan's testimony does not advert to any such conversation.

[24] This affidavit stated, among other things, that Sherry had never discussed with Chick, or showed him, "a letter dated December 1, 1994 from Tim Edney of the Union."

[25] However, Sherry testified without contradiction that on a "couple" of occasions, "usually" when out-of-town work came up, Chick had said that if he was requested to do out-of-town work he would probably leave, that he did not really need to be working for Respondent, and that he and his wife were selling insurance on the side. Also, Sherry testified without contradiction that Chick had said he did not need to work in construction any more.

[26] My factual findings here are not based on Chick's second affidavit as proof of the truth of the contents. However, because Respondent's posthearing brief relies on Chick's first affidavit (offered and received to show the truth of the contents) as the basis for certain factual assertions, I have used the second affidavit to impeach the first affidavit. (See infra, part II,C,2e.)

[27] See Sec. 102.35(b) of the Board's Rules and Regulations, as amended on February 23, 1996, 61 F.R. 6941.

[28] He could not have done so without the written permission of General Counsel Frederick L. Feinstein. See Rule 102.118 (a)(1) of the Board's Rules and Regulations.

into Schlosser's contract with ACE, which decision contained a $22.06 union-negotiated hourly rate (base wage of $17.66 and fringes of $4.40) for "Glaziers" and "Glaziers—Mechanics," included worker classifications for the complete installation of windows, including field assembly and installation of aluminum window/door frames and installation of glass and hardware; no wage classification existed which combined mechanic-laborer into a single skill or trade; there was no glazier laborer, skilled or unskilled, classification for the performance of work for which Schlosser was requesting a wage classification; and under the wage decision, "general laborers" making at least $13.11 an hour could distribute the window materials but could not install the window, glass, or hardware without being paid the mechanic's rate. The letter further stated that the "wage classifications and rates you have requested to be added do not include any bona fide fringe benefits nor [do they bear] any reasonable relationship to similar wage rates contained in the wage determination as required."

Swan testified that on dates which Swan did not give, but which he at least implied were between December 12, 1994, and February 10, 1995, Respondent proposed additional classifications which were approved by Major Porter and "another army person." A memorandum from Swan to Schlosser dated February 10, 1995, with regard to the Fort Belvoir job stated:

> Per telephone message Major Porter this date, [Respondent] submitted spread sheet revising wages is accepted. I will get with you in next week to discuss Pymt. to the Employee's [sic] and [?] our previous plan. Please check with Porter on Pymt. of the 19,400—difference to you & thus to me.

This letter was received into evidence to show that it was sent to Schlosser, but not for any other purpose.

A memorandum faxed to Schlosser by Respondent dated March 29, 1995, states in part, "Following is the information on changes in employee classifications [and] a breakdown by week of how new classifications [affect] employee earnings. Also please find a list of checks to be cut to pay back wages." Of the approximately 29 persons on that list, the wage rates of about 23 were increased. The minimum new wage was $13.10 an hour, the straight-time increases ranged from 60 cents to $13.06 an hour, and about $10,600 in back wages was to be paid. Stepp and May were to be classified as "semiskilled." As to Stepp, the "old rate" and the "new rate" were to be the same, and he was to receive nothing. May's "new rate" was to exceed his "old rate" by 85 cents, and he was to receive about $93.

As the first witness called by the General Counsel, Swan testified on October 10, 1995, that restitution "in agreement with" Schlosser and ACE had been made to "All of the hourly employees on the job that were affected by the change in wage rate," and that the case had been "resolved." Later that day, the General Counsel called as a witness Rosalyn Davis, whose job title with ACE is contractor industrial relations specialist, and whose duties consist of overseeing the labor provisions of the contracts that are let by ACE for the Baltimore district to assure that the employees are properly paid according to the wage determination in the contract, and that the prime and/or subcontractors abide by all the clauses for the labor compliances. She credibly testified that the Department of Labor regulations require a proportionate number of mechanics and laborers on a particular job, and that in reviewing the file in the Department of Engineers case involving Respondent, she felt that there was an unduly low proportion of mechanics as compared to laborers.[29] She further credibly testified that a contractor needed a bona fide apprenticeship program in order to have an apprentice rate on a prevailing-rate job. She credibly testified that so far as she knew, Respondent had no such program; and there is no evidence to the contrary.[30] She testified that as of the date of her testimony (October 30, 1995), the question of whether the employees were paid the proper rate was still open. Davis went on to testify that ACE's files contained an undisclosed number of checks which had been cut by Respondent for restitution but were unsigned.

Thereafter, as a witness for Respondent, Swan testified that on a date which he was not asked to give, Respondent reached an agreement with Schlosser and ACE as to certain reclassifications and certain amounts to be paid by Respondent; that Respondent had prepared checks for the amounts in question but was unable to pay these amount with checks; that Respondent sent the blank checks to Schlosser so it could see they were prepared and so it could fund the checks; that after Schlosser funded the checks, Respondent signed them and sent them to the employees; but that he had been unable to locate the canceled checks. If these checks were written in accordance with Respondent's March 29, 1995 memorandum to Schlosser, they were 23 in number and totaled more than $10,000.

C. *Analysis and Conclusions*

1. The allegedly unlawful rule

I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act by maintaining a rule which prohibited employees, under threat of discharge or other discipline, from discussing earnings with each other. See *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993); *Handicabs, Inc.*, 318 NLRB 890 (1995), enfd. 95 F.3d 681 (8th Cir. 1996).[31] There is no merit to Respondent's seeming contention at the hearing that the rule is not unlawful because, at least in practice, it has not been extended to prohibit employees from discussing their wages with government officials, and because the rule allegedly was motivated by a desire by Respondent to avoid hard feelings between employees. As observed in *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976):

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[29] Of the approximately 10 persons whom Respondent employed on the Fort Belvoir job during the last full week (November 27—December 3) before May and Stepp were terminated, 2 were being paid the $22.06 posted straight-time "scale" rate for glaziers. Cf. infra, fn. 30.

[30] Edney testified that under the Davis-Bacon Act, every glass installation employee was entitled to receive a journeyman rate, except that for every three journeymen, the employer could employ at an apprentice rate one helper or apprentice if he was enrolled in a bona fide apprenticeship program.

[31] The complaint does not allege that Respondent violated the Act by enforcing this rule.

> [D]issatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action. The possibility that ordinary speech and discussion over wages . . . may cause "jealousies and strife among employees" is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights.

I do not agree with the contention in Respondent's posthearing brief (p. 4) that no unfair labor practice finding should be based on this rule because it allegedly "was never enforced and has long since been rescinded." In the first place, the mere maintenance of such a rule violates the Act, without evidence of enforcement. *Radisson Plaza*, supra, 307 NLRB 94. In the second place, after posting this material Respondent failed to offer reinstatement to or to make whole employees May and Stepp, although Respondent had discharged them because of protected activities which included discussions with other employees about earnings (see infra, part II,C,2e).[32] In the third place, the action which Respondent chose to use in order to publicize the rescission of the invalid rule is less than the Board would routinely require; more specifically, the rescission notice may have been posted for only 2 weeks (rather than the 60 days which the Board customarily requires), and there is no evidence or claim that Respondent deleted the rule from its printed employee manuals—either those which it keeps in stock to show or distribute to new employees, or those which its incumbent employees have already received. Indeed, although Respondent periodically prints up new pages which are to be substituted for old pages in its manual, Respondent did not print up a new page to be substituted for the old page which included the unlawful rule, but merely crossed out the unlawful rule on one posted copy of that page.[33] See *Sam's Club*, 322 NLRB 8 (1996). Nor does the record show that the rescission material was publicized to any of Respondent's employees who may have been working in out-of-town locations where they did not punch the time clock and, therefore, would likely not have seen the rescission notice posted over the timeclock. Finally, even an effective and adequately publicized rescission of the rule would not render a cease-and-desist order inappropriate. *Lenox Hill Hospital*, 225 NLRB 1237, 1243 (1976).

[32] Swan's January 1995 affidavit (see infra, part II,C,2b) states that he did not act on Union Organizer Edney's December 1, 1994 letter regarding employee discussions about alleged underpayment of wages "because the employees were discussing their wages with a Government Employee, namely captain Porter [sic], and it made no indication of discussing wages with other employees."

[33] The last page of the manual calls for a signature by the employee after, inter alia, an acknowledgement of its receipt. That same page contains a form headed "Updates and Revisions" with blanks calling for "Date," "Page," "Section," and "Initial." There is no claim or evidence that Respondent used this form in connection with the deletion of the unlawful rule.

2. The allegedly unlawful terminations

a. *Whether Chick was a statutory supervisor*

(1) Facts

It is convenient to determine at this point whether Chick was a statutory supervisor.

As previously noted, Respondent performs glass installation work atvarious jobsites. Respondent's operations are headed by Swan, an admitted supervisor, who puts together and signs contracts with developers or general contractors. He and/or Respondent's project managers quote jobs on the basis of estimates made by them of the needed amount of glass, framing, and labor; order and/or provide the materials for the various jobs; handle any financial end of the job; perform the project management and coordination; and put work orders together.[34] After a work order is put together, it is given to Sherry, who oversees the assignment of laborers, and who is responsible for manning the job and seeing that the job gets done. Sherry spends most of his time in the shop rather than in the field, but "technically" (Sherry's word) he is in charge of all the jobsites. Respondent contends that at all material times, Swan and Sherry were its only supervisors.

During the period relevant here (between about October 1994 and Chick's resignation about April 1995), Respondent employed about 20 employees and was working on about 20 projects, although not necessarily on a continuous basis.[35] Respondent sometimes performs jobs so situated that employees cannot return at night; but the record fails to show whether Respondent was performing any such jobs during the period involved here.

During each week between October 2, 1994, and May 20, 1995, Respondent employed between 2 and 21 persons on the Fort Belvoir job. Sherry visited this job occasionally, but not on a day-to-day basis.[36] While Chick was working on the Fort Belvoir job (between November 9, 1994, and January 6, 1995), nobody else on the job was paid more than he; after December 12 and until January 6, nobody else was paid as much,[37] and Respondent employed between six and eight persons on the job.

Respondent has variously described Chick's position on the Fort Belvoir job when May and Stepp were let go as "la-

[34] As to the duties set forth in this sentence, Sherry testimonially attached them to the project managers and Swan testimonially attached them to himself. The project managers do not have daily contact with the leadman on the job. There is no evidence that any field personnel who worked on the Fort Belvoir job had any contact with any of the four project managers on that job. Accordingly, I find it unnecessary to resolve the testimonial conflicts between Sherry and Swan on the subject of project manager.

[35] As to the number of projects, this finding is based on Swan's affidavit dated January 6, 1995 (see infra, part II,C,2b). On October 30, 1995, Swan testified that he did not really know the number of projects on which Respondent's employees were working in late 1994 and early 1995 ("maybe" four to eight).

[36] Sherry testified that he "believe[d]" he had seen May and Stepp working. Before being terminated, May had worked on the Fort Belvoir job on about 18 different days, and Stepp on about 20 different days.

[37] Chick's straight-time hourly rate was $22.06. During this December 12—January 6 period, the next highest straight-time rate was $13 (Sewell).

borer," "lead man," "lead person," "foreman,"[38] and (in a January 1995 letter to the NLRB Regional Director, with copies to two Congressmen) "site supervisor." When May and Stepp were hired effective October 21 and November 11, respectively, each of them was told to report to Ted Rampulla, whom Stepp testimonially identified as the foreman on the job, and who received the same hourly rate as Chick. However, Rampulla did not work on the Fort Belvoir job after November 15, 1994 (May and Stepp were discharged on December 2), whereas Chick worked on that job most of the days during this period.[39] Sherry credibly testified that when May and Stepp were let go, Chick was the only lead man on the Fort Belvoir job.[40] Sherry credibly testified that he gave day-to-day direction to Chick on the Fort Belvoir job. Swan credibly testified that Chick directed employees as to what to do on the job. Chick credibly testified that he "was the one basically in charge of what went on and the procedures through the day and who did what"; and that on a day-to-day basis he would direct the workers on what exactly he wanted done. If an employee wanted time off, he would come to Chick, who could not himself approve time off but whose recommendation as to such requests was usually followed.

Chick credibly testified that he had the authority to recommend the discipline or discharge of employees, but did not have the authority to discipline employees "unless there was a real necessity like somebody drinking on the job." On August 16, 1994, when Chick was on a jobsite other than the Fort Belvoir jobsite, Chick told an employee of Respondent that he was discharged for drinking on the job. Then, Chick reported this incident to Sherry, who thanked Chick, told him that "it was a good job," and stated that Sherry would "back him up on that." Thereafter, Sherry telephoned the employee that he was terminated for drinking on the job. Also, Sherry asked Chick to fill out an "Employee Advisement Report" form, which Respondent uses to advise employees of discipline or disciplinary termination; Chick did so, but the record fails to show whether Sherry instructed him to fill out the entire form.[41] In the blank calling for "Supervisor's Remarks," Chick wrote a brief purported account of the employee's conduct. Also, Chick inserted a check mark before the printed entry on the form "Dismissal" (the choices "Suspension," "Warning," and "Information Only" are also printed on the form); signed it in the space calling for "Supervisor Signature"; and turned it in to Sherry, who signed his own name thereon.

On December 6 and 7, 1994, Respondent's daily construction reports to Schlosser were signed by Chick in a blank calling for "Subcontractor's approved authorized representative." Nobody in Respondent's office ever approved of him as a supervisor for that kind of report. Nor did Sherry ever advise Schlosser that Chick was not the appropriate person to complete these reports. Sherry testified that so advising Schlosser would have been the project manager's responsibility, but there is no evidence that the project managers so advised Schlosser, nor did Sherry so advise the project managers.

(2) Analysis and conclusions

On the basis of the foregoing evidence, I conclude on a preponderance of the evidence that while working on the Fort Belvoir job, Chick had the authority, in Respondent's interest and in the exercise of independent judgment, to effectively recommend discipline and discharge of employees, and to responsibly direct them.[42] Accordingly, I find that while working on that job, Chick was a supervisor within the meaning of Section 2(11) of the Act.

b. *Evidentiary rulings*

Respondent's posthearing brief claims that I improperly received alleged hearsay into evidence. At the hearing, Respondent did not object to any of this evidence on hearsay grounds. Accordingly, such evidence is receivable to show the truth of the contents, even if a timely hearsay objection would have been warranted. *Iron Workers Local 46*, 320 NLRB 982 fn. 1 (1996); *Today's Man*, 263 NLRB 332 (1982). However, because Respondent appears to contend that in receiving such evidence I was somehow taking advantage of the fact that Respondent was not represented by counsel, such rulings will be discussed on the assumption that hearsay objections thereto were timely made.

1. Respondent apparently contends that because of the hearsay rule, I erred in receiving into evidence the testimony of Edney, Stepp, and May that Stepp and May told Edney they were not receiving the prevailing rate on the Fort Belvoir job. However, this testimony was receivable to show that Stepp and May believed this to be true, that they so advised Edney, and that he took certain action on the basis of these representations. I have not used this testimony, or any other evidence in the record, to determine whether Respondent was in fact paying the prevailing rate. Because May and Stepp entertained a good-faith belief that Respondent was not paying them the prevailing rate, whether Respondent was in fact paying the prevailing rate is immaterial to the instant proceeding, and will not be determined by me. See infra, part II,C,2e.

2. Respondent contends that because of the hearsay rule, I erred in receiving into evidence, for purposes other than impeachment, the prehearing affidavits of Swan and Sherry and the two prehearing affidavits of Chick. Swan and Sherry are admittedly supervisors. Swan heads Respondent's entire

[38] The term "foreman" was used by Sherry in his prehearing affidavit; see infra, part II,C,2b.

[39] Although the payroll records which Respondent initially certified to Schlosser state that Rampulla worked on the Fort Belvoir job on November 28 and 29, the revised records for the week in question do not name him.

[40] Sherry testified that when both Chick and Barry Sorenson were on that job, both of them were lead persons.

[41] Chick carried such forms to the job in his briefcase. However, because Sherry testified that these forms are kept in his office file cabinet and are not issued to field employees, I infer that Chick was not given them by his superiors, but helped himself for purposes of convenience if they were needed on the job.

[42] As discussed infra, part II,C,2c, Respondent contends that on November 23, 1994, Chick gave a letter from himself to Sherry which asked that May and Stepp be let go. For the reasons set forth infra, part II,C,2c, I do not believe that this letter was written on the date it bears; or that it was intended by Chick, or believed by Respondent, to set forth a real opinion by him that they should be discharged. However, Respondent's contention in this respect implicitly concedes that Chick had authority effectively to recommend discharge.

operation, including the Fort Belvoir job; Sherry is in charge of all the jobsites, including the Fort Belvoir job. Chick was a supervisor on the Fort Belvoir job, was working for Respondent on that job when he gave his first affidavit, and was told by Swan what to say in that affidavit. I find that each of these three affidavits constituted a statement made by Respondent's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Accordingly, and because these affidavits were offered against Respondent, under Rule 801 (d)(2)(D) of the Federal Rules of Evidence the admissions therein did not constitute hearsay. Further, at least as to Swan's affidavit and Chick's first affidavit, the same result is called for by Rule 801 (d)(2)(C), since Swan heads Respondent's entire operation and authorized Chick to give his first statement to the NLRB. See *Croley Coal Corp.*, 280 NLRB 899 fn. 2 (1986), enfd. 844 F.2d 380, 384 fn. 6 (6th Cir. 1988); *Boilermakers Local 587 (Stone & Webster Engineering)*, 233 NLRB 612, 615 fn. 5 (1977); *Consolidated Accounting Systems*, 225 NLRB 93, 95 (1976).

Remaining is Chick's second affidavit, which he gave after he had resigned from Respondent's employ. This affidavit was receivable for purposes which had nothing to do with the truth of its contents. More specifically, the second affidavit constituted in essence part of Chick's testimony that before resigning he made certain representations to the NLRB in his first affidavit at Swan's instructions, and that after resigning Chick made different representations to the NLRB in his second affidavit. As shown infra, part II,C,2e, this narrative is material to the discharge issue without regard to whether the representations in the second affidavit are probative of their truth. As to conflicts between Chick's testimony on the one hand and Swan's and Sherry's testimony on the other, certain portions of Chick's second affidavit are arguably receivable to corroborate Chick's testimony.[43] However, for the reasons set forth infra, part II,C,2c-d, I credit Chick over Swan and Sherry without regard to Chick's second affidavit. Further, my findings of fact are not based on any conclusion that Chick's second affidavit is probative of the truth of its contents.

c. *The alleged November 23 letter (R. Exh. 5)*

A photocopy of what purports to be a handwritten letter from Chick was received into evidence, on Respondent's motion and over the General Counsel's objections, as Respondent's Exhibit 5.[44] When asked if he possessed the original letter, Swan replied, "No, we believe [the original letter] was here at the time we came up here and it's now missing." The document was written on lined paper. The upper right-hand corner contains the following entry, most if indeed not all of which is written in the top margin, before the lines begin:

Wayne May[45]
Ronnie Stepp
11/23/94

The next word which appears on the document is the word "Date," which begins at about the left-hand margin and is written on a line below the "11/23/94" entry. The letter goes on to say:

> I would like to request that you let Wayne May & Ronnie Stepp go. We have two of our own men who can do more work in less time.
>
> [Barry Sorenson] and [Wesley Conrad] are doing about 6 to 8 header [sic] a day and only [Sorenson] is a [mechanic]. Wayne & Ronnie can only do about 3 to 4 header [sic] each and they are on the job site 1 1/2 [hours] longer than [Sorenson] and [Conrad] besides they are both [mechanics].
>
> I tried to [motivate] them on a day to day basis with very little success. I also have very little depenably [sic] for the both of them so for the [benefit] of the Company we no longer need them.
>
> 90% of all frames are in so I only need (1) [mechanic] on the job site.[46]
>
> Thank you.
> Charlie Chick [Foreman]

Chick testified on October 30, 1995, that before December 2, 1994, "I discussed with Mr. Sherry that I felt that [May's and Stepp's] work habits were not very good. I don't remember discussing with Mr. Sherry about letting them go, no. I may have, but I don't remember discussing that with him, no." Chick was not shown or specifically asked about Respondent's Exhibit 5. After Chick had testified for the General Counsel on that day, I excused him as a witness; the record fails to show whether he was testifying under subpoena. Respondent's Exhibit 5 was marked as an exhibit, at Respondent's instance, on November 1, 1995, the second day of the hearing. At that time, the General Counsel stated that he had seen the document before, although he could not recall whether he had seen the original. Morever, before Chick testified, Swan testified that "the lead man . . . had sent a letter to [Sherry], asking to have them released from the job." The General Counsel did not call Chick as a rebuttal witness, nor did Respondent call him as a witness.

As to whether the original document of which Respondent's Exhibit 5 is a photocopy is in Chick's handwriting, the record contains as the only exemplars Chick's photocopied signatures on photocopies of his two affidavits (G.C. Exhs. 17 and 18) and a photocopy of a disciplinary form (G.C. Exh. 16) which Chick filled out and signed. Respondent's Exhibit 5 appears to be in the same handwriting as the exemplars. I note, however, that the "11/23/94" date written in the upper right-hand corner of Respondent's Exhibit 5 does not seem to have been placed where it would naturally have been placed if the document had been dated at the same time it was written. More specifically, it would have been more natural either for the "11/23/94" entry to have been placed directly after the handwritten word "Date," rather than above it and near the opposite margin, or for the word

[43] See *Tome v. United States*, 513 U.S. 696 (1995). However, Chick gave his second affidavit only 5 days before testifying, and no contention is made that any improper influence or motive newly arose during this 5-day period.

[44] Swan moved for its admission after receiving a reminder from me.

[45] May uses his middle name, Wayne, as his first name.

[46] Chick's October 1995 affidavit states that "at the time May and Stepp were let go there was not . . . a lack of work. There was still sufficient work for the whole crew, including May and Stepp."

"Date" to have been omitted entirely. I note, moreover, that Sherry testified, in effect, that he was not really sure whether the original document had been dated when he received it.

Neither Sherry's nor Swan's prehearing affidavits dated January 6, 1995, nor Chick's prehearing affidavit dated January 17, 1995, contain any reference to a document of this nature. Nor did Sherry give a copy to the Board agent who took Sherry's affidavit. When Sherry was asked by Swan on direct examination whether this document was "something that Mr. Chick gave you approximately on 11/23/94," Sherry replied yes. However, a few minutes later, when I asked Sherry when Chick had given it to him, Sherry replied, "Well, it was in the fall." When I then asked him whether the date had been on it when he got it from Chick, Sherry replied, "I would assume so since most everything that we do is dated." Sherry testified that Chick "verbally" told him May and Stepp were not working up to par and asked Sherry to remove them from the job, and that Sherry agreed and asked Chick to "do it in his own writing." Sherry testified that Chick gave him this letter "just prior to when I discharged the two employees." Sherry discharged them 9 days after November 23, the date on the document.

At least so far as relevant here, Respondent's employees on the Fort Belvoir job worked in two-man crews. The document purports to compare the work performed by a crew consisting of May and Stepp with the work performed by a crew consisting of Sorenson and Conrad. Sorenson and Conrad did not come onto the job until November 16, and the only days worked on the Fort Belvoir job by all four of these men before November 23 were November 21, 22, and 23. During these 3 days, Sorenson and Conrad did in fact each work 1-1/2 hours less than did May and Stepp (23.5 hours as compared to 25 hours). However, Sherry testified that he "would think" the May-Stepp crew was split up prior to November 23.[47] The document also describes May and Stepp as undependable. Between Stepp's first day on the job (November 1) and November 23, he missed a total of 2 days of work.[48] Between May's first day on the job (October 21) and November 23, May missed a total of about 9 days of work, about 5 of which had been prearranged when Sherry hired him.[49] When read together, Respondent's payroll records and an "Employee Advisement Report" from Sherry to employee Scott Murray (whose classification on Respondent's payroll records was semiskilled laborer, the same as May and Stepp) show as follows: Murray started to work for Respondent on the Fort Belvoir job on November 2, 1994. He missed work on November 18 and 25.[50] On Saturday, November 26, in order to save Murray from driving to Fredericksburg, Sherry used his own personal time to meet with Murray and complain about his attendance. Although Murray promised to improve his attendance, he missed work on the next 2 working days (November 28 and 29) and also missed work on December 5. On December 6, Sherry gave Murray an "Employee Advisement Report" which states, among other things, that he needed to improve his attendance in order to justify a pending request for a raise. Murray missed another day of work on December 12 (his sixth during his 6-week tenure), and was discharged on December 16.[51] May's and Stepp's personnel files contain no written warnings for absenteeism. Stepp, at least, received no oral counseling about his attendance.[52] Although the alleged November 23, 1995 letter states that 90 percent of the frames were in, the job was not completed until May 15, 1995, at the earliest; and after employees Stepp and May were terminated on December 2, six to eight persons were employed by Respondent on the Fort Belvoir job during each week until the week ending January 7, 1995. During this period, two persons worked on that job who had never worked on it before nor (so far as the record shows) ever worked for Respondent before ("unskilled laborer" Bartholomew and "semi-skilled laborer" O'Conner).

During the hearing, the General Counsel moved to strike Respondent's Exhibit 5. I then stated that I would dispose of this motion in my decision. In view of my conclusion that this purported letter is in Chick's handwriting, I credit Sherry's testimony about it to the extent that he testified Chick prepared it upon Sherry's request and gave it to him, and, therefore, deny the motion to strike. However, I further conclude that this letter was not written until after the discharges, and did not set forth Chick's real opinion about their quality as employees and whether they should be let go. In so finding, I rely on (1) Chick's credible testimony that he did not remember discussing with Sherry about letting them go; (2) Chick's uncontradicted testimony that Swan instructed him to make certain untrue statements about (among other things) the reasons for and the circumstances of the terminations when being interviewed by the NLRB in January 1995, which untrue statements are included in his first affida-

[47] On November 21, 22, and 23, employees Billy Sewell and Scott Murray worked the same number of hours each day as May and Stepp.

[48] This finding disregards Chick's second affidavit (see supra, part II,C,2b). These two absences do not include Thursday, November 24 (Thanksgiving Day), or November 10, when for reasons undisclosed by the record (Sherry testimonially speculated that it might have been a rain day) nobody worked. Stepp also missed a half-day on November 11, because of an injury on the job.

[49] This 9 days does not include November 10 or 24 (see supra, fn. 48). As to the length of the prearranged absence period, see p. 2 of Chick's January 1995 affidavit (see supra, part II,C,2b).

[50] He also missed work on November 10 and 24 (see supra, fn. 48).

[51] A subpoena issued on October 12, 1995, to Respondent at the General Counsel's request calls for, among other documents. "All documents related to the employment of all employees who have been disciplined or discharged by Respondent, including . . . disciplinary notices." In responding to this subpoena, Respondent unexplainedly failed to produce the "Employee Advisement Report" directed to Murray, which the General Counsel obtained from other sources.

[52] Sherry testified without corroboration that in order to talk to May and Stepp about their problems, he left "messages" for them at the jobsite, but (in effect) that they did not get in touch with him. When asked why he did not mention such efforts in his prehearing affidavit, he replied that the Board agent had not asked about this and Sherry did not think it was important. May and Stepp were not asked whether they received any such messages. Accordingly, because May unexplainedly missed about four workdays, and because during part of this period he had no home telephone, I credit Sherry's testimony as to May. However, because Stepp had only two unexcused absences at most, because he did have a home telephone, because Sherry was an unreliable witness in other respects (see infra, part II,C,2d), and for demeanor reasons, I do not believe his testimony that he left such messages for Stepp. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

vit; (3) the overstatements and other, probable inaccuracies in the factual representations made in the letter; (4) Sherry's general unreliability as a witness (see infra, part II,C,2d); and (5) the facial peculiarities in the document with respect to the date thereon.

d. *When Swan and Sherry first saw Edney's faxed letter to Swan*

Swan testified that he did not find out about May's and Stepp's union membership, or that they had been discussing their wages with the ACE, until Swan received the letter which Edney faxed to Swan on December 1. As previously noted, my finding that Swan read this letter on December 1, 1994, the day before the terminations, is based on Swan's prehearing affidavit, sworn to on January 6, 1995, which states:

> On December 1, 1994, I received a fax from Tim Edney. I read it and then placed it in my "follow up" in box. I did not call Edney, nor did I call Dale [Sherry]. I did not do anything in response to receiving the letter because I was busy that day. I was probably doing payroll at the time. I did not act on this letter because the employees were discussing their wages with a Government Employee, namely captain Porter [sic], and it made no indication of discussing wages with other employees.

This statement in Swan's affidavit as to when he read Edney's faxed letter is corroborated by a letter, under Respondent's letterhead and bearing Swan's purported signature, which is addressed to the Regional Director for NLRB Region 5, is dated January 26, 1995, and states, in part:

> The union faxed a letter to me on Thursday [December 1, 1994] advising of [May's and Stepp's] union involvement. Their release the following evening was merely coincidence. The union's letter was received on a Thursday afternoon, stuck in my "in basket," and I set it aside due to the fact that the wage scale was being determined by the government and their employment was temporary. [See infra, part II,C,2e.]
>
> Although I planned on responding to the union's writer [sic], I did not come back to the union's letter until the following week . . . .

However, Swan testified at the hearing that he did not read the faxed letter on December 1, when it came, nor on Friday, December 2, the date of the terminations that evening. He went on to testify as follows:

> Q. Can you explain why not?
>
> A. I didn't receive it until—I think it was either Monday or Tuesday afternoon, the following week.
>
> Q. Can—can you explain why you didn't receive it?
>
> A. I wasn't in the office during that time frame, to go into my basket and get the—the letter out of the—
>
> Q. Were you out of town or—
>
> A. I was out of town most of the time.
>
> Q. Would that be on business or pleasure?
>
> A. Both.

The last paragraph of Swan's affidavit states: "I have read this statement . . . including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief." Swan admitted on the witness stand that he had read and signed this affidavit. However, he testified that as to the statement in his affidavit that he read Edney's faxed letter on December 1, "that is not what took place." He went on to testify that he did not understand "all" of the affidavit at the time, that he told Board Agent Ricardo Morillas (who took down the affidavit and administered the oath to Swan) that Swan did not understand it, and that Morillas said that Swan "had to sign it or [he] would be in default," and that if Swan signed it, "it wasn't an admission of guilt by any means . . . could be able to go back later and correct things." As to the January 26 letter, Swan, after testimonially identifying it as "a letter that *I* sent to the NLRB" (emphasis added), went on to testify that "maybe" his secretary/receptionist/administrative assistant ("She's the only one there"), Karen Bost, had drafted it and sent it out without his having reviewed it; he went on to testify that it was not "abnormal" for him to ask her to draft responses to letters to Respondent, and that she "often" signs Swan's name to letters and sends them out without his reading them. When initially sending the Regional Director the January 26 letter, Respondent also sent two Congressmen courtesy copies of that letter. On March 2, 1995, Respondent sent the Regional Director a second copy of Respondent's January 26 letter, at whose end appears a request, purportedly handwritten and signed by Swan but in Bost's handwriting, asking to be advised "of status/action taken by 3/7/95"; Swan testified that he did not recall reproaching her for making this notation. Respondent sent two Congressmen courtesy copies of its March 2 letter; the record suggests (although this is not wholly clear) that Respondent attached to the courtesy copies of its March 2 letter additional copies of its January 26 letter. A May 26, 1995 letter to a Board agent, with Swan's purported signature which was in fact written by Bost, attached still another copy of the January 26 letter, with notations in Swan's own handwriting on the first page. However, although the January 26 letter which (Swan testified) may have emanated entirely from Bost states that he read Edney's faxed letter on December 1, Swan testified that Bost "reminded [me] that I wasn't in the . . . office on [December] first . . . nor did I pick up my basket until the following day . . . of [sic] the weekend."

Sherry testified that he had seen Edney's faxed letter "once before." He went on to testify that he had been shown a copy (by Board Agent Morillas, "I believe") on a date Sherry was not asked to give, but after the December 2, 1994, discharges. However, the pretrial affidavit which he gave to Morillas on January 6, 1995, states: "The first time I saw this letter was when Swan showed it to me and told me that someone from the government was going to come down to interview me. It was about a week and a half ago" (that is, about December 26, 1994).

On the basis of the foregoing evidence, and for demeanor reasons, I conclude that Edney's faxed letter was read by Swan on December 1, 1994, the day that Respondent received it and the day before the discharges. I so find because Swan made such representations in his January 6, 1995 affidavit and because such representations were included in the January 26, 1995 letter which on several separate subsequent

occasions up to May 26, 1995, was sent out by Respondent to the NLRB Regional Office and to two Congressmen. In view of Bost's admitted participation in repeatedly sending out copies of the January 26 letter over a 4-month subsequent period, I do not believe that without Swan's knowledge she drafted the January 26 letter stating, in effect, that Swan had seen Edney's letter on December 1, but that she also "reminded" Swan that he had been out of town when it was received on December 1.[53] Nor do I believe Swan's testimony at least implying that when he read and then signed his affidavit, he did not "understand" the simple statement in the affidavit, "On December 1, 1994, I received a fax from Tim Edney. I read it and then placed it in my 'follow up' in box." Swan is an intelligent businessman whose accent, phrasing, and vocabulary when testifying indicate that English is his first language. Furthermore, I credit Chick's testimony that Sherry showed him the letter on the morning of December 2, 1994, and prior to the terminations; and I do not credit either Sherry's testimony that he did not see the letter until about December 26, 1994, when Swan showed it to him, or Sherry's inconsistent affidavit that he did not see the letter until it was shown to him by Board Agent Morillas, who took this affidavit on January 6, 1995.

e. *Analysis and conclusions*

There can be no doubt that union members May and Stepp were engaging in protected union and concerted activity when they discussed with each other and with fellow employees whether they were being paid the wage rates required by law; when they drew this matter to the attention of their union representative; and when they assisted a government agent in conducting the investigation which the Union had requested in response to the employees' suggestion that the law entitled them to higher wages. See *NLRB v. Moss Planing Mill Co.*, 206 F.2d 557, 559–561 (4th Cir. 1953); *Novotel New York*, 321 NLRB 624 (1996); see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–570 (1978). Such employee conduct was protected by the Act whether or not they were correct, or even reasonable, in their honest belief that the Davis-Bacon Act entitled them to be paid more than Respondent was paying them. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962); *Dave Castellino & Sons*, 277 NLRB 453, 459–460 (1985).[54]

Moreover, the credible evidence preponderantly shows that May's and Stepp's termination was motivated, at least in part, by their protected union and concerted activity. By Swan's own admission, he first learned of their participation in this activity when he read Edney's faxed letter, and the credible evidence (including Swan's prehearing affidavit) shows that he read this letter late in the afternoon of December 1, 1994. On the following morning, Swan and Sherry told Chick that they wanted to let May and Stepp go because they were not being paid the "daily wage," a lot of the other people on the job were not being paid the "daily wage" either, May and Stepp were "starting to talk about it," and if Respondent "could get rid of them or let them go, this would not filter to the rest of the employees that were working there and it wouldn't create a problem . . . [Swan and Sherry were] afraid that word would get down to the rest of the people and it would create a bigger hassle for the Company." When Chick refused to comply with Sherry's instructions to let May and Stepp go, Sherry told Chick to have the employees call Sherry at the end of the day; and, when the employees complied with these instructions, Sherry terminated them. Thereafter, when Swan learned that Chick was to be interviewed by a Board agent, Swan told Chick not to tell the Board agent anything "in the line that [May and Stepp] were being dismissed because of the idea of not being paid the scale wages" (the subject of their protected activity) and not to discuss the letter from Edney which for the first time made Swan aware of May's and Stepp's protected and union activity regarding scale wages, and which Swan read the day before the employees were terminated.

This strong evidence that Respondent terminated May and Stepp, because of their protected activity is augmented by the variations in the explanations that Respondent has given for this action. Respondent's posthearing brief contends (p. 1) that they were laid off because materials on the job were running low, layoffs became necessary, and Chick recommended that they be laid off "because they were the worst employees." However, Sherry's prehearing affidavit states, "Although I told [May and Stepp] that I was laying them off for lack of supplies, the genuine reason for their termination [was] the excessive absenteeism/unsatisfactory attendance." Such shifting assertions strengthen the inference that the true reasons for the terminations was the employees' protected activity. *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988). Moreover, the evidence affirmatively shows that these claims are at least largely pretextuous. Thus, as to the assertion in Respondent's brief that May and Stepp were the "worst" employees, Sherry testified that he had no problem with using them again, and Swan testified that Sherry told him that Sherry had so advised the employees. Furthermore, when terminating May and Stepp, Respondent retained employee Murray, whose attendance record was worse than Stepp's and no better than May's (supra, part II,C,2c). Further, as to the lack-of-mate-

[53] As discussed in the Statement of the Case, supra, an affidavit by Bost, marked for identification as R. Exh.1, was rejected after timely objection on hearsay grounds, but has been put into the rejected-exhibit folder. Like Swan's testimony that he was out of town on December 1 and 2, Bost's affidavit to that effect cannot be reconciled with the January 26 letter which (according to Swan's testimony) could have been drafted and sent out by her without his knowledge.

[54] Although the reasonableness of their belief does not affect the protected character of their conduct, I conclude that their belief was in fact reasonable. Thus, they were being paid much less than the only rate then posted on the job; their union had advised them that this was a "scale" job; and both of them had about 10 years' experience in glass installation and brought their own tools to the job. Furthermore, May's and Stepp's testimonial description of the work which they performed on the Fort Belvoir job is similar to ACE's December 12, 1994 description of the "Glaziers" and "Glaziers-Mechanics" jobs which were to be paid $22.06 an hour (see supra, part II,B,3b). Further, Chick testified that May and Stepp did not "usually" do helper work on the job, but "did most mechanical work." Also, Swan's prehearing affidavit did not attribute his wage offer to Stepp to any belief that the then-posted wage scale did not apply to employees whose skills and experience were no greater than Stepp's, or to employees who would be performing the work which Stepp would be expected to perform. Rather, according to Swan's affidavit, he told Stepp that Respondent already had "the upper classification filled for what we needed on that job [and] I was looking for helpers."

rials claim (disavowed by Sherry's affidavit), on the first weekday (December 5) after May's and Stepp's termination Respondent installed 44 lengths of spandrel (painted) glass and 2 frames; and on the following day, Respondent installed headers, sills, and 56 lengths of spandrel glass.[55] Moreover, May credibly testified that in his opinion, there was not a lack of material on the job; that there was still "plenty more work" to be done on the job; that it was not nearing completion; and that after his crew put in the head and sill members and the framing, the glass which had been delivered to the jobsite was installed by his crew or other employees. Also, Stepp credibly testified that when he was terminated, there was plenty of work left on the job and material to be installed was being sent to the job every day or two, although he did not know whether it had been approved for installation. Respondent appears to rely upon Chick's first affidavit, which was received into evidence to show the truth of the contents. This affidavit states that "during the week of" November 26, 1994 (November 26 was the Saturday immediately prior to the terminations),[56] Chick told Sherry that Chick was not going to need May and Stepp any more "as the materials were running low, their lack of motivation and their poor attendance," and that Respondent should let them go.[57] However, Chick's second affidavit, which he signed after his resignation, states: "At the time May and Stepp were let got there was not a lack of material or a lack of work. There was still sufficient work for the whole crew, including May and Stepp . . . it was not contemplated or suggested, to my knowledge, that May and Stepp be laid off prior to Swan receiving that letter [faxed by Edney on the day before the terminations] . . . there was not a lack of materials and the job was not near completion." This use by Respondent of pretextuous reasons for the terminations supports the General Counsel's contention that they were motivated by May's and Stepp's union and protected activity. *Whitesville Mill Service Co.*, 307 NLRB 937 (1992); *Western Plant Services*, 322 NLRB 183, 195 (1996).

Because the evidence thus preponderantly shows that May's and Stepp's protected activity was a motivating reason for their termination, their termination violated Section 8(a)(1) and (3) unless Respondent shows, by a preponderance of the evidence, that Respondent would have taken the same action even in the absence of their protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–404 (1983); *Salem Leasing Corp. v. NLRB*, 774 F.2d 85, 87–88 (4th Cir. 1985); *FPC Holdings, v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995); *NLRB v. NUEVA Engineering*, 761 F.2d 961, 967 (4th Cir. 1985); *KNTV, Inc.*, 319 NLRB 447, 452 (1995); and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Respondent has failed to sustain this burden.

Thus, to the extent that the reasons relied on by Respondent have been found pretextuous, they are wholly ineffective in meeting this burden. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Hi-Tech Cable Corp.*, 318 NLRB 280, 281 (1995). As to the lack-of-materials contention, Respondent seems to be contending that materials sent to the job were unusable because they at least allegedly did not conform to specifications. However, Swan testified that he could not state the time when Respondent encountered these alleged problems—the wrong size glass and frame, insulation, vision glass, spandrel (opaque) glass, caulking, and door framing and hardware.[58] Although Sherry testified that some of the glass had to be reordered, it is unclear from his testimony whether the reordered glass was delivered before or after May's and Stepp's termination. As previously noted, during the two working days following the terminations, Respondent's employees installed frames and spandrel glass. It is true that according to Sherry, when inserting panes into the frames Respondent was securing the panes by using only pieces of "stops," rather than the full-length "stops" which would be substituted therefore before the job was completed, because not enough "stop" material had been ordered. Moreover, Sherry went on to testify that the glazing process which did not involve full-length "stops" did not require highly qualified people. However, he gave no dates in this connection;[59] and during the week after the terminations, Respondent used on the Fort Belvoir job the same number of "glaziers" (at Respondent's top hourly rate of $22.06) as the week of the terminations.

Finally, Respondent contends that May and Stepp were selected for termination because they did not work on Saturdays and sometimes declined offers to work in the shop and because their attendance was poor. However, although the General Counsel subpoenaed records which would have shown the dates and hours other employees worked on Saturdays or in the shop, Respondent failed to provide such records (see supra part II,B,2). I infer that, if produced, these records would have shown that Respondent retained in its employ other employees who did not work on Saturdays or in the shop, and employees on other jobs whose attendance was worse or no better than May's and Stepp's. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 173–174 (1973); *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), enfd. 621 F.2d 328 (9th Cir. 1980).[60] Moreover, before discharging Fort Belvoir employee Murray (with the same job classification as, and a much worse attendance record than, May and Stepp) on December 16, 2 weeks after May and Stepp's December 2 termination, Sherry orally conferred with him (at Murray's instance) on November 26 about his attendance and on December 6 issued him an "Employee Advisement Report." In contrast, no "Employee Advisement Reports" were issued to

[55] A header (or subheader) is a piece of metal which goes on the top of the window. After the header is installed, the window is set into it.

[56] The exhibit-folder copy of the affidavit is a photocopy of a handwritten document. The date therein may be November 28, rather than November 26. The difference is immaterial.

[57] The alleged letter from Chick including this recommendation is dated November 23 (supra, part II,C,2c).

[58] Swan testified that Respondent used much of the wrong-sized frame, at Schlosser's direction, and installed at least part (perhaps all) of the wrong-sized glass.

[59] He testified that "By the time we were putting a spandrel in [this was done during, at least, the two working days following the terminations], 75 to 80 percent of the building had already been done. As far as the glass goes."

[60] The record includes only the payroll records for the Fort Belvoir job. These records show that of the eight other persons who worked on that job during May's and Stepp's last week on that job, one (Burgess) had worked no Saturdays on that job, four (Sorenson, Conrad, Samuels, and Murray) had each worked one Saturday; two (Chick and Wilson) had each worked two Saturdays; and Sewell had worked eight Saturdays. In view of these records and the statement in Chick's first affidavit that Saturday work is not mandatory, and for demeanor reasons, I do not credit Swan's testimony otherwise.

May or Stepp, and there is no evidence or claim that Respondent ever complained to either of them about their attendance, at the time they were terminated or at any other time.

For the foregoing reasons, I conclude that Respondent violated Section 8(a)(1) and (3) of the Act by terminating May and Stepp.

CONCLUSIONS OF LAW

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

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

3. Respondent has violated Section 8(a)(1) of the Act by maintaining a rule which prohibits employees from discussing earnings with each other.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by terminating employees Louis Wayne May and Ronald Stepp.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the polices of the Act.

Because Respondent has already rescinded its unlawful rule, Respondent will not be required to rescind that rule. However, because the rule may still be included in copies of the employee manual which Respondent's incumbent employees have in their possession, or in copies which Respondent now possesses and may distribute to employees in the future, Respondent will be required to delete that rule from any copies of that manual which it distributes to employees, and either to distribute such revised manuals to its incumbent employees, or to make such revisions in the copies which they now possess.

In addition, Respondent will be required to offer May and Stepp reinstatement to their former positions or, if no such positions exist, to substantially equivalent positions, dismissing, if necessary, any employees hired to fill such positions. In addition, Respondent will be required to make them whole for any loss of earnings and other benefits they may have suffered, 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). Gross backpay is to be computed on the basis of the wage rates to which the appropriate Federal authorities find them to be entitled under the Davis-Bacon Act. See *K & H Specialties*, 163 NLRB 644, 647 (1967), enfd. 407 F.2d 820 (6th Cir. 1969) (Holcomb); *Karsh's Bakery*, 273 NLRB 1131 (1984). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987). In addition, Respondent will be required to expunge from its records all references to the unlawful termination of May and Stepp and notify them in writing that this has been done and that these unlawful terminations will not be used against them in any way. *Sterling Sugars*, 261 NLRB 472 (1982). Also, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Respondent Fredericksburg Glass and Mirror, Inc., Fredericksburg, Viriginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules which forbid employees to discuss earnings with each other.

(b) Terminating employees, or otherwise punishing them, because they have engaged in concerted activity protected by Section 7 of the Act.

(c) Discouraging membership in International Brotherhood of Painters and Allied Trades, Glaziers Local 963, or any other labor organization, by terminating employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(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, delete the unlawful no-discussion rule from any copies of the employee manual which Respondent distributes to employees.

(b) Within 14 days from the date of this Order, either distribute manuals so revised to incumbent employees, or make such revisions in the copies which they now possess.

(c) Within 14 days from the date of this Order, offer Louis Wayne May and Ronald Stepp full reinstatement to their former jobs or, if these jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(d) Make May and Stepp whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

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

(f) 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 or useful in analyzing the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by Region 5, post at its facility in Fredericksburg, Virginia, and at all of its jobsites, copies of the attached notice marked "Appendix."[62] Copies

[61] If 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.

[62] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

Continued

of the notice, on forms provided by the Regional Director for Region 5, 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, closed its Fredericksburg, Virginia facility, or completed the Fort Belvoir job, 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 June 12, 1994.

(h) 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.

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."