

CDR Manufacturing and International Brotherhood of Electrical Workers, AFL-CIO. Case 9-CA-33316-1, -2, -3

October 21, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 4, 1996, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The judge found that Kathy Facundo is a supervisor and agent of the Respondent. For the reasons given below, we agree with the judge that Facundo is an agent of the Respondent. Accordingly, it is unnecessary to pass on the finding that she also is a supervisor.³

Employees testified that Facundo is their supervisor. Further, the record shows that she transfers employees to different work assignments, reprimands employees for slacking off, schedules overtime, signs timecards, and grants time off. And, according to employee Barbara Haynes, during the critical period the Respondent's president called an employee meeting and told her to "go to Kathy Facundo, supervisor," who was keeping attendance at a captive audience meeting.⁴

It is clear that employees perceived Facundo to be aligned with management. It is also apparent, as evidenced by the remark of the Respondent's president

¹We find it unnecessary to pass on the judge's finding that the Respondent's action in permitting employee Barbara Haynes to finish out the week was part of an effort by the Respondent to learn more about the union campaigns, with the prospect that her termination could be rescinded. This matter was not alleged as unlawful in the complaint, and the judge's finding is unnecessary to the conclusion that Haynes' discharge was unlawful.

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

³For the reasons stated by the judge, Member Higgins concludes that Facundo is a supervisor. However, he also concludes that, at the very least, she is reasonably perceived by employees to be an agent of the Respondent.

⁴Our dissenting colleague contends that Haynes' use of the term "supervisor" in her testimony should be interpreted not as Haynes' quote of the Respondent's president, but rather as Haynes' description of her own view of Facundo's status. We find this to be a strained reading of Haynes' testimony. Prior to testifying about the remark of the Respondent's president, Haynes had asserted her belief that Facundo was a supervisor. Thus, it does not make sense, in our view, that Haynes would have felt the need to repeat her personal view of Facundo's supervisory status in the middle of her quote of the Respondent's president, rather than simply stating her recollection of what the Respondent's president had said.

and by management's assignment of Facundo as the attendance keeper at a captive audience meeting, that management acted in a manner that is consistent with, and that contributed to, the employees' perception. We, therefore, find that employee Christy Randolph could reasonably believe that Facundo spoke and acted for management when she interrogated Randolph and made threats of job loss and plant closure. *Roskin Bros., Inc.*, 274 NLRB 413, 421 (1985); *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1234-1235 (1982); and *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980).⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CDR Manufacturing, Somerset, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(b) Within 14 days from the date of this Order, offer Nicole Adams, Mary Collier, Linda Girdler, Sue Hall, Barbara Haynes, Tracey Haynes, Franka Johnson, Christy Randolph, and Carrie Vanover full 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."

2. Substitute the following for paragraphs 2(d), (e), and (f).

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

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

⁵Our colleague contends that an agency finding is not warranted, in part, because the meeting in which the Respondent referred to Facundo as a supervisor occurred little more than a week after Facundo had interrogated an employee and made threats of plant closure. We find no merit to this contention. That the Respondent identified Facundo as its agent after Facundo made such statements, rather than at some earlier date, does not change the impact Facundo's statements would have on employees. That is, if a person engages in 8(a)(1) conduct, and that person is later perceived by employees to be an agent of the Respondent, the coercive impact exists, at least as of the later date.

Chairman Gould further notes that the Respondent has not excepted to the judge's finding that Facundo is an agent of the Respondent.

“(f) Within 14 days after service by the Region, post at its Somerset, Kentucky facility copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 1995.

“(g) 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.”

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

MEMBER FOX, dissenting in part.

I would dismiss the unfair labor practice allegations based on the conduct of Kathy Facundo because I would not find that the record supports the conclusion that Facundo is either a supervisor within the meaning of Section 2(11) of the Act or an agent of the Respondent for the purpose of attributing to it the allegedly unlawful acts in which she engaged.

First, as to the question of Facundo’s supervisory status, the judge’s findings regarding her authority are clearly deficient because they do not establish that she exercised independent judgment in connection with any of her allegedly supervisory actions, e.g., transferring employees between work assignments, signing timecards, reprimanding employees. See, e.g., *Providence Hospital*, 320 NLRB 717 (1996); *Clark Machine Corp.*, 308 NLRB 555 (1992). In any event, I note that there is no majority finding that Facundo is a supervisor.

With respect to the agency issue,¹ in determining whether an individual is an agent for any given action, the Board applies common law principles of agency. *Alliance Rubber Co.*, 286 NLRB 645 (1987). My col-

¹ I note that the Respondent has combined its exceptions and brief in one document, and it has argued that “there is no evidence that CDR authorized Facundo to speak for CDR on the question of union organization” and that “[e]xpressing an opinion about what she recalled Don Curtis saying five years ago hardly portrays Kathy Facundo as a spokesman for Don Curtis or CDR.” Accordingly, I believe that the Respondent has adequately placed in issue the correctness of the judge’s alternative finding of agency.

leagues, for good reason, do not purport to find evidence showing that Facundo was actually authorized to speak for the Respondent on the subject of the union campaign. Instead, they appear to be finding that she had apparent authority to do this. Under the concept of apparent authority, “an individual will be held responsible for actions of his agent when he knows or ‘should know’ that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.” *Id.* at 646, citing Restatement 2d, *Agency* §27. In other words, an agent cannot create his own authority: actions of the principal creating the appearance of that authority are required.

The actions of the Respondent regarding Facundo on which my colleagues rely are merely (1) that it gave her authority to take various actions regarding employees’ daily work assignments and scheduling in a manner that did not necessarily rise to the level of supervisory authority within the meaning of Section 2(11) of the Act, (2) that it assigned her to take attendance at a captive audience meeting and, (3) that the Respondent’s president (Don Curtis) told employee Barbara Haynes to “go to Kathy Facundo supervisor” because she was taking attendance. I find all of these insufficient.

The minor authority over daily worktasks shows nothing more than that Facundo has the authority of a leadperson. As to Facundo’s duties in connection with the captive audience meeting, they did not rise above merely clerical tasks that might be assigned to any low-level employee without endowing that employee with authority to speak for the Employer on its views as to unionization. Had Facundo made antiunion statements or interrogated employees about their union sentiments in the course of her attendance taking, a case either for apparent authority or for actions within the scope of authority might be made out. See *Alliance Rubber Co.*, supra, 286 NLRB at 645 (where employer had actually authorized polygraph examiners to interrogate employees, the questions they asked about union activity could be found within the general scope of authority actually conferred). Her interrogation and report about what she thought were the views of President Curtis, however, were uttered on September 26, more than a week before she performed the attendance-taking duty.²

² I recognize, as my colleagues suggest, that circumstances indicating that an employee is an agent on a given date may suggest that actions by that individual on an earlier date were also taken on behalf of the principal. My point here, however, is that the statements made by Facundo on September 26 in the course of the alleged interrogation were clearly not made in the course of her later attendance-taking assignment, and in no way suggested that she was speaking as an agent of the Respondent. Hence, the September 26 statements do not constitute evidence supporting a finding that

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Finally, in citing President Curtis's reported remarks in sending employee Haynes to Kathy Facundo to have her name recorded, my colleagues are relying on the following testimony of employee Haynes concerning the day of the October 5 captive audience meeting:

We were met at the break room door, this was as I was walking into work and I was told by Don Curtis to remain in the break room and to go to Kathy Facundo, supervisor, and tell her your name so she could check your name off of the computer sheet that she had.

Since it was Haynes' assertion elsewhere in her testimony that Facundo was a supervisor, it is not at all clear whether in using the term "supervisor" here, she is quoting President Curtis, as my colleagues seem to believe, or simply interpolating her own characterization of Facundo's status. Certainly "go to Kathy Facundo supervisor" is not a plausible account of what an idiomatic speaker of English would say, and it is thus a thin reed on which to predicate a finding that the Respondent had created apparent authority for Facundo to speak on its behalf a week before the captive audience meeting, when she interrogated a fellow employee and threatened that unionization would have dire consequences.³

In the cases on which my colleagues rely, the putative agents were either placed by their principals in positions much closer to management or, with management's apparent approval, convened antiunion meetings at which admitted supervisors or high-level managers appeared. In *Roskin Bros., Inc.*, 274 NLRB 413, 421 (1985), the individual found to be an agent was an assistant warehouse manager who was "often together" with the manager, who functioned as the manager's "right hand man," and who spoke for him in his absence. In *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1230-1231 (1982), one of the building superintendents found to be an agent of the employer had arranged a meeting for the employees in his own apartment at which the employer's president and his attorney appeared, and the topic of discussion was how the employees could secure representation by a union other than the incumbent. Employees were brought to this meeting, outside their normal workplaces, at the behest of the president by the other superintendent found to be an agent. Other evidence showed close ties between these superintendents and the top managers.

Facundo was acting as the Respondent's agent for more than simply attendance-taking purposes on October 5. In the final analysis, the agency finding stands or falls on Haynes's use of the term "supervisor" in her testimony. For the reasons stated above, I find that insufficient to carry the General Counsel's burden on this issue.

³In assessing Haynes' testimony, I am not disputing the judge's decision to credit her testimony but merely making my own interpretation of that testimony, as the Board is free to do without disturbing credibility resolutions.

Under all the circumstances, the judge found that employees could reasonably perceive them as speaking and acting for management, "particularly on union-related matters." *Id.* at 1235. In *B-P Custom Building Products*, 251 NLRB 1337, 1338, 1347, 1351 (1980), the individual found to be an agent for purposes of coercive statements had called all the unit employees to two meetings on the subject of the union campaign, at the first of which he was joined by three admitted supervisors in delivering the employer's antiunion message.

In sum, I would find that, given the common law agency rules that the Board customarily applies in such cases, the General Counsel has not shown by a preponderance of the evidence that Kathy Facundo was an agent of the Respondent when she uttered the statements on September 26 that are alleged as unlawful.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post an abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate our employees about their knowledge of the Union.

WE WILL NOT threaten our employees with job loss or plant closure if they select a union to represent them.

WE WILL NOT, without evidence, blame the Union for acts of vandalism or bomb threats.

WE WILL NOT implement new work rules prohibiting our employees from talking at their work stations, prohibiting our employees from engaging in group discussions in the parking lot, and restricting employee access to the plant, in order to discourage union organizational efforts among our employees.

WE WILL NOT discharge employees because of their activity on behalf of the Union.

WE WILL NOT refuse to reinstate or discharge striking employees upon their unconditional offer to return to work.

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

WE WILL, within 14 days from the date of the Board's Order, offer Nicole Adams, Mary Collier, Linda Girdler, Sue Hall, Barbara Haynes, Tracey Haynes, Franka Johnson, Chirsty Randolph, and Carrie Vanover full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make the nine employees listed above whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against the nine employees listed above, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

CDR MANUFACTURING

Vyrone Alex Cravanas, Esq., for the General Counsel.
John T. Lovett, Esq. (Brown, Todd & Heyburn), of Louisville, Kentucky, for the Respondent.
Thomas M. Curley, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On October 11, 16, and 24 and November 29, 1995, charges and an amended charge were filed by the International Brotherhood of Electrical Workers, AFL-CIO (the Union) against CDR Manufacturing (Respondent).

On December 12, 1995, the National Labor Relations Board (the Board), by the Acting Regional Director for Region 9, issued a complaint which alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Respondent filed an answer in which it denied that it violated the Act in any way.

Trial was held before me in Somerset, Kentucky, on January 24, 25, and 26, 1996.

On the entire record in this case, to include posttrial briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, has been engaged in the manufacture of electronic computer bonds at Somerset, Kentucky.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Overview

The Union's campaign among Respondent's employees was started by employee Christy Randolph with the assistance of her father, Lester Randolph, and his Union, i.e., the IBEW. Through her father and the Union Christy Randolph secured a financial statement of Respondent and concluded with representatives of the Union that Respondent was profitable and could pay more to its employees. Lester Randolph works for another employer in the area and not Respondent.

Randolph very quickly enlisted the support of fellow employees Mary Collier and Barbara Haynes. They met with a union representative in mid-September 1995 and started getting union authorization card signed immediately thereafter.

It is alleged in the complaint that four supervisors of Respondent, i.e., President Don Curtis, Vice President Ray Curtis, alleged Supervisor Kathy Facundo, and alleged Supervisor Sharon Slavey violated Section 8(a)(1) of the Act.

It is also alleged that employee and union activist Barbara Haynes was fired on October 9, 1995, effective October 13, 1995, because of her support for the Union.

Further, it is alleged that eight employees and Barbara Haynes engaged in an unfair labor practice strike to protest Barbara Haynes' discharge and were unlawfully denied reinstatement on October 11, 1995, when they made an unconditional offer to return to work.

Lastly, it is alleged that employee Kristi Petrey, who picketed during the alleged unfair labor practice strike, while on medical leave, was discriminated in her employment when she returned to work, because Respondent did not return her to her old assignment.

I will address the allegations separately but before I do I note that Union International Representative Tom Curley credibly testified that by October 11, 1995, the Union had secured 26 union authorization cards for a unit of approximately 90 employees less than 1 month into the organizing campaign but since October 11, 1995, has secured only 3 additional union authorization cards. According to Curley the campaign to organize Respondent's employees is "stone dead" and he attributes this to the unlawful discharge of Barbara Haynes and the discharge of the striking employees following their unconditional offer to return to work.

B. The 8(a)(1) Allegations Involving Alleged Supervisors Kathy Facundo and Sharon Slavey

Respondent denies that Facundo and Slavey are supervisors and agents of Respondent within the meaning of the Act. I note that Facundo and Slavey are both hourly employees.

Employees wear blue lab coats at work while Facundo and Slavey wear white lab coats.

With respect to Facundo employees Christy Randolph, Barbara Haynes, Mary Collier, Nicole Adams, and Franka Johnson all testified that Facundo was their supervisor. Further, that Facundo scheduled overtime, signed timecards, was the person to see if you wanted time off, policed the production line on which she worked by, for example, moving employees about and telling them to be quiet if she thought they were being too noisy. Facundo specifically told both Mary Collier and Franka Johnson on separate occasions that she was their supervisor and she used the word supervisor. On absence reports in evidence (R. Exhs. 5, 9, 10, and 11), Barbara Haynes identified Facundo as her supervisor and the form was not changed by management to reflect that Facundo was not Haynes' supervisor.

Neither Kathy Facundo nor Sharon Slavey testified. I find that Kathy Facundo is a supervisor and agent of Respondent because the evidence, among other things, demonstrates that she responsibly directs the work of employees under her. I find that the General Counsel has failed to prove, however, that Sharon Slavey is a supervisor and agent of Respondent. The only evidence of Slavey's supervisory status is the fact that she wears a different color lab coat than the other employees.

On September 26, 1995, Facundo approached employee Christy Randolph and asked her what she knew about someone starting a union. Facundo went on to tell Randolph that 5 years earlier someone tried to start a union and Don Curtis threatened to pull the plug on Respondent. Facundo said that those responsible for trying to bring in a union could lose their jobs. When Randolph told Facundo she had signed a union authorization card Facundo responded "Christy, I had plans for both you and Carrie (Vanover)." Facundo went on to say that if the plant closed then they'd all be out of a job. Respondent, through Facundo, violated Section 8(a)(1) of the Act when it unlawfully interrogated an employee and made threats of job loss and plant closure because of employee support of unionization.

C. The 8(a)(1) Allegations Involving President Don Curtis

The Union began its organizing campaign among Respondent's employees in mid-September 1995.

Don Curtis, Respondent's president, admits he first learned about the organizing efforts at that time. Indeed on September 27, 1995, Curtis gave a captive audience speech to his employees in which he referred to the Union as Respondent's "greatest threat" and urged his employees to reject the Union.

Thereafter, on October 5, 1995, Respondent received a bomb threat. There is no evidence in this record as to who was responsible for the bomb threat but, suffice it to say, Curtis held a meeting with employees who voted not to go to work because of the bomb threat. Respondent did not operate on October 5, 1995.

In referring to the bomb threat and other vandalism which had occurred since the beginning of the Union's organizing campaign, Curtis told the employees that the bomb threats and vandalism occurs when "outsiders" get involved. He clearly blamed the vandalism and the bomb threat on the union organizing effort and this is the kind of language that, needless to say, will interfere with employee free choice on whether to select a union or not. In the complete absence of

evidence of who did what Curtis blamed it on the Union, i.e., Curtis was telling the employees if you don't want vandalism and bomb threats (and who would) then get rid of the Union. Curtis' statements violate Section 8(a)(1) of the Act. There was no bomb fortunately.

On October 6, 1995, it is alleged Curtis threatened to close the plant because of the union activity. I conclude otherwise. On October 6, 1995, the day after the bomb threat, Curtis told the employees who were to decide whether to work or not that if they didn't work because of bomb threat fears or any other reason Respondent's customers would go elsewhere for product and Respondent would in time go out of business. This statement does not violate the Act. Respondent was in full operation on October 6, 1995.

Respondent also issued some new work rules. It claims it issued these rules in response to the bomb threat, but I find that these new rules were issued in order to interfere with and defeat the union organizing efforts. On October 6 and 9, 1995, the employees were told there would henceforth be *no* talking at their work stations. Prior to this the work rule, which Christy Randolph said was not enforced, forbade "idle talk" at the work stations. (Jt. Exh. 1.) In addition, Respondent implemented a new work rule that prohibited group discussions among employees in Respondent's parking lot and a new work rule that restricted access to the plant, i.e., no entry more than 10 minutes before the start of the shift and 2 minutes after the start of the shift.

The cumulative effect of these new work rules were that employees could not exchange thoughts and ideas in the parking lot before or after work, at work stations while working and couldn't enter the plant early and talk with fellow workers before they went on the clock. These new rules were implemented, I find, to interfere with and restrain employees in deciding whether or not to select the Union to represent them. It is ludicrous to suggest that these rules were put in place to prevent employees from planning to sabotage production or destroy Respondent or its business. Accordingly, the implementation of these new work rules was a violation of Section 8(a)(1) of the Act.

C. Discharge of Barbara Haynes

Barbara Haynes began her employment with Respondent in August 1995. She and Mary Collier were Christy Randolph's first recruits and Barbara Haynes met with a union representative on September 19, 1995. Haynes talked about the Union at work and solicited her fellow employees to join the Union. She credibly testified that Don Curtis observed her give a union authorization card to employee Steve Smith on or about September 29, 1995. Curtis denied he saw this. Smith didn't testify. I credit Barbara Haynes. In addition, according to Barbara Haynes, Supervisor Pam Hall saw Barbara Haynes discussing the Union with other union supporters on or about October 2, 1995, and then Hall stood by Ray Curtis, and they both stared at Haynes. Neither Pam Hall nor Ray Curtis testified.

Barbara Haynes left work early on August 25, 1995, to go to the dentist. She also left early on September 18, 1995, to be at home when a repairman came to the home. And, on September 22, 1995, she was late returning from work and, pursuant to Respondent's attendance policy, was put on attendance probation. Being put on attendance probation meant

that the next time, Barbara Haynes missed work or was tardy without a valid excuse she *could* be fired.

On October 4, 1995, Barbara Haynes was 12 minutes late to work.¹ She clocked in at 8:12 a.m. and was due at work by 8 a.m. At this point Barbara Haynes could have been fired. Thursday, October 5, 1995, was not a workday since the employees voted not to work because of the bomb threat. On October 6, 1995, a Friday, Barbara Haynes worked. She was off for the weekend and when she returned to work on Monday, October 9, 1995, she was told she was fired for breaking attendance probation but could finish out the week if she wanted to. She said she wanted to finish out the week, i.e., stay on the payroll until Friday, October 13, 1995.

Don Curtis testified that he fired Barbara Haynes for breaking attendance probation and because he had to enforce the attendance policy, i.e., if you break probation you will be fired. No exceptions.

I find, however, applying the Board's *Wright Line*² analysis that Barbara Haynes was *not* fired for breaking attendance probation, but because of her support for the Union in violation of Section 8(a)(1) and (3) of the Act.

I find that Respondent knew of Barbara Haynes' activity on behalf of the Union, e.g., Don Curtis saw her give a union authorization card to Steve Smith, and Curtis' son, Ray Curtis, and Supervisor Pam Hall had seen Barbara Haynes discussing the Union with other union supporters and in mid-September Barbara Haynes filled out a questionnaire and turned it in to the front office and in the questionnaire she wrote that Respondent would benefit if it had a Union. And, I find Respondent did not want its work force to be organized. Indeed it called the Union the "greatest threat" to Respondent. In addition, a number of employees had broke attendance probation and *not* been fired and this was shown by Respondent's own records. The employees who broke attendance probation and were not fired were Tracey Haynes (no relation to Barbara Haynes), Sue Hall, Pam Smith, Sharon Powers, and Debra Tucker. This is a clear case of disparate treatment.

In addition I credit Barbara Haynes' testimony over Don Curtis' denial that, after Curtis told Haynes she was fired but could finish out the week, he told her that his door was open and she could come by and see him. This was an effort on Curtis' part, I firmly believe, to learn more about the union organizing effort with the prospect that Barbara Haynes' termination could be rescinded. I make this finding because others who were fired for attendance problems were not permitted to finish out the week. Barbara Haynes never went to

¹ Barbara Haynes testified that she broke probation not on October 4, 1995, but on September 27, 1995, when she was late for work because of a fight she had with her husband because he hadn't given her an anniversary gift. This is an event which you would think the person would not be mistaken about. She claims she was on time for work on October 4, 1995. I don't think Barbara Haynes is lying but I think she is mistaken. Timecards, attendance records, and payroll records reflect that Haynes was late for work on October 4, 1995, and not late for work on September 27, 1995. It is possible, I suppose, that Haynes was also late for work on September 27, 1995, and a friend punched her in but this seems unlikely. There is no doubt that she was late on October 4, 1995.

² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

see Don Curtis and, of course, her termination was not rescinded.

D. Discharge of Striking Employees

At a union meeting on the night of October 9, 1995, the discharge of Barbara Haynes was discussed. Eventually it was decided that several employees would demand of management that Barbara Haynes, whom they thought had been unjustly fired for union activity, be reinstated or the employees would go out on an unfair labor practice strike.

The following day, October 10, 1995, three employees demanded the reinstatement of Barbara Haynes. Management refused. And the three employees, Mary Collier, Christy Randolph, and Barbara Haynes went on strike and picketed in front of Respondent's plant carrying signs that said that Barbara Haynes was fired unjustly and they could be next and that they were striking to protest Respondent's unfair labor practice.³

The next day was October 11, 1995, and the three striking women were joined on the picket line by fellow strikers Linda Girdler, Nicole Adams, Sue Hall, Tracey Haynes (no relation to Barbara Haynes), Franka Johnson, and Carrie Vanover as well as several union members from other employers in the area.

After the lunch hour on October 11, 1995, the nine striking employees decided to end their strike midway through its second day.

All nine striking employees made an unconditional offer to return to work. Don Curtis, however, insisted that the striking employees had to fill out absence reports before they could go back to work. The striking employees would not fill out the absence reports and were fired.

It is well settled that strikers, economic as well as unfair labor practice strikers, retain their status as "employees" under Section 2(3) of the Act. *NLRB v. Mackay Radio & Telegraph Co.*, 303 U.S. 333, 345 (1938). As employees, economic strikers are entitled to reinstatement on their unconditional offer to return to work, unless the employer can show, as an affirmative defense, that the strikers have been permanently replaced or some other "legitimate and substantial business justification." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-379 (1967). Absent such a showing, a refusal to reinstate strikers constitutes an unfair labor practice, even in the absence of bad faith or antiunion motive. *NLRB v. Fleetwood Trailer Co.*, supra.

Consistent with the above legal principles, "[i]t is well settled, that, absent legitimate and substantial business justification, an employer may not attach conditions to accepting an unconditional offer to work on behalf of economic strikers." *Blue & White Cabs*, 291 NLRB 1047, 1050 (1988).

The Board has held that to require striking employees who have made an unconditional offer to return to work to submit to employment interviews or fill out job applications is violative of the Act. See *Sunol Valley Golf Club*, 310 NLRB 357 (1993).

³ It is alleged that Supervisor Ray Curtis kicked Barbara Haynes on her right foot. Although Ray Curtis did not testify it is my finding that he may have accidentally hit Haynes' foot with his. No words were exchanged. There was no injury. This does not amount to a violation of the Act.

What legitimate and substantial business justification would permit Respondent to condition acceptance of the unconditional offer to return to work in this case. There aren't any. The employees who went on strike were neither temporarily nor permanently replaced.

Only nine employees went on strike and made the unconditional offer to return to work. The strike lasted only 1-1/2 days for three of the strikers and 1/2 day for six of the strikers and Respondent was well aware of the identify of the strikers and precisely who was making unconditional offers to return to work. The employees were not absent in the ordinary sense of that word. They were engaged in protected concerted activity. Just like I wasn't present at Respondent's facility on October 10 or 11, 1995, but I wasn't absent.

When the employees voted not to work on October 5, 1995, because of the bomb threat they were not required to fill out an absence report.

The nine striking employees could not be disciplined for participating in the strike and yet the absence report and Respondent's attendance policy have discipline written all over it.

Joint Exhibit 1, in evidence, is Respondent's employment policy and, in the area of attendance, provides, in pertinent part, as follows:

7. You are required to complete an Attendance form before returning to work after being tardy or absent. This completed form must be turned into the office. It is your responsibility to get this form to the office, do not cause someone to have to ask you for it.

8. 480 minutes of unexcused absence per month is the basis of the system. Any time missed between 3 and 225 minutes before lunch will be counted as 240 minutes (1/2 Day). Any time missed between 3 and 255 minutes after lunch will be counted as 240 minutes (1/2 Day). A full day off is counted as 480 minutes. This system accommodates the difference of time worked in the morning as opposed to afternoon because of our lunch time.

A. An absence is excused *ONLY* for the following reasons:

1. Appointment with a doctor (for yourself only). Taking someone to the doctor is not excused. Excuse from doctor showing patients name must be submitted with absence report upon return to work. Excuse is subject to verification. CDR reserves the right to evaluate repeated absences with doctors' excuses.

2. Hospitalization of immediate family (must have statement from doctor or hospital).

3. Death in family (must have statement).

4. Jury Duty (must have statement).

B. An unexcused absence is an absence for any reason other than those listed in A.

C. Should you exceed 480 minutes of unexcused absenteeism in one calendar month, the following action will be taken:

1. The first time 480 minutes of unexcused absence occurs, a written warning will be issued.

2. If within a 3 month period, there is a second time that 480 minutes of unexcused absence is exceeded, a statement of written two month probation will be issued.

3. Once on probation, if there is any unexcused absence a dismissal statement will be issued. At this time employment is terminated.

Although the policy talks about an "Attendance form" the form itself, many of which are in evidence, is entitled "Absence Report."

Suffice it to say the language of the policy would suggest that if the employees were not at work, because they were engaged in the protected concerted activity of being on strike that this would be an *unexcused* absence. (See sec. 8A and B from Respondent's attendance policy quoted above.) Indeed Carol Haynes (no relation to either Barbara Haynes or Tracey Haynes), who works in Respondent's front office as assistant accounting manager and is referred to in Respondent's brief as a supervisor, was a witness called by Respondent, and she testified that being on strike, in her opinion, would be an *unexcused* absence under Respondent's attendance policy and would subject the striker to discipline.

Accordingly, it was an unlawful condition to Respondent's acceptance of the striking employees unconditional offer to return to work to require them to fill out absence reports and unlawful for Respondent to fire the returning employees for refusing to fill out the absence reports. The termination of the nine striking employees was, therefore, a violation of Section 8(a)(1) and (3) of the Act. Considering the facts of this case it is irrelevant whether the employees are considered unfair labor practice strikers or economic strikers.

E. Reassignment of Employee Kristi Petrey

Kristi Petrey was on the picket line on October 11, 1995. She was not asked by Respondent to sign an absence report because she was already on medical leave. When she returned to work a few days later she was not immediately returned to her old job but spent 2 weeks doing other jobs before returning to her former assignment. There is no evidence that Petrey was required to perform more onerous work during this 2-week period and since she received the same pay and went back to her old job within 2 weeks I do not find any violation of the Act.

REMEDY

The remedy should include the issuance of a cease-and-desist order, the posting of a notice, and the requirement that Respondent reinstate Barbara Haynes and the striking employees who made an unconditional offer to return to work along with the appropriate make whole provision.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting 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 violated Section 8(a)(1) of the Act when it unlawfully interrogated employees about their knowledge of the union.

4. Respondent violated Section 8(a)(1) of the Act when it threatened its employees with job loss and plant closure if the employees selected a union to represent them.

5. Respondent violated Section 8(a)(1) of the Act when, without evidence, it blamed the Union for acts of vandalism and a bomb threat during the union organizing campaign.

6. Respondent violated Section 8(a)(1) of the Act when it implemented work rules prohibiting its employees from talking at their work stations, prohibiting its employees from engaging in group discussions in the parking lot, and when it restricted access to the plant in order to discourage union organizational efforts among its employees.

7. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Barbara Haynes because of her activity on behalf of the Union.

8. Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to reinstate and then discharged striking employees Nicole Adams, Mary Collier, Linda Girdler, Sue Hall, Barbara Haynes, Tracey Haynes, Franka Johnson, Christy Randolph, and Carrie Vanover on their October 11, 1995 unconditional offer to return to work.

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

10. Respondent did not otherwise violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, CDR Manufacturing, Somerset, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about their knowledge of the Union.

(b) Threatening employees with job loss and plant closure if they select a union to represent them.

(c) Blaming the Union, without evidence, for bomb threats and acts of vandalism.

(d) Implementing new work rules to discourage union organizational efforts among its employees.

(e) Discharging employees because of their union activity.

(f) Failing to reinstate without justification striking employees on their unconditional offer to return to work.

⁴If 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.

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

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

(a) Rescind the new work rules designed to discourage union organizing efforts among its employees.

(b) Offer Nicole Adams, Mary Collier, Linda Girdler, Sue Hall, Barbara Haynes, Tracey Haynes, Franka Johnson, Christy Randolph, and Carrie Vanover full reinstatement to their former positions or, if those positions no longer exist to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(c) Make Nicole Adams, Mary Collier, Linda Girdler, Sue Hall, Barbara Haynes, Tracey Haynes, Franka Johnson, Christy Randolph, and Carrie Vanover whole for any loss of pay and other benefits suffered by them commencing on October 11, 1995. Backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)).

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

(e) Post at its facility in Somerset, Kentucky, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."