

Dynatron/Bondo Corporation and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC. Cases 10-CA-29014 and 10-CA-29231

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 8, 1997, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions¹ 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,² and conclusions³ and to adopt the recommended Order as modified and set forth in full below.⁴

¹The Respondent excepts to the judge's Order granting the Union's petition to revoke the subpoena served on it by the Respondent. For the reasons stated in the judge's October 3, 1996 Order, we find that he properly granted the Charging Party's petition to revoke the subpoena.

We grant the Respondent's motion for correction of the record to place certain exhibits in the rejected exhibit file.

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

The Respondent excepts to the judge's decision, asserting that it evidences bias and prejudice. On our full consideration of the entire record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

The earlier *Dynatron/Bondo* case to which the judge referred (Case 10-CA-25736) issued on July 16, 1997, and appears at 323 NLRB 1263.

³In adopting the judge's conclusion that Lee Carter's discharge was unlawful, Member Higgins finds it unnecessary to rely on the judge's finding that "Respondent failed to conduct a fair investigation of Carter's supposed wrongdoing, and thus further evidenced its discriminatory motivation under accepted Board law."

Member Higgins agrees with the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Brenda Rogers because she engaged in union activities. Therefore, he finds it unnecessary to decide whether her discharge also constitutes an independent violation of Sec. 8(a)(1) of the Act.

⁴We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The judge inadvertently failed to include a bargaining order to remedy the Respondent's unilateral changes. We shall modify the judge's recommended Order accordingly.

We find it unnecessary to determine whether the Respondent was in compliance with OSHA standards regarding respirator cleanliness, and whether the Respondent "defied" OSHA citations in its treatment of Brenda Rogers.

The judge recommended the special remedies that are described in pars. 2(h)-(j) of our Order. Member Higgins agrees with the imposi-

tion of the notice reading and mailing requirements set forth in pars. 2(h) and (i). He would, however, not require the local newspaper publication imposed by par. 2(j), as there has been no showing of need for that action to remedy the unfair labor practices. In finding that the special remedies of pars. 2(h) and (i) are appropriate here, Member Higgins particularly notes the pending contempt proceedings against the Respondent. Finally, although Member Higgins relies on the Respondent's numerous unfair labor practices, he does not rely on the test-of-certification case involving the Respondent (reported at 305 NLRB 574 (1991), enfd. per curiam 992 F.2d 313 (11th Cir. 1993)).

1. The Respondent claims that the judge erred in granting counsel for the General Counsel's posthearing motion to reopen the record to receive the amended charge in Case 10-CA-29231, claiming violation of due process, bias by the judge, and "direct, prejudicial harm to the Company." We find no merit in the Respondent's exception.

At the hearing, the Respondent amended its answer to the complaint to deny allegations that the amended charge in Case 10-CA-29231 was filed on June 26, 1996, and served on the Respondent on June 26, 1996. Counsel for the General Counsel, noting that the Board's formal papers⁵ did not contain proof of service of the amended charge, moved to admit the proof of service. The judge, without objection by the Respondent, received the proof of service into evidence.

Subsequent to the hearing, counsel for the General Counsel moved to reopen the record to receive the amended charge in Case 10-CA-29231, stating it had been inadvertently omitted from the formal documents. The judge granted the motion over the Respondent's objections.

The Respondent has failed to show how it has been prejudiced or "harmed" by the judge's action. The Respondent's original answer to the complaint admitted service of the amended charge in Case 10-CA-29231. When the Respondent amended its answer to deny service of the amended charge, the General Counsel established at the hearing that the amended charge was properly served on the Respondent. In view of the fact that service of the amended charge has been established, it is apparent that the amended charge itself was inadvertently omitted from the formal papers received at the hearing. We find, accordingly, that the judge properly granted the General Counsel's motion to reopen the record to admit the amended charge.

2. The complaint alleges, the judge found, and we agree that the Respondent violated Section 8(a)(5) by unilaterally instituting a new rule disciplining employees who report to work less than 15 minutes late and by discharging employee Lamar Shelton pursuant to this unilaterally instituted new rule. The Respondent excepts to these findings, asserting that the underlying

⁵The Board's formal papers consist of the charge, any amended charge, complaint and notice of hearing, proof of service, and other similar procedural documents.

complaint allegations are barred by Section 10(b) of the Act. For the reasons set forth below, we find no merit in the Respondent's exceptions.

It is well established that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. See, e.g., *Desks, Inc.*, 295 NLRB 1, 11 (1989). "Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b)." *Chinese American Planning Council*, 307 NLRB 410 (1992). As discussed below, we find that the Respondent has failed to carry its burden of showing that the Charging Party had notice that a violation of the Act occurred more than 6 months before the filing of the relevant charge allegations on June 26, 1996.

The Respondent's written attendance policy provided for discipline (a tardy) for employees reporting to work more than 15 minutes late. For those employees reporting *less* than 15 minutes late, however, the policy did not provide for a "tardy," but only for loss of pay for the time missed. The Respondent provided the Union with a copy of its attendance policy.

Sometime in mid-1993, and continuing on a regular basis, the Respondent gave the Union copies of employee disciplinary notices. Some of these notices used the word "tardy," while others referred to "late arrival to work station" without specifying the number of minutes late. At a negotiating session on September 19, 1994, the Union asked the Respondent if "late arrival to work station" was a new disciplinary measure.⁶ The Respondent answered that "if you are late coming to work or *late arriving at your work station*, that is simply late. It is a violation of the company rules."⁷ (Emphasis added.) At a bargaining session on September 11, 1995, the Union again asked for clarification. This time the Respondent stated that a "tardy" and a "late arrival to work station" were violations of different rules. The Respondent said that an employee is "tardy under [the] attendance policy if [he] is 15 minutes or more late punching in," but "not appearing at [an employee's] work station in a reason-

able period of time is a disciplinary matter and not under the attendance policy."

On March 27, 1996, employee Lamar Shelton was discharged for violating the "late arrival to work station" rule on five occasions. In April 1996, the Union reviewed Shelton's timecards and discovered that he had clocked in less than 15 minutes late on four of the five occasions. When the Union protested, the Respondent claimed that an employee who clocked in after his starting time could not arrive on time at his work station.

On June 26, 1996, the Union filed an amended charge in Case 10-CA-29231, alleging that the Respondent violated Section 8(a)(5) when it "unilaterally implemented a new disciplinary program called 'late arrival to work station' for employees who arrive late to work by fewer than fifteen (15) minutes." The amended charge also alleges that the Respondent violated Section 8(a)(5) by discharging employee Shelton for "violating the unilaterally implemented program 'late arrival to work station.'"

In its exceptions, the Respondent contends that the Union had notice of the allegedly new disciplinary policy more than 6 months prior to the filing of the amended charge in Case 10-CA-29231. Specifically, the Respondent asserts that the Union knew of the policy on September 19, 1994, and certainly no later than September 11, 1995.

Contrary to the Respondent's contention, we find that it failed to show that at either September negotiating session it gave the Union the requisite clear and unequivocal notice necessary to start the running of the 10(b) period. When the Union received written disciplinary notices referring to "late arrival to work station," the Union properly sought clarification from the Respondent. The Respondent's replies to the Union's inquiries were, as the judge correctly found, "confusing and contradictory." In September 1994, the Respondent assured the Union that "late arrival" and "tardy" were simply different words for the same infraction. In September 1995, however, the Respondent told the Union that a "late arrival" and a "tardy" were violations of two different rules. At no time did the Respondent present the Union with a written rule describing its "late arrival to work station" policy, and the Respondent's own written attendance policy provided that employees would *not* be disciplined for reporting to work fewer than 15 minutes late. At most, the record shows that by September 1995 the Union was aware that "late arrival to work station" was a violation of a company rule, but the Respondent still failed to make clear to the Union the critical point that, contrary to the terms of its own written attendance policy, employees could be disciplined for lateness of fewer than 15 minutes.

⁶Union Representative Harris Raynor specifically stated that the notices used terminology he had "never seen before on any other warning."

⁷The Respondent claims that if the Union had carefully examined the written notices, it could have discovered that there were two different rules because if an employee was "tardy," the box on the form labeled "attendance" was checked and no more than four dates were listed, while on "late arrival to work station," the box marked "other" was checked, and no fewer than five dates were listed. According to the Respondent, "other" referred to a violation of its plant rule disciplining employees for "chronic absenteeism and tardiness," while "tardy" referred to its written attendance policy. Even assuming all the notices were marked as the Respondent asserts, which they are not, we would not find that the documents alone were clear enough to have put the Union on notice that there were two separate rules. Further, we emphasize that the Respondent's answer to the Union's question in September 1994 directly contradicts what the Respondent says the documents show.

In sum, we find that it was not until the Union received Shelton's timecards in April 1996 that the Union was put on notice that the Respondent's "old rule" that employees would not be disciplined for fewer than 15 minutes of lateness had effectively been replaced with a "new rule" that a total of five instances of lateness, of any amount, was cause for discipline. Because the Union filed its amended charge in Case 10-CA-29231 within 6 months of that time, i.e., on June 26, 1996, we find that the charge was timely filed and that the complaint allegations pertaining to the new disciplinary rule are not barred by Section 10(b).

Assuming *arguendo* that the Respondent's statements at the September 11, 1995 bargaining session provided the Union with notice of its new disciplinary rule, we would still find that the relevant complaint allegations are not barred by Section 10(b). Within 6 months of that date, specifically, on January 18, 1996, the Union filed the original charge in Case 10-CA-29014, alleging, *inter alia*, that the Respondent violated Section 8(a)(5) by the following conduct:

- Since on or about August 29, 1995, the [Respondent] has created a new disciplinary procedure for material handlers without bargaining with the Union.
- Since on or about October 2, 1995, the [Respondent] has unilaterally changed its parking policy without bargaining with the Union.
- Since on or about October 5, 1995, the [Respondent] has unilaterally implemented a policy for dealing with power outages without bargaining with the Union.

As explained below, we find that these charge allegations are legally sufficient to support the complaint allegations that the Respondent violated Section 8(a)(5) by unilaterally implementing a new disciplinary rule which disciplines employees who arrive to work fewer than 15 minutes late and by discharging employee Shelton pursuant to that unilaterally implemented rule.

In making this determination, we apply the Board's "closely related" test and examine the following factors: (1) "whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge"; and (2) "whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge."⁸ Here, the allegations of the charge and the allegations of the complaint involve the same section of the Act (Sec. 8(a)(5)) and the same

⁸ *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). In addition, under *Redd-I*, the Board "may look at whether a respondent would raise the same or similar defenses to both allegations." *Id.* This factor is not particularly relevant here, because the Respondent does not appear to be asserting any defense to the new disciplinary rule allegations aside from its 10(b) contention.

legal theory (circumvention of the collective-bargaining process). In addition, the charge and complaint allegations involve similar conduct (changing employee terms and conditions of employment), and the conduct alleged in the charge occurred during the same time period (August 29—October 5, 1995) that the Union allegedly learned of the new disciplinary rule (September 11, 1995). Thus, we find that the new disciplinary rule allegations of the complaint are closely related to the other unilateral change allegations of the charge.⁹

Accordingly, for all these reasons, we conclude that the complaint allegations pertaining to the Respondent's new disciplinary rule are not barred by Section 10(b) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Dynatron/Bondo Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, and without bargaining with the Union, (1) instituting a new rule which disciplines employees who arrive to work less than 15 minutes late; (2) creating a new disciplinary rule for material handlers; (3) changing its parking policy; (4) creating a new policy for employee compensation during power outages; and (5) creating a new disciplinary procedure for employees who fail to bring their ID cards to work.

(b) Discharging or otherwise discriminating against employees who violate the unlawfully promulgated rule disciplining employees who arrive to work less than 15 minutes late, or who violate any of the foregoing unlawfully promulgated rules.

(c) Discouraging membership in Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC or any other labor organization by discharging employees because of their union or other protected concerted activity, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment, or any other terms and conditions of employment.

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

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

(a) Within 14 days from the date of this Order, offer Lee Carter, Brenda Rogers, and Lamar Shelton 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 and

⁹ See *Long Island Day Care Services*, 303 NLRB 112, 112-113 (1991).

privileges previously enjoyed, discharging, if necessary, any replacement employees.

(b) Make Lee Carter, Brenda Rogers, and Lamar Shelton 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 the judge's decision.

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

(d) On request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC as the collective-bargaining representative of the employees in the appropriate unit as to their terms and conditions of employment, including its rule disciplining employees who arrive to work less than 15 minutes late, its disciplinary rule for material handlers, its new parking policy, its policy establishing employee compensation during power outages, and its disciplinary policy for employees who fail to bring their ID cards to work. The appropriate unit is:

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

(e) On request of the Union, rescind its rule disciplining employees who arrive to work less than 15 minutes late, its disciplinary rule for material handlers, its parking policy, its policy of establishing employee compensation during power outages, and its disciplinary policy for employees who fail to bring their ID cards to work.

(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 to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Mail copies of the notice to all its present employees and to all employees on the Respondent's payroll since July 14, 1989, when the Respondent began its unlawful conduct.

(i) Convene all employees during working time at the Respondent's Atlanta, Georgia facility, by shifts, departments, or otherwise, and have either Human Resources Manager Fred Tomkowicz or Plant Manager Leigh Fragnoli read the notice to employees, or at Fred Tomkowicz' or Leigh Fragnoli's option, permit a Board agent to read the notice. If Fred Tomkowicz or Leigh Fragnoli choose to have a Board agent read the notice, one of them shall be present while the notice is read.

(j) Publish in local newspapers of general circulation a copy of the notice two times a week for a period of 4 weeks.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT unilaterally, and without bargaining with the Union, (1) institute a new rule which disciplines employees who arrive to work less than 15 minutes late; (2) create a new disciplinary rule for material handlers; (3) change our parking policy; (4) create a new policy of employee compensation during power outages; and (5) create a new disciplinary procedure for employees who fail to bring their ID cards to work.

¹⁰If 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."

WE WILL NOT discharge or otherwise discriminate against employees who violate any of the foregoing unlawfully promulgated rules.

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

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lee Carter, Brenda Rogers, and Lamar Shelton 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.

WE WILL make Lee Carter, Brenda Rogers, and Lamar Shelton whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful actions taken against Lee Carter, Brenda Rogers, and Lamar Shelton, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL, on request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC as the exclusive collective-bargaining representative of our employees in the appropriate unit, concerning their terms and conditions of employment, including our rule disciplining employees who arrive to work less than 15 minutes late, our disciplinary rule for material handlers, our parking policy, our policy of establishing employee compensation during power outages, and our disciplinary policy for employees who fail to bring their ID cards to work. The appropriate unit is:

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

WE WILL, on request, rescind our rule disciplining employees who arrive to work less than 15 minutes late, our disciplinary rule for material handlers, our parking policy, our policy of establishing employee compensation during power outages, and our discipli-

nary policy for employees who fail to bring their ID cards to work.

DYNATRON/BONDO CORPORATION

Lesley A. Troope, Esq. for the General Counsel.

Douglas H. Duerr, Esq. and *Kenneth N. Winkler, Esq.* (*Elarbee, Thompson & Trapnell*), of Atlanta, Georgia, for the Respondent.

David M. Prouty, Esq., of New York, New York, and *Harris L. Raynor*, Assistant Southern Regional Director, of Union City, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

A. *The Procedural Dispute*

HOWARD I. GROSSMAN, Administrative Law Judge. An original and amended charge in Case 10-CA-29014 was filed by the Union of Needletrades, Industrial and Textile Employees (the Union) on January 18, 1996, and an amended charge on January 29, 1996. Complaint issued on June 14, 1996, alleging that Dynatron/Bondo Corporation (Respondent or the Company) engaged in certain unfair labor practices.

The Union filed the original charge in Case 10-CA-29231 on April 8, 1996. At the first day of a hearing, on October 7, 1996, counsel for the General Counsel moved to amend the complaint to add proof of service of an amended charge in Case 10-CA-29231. This motion was granted.

Subsequent to the hearing, counsel for the General Counsel moved to reopen the record to receive the amended charge itself, stating that it was omitted inadvertently by clerical error. Respondent opposed the General Counsel's motion, arguing that the omission could not have been inadvertent because the matter was brought to the General Counsel's attention at the hearing, and because receipt of posthearing evidence is prohibited by Section 102.48 of the Board's Rules and Regulations, unless the evidence was newly discovered and could not have been discovered before the close of the hearing.

Respondent's arguments lack merit. It is obvious that the amended charge would have been included in the formal papers if the matter had been noticed. It is irrelevant whether its inadvertent omission is attributable to counsel for the General Counsel or a clerk.

Respondent's argument based on the Board's Rules also lacks merit. It is true that Section 102.48 prohibits reopening a record to receive evidence except in certain circumstances. However, a charge is not evidence. Accordingly, I grant the General Counsel's motion and receive the General Counsel's Exhibit 1(q).

B. *The Allegations in the Complaint*

After the filing of the first complaint on June 14, 1996, an amended consolidated complaint issued on June 28, 1996. It alleges that Respondent violated Section 8(a)(5) of the Act by engaging in certain actions without notifying the Union and giving it an opportunity to bargain, to wit, (1) instituting a new rule which disciplined employees who arrived late at work by fewer than 15 minutes, (2) creating new disciplinary

procedures for material handlers, (3) changing its parking policy, (4) implementing a new procedure for dealing with power outages, (5) creating a new disciplinary procedure for employees who failed to bring their new ID badges to work, and (6) eliminating its employee safety slogan contest and its employee safety bingo contest.

The complaint also alleges that Respondent violated Section 8(a)(5) by discharging employees Lee Carter and Brenda Rogers because of their union activities, and employee Lamar Shelton for violation of its unlawful rule instituting new disciplinary procedures for employees who arrive at work later than 15 minutes.

A hearing was held before me on these matters in Atlanta, Georgia, on October 7, 8, and 9, 1996. Thereafter, the General Counsel, the Respondent, and the Charging Party filed briefs.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

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

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

II. ALLEGED VIOLATIONS OF SECTION 8(A)(5)

A. Background

On April 12, 1991, the Board with judicial approval found that Respondent discharged employee Ernestine Baskins because of her union activities, in violation of Section 8(a)(3) and (1). *Dynatron/Bondo Corp.*, 302 NLRB 507 (1991), *enfd. per curiam* 992 F.2d 313 (11th Cir. 1992).

The pleadings here establish that the Board certified the Union as the exclusive collective-bargaining representative of all employees in an appropriate unit on June 5, 1991. On November 8, 1991, the Board with judicial approval found that Respondent had refused to bargain with, and had refused to supply relevant information to, the Union in violation of Section 8(a)(1) and (5) of the Act. *Id.*

After a prior hearing involving the same Respondent, I issued a decision on June 28, 1996, finding that Respondent had unlawfully discharged certain employees, and had engaged in unilateral action without notifying the Union. *Dynatron/Bondo Corp.*, Case 10-CA-25736, *et al.* Respondent has filed exceptions to this decision.

B. *The Alleged New Rule for Late Arrival and the Discharge of Lamar Shelton*

1. Summary of the evidence

Respondent and the Union began bargaining in July 1993. Respondent's employee handbook defines a "Tardy" as follows:

Reporting to work more than 15 minutes late will result in a tardy of being docked that time. Reporting to work less than 15 minutes late will result in your being docked that time *not worked but not given a tardy*.¹

Pursuant to the Union's request, Respondent supplied to the Union monthly notices of discipline. The Union began receiving notices of an infraction called "late arrival to work station." At a negotiating session on September 19, 1994, Union Negotiator Harris Raynor asked Company Negotiator Walter Lambeth whether "late arrival to work station" was a new infraction. Lambeth replied that it was simply a tardy, regardless of the terminology.

Lamar Shelton had been an employee for more than 4 years, and was responsible for the safe passage of hazardous materials through the plant. On June 20, 1994, he received a written warning for being late in arrival at his work station on five occasions, and was instructed to be at his assigned area at the beginning of his shift.² On August 22, 1994, Shelton received a written warning stating that he was late in arrival at his work station on five additional occasions.³ On March 24, 1995, he received another such warning, a suspension for 1 day, and a statement that five more violations would result in termination.⁴

There was a bargaining session on September 11, 1995. Union Negotiator Raynor again questioned Company Representative Lambeth about this infraction. Lambeth replied that being tardy violated an attendance rule, but that being late in arrival at the work station is a violation of a plant rule.

Shelton was present at this session as a member of the bargaining committee. He protested to Lambeth that his area of work was all over the plant, that he sometimes had to hunt for his supervisor, while another supervisor, at the area where he was supposed to begin work, was writing him up for late at arrival at his work station. Raynor told Lambeth that the Company had two supervisors supervising the same employee, and asked Lambeth to reverse the warnings to Shelton, without success.

On March 27, 1996, Shelton was given two termination notices for the same infraction, late arrival at his work station on January 5, February 5 and 14, and March 12 and 22, 1996.⁵ Another bargaining session took place on April 8, 1996, and Shelton was again present. After a long discussion between Shelton and Lambeth, the latter said that if Shelton did not punch in until 6:15 a.m., then he could not have been at his work station at 6 a.m. (Shelton's starting time.) Shelton affirmed that he had asked Plant Manager Fragnoli for his timecards, and that Fragnoli had refused.

The Union later received the timecards. They show that Shelton clocked in at 6:16 a.m. on January 5, at 6:02 a.m. on February 5, at 6:03 a.m. on February 14, at 6:03 a.m. on March 12, and at 6:04 a.m. on March 22.⁶

¹ G.C. Exh. 12, emphasis in original.

² G.C. Exh. 45.

³ G.C. Exh. 46.

⁴ G.C. Exh. 47.

⁵ G.C. Exhs. 48, 49.

⁶ G.C. Exh. 52.

2. Factual and legal conclusions

Prior to this litigation, Respondent's only rule on tardiness allowed an employee to arrive at work up to 15 minutes after his starting time without being marked "tardy." On September 19, 1994, Company Representative Lambeth told Union Negotiator Raynor that the infraction listed as "late arrival to work station" was simply another name for tardiness. On September 11, 1995, he said they were different rules. On April 8, 1996, Lambeth asserted that an employee could not be at his work station on time if he clocked in after his starting time. Thus, although an employee who arrived 1 minute after his starting time was not "tardy," he was "late in arrival at his work station," an infraction leading to discipline including discharge.

Lambeth's replies to Raynor's inquiries were confusing and contradictory. In effect, they amounted to abrogation of the rule on tardiness—the 15-minute window excusing lateness was replaced by a new rule announcing that the total of five instances of lateness, of any amount, was a violation.

Work rules are mandatory subjects of bargaining, and Respondent's substitution of a more stringent rule without explaining it to the Union, much less giving the Union an opportunity to bargain, violated Section 8(a)(5) and (1). *Randolph Children's Home*, 309 NLRB 341, 343 fn. 3 (1992); *Casa San Miguel*, 320 NLRB 534 (1995). Respondent's implementation of the new rule by its warnings to and discharge of Lamar Shelton because he violated this unlawful rule violated the same sections of the statute.

C. *The Alleged New Disciplinary Procedure for Material Handlers*

1. Summary of the evidence

The complaint alleges that Respondent, on August 29, 1995, created a new disciplinary procedure for material handlers.

On August 29, 1995, Respondent issued a memorandum announcing that various types of "locator errors" and "count errors" would result in discipline.⁷

At a negotiating session on September 11, 1995, Union Representative Raynor asked why the Union was not notified about the new policy and given an opportunity to bargain. Company Representative Lambeth first stated that he did not know about the new policy. On being given a copy of the memorandum, Lambeth stated that it was simply an affirmation of existing policy.⁸

Plant Manager Fragnoli asserted that the new memorandum was simply a restatement of plant rule 19 of the employee handbook.⁹ He agreed that rule 19 does not provide for discipline of material handlers who commit locator or count errors. Fragnoli was asked why, if the new policy was merely a restatement of prior policy, there was no evidence of prior discipline for violation of this policy. Fragnoli said that he could not answer this question.

As noted, the Company supplied the Union with monthly notices of disciplinary action. Union Representative Raynor

testified that prior to August 29, 1995, the Union had not received any notices of discipline of material handlers for locator or count errors, and that the memorandum on that date was a unilateral change in the Company's disciplinary policies.

2. Factual and legal conclusions

I conclude that the rule on material handlers was a new policy, and that the Union was not given notification of it or an opportunity to bargain. Accordingly, the new rule violated Section 8(a)(5) and (1).

D. *The Alleged New Parking Policy*

1. Summary of the evidence

The complaint alleges that Respondent changed its parking policy on October 2, 1995. By a memorandum of that date, Respondent informed employees that they would be assigned a numbered parking space. The first violation of the rule would result in a verbal warning and in the event of a second offense, the vehicle would be towed away.¹⁰

Union Representative Raynor testified that he received no prior notice from the Company about the new policy. His first knowledge of the new rule came from employees, who expressed apprehension that they would be compelled to park too far from the plant entrance and thus become tardy.

2. Factual and legal conclusions

The new parking rule was a more stringent work rule, and Respondent did not give the Union notice of the rule and an opportunity to bargain over it. Accordingly, on the authority above cited, Respondent thereby violated Section 8(a)(5) and (1).

E. *The Alleged New Policy Dealing with Power Outages*

1. Summary of the evidence

The complaint alleges that Respondent unilaterally created a new policy dealing with power outages. There was a hurricane in October 1995, and the plant was without power on October 5 and 6. Employees reported for work, and the complaint deals with their compensation during this time.

Plant Manager Fragnoli issued a notice stating that employees who reported for work on October 5 and who were asked to remain while the Company attempted to obtain power would be paid for a full 8-hour shift. Employees who came to work on October 6 and who were sent home would be paid for 4 hours. Employees who did not report for work would be given a personal day off or an excused absence.¹¹ Fragnoli testified that he did not consult with the Union before deciding on this compensation. He had previously dealt with a similar problem when there was an ice storm. However, the plant had continued to operate during the storm, unlike the hurricane. Fragnoli discussed his wage decision during the hurricane with Human Resources Manager Tomkowicz. The latter asked whether his decision was based on prior policy. Fragnoli replied that there was no policy.

⁷G.C. Exh. 25.

⁸G.C. Exh. 24.

⁹Plant rule 19 provides that a continuance of lack of quality in job performance is a ground for disciplinary action. G.C. Exh. 11, p. 26.

¹⁰G.C. Exh. 30.

¹¹G.C. Exh. 23.

The Union's first notice of the Company's October 5 and 6 wage decisions came in a bargaining session on October 23, 1995. The Union was then informed about the decision, and that it had already been implemented.

2. Factual and legal conclusions

It is obvious that the Company's decision was made unilaterally. This constituted a new policy on employee wages promulgated without consulting with the Union, and violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 NLRB U.S. 736 (1962).

F. *The Alleged New Discipline for Employees Who Fail to Bring Their ID Badges to Work*

1. Summary of the evidence

At the bargaining session on September 11, 1995, Respondent announced that it intended to institute a new security system. Employees would be given ID cards, similar to credit cards. These would be inserted into a slot in the company gate, which would then open. The employee's time of arrival would automatically be recorded. Union Representative Raynor asked what would happen if the employee forgot his ID card. Company Representative Lambeth replied that he would be admitted manually.¹²

On March 12, 1996, Human Resources Manager Tomkowicz issued a memorandum stating that employees who forgot to bring their ID cards would be subject to disciplinary action.¹³ Thereafter, employees received warnings for failure to bring their ID cards to work.¹⁴

Union Representative Raynor testified that the Union did not receive any prior notice of the new disciplinary policy or opportunity to bargain over it prior to its implementation, and did not agree with it. As noted, Raynor asked what would happen if the employee failed to bring his card, and was told only that the employee would be admitted manually.

2. Factual and legal conclusions

It is obvious that Respondent's new disciplinary policy for employee failure to bring an ID card to work was implemented unilaterally and violated Section 8(a)(5) and (1).

G. *The Alleged Elimination of the Safety Slogan Contest and the Safety Bingo Contest*

1. Summary of the evidence

Prior to March 1996, Respondent had two contests designed to promote safety in the plant. One was a quarterly safety slogan contest, in which the employee submitting the best safety slogan was awarded a \$50 prize. Employee awards amounted to \$200 annually.

The second contest was a safety bingo contest. Employees were given bingo cards. Each day that no recordable accident happened in the plant, the employee marked off the space on his bingo card that matched that date. From February 28, 1995, through March 7, 1996, employees received a total of \$650 from the safety bingo contest.

¹² G.C. Exh. 24.

¹³ G.C. Exh. 26.

¹⁴ G.C. Exhs. 27, 28, and 29.

Respondent admitted that it did not solicit any new safety slogans or "call" any new bingo numbers since March 1996.

2. Factual and legal conclusions

Although Respondent discontinued one method of compensating its employees, there is no evidence that it did so without notification to the Union or an opportunity to bargain. In similar circumstances the Board has stated (*A. G. Boone Co.*, 285 NLRB 1070, 1072 (1987)):

The evidence establishes only that the wage increase was granted, and is silent as to whether the Union was afforded an opportunity to bargain. Thus, we cannot conclude that a violation has occurred.

I reach the same conclusion here, and recommend that these allegations be dismissed.

III. THE ALLEGED VIOLATIONS OF SECTION 8(A)(3)

A. *The Discharge of Lee Carter*

1. Carter's performance history

Carter was hired on May 7, 1984. On September 19, 1995, he received two notices from the Company stating that he was terminated. One stated that the termination was the result of "abusive, profane language towards a member of management as well as insubordination to work assignment."¹⁵ The other states that Carter was argumentative, and had cursed and was abusive toward Respondent's supervisor.¹⁶

Respondent's supervisors testified that during Carter's employment history he had been loud, belligerent, argumentative, and insubordinate and that he used profanity. Nonetheless, Plant Manager Fragnoli wrote him a letter in February 1990 commending him for his caring attitude toward his job responsibilities.¹⁷ He was issued only one warning prior to his discharge, for insubordination in March 1992.¹⁸ Respondent's employee handbook provides that a warning is active for only 1 year.¹⁹ About half a year later, in a performance evaluation, in November 1992, a supervisor said that Carter was "an asset to this Company, particularly on the second shift." Although Carter had a problem in that he disagreed with others, and had to work on being "less emotional," he was "always willing to help others (and) was a pleasure to work with."²⁰

In a performance evaluation in March 1993, a supervisor stated that Carter had a problem controlling his emotions, and in disagreeing with others, but that he was "over all . . . a very good employee."²¹ A performance evaluation in May 1994 repeated Carter's deficiencies previously noted, but stated that he was "an employee with all the skills and abilities along with the knowledge and intelligence to be one of Bondo's best."²² Later that year, in November 1994, a su-

¹⁵ G.C. Exh. 54.

¹⁶ G.C. Exh. 55.

¹⁷ C.P. Exh. 1.

¹⁸ R. Exh. 10.

¹⁹ G.C. Exh. 11, p. 28.

²⁰ G.C. Exh. 21.

²¹ G.C. Exh. 18.

²² G.C. Exh. 19.

supervisor stated that Carter was “a true asset to the Company, whose skill and knowledge help drive the second shift.” The evaluation adds that “at times he can be a real pleasure to work with, yet on occasions he can also be very disruptive.”²³

Carter testified that both employees and management used profanity, and that he had engaged in it. Plant Manager Fragnoli and Human Resources Manager Tomkowicz testified that profanity was used in the plant. Fragnoli stated that an employee used profanity toward him and threatened him, but was not discharged.²⁴

2. Carter’s union and other protected activities

Carter supported the Union during the 1989 election and joined it thereafter. He attended several negotiating committee sessions. In 1994, he began wearing union T-shirts.

In May 1995, Carter attended a meeting where Human Resources Manager Tomkowicz told temporary employees that the Company was a good place at which to work, and that they should not listen to anything bad about the Company that the permanent employees might tell them. Carter later told Tomkowicz that he disagreed with him. Tomkowicz replied, “You all have made it. Go wallow in your own shit.”

Also in May 1995, Carter protested to the Company that its promotion policies were racially discriminatory, and threatened to quit. The Company told Carter that his protest was not well grounded, and cited examples of minority employees who had been promoted. Carter then returned to work.²⁵

On one occasion, Carter was repairing a machine for Assistant Plant Manager Leonard Amundsen. Carter testified that Amundsen wanted to transfer him from the second to the first shift, and offered him extra hours if Carter would do so. Carter replied that he should not get a raise unless everybody received one. He then showed Amundsen his union card. Amundsen “flinched,” as if in fear according to Carter, and walked away. Amundsen denied seeing a union card. I credit Carter.

3. Carter’s job classification and supervision

(a) Summary of the evidence

As noted, insubordination was one of the reasons given for Carter’s termination. This fact makes Carter’s job classification, and the supervision toward which he was supposed to respond, relevant.

Carter testified that he was a maintenance mechanic on the second shift. His shift ran from 3 until 11:30 p.m. His job was to repair machinery and keep it running. According to Carter, he worked under the supervision of Michael Amuso.

Another supervisor mentioned by Carter was Jerry Talent. He was employed by Respondent as an hourly employee in June 1995. In September 1995, the month that Carter was discharged, Talent was supervisor of the maintenance depart-

ment. Another department was the chemical packaging department. All the chemical packaging work was done on the second shift, and Michael Amuso was the supervisor. Nonetheless, Talent testified that he had supervisory oversight over Carter. He asserted that he went over the jobs that had to be performed at night with Amuso and Carter, and that it was Amuso’s function to see that the jobs were done.

Assistant Plant Manager Leonard Amundsen testified that Carter was a setup employee in the chemical packaging department, and that he had a job description defining this position. It states that individuals in that position report to the chemical packaging supervisor.²⁶ On the other hand, Amundsen also testified that he told every maintenance mechanic, including Carter, that Talent was “the acting supervisor,” and that maintenance mechanics were to report to him.

On August 23, 1995, Carter had a meeting with supervisors in which he questioned orders he had received to train another employee. He was told to do as he was directed, but was not disciplined.²⁷ On August 31, 1995, Carter had a meeting with company managers in which he stated that he did not know what his job was, and that some of his assignments were beneath his talents. Tomkowicz told him that he was a setup employee and had a job description. If he chose not to perform his assignments, he could resign. Carter asked why they did not fire him, and Tomkowicz replied that he would do so if Carter did not do his job.²⁸

The Union raised Carter’s status and his “ambiguous situation” at a bargaining meeting on September 11, 1995. Union Representative Raynor contended that Carter should be in maintenance, but Human Resources Manager Tomkowicz said that Carter was in chemical packaging. Tomkowicz agreed that an individual in that department reported to the supervisor of the department. Three days after the bargaining session, Carter was suspended and later discharged.

(b) Factual conclusions

Carter’s job description and the testimony of Amundsen and Tomkowicz establish that he was assigned to the chemical packaging department. Carter testified that he worked on the night shift under the supervision of Chemical Packaging Department Supervisor Michael Amuso. On the other hand, Talent was the maintenance supervisor. As indicated, Talent stated that he went over maintenance work to be performed on the night shift with both Amuso and Carter, and that it was Amuso’s job to see that the work was done.

I conclude that Carter’s supervision was ambiguous, in that the roles of Amuso and Talent were not clearly defined.

4. Carter’s discharge

(a) Summary of the evidence

(i) Carter’s meetings with Amuso and Talent on September 14

Carter testified that he arrived at work at 3 p.m. on September 14, 1995. He was met by Supervisor Amuso. The latter told him that they were preparing to ship a machine

²³ G.C. Exh. 20.

²⁴ The employee was Gene Bennett. In my prior decision, I found that Bennett filed a notice of intention to resign, and that Respondent discriminatorily converted the notice into an immediate discharge, thus depriving Bennett of work during the notice period. *Dynatron/Bondo Corp.*, Case 10-CA-25738, et al. pp. 10-12.

²⁵ G.C. Exh. 63.

²⁶ G.C. Exh. 68.

²⁷ R. Exh. 13.

²⁸ R. Exh. 14.

called an "Arinko" machine back for another product. It was in a room called the "Arinko room." First, however, it had to be "broken down," and then cleaned. Amuso instructed Carter to do this. Amuso was "desperate" to get the machine. Carter dismantled the hopper and was getting ready to pull out the cylinders when he was approached by Jerry Talent, who interrupted his work. The latter told him that some pumps needed repairing, and the two of them walked to the mixing room. Talent said that a pump Carter had repaired the night before was leaking. Carter replied that he would get to it if he had time.

Carter then started back toward the room where the Arinko machine was located. The job was "Priority One" according to Carter. Talent followed him. They passed some plastic tubing that had been left on the floor. Carter said to Talent: "Do you expect me to pick that up too. I'm getting tired of kissing asses around here like that. It's time somebody kisses my ass." He denied that he said this personally to Talent, denied that he said anything more than this, and testified that he heard nothing more from Talent.

Jerry Talent provided a different version. According to him, he met Carter near the mixing room as the latter was entering the plant. Talent told Carter that there were some things that had to be done. They went to the mixing room, where Talent pointed to a diaphragm pump. Carter said that another employee built the "f—king thing," and that he was not touching it. Talent replied that it pumped all right, but leaked when changed. Carter said "Oh."

They then went to another section, where Talent noted tubing on the floor, and told Carter to throw it away. Carter said he did not put the tubing there, and that it could stay there until it "f—king rots." Talent asserted that Carter refused his orders to fix the pump and pick up the tubing. Carter told him: "You can kiss my f—king ass."

Talent stated that Carter was becoming "hostile." Talent tried to leave him, but Carter "pursued" him and kept "attacking" him. Talent denied that Carter went to the Arinko room, which was distant from the mixing room. He denied knowledge of Carter's assignment to repair the Arinko machine, and said, at the hearing, "This is the first I've heard [of it]."

(ii) Carter's suspension and discharge

Talent called Human Resources Manager Tomkowicz and reported his version of the incidents with Carter. Carter was then called to Assistant Plant Manager Amundsen's office, where Amundsen, Tomkowicz, and Talent were present. Amuso was not there. Respondent's witnesses testified that Carter was "profane and out of control." He stood in front of Amundsen's desk, spoke in a loud voice, and waived his arms. Tomkowicz told him that he was suspended, and he was escorted out of the plant.

Tomkowicz testified that a decision was made later to discharge Carter. The decision was based on what Carter said to Talent on the plant floor, not on what took place in Amundsen's office. Tomkowicz based his decision as to what took place on Talent's report, which he accepted although Talent had only recently been appointed a supervisor.

Assistant Plant Manager Amundsen testified that he, Tomkowicz, and Plant Manager Fragnoli participated in the decision to discharge Carter. The decision was based on Talent's report that Carter had refused to fix a leaking pump and

had refused to pick up some hose on the floor. Talent told them that he had tried to defuse the situation by walking away from Carter.

Amundsen was asked whether he was aware that Carter had been given an earlier directive by Michael Amuso to repair an Arinko machine in the Arinko room. The transcript then reads:

A. Yes.

Q. You were aware of that?

A. Yes.

Q. You chose to discharge Lee Carter anyway?

A. For refusing to do his job.

Q. Are you aware that at the time that Jerry Talent approached Lee Carter to give him instructions on fixing the pump that he was busying himself following Mike Amuso's instructions in breaking down the Arinko machine?

A. Well, that's fine.

Q. Mr. Amundsen, did you and Mr. Fragnoli and Mr. Tomkowicz give that no consideration in deciding to discharge Mr. Carter?

A. Once again, I'll tell you this. I like Lee Carter. Yes, I did. I liked Lee Carter.

Tomkowicz and Amundsen agreed that neither of them witnessed Carter refusing to obey an order from Talent. As indicated, Carter was discharged on September 19 for being argumentative with, cursing, and abusing a member of management, and for insubordination.²⁹

(b) *Factual analysis*

Amundsen's admission that he was aware of Amuso's prior instruction to Carter, to break down the Arinko machine, corroborates Carter's testimony that this took place. Respondent did not call Amuso to contradict Carter on this issue. Accordingly, I find that Amuso did give Carter this order, and that Amuso was "desperate" to get this work done. I further credit Carter's testimony that he began this work, that it took place in the "Arinko room," and that Talent interrupted it.

This finding contradicts Talent's version of these events. He could not have met Carter near the mixing room if Carter in fact was in the Arinko room, some distance away, breaking down the Arinko machine. Talent's further testimony that he was unaware of Amuso's instruction to Carter, and first learned it at the hearing, is unbelievable. Amundsen testified that he was aware of it when he, Tomkowicz, and Fragnoli decided to discharge Carter. They purportedly relied on Talent's report of these incidents, and it is highly unlikely that Talent was unaware of the same fact. Indeed, the only place he could have found Carter was in the Arinko room, breaking down the machine.

Talent's own testimony does not establish that Carter refused to fix a pump. After Carter protested that another employee had repaired the pump, Talent explained that it pumped satisfactorily, but that it leaked. Carter's response to this explanation was "Oh," an apparent acceptance of the explanation. It cannot be said that Carter categorically refused to fix the leak, in light of his last exchange with Talent

²⁹ G.C. Exhs. 54, 55.

that he would do the work Talent asked to him to do if he had the time, and then went back to the "Priority One" job, the Arinko machine.

Talent's credibility is further impaired by the fact that his description of these events is contrary to the procedure which he described. That procedure was to go over the jobs that had to be performed on the night shift with Carter and with Chemical Packaging Department Supervisor Amuso. In this case, Talent, by his own testimony, did not do so. Instead, he gave the orders to Carter without consulting Amuso.

For these reasons, and Carter's honest demeanor, I conclude that he was a more credible witness than Talent. I accept his testimony that as he and Talent were passing some tubing on the floor he asked whether he was expected to pick it up, but heard nothing more.

Respondent's disciplinary policies when employees refused orders are relevant. It had a progressive disciplinary policy. An employee who was belligerent and refused to unload a truck was given a written warning.³⁰ An employee found to be insubordinate for sitting on and bouncing a drum was given a verbal warning.³¹ An employee who refused to obey a supervisor's order was suspended for 3 days.³² Two employees who persistently refused to work were discharged.³³

I further credit Carter's testimony that he told Talent that he was tired of "kissing asses" and wanted somebody to "kiss his ass," but did not direct this to Talent personally, and did not say anything more. Accordingly, I reject Talent's testimony that Carter told him to "kiss his f—king ass."

(c) *Legal conclusions*

In order to establish a discriminatory discharge, the General Counsel must make a prima facie case sufficient to support an inference that protected conduct was a motivating factor in the employer's decision to discipline an employee. Once this is established, the burden shifts to a respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.³⁴

Respondent's antiunion animus is established by the three cases cited above in which it was found to have violated the Act. It is also established by its violations already found here.

Lee Carter was an early supporter of the Union, beginning in 1989. Evidence of his support increased in 1994, when he began wearing union T-shirts. He also showed Assistant Plant Manager Amundsen his union card, and protested Human Resource Manager Tomkowicz' statement to temporary employees that they should not listen to permanent employee criticism of the Company—which prompted Tomkowicz to tell Carter to "go wallow in your own shit." Carter also protested what he considered to be Respondent's racially discriminatory promotion policies. The General Counsel has thus established a prima facie case that union

and other protected activities were a factor in Respondent's decision to discharge Carter.

Tomkowicz testified that the reasons for Carter's discharge were his profanity toward Talent on the plant floor and his insubordination. I have found that the only profanity was Carter's statement to Talent that he was tired of kissing other people's "asses and wanted somebody to kiss his ass." I have also found that Carter had a history of using profanity, and that it is commonplace in the plant. The Company was well aware of this fact, as indicated in the testimony of Respondent's witnesses and Carter's evaluations by supervisors. The same evidence indicates that Carter had a personality which made him argumentative at times. Despite these factors, the evaluations found that Carter was "overall a very good employee," and "a true asset to the Company."

I have also found that Carter commented on the tubing on the floor, asked whether he would be expected to pick it up, but heard nothing more from Talent. Even if Talent had ordered him to pick it up, this would not have warranted discipline as severe as discharge in light of Respondent's actual practice in the discipline of other employees discussed above. It had nothing to do with Carter's work, and would have constituted further interference with his priority job with the Arinko machine.

Respondent's decision to discharge Carter for conduct no worse than that in which he and other employees had engaged followed increased evidence of his support of the union and his other protected activities, including his attempt to get his own status clarified. The discharge took place a few days after the Union brought up his case at a collective-bargaining session. It is a permissible inference that, after tolerating Carter's personality problems for many years, Respondent suddenly decided to discharge him because of the increase in protected activities, not his conduct.

In *Marion Steel Co.*, 278 NLRB 897, 900 (1986), the Board stated:

The general rule followed by the Board and the courts is that, where an employee utters profanity or vulgarity to a supervisor, including statements which could be construed to be threats, the Board will extend a mantle of protection over such statements unless the statements are so egregious and so opprobrious that they render the employee unfit for further service.

Such is not the case here, even with respect to the remarks attributed to Carter by Talent.

The record is also devoid of any evidence that Respondent attempted to find out from Carter what transpired between him and Talent. The meeting in Amundsen's office did not include calm questions and answers. As Tomkowicz candidly admitted, he relied on what Talent reported to him. Respondent failed to conduct a fair investigation of Carter's supposed wrongdoing, and thus further evidenced its discriminatory motivation under accepted Board law. When Amundsen was asked whether he gave any consideration to the fact that Carter had received a prior order from Amuso, his answers were evasive and unresponsive. This is further evidence of Respondent's unlawful motivation, and the pretextual nature of the reasons it advanced for Carter's discharge.

Respondent has not rebutted the General Counsel's prima facie case, and I conclude that it suspended Carter on Sep-

³⁰ G.C. Exh. 16.

³¹ G.C. Exh. 75.

³² G.C. Exh. 17.

³³ G.C. Exhs. 16, 25.

³⁴ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

tember 14 and discharged him on September 19, 1995, because of his union and other protected concerted activities, thus violating Section 8(a)(3) and (1).

B. *The Discharge of Brenda Rogers*

1. Rogers' work history and union activities

Brenda Rogers was hired in August 1985, and was discharged on January 5, 1996, for insubordination in that she refused to wear "safety equipment" (a respirator).³⁵ Rogers supported the Union before the election, joined it, and wore union T-shirts. They were imprinted with the legend, "Dissatisfied Bondo employee." Rogers signed a petition that asked Respondent to treat its employees fairly.³⁶

2. Safety complaints against Respondent

On October 7, 1994, the Union filed a complaint against Respondent with the Occupational Safety and Health Administration (OSHA). The complaint alleged that the Company failed to abide by numerous OSHA regulations including respirators. "Respirator masks that are used are not sanitized and have not been for nearly a year." Temporary employees are currently given used soiled respirators for usage while employed at Bondo.³⁷ In October 1994, the Union issued a handbill asserting that OSHA had fined Respondent a total of \$11,900 for various violations.³⁸

On March 1, 1995, the Union sent Respondent a letter with a copy of a "second OSHA citation," a second petition signed by "a vast majority of employees," and a protest against "numerous violations of the National Labor Relations Act."³⁹ On May 8, 1995, OSHA issued a citation against Respondent, finding that users of respirators were not properly instructed in their use in the hazardous material handling area, and that approved respirators were not used in the packaging room. The violation was characterized as "Serious" was to be abated by June 7, 1995, and the proposed penalty was \$1200.⁴⁰

In about May 1995, the Union published a handbill asserting that OSHA had issued another citation against Respondent. The handbill contains a purported copy of the citation, alleging that Respondent "had not provided a place of employment free from recognized hazards that were likely to cause death or serious physical harm . . . in that employees were exposed to Methyl Ethyl Ketone Peroxide." The proposed penalty was \$4000, and the handbill added that amount to the \$1200 penalty for a total of \$5200.⁴¹

³⁵ G.C. Exh. 59.

³⁶ G.C. Exh. 33.

³⁷ G.C. Exh. 35.

³⁸ G.C. Exh. 37.

³⁹ G.C. Exh. 40.

⁴⁰ G.C. Exh. 39. OSHA has issued respiratory protection rules. OSHA Regulation 1910.134 requires that "respirators used by more than one worker shall be thoroughly cleaned and disinfected after each use." Employees must be trained in its use. G.C. Exh. 34, attachment D, p. 423.

⁴¹ G.C. Exh. 36.

3. Rogers' discharge—summary of the evidence

(a) *Respondent's procedure on use of respirators*

Respondent published "Standard Operation Procedures for the Selection and Use of Respirators."⁴² Those procedures require an employee to engage in inspection and maintenance of respirators each time it is used, to assure that it is in "good, clean condition." The procedures make a distinction between "individually issued" respirators, and those that are "commonly used." As to the former, the employee is required to clean them with a sanitary respirator wipe. Respirators that are "grimly soiled" must first be soaked and brushed to make certain that all residue is removed. The valves must be cleaned of all residue before use. "Be sure all residue are thoroughly washed away and respirator is clean and free from all putty or dust."

For "commonly used" respirators, the employee must engage in the foregoing cleaning operations. In addition, the respirator must be soaked in a disinfectant solution for 2 minutes, and then allowed to dry "if time allows." The employee must document these cleaning and maintenance activities on a prescribed form.⁴³

(b) *Rogers' assignment on January 3, 1996 suspension and discharge*

Rogers' regular job was that of a machine operator in the packing department. She had not been given a personal respirator. On January 3, 1996, she was assigned to a job of packing glazier spot putty, as part of a four-person team in the packing area. The employee running this operation told Rogers that she would need a respirator. When Rogers said that she did not have one, the team leader had two delivered, one for Rogers and the other for a temporary employee doing the same work.

Two respirators were delivered by Steven McDonald, an environmental technician. McDonald told Rogers to put on one of the respirators. Rogers picked one up, and observed that it had white powder and "stuff" on it. It looked as if it had come out of the mixing room. Rogers told McDonald that she would not wear it. McDonald replied that she would have to take it up with Assistant Plant Manager Amundsen.

The respirator itself was received in evidence.⁴⁴ It consists basically of three parts, a central section that goes over the face, and two sections with filters that fit over the area next to the ears. Steven McDonald called these pieces "caps." He testified that the central section was new, and that he took both central sections out of a box. The caps were not new. McDonald said he added them to the central sections. He handled the devices with latex gloves, and some white powder from the gloves came off onto the device. He agreed that some of the white powder was in the interior of the central section of the device that would have laid against Rogers' face if she had put it on. In addition, McDonald conceded that the caps had some kind of "debris, probably putty and dirt mixed." McDonald asserted that this had been cleaned, but would not come off. It may have been dirtier on January

⁴² G.C. Exh. 34.

⁴³ Id., part 5, 6, app. C.

⁴⁴ R. Exh. 19.

3, 1996, than it was at the hearing. Human Resources Manager Tomkowicz examined the device. At the hearing, he testified that the covers did not look clean to him. The device, in evidence, still has black markings on the outside parts, or "caps."⁴⁵

McDonald called Assistant Plant Manager Amundsen, who came to the jobsite. Rogers told Amundsen that the respirator was "real dirty." Amundsen replied that it was clean, and that she would have to put it on. Rogers said that she had no problem wearing a respirator, and that she would wear it if he would allow her to clean it. Amundsen replied that it was clean, and that she would either put it on or she was "out of there, fired."

Amundsen testified that Rogers told him she was not going to wear that "dirty thing." He replied that it "wasn't dirty. It was clean. All new parts were put on the respirator." Amundsen denied that he told her she was fired.

Amundsen then called Tomkowicz, and Rogers and Amundsen went to his office. According to Rogers, Tomkowicz asked her what her problem was, and Rogers replied that the respirator was dirty. Tomkowicz told her to think about it, then threw up his hands and said that they would have to fire her for insubordination. Rogers replied that she had no problem wearing the respirator, but wanted to clean it. Tomkowicz replied that the respirator was clean, and that they were too expensive for the Company to buy Rogers her own personal respirator.

According to Rogers, she was one of only two regular employees who did not have a personal respirator. She asked for one but did not receive one prior to January 3, 1996. Rogers did not receive a copy of Respondent's procedure on the use of respirators. Prior to January 3, 1996, she received a copy of a document from Union Representative Lamar Shelton asserting that OSHA had cited Respondent for using respirators that were inadequate in that parts were being interchanged, and that unsanitary respirators were being shared by employees.⁴⁶

Amundsen testified that he had other respirators but they did not have new caps and were "cleaned as good as possible." He stated that he cleaned commonly used respirators after they were used.

Tomkowicz testified that he told Rogers he could see no problem with the respirator, that Rogers should wear it, and that she would put herself "in harm's way" by refusing to do so. Rogers again refused—not to wear any respirator but this particular one. According to Tomkowicz, he then suspended Rogers.

Tomkowicz wrote a memo on the same date. It reads in part: "It was not a NEW RESPIRATOR but rather a newly cleaned unit with new filters and valves."⁴⁷ At the hearing, Tomkowicz contended that he later discovered that the memo contained an error, and that the respirator in fact was "ninety-nine and forty-four hundredths percent" new. He agrees that he probably told Rogers that the respirator was refurbished.

Tomkowicz called Rogers 2 days later. According to Rogers, he told her she could report back for work, but would have to wear the same respirator. She replied that she had no problem wearing a respirator, but asked whether she

could come in and clean it. Tomkowicz said that the respirator was clean, and that he was submitting her termination notice. Tomkowicz agreed that she was not discharged for refusing to wear any respirator, but, rather, in Respondent's Exhibit 19, her termination notice states that she was terminated for "insubordination, refused to wear safety equipment provided to her."⁴⁸

4. Rogers' unemployment insurance claim

Rogers applied for state unemployment insurance benefits, which were granted on January 22, 1996. The Company appealed, and the appeal was heard by an administrative hearing officer on February 23, 1996. His decision issued on March 8, 1996, and upheld the award of benefits. He found that Rogers refused to wear the respirator because the portions which rested against her skin were not clean. "Even though it was new," the decision reads, the claimant was not given an opportunity to clean the respirator. "The employer's adamant position was unreasonable."⁴⁹

5. Factual and legal conclusions

The requirement for a finding of a violation of Section 8(a)(3) is set forth above. Respondent's antiunion animus is established by the three prior decisions cited above, and by its unfair labor practices committed here. Rogers was a union activist who supported the Union, joined it, wore union T-shirts announcing that she was a "dissatisfied" employee, and signed a petition asking Respondent to treat its employees fairly. The General Counsel has established a prima facie case that animus was a factor in Respondent's decision to discharge Rogers.

The Union issued various handbills stating that OSHA had issued citations against Respondent. On May 8, 1994, OSHA issued a citation against Respondent, inter alia, finding that approved respirators were not used in the packaging room.⁵⁰ OSHA regulations require that commonly used respirators must be thoroughly cleaned and disinfected after each use.⁵¹ Respondent's operating procedure on the use of respirators requires that respirators that are "grimly soiled" must be soaked and brushed to make certain that all residue, including putty or dust, is removed. For commonly used respirators, the employee is required first to disinfectant it with a disinfectant solution for 2 minutes and then allow it to dry if time permits.⁵²

Rogers was normally assigned to work as a machine operator. On January 3, 1996, she was assigned to the work of packing glazier spot putty in the packing area. She was one of only two regular employees who had not been assigned a permanent respirator, although she had requested one. She was supplied a respirator by environmental technician Steven McDonald on January 3. He testified that the central section of the respirator was new, but that the "caps," containing the filters, were not new. The technician testified that he used latex gloves handling the respirators, and that white powder had come off the gloves onto the respirators, and had gone into the central section of the respirator which goes up

⁴⁵ R. Exh. 19.

⁴⁶ R. Exh. 80.

⁴⁷ R. Exh. 28, emphasis in original.

⁴⁸ G.C. Exh. 59.

⁴⁹ G.C. Exh. 60.

⁵⁰ G.C. Exh. 39.

⁵¹ G.C. Exh. 34, attachment D.

⁵² Id.

against the employee's face. In addition, the caps, containing the filters, had "debris, probably putty and dirt mixed."

I conclude that Respondent's delivery of this respirator to Rogers was not in compliance with its own operating procedure in that the respirator was not free of putty and dust (dirt)—McDonald admitted that putty was on the caps.

McDonald's assertion that he sanitized the commonly used respirators after each use is contrary to the explicit instructions in Respondent's rules specifying that the employee is to do so and record his or her actions on a prescribed form.

I further conclude that Respondent was still in noncompliance with OSHA's rule requiring that commonly used respirators must be thoroughly cleaned after each use, and with the May 8, 1994 citation in that Respondent ordered Rogers to use a respirator that was not thoroughly cleaned. Rogers offered to wear the respirator if they would let her clean it—first in her meeting with Tomkowicz on January 3, 1996. She made the same offer when Tomkowicz called her a few days later and told her she could come back to work if she would wear the respirator. Her offers were in compliance with Respondent's own operating procedure requiring an employee to examine a respirator and make certain that it is clean. There is no doubt that the respirator was dirty, and that Respondent refused to let Rogers clean it before wearing it.

Did Rogers' refusal to wear the dirty respirator constitute concerted activity? As noted above, the Union filed a complaint with OSHA against Respondent, protesting the use of soiled and unsanitized respirators. It also published handbills protesting Respondent's failure to protect the safety of its employees, including the failure to provide safety equipment.⁵³

The General Counsel argues that Rogers' refusal to wear the respirator was "a logical outgrowth of the complaints of Rogers, her co-workers and the Union regarding unsafe working conditions at Respondent's facility, including complaints about the use of unsanitized and soiled respirators." As such, the General Counsel argues, Rogers' refusal to wear the respirator constitutes union and other protected concerted activity, citing *Meyers Industries (II)*, 281 NLRB 882 (1986). The General Counsel concludes that Rogers' discharges violated Section 8(a)(3) and (1) of the Act.

The record demonstrates that Rogers refused to wear the respirator because she considered it to be unsafe. In *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975), a case preceding *Meyers (II)*, the Board stated:

The contract clearly indicates that the Employer shall not require employees to drive an unsafe vehicle, and that employees have the right to refuse to drive such a vehicle. Although Ferguson acted alone in his refusal to drive the tractor, and he did not at the time of his refusal specifically refer to the contract as granting him this right, the nature of his complaint has significance and relevance under the contract to the interests of all of Respondent's employees whose employment is governed under the contract.

We have held in the past that when an employee makes complaints concerning safety matters, which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract pro-

visions in the interest of all the employees covered under that contract. We have found such activity to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1) (authority cited).

In *Blue Circle Cement Co.*, 311 NLRB 623 (1993), enfd. 41 F.3d 203 (5th Cir. 1994), the employee used the employer's photocopier to reproduce an article attacking the employer's disposal of hazardous waste as "sham recycling." Both the union and an environmental group had opposed the employer's actions. The employer argued that the employee's actions were "entirely personal and not in any way connected with the Union." The Board disagreed and held that the employee's actions were "a logical outgrowth" of the employee's and the union's opposition to the respondent's plan to burn hazardous waste (id. at 624).

The Board has recently stated in *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992):

We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group [authority cited].

Rogers' refusal to wear the respirator was a logical outgrowth of the Union's concern with the safety of the employees, as reflected in the complaints it filed with OSHA, the latter's citations against Respondent, and the handbills that the Union issued. In addition, Rogers was a union activist, and the charge of insubordination against her was clearly pretextual, in light of her offer to wear the respirator if first allowed to clean it in compliance with Respondent's own procedures. Accordingly, by discharging her, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.⁵⁴

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Dynatron/Bondo Corporation is an employer engaged commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Union of Needletrades, Industrial and Textile Employees is a labor organization with the meaning Section 2(5) of the Act.
3. Since June 5, 1991, the Union named above has been the exclusive collective-bargaining representative of all employees in the following unit:

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

⁵⁴The conclusion reached by the administrative hearing officer in Rogers' unemployment insurance claim is similar to the one reached herein. Although the decisions of state agencies on such matters are not determinative, they have probative weight.

⁵³G.C. Exh. 37.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct without notifying the Union and giving it an opportunity to bargain:

(a) Instituting a new rule which disciplined employees who arrive late at work by fewer than 15 minutes.

(b) Creating on August 29, 1995, a new disciplinary procedure for material handlers.

(c) Changing its parking policy on October 2, 1995.

(d) Creating a new policy on employee compensation during power outages.

(e) Creating a new disciplinary procedure for employees' who fail to bring their new ID badges to work.

5. Respondent additionally violated Section 8(a)(5) by discharging employee Lamar Shelton on March 27, 1996, for alleged violation of the unlawful rule set forth in section 4(a), above.

6. Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Lee Carter on September 19, 1995, because he engaged in union and other protected concerted activities.

7. Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Brenda Rogers on January 5, 1996, because she engaged in union and other protected concerted activities, and because she refused to wear a dirty respirator, a logical outgrowth of union and employee opposition to Respondent's lack of adequate safety procedures.

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

9. Respondent has not violated the Act except as found here.

THE REMEDY

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

The Charging Party argues that Respondent is a "recidivist labor law violator," and urges extraordinary remedies. The record shows that Respondent discriminatorily discharged an employee in 1989⁵⁵ and refused to bargain with or supply relevant information to the union in 1991.⁵⁶ In 1993, Respondent violated Section 8(a)(5) by unilaterally changing its employees working conditions in four areas, and, in 1994, violated Section 8(a)(3) by discriminatorily discharging four employees.⁵⁷

The Union argues that Respondent should be required to have a notice read by a corporate officer, mailed to employees and former employees at their homes, published in local newspapers, and published in the parent corporation's annual report to shareholders. In addition, the Charging Party requests that the General Counsel and the Charging Party be paid their litigation expenses, and that the discriminatees be compensated for lost wages by not deducting interim earnings from their gross backpay.

In the case at bar, Respondent has continued its practice of unlawful unilateral changes to the detriment of its employees' working conditions, and has continued its discriminatory

discharges of employees. Its treatment of Brenda Rogers was outrageous and was in defiance of OSHA citations. Respondent's refusal to let her clean the respirator prior to using it manifested a contemptuous disregard of her apprehensions concerning her own health.

In *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), the employer violated Section 8(a)(1) and abused, assaulted, and discriminatorily discharged employees; the Board ordered extraordinary remedies.⁵⁸

Although the case at bar does not contain the abuse and assault features of *Three Sisters*, it does manifest a pattern of continuous violations of the Act, beginning in 1989 and continuing to the present time. I conclude that the coercive and cumulative effect of this pattern is at least equivalent in magnitude to that in *Three Sisters*.

I shall first recommend that Respondent be required to post copies of the attached notice marked "Appendix",⁵⁹ at its Atlanta, Georgia facility. Copies of the notice, provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

In addition, pursuant to *Three Sisters* and *Fieldcrest Cannon*, supra, I shall recommend that either Human Resources Manager Fred Tomkowicz or Plant Manager Leigh Fragnoli read the notice to all employees at its Atlanta facility, by shifts, departments, or otherwise, or, at its option, permit a Board agent to read the notice in the presence of either Tomkowicz or Fragnoli. In addition, Respondent shall mail signed copies of the notice to all its employees since July 14, 1989, the date of its unlawful discharge of Ernestine Baskin.⁶⁰ I shall further recommend that Respondent be required to publish in local newspapers of general circulation a copy of the notice two times a week for a period of 4 weeks.

I shall not, however, recommend that the notice be printed in the parent corporation's annual report to shareholders. This would go beyond what is required to remedy the unfair labor practices committed against Respondent's employees.⁶¹

In support of its request for reimbursement to the General Counsel and the Union for litigation expenses, the Union cites *Heck's, Inc.*, 215 NLRB 765 (1974). The Union argues that Respondent's violations are "studied and willful," that its defenses "in various instances are frivolous and nonexistent," and that in the case at bar it did not even file a brief to the administrative law judge.

The cited *Heck's* case was a second supplemental decision by the Board, following "the labyrinthine history" both of the original decision and of the Board's decision in *Tiidee Products*, 194 NLRB 1234 (1972). Following a Supreme

⁵⁸ See also *Fieldcrest Cannon, Inc.*, 318 NLRB 466, 473 (1995), and authority cited there.

⁵⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁶⁰ *Dynatron/Bondo Corp.*, supra at fn. 55.

⁶¹ *Fieldcrest Cannon*, supra at 474 fn. 8.

⁵⁵ *Dynatron/Bondo Corp.*, 302 NLRB 507 (1991), enf. per curiam 992 F.2d 313 (11th Cir. 1993).

⁵⁶ Id.

⁵⁷ *Dynatron/Bondo Corp.*, Cases 10-CA-25735, et al.

Court remand in *Heck's*, the Board discussed the distinction between “frivolous” and “debatable” issues. The Board stated:

The fact that in retrospect a respondent is found to have engaged in a flagrant repetition of conduct previously found unlawful, otherwise characterized as aggravated and pervasive, does not in our judgment justify our discouraging that respondent from gaining access to an appropriate forum where the credibility of witnesses leaves an unfair labor practice issue in doubt.⁶²

In this case, credibility resolutions were required in order to conclude that Respondent had committed unfair labor practices. It follows that Respondent's defense here is not frivolous.⁶³ Accordingly, I shall not recommend an award of litigation expenses to the General Counsel or the Union.

In support of its contention that interim earnings should not be deducted from backpay, the Union argues that the Board's traditional “make-whole” remedy does not really make whole the discriminatee who had been unlawfully discharged and that the “Act's statutory scheme is not fully vindicated, nor are employees' rights protected, by the current remedial arrangements.” Conceding that the Board has held otherwise in the past, the Union requests it “to reconsider the proposition and to formulate a new standard which would allow such a remedy in cases where the evidence shows flagrant, willful and repeated violations of the Act.”

⁶² 215 NLRB at 768.

⁶³ Respondent did file a brief in the instant case, albeit two pages in length.

This remedy is not within the compensatory remedial scheme of the Act, and has been rejected by the Board. *Fieldcrest Cannon, Inc.*, supra at 474 fn. 8. Accordingly, I shall not recommend this remedy.

I shall recommend that Respondent be ordered to offer Lee Carter, Brenda Rogers, and Lamar Shelton immediate reinstatement to their former positions, dismissing if necessary any employees hired to fill those positions, and to make them whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful conduct, by paying each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful discharge to the date of an offer of reinstatement, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁶⁴

I further conclude that Respondent “has engaged in such egregious or wide spread misconduct as to demonstrate a general disregard for employees statutory rights.”⁶⁵ Accordingly, I shall recommend a broad order.

[Recommended Order omitted from publication.]

⁶⁴ Under *New Horizons*, interest is computed at the “short-term Federal rate” for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁶⁵ *Hickmott Foods*, 242 NLRB 1357 (1979).