

**Meritor Automotive, Inc. and Teamsters Local 61,
a/w International Brotherhood of Teamsters.**
Case 11-CA-17710

June 25, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 8, 1998, Administrative Law Judge George Carson II issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

The judge found that the Respondent's discipline of Paul Kica and its discharge of Eddie Underwood were not motivated by animus toward their union activities. We agree. However, we disavow the judge's suggestion that because there is no evidence establishing an independent violation of Section 8(a)(1), there can be no direct evidence of antiunion animus.² It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful.³ In affirming the judge, we find no direct evidence of antiunion animus on the Respondent's part, and we find that the judge properly declined to infer animus from the circumstances surrounding the Respondent's treatment of either employee.⁴ We therefore find,

¹ The General Counsel has implicitly 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge dismissed the portions of the complaint alleging unlawful surveillance and creating the impression of surveillance of union activities. No exceptions were filed to those dismissals.

³ See, e.g., *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993).

⁴ The General Counsel contends that animus is evident in the testimony of Materials Manager William Emory. Emory stated that in training sessions concerning appropriate conduct for supervisors in union organizing campaigns, he was encouraged to look for signs of concerted activity (e.g., small groups "hanging out" together who had never done so before), to find out what was going on, and to report it to a coordinator. The General Counsel argues that Emory's testimony constitutes an admission that the Respondent routinely instructs its supervisors to engage in unlawful surveillance of union activities, and clearly indicates animus toward those activities. We reject that argument. Emory testified that he had not been through such training in 10 years. Thus, whatever evidence of animus might otherwise be found in such instructions is extremely remote in time. Under these circumstances, we decline to find from Emory's testimony, taken either by itself or in the context of all the record evidence, that the Respondent harbored antiunion animus at the time of the events in this case.

in agreement with the judge, that the General Counsel has failed to demonstrate that animus against the employees' union activities was a motivating factor in the Respondent's actions against them,⁵ and we affirm his dismissal of the complaint.⁶

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Donald R. Gattalaro, Esq., for the General Counsel.

Charles P. Roberts III, Esq., for the Respondent.

Mr. Johnny Sawyer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Asheville, North Carolina, on August 3 and 4, 1998. The charge was filed on October 9, 1997, and was amended on November 5, 1997,¹ and February 26, 1998. The complaint issued on February 26, 1998. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by engaging in surveillance of employee union activities and creating the impression that employee union activities were under surveillance and Section 8(a)(3) of the Act by warning Paul Kica and discharging Eddie Underwood because they engaged in union activities. Respondent's answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Meritor Automotive, Inc., a corporation, is engaged in the manufacture of truck axles and differential gears at its facility in Fletcher, North Carolina, at which it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of North Carolina. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I conclude and find, that Teamsters Local 61, a/w International Brotherhood of Teamsters, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent, Meritor Automotive, is a recently created subsidiary of Rockwell International. Employees at the Fletcher plant identify their employer as Rockwell or Meritor. Although some of Rockwell's facilities are unionized, the employees at this facility are not represented by a labor organization. Prior to September 1997, there had been three or four organizational

⁵ *Wright Line*, 251 NLRB 1083 (1980).

⁶ In view of this result, Member Hurtgen finds it unnecessary to pass on whether, or in what circumstances, non-8(a)(1) conduct can be used to establish the "animus" element of an 8(a)(3) violation.

¹ All dates are in 1997 unless otherwise indicated.

campaigns at the Fletcher plant, all conducted by the Auto Workers (UAW). In September, the Teamsters initiated an organizational campaign. During the second week of September, employees distributed union leaflets in the plant parking lot. Some members of supervision observed this open union activity as it occurred. There is no allegation of surveillance regarding this event.

Employees of the Respondent are salaried, thus their compensation is not reduced when they are late to work, leave early, or are absent. As a consequence, Respondent places great emphasis on attendance. Respondent's attendance policy recognizes that employees will miss some work due to accidents, short-term illness, and personal reasons such as medical appointments. It designates such absences as "controllable absences," although fender-benders and the 24-hour flu are obviously not controllable. When an employee is injured or ill and not hospitalized, the first 16 hours are deemed "controllable," with the remainder of the absence being classified as "uncontrollable." In monitoring controllable absences, Respondent considers 32 hours as a "flag." Employees are not warned when they reach that benchmark, but they are counseled by their supervisor. Discipline is not automatically administered if the 32-hour benchmark is exceeded. Rather, the supervisor considers the employee's overall attendance record, the reason for the absences, any unusual pattern, and past discussions regarding attendance. The 32-hour benchmark is computed on rolling year, the most recent 12-month period.

Respondent has a four-step disciplinary system, the fourth step being termination. Each step is documented by a written warning that Respondent refers to as a corrective action. The policy on corrective actions provides that, after 6 months from the date of the last documented step, the oldest step is reviewed for removal and, if the performance problem has been corrected, "then removal from the employee personnel file of the formal counseling will occur . . ." The employee receives the original form, and no copies are kept. Thus, all employees are aware of their status in the disciplinary system. Periods of extended absence, such as medical leave, are not counted in computing the 6-month period.

Respondent's policy manual, a copy of which is given to each employee, sets out various offenses for which progressive corrective action will be taken. These offenses include excessive absenteeism or tardiness, including "failure to properly report an absence." Regarding absences it states:

If you determine that you must be absent or late, you must notify your supervisor as far in advance as possible prior to the start of your shift. In this way, arrangements can be made to temporarily provide coverage for your job function. When initially contacting your supervisor, you should advise him/her of the reason for your absence and its expected duration Subsequently, you should call in each day, prior to the start of your regular shift. Failure to properly report an absence could result in appropriate corrective action.

B. The Surveillance Allegations

1. Facts

On September 18, the Union held meetings for Meritor employees at its office located on Sardis Road in Asheville. The meeting for third-shift employees was scheduled for 8 a.m., after the night shift ended. When the meeting began, employees Richard Sullivan and Paul Kica introduced union organizer

Johnny Sullivan to the employees. Sullivan and Kica then went to the front porch to direct any latecomers to the meeting room. About 8:15 a.m., as they were standing in front of the building, they observed a white Jeep Cherokee with gray lower body trim coming up the gravel driveway to the parking area. Kica commented that the vehicle looked like that driven by Respondent's human relations team leader, Joyce Painter. Sullivan and Kica began walking toward the vehicle. The vehicle began turning around and Sullivan started to run after it. The vehicle completed turning around and went down the driveway to Sardis Road, a distance of about 100 yards. Traffic on Sardis Road precluded the driver from immediately turning onto the road. As soon as traffic permitted, the driver crossed the lane and turned left. Sullivan recorded the license plate number on his hand.

Sullivan testified that, as the vehicle was turning onto Sardis Road, he identified the driver, who he recalled was wearing a yellow coat, as Painter. I find that he was mistaken in his identification. Kica recalled that the driver, who he did not specifically identify, was wearing a gray sweatshirt. Employee Eddie Underwood, who had arrived late, was walking up to the porch when the Jeep Cherokee approached. He saw only a silhouette, which he thought looked like Painter. Sullivan, Kica, and Underwood all testified that they observed a Rockwell parking sticker on the windshield of the vehicle; however, Sullivan's testimony reveals that the employees observed a blue and white sticker. It is clear that the sticker identification was on the basis of appearance. No one read the sticker. The closest anyone came to the car was Sullivan as the vehicle was departing.

Painter credibly denied being present at the union office. She was, on the morning in question, preparing for a celebration marking the plant's production of its 2 millionth axle. This involved coordinating the distribution of T-shirts and model trucks to supervisors who, in turn, distributed these mementos to the employees. Her presence at the plant is corroborated by Supervisors Mark Turner, Jerry Krug, and Scott Given, who observed her in the area from which the mementos were being distributed between 8 and 8:30 a.m.

Further evidence that Painter was not at the union office was provided by Sonya Turner, wife of Supervisor Mark Turner, who testified that it was she who turned into the parking lot. Sonya Turner is employed as a branch manager at a local bank. As she was driving to work in a white Jeep Cherokee with gray trim, she noticed a number of cars with what appeared to be Rockwell stickers turning into a driveway on Sardis Road. Looking up the driveway, she thought she saw her husband's black Corvette. She attempted to reach him on her cellular telephone, but got his voice mail. She turned around and proceeded back down Sardis Road and turned into the gravel driveway. She again called her husband. Upon reaching him, she told him that, as she was driving on Sardis Road, she thought she had seen his car. Mark Turner asked his wife where she was, and she told him she was in a gravel parking lot and that there was a building. Mark Turner told his wife to leave. At this point she noticed three people coming toward her vehicle. She turned around, drove down the driveway, waited for traffic to clear, and then turned left onto Sardis Road. Her cellular telephone bill reflects a 2-minute call to her husband's number at 8:10 a.m. and a 7-minute call to the same number beginning at 8:14 a.m.

Mark Turner denied that he was responsible for his wife's actions, and I credit his denial. He testified that he did not, in

any way, ask his wife to engage in surveillance. He had no idea that she would be in the parking lot of the union office. When he was speaking with her on the telephone and learned where she was, he directed her to leave immediately.

Painter's alleged presence in the union office parking lot was a subject of conversation among employees at the plant. On September 19, when material handler Mary Pressley reported to work on first shift, she heard that Painter had been seen at the union office, "[e]verybody in the building was talking about it." Although Pressley had not been at the union meeting, she talked about the rumor with other employees. Painter received a report that Pressley was telling people that she had been seen at the union office. Painter sought out Pressley and spoke with her on the shipping dock. Painter told Pressley that she had heard that she, Pressley, had been telling people that she had been at the union office. Pressley asked from whom she had heard this, but Painter refused to tell her. Painter denied being present, telling Pressley that, for her information, she did not know where Sardis Road was located.

2. Analysis and concluding findings

Insofar as I have credited Painter's denial that she went to the union office on the morning of September 18, I find that Respondent did not engage in surveillance and shall recommend dismissal of this allegation. My finding in this regard is underscored by the testimony of Sullivan that he wrote down the license plate number of the vehicle. If that license number had matched the number of Painter's vehicle, I have no doubt that the evidence in that regard would have been presented at the hearing.

The General Counsel argues in his brief that, even if I find that Painter was not present, I should find that Sonya Turner engaged in surveillance as an instrument of her husband. In this regard, he argues that Sonya Turner was not credible in various aspects of her testimony, including her purported failure to observe the large sign identifying the house as the office of Teamsters Local 61 and failure to recognize Paul Kica, who has an account at the bank at which she works. Even though Sonya Turner's deviation from her route to work is suspicious, I have credited Mark Turner's denial that he was in any way responsible for his wife's actions. Thus, Sonya Turner's credibility ceases to be relevant. There has been no request to amend the complaint to allege Sonya Turner as an agent of Respondent. There is no probative evidence either that Mark Turner was responsible for his wife's actions or that she took any action at his behest; thus, there is no evidence that she was acting an agent of Respondent.

The General Counsel argues that Painter's informing Pressley that she had heard that Pressley was telling employees that she had been at the union office created the impression that Pressley's union activities were under surveillance. Pressley admitted that she had talked with others about the rumor. Painter's statement of hearing about Pressley's conversations does not suggest surveillance. The General Counsel has not established that Respondent could have learned of Pressley's role in spreading the rumor only through surveillance. *Embassy Suites Resort*, 309 NLRB 1313, 1329 (1992). I further note that the Board, in *Times Wire & Cable Co.*, 280 NLRB 19 (1986), held that no impression of surveillance was created when a supervisor informed a group of known prounion employees that he knew who the organizers were in order "to dispel a rumor that he had been surreptitiously observing a union meeting." *Id.* at 26. In the instant case, there is no probative evidence that

Painter, in seeking to dispel a false rumor, created an impression of surveillance.

C. The Warning of Paul Kica

1. Facts

Paul Kica is a blanking technician. In 1997 he was on third shift under the supervision of Tom Sullivan. Kica handed out union leaflets at the plant during the second week of September. Supervisors Mike Atkinson, Jim Ginnors Jr., and Tom Ford came outside of the plant as the leafleting was occurring. Atkinson acknowledged seeing certain employees and did not deny seeing Kica. Neither Ginnors nor Ford testified. As of September, Kica had 34 hours of controllable absences during the previous 12 months. Although he had exceeded 32 hours, Kica had received no discipline. Kica thereafter missed an additional 8 hours of work. On October 3, he was issued a step-1 corrective action upon which he wrote that he considered the corrective action to be fair, that he had not been singled out, and that he understood the attendance of everyone under the supervision of Tom Sullivan was being evaluated.

At the hearing, Kica testified that he felt the warning was unfair and that David Banks, Danny Mathis, Lee Dalton, and William Haney, employees with whom he worked, all had as many or more controllable absences than he did. Kica testified that they all told him they had not been warned; however, the dates of any such conversations were not established. Documentary evidence establishes that, as of October, Banks did have more controllable absences than Kica. Mathis had only 25 hours; he accrued 8 more in October for a total of 33 and was warned when he accrued an additional 8 hours in December for a total of 41. Dalton had a total of 39.5 hours as of October, fewer hours than Kica's 42. Haney had a total of 44 hours, which was the same total he had in April.

Supervisor Tom Sullivan assumed supervisory responsibility over the blanking department in April. He issued no discipline for hours of controllable absences already accrued by employees in his department, thus accounting for the absence of discipline to Haney who had 44 hours in April but who, over the next 6 months, accrued no additional absences. Sullivan counseled with each employee. He disciplined employees whom he detected had an attendance problem. The record reflects no discipline until an employee exceeded 40 hours. Employees who exceeded 40 hours were routinely disciplined, including Kica, when he accrued a total of 42 hours in October; Mathis, who was warned when he accrued 41 hours in December; Larry Patterson, who prior to December had 32 hours and was warned on December 9 when he accrued an additional 12 hours for a total of 46; and Paul Angel who, prior to December, had 36.9 hours but was warned when he accrued an additional 16 for a total of 52.9. Sullivan explained that Banks, who had no prior attendance problem and only 28 hours as of May, was not warned when he accrued 29 hours under unusual circumstances. In May, Banks had attempted to return to work after missing 2 days, but he discovered he was too ill to work after 3 hours. Since the first 16 hours of personal illness are considered controllable and hours over 16 are considered uncontrollable, Banks' ill-timed attempt to return to work resulted in his accrual of hours that otherwise would not have been charged against him. Thereafter, until his daughter became ill in December, Banks had no controllable absences. He accrued 16 hours when his daughter was hospitalized in December. Sullivan acknowledged that he could have issued a corrective ac-

tion, but that Banks called him and left messages and that he made a judgment call not to issue discipline.

The General Counsel introduced the attendance records of several employees who accrued 40 and 50 hours of controllable absences without receiving corrective actions, as well as the record of Debra Bruckner, who had a total of 112.5 hours in 1996, 48.9 of which were accrued in January 1996. The General Counsel adduced no evidence regarding the circumstances of Bruckner's absences nor of the absences of any of the other employees, none of whom were supervised by Sullivan. Respondent introduced the records of three employees whose controllable absence hours exceeded 40 and who were warned by Supervisor Mark Turner.

2. Analysis and concluding findings

Respondent argues that any knowledge of Kica's union activities is marginal; however, in view of his leafleting which he testified Ginners and Ford observed, and in view of their failure to testify, I find that Respondent had knowledge that Kica was engaging in union activities.

There is no evidence establishing an independent violation of Section 8(a)(1) of the Act, thus there is no direct evidence of animus. Consequently, to make a finding of animus, I must infer animus from the circumstances surrounding the treatment of Kica. Under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), the burden of proof is upon the General Counsel to establish animus. With regard to Kica, the issue is whether he was treated disparately. The Board recognizes that an inference of unlawful motivation may be "drawn from evidence of blatantly disparate treatment." *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998).

Kica missed 8 hours of work shortly before he received the corrective action. Disparity consists of "a plain failure . . . to treat equally-situated employees equally." *New Otani Hotel & Garden*, *supra*. Supervisor Sullivan routinely issued warnings to employees under his supervision who exceeded 40 hours of controllable absences. This may have been a stricter standard than that utilized by some other supervisors, but it does not establish blatant disparity from which I can infer unlawful animus. In *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987), the Board found no unlawful disparity, notwithstanding different treatment of employees, where the absence of uniformity, even assuming that the circumstances were similar, could "be attributed to the fact that different supervisors, acting without guidance from written disciplinary standards, made the disciplinary decisions at different times." The General Counsel adduced no evidence regarding the circumstances surrounding Bruckner or any other employees he asserts had excessive absences but who worked for different supervisors. Sullivan credibly explained the basis for his failure to warn Banks. Kica was treated no differently from Mathis, Patterson, and Angel. Even if I were to assume animus, the record establishes that Sullivan treated Kica no differently from other employees under his supervision.

The General Counsel, in his brief, notes that Kica's corrective action requests that he set a long-term goal of keeping his personal absences under 24 hours, and asserts that this establishes discrimination in that Kica was being held to a "standard not required of other employees." The brief neglects to note that Supervisor Sullivan used exactly this same language in the corrective actions issued to Mathis, Patterson, and Angel.

Insofar as the record does not establish that Respondent's discipline of Kica was motivated by animus towards employee union activity, the General Counsel has failed to establish a prima facie case. In view of the foregoing, I shall recommend that this allegation be dismissed.

D. The Discharge of Eddie Underwood

1. Facts

Eddie Underwood worked as a material handler on third shift. Third shift began at 11:15 p.m. and ended at 7:15 a.m. His supervisor was Sandy Wallace, a position she assumed in late August or early September 1996. Wallace supervised the material handlers on all three shifts. She worked different hours, always being present for a portion of first shift and overlapping either second or third shift. When Wallace was not present, Underwood's work was overseen by Third-Shift Assembly Supervisor Mike Atkinson. Third-shift employees were fully aware that the date of their shift was the day that the shift ended. Thus, employees scheduled to work on October 6, reported at 11:15 p.m. on October 5. The General Counsel, citing Joyce Painter's testimony that she found third-shift dates confusing, refers to Respondent's "own calendar," thereby suggesting some confusion regarding dates. There is, however, no dispute regarding the critical dates herein, and Underwood did not assert any confusion regarding dates.

Underwood's employment history reflects an attendance problem. He received a step-1 corrective action on March 21, 1996, after 69 hours of controllable absences from January through March 21, reaching a total of 100.5 hours. He missed an additional 16 hours due to illness in March and 4 more hours in June, bringing his rolling calendar year total of controllable absences to 120.5. He was placed at step 2 on July 22, 1996. On August 21, 1996, Underwood received a step-3 corrective action after not reporting for work or giving notification that he would be absent. This corrective action notes that Underwood had previously failed to report or give notice on March 5 and had been verbally counseled regarding this on March 11, 1996, shortly before receiving the step-1 corrective action. It further notes that this problem continued on June 24 and August 19, 1996. It specifically notes that, on August 19, Underwood did not contact any supervisor, although he did contact the first aid office.

Underwood has a recurring problem with his knee, which was injured when he was in the military service. He underwent surgery on his knee in September 1996, and was on medical leave from September 6 until November 4, 1996.

In January 1997, Supervisor Atkinson noted that Underwood had been late for work on four occasions, and he reported this tardiness problem to Supervisor Wallace. On February 4, Wallace, upon review of Underwood's oldest corrective action, determined that Underwood's attendance problem had not been corrected, and he therefore remained at step 3.

On March 5, Underwood did not report for work or call in. He had been called to his grandmother's home with regard to a crisis. His grandmother, whose telephone was disconnected, has Alzheimer's disease. She was totally disoriented and unwilling to let anyone but Underwood assist her. Underwood requested his wife to report his absence. She attempted to do so but got a busy signal on the telephone. Thereafter she fell asleep; thus, the absence was unreported. The following day, Mrs. Underwood contacted Materials Manager Bill Emory and explained the situation to him, and Emory told her that Under-

wood would not be terminated. Underwood met with Supervisor Atkinson and Shift Manager Larry Peters who was aware that Emory had spoken to Mrs. Underwood. Underwood requested to speak privately with Peters. Atkinson left, and Underwood explained the situation to Peters. Peters told Underwood that, in the future, it was critical that he report any absence. Underwood confirmed that “[a]nytime I wasn’t going to be at work or I would be late for work I needed to make sure that someone was informed in the plant.”

Underwood was again on medical leave from March 10 until May 12.

During the second week of September, Underwood participated in the leafleting prior to third shift during which Supervisors Atkinson, Ginners, and Ford came outside of the plant. Neither Ginners nor Ford testified. Atkinson denied seeing Underwood. Underwood testified that this was the first union campaign in which he had become involved. He attended the union meeting on September 18.

On September 22, Underwood fell as he was preparing to go to work. The Underwoods had no telephone, and Underwood, realizing his precarious attendance situation, directed his wife to report his absence. She went to a pay telephone, but the line was busy. She testified that she was “frantic.” She drove to the plant, a short 2- or 3-minute drive. She did not stop at the guard shack at the entrance to the parking lot. Instead she went immediately into the building where there is another guard station at the point one enters the building. No guard was present. Mrs. Underwood did not return to the outdoor guard shack or seek to attract the attention of anyone in the plant. The entrance to the plant at this location is not restricted, and Mrs. Underwood was aware that the cafeteria was a short distance inside the door. Despite this, she testified that she “patiently waited” for 40 to 50 minutes before deciding to go to the cafeteria to find someone. As she entered the plant and began making her way to the cafeteria, she met the guard. He wrote a note that Mrs. Underwood dictated stating: “Hurt his knee, will not be in tonight.” Mrs. Underwood’s inexplicable failure to notify the guard at the entrance to the parking lot and lengthy wait before going through the unrestricted plant entrance resulted in Underwood’s absence not being reported until 12:30 a.m., over an hour after the shift started.

On September 23, Underwood went to his physician who wrote a note stating that he would be off work through September 30. By the time Underwood got to the plant to deliver this note, the first aid office had closed. Underwood had the guard open the office and place the note on the first aid person’s desk. He made no other effort to advise that he would not be present for work that night, despite having been counseled in writing on August 21, 1996, that contact with the first aid office was not sufficient.

Underwood saw his physician again on September 29. The physician revised his release date and signed a note stating that Underwood could return to work on October 6, a Monday. Underwood turned in this note, presumably at the first aid office since he did not speak to any supervisor. Underwood understood that Respondent would interpret this note as meaning that he would be present for the October 6 shift which actually began at 11:15 p.m. on October 5 since a similar situation had occurred in the past. On that occasion, Supervisor Kevin Sellers had explained that Respondent expected Underwood to report to the shift that ended on the day reflected by the release date, and he had permitted Underwood to obtain a revised note. Thus

Underwood “knew the company would interpret the note as meaning I would be back for the shift that ended on the 6th.” Although Underwood came to the plant to pick up his check, he did not seek to talk with anyone regarding when he would return because, “the note had already explained that.” The only operative note at that time was the note releasing him on October 6.

Underwood did not report to work for the October 6 shift, nor did he notify anyone at the plant that he would be absent. He testified that he made no effort to contact anyone because he was to see the physician on October 6 and would get him to write another note, “I figured by him [the physician] writing the other note, the company would understand.” On October 6, Underwood obtained another note from his physician which states that he could return to work on October 6 “after midnight shift 10/07/97” and restricts his duties. Underwood gave this note to Supervisor Atkinson, who, pursuant to the limitations thereon, placed Underwood on light duty. On October 7, Atkinson was told by Wallace not to permit Underwood to work until “they could find out why he had not shown up on the 6th.” Atkinson informed Underwood of this at 11:26 p.m., when Underwood arrived 11 minutes late for the October 8 shift.

When asked whether he made any efforts between September 23 and October 8 to talk to any supervisor or manager about his absences during that time period, Underwood answered, “The note explained it all. As in the past every note has always explained it. I never went to them personally and talked to them. There has never been a problem. Never been—there has never been nothing that I was told I had to do.” The record establishes otherwise. Underwood, after asking that Atkinson not be present, talked with Peters regarding the failure to notify Respondent the day after he had to deal with his grandmother. Contrary to the assertion that “there was never a problem,” the record reveals continuous problems regarding Underwood’s failure to notify Respondent as reflected in his corrective actions. Contrary to his assertion that there was “nothing that I was told I had to do,” Underwood admitted that, in March, he was told that it was absolutely critical that he notify Respondent prior to being absent, that “[a]nytime I wasn’t going to be at work or I would be late for work I needed to make sure that someone was informed in the plant.” I find it incredible that Underwood, having received this admonition, “figured . . . the company would understand” when he obtained another note after missing the October 6 shift without reporting that he was going to be absent.

On the morning of October 8, Underwood met with Wallace and Peters, who had assumed duties in human relations. He explained the circumstances of his accident on September 22 and subsequent doctor visits, the notes of which he brought to the first aid office, except for the final note which he presented to Atkinson. Underwood acknowledged that he did not attempt to contact any supervisor or anyone else in management, stating that he thought the notes were sufficient. On the afternoon of October 8, Underwood met with Wallace, Peters, and Painter. He was terminated. The document summarizing the reasons for his termination notes the failure to properly report his absences of September 23 and 24 and October 6, as well as his failure to communicate with anyone in management regarding his current injury.

Underwood was fully aware that he was at step 3. Underwood testified that he spoke with Materials Manager Emory in July regarding being removed from step 3 in August. Emory

credibly denied that he made such a statement, explaining that such action was the responsibility of the supervisor. On September 24, Supervisor Wallace, who had been absent for much of September, recommended that Underwood's step 3 be reduced, but she withdrew this recommendation upon learning that Underwood had been absent on September 23 and 24. Respondent's failure to remove Underwood from step 3 is not alleged as a violation of the Act.

Although Underwood denied being involved in any prior union campaign, Supervisor Wallace credibly testified that, in August 1996, Mary Pressley told her that she wanted her authorization card back because she had leaned that Underwood was going to be made "an officer in the Union." This conversation occurred prior to Wallace's assumption of supervisory duties over material handlers in late August or September. She reported this conversation to Emory in late 1996 or early 1997. Emory understood that Wallace was not reporting a contemporaneous conversation; the conversation being reported "had to be before August."

2. Contentions of the parties

Respondent argues that it lawfully discharged Underwood for cause after he failed to advise Respondent of his situation following his injury on September 22 and failed to report to work or to notify Respondent that he would be absent from the October 6 shift.

The General Counsel, without noting that he is disregarding Underwood's testimony, argues that Respondent's discrimination against Underwood began on February 4 when Wallace, "[c]ontemporaneously with learning of Eddie Underwood's union involvement," kept him at step 3. In view of this argument and the General Counsel's failure to recall Pressley regarding her conversation with Wallace, it appears that the General Counsel agrees that Underwood, contrary to his testimony, was involved in a prior union campaign. The record, however, does not support the time sequence upon which the General Counsel's argument is based. Wallace's conversation with Pressley was prior to her assumption of supervisory duties over material handlers, a responsibility she assumed in late August or September. Emory, although learning of this conversation from Wallace at a later time, confirmed that the conversation "had to be before August." Although asserting discrimination in February, The General Counsel does not address Respondent's treatment of Underwood one month later, in March, when his wife failed to report his absence. I specifically reject any argument that Respondent, by Wallace, discriminated against Underwood contemporaneously with learning of his union activity. The retention of Underwood at step 3 is not alleged as a violation of the Act, nor is the failure to remove Underwood from step 3 in September alleged as a violation of the Act.

The General Counsel contends that Respondent's stated reasons for discharging Underwood were pretextual and, in support of this, argues that the memorandum summarizing the events relating to the discharge decision is false in stating that Underwood failed to give proper notification of his absence on September 23 and failed to present any other doctor's note on October 6. The memorandum does not state that Respondent received no notification of Underwood's September 23 absence; it states that it did not receive proper notification. Wallace, when asked to agree that Mrs. Underwood "properly reported his [Underwood's] injury," responded, "She reported his injury." Insofar as the accident occurred shortly before the shift was to begin, it may not have been possible to have notified

Respondent prior to the actual beginning of the shift; however, Underwood's absence was not reported until over an hour after the shift began. Although Mrs. Underwood's inexplicable failure to contact the gate guard and her delay in entering the plant explains the reason for the tardy report, it does not alter the fact that the report was not made in a timely manner. Thus, I cannot agree with the General Counsel that the reference to failure to give proper notification was false. Even if it were, the focus of the memorandum is Underwood's failure to communicate with Respondent throughout the period of his absence. Underwood, by his own admission, did not seek to speak to a supervisor at any time between September 23 and October 8, and that is the focus of the memorandum which summarizes the events leading to the termination. It does, as the General Counsel points out, state that Underwood failed to report to work or report his absence on October 6 and that "[n]o other Dr. notes were received." The General Counsel characterizes this statement as false. I disagree. The document sets out the events chronologically and is clearly referring to events prior to Underwood's presentation of the subsequent note. The sentence immediately following the reference to the absence of any other doctor's note on October 6 begins: "Also as of 9:10 a.m. on 10/6/97." The next paragraph of the document notes that Underwood returned to work for the October 7 shift but "failed to report to or communicate with first aid concerning his light duty restrictions." The restrictions were set out on the note that Underwood obtained during the day on October 6, after he had failed to report to work or notify Respondent of his absence.

The General Counsel further argues that Respondent's action was pretextual because, by holding Underwood accountable for not reporting to the October 6 shift or giving notice that he would be absent, it gave no effect to the revised doctor's note that he obtained after the October 6 shift. In making this argument, the General Counsel alludes to what the doctor may have intended. The doctor did not testify, thus the record does not establish anything regarding the doctor's intentions. Regardless of the doctor's intentions, this argument is not persuasive. Underwood admitted that, as a result of the prior situation involving Supervisor Sellers, he knew that the September 29 note releasing him on October 6 meant that he was expected to report for the October 6 shift. He did not do so. Underwood also admitted that it was critical that he notify someone "in the plant" prior to being absent. The after-acquired note did not excuse him from the obligation to report to work or to notify Respondent of his anticipated absence.

3. Analysis and concluding findings

The leafleting in which Underwood participated during the second week of September was observed by Atkinson, Ginners, and Ford. Neither Ginners nor Ford denied observing Underwood as he engaged in this union activity. Thus, I find that Underwood did engage in union activity and that Respondent was aware of this activity. Whether this was Underwood's initial union activity or renewed union activity is immaterial.

There is no independent evidence of animus, thus, any finding of animus must be inferred from the circumstances surrounding Underwood's discharge. On September 23, Underwood's wife had reported at 12:30 a.m., that he would "not be in tonight." On the afternoon of September 24, after the first aid office closed, Underwood left a note stating that he would return on September 30. Even though Underwood had been counseled in August 1996 regarding the insufficiency of giving notice through the first aid office, he did not contact anyone in the

plant. On September 29, he left a note revising his return date to October 6. He did not seek to speak to anyone. Although he went to the plant to pick up his paycheck, he never communicated with Respondent regarding his anticipated return. Upon receipt of the September 29 note that revised his release date to October 6, Underwood “knew the company would interpret the note as meaning I would be back for the shift that ended on the 6th.” Despite this, he did not, prior to the October 6 shift, seek to speak to any one or seek to obtain a note that did not release him until October 7. Underwood did not report for the October 6 shift, nor did he notify Respondent that he would be absent. He was discharged. The foregoing circumstances simply do not establish that Underwood’s termination was pretextual. There is no evidence of disparity. There is no probative evidence from which I can infer that Underwood’s discharge was the product of animus towards his union activity. Underwood was discharged due to his acknowledged failure to communicate with Respondent and either to report to work or to report his absence on October 6. The General Counsel has not established that

Respondent’s discharge of Underwood was motivated by animus toward employee union activity. I shall, therefore, recommend that this allegation of the complaint be dismissed.

CONCLUSION OF LAW

The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed.

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.