

**The Denver Post Corporation and Graphic Communications International Union, Local 22.** Cases 27-CA-14513, 27-CA-14814, and 27-CA-15149

April 29, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 18, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel and alleged discriminatee Donald Grabhorn filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a brief in support of cross-exceptions and in support of the judge's decision.

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,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging pressman Donald Grabhorn because he engaged in protected concerted activities in support of the Union. The judge found that the General Counsel had established that Grabhorn's union activity was a motivating factor in his discharge, but that the Respondent had proved that it would have discharged Grabhorn even in the absence of his protected concerted activity, and therefore that it had not violated the Act by firing him.<sup>2</sup> The General Counsel

<sup>1</sup> The Respondent and Grabhorn have 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.

No exceptions were filed to the judge's findings concerning the alleged violations of Sec. 8(a)(5) or to his finding that Pressroom Manager Dan Armand did not violate Sec. 8(a)(1) by telling employee Charles Lahm that the Union was "screwing him" because of a recent series of production problems.

The judge found that Armand violated Sec. 8(a)(1) by telling acting Chapel Chairman (the Union's equivalent to a shop steward) Trinidad Torres that he would get in trouble by doing as the other men asked and telling substitute employees that they could leave before the end of their shifts, and that Torres should reconsider being the chairman because he was going to get fired. In adopting the judge's finding, we emphasize that Armand's statement amounted to a threat to fire Torres because he held union office.

In affirming the judge's finding that Plant Manager Larry Charest unlawfully threatened pressman Robert Laidley, we do not rely on the judge's unsupported statement that Charest admitted being at work on the night in question.

<sup>2</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Actually, the judge found that the General Counsel had shown that Grabhorn's union activities "may have" motivated his discharge. Earlier, however, the judge noted that the elements commonly supporting a finding of discriminatory motivation include antiunion animus, union activity, employer knowledge of

and Grabhorn have excepted to the latter findings, and we find merit in their exceptions.

Grabhorn has been a journeyman pressman for approximately 28 years. He was employed by the Respondent from September 1, 1991, until the evening of February 21, 1997, when he was fired. During his tenure of employment with the Respondent, Grabhorn was counseled twice about his job performance (once in 1992 and once on an undetermined date), and received a warning about tardiness in 1992.

On February 21, Grabhorn was working with pressman Stanley Cole in the reel room on D press. Reel room employees load rolls of newsprint onto the press, splicing the rolls together so that the paper runs through the press continuously. They are also responsible for checking the rolls of paper for damage and defects to prevent "web breaks," or breaks of the paper, as it is fed through the press.

During the evening shift, a web break occurred on D press, which automatically shut the press down. Because the break occurred on a roll that Grabhorn had prepared, he was responsible for repairing the break. This involved making a diagonal tear, called a taper, in the leading edge of the paper on the roll so that it could pass easily through the press. Grabhorn testified that he started making the taper, but almost immediately realized that, in working from the drive side of the reel, he was doing it "backwards."<sup>3</sup> He moved to the operator side of the reel, but before he resumed making the taper, he noticed that paper had fallen into the reel area when the web broke. He cleared that paper away and carried it with him as he went back to finish making the taper.

At that point, Pressroom Manager Dan Armand entered the reel room. Armand was not normally at work in the small hours of the morning. On that evening, however, he had been called at home at about 1 a.m. to come in because of production problems. Armand had been called in at night to rectify production problems several times in the days leading up to February 21, and he was not happy about it. On one of those occasions, he told an employee that "heads were going to roll" if he had to come in again. By the time Armand approached D press after the web broke, one head had, in fact, rolled.

the protected conduct, and the timing of the employer's action. The judge further found that each of those elements had been established in this case. The Respondent, in its brief in support of the judge's decision, concedes that the General Counsel met his initial *Wright Line* burden. We therefore find that the judge implicitly found that the General Counsel had demonstrated that Grabhorn's discharge was, in fact, motivated at least in part by his union activities, and that this finding (which the Respondent concedes) is well supported. Contrary to the judge, however, we do not rely on the Respondent's unilateral promotion of apprentices to provisional pressman status, in violation of Sec. 8(a)(5), as a basis for finding antiunion animus. We find nothing in that action indicating animus against the Union or its supporters.

<sup>3</sup> Because D press is configured differently from the other three presses, a taper on it is prepared from the operator side of the roll, rather than from the drive side.

Armand had decided that Charles Starling, a substitute employee from the Rocky Mountain News who was working the night shift for the Respondent,<sup>4</sup> was not doing his job correctly and summarily fired him. One employee described Armand to another that evening as looking like he was “on a rampage.”

Armand went to D press with Foreman Gene Sonntag to investigate the web break. As the judge found, they saw a tear about 2 inches long, straight across the roll of newsprint Grabhorn had been working on. Armand testified that the tear was discolored at the edges; this indicated to him that the tear had been exposed to the light for some time and therefore was not recent.<sup>5</sup> Armand asked Grabhorn if he had checked the roll before using it, according to standard procedures, and Grabhorn replied that he had done so, as he always did. Armand asked Grabhorn about the tear; Grabhorn said that it was the start of a taper, and then pulled the torn paper off the roll. Armand remarked that “if there was any need for any evidence, it’s destroyed now.”

As the judge further found, Armand did not believe Grabhorn’s explanation about the tear because it was not a normal tear for a taper and because, given the discoloration, it appeared to have been there for some time. Armand concluded that the web break was due to Grabhorn’s failure to inspect the paper roll and fired him, citing his negligence in that regard. Armand alone was responsible for the decision to discharge Grabhorn.

As discussed above, the judge found that the General Counsel had demonstrated that the discharge of Grabhorn was motivated in part by his union activities. The judge also noted, however, that Armand was irritated by a series of bad press runs that caused him to be rousted out of bed in the middle of the night, so much so that he had threatened that “heads would roll” if he was called in again. Indeed, before he terminated Grabhorn, he had terminated Starling (and Starling’s discharge is not alleged to be unlawful). Moreover, the judge was convinced by Armand’s testimony that he believed that Grabhorn had negligently failed to inspect the paper roll as he was supposed to. Thus, the judge found that Armand fired Grabhorn for negligence, and that this explanation was not pretextual. He also found that the Respondent had shown that it would have discharged Grabhorn even in the absence of his union activities.

Given the judge’s finding that Armand convincingly testified to his belief that Grabhorn had acted negligently, we do not disturb his finding that Armand’s stated reason for firing Grabhorn was not pretextual. That is, we do not find either that that reason did not ex-

<sup>4</sup>As discussed by the judge, the two newspapers routinely hire each other’s employees on an as-needed basis. Employees hired on a temporary basis in this fashion are called substitutes, or “subs.”

<sup>5</sup>Sonntag testified that he saw the tear, but could not see whether it was discolored.

ist or that Armand did not actually rely on it.<sup>6</sup> Contrary to the judge and our dissenting colleague, however, we find that the Respondent has failed to show that it would have fired Grabhorn regardless of his union activities.<sup>7</sup>

To begin with, as the judge found, the Respondent’s records show that other employees whose job performance was subpar, or even negligent, were not discharged. For example, pressman Greg McDougle received several writeups for poor performance, including poor make-ready procedures and subpar startup procedures, both before and after Grabhorn’s discharge. On September 27, 1997, McDougle put a plate in his press incorrectly, and some 40,000 papers were run before the error was found. Armand testified that he considered McDougle’s actions negligent. Yet despite his negligence and his earlier poor performance, McDougle was only warned that “further actions would be taken if this kind of performance is kept up.” On an unspecified date, pressman Sam Rinehold and another employee let the blue ink run out, causing the loss of around 5000 papers. The employees were only instructed as to the “gravity of the situation.” On December 4, 1996, Rinehold left too much ink on a web, leading to a 2-hour delay for cleaning and rewebbing. Rinehold received a reprimand and warning. On September 25, 1997, pressman Lindsey Burr failed to plate up properly on C press and, as a result, 40,000 papers were printed incorrectly. Although Armand testified that this was a negligent act, Burr received only a warning. On April 2, 1997, Armand gave Steve Earley a verbal warning for missing page numbers on his press. On September 25, 1996, pressman John Dixon misplated the yellow and red plates on one paper, adversely affecting an entire run of 200,000 papers. Yet despite having received three previous reprimands, Dixon received only a warning for what Armand described in the warning as “neglect of duty.”

As the Respondent notes, both Starling and substitute pressman Elton Moyer were discharged for negligence and neglect of duty, respectively. Neither employee’s case was like Grabhorn’s, however. Thus, Armand testified that he had previously counseled Starling concerning the proper way to prepare a “paster,”<sup>8</sup> but Starling failed to follow his instructions. Armand concluded that Starling had shown a lack of concern over the matter, and therefore terminated him. Although Grabhorn had been counseled twice about his job performance (once more

<sup>6</sup> Cf. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

<sup>7</sup>Contrary to the dissent, we are not reversing the judge’s credibility findings. We have adopted the judge’s findings that Armand believed that Grabhorn was negligent and that he relied on that negligence in firing Grabhorn. We reverse the judge only insofar as he found that the Respondent would have discharged Grabhorn for that reason even in the absence of his union activities.

<sup>8</sup>A paster is a pattern of sticky tape that enables a new roll of paper to stick to an expiring roll, allowing the press to continue to run while the rolls are changed.

than 4 years before he was discharged), neither episode involved the kind of conduct for which he was fired. Moyer was discharged for failing to set the ink correctly, causing the ink to fade out on an entire run, but, unlike Grabhorn, he was later reinstated. The Respondent therefore failed to show that negligent job performance always, or even usually, leads to discharge, let alone to immediate and permanent discharge.<sup>9</sup>

The Respondent does not contend, and has not demonstrated, that negligently causing a web break is such a serious offense that it should be treated less leniently than other types of poor or negligent job performance. Indeed, according to Grabhorn's testimony, the web break caused his press to be shut down for approximately 15 minutes. By contrast, other substandard and/or negligent performance that had seemingly more serious effects on production (e.g., 2 hours downtime, tens or hundreds of thousands of papers incorrectly printed) led to only reprimands and warnings.

Armand's remarks to pressman Charles Lahm on March 11 further undercut the Respondent's *Wright Line* defense. In a conversation on that date, Armand asked Lahm why he had a bad attitude. Lahm replied that it was because, in the past, he had not seen Armand firing people for no reason, evidently referring to the firing of Grabhorn. Armand responded that the negotiating session for a new contract had not gone well and the plant was having production problems every night.<sup>10</sup> As Lahm testified, Armand further stated that "you guys," meaning the Union, were "screwing" him and that he had to do something. Lahm said, "So you fired him for no reason." Armand replied that he had found damage on Grabhorn's paper roll. Thus, in responding to Lahm's query about his termination of Grabhorn, Armand first blamed frustration over collective-bargaining negotiations and then the Union's assertedly "screwing" him, before mentioning that he had found damage on the paper roll. Armand thereby indicated that relations between the Union and the Respondent, and not the damage to the roll, were uppermost in his mind when he fired Grabhorn. This further weakens the Respondent's contention that Armand would have fired Grabhorn even in the absence of his union activities.

In its response to the General Counsel's exceptions, the Respondent acknowledges that Armand acted precipitously, and that he "did not apply a just cause test or progressive discipline principles to Grabhorn's disci-

pline."<sup>11</sup> The Respondent contends, however, that this is attributable to Armand's understandable irritation at having been repeatedly called to the plant in the middle of the night and is not evidence of an unlawful motive. Assuming, arguendo, that this explains Armand's precipitous actions on the night of the discharge, it does not explain why the discharge was allowed to stand even after the immediate pressures of that night had passed.

There is evidence of at least one other instance in which a pressman (Moyers) who was discharged for failing to operate a press correctly was reinstated. Armand admitted in his testimony that his decision to fire Grabhorn was also subject to reversal by higher management. Yet in this instance, no action was taken by the Respondent to convert Grabhorn's discharge to discipline more in keeping with that meted out to other employees for similar offenses. Its failure to do so further undercuts its *Wright Line* defense, i.e., that it would have discharged Grabhorn even absent his union activities.

For the foregoing reasons, then, we find that the Respondent has failed to carry its *Wright Line* burden.<sup>12</sup> We therefore find that the Respondent violated Section 8(a)(3) and (1) by discharging Grabhorn.

#### ORDER

The National Labor Relations Board orders that the Respondent, the Denver Post Corporation, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally promoting apprentices without providing Graphic Communications International Union, Local 22 (the Union) with timely notice and a meaningful opportunity to bargain.

(b) Threatening employees about testifying in support of employees' grievances.

(c) Coercing employees by telling them they have a bad attitude because they are engaged in protected concerted activities.

(d) Threatening employees with discharge if they serve as a union representative.

(e) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

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

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

<sup>9</sup> Inconsistency also characterized the Respondent's treatment of other kinds of employee misconduct. Thus, although some employees were discharged, apparently for the first offense, for failing to appear for work, for leaving work early without permission, and for drinking on the job, others received only warnings or suspensions for the same offenses.

<sup>10</sup> The Respondent neither contends nor cites any evidence to suggest that Grabhorn had been responsible for the repeated production problems.

<sup>11</sup> See Respondent's brief at pp. 17 and 20.

<sup>12</sup> We find it unnecessary to decide whether the Respondent was required by custom or contract to apply progressive discipline or to discharge only for "just cause." However, even without either such requirement, the Respondent's failure to show a pattern of similar treatment of other employees for misconduct similar to Grabhorn's obviously makes it more difficult for it to show that it would have fired Grabhorn even absent his union activity.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees, including journeymen, second men in charge, men in charge, and other employees who hold the rank of assistant foremen employed in the press room, excluding guards and supervisors as defined in the Act.

(b) On request of the Union, rescind the October 1996 unilateral promotions of apprentices to conditional pressmen.

(c) Within 14 days from the date of this Order, offer Donald Grabhorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Donald Grabhorn whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), less any net interim earnings, plus interest to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

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

(g) Within 14 days after service by the Region, post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

<sup>13</sup> 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."

to all current employees and former employees employed by the Respondent at any time since April 12, 1996.

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

MEMBER HURTGEN, dissenting in part.

I would adopt the judge's finding that the Respondent's discharge of employee Donald Grabhorn did not violate the Act.

The judge found that the General Counsel made a prima facie showing that Grabhorn's union activity was a motivating factor in his discharge. However, he further found that the Respondent effectively rebutted the General's Counsel's case, and he recommended dismissal of the allegation. The General Counsel and the Charging Party except. I agree with the judge.

In view of the judge's credibility resolutions, my colleagues accept the fact that the Respondent's reason for the discharge (i.e., Grabhorn's negligence) was not a pretext. Nonetheless, my colleagues conclude that the Respondent failed to demonstrate that it would have discharged Grabhorn for his negligence in the absence of his union activities. I disagree.

As fully recounted by the judge, the Respondent's pressroom manager, Dan Armand, discharged Grabhorn on February 21, 1997. Numerous production problems occurred in the Respondent's pressroom in February 1997. Armand had to be called in at night to rectify these problems. Armand was upset by this and announced that "heads were going to roll" if he had to be called in again. Armand was called in again on February 21, 1997, and heads did roll. Armand discharged both Grabhorn and employee Charles Starling.<sup>1</sup> As the judge found, Armand was "genuinely piqued" by the production problems and the interruption of his sleep. Further, the judge credited Armand's testimony that Armand concluded that Grabhorn had acted negligently on February 21, causing production problems. Under these circumstances, the judge concluded that the Respondent would have discharged Grabhorn irrespective of his union activities.

As noted above, my colleagues say that they accept the judge's credibility findings. One such finding is that Armand testified credibly that Armand discharged Grabhorn for negligence. There is no rational reason for the acceptance of credibility findings and the rejection of this particular finding.

My colleagues proceed at some length to show that other employees have been "negligent" and have not been discharged. However, the critical point is that Grabhorn and Starling were unlucky enough to be negli-

<sup>1</sup> The General Counsel does not challenge the discharge of Starling. There is no showing that Starling engaged in union activity.

gent on the night when Armand was very upset and had vowed to discharge anyone who caused a work problem. It is clear that Armand was upset not because of union activity but rather because he had been called in on prior nights to deal with work problems. Although it may have been unfortunate for Grabhorn and Starling to have suffered because of Armand's pique that night, this does not establish the kind of discrimination barred by the Act.

My colleagues seize upon a March 11 postdischarge statement by Armand to employee Lahm. In this statement, Armand referred to the production problems at night and to the contract negotiations. However, in particular reference to the Grabhorn discharge, Armand told Lahm that Grabhorn's negligence caused the discharge. Further, in the critical period prior to the discharge, it was only the production problems that caused Armand to say that "heads would roll" if there were a repetition of these problems. Accordingly, the judge found, and I agree, that Armand would have discharged Grabhorn and Starling without regard to contract negotiations.

Finally, Armand's opinion that the Union was "screwing him" because of production problems was not an unlawful statement, and it does not contradict the fact that Grabhorn's production problem caused his discharge.

#### 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 promote apprentices without providing Graphic Communications International Union, Local 22 (the Union) with timely notice and a meaningful opportunity to bargain.

WE WILL NOT threaten employees about testifying in support of employees' grievances.

WE WILL NOT coerce employees by telling them they have a bad attitude because they are engaged in protected concerted activities.

WE WILL NOT threaten employees with discharge if they serve as a union representative.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union, or any other union.

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

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All employees, including journeymen, second men in charge, men in charge, and other employees who hold the rank of assistant foremen employed in the press room, excluding guards and supervisors as defined in the Act.

WE WILL, on request of the Union, rescind our October, 1996 unilateral promotion of apprentices to conditional pressmen.

WE WILL, within 14 days from the date of the Board's Order, offer Donald Grabhorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Donald Grabhorn whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Board's decision.<sup>7</sup> Order, remove from our files any reference to the unlawful discharge of Donald Grabhorn, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

#### THE DENVER POST CORPORATION

*Leticia Pena, Esq.*, for the General Counsel.  
*Howard M. Kastrinsky, Esq.*, for the Respondent.  
*Walter C. Brauer III, Esq.*, for the Charging Party Union.  
*David A. Grabhorn, Esq.*, for Donald Grabhorn.

#### DECISION

ALBERT A. METZ, Administrative Law Judge.<sup>1</sup> This case involves issues of whether the Respondent has violated Section 8(a)(1), (3), and (5) the National Labor Relations Act (Act).<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, Respondent, and counsel for Donald Grabhorn, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> This case was heard at Denver, Colorado, on December 8-11, 1997. All dates refer to the time period April 1996 through March 1997 unless otherwise stated.

<sup>2</sup> 29 U.S.C. § 158(a)(1), (3), and (5).

## II. BACKGROUND

The Respondent publishes one of the two major daily newspapers in Denver, Colorado. The Union represents a unit of the Respondent's pressroom employees.<sup>3</sup> The Respondent and the Union have had a long-term collective-bargaining relationship which includes a collective-bargaining agreement that expired November 15, 1995. Following the expiration of that agreement the parties engaged in negotiations but were unable to reach a new agreement until July 1997. During the bargaining for a new contract there were demonstrations and leafleting by the Union. Pressman Donald Grabhorn participated in some of these union activities.

The other major daily newspaper in the Denver area is the Rocky Mountain News (News). Historically the Respondent has used "subs" from the News to supplement its pressroom employees. Subs are hired by Respondent's management notifying the Union's chapel chairman of the number of workers needed. The chairman (or other designee) telephones the outside chairman at the News with the request for subs. The News' outside chairman then hires the needed News' employees to work temporarily for the Respondent. Once the subs are working at the Respondent's pressroom they are directed on each of the several presses by unit employees called the man-in-charge.

## III. UNFAIR LABOR PRACTICE ALLEGATIONS

### A. Threat to Torres

On the evening shift of April 12, 1996, pressman Trinidad Torres was the acting chapel chairman at Respondent's printing plant. On his own initiative he allowed some substitute News workers to "breakout" or leave work early. Pressroom Manager Dan Armand, was in the plant that night because of press run problems and noticed men missing from the crews. He questioned Torres about the shortage and learned that Torres had unilaterally approved the breakout. He then called Torres, along with his union representative, pressman Robert Laidley, to his office.

Armand was angry that management had not been consulted about the News employees being allowed to leave early. Armand angrily accosted Torres about why he should not be fired. Torres apologized and said he thought it was the practice to let the Union grant the News substitutes the right to leave early. He said that he would not do the same thing again. During the conversation Torres stated to Armand that the subs had asked him to allow the breakout. Armand retorted that Torres was going to get in trouble if he did what the men asked. Torres and Laidley recalled that Armand also said that Torres should reconsider being the chairman because he was going to get fired. Armand denied making that statement. Judging the demeanor of the witnesses, I find that Armand did make the statement about getting fired in the context of Torres being unwisely influenced by his members in allowing the breakout. I find that the statement was coercive in that it threatened Torres if he listened to union members' requests. I thus conclude the statement was a violation of Section 8(a)(1) of the Act.

<sup>3</sup> All employees, including journeymen, second men in charge, men in charge, and other employees who hold the rank of assistant foremen employed in the press room, excluding guards and supervisors, as defined in the Act.

### B. Practice Regarding "Breakouts"

On April 13 Armand called a meeting of foremen and chapel chairman in the breakroom. Armand told the assemblage that the union representatives were not to allow News substitutes early exit from shifts without first receiving permission of supervision. The Government alleges this is a unilateral change of past practice that granted the chapel chairman that right. The Respondent contends that there has not been such a practice.

Several witnesses testified in regard to this allegation. In sum, the union witnesses contended that while there was no written agreement, it was common for the chairman to permit News employees to leave work early. The Respondent's witnesses testified that while News substitutes were allowed to leave early on occasion it was only after the chairman had received permission from supervision. It was uncontroverted that Respondent's regular employees are not permitted to leave at any time without first obtaining supervisory permission. There were instances where breakouts of News subs had occurred without Respondent's permission. One such situation involved a new foreman, Gene Sonntag, who soon learned that was not the practice and stopped the unapproved breakouts. Likewise, Armand gave uncontroverted testimony that he had reprimanded Union Chairman Wayne Scott and another union official on earlier occasions for unapproved breakouts. Respondent's notes from a departmental meeting of January 1993 show that employees were reminded that breakouts required supervisory permission.

The record demonstrates that there may have been instances where breakouts occurred without Respondent's permission. However, the record as a whole does not show that there was an established past practice that breakouts were acquiesced in by the Respondent. To the contrary, when management learned of subs early release the practice was challenged. I find that the Government has failed to prove by a preponderance of the evidence that the Respondent unilaterally changed a past practice of allowing union officials to solely approve breakouts of News employees. I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act by stopping the Union's representatives from granting unapproved breakouts of subs. *Chef's Pantry*, 274 NLRB 775-776 (1985).

### C. Assignment of Color Printing Work

The Respondent has several presses and each press requires approximately eight to nine unit employees in order to run properly. The pressmen are assigned to a press by the Respondent and then they select their jobs on that press by seniority. News employees do not have seniority in the selection of jobs and take the remaining positions. One of the jobs involves working with color. The Respondent is sensitive about this operation because it in part involves advertisements and customer satisfaction with the appearance of their ads. In August, the Respondent was receiving complaints from some major advertisers about the appearance of their colored ads. As a result a management meeting was convened to rectify the problem. Several things were done to alleviate the complaints. One solution was a decision to not allow News substitutes to work on color jobs of the press as it was felt that Respondent's full-time employees would perform better in this function.

In August the Respondent unilaterally implemented its decision to restrict News subs in the color work they performed. This had the effect of eliminating some press jobs for News employees, with the result that Respondent's employees were

limited in the positions they could fill by seniority. This change lasted for approximately 2 to 3 months before News employees were again allowed to work color. The parties have had disputes in the past on the interpretation of the seniority provisions in the contract and clauses giving the Respondent the right to assign work and determine workers' competency.<sup>4</sup> The Respondent adequately showed that it was seriously concerned about the poor results it had been getting in color printing and that it was motivated to attempt to rectify the situation by assigning its full-time employees this task for a period of time. There is no allegation nor evidence that the color printing assignment resulted from animus, bad faith, or an intent to undermine the Union. I find that the Respondent had at least an arguable contract defense to making the color assignment based on the terms of the expired collective-bargaining agreement and conclude that the Respondent has not violated Section 8(a)(1) and (5) of the Act in making this work determination. *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988).

#### *D. Upgrading Apprentices*

In October, the Respondent needed more journeymen pressmen in the unit. On approximately October 3 Armand telephoned the Union's president, Ronald Westkamp, and asked if he would agree to the Respondent giving three apprentices early promotion to conditional pressmen status. Armand asked Westkamp if there would be a possibility that Westkamp could bring Respondent's request before the Union's general membership and get approval to upgrade the apprentices. Westkamp said that the next general membership meeting was not scheduled for a week and a half. Armand said that would not be satisfactory and that he needed approval sooner. Armand and Westkamp then discussed the possibility of polling the Union's executive board and Westkamp said that might be a possibility. According to Westkamp, Armand said, "Well, Ron, you know, I'm backed up against the wall. I'm going to have to do it with the union's permission or without it." Westkamp asked Armand to let him try to contact the executive board to see if he could get approval. Subsequently, Westkamp was able to poll a majority of the executive board members and they expressed opposition to the Respondent's proposal. Westkamp unsuccessfully attempted to telephone Armand the following day with this information. On October 4 or 5 Westkamp learned the Respondent had already unilaterally made the promotions.

I find that the subject of the apprentices' promotion is a mandatory subject of bargaining. Armand did not afford a reasonable opportunity for the Union to bargain about the matter and announced that the change would be made with or without the Union's permission. The Respondent thus unilaterally changed the status of apprentices without satisfying its obligation to provide the Union with timely notice and a meaningful opportunity to bargain. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), *affd.* 984 F.2d 1562 (10th Cir. 1993); *Intersystems Design, Inc.*, 278 NLRB 759-760 (1986). Respondent's unilateral early promotion of apprentices is found to be a violation of Section 8(a)(1) and (5) of the Act.

<sup>4</sup> Art. II, sec. 3, reads in pertinent part: "The foreman representing the Publisher shall be the judge of any man's competency as a workman. He shall select and employ all help and supervise and control all employees in the pressroom. All pressmen shall perform such press work as he may direct."

#### *E. Discharge of Grabhorn*

On several nights before February 21 there had been numerous problems with the press runs. Armand had been called in the night at home to come into work to rectify the problems. On one of these occasions he told an employee if he had to come in again, "Heads were going to roll." On the night of February 21 Armand was once again called at home about 1 a.m. to return to work because of production problems. When he arrived at work he determined that Charles Starling, a News substitute worker, was not doing his job properly and immediately fired him. Starling's discharge is not contested by the Government. Armand continued checking the pressroom for problems after the Starling termination. Appointed Union Chairman Robert Bullard was present for Starling's discharge and could tell that Armand was in an angry mood. As a result he telephoned Union Chairman Wayne Scott. Bullard reported the Starling termination and asked Scott to come to the plant because, "Danny [Armand] looked like he was on a rampage."

During the February 21 evening shift, pressmen Donald Grabhorn and Stanley Cole were working in the reel room of the D press. At that station large rolls of newsprint are loaded on the press and spliced together at the beginning of the printing cycle. The reel room employees are responsible for checking the paper rolls for damage and defects as they are prepared for use. This prevents breakage of the "web" or paper roll as it goes through the multilevel press. Armand was at the D press during the evening and noticed that Cole had not been watching his reel. Armand angrily confronted Cole who assured him that he would pay attention to the roll. Later during this shift a paper (web) break occurred on the D press and it automatically shut down. Grabhorn had prepared the paper roll for use and was responsible for fixing the break. He testified this involved making a tear in the roll at an angle so it could be spliced to the next roll. Grabhorn stated he quickly realized that he was doing the tear in error on the wrong side of the roll. The splicing process is done "backwards" on the D press where he was working this night. On the other three presses the tearing process is done on the opposite side.

Armand and Foreman Gene Sonntag arrived at the D press to investigate the web break. They noticed a tear in the roll which Armand described as approximately 2 inches straight across the newsprint roll. The tear appeared to Armand to be discolored at the edges. The discoloration indicated to Armand that the tear had been exposed to light for a period of time and thus was not of recent origin. Sonntag testified he likewise saw a tear in the roll, but he was not close enough to the roll to notice if it was discolored. Armand asked Grabhorn if he had followed standard procedures and checked the newsprint roll before its use. Grabhorn said that he always checked the rolls. Armand questioned Grabhorn about the tear in the roll. Grabhorn told him it was the start of a taper to make a patch in the roll. Grabhorn then pulled the torn paper off the roll and Armand told him, "If there was any need for any evidence, it's destroyed now."

Armand did not believe Grabhorn's statement that the tear was the start of a repair because it was not a normal tear for that purpose. Additionally, the tear was discolored which caused Armand to believe the tear had been there for some time. Armand concluded that Grabhorn's negligence had contributed to the bad runs of the night. Grabhorn fixed the break and was then called to Armand's office with union representative, Bullard. In the office Armand accused Grabhorn of negligently

ignoring the damage to the roll. He then rejected Grabhorn's excuses that it was not his fault and fired him. Armand was solely responsible for making the termination decision.

#### F. Analysis of Grabhorn's Discharge

The Government alleges that Grabhorn's discharge was the result of his union activities. The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1478-1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984).

[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

*Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. *NLRB v. Limestone Apparel Corp.*, 705 F.2d 799 (6th Cir. 1982).

Grabhorn was active in the Union and held various union offices. He was a visible participant in union demonstrations held at the Respondent's downtown Denver offices during the months preceding his discharge. Armand denied having knowledge of Grabhorn's particular union activities, but I find that Grabhorn's union activities were well known in the printing plant and that he was consulted by less experienced union members concerning grievances. I infer that Armand was at a minimum aware that Grabhorn was a union member and supporter. The timing of Grabhorn's discharge was concurrent with the Union's lengthy ongoing attempts to obtain a new collective-bargaining agreement with the Respondent. Evidence of the Respondent's animus toward the Union is demonstrated by the unfair labor practice violations set forth in this decision, including Armand's unilateral actions in prematurely promoting apprentices. The record also shows many examples of other employees with serious work problems who were not discharged for their conduct. Thus, the Government has shown a sufficient basis to conclude that Grabhorn's discharge may have been motivated by his union activities.

The record also shows, however, that Armand was very irritated by days of bad press runs that required his attendance at the plant in the middle of the night. As he stated, "Heads were going to roll" if he was called from home again because of production problems. I find that Armand was genuinely piqued by the spate of production troubles and the resultant interruption to his sleep. The initial result of Armand's anguish was the discharge of Starling early on the night shift of February 21. The secondary result was Grabhorn's discharge later that night. Armand convincingly testified that he believed Grabhorn had

failed to properly inspect the newsprint roll as required. I find that Armand made the discharge decision because of what he perceived to be Grabhorn's negligent work and that this reason was not a pretext. I further find that the Respondent has met its burden of showing that Grabhorn would have been discharged regardless of his protected concerted activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it terminated Grabhorn.

#### G. Threat to Laidley

Pressman Robert Laidley was working on the evening shift the night after Grabhorn's discharge. He was approached by Plant Manager Larry Charest, who had been called into work because of production problems. Laidley testified that Charest said to him that if he testified against Danny Armand they were going to get him. Laidley had on previous occasions testified on behalf of union members who had grievances against the Respondent. Charest conceded being at work that night but denied he threatened Laidley about testifying against Armand. Laidley was a persuasive witness who presented a credible demeanor. Charest's demeanor and denial of making the statement were not convincing. I credit Laidley's version of the encounter. I find that Charest's threat to Laidley was coercive and intended to prevent his supporting any appeal that Grabhorn might make concerning his discharge. I find by this threat the Respondent violated Section 8(a)(1) of the Act. *Overnite Transportation*, 297 NLRB 638, 641 (1990).

#### H. Armand's Conversation with Lahm

Early in the evening of March 11 Armand was having a conversation with several pressmen. Employee Charles Lahm,<sup>5</sup> who was a part-time union on the night shift, walked by and yelled to the employees that they had the right to have a present when they spoke with Armand.

Later in the evening Lahm was working on a press when Armand approached and started to assist him. Lahm objected, telling Armand it was unit work and he should not be assisting. Armand told Lahm that he could not say that to him. Lahm said they were apparently having a problem and he needed a union chairman. Armand then left and returned with Bullard who was the union chairman that evening. Armand told Bullard that Lahm had a bad attitude and that he was obstructing production because he had told some employees not to talk to him that night. Bullard then walked away and Armand and Lahm continued their conversation.

Armand asked Lahm why he had a bad attitude. Lahm replied it was because in the past he had not seen Armand firing employees for no reason—referring to Grabhorn's discharge. Armand replied that the contract bargaining session the week or two before had not gone well and the plant was having bad nights every night. Lahm recalled Armand stated, "And that you guys, meaning the union, was screwing him and he had to do something." Lahm then said, "So you fired him for no reason." Armand stated that he had found damage on the roll that Grabhorn had made.

I find that Armand's statement to Lahm that he had a bad attitude referred to two protected matters: (1.) Lahm's telling employees they could be represented when they spoke to Armand, and, (2.) Lahm's protest that Armand was improperly

<sup>5</sup> Lahm's name is misspelled in the transcript as "Long." The Government's unopposed posthearing motion to correct the transcript to accurately reflect Lahm's name is granted.

performing work reserved for unit employees. I conclude that such a statement is coercive and a violation of Section 8(a)(1) of the Act. Armand's statement the union was screwing him because of the series of recent production problems was his opinion. I find that the Respondent did not violate Section 8(a)(1) of the Act by this statement.

CONCLUSIONS OF LAW

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

2. Graphics Communications International Union, Local 22 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (5) of the Act.

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

5. Respondent has not violated the Act except as here specified.

[Recommended Order omitted from publication.]