Avondale Industries, Inc. *and* New Orleans Metal Trades Council. Cases 15–CA–12171–1, et al.

November 10, 1999

DECISION AND ORDER*

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On February 26, 1998, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Charging Party filed cross-exceptions and a supporting brief. The Respondent filed separate answering briefs to the General Counsel's exceptions and the Charging Party's cross-exceptions. The General Counsel filed a reply 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, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt the recommended Order as modified and set forth in full in this decision.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act on 73 different occasions from March 1993 through June 1994.[2] He recommended dismissal of 47 other 8(a)(1) allegations. The General Counsel and the Charging Party have excepted to several of the recommended dismissals. In one instance, involving an alleged unlawful interrogation of an employee in preparation for Board litigation, we find merit in these exceptions.

Based on credible testimony, the judge found that, on February 28, 1994, employee Lawrence Arabie's supervisor directed Arabie to go to the office suite of Michael Simpson, the Respondent's vice president for production. Upon arrival, Arabie was directed to an interview with one of the Respondent's attorneys. As part of the Respondent's preparation for litigation of postelection challenges and objections in Case 15–RC–7767, the attorney showed Arabie three pieces of paper that had apparently been circulated as prounion campaign propaganda. The attorney asked Arabie if he had seen the papers before and if he could tell her the source of the papers. Arabie acknowledged having seen the papers, but said that he could not identify the source. After this questioning, the attorney asked Arabie to sign a paper stating that his participation in the interview had been voluntary. Arabie refused, the interview was terminated, and he returned to work.

The General Counsel contends that the Respondent's interrogation violated the safeguards established in *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), to minimize the coercive impact of an employer's investigatory interview of employees in preparation for litigation. Those safeguards include the requirement that the employer "must communicate to the employee the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis." Id. The judge noted that the Respondent's attorney did not give Arabie the *Johnnie's Poultry* notice and assurances before questioning him, but he found no safeguards were required because the attorney did not ask about Arabie's union or protected concerted activities or the protected concerted activities of other employees. We disagree.

Clearly, the Respondent's questions about the distribution of union election campaign propaganda among the Respondent's employees involved those employees' protected concerted activities, regardless of whether there was any implication that Arabie himself was engaged in distribution, or that the Respondent believed he was. Even assuming that the Respondent's attorney stayed within the area of permissible inquiry about such activities in preparing for the postelection hearing, she was obligated to give the *Johnnie's Poultry* assurances and to secure Arabie's voluntary participation prior to questioning him. Her failure to do so violated Section 8(a)(1). E.g., *Le Bus*, 324 NLRB 588 (1997).

2. The judge considered 136 allegations of 8(a)(3) violations. He found 68 violations (discriminatory discharges, suspensions, warning notices, assignment of more onerous work, denial of benefits, and a refusal to hire). He dismissed the other 68 allegations. With the exception noted in section 4 of this decision, we affirm

* Modifications have been made to comply with a Board Order Correcting that issued on March 22, 2000. The Board amended the Conclusions of Law to include a paragraph regarding the unlawful transfer of employees to the Westwego shipyard. Further, it modified the Order by including paragraphs requiring affirmative relief for onerous work assignment discriminatees, for transfer discriminatee Luis Gonzales, and for requiring the Respondent to remove any references to these unlawful personnel actions from its file.

[1] The Respondent, the General Counsel, and the Charging Party 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions contend that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] For the reasons set forth in *Ross Stores,* 329 NLRB No. 59 (1999), and in cases cited there slip op. at 2 fn. 7, we agree with the judge that the charge filed in Case 15–CA–12171–1 on June 7, 1993, supports all of the 8(a)(1) allegations in this consolidated complaint proceeding. We further agree that each of the numerous charges of 8(a)(3) discrimination supports closely related allegations of 8(a)(1) violations involving the alleged discriminatee and occurring within 6 months prior to the filing of the 8(a)(3) charge.

the judge's findings and conclusions for all 8(a)(3) allegations.[3]

In his analysis of these allegations, the judge applied the test of discriminatory motivation set forth in *Wright Line*, 251 NLRB 1083, 1089 (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). Under that test, the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id.

The Respondent contends that the judge's analysis entails an erroneous standard with respect to the General Counsel's initial burden of proof. We find no merit in this contention. As stated in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

> The Board has traditionally described the General Counsel's burden of demonstrating discriminatory motivation as one of establishing a prima facie case. [citing *Wright Line*] The D.C. Circuit has suggested that in light of *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2551, 2557–2558 (1994) (the General Counsel's burden of proof is a burden of persuasion, not merely of production), "it will be no longer appropriate to term the General Counsel's burden [as] that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of antiunion animus." *Southwest Merchandising Corp. v. NLRB*, No. 93–1859, slip op. 9 fn. 9 (May 12, 1995). This change in phraseology does not represent a substantive change in the *Wright Line* test. Under that test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, supra at 2258.

We have reviewed the judge's analysis of all 8(a)(3) allegations, including both those where he found unlawful discriminatory motivation and those where he did not. We find that in all instances he correctly applied the *Wright Line* test, as clarified in *Manno Electric*, with respect to the General Counsel's initial burden of persuasion.[4] We further find that his analysis accords with the requirement that the General Counsel must bear throughout the ultimate burden of proving the alleged discrimination by a preponderance of the evidence.

3. In exceptions to the judge's analysis of 8(a)(3) issues, the Respondent also contests both the judge's reliance on evidence of disparate treatment submitted by the General Counsel and the judge's exclusion of evidence offered by the Respondent to demonstrate that disciplinary actions challenged as discriminatory were consistent with discipline for similar incidents of employee misconduct. We find no merit in the Respondent's exceptions.

In its defense of almost every allegation that a disciplinary action violated Section 8(a)(3), the Respondent sought to prove that the alleged discriminatee engaged in misconduct specifically defined in the Respondent's rules and that the Respondent imposed the appropriate sanction for the misconduct in accord with its progressive disciplinary system.[5] For instance, the Respondent's witnesses testified that certain alleged discriminatees had engaged in multiple violations of the Respondent's rules and that a third violation within a 12-month period justified discharging them. In rebuttal, the General Counsel

[3] In accord with the judge's conclusions of law, the 8(a)(3) violation with respect to job applicant Cynthia Johnson was a refusal to hire. We note that Johnson applied for a security guard position on August 17, 1993, and that the Respondent hired a guard on September 3.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) by failing to assign employee Larry Gibson light-duty work from May 10 to July 20, 1994, we find that the credible testimony shows that he was qualified to perform some light-duty work within the paint department and that the Respondent failed to prove that it would not have found such work for him, as it had in the past for other employees, even in the absence of Gibson's union activities.

We affirm the judge's finding, in sec. IV,B,1,(3) of his decision, that the Respondent violated Sec. 8(a)(3) by warning employee Dwight Ballard for his unauthorized posting of union handbills on company bulletin boards. See, e.g., *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). We disavow, however, any implication that a finding of unlawful discrimination could be based solely on permitting the posting of United Way notices while prohibiting all other notices, including union literature. See *Hammary Mfg.*, 265 NLRB 57 (1982).

[4] In affirming the judge's findings with respect to all instances in which he found that the General Counsel met this initial burden, we find that the Respondent's numerous unfair labor practices, standing alone, are sufficient to establish its animus. We nevertheless rely on all of the factors cited by the judge, in his introduction to sec. 4,B of his decision, as evidence of animus, except that we do not infer any animus from the Respondent's refusal to bargain with the Union after its election victory and certification by the Board in Case 15–RC–7767. Moreover, we note that the Fifth Circuit has denied enforcement of the Board's bargaining order and directed a second election in *Avondale Industries v. NLRB*, 180 F.3d 633 (1999).

In finding animus, Member Hurtgen relies solely on the numerous unfair labor practices, excluding the aforementioned refusal to bargain. Unlike his colleagues, Member Hurtgen would not affirm the judge's reliance on any statements made by Albert Bossier, the Respondent's president, during a June 1, 1993 speech to employees as evidence of union animus supporting the General Counsel's case. In Member Hurtgen's view, such statements are protected by Sec. 8(c) and cannot therefore "be evidence of an unfair labor practice under any of the provisions of this Act." See Member Hurtgen's dissenting opinion in *Ross Stores,* 329 NLRB No. 59., slip op. at 8.

[5] See sec. III,C of the judge's decision for a summary description of the Respondent's disciplinary system, drawn primarily from the "Avondale Employees' Guide."

introduced exhibits, based on the Respondent's personnel records from 1990 through 1994, showing 883 instances in which employees who received three or more warning notices in a 12-month period were not discharged.[6] (The parties and the judge refer to these employees as "comparators.") In another instance, the Respondent's witnesses testified that certain alleged discriminatees were discharged for a single unexcused absence that followed two warning notices for absenteeism that were less than 12 months old. In rebuttal, the General Counsel introduced exhibits showing that, from 1990 until the advent of the organizational campaign, 58 comparators received three warning notices for absenteeism in a 12-month period and 66 comparators had received four or more warning notices in a 12-month period.[7] Those coparators were not discharged.

The Respondent attempted to introduce comparator evidence of its own to prove that many employees had received the same degree of discipline for the same offenses committed by alleged discriminatees. The judge admitted some evidence of consistent past disciplinary practice, particularly where the existence of a disciplinary rule or practice was in dispute. However, he rejected the Respondent's offers to introduce evidence of all post-1989 warning notices for violations of selected disciplinary rules as evidence of consistent treatment.[8] The judge viewed such evidence as irrelevant and burdensome because, in light of the General Counsel's evidence of significant disparate treatment, evidence of consistent treatment would not prove that the real reason for disciplinary action was the violation of a rule. We agree with the judge.

Initially, we emphasize that in every instance of an 8(a)(3) violation found by the judge in this case, the General Counsel met his initial burden of proof under *Wright Line* with credible evidence independent of any evidence of disparate treatment. "Accordingly, the value of the disparate treatment evidence lies principally in its tendency to rebut the employer's own attempt to carry its now-shifted burden under *Wright Line* of demonstrating that it would have taken the same action against the [union] activist even absent his or her union activities." *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998).[9]

Once the burden has shifted, the Respondent must show not just that it *could have* taken the challenged disciplinary action but that it *would have* done so even in the absence of union activities. *Structural Composites Industries*, 304 NLRB 729, 730 (1991). The Board has found that "*in the absence of countervailing evidence*, such as that of disparate treatment based on protected activity, the Respondent [can meet its *Wright Line* burden] by demonstrating that it has a rule . . . and that the rule has been applied to employees in the past." *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (emphasis added). Furthermore, the Respondent must only prove its defense by a preponderance of the evidence. "[The] defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." Id.

The insurmountable problem for the Respondent's defense in this case, however, is that the General Counsel has presented significant countervailing evidence of disparate treatment. The Respondent does not contest the disparity, and it fails to make any persuasive qualitative or quantitative argument to rebut it. Qualitatively, the Respondent does not attempt to show that the disparity in discipline between alleged discriminatees and the General Counsel's comparators is attributable to differences in work history, to the severity of misconduct, or to some other factor unrelated to union activity. Indeed, the Respondent argues, in contravention of the *Wright Line* standard, that the General Counsel must always bear the burden of disproving any possible nondiscriminatory explanation for the disparity. Otherwise, the Respondent makes no qualitative effort to explain the disparity in application of a uniform disciplinary system shown by the General Counsel's comparator evidence.[10]

As stated, the Respondent's *Wright Line* burden is merely to prove by a preponderance of the evidence that it would have disciplined an employee even in the absence of union activities. Quantitatively, however, that burden is not met simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate treatment. The Respondent must prove that the instances of disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general consistent past practice.[11] The Respondent does not argue that its rejected evidence would constitute such proof.

[6] See sec. IV,B,1,a (Barbara Marshall's discharge) and apps. B and C of the judge's decision.

[7] See sec. IV,B,2,a (Isador Ancar's discharge) and app. D of the judge's decision.

[8] The total number of alleged examples of consistent past disciplinary practice proffered or introduced by the Respondent is approximately 2600.

[9] Contrary to the Respondent, the General Counsel is not required to prove disparate treatment as part of the initial showing of antiunion discrimination, although a blatant disparity can be sufficient in certain circumstances to meet the initial *Wright Line* burden. See, e.g., *New Otani Hotel & Garden*, supra at 928 fn. 2.

[10] For the reasons stated by the judge, we find no merit in the Respondent's argument that, notwithstanding its uniform set of rules, it had a decentralized disciplinary system for some rules where the appropriate discipline for a defined employee offense varied from department to department or from supervisor to supervisor. Moreover, in all cases where the judge relied on disparate treatment as a factor in finding that the Respondent failed to meet its *Wright Line* burden, the General Counsel's rebuttal evidence included significant examples of disparate treatment within each discriminatee's department.

[11] Accordingly, this case is clearly distinguishable from those cases cited by the Respondent where there was no evidence of disparate

In sum, all of the comparator evidence proffered by the Respondent would prove at most that, in many instances, it took disciplinary action in reliance on its rules. However, the General Counsel showed that, in many other instances, Respondent did not take such disciplinary action. Given the General Counsel's initial showing under *Manno*, Respondent had the burden of establishing that it would have taken the disciplinary action challenged herein even in the absence of union activity. In fact, the evidence shows that Respondent may, or may not, have done so, i.e., the record of disciplinary action is mixed. The General Counsel's case has not been rebutted. We therefore find no error in the judge's analysis of evidence of disparate treatment or in his exclusion of the Respondent's comparator evidence.

4. The judge found that the Respondent violated Section 8(a)(3) by discriminating against seven prounion employees in regard to their compensation for a day on which they were compelled by the Respondent to appear at a Board representation election hearing. The Respondent contends that the General Counsel failed to meet his burden of proving that these employees suffered any actual adverse employment action on this day. We agree with the Respondent.

On January 7, 1994, the Respondent subpoenaed seven employees to appear at the postelection hearing on objections and challenges in Case 15–RC–7767. The subpoenaed employees had served as election observers for the Union, and the Respondent believed that they would not attend the hearing voluntarily to testify as its witnesses. The subpoenaed witnesses appeared to testify on January 19. They were excused after only one-half hour. Including travel time, their compelled attendance forced them to miss 3 hours of work. The Respondent paid the subpoenaed employees the statutory witness fee of $40, plus a travel allowance. It is undisputed that this amount was in excess of the wages any in this group would have received for 3 hours of work.

Throughout the many days of the postelection hearing, a total of 150 employees voluntarily appeared to testify as witnesses for the Respondent. It did not pay them the same statutory minimum witness fee provided to the subpoenaed employees. Instead, according to representations made by the Respondent's counsel in this case, "the Respondent paid employees other than those subpoenaed their lost wages."

The judge found that the Respondent's reason for maintaining different payment systems for two groups of its own witnesses stemmed from the prior union activity of the subpoenaed group.[12] He acknowledged that this group could actually have benefited monetarily had the employees worked all the hours they could have worked on January 19. The judge nevertheless concluded that there was unlawful discrimination because he found that the Respondent paid a full day's wages to all 150 voluntary witnesses and it failed to show that all of them worked before and after they attended the hearing. In other words, the judge found that the subpoenaed, prounion employees received only the statutory fee for their 3 hours of lost work while the Respondent's voluntary witnesses losing 3 hours of work would have received a full day's wages.

Under the *Wright Line* test of unlawful motivation, the General Counsel has the burden of proving the factual elements of union activity, employer knowledge, animus, and adverse employment action. E.g., *Columbian Distribution Services*, 320 NLRB 1068, 1071 (1996). In cases of alleged discriminatory discipline, the adverse nature of the challenged action is obvious, and the Board focuses on the General Counsel's proof of other elements. Here, however, the critical inquiry is whether the General Counsel has proved that the subpoenaed employees suffered any actual adverse employment action in their compensation on January 19. We find that the record does not support the finding of an adverse action.

Contrary to the judge, there is no evidence that the Respondent paid its volunteer witnesses a full day's pay for attending the Board hearing. The Respondent's counsel represented only that volunteer witnesses received *lost wages*. Counsel did not represent that these witnesses received *a full day's wages* or any wages in excess of hours actually lost for attending the hearing. Apart from counsel's representation, there is no evidence indicating what the Respondent actually paid voluntary employee-witnesses. On the other hand, it is undisputed that the subpoenaed employees' compensation on January 19 was itself in excess of their wages for the 3 hours they actually lost. For this 3-hour period then, the subpoenaed employees would have received more than they would have under the volunteer witness compensation system, if that system only compensated employees for hours actually lost. We therefore find that the General Counsel has failed to prove the allegation that the Respondent discriminated against the subpoenaed employees by paying them a lesser amount than it paid to employees who testified at its request and were not supporters of the Union. We shall dismiss this 8(a)(3) allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2(f) in the judge's decision.

treatment or the evidence was deemed insignificant or anomalous in light of preponderant evidence of consistent past practice. E.g., *Great Lakes Window, Inc.*, 319 NLRB 615, 617–618 (1995) (discharge consistent with past practice; no evidence of disparate treatment); *Synergy Gas Corp.*, 290 NLRB 1098, 1103 (1988) (one known instance of disparate treatment "appears to be an anomalous occurrence which was offset by the other instances in which severe disciplinary action was taken").

[12] The complaint does not allege that the maintenance of separate payment systems was per se discriminatory.

"(f) Transferring the following named employees to its Westwego shipyard on the dates set opposite their names.[13]

Edward Armstrong	July 30, 1993
Walter Brown	July 13, 1993
Luis Gonzalez	August 2, 1993
Joseph Melton	July 30, 1993"

AMENDED REMEDY

We agree with the judge that the Respondent's unfair labor practices warrant a broad cease-and-desist order enjoining the Respondent not only from committing again the specific violations found but also enjoining it from violating the Act "in any other manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). We also agree with the judge that the quantity and severity of the unfair labor practices committed by the Respondent are comparable to those committed by the respondent in *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473–474 (1995), and warrant consideration of the special remedies imposed in *Fieldcrest* and in cases cited there. Id. at 473.[14] We find it necessary, however, to modify the judge's recommended remedies in certain respects.

We adopt the judge's recommendation that the Respondent comply with special mailing and published notice remedies. We disagree, however, with the requirement that the Respondent's president, Albert Bossier (or, alternatively, Vice President Simpson), personally sign the written notice and read the notice to employees or permit it to be read by a Board agent in his presence. The Board has imposed this personal requirement on an executive of a flagrant wrongdoer in circumstances where it is necessary to dispel the atmosphere of intimidation that the executive personally created. E.g., *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996).[15] There is no finding that Bossier directly committed any unfair labor practice in this case. Although his involvement in the Respondent's preelection campaign against the Union is clear enough, there is insufficient proof of his personal involvement in the unlawful aspects of that campaign or in the numerous unfair labor practices that occurred after the election. Accordingly, we shall modify the recommended remedy to provide that the notice be read to employees by either a responsible supervisory official of the Respondent, above departmental level, or, at the Respondent's option, by a Board agent, with the responsible supervisory official present when it is read. *Fieldcrest*, 318 NLRB at 473.

We disavow the judge's reliance on the Respondent's refusal to bargain with the Union as a factor justifying the imposition of special notice remedies here. As previously stated, the Fifth Circuit has found that the Respondent did not unlawfully refuse to bargain, and it has directed that a second representation be held. *Avondale Industries v. NLRB*, 180 F.3d 633 (1999). The judge, however, also relied on the Union's certification resulting from the now-invalidated election as the basis for declining to recommend special access remedies imposed by the Board in *Fieldcrest* and *Monfort* where a second election was pending. In light of the Fifth Circuit's direction of a second election among the Respondent's employees, we find it necessary to impose those special access remedies in order to assure a fair and free election by eliminating the effects of the Respondent's widespread, serious, and pervasive unfair labor practices.[16] We shall therefore order the Respondent to comply with the following special access remedies: (1) supply the Union, on request made within 1 year of the date of this Decision and Order, the full names and addresses of its current employees; (2) on request, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted; (3) on request, grant the Union reasonable access to its facilities in nonwork areas during employees' nonworktime; (4) give notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation; and (5) afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may

[13] We note that the original Conclusion of Law 2(f) concerned an 8(a) finding by the judge that we have reversed.

[14] The special remedies in that case were upheld by the reviewing court. 97 F.3d 65, 74 (4th Cir. 1996).

[15] See also *Monfort of Colorado*, 298 NLRB 73, 86 fn. 47 (1990).

[16] Contrary to our dissenting colleague, we find that the circumstances presented in this case are not significantly distinguishable from *Fieldcrest* and *Monfort*. The unfair labor practices are comparable in number and scope and include numerous attempts to interfere with efforts to communicate the Union's organizational message, including: discharges, warnings, and threats focusing on employees who displayed union insignia; threats and rules directed against employee discussion of the Union; creating the impression of surveillance; and ordering employees not to take literature from union representatives or not to talk with them. Further, even if there had not been direct interference with the Union's efforts to communicate, the access remedy would still serve the important purpose of offsetting the effects of a respondent's unfair labor practices and making clear to employees that the Union has a legitimate role to play in their decision whether to seek union representation. We also do not believe that the Union's court-invalidated election victory in the June 25, 1993 election undermines the need for special access remedies. We note in this regard that nearly half of the Respondent's 8(a)(1) violations took place after that election. Finally, we do not find it particularly relevant to the need for special access remedies that there was no showing of direct involvement by the Respondent's chief executive in the unfair labor practice campaign. In any event, given that the Respondent's senior management failed to prevent the 141 unfair labor practices that we have found were committed during that campaign, we have less confidence than our dissenting colleague that the employees will view the chief executive or other senior management as "untainted' by those unfair labor practices and that they will be able to "set a corporate tone which assures employees of their Sec. 7 rights" absent these additional remedies.

be scheduled in which the Union is a participant. These additional access provisions shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.[17]

ORDER

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

1. Cease and desist from

(a) Discharging, refusing to hire, or otherwise discriminating against its employees or employee-applicants because it knows or suspects that such employees have become or remained members of the New Orleans Metal Trades Council, AFL–CIO (the Union), or because it knows or suspects that such employees have given aid, assistance, or support to the Union or any other labor organization.

(b) Suspending its employees because they have become or remained members of the Union or because they have given aid, assistance, or support to it.

(c) Issuing warning notices to its employees because they have become or remained members of the Union or because they have given aid, assistance, or support to it.

(d) Assigning its employees to more onerous work because they have become or remained members of the Union or because they have given aid, assistance, or support to it.

(e) Discriminating against its employees by denying them telephone use privileges, or any other privileges, because they have become or remained members of the Union or because they have given aid, assistance, or support to it.

(f) Refusing to hire any employee-applicant because it knows or suspects that such applicant has become or remained a member of the Union or because it knows or suspects that such applicant has given, or would give, aid, assistance, or support to the Union or any other labor organization.

(g) Threatening its employees with plant closure if they select the Union as their collective-bargaining representative.

(h) Threatening its employees with discharge because they have engaged in union or other protected concerted activities.

(i) Threatening its employees with unspecified reprisals because they have engaged in union or other protected concerted activities.

(j) Threatening its employees with more strict enforcement of work rules because they have aided or supported the Union or because it suspects that its employees have aided or supported the Union.

(k) Threatening its employees with discharge because they have worn prounion insignia.

(l) Threatening its employees with unspecified reprisals because they have worn prounion insignia.

(m) Threatening its employees with unspecified reprisals because of their participation in a Board-conducted election.

(n) Threatening its employees with discharge because they filed charges under the Act.

(o) Threatening its employees with unspecified reprisals because they filed charges under the Act.

(p) Interrogating its employees about their union membership, activities, or desires.

(q) Threatening its employees that it will deny them transfers because unfair labor practice charges have been filed on their behalf.

(r) Soliciting its employees' grievances and promising to remedy them in order to discourage prounion sympathies.

(s) Threatening to withhold wage increases from its employees because they have been wearing prounion insignia.

(t) Threatening its employees with discharge or other reprisals because they have been seen reading prounion literature.

(u) Instructing its employees to remove prounion insignia from their clothing.

(v) Threatening its employees with layoffs if they select the Union as their collective-bargaining representative.

(w) Threatening its employees with unspecified reprisals if they select the Union as their collective-bargaining representative.

(x) Instructing its employees not to wear prounion insignia.

(y) Threatening its employees with unspecified reprisals because they have mentioned the word "union" during conversations with supervisors.

(z) Threatening its employees by telling them that other employees have been discharged because of their union activities.

(aa) Threatening its employees by telling them that other employees would not be reinstated because those other employees were prounion.

[17] We take notice of a reported agreement between the Union and the Respondent, under new ownership, to conduct a card check before a third-party arbitrator to determine whether a majority of current unit employees wish to be represented by the Union. The Respondent reportedly agrees to remain neutral while the union campaigns to secure a majority card showing, and it agrees to recognize the Union if the arbitrator certifies that the union represents a majority. See 212 Daily Lab. Rep.t AA-1 (Nov. 3, 1999). We leave to subsequent proceedings, upon appropriate motion and argument from the parties, the issue of whether this reported agreement has, or should have, any impact on the remedy in this case.

(bb) Threatening its employees by telling them that it would be futile for them to select the Union as their collective-bargaining representative.

(cc) Threatening its employees with discharge if they sign union authorization cards.

(dd) Creating the impression that its employees' activities on behalf of the Union are under its surveillance.

(ee) Threatening its employees that indulgences or privileges would be withdrawn if they support the Union.

(ff) Promulgating any rule that precludes its employees from talking about the Union.

(gg) Threatening its employees with discharge if they talk about the Union during working time.

(hh) Threatening its employees with unspecified reprisals because of their expressions of interest in union activities.

(ii) Soliciting its employees to demonstrate against the Union.

(jj) Threatening its employees with transfer or discharge if they continue to support the Union.

(kk) Threatening its employees by telling them that they have been transferred to more onerous positions because they aided or supported the Union.

(ll) Threatening its employees by telling them that another employee was reassigned because he had aided or supported the Union.

(mm) Threatening its employees by telling them that it will engage in closer supervision of their work because they had aided or supported the Union.

(nn) Ordering its employees not to take literature from union representatives or not to talk to them.

(oo) Coercively interrogating employees about matters that are the subject of a Board representation election hearing.

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

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

(a) Within 14 days from the date of this Order, offer the following-named employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Jose Aguilar	Eddie Johnson
Edward Armstrong	Marie Joseph
Dwight Ballard	Charles Kent
Charles Bennett	Barbara Marshall
Michael Boudreaux	Joseph Melton
Johann Burton	Michael Molaison
Vernon Charles	Patrick Noah
Leroy Clark	Audra Scott
Keith Collins	Eugene Sheard
Charles Fleming	Joseph Simpson
Julie George	William Smith
Carlos Henriquez	Donald Thompson
Vincente Hernandez	Donald Varnado

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the above-named employees, and within 3 days thereafter notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Make the following-named employees whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings, plus interest.

Dwight Ballard	Robert Ruiz
Mark Cancienne	Lennie Valentine
Larry Gibson	

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

(f) Rescind the warning notices that were issued to the following-named employees on or about the dates set opposite their respective names:

Dwight Ballard	April 26, 1994
Dwight Ballard	May 18 1994
Dwight Ballard	June 6, 1994
Dwight Ballard	June 28, 1994
Harold Adams	August 30, 1993
Carlos Henriquez	February 1, 1994
Joe Howard	October 12, 1993
Cornelius King	July 30, 1993
Michael Molaison	June 3, 1993
Donald Mason	December 9, 1993
Donald Mason	May 19, 1994
Philip Perera	June 30, 1993
Philip Perera	March 10, 1994
Philip Perera	March 16, 1994
Darrell Smith	July 23, 1993
Octave Rouege	June 15, 1993(2)
Richard St. Blanc	July 29, 1993
Lennie Valentine	July 15, 1994

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning notices that were issued to these employees, and within 3 days thereafter notify each of them in writing that this has been done and that their warning notices will not be used against them in any way.

(h) Within 14 days from the date of this Order, offer Mark Cancienne, Mamoru Honju, Larry Gibson, Charles Giles, Luis Gonzalez, Loraine Moses, Sidney Jasmine, and Richard St. Blanc full reinstatement to their former jobs held prior to an unlawful transfer or assignment to more onerous work or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.

(i) Within 14 days from the date of this Order, remove from its files any reference to the transfers and/or assignments to more onerous work for these employees, and within 3 days thereafter notify each of them in writing that this has been done and that these personnel actions will not be used against them in any way.

(j) Make Mark Cancienne whole for any loss of earnings and other benefits that he suffered as a result of his unlawful assignment to more onerous work.

(k) Within 14 days from the date of this Order, offer Cynthia Johnson full employment in the position for which she applied, or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges.

(l) Make Cynthia Johnson whole for any loss of earnings and other benefits that she suffered as a result of the unlawful refusal to hire her in the manner described in the remedy section of the judge's decision.

(m) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Cynthia Johnson, and within 3 days thereafter notify her in writing that this has been done and that the refusal to hire her will not be used against her in any way.

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

(o) Within 14 days after service by the Region, post at its plants in Avondale and Westwego, Louisiana, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by a supervisory official of the Respondent above the departmental level, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(p) Publish the attached notice marked "Appendix" in the Respondent's internal newsletter.

(q) Mail copies of the notice to all of its present employees and to all employees on the Respondent's payroll since March 11, 1993, when the Respondent began its unlawful conduct.

(r) Convene during working time all employees at Respondent's Avondale and Westwego facilities, by shifts, departments, or otherwise, and have a supervisory official of the Respondent above the departmental level read the notice to employees, or, at the Respondent's option, permit a Board agent to read the notice with the responsible supervisory official present when it is read. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice by an official of the Respondent.

(s) Supply the Union, upon request made within 1 year of the date of this Decision and Order, the full names and addresses of its current unit employees employed at its Avondale and Westwego facilities.

(t) On request, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted in its Avondale and Westwego facilities.

(u) On request, grant the Union reasonable access to the Respondent's Avondale and Westwego facilities in nonwork areas during employees' nonwork time.

(v) Give the Union notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees in the Avondale and Westwego facilities on the question of union representation.

(w) Afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled involving the Respondent's employees at the Avondale and Westwego facilities in which the Union is a participant in a time frame of not more than 10 working days before, but not less than 48 hours before, such election. (Pars. (p) through (t) shall apply for a period of 2 years from the date of the posting of the notice provided by the Order here or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.)

(x) 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 disagree with my colleagues on two issues in this case. First, I would find that the limitations period of Section 10(b) bars litigation of certain 8(a)(1) allegations that are not closely related to any timely filed charge.

[18] 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."

Second, I would not expand the judge's recommended remedy to include special access remedies.

On the first point, the majority affirms the judge's conclusion that a single charge of 8(a)(3) discrimination filed on June 7, 1993, in Case 15–CA–12171–1 with respect to the discharge of Danny Cox, is sufficient to support all subsequent complaint allegations of 8(a)(1) violations that allegedly occurred within a period 6 months before that charge and for an unlimited period after the filing of that charge. For the reasons set forth in my dissenting opinion in *Ross Stores,* 329 NLRB No. 59 (1999), I would find that the mere fact that timely and untimely filed allegations are based on acts that arise out of the same antiunion campaign is insufficient to show that those allegations are "closely related" under the test of relatedness in *Redd-I, Inc.*, 290 NLRB 1115 (1988). I would therefore dismiss on 10(b) grounds any 8(a)(1) allegation that is not "closely related" to a timely filed charge under the test set forth in *Redd-I*.[1]

On the second point, I agree with my colleagues and the judge that the quantity and severity of the Respondent's unfair labor practices warrant special notice remedies in addition to the traditional cease-and-desist and restitutional remedies imposed here. I disagree, however, that there has been a showing of need for special access remedies in the event that there is a second election.[2]

In this regard, I note particularly that the instant case is clearly distinguishable from those cases in which special access remedies were granted.[3] More particularly, there is no showing that the Respondent's unfair labor practices substantially affected the Union's ability to communicate its organizational message to the Respondent's employees. The record in Case 15–RC–7767 is replete with evidence of the Union's frequent and extensive oral and written communications prior to the election in that case. Indeed, unlike the unions in *Fieldcrest* and *Monfort*, the Union here actually prevailed in the election. Although the Fifth Circuit's opinion has invalidated those election results, it did so because of flawed voting procedures rather than any preelection conduct.

I also note that, unlike the cited case, Respondent's chief executive was not personally involved in any unlawful conduct. Thus, the chief executive, untainted by past misconduct, can set a corporate tone which assures employees of their Section 7 rights. This tone, set from the top, would be backed by the Board's other remedies. These remedies include recompense of all discriminatees, a broad cease-and-desist order, and a special requirement that the notice be read to all current employees and mailed to all persons employed by the Respondent since its first unfair labor practice.

In sum, there is no showing of a need for the extraordinary remedy of giving union agents access to the private property of Respondent. My colleagues assert that the access remedy will "serve the important purpose of offsetting the effects of respondent's unfair labor practices." However, the issue is *not* whether the access remedy will serve that purpose. (Presumably, it could do so.) Rather, the issue is whether the traditional and other remedies imposed herein would fail to adequately serve that purpose. In my view, there has been no showing of any inadequacy of these traditional and other remedies. Absent such a showing, there is no need for the extraordinary remedy of access.

My colleagues also note that Respondent's senior management failed to prevent the unfair labor practices. However, they do not suggest that this "failure to prevent" was itself an unfair labor practice. Thus, these members of senior management are free from any unfair labor practices and are in a good position to set a corporate tone which will assure employees of their Section 7 rights.

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

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[1] Accordingly, I would dismiss on 10(b) grounds the following 8(a)(1) allegations, regardless of whether the judge recommended dismissal of some of them on the merits: the allegation of threats and promises by Respondent's president, Albert Bossier, in speeches to employees (judge's decision sec. IV,A,2); the allegation of threats by Foremen Walter Falgout, Glen Clement, Carl Mott Jr., and Timmy Benoit (judge's decision sec. IV,A,8, 15, 16, and 18, respectively); the allegation of a threat by Foreman Charlie Bourg Sr. to a group of employees (judge's decision sec. IV,B,3,g); and the allegation of a threat by Foreman Keith Folse to employee Robert Ruiz (judge's decision sec. IV,B,11,a).

I agree with the judge and my colleagues that timely filed 8(a)(3) charges are closely related to subsequent 8(a)(1) allegations when they involve employer threats or interrogation specifically directed to the alleged discriminatee. I would find that the specific allegation of interrogation of employees in the charge filed in Case 15–CA–12207 is closely related to subsequent allegations of interrogation within the 10(b) period of the original charge. Similarly, I would find that the specific allegation of impression of surveillance in the amended charge filed in Case 15–CA–12234–4 is closely related to subsequent allegations of actual surveillance within the 10(b) period of the amended charge.

[2] As noted in the majority opinion, an apparent neutrality and card-check agreement between the Respondent, under new ownership, and the Union may negate the need for a second election.

[3] E.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473–474 (1995); and *Monfort of Colorado*, 298 NLRB 73, 86 (1990).

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge you or otherwise discriminate against you because we know or suspect that you have become or remained members of the New Orleans Metal Trades Council, AFL–CIO, or because we know or suspect that you have given aid, assistance, or support to the Union or any other labor organization.

WE WILL NOT suspend you because you have become or remained a member of the Union or because you have given aid, assistance, or support to it.

WE WILL NOT issue warning notices to you because you have become or remained a member of the Union or because you have given aid, assistance, or support to it.

WE WILL NOT assign you to more onerous work because you have become or remained a member of the Union or because you have given aid, assistance, or support to it.

WE WILL NOT discriminate against you by denying you telephone use privileges, or any other privileges, because you have become or remained a member of the Union or because you have given aid, assistance, or support to it.

WE WILL NOT refuse to hire any employee-applicant because we know or suspect that such applicant has become or remained a member of the Union or because we know or suspect that such applicant has given, or would give, aid, assistance, or support to the Union or any other labor organization.

WE WILL NOT threaten you with plant closure if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with discharge because you have engaged in union or other protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you have engaged in union or other protected concerted activities.

WE WILL NOT threaten you with more strict enforcement of work rules because you have aided or supported the Union or because we suspect that you have aided or supported the Union.

WE WILL NOT threaten you with discharge because you have worn prounion insignia.

WE WILL NOT threaten you with unspecified reprisals because you have worn prounion insignia.

WE WILL NOT threaten you with unspecified reprisals because of your participation in a Board-conducted election.

WE WILL NOT threaten you with discharge if you file charges under the Act.

WE WILL NOT threaten you with unspecified reprisals if you file charges under the Act.

WE WILL NOT interrogate you about your union membership, activities, or desires.

WE WILL NOT threaten you that we will deny you a transfer because an unfair labor practice charge has been filed on your behalf.

WE WILL NOT solicit your grievances and promise to remedy them in order to discourage prounion sympathies.

WE WILL NOT threaten to withhold wage increases from you because you have been wearing prounion insignia.

WE WILL NOT threaten you with discharge or other reprisals because you have been seen reading prounion literature.

WE WILL NOT instruct you to remove prounion insignia from your clothing.

WE WILL NOT threaten you with layoffs if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with unspecified reprisals if you select the Union as your collective-bargaining representative.

WE WILL NOT instruct you not to wear prounion insignia.

WE WILL NOT threaten you with unspecified reprisals because you have mentioned the word "union" during conversations with supervisors.

WE WILL NOT threaten you by telling you that other employees have been discharged because of their union activities.

WE WILL NOT threaten you by telling you that other employees would not be reinstated because they were prounion.

WE WILL NOT threaten you by telling you that it would be futile for you to select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with discharge if you sign union authorization cards.

WE WILL NOT create the impression that your activities on behalf of the Union are under our surveillance.

WE WILL NOT threaten you that indulgences or privileges would be withdrawn if you supported the Union.

WE WILL NOT promulgate any rule that precludes you from talking about the Union.

WE WILL NOT threaten you with discharge if you talk about the Union during working time.

WE WILL NOT threaten you with unspecified reprisals because of your expression of interest in union activities.

WE WILL NOT solicit you to demonstrate against the Union.

WE WILL NOT threaten you with transfer or discharge if you continue to support the Union.

WE WILL NOT threaten you by telling you that you have been transferred to a more onerous position because you aided or supported the Union.

WE WILL NOT threaten your by telling you that another employee was reassigned because he had aided or supported the Union.

WE WILL NOT threaten you by telling you that we will engage in closer supervision of your work because you aided or supported the Union.

WE WILL NOT order you not to take literature from union representatives or not to talk to them.

WE WILL NOT coercively interrogate you about matters that are the subject of a Board representation election hearing.

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

WE WILL, within 14 days from the date of the Board's Order, offer the following-named employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Jose Aguilar	Eddie Johnson
Edward Armstrong	Marie Joseph
Dwight Ballard	Charles Kent
Charles Bennett	Barbara Marshall
Michael Boudreaux	Joseph Melton
Johann Burton	Michael Molaison
Vernon Charles	Patrick Noah
Leroy Clark	Audra Scott
Keith Collins	Eugene Sheard
Charles Fleming	Joseph Simpson
Julie George	William Smith
Carlos Henriquez	Donald Thompson
Vincente Hernandez	Donald Varnado

WE WILL make these employees whole for any loss of earnings and other benefits result from their discharges, less any net interim earnings, plus interest.

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

WE WILL make the following-named employees whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings, plus interest.

Dwight Ballard	Robert Ruiz
Mark Cancienne	Lennie Valentine
Larry Gibson	

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

WE WILL rescind the warning notices that were issued to the following-named employees on or about the dates set opposite their respective names:

Dwight Ballard	April 26, 1994
Dwight Ballard	May 18 1994
Dwight Ballard	June 6, 1994
Dwight Ballard	June 28, 1994
Harold Adams	August 30, 1993
Carlos Henriquez	February 1, 1994
Joe Howard	October 12, 1993
Cornelius King	July 30, 1993
Michael Molaison	June 3, 1993
Donald Mason	December 9, 1993
Donald Mason	May 19, 1994
Philip Perera	June 30, 1993
Philip Perera	March 10, 1994
Philip Perera	March 16, 1994
Darrell Smith	July 23, 1993
Octave Rouege	June 15, 1993(2)
Richard St. Blanc	July 29, 1993
Lennie Valentine	July 15, 1994

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning notices that were issued to these employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their warning notices will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, offer Mark Cancienne, Mamoru Honju, Larry Gibson, Charles Giles, Luis Gonzalez, Loraine Moses, Sidney Jasmine, and Richard St. Blanc full reinstatement to their former jobs held prior to an unlawful transfer or assignment to more onerous work or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the transfers and/or assignments to more onerous work for these employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that these personnel actions will not be used against them in any way.

WE WILL make Mark Cancienne whole for any loss of earnings and other benefits that he suffered as a result of his unlawful assignment to more onerous work.

WE WILL, within 14 days from the date of the Board's Order, offer Cynthia Johnson full employment in the position for which she applied, or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges.

WE WILL make Cynthia Johnson whole for any loss of earnings and other benefits that she suffered as a result of

the unlawful refusal to hire her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire Cynthia Johnson, and WE WILL within 3 days thereafter, notify her in writing that this has been done and that the refusal to hire her will not be used against her in any way.

WE WILL convene during working time all employees at our Avondale and Westwego facilities by shifts, departments, or otherwise, and have a supervisory official of our departmental level read the notice to employees or, at our option, permit a Board agent to read the notice with the responsible supervisory official present when it is read. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice by an official of the Company.

WE WILL supply the Union, upon request made within 1 year of the Board's Decision and Order, the full names and addresses of all current unit employees employed in our Avondale and Westwego facilities.

WE WILL, on request, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted in our Avondale and Westwego facilities.

WE WILL, on request, grant the Union reasonable access to our Avondale and Westwego facilities in nonwork areas during employees' nonworktime.

WE WILL give the Union notice of, and equal time and facilities for the Union to respond to any address made by us to the employees at our Avondale and Westwego facilities on the question of union representation.

WE WILL afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled involving employees at our Avondale and Westwego facilities in which the Union is a participant in a time frame of not more than 10 working days before, but not less than 48 hours before, such election.

AVONDALE INDUSTRIES, INC.

Ronald C. Morgan, Steven C. Bensinger, Kathleen McKinney, Nancy Recko, and *Stacey M. Stein, Esqs.,* for the General Counsel.

Steven Hymowitz, Joan M. Canny, and *Steven R. Cupp, Esqs.,* for the Respondent.

William Lurye, Esq., of Avondale, Louisiana, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in New Orleans, Louisiana, on 165 dates from July 11, 1994, through July 15, 1996. The case was initiated by 122 charges and amended charges that were filed by the New Orleans Metal Trades Council (the Charging Party or the Union) against Avondale Industries, Inc. (the Respondent or the Company). Upon those charges as listed below, proper service of which is admitted, the General Counsel issued four complaints that are before the National Labor Relations Board (the Board):[1]

First complaint. On May 27, 1994, the General Counsel issued an order consolidating cases, amended consolidated complaint and notice of hearing (the first complaint)[2] upon the filing and service of the following charges: (a) the charge in Case 15–CA–12171–1, filed on June 7, 1993, which alleges the unlawful discharge of James (Danny) Cox; (b) the charge in Case 15–CA–12171–3, filed on June 8, 1993, which alleges the unlawful discharge of Keith Collins; (c) the charge in Case 15–CA–12171–4, filed on June 8, 1993,—which alleges the unlawful discharge of Michael Molaison; (d) the charge in Case 15–CA–12171–5, filed on June 10, 1993, which alleges the unlawful discharge of Edwin Brown; (e) the charge in Case 15–CA–12181–2, filed on June 14, 1993, which alleges the unlawful discharge of Edward Armstrong; (f) the first amended charge in Case 15–CA–12181–2, filed on September 24, 1993; (g) the charge in Case 15–CA–12190–1, filed on June 22, 1993, which alleges the unlawful discharge of Eugene May; (h) the charge in Case 15–CA–12190–3, filed on June 22, 1993, which alleges the unlawful discharge of Charles Giles; (i) the first amended charge in Case 15–CA–12190–3, filed on August 17, 1993; (j) the first amended charge in Case 15–CA–12171–1, filed on March 8, 1994; (k) the second amended charge in Case 15–CA–12181–2, filed on March 8, 1994; and (l) the second amended charge in Case 15–CA–12190–3, filed on March 8, 1994.

Second complaint. On May 31, 1994, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the second complaint) upon the filing and service of the following charges: (a) the charge in Case 15–CA–12203–1, filed on July 1, 1993, which alleges the unlawful making of onerous work assignments to Richard St. Blanc; (b) the first amended charge in Case 15–CA–12203–1, filed on August 4, 1993, which alleges the issuance of an unlawful warning notice to St. Blanc; (c) the second amended charge in Case 15–CA–12203–1, filed on April 7, 1994, which alleges the unlawful making of onerous work assignments to St. Blanc and the unlawful issuance of a warning notice to St. Blanc (and threats to employees); (d) the charge in Case 15–CA–03–2, filed on July 1, 1993, which alleges the unlawful discharge of Isador Ancar; (e) the amended charge in Case 15–CA–12203–2, filed on April 7, 1994; (f) the charge in Case 15–CA–12211–1, filed on July 9, 1993, which alleges the unlawful discharge of Donald Varnado; (g) the charge in Case 15–CA–12211–2, filed on July 9, 1993, which alleges the unlawful making of onerous work assignments to Larry Gibson; (h) the charge in Case 15–CA–12214, filed on July 13, 1993, which alleges the

[1] For the following charges that were filed under Sec. 8(a)(3) of the Act, I include the names of the alleged discriminatees who are the subjects of those charges. This is done to provide a point of reference for dispositions, infra, of certain contentions that are made by the Respondent. (See sec. IV(A)(1), infra.)

[2] The first complaint has the word "Amended" in its title because the General Counsel had previously, on February 27, 1994, issued another complaint against Respondent. All allegations of the February 27 complaint were incorporated into the May 27 complaint, and the February 27 complaint will not be referred to again.

unlawful discharge of Patrick Noah; (i) the charge in Case 15–CA–12225–3, filed on July 21, 1993, which alleges the unlawful making of onerous work assignments to Walter Brown; (j) the charge in Case 15–CA–12225–4, filed on July 21, 1993, which alleges the unlawful making of onerous work assignments to Charles Fleming; (k) the amended charge in Case 15–CA–12225–4, filed on August 31, 1993, which alleges the unlawful discharge of Fleming; (l) the charge in Case 15–CA–12225–5, filed on July 21, 1993, which alleges the unlawful discharge of Charles Bennett; (m) the charge in Case 15–CA–12234–1, filed on July 26, 1993, which alleges the unlawful making of onerous work assignments to Harold Dennis; (n) the charge in Case 15–CA–12234–2, filed on July 26, 1993, which alleges the unlawful making of onerous work assignments to Mark Cancienne; (o) the charge in Case 15–CA–12234–3, filed on July 26, 1993, which alleges the unlawful making of onerous work assignments to Josephine Hartman; (p) the amended charge in Case 15–CA–12234–3, filed on January 20, 1994; (q) the charge in Case 15–CA–12234–4, filed on July 26, 1993; (r) the amended charge in Case 15–CA–12234–4, filed on August 17, 1993; (s) the charge in Case 15–CA–12234–5, filed on July 26, 1993, which alleges the unlawful making of onerous work assignments to Lorraine Moses; (t) the charge in Case 15–CA–12238–1, filed on July 29, 1993, which alleges the unlawful discharges of Peter Legeaux and Kevin Lockett; (u) the amended charge in Case 15–CA–12238–1, filed on May 25, 1994; (v) the charge in Case 15–CA–12238–2, filed on July 30, 1993, which alleges the unlawful discharge of Donald Thompson; (w) the charge in Case 15–CA–12238–3, filed on August 4, 1993, which alleges the unlawful discharge of Julie George; (x) the charge in Case 15–CA–12238–4, filed on August 4, 1993, which alleges the unlawful issuances of warning notices to Cornelius King and Leroy Jackson; (y) the charge in Case 15–CA–12264, filed on August 11, 1993, which alleges the unlawful discharge of Ramona Edwards; (z) the amended charge in Case 15–CA–12264, filed on May 27, 1994; (aa) the charge in Case 15–CA–12275–1, filed on August 19, 1993, which alleges the unlawful discharge of Ronald Johnson and the unlawful issuance of a warning notice to Darrell Smith; (bb) the amended charge in Case 15–CA–12275–1, filed on May 27, 1994; (cc) the charge in Case 15–CA–12275–2, filed on August 19, 1993, which alleges the unlawful discharge of Marie Joseph; (dd) the amended charge in Case 15–CA–12275–2, filed on August 26, 1993; (ee) the charge in Case 15–CA–12285–1, filed on August 26, 1993 which alleges the unlawful discharges of Octave Rouege, Dwane Braud and Marty Bourgeois; (ff) the amended charge in Case 15–CA–12285–1, filed on May 26, 1994; (gg) the charge in Case 15–CA–12285–2, filed on August 26, 1993, which alleges the unlawful discharges of Glenn Zeringue and Joseph Melton; (hh) the amended charge in Case 15–CA–12285–2, filed on May 26, 1994; (ii) the charge in Case 15–CA–12315–1, filed on September 10, 1993, which alleges the unlawful issuance of warning notices to Harold Adams and Luis Gonzalez; (jj) the amended charge in Case 15–CA–12315–1, filed on May 26, 1994; (kk) the charge in Case 15–CA–12315–2, filed on September 10, 1993, which alleges the unlawful discharge of Michael James Boudreaux; (ll) the charge in Case 15–CA–12334–2, filed on September 24, 1993; (mm) the amended charge in Case 15–CA–12334–2, filed on May 26, 1994; (nn) the charge in Case 15–CA–12334–4, filed on September 29, 1993, which alleges the unlawful discharge of Chad Durocher; (oo) the amended charge in Case 15–CA–12334–4, filed on May 26, 1994; (pp) the charge in Case 15–CA–12344, filed on October 8, 1993, which alleges the unlawful discharge of Walter Brown; (qq) the charge in Case 15–CA–12364, filed on November 3, 1993; (rr) the amended charge in Case 15–CA–12364, filed on May 27, 1994; (ss) the charge in Case 15–CA–12368, filed on November 9, 1993, which alleges the unlawful discharges of Barbara Marshall and Joseph Bush; (tt) the amended charge in Case 15–CA–12368, filed on May 27, 1994; (uu) the charge in Case 15–CA–12438, filed on January 11, 1994, which alleges the unlawful discharge of Jose Aguilar; (vv) the charge in Case 15–CA–12449, filed on January 20, 1994, which alleges the unlawful discharge of Johann Burton and the unlawful issuance of a warning notice to Donald Mason; (ww) the charge in Case 15–CA–12454, filed on January 21, 1994, which alleges the unlawful discharge of Leroy Clark; (xx) the charge in Case 15–CA–12469, filed on February 4, 1994, which alleges the unlawful discharge of William Smith; (yy) the charge in Case 15–CA–12476, filed on February 8, 1994; (zz) the amended charge in Case 15–CA–12476, filed on May 19, 1994; (aaa) the second amended charge in Case 15–CA–12476, filed on May 25, 1994; (bbb) the charge in Case 15–CA–12489–1, filed on February 16, 1994, which alleges unlawful refusals to hire certain named individuals; (ccc) the charge in Case 15–CA–12489–2, filed on February 16, 1994; (ddd) the amended charge in Case 15–CA–12489–2, filed on May 10, 1994; (eee) the charge in Case 15–CA–12489–3, filed on February 16, 1994, which alleges the unlawful discharge of Carlos Henriquez; (fff) the charge in Case 15–CA–12497, filed on February 24, 1994, which alleges the unlawful discharge of Rene Rubi; (ggg) the charge in Case 15–CA–12521–1, filed on March 15, 1994; (hhh) the amended charge in Case 15–CA–12521–1, filed on April 28, 1994; (iii) the second amended charge in Case 15–CA–12521–1, filed on May 17, 1994, which alleges the unlawful discharge of Joseph Simpson; (jjj) the charge in Case 15–CA–12578, filed on April 26, 1994; (kkk) the charge in Case 15–CA–12579, filed on April 26, 1994, which alleges the unlawful transfer of Mamoru Honjo; (lll) the amended charge in Case 15–CA–12579, filed on May 27, 1994; (mmm) the charge in Case 15–CA–12611, filed on May 17, 1994, which alleges the unlawful discharge of Vincente Hernandez; and (nnn) the amended charge in Case 15–CA–12611, filed on May 27, 1994. A separate order that consolidated the first and second complaints was also issued by the General Counsel on May 31, 1994.

Third complaint. On August 19, 1994, the General Counsel issued an order consolidating cases and consolidated complaint (the third complaint) upon the filing and service of the following charges: (a) the charge in Case 15–CA–12207, filed on July 1, 1993; (b) the charge in Case 15–CA–12211–5, filed on July 9, 1993, which alleges the unlawful issuance of a warning notice to Phillip Perera; (c) the first amended charge in Case 15–CA–12211–5, filed on July 27, 1993, which alleges the unlawful issuance of another warning notice to Phillip Perera; (d) the second amended charge in Case 15–CA–12211–5, filed on September 10, 1993, which alleges the unlawful issuance of another warning notice to Perera; (e) the third amended charge in Case 15–CA–12211–5, filed on March 16, 1994, which alleges the unlawful issuance of another warning notice to Perera; (f) the fourth amended charge in Case 15–CA–12211–5, filed on March 24, 1994, which alleges the unlawful issuance of another warning notice to Perera; (g) the fifth amended charge in Case 15–CA–12211–5, filed on June 7, 1994, which alleges

the unlawful issuance of another warning notice to Perera; (h) the charge in Case 15–CA–12214–6, filed on July 15, 1993, which alleges the unlawful issuance of a warning notice to Vernon Charles; (i) the amended charge in Case 15–CA–12214–6, filed on August 4, 1993, which alleges the unlawful discharge of Charles; and (j) the amended charge in Case 15–CA–12207, filed on October 19, 1994. Upon the General Counsel's motion at trial, and over the Charging Party's objections, I consolidated the third complaint for hearing with the first two.

Fourth complaint. On August 31, 1994, the General Counsel issued another order consolidating cases and consolidated complaint (the fourth complaint) upon the filing and service of the following charges: (a) the charge in Case 15–CA–12386, filed on November 24, 1993, which alleges the unlawful discharge of Eugene Sheard; (b) the amended charge in Case 15–CA–12386, filed on August 31, 1994; (c) the charge in Case 15–CA–12596, filed on May 10, 1994, which alleges the unlawful discharge of Audra Scott; (d) the first amended charge in Case 15–CA–12596, filed on July 12, 1994, which alleges the unlawful issuance of a warning notice to Scott; (e) the charge in Case 15–CA–12598, filed on May 11, 1994, which alleges the unlawful refusal to employ Scott Montecino;[3] (f) the charge in Case 15–CA–12600, filed on May 11, 1994, which alleges the unlawful issuance of an warning notice to Robert Ruiz;[4] (g) the amended charge in Case 15–CA–12600, filed on July 27, 1994, which alleges the unlawful denial of telephone privileges to Ruiz; (h) the charge in Case 15–CA–12601, filed on May 11, 1994; (i) the charge in Case 15–CA–12610, filed on May 17, 1994, which alleges the unlawful discharge of John Joseph; (j) the first amended charge in Case 15–CA–12610, filed on July 27, 1994, which alleges the unlawful issuance of warning notices to Joseph; (k) the charge in Case 15–CA–12615, filed on May 19, 1994; (l) the amended charge in Case 15–CA–12615, filed on August 2, 1994, which alleges the unlawful issuance of warning notices to Dwight Ballard; (m) the charge in Case 15–CA–12637, filed on June 2, 1994, which alleges the unlawful discharge of Eddie Johnson; (n) the amended charge in Case 15–CA–12637, filed on August 31, 1994; (o) the charge in Case 15–CA–12638, filed on June 3, 1994, which alleges the unlawful issuance of a warning notice to Donald Mason; (p) the charge in Case 15–CA–12639, filed on June 3, 1994;[5] (q) the first amended charge in Case 15–CA–12639, filed on July 27, 1994;[6] (r) the charge in Case 15–CA–12648, filed on June 8, 1994, which alleges the unlawful discharge of Glenda Dennis; (s) the charge in Case 15–CA–12649, filed on June 8, 1994; (t) the amended charge in Case 15–CA–12649, filed on August 22, 1994, which alleges the unlawful denial of a wage increase to Kenneth Patterson; (u) the charge in Case 15–CA–12650, filed on June 8, 1994, which alleges the unlawful discharge of Charles Kent; (v) the charge in Case 15–CA–12651, filed on June 8, 1994; (w) the amended charge in Case 15–CA–12651, filed on August 18, 1994; (x) the charge in Case 15–CA–12657, filed on June 9, 1994; (y) the amended charge in Case 15–CA–12657, filed on July 27, 1994, which alleges the unlawful making of an onerous work assignment to Sidney Jasmine; (z) the charge in Case 15–CA–12660, filed on June 10, 1994, which alleges the unlawful discharge of Andre Duhon; (aa) the charge in Case 15–CA–12661, filed on June 10, 1994; (bb) the amended charge in Case 15–CA–12661, filed on June 27, 1994; (cc) the charge in Case 15–CA–12701, filed on June 24, 1994; (dd) the charge in Case 15–CA–12715, filed on June 30, 1994; (ee) the amended charge in Case 15–CA–12715, filed on August 26, 1994; (ff) the charge in Case 15–CA–12724, filed on June 7, 1994, which alleges the unlawful discharge of Dwight Ballard; (gg) the charge in Case 15–CA–12745, filed on July 19, 1994, which alleges the unlawful issuance of a warning notice to Lennie Valentine; (hh) the charge in Case 15–CA–12771, filed on August 4, 1994, which alleges the unlawful discharge of Valentine; and (ii) the charge in Case 15–CA–12781, filed on August 8, 1994. Upon the General Counsel's motion at trial, and over the Charging Party's objections, I consolidated the fourth complaint for hearing with the first three.

In answers to the four complaints (the complaint), Respondent admits that this matter is properly before the Board, but it denies the commission of any unfair labor practices. On the entire record and my observation of the demeanor of the witnesses,[7] and after considering the briefs and reply briefs that have been filed by all parties, I make the findings of fact and conclusions of law that are entered infra.

Overview of the Case

The Act provides:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities
>
> . . . .
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

This case involves the resistance of an employer to an organizational attempt of its employees by many alleged violations of Section 8(a)(1) and (3) of the Act. The organizational attempt began openly on March 2, 1993, when the Union began handbilling at Respondent's gates. In NLRB Case 15–RC–7767 (the representation case), a Board election was conducted on June 25, 1993. The tally of ballots reflected that 1804 ballots had been cast for representation by the Union, and 1263 ballots had been cast against such representation. There were 850 determinative challenged ballots. From September 27, 1993, through March 29, 1994, Board Hearing Officer Bernard Aronstam conducted a hearing on objections and challenges. The hearing officer issued a report on the objections and challenges on

[3] This charge and the complaint allegations based upon it were dismissed at trial.

[4] No complaint was issued on the basis of this charge; the validity of its serving as a basis for complaint allegations is separately discussed in Ruiz' case.

[5] This charge, however, was severed and dismissed at trial on October 31, 1994.

[6] Id.

[7] I make credibility resolutions on the basis of my observations and appraisals of the demeanor of the witnesses and other factors to which I may

March 27, 1995. Review of this report was still pending before the Board at the close of this trial. Counsel for Charging Party represented at the hearing that the organizational effort was continuing at the time of the close of trial.[8]

The allegations of the complaint are based on approximately 250 separate incidents (or "alleged incidents," because Respondent denies that many occurred). There are 120 incidents upon which the complaints base allegations that Respondent violated Section 8(a)(1) by threatening and interrogating employees and by engaging in other such conduct toward employees. There are 136 incidents upon which the complaints base allegations that Respondent violated Section 8(a)(3) by discharging employees, or refusing to hire employees, or by engaging in other such conduct toward employees. In this decision, most of the events that gave rise to the 8(a)(1) allegations are discussed along with the incidents that gave rise to the 8(a)(3) allegations; this is because most of the alleged threats and other acts of alleged violations of Section 8(a)(1) were directed at the alleged discriminatees.

For almost all of the 8(a)(3) cases, Respondent denies that its supervisors had knowledge of any prounion sympathies of the alleged discriminatees. For each of the cases of allegedly unlawful discipline, Respondent answers that its actions were caused solely by the misconduct of the alleged discriminatees. And, for almost all cases of alleged unlawful discipline, the prior warnings (written or oral) are in issue. For each of the cases of allegedly unlawful transfers, assignments or harassment, Respondent answers that its actions were prompted solely by business necessity. For each of the refusal-to-hire cases, Respondent answers that the applicants were not needed, or they were not qualified, or they were not bona fide applicants.

In only a few of the discharge and warning-notice cases does the General Counsel admit that the alleged discriminatees engaged in precisely the conduct that Respondent attributes to them. The General Counsel usually denies that the alleged discriminatees engaged in any misconduct; sometimes the General Counsel denies that the alleged discriminatees engaged in the degree of misconduct that Respondent attributes to them. For the most part, however, I find that the alleged discriminatees did, in fact, engage in the conduct that Respondent attributes to them.

Anticipating that I might find that many of the alleged discriminatees had engaged in some misconduct, the General Counsel adduced a great deal of evidence in support of alternate theories of disparate treatment. The General Counsel contends that, even if the Board finds that the alleged discriminatees engaged in part or all of the misconduct attributed to them, other employees engaged in equivalent (or worse) misconduct and those other employees received lesser discipline than the alleged discriminatees—or they received no discipline whatsoever. All of which is to say that resolutions of virtually all of the discharge allegations, and many of the warning-notice allegations, turn on issues of disparate treatment.

In this decision, I refer to as "comparators" those employees whom the General Counsel contends were issued no discipline, or lesser discipline, for offenses that were equivalent to (or worse than) the offenses that were committed by the alleged discriminatees. The "comparators' cases" are recitations of what happened (or did not happen) to the comparators. Because Respondent disputed whether they were equivalent, the comparators' cases introduced by the General Counsel were, in essence, litigated as well as the cases of the alleged discriminatees. Many warning notices that had been issued to comparators were introduced; all such warning notices have the employees' badge numbers, but often the names are omitted, or the signatures (if any) are illegible. I have, therefore, included the badge numbers of the comparators when discussing their warning notices, as well as making my best effort at reading any signatures. Because of remoteness, and the probable lack of probity of the testimony that would be adduced, I rejected the General Counsel's offers of evidence of comparators' cases if those cases occurred before January 1, 1990 (that is, more than 3 years before the beginning of the organizational campaign involved in this case).

In cross-examination of many of the alleged discriminatees, Respondent offered certain unrelated warning notices that the alleged discriminatees had received (also after January 1, 1990). Over the General Counsel's objections, I received those warning notices as evidence of the existence of certain rules (which evidence did not unduly burden the record). Then, in its case, Respondent also attempted to introduce all post-1989 warning notices for violations of selected disciplinary rules as evidence of consistent enforcement of those rules. (One such exhibit included 1097 electrical department warning notices.) I admitted such warning notices where the existence of a rule was in issue. (For example, I admitted warning notices for violations of a rule against an employee's asking for an excessive number of excused early departures from work because the existence of the rule was still in issue when those warning notices were offered.) Where the existence of a rule was not in issue, however, I rejected as irrelevant (and burdensome) Respondent's offers of consistent treatment of other employees. I rejected such offers because, no matter how many other employees had been discharged for, say, tardiness, the issue before me was the real reason that an alleged discriminatee had been discharged allegedly for tardiness although a significant number of comparators had been permitted to be tardy to the same (or lesser) extent without being discharged.[9] The cases admitting evidence of disparate treatment are legion; the cases admitting evidence of prior consistent treatment are few, and in each of those few cases the General Counsel had introduced no evidence of disparate treatment. In this case, the General Counsel introduced a large amount of evidence of disparate treatment, and Respondent made no attempt to rebut it.

This is a construction industry case. Unlike the circumstances of a factory, the employees do not usually stay in one place, and they are supervised by more than one level of supervision. The fact recitations therefore necessarily involve resolutions of differing accounts of actions that occurred in different places. Also, all discipline of the alleged discriminatees was reviewed by multiple supervisors, and differing accounts of what happened at the various levels of review also are to be reconciled.

[8] On April 29, 1997, the Board overruled the objections and challenges and certified the Union as the collective-bargaining representative of Respondent's production and maintenance employees. Thereafter, on October 22, 1997, the Board found Respondent to be in violation of Sec. 8(a)(5) of the Act and ordered it to bargain with the Union. *Avondale Industries*, 324 NLRB 808 (1997).

[9] A "significant number" can be one; see, for example, the cases of alleged discriminatees Philip Perera and William Smith, as discussed infra.

Further contributing to the length of this decision is the fact that, in virtually all of the cases of alleged unlawful discrimination, knowledge of prounion sympathies is denied; in fact, Respondent claims that some of the alleged discriminatees were actively antiunion. For the most part, however, I find that the employees who claimed that they had engaged in union activities did so; and I find that Respondent's supervisors had knowledge of those activities at relevant times.

Finally, each of the refusal-to-hire cases involves an issue of knowledge of prounion sympathies, as well as issues about the applicant's qualifications for the job applied for and the bona fides of the application.

Editing Methods and Techniques

Certain passages of the transcript have been electronically reproduced in this decision. Proper punctuation of transcript quotations is supplied where necessary to avoid confusion; supplied punctuation is noted by brackets where it is arguably significant. Corrections to the transcript are noted by citation of volume number, as well as pages and line; for example, where I state, "Vol. 91, p. 21,079, L. 4., is corrected to change 'file' to 'final,'" I am making reference to page 21,079, line 4, of the transcript's Volume 91. (Vol. 91 is the transcription of the 91st day of the trial.) When referring to testimony, I often cite the volume of transcript in which that testimony is to be found; for example, "Doe (vol. 21) testified . . . would be an indication that Doe testified on the 21st day of trial and that his testimony may be found in that volume of the transcript."

Ellipses between questions and answers indicate that an objection has been overruled. I eliminate, without ellipses, many introductory remarks such as "Thank you," "All right," and "Okay," from quotations of questions to the witnesses. Many extraneous testimonial usages of "you know" are also omitted without indication by ellipses. When witnesses quote themselves (or others), and they re-affirm who is talking, I eliminate, without indication by ellipses, one or the other of the affirmations; e.g., "And I told him, you know, I said that" becomes "And I said that" Where a witness "backs up" and corrects himself, *and the correction is meaningless*, I have entered the correction without ellipses; e.g., "I called our security—not security—our safety department" becomes, "I called our safety department." Also, where lawyers "back up" and re-start quoted questions to witnesses, I omit the surplusage (e.g., "Didn't he—I mean she—ask you" becomes "Didn't she ask you" I have not changed any of the witnesses' words, but I have inserted bracketed words within quotations of testimony for purposes of clarity and context, and to correct meaningless errors in the testimony. (For example, "he workmanship" becomes "[his] workmanship.") Generally, typewriter-style quotation marks ("X") are those that have been entered by the reporter; typographic quotation marks ("X") are those that have been entered by me; however, I also use typewriter-style quotes when quoting exhibits that themselves contain quotation marks. Where the originals of quoted exhibits contain insignificant grammatical errors, I often enter corrections without indication rather than use "[sic]." (I do not make grammatical corrections, or use "[sic]" for grammatical errors, in quotations of the testimony.) In the quotations of transcript, any parenthetical "[sic]" is the entry of the reporter; any bracketed [sic] has been entered by me. Capitalizations and underlines in quotations of exhibits are original.

For purposes of economy only, and certainly with no disrespect intended, I eliminate "Jr.," "Sr.," "III," and middle initials from the names of all witnesses, except where such entries are necessary to distinguish between individuals who have the same last names. (In this decision there are two employees named Michael James Boudreaux; one is an alleged discriminatee, the other is not. There are also two employees named Glenda Dennis; one is an alleged discriminatee, the other is not. References to Michael James Boudreaux or Glenda Dennis are to the alleged discriminatees, unless otherwise indicated. Also mentioned in this decision are two individuals named Ronald Johnson; one is an alleged discriminatee, the other is a supervisor; all references to Ronald Johnson are to the alleged discriminatee, unless otherwise indicated.)

The Charging Party was represented at trial by most able counsel; however, the ultimate positions of the Charging Party were, and are, usually the same as those of the General Counsel. Therefore, for purposes of economy, when I express the position of the General Counsel, I include the position of the Charging Party, unless otherwise indicated.

II. JURISDICTION

Respondent admits that it is a corporation with an office and place of business at Avondale, Louisiana, its facility or plant, where it is engaged in business as a shipbuilder. During the 12-month period ending January 31, 1994, the Respondent sold and shipped from its facility goods valued in excess of $50,000 directly to customers located at points outside Louisiana. During the same period of time the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from suppliers located at points outside Louisiana. Therefore, at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

III. RESPONDENT'S OPERATIONS AND BACKGROUND OF THE CASE

A. Respondent's Physical Facilities and Business

Respondent operates two physical plants that are involved in this case. Respondent's Avondale plant (the main plant, or the main yard) occupies about 250 acres on the west bank of the Mississippi River, about 10 miles upriver from New Orleans. Respondent's Westwego yard (Westwego) occupies about 28 acres of the Mississippi River's west bank, about 5 miles downriver from the main yard.

At its main yard (which is the only yard referred to here, unless the Westwego yard is specifically mentioned) Respondent builds oceangoing ships for the Navy, and it does some commercial (drydock) repair work. At Westwego, Respondent builds barges and casino boats. From the 1980s through 1995, Respondent built (or partially built, or was under contract for): nine landing-ships-dock (*LSDs*; 609 feet long and 12,000 tons-displacement),[10] 16 auxiliary oilers (*TAOs*; 678 feet long and 16,000 tons-displacement); four fiberglass hull mine hunters (*MHCs*; 180 feet long and 900 tons-displacement); and one oceanographic research vessel (the *T-AG*; 420 feet long and 4000 tons-displacement).

[10] *LSDs* were also referred to as "*LSD-CVs*" for "cargo variant."

Except for Respondent's frontage along the Mississippi River, a fence, with many gates, surrounds all of the main-yard property. A Mississippi River levee (the levee) winds through the property. The yard is divided into the fabrication side and the assembly side of the levee. The fabrication side (or "area") is located on the "land" side of the levee (i.e., between the fence and the levee); the assembly side is located between the levee and the River.

On the fabrication side, construction steel is received by railway. Heavier pieces of steel are delivered throughout the yard by Respondent's internal rail system; there is one work-train that consists of an engine-unit (that has a crane) and a flat-car unit. In the plate shop, steel is cut and shaped for the hull. At other points in the fabrication area, construction is begun by the manufacture of modules or "units" that ultimately become the various compartments and areas of a ship. (For example, storage rooms, engine rooms, and fuel tanks are all fabricated as units before they reach a ship that is under construction.) These units, when finished, contain up to 80 tons of steel; the exterior dimensions of some of the units are as large as 35-feet, by 50-feet, by 20-feet high. The units are constructed on "platens," which are large concrete slabs. Construction of the units is conducted on jigs, or stanchions, which support the units at heights that are from 5-feet to 12-feet above the platens. When the larger units are completed to a certain point, "transporters," which are vehicular platforms with 250-ton lifting capacities, are driven under the units. The transporters lift the units from the stanchions and carry them to a point in the assembly area where a keel has been laid and a hull has been assembled.

Respondent has about 16 gantry cranes; a gantry crane is a 100-foot-high[11] crane that move on 35-foot-wide tracks; each gantry crane has a lifting capacity of over 100 tons. When a unit arrives in the assembly area on the transporter, a gantry crane lifts it from a transporter into a hull. After being lifted into a hull, the units are welded together; then begins construction of connecting facilities (involving countless wires and pipes) between the units and other parts of the ship. The superstructures of ships, and the bow and stern assemblies, are also built as units. These are much heavier units, and they are built on platens that are located immediately in the areas of the hulls, on the assembly side of the levee. These units are lifted to the keel (or into the hull) by gantries that work together.

At some point, usually when construction is about three-quarters finished, a ship is launched by side-launch procedures. "Launchways" are I-beam-type structures across which a keel has been laid. Side-launches are accomplished by hydraulically pushing the partially assembled ships on launchways toward the water. When they are in the water, the final finishing (connections, painting, and repairing, etc.) is performed. Ships are tested (and re-tested) by Respondent before final sea-trials[12] and acceptance by the Navy. From contract-award to acceptance by the Navy, it takes about 30 months for the completion a ship.

Except for the incidents that occurred on and around the platens, most of the events of this case occurred on ships that were either on the ground or in the water. Levels of the ships are designated by number. On an *LSD*, the type of ship most often involved in this case, the first deck below the main deck is the second deck; and below the second deck is the well deck, or storage deck; below the well deck is the engine level. The very bottom of a ship is called the "grade line." Some decks are not complete spans of the ship; i.e., the second deck, or level, may be just a walkway above the perimeter of the well deck. The super-structure of a ship is called "the house of the ship" or "the house." The house includes the living quarters and, of course, the bridge. Above the main deck, the levels of the super-structure are numbered "01," usually up to "06." Above the main deck, aft of the house, is the helicopter deck (or "Helo deck," as the witnesses sometimes called it). During construction, many of the supervisors' offices were on the helicopter decks. Those offices, like many of the supervisors' offices on land, were often converted containers that had once been used in containerized-freight shipping.[13]

B. Employee Complement and Supervisory Structure

During the relevant periods, Respondent employed approximately 4100 production and maintenance employees. Overall supervision of these employees is vested in Albert Bossier, corporate president and chief executive officer. Reporting directly to Bossier are, inter alia, Ed Mortimer, corporate vice president and shipyard manager, and Ernest Griffin, vice president over personnel matters which are administered by Respondent's human resources department. Reporting directly to Griffin is Julie Bolden, the manager of employment. Reporting to Bolden is Bruce Nunez, Respondent's placement supervisor. (As his title would imply, Nunez oversees the hiring processes, but, as will be seen, his responsibilities encompass much more.)

Michael Simpson, vice president for production, reports to Bossier through Mortimer.[14] (Simpson, much more than Griffin or his subordinates, was involved in the disciplinary issues that arose in this case.) Reporting directly to Simpson are several production vice presidents, some of whom are mentioned in this decision including: (1) Emil Foret Sr., vice president in charge of ship-construction which includes the following departments: welding (mostly structural), shipfitting (mostly non-structural welding), paint, cleanup-during-construction (CDC), and rigging; (2) Caroll Danos, assistant vice president to Foret and successor to Foret when the latter retired on June 1, 1994; (3) Ken Genter, vice president in charge of ship-outfitting which includes the following departments: pipe, electrical, sheet metal, and insulating/carpentry; and (4) Eugene Blanch-

[11] In a question that I once addressed to a witness (vol. 73, p. 15, 894), I incorporated an assumption that one "might" see these tall cranes as he drove on the public road that passes by the main yard. Contrary to an assertion made by Respondent on brief (page "Steel Control-15"), I did not thereby acknowledge that I had once made some sort of surreptitious, ex parte, inspection of the plant's perimeter. Respondent's counsel calls my conduct "highly improper," and she further calls my questioning of the witness on the point "audacity." Respondent did not make any of these assertions at any time during trial, and I am loathe to dignify them with a response on any account. For possible purposes of review, however, I here state that I have never been in the vicinity of Respondent's plant.

[12] At various points, the transcript uses "C-trials" instead of "sea trials," and it is accordingly corrected.

[13] Glossary notes: On a ship, a floor is a deck; a wall is a bulkhead; a ceiling is an overhead; a set of stairs is a ladder; a straight ladder is a ladder in the ordinary sense; and a hallway is a passageway; a gangway is an inclined walkway between a ship and the ground.

[14] Barry Heaps, vice president in charge of the Westwego operations, is the counterpart of Simpson at Westwego.

ard, vice president in charge of production control and steel fabrication.[15]

Reporting to Simpson (and his staff of vice presidents) are 400 supervisors in 16 construction departments (such as welding, pipe, electrical, etc.). Each department is known by a two-digit number.[16] The employees of each department wear color-coded hardhats.[17] As well as wearing the proper color of hardhat, each employee is required to have his department's number stenciled on each side of his hardhat and his badge number stenciled on the back. The employees' badge numbers are of vital importance in the vicissitudes of the yard's life; in many of the written exchanges quoted here, employees were referred to by their badge numbers rather than their names.[18]

Each of the 16 construction departments has one superintendent who reports directly to Simpson and his subordinate vice presidents; some of the departments have assistant superintendents. There are approximately 40 general foremen and approximately 350 first-line foremen (foremen or line foremen). Approximately 200 superintendents, assistant superintendents, general foremen, and foremen are mentioned in this decision. Respondent formally admits, or stipulates, that most of those mentioned as foremen are supervisors within the meaning of Section 2(11) of the Act (supervisors). There are, however, no admissions or stipulations of supervisory status for several other individuals who were named as foremen by witnesses, and it is necessary to make findings and conclusions on the status of those individuals.

Griffin, Respondent's vice president for personnel, testified (vol. 28) that all individuals who are classified as foremen[19] have the authority: (1) to issue to employees written disciplinary citations for misconduct, (2) to allow employees to leave work early, (3) to effectively recommend employees for wage increases, and (4) to effectively recommend discharges of employees. Upon these admissions by Griffin, I find and conclude to be supervisors within the meaning of Section 2(11) of the Act those individuals whose classifications as foremen are not in dispute. For individuals whose classifications as foremen at relevant times are in dispute, subsequent findings and conclusions will be entered.

Some general foremen functioned as assistant superintendents, although they did not have the title at the time of the events in question.[20] Some foremen acted as "lead foremen." The lead foremen did not have their own crews; rather, they acted as general foremen, or assistants to the general foremen, in coordinating the work of the other foremen who did have crews. Foremen's crews varied in numbers from 6 to 30 employees, but usually they numbered about 12. Foremen wear white hardhats; they have a "W" or "S," as a prefix to their badge numbers[21] which are stenciled on their hardhats. As a group, foremen, and those classified above the level of foreman, were referred to by the witnesses for both Respondent and the General Counsel as "white hats." For example, Welding Department Foreman Robert Ramirez at one point testified (vol. 134) that he was "a white hat"; when asked what he meant by that term, Ramirez replied, "Supervisor. You know, that is what they call us, a white hat." (Employees in the classifications of operators and inspectors also wear white hardhats, but these individuals are few in number, and there is no testimony that they were ever confused with foremen, general foremen, or superintendents.)

The production and maintenance employees are classified as either mechanics or helpers. A first-class mechanic is the most skilled in a craft; a fourth-class mechanic is the least skilled of the mechanics, but he is more skilled than any of the helpers. There are six levels of helpers, level six being the entry level. For example, a person without skills may be hired and placed in the paint department where he could progress from sixth-class to first-class helper, then from fourth-class to first-class mechanic. Mechanics are further classified according to the type of work that they usually do; e.g., a mechanic in the electrical department could be a third-class internal-communications electrician or a first-class power electrician.

C. Respondent's Progressive Disciplinary System-The "Avondale Employees' Guide"

Since at least 1990, Respondent has distributed to employees and supervisors a booklet entitled "Avondale Employees' Guide." The Avondale Employees' Guide begins with statements of company policies and employee benefits, and it concludes with a section on discipline. The disciplinary section of the Avondale Employees' Guide contains a complex progressive disciplinary system that begins with:

> WORK GUIDES
>
> When an employee has violated one or more of the Company rules, he[22] will be penalized through the use of a warning system according to the nature and/or severity of the offense. Warnings may be issued by all supervisors, but usually they will be handled by the immediate supervisor of the person involved. Violations of the Company rules are divided into three categories: (1) General Offenses, (2) Major Offenses, and (3) Immediate Discharge Offenses. However, while these categories are useful, not every "offense" can be listed, nor will the particular circumstance surrounding an offense fit within a category. Accordingly, Avondale reserves the right to determine the disciplinary action to be taken for any employee conduct regardless of whether it is presented in the following list of offenses.
>
> PENALTIES FOR GENERAL OFFENSES
>
> Commission of any of the General Offenses may result in the following penalties, although in any particular case the penalty may be more severe up to and including discharge for the first offense, depending on the seriousness

[15] I substantially rely upon Blanchard's testimony (vol. 67) for the above synopsis of the production processes.

[16] Relevant department numbers are: 01, paint; 05, welding; 06, pipe; 08, electrical; 09, sheet metal; 15, CDC; and 23, operators.

[17] Relevant hardhat colors are: paint, purple; welding, yellow; pipe, green; electrical, blue; sheet metal, gray; CDC, black; and shipfitting, orange.

[18] Badge numbers were often referred to by witnesses and lawyers as "clock numbers." Respondent has over 100 timeclocks in the main yard, each of which has a number, but the distinction is always clear from the context.

[19] Actually, Griffin used the term "salaried foremen," but Brian Ponville, an admitted supervisor in the commercial repair department, is the only foreman who was mentioned during the hearing as being nonsalaried.

[20] The best example of this was Electrical Department General Foreman Gerald Gerdes who figures prominently in this decision.

[21] Even salaried foremen have badge numbers.

[22] Of course, the pronoun "he" is intended to be unisex in Respondent's handbook, as it is in this decision.

of the offense. Generally, these offenses will result in the following penalties:

FIRST OFFENSE—written first warning notice

SECOND OFFENSE—final written warning or discharge

THIRD OFFENSE—discharge

Immediately after this statement of a progressive disciplinary system for general offenses, the Avondale Employees' Guide then lists 16 types of misconduct that are general offenses; pertinent to this case are the following:

1. Unexcused absences of three (3) working days within a 30-day period.

2. Tardiness three (3) times within a 30-day period.

3. [N]ot properly displaying your identification badge when entering the plant or on request of the supervisor or security personnel.

4. Wasting time, loitering or leaving the working place without permission.

5. Quitting work, washing up, or going to the time-clock area before the specified time.

. . . .

8. Defacing the Company property.

. . . .

11. Posting or removing of any material on bulletin boards located on Company property or on any structure controlled by the Company without prior approval.

12. Violation of Company Safety Rules and Regulations through carelessness.

13. Parking and traffic violations within Company-controlled areas.

Following the listing of general offenses, the Avondale Employees' Guide states:

PENALTIES FOR MAJOR OFFENSES:

Commission of any of the Major Offenses may result in the following penalties, although in any particular case, the penalty may be more severe up to an including discharge for the first offense, depending on the seriousness of the offense.

FIRST OFFENSE—written final warning or discharge

SECOND OFFENSE—discharge

The Avondale Employees' Guide then lists 24 types of misconduct that are major offenses; pertinent to this case are the following:

1. Unexcused absences of three (3) consecutive working days.

2. Intentional negligence, inefficiency or failure to complete [the] job assigned.

. . . .

7. The unauthorized use of another person's badge or pass or permitting another person to use an employee's badge, gate pass, vehicle pass or parking pass for any unauthorized purpose.

. . . .

11. Unauthorized entry to or exit from Company premises at any location at any time. . . .

12. Deliberate interference with or failure to comply with instructions given by a Plant Protection Officer, Security Representative or other proper authority in the performance of his duties. . . .

20. [Lengthy, facially valid, no-solicitation rule followed by:] The only exceptions permitted are solicitations authorized by the Company on bulletin board notices which are posted and signed by Company management.

21. [Lengthy, facially valid, no-distribution rule followed by:] The only exceptions permitted are the distributions of written materials authorized by the Company on bulletin board notices which are posted and signed by Company management.

Following the major offenses, the Avondale Employees' Guide lists:

IMMEDIATE DISCHARGE OFFENSES:

1. Insubordination. Willful disobedience of authorized instructions issued by supervision.

2. Sleeping or deliberate loafing during hours of work.

3. Theft, [or] unauthorized removal [of,] or willful damage to[,] any property belonging to another employee, to the Company, or to a customer of the Company.

4. Committing any act of violence against another employee, including fighting on Company premises, other than in provoked self-protection.

5. Gambling in any form, including the selling of chances, pool tickets, bookmaking or any other lottery on Company premises at any time.

In a separate section, the Avondale Employees' Guide states a "call-in" rule:

REPORTING ABSENCES AND TARDINESS

It is the employee's responsibility to notify his supervisor or department head's office of the reason for his absence or tardiness on a daily basis. Failure to do so will result in either a written warning or discharge.

Failure to give such notification is not listed in the Avondale Employees' Guide as either a general offense, or a major offense, or an immediate discharge offense; however, as stated, failures to give notification of absences are equated with the major offenses by the Avondale Employees' Guide because its progression of discipline is the same.

Warning Notices

The written warning notices to which the Avondale Employees' Guide refers are also known as "citations." The preprinted form for warning notices is Respondent's "ASI-126" form.[23] Form 126 has a caption of "WARNING NOTICE"; the heading consists of blanks for the name of the employee being warned, his badge number, his department, the name of the department's superintendent, and the date. Then follows a preprinted statement that: "THIS WILL CONFIRM OUR CONVERSATION OF TODAY, IN WHICH YOU WERE INFORMED OF THE FOLLOWING." The form then states to supervisors: "Please check infraction number below." Then follow rows of boxes with numbers corresponding to the num-

[23] Several documents that are in evidence refer to Respondent as "ASI."Avondale Shipyard Industries is a divisional name of Respondent.

bers of general offenses and major offenses that are listed in the Avondale Employees' Guide. The last box in each row is designated (for checking) "other." Below the boxes are areas for entry of the "Date and Time of Issuance of Notice," and "Date and Time of Offense." Then follow six blank lines for entry of the "Reason for Warning (Explain Fully)." Sometimes supervisors did "explain" what happened; other times, the supervisor simply repeated the text of the rule that he believed to have been violated. (For example, the box for general offense-4 might be checked, and the only explanation that is entered by the supervisor is a quotation of the offense as stated in the Avondale Employees' Guide: "Wasting time, loitering or leaving the working place without permission," rather than some description like "Doe wandered away from his painting job and we couldn't find him for X minutes.") Immediately below the lines for explanation of the offense are two lines for entry of the signatures of "Supv. or Department Head," and "Witness." The persons signing as supervisor or "Department Head" was usually the supervisor who witnessed the alleged employee infraction. Other times the name of the department head, or superintendent, was entered as a matter of form, and the issuing supervisor signed as the "Witness." The "Witnesses" blanks were sometimes signed by those who were witness to the deliveries of the warning notices, and sometimes those blanks were signed by those who only witnessed warning notices being drafted and signed by supervisors. (That is, the term "witness" on the warning notices was used rather loosely.) Usually, supervisors signed the spaces for witnesses, but employees did sign as witnesses on at least some warning notices that are in evidence.[24] To the side of the supervisor's and witness's signature blanks is a blank for "Employee Acknowledgment." (Employees were not required to acknowledge the receipt of warning notices, and many of the warning notices that were received in evidence have, usually hand-entered, in the last blank, "Refused to Sign.") Then, after a bold double line, there is a five-line area for entry of "EMPLOYEE COMMENT." These comments are also voluntary.[25] Finally, the (triplicate, multicolor) warning notice forms have printed at the bottom: "WHITE ORIGINAL TO EMPLOYEE/PINK COPY FOR SUPV. FILE/GREEN COPY TO PERSONNEL."

Although the Avondale Employees' Guide states that an employee may be discharged for his second general offense, every supervisor who was asked admitted that employees were not "typically," or "usually, discharged until at least a third offense (general or major) occurred.

The Avondale Employees' Guide does not expressly state within what period of time three accumulated warning notices will, or may, precipitate a discharge. In statements to the Region during the investigation of 8(a)(3) charges, however, Respondent's counsel stated Respondent's policy in that regard. In a letter to the Region dated October 15, 1993, counsel states: "ASI's policy [is] that three warning notices within a 12-month period results in termination." Also, in a letter to the Region dated February 4, 1994, counsel states: "In accordance with ASI policy, if an employee receives three warning notices within a twelve-month period, the employee should be terminated." Moreover, all supervisors who were asked, except one, testified that they do not count against employees warning notices that are over 12 months old.[26] For example, Electrical Department Superintendent Robert Terry testified (vol. 93) that when contemplating discharging an employee for multiple disciplinary offenses: "I look at the entire file. . . . But the ones that are accountable, yes. The ones that really forge my final decision, my judgment, are the most—the current ones within the 12-month period." Or, as Welding Department General Foreman (and, in effect, assistant superintendent) Ernest Foret Sr. testified (vol. 100): "In other words, every month to the year, the old ones are torn away and are no good. After a year, the citations are no good."

Another form relevant to this proceeding is Respondent's form "ASI-22" which is entitled: "Personnel/Payroll Change Authorization." The form is used for recording discharges, pay changes, and other changes in an employee's tenure. The forms are initiated in the offices of the departmental superintendents which send them to the human resources department (or "Personnel" department, as stated on the ASI-126 forms and as named by many witnesses and all lawyers) for approval. After approval (which can involve vice presidents), a copy is returned to the production department. Although ASI-22 forms could be used for wage increases, transfers, and other changes, the discussions in this case center almost entirely on their usages in discharge situations; therefore, when I refer to an "ASI-22 form" I am indicating a discharge form, unless otherwise indicated.

(The ASI-22 forms became business records when completed, and, for some of the information they contain, they constituted admissible hearsay under Federal Rules of Evidence 803(6). (This would include bookkeeping-type matters such as the dates of discharges, changes in pay rates, etc.) On each ASI-22 form there is also an area for "Explanation For Action." In these areas, superintendents (and sometimes general foremen) entered statements of why discharges had occurred. Usually these statements relied on reports that, in turn, had been made to the superintendents or general foremen who completed the forms. I rejected these forms when Respondent offered them solely as proof of the reasons for the discharges of alleged discriminatees. I did this because I wished to have sworn, cross-examined, testimony of those reasons rather than post hoc constructions that had not been sworn to and had not been subject to cross-examination. That is, as contrasted with available, sworn, cross-examined testimony, I considered the "source of information or the method or circumstances of preparation [of the ASI-22 forms to] lack trustworthiness" within Federal Rules of Evidence 803(6). Certainly, if I believed that a supervisor's trial testimony was incredible, I would not change my mind because he had previously stated on a ASI-22 form an ostensibly valid reason to his superiors in his production department or his superiors in the human resources department. Knowing this, I further rejected the ASI-22 forms as lacking in probative value under Federal Rules of Evidence 403. Therefore, if there was an objection, I did not allow Respondent to introduce such entries solely as statements of the true reasons

[24] For example, alleged discriminatee Joseph Melton signed as a witness on warning notices issued by Pipe Department Foreman James Walker. (Compare R. Exhs. 361 and 363 with the G.C. Exh. 72.)

[25] In this decision, I do not consider probative of anything employees comments that were purely self-serving. I do consider, however, employee comments that contain admissions against their interests or comments which were otherwise shown to contain relevant matter.

[26] This one supervisor was CDC Department Superintendent Leroy Cortez who, in the case of alleged discriminatee Julie George, testified (vol. 96) to one circumstance in which he would count against an employee a warning notice that was more than 12 months old.

that given alleged discriminatees had been discharged. I did receive ASI-22 forms when probative value was shown; e.g., where the existence of a rule was an issue and the proffered form reflected that comparators had been discharged for violation of that rule. Also, where an entry in an "Explanation For Action" space on a completed ASI-22 form reflected an arguable admission against interest, I allowed the General Counsel to introduce the form into evidence.)

A final form to be mentioned here is each employee's "personnel card." These cards are maintained by the human resources department and they list (in addition to names, addresses, etc.) information supplied by the production departments. This information includes raises (marked as general or merit), changes in classifications, and transfers between departments. At the bottom of each card is listed the dates of warning notices that have been issued to the employee, but there are never any indications of what offenses caused the warning notices. If an employee has been separated, an indication of his last day to have worked is indicated (as "LDW").

D. Respondent's Timekeeping Procedures

For designations of time, Respondent's timekeeping system utilizes the 24-hour clock for hours and decimal-equivalents for minutes; e.g., a designation of "14:30" is not 2:30 p.m., as would be the case if the military timekeeping system were employed; for Respondent's records "14:30" is 2 p.m., plus 30 percent of the following hour, or 2:18 p.m. (And the civilian time of 2:30 p.m. is "14:50" under Respondent's system.) In my narrative I shall use the usual, "civilian," designations of time. E.g., if something happened at 2:30 p.m., I will refer to 2:30, not "14:50." If an entry on some documentation of an event (such the entry of time of an offense on a warning notice) uses "14:50," I shall indicate my conversion by quoting it as "[2:30]." As most events occurred on the day shift, I shall not always add "a.m." or "p.m."; it should be understood that times from 7 through 11:59 are a.m., and 12:01 through 3:30 are p.m., unless otherwise indicated.

The hours of the first shift are from 7 a.m until 3:30 p.m. The vast majority of the employees, including most of the alleged discriminatees, worked the first shift. In this decision, unless otherwise specified, all events that are described occurred during, or immediately before or after, the first shift; and the events involved only first-shift employees. The hours of the second shift are from 3:30 to midnight. The hours of the third shift are from 11 p.m. until 7 a.m. There are half-hour unpaid lunchbreaks on the first and second shifts; there is none on the third. The second and third shifts are sometimes staggered for business necessities; e.g., certain crews will report at 2 p.m and leave at 10:30 a.m. Some shifts, especially staggered shifts, are worked without a lunch period; e.g., a crew of employees may be told to report at 2 p.m and leave at 10 a.m, with no scheduled lunch period.

Respondent schedules no paid breaks for the employees; however, virtually all of the foremen who testified acknowledged that they allow rest breaks of about 10 minutes in the mornings, or afternoons, or both. During these breaks employees are allowed to eat and drink what they carry with them; some foremen also allow employees to leave their work areas to go to vending machines in the yard to buy snacks and canned sodas. The pervasiveness of this practice is an issue in this case.

Man-Hour Control Reports

About 100 timeclocks are located throughout the yard. Employees are assigned badges that can be inserted into any timeclock as they enter or leave the yard.[27] The timeclocks electronically read the badges and record the punch-in/out times and credit those times to the employees' badge numbers. The punch-in/out times are recorded on daily "Transaction Registers," but the employees are not paid strictly according to those records, as will be discussed below.

Each foreman maintains a daily "Man-hour Control Report" (MCR) for the employees whom he supervises. MCRs have been in use by Respondent since 1990. The heading of each MCR contains spaces for entry of the foreman's (and crew's) department number, the date, the area of the yard in which the crew is working that day, and the supervisor's badge number. The body of each MCR contains 23 rows and 10 columns; each row is dedicated to one employee, and information about what the employee did that day is entered in the column spaces of each row.

The columns of the MCRs are designated for entries of: (1) the employee's badge number; (2) his signature; (3) his starting time; (4) a job account number (this is the number of the contract for the ship upon which the employee is working); (5) a work-order number, or cost-code number, for the employee's work (this is the budget authorization for the employee's activity during the time indicated); (6) his "time out"; (7) the foreman's, or timekeeper's, corrections (divided into two subcolumns for initials and date); (8) codes for the employee's absence, if any; this column is divided into three subcolumns headed: (a) "34," a code for indicating that the employee is using a vacation day that day; (b) "68," a code for indicating that an employee is working with no lunchbreak scheduled; and (c) "other," for entry by the foreman of other codes to categorize absences as excused, unexcused, or otherwise, as discussed below; (9) time of the employee's "late arrival," if any; this column is divided into two subcolumns for entries of time that the shift started and the (later) time that the employee actually started working; and (10) the foreman's comments (this section is usually left blank, but sometimes the foreman enters codes for, or descriptions of, certain actions that occurred during the shift, as discussed infra).

As employees are moved from one job account to another, or from one cost code to another, they may sign in and out more than once during a day on the same MCR. They also sign out, and sign back in, when they go to the medical department (often called the "First Aid Department"), to meetings conducted by Respondent, or to attend to personal business elsewhere in (or out of) the yard. The employees will sign different MCRs during a day if they are reassigned from one foreman's crew to another.

Foremen usually report to work at least one-half hour before the shift starts. During that time, the foreman will enter on the rows of the MCR the badge numbers of the employees whom he expects to be on his crew on that day. The foreman will also enter the work order number, and the cost-code number of the first (and sometimes only) job that the employee will be working on that day.

At the beginning of each day, each employee enters his starting time on the MCR in the row that his foreman has desig-

[27] And for a supervisor to take an employee's badge is an act of discharge.

nated for his badge number. If the employee is late, the foreman may tell him to enter the time at which his pay should start. (For example, if an employee is scheduled to arrive at 7, and he actually arrives somewhere between 7 and 7:15, his foreman may tell him to enter 7:15 as his starting time, and the employee will be paid from that point, no matter when he punched in.) At the end of the day, the foreman enters the employee's "time out" and presents the MCR to the employee for signature. (At the top of the signature column is preprinted: "My signature certifies that I worked on the job as indicated for the time shown.") Throughout the hearing, witnesses used the term "sign in" to describe what the employees do when they meet their foremen at the beginning of a shift. Employees do not place their signatures on MCRs until the end of a shift. By saying "sign in" the witnesses clearly intended to indicate their entries of their starting times in the appropriate column, not the affixation of their signatures. In this decision I also use the term "sign-in," and I also mean that the employee has met with his foreman and has entered his starting time on the foreman's MCR.

The "other" subcolumn for coding absences is most important for many aspects of this case; many employees were disciplined for excessive absenteeism, but the codes are important for other issues, as well. At the bottom of each MCR is listed the following key for "Absentee Codes":

02—Non-workday
03—Jury Duty
04—Terminated
05—Excused
06—Unexcused
07—Occupational Injury
08—Personal illness
09—Vacation

When an expected employee does not appear at the beginning of a shift, the foreman enters one of these codes for him on the MCR, sometimes after consulting with his superintendent's office to see if that employee had called in and given a reason for his absence.[28]

At the end of each workday, foremen enter on their daily MCRs the "Time Out" for each employee and has the employee sign in the "signature" column. Each foreman signs his MCR at a blank designated "Salaried Supervisor." The MCRs are routed to the timekeeping and data entry departments for recordkeeping purposes.

E. Inception of the Organizational Campaign

When the Union began handbilling at various of Respondent's gates on March 2, 1993, it also began distributing "Union Yes" clothing-stickers and badges. Later, it distributed bumper stickers, baseball-style caps, and T-shirts. (The stickers and the legends on the items that were distributed are referred to herein as prounion insignia.) Union authorization cards were also distributed to some employees who, in turn, distributed them to other employees.

Respondent freely acknowledges that it does not wish to have its employees represented by a labor organization. In fact, one of the policies expressed early in the Avondale Employees' Guide is:

> NON-UNION STATEMENT
>
> Avondale is the only major non-union shipyard in the United States. It is also one of the most productive shipyards in this country. Because the management has a good relationship with its employees, both benefit. You are treated fairly and the Company makes a fair profit. When the Company makes a fair profit, you have a secure job and receive better wages and benefits.
>
> The management prefers to operate its facilities without the interference of organized labor. We prefer to communicate directly with our employees in all matters affecting their jobs. We feel it is to the best advantage of both the employees and the Company to continue to be non-union.

In short, Respondent is the only major shipbuilding company in the United States that does not recognize a labor organization as the collective-bargaining representative of any of its employees, and it wishes to stay that way. There is, of course, nothing illegal in maintaining this position; the issue before the Board is what, in response to the organizational campaign, Respondent did in an attempt to remain nonunion.

Production Vice President Simpson testified (vols. 55, 139) that he was in charge of the Respondent's efforts to oppose the organizational campaign, and those efforts also began on March 2. On that date, Simpson convened all 4100 employees and announced Respondent's opposition to the organizational attempt. Also within the first week of the campaign, according to Simpson and other supervisors who testified, all supervisors were convened to receive instructions by Respondent's counsel about how the campaign was to be conducted. Each foreman was issued a "TIPS" card. The acronym was explained to the foremen, as Simpson testified:

> We have a little card that I had all of the supervisors carry called the TIPS card. And it reminded them that you cannot threaten, you cannot intimidate, you cannot use surveillance, you can't make any promises. In other words, [the TIPS card told the supervisors that] we will hold the campaign, but we will do it in accordance with the law.

A copy of the TIPS card was received in evidence. It is a two-inch, by four-inch, laminated card with printing on both sides. On one side the supervisors are given the acronym and told that, "[i]n other words, threats, intimidation, promises and surveillance are prohibited." On the same side of the card supervisors are told that they should tell all employees:

> You and Avondale are 100% against a union.
>
> Signing a union card is like signing a blank check. It can obligate the employee to pay dues, fees, and even fines.
>
> You believe unions drive a wedge between employees and supervisors.
>
> Union work rules and restrictions can cripple efficiency and productivity.

On the other side of the TIPS card is a table indicating where and when solicitations and distributions can occur (in rows for working time and nonworking time, and in columns for work areas and nonwork areas).

In a second convocation of the supervisors that was conducted by a company lawyer and Simpson, an 11-page handout entitled "A Foreman's Guide to a Union-free Policy for Avon-

[28] See the "Reporting Absences and Tardiness" section of the Avondale Employees' Guide, as quoted above.

dale" (the Foreman's Guide) was distributed. In addition to the title, the cover sheet states: "CONFIDENTIAL—For Supervisors and Managers Only—1993." The second sheet repeats the "Non Union Statement" of the Avondale Employees' Guide. The following three pages contain 33 numbered paragraphs under the heading "What Supervisors Can Do." The first 30 paragraphs suggest lawful campaign statements that may be made to employees. The last three of the numbered paragraphs are:

> (31) You may enforce company conduct and safety rules during the Union organizing campaign regardless of whether or not the employee favors or shows interest in the Union. Wherever possible, follow your past practice in the enforcement of all company rules.
>
> (32) You may make job assignments, overtime work, and shift changes so long as this action is done without regard to the employees' interest in or support for the Union.
>
> (33) In short, you may say anything, do anything, so long as your activities do not involve a promise, or threat, and which do not discriminate against employees because of their union sympathies. We must avoid interrogating and spying on employees concerning union activities; we must avoid interfering, restraining or coercing employees in their federal right to participate and assist in union organizing activities.

Following this, the handout lists "TIPS" again, but this time "Interrogation" is listed for the "I," and the booklet states: "Do not ask questions of employees about their union sentiments or activities." The following six pages list other lawful employer campaign statements, in question-and-answer form, and it concludes with the admonition to supervisors that discipline of employees, even for valid reasons, can lead to unfair labor practice charges and such charges can lead to a bargaining order.

Simpson testified that, in addition to the two meetings at which he and Respondent's counsel distributed TIPS cards and the foremen's guides, he and counsel had other meetings with the supervisors in March and April. At first, these sessions included all foremen and general foremen, as well as superintendents. Later, the meetings were only for superintendents. These meetings were conducted weekly during March and April, and those in attendance were given information to be used by foremen as "themes-of-the-weeks" in future meetings with their employees.[29] At the ends of each of these March–April meetings, counsel reminded the superintendents in attendance of the TIPS cautions. Simpson testified that after general foremen and foremen stopped meeting with him and counsel in the March–April period, the themes-of-the-weeks were distributed to foremen through the superintendents. Simpson testified that, throughout the remainder of the preelection period, as well as distributions of the themes-of-the-weeks, Respondent relied on the superintendents to remind the general foremen to remind the foremen of the TIPS cautions.

There are approximately 350 line foremen (as opposed to general foremen) at the plant; during the preelection period, the line foremen conducted approximately 350 weekly campaign meetings which were usually based on the themes-of-the-weeks. Several of the foremen's weekly meetings with the employees are mentioned in this decision. (Such meetings are referred to as "Employer campaign meetings.") Some of the employer campaign meetings were conducted by two or more foremen for their combined crews; sometimes, general foremen and superintendents participated in, or just observed, the employer campaign meetings.

Simpson testified that in the employer campaign meetings, foremen were to "give the employees a chance to comment." The foremen were to relay the employees' comments to Simpson through the superintendents.[30] Simpson testified that he asked for this information because "I was interested in the employees' concerns." As it happened, many employees took advantage of their "chance(s) to comment." Many of the comments expressed by employees in the employer campaign meetings revealed prounion sentiments; many did not. The General Counsel relies on testimony about some of these comments as proof of Respondent's knowledge of the prounion sympathies of many of the alleged discriminatees. Respondent argues that many of the employee comments at the employer campaign meetings were ambiguous, at best. Respondent further argues that some of the alleged discriminatees made antiunion statements at the employer campaign meetings (and elsewhere).

Simpson acknowledged that during the preelection period the foremen were encouraged to express their individual opinions about the organizational attempt to the employees. The General Counsel alleges that many of the foremen's expressions of opinion at the employer campaign meetings (and elsewhere) constituted threats in violation of Section 8(a)(1), the TIPS admonitions and the foremen's guides notwithstanding. The General Counsel further contends that, the TIPS meetings and the foremen's guides notwithstanding, in its response to the organizational campaign Respondent's supervisors committed numerous violations of Section 8(a)(3).

As Respondent points out on brief, in my decision in *Comcast Cablevision*, 313 NLRB 220, 223 (1993), I commented that I felt that such instructions as the TIPS instructions, when given by lawyers, "have an ameliorative value and make violations less probable." Although Respondent's lawyers conducted two TIPS training sessions for all supervisors, the bulk of the coaching of first-line foremen came in the form of the themes-of-the-week messages that had come from counsel and Simpson to superintendents, then to the general foremen, and then to the foremen. That is, much of the coaching came to the immediate supervisors of the employees second-hand, or third-hand. (And it came from decided nonlawyers.) The possibilities for misunderstandings in such a system are obvious. Moreover, as I quote in the following narrative of the allegations, many of Respondent's supervisors showed on cross-examination (or even on direct examination) that they did not understand the TIPS instructions; indeed, one supervisor testified that he understood that the import of the TIPS training was that he should not intimidate *himself*.[31]

Therefore, as I did in *Comcast*, I have considered the testimony about the TIPS instructions, and the additional instructions of the foremen's guide, but I find that such testimony is not controlling.

[29] Some of the information was on topics such as the Respondent's financial position, and all of the information was designed to convey expressions of Respondent's opposition to the organizational attempt.

[30] The foremen were to transmit written reports about their meetings. The General Counsel subpoenaed the reports, but only a few existed by time of trial.

[31] This was Foreman Joseph DeNicola (vol. 119).

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The 8(a)(1) Allegations

1. Charges that support the 8(a)(1) complaint allegations

The first 8(a)(1) complaint allegations to be decided are found in paragraph 19(a)(b) of the second complaint. As detailed below, the allegations in that paragraph are essentially that in the spring of 1993, in speeches by its President and Chief Executive Officer Albert Bossier, Respondent threatened employees with plant closure and other adverse employment actions because they had become or remained members of, or had given assistance or support to, or had been active on behalf of, the Union. Before consideration of the substance of paragraph 19(a)(b), I shall deal with a procedural contention that is raised by Respondent because disposition of that contention affects the dispositions of many other 8(a)(1) allegations of the four complaints before the Board.

Respondent moves to dismiss paragraph 19(a)(b) on the ground that it is not supported by a charge under Section 10(b) of the Act. Section 10(b) provides in pertinent part:

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Respondent similarly moved to dismiss some 54 other 8(a)(1) allegations that are contained in the four complaints; to wit: first complaint, paragraph 14; second complaint, paragraphs 7–9, 13, 17, 20–24, 28–33, 36, 38, 40, 42, 43, 46, 50, 51, 53–57, 60–63, 65–67, 71, 74, and 76–79; third complaint, paragraphs 7 and 8; and fourth complaint, paragraphs 8–11, 13–14, 16, and 18–19. Essentially, Respondent contends that none of these complaint allegations is supported by a charge within Section 10(b) because none of them track timely, previously filed, charges.[32] Respondent's objections to the litigation of the listed 8(a)(1) complaint allegations may be considered as a group, and I shall do so at this point in order to avoid repeated interruptions of the narratives concerning the substance of the allegations with repeated re-statements of the procedural law that disposes of Respondent's position.[33]

Redd-I, Inc., 290 NLRB 1115 (1988), identifies factors relevant to a determination whether certain otherwise unsupported allegations can be included in a complaint based on their close relationship to a pending timely filed charge. Under this "closely related" test, the Board will examine whether the complaint allegations (1) involve the same legal theory as allegations in the timely filed charges, (2) arise from the same factual circumstances, and (3) entail the same or similar defenses by the respondent involved.

The first charge that is before the Board was filed on behalf of alleged discriminatee James (Danny) Cox in Case 15–CA–12171–1 (the Cox charge). The Union filed the Cox charge on June 7, 1993, alleging that Cox was discharged in violation of Section 8(a)(3) and (1) of the Act. The gravamen of that charge is that Cox was discharged for his support of the organizational drive that was begun by the Union on March 2, 1993. The threats that are alleged in paragraph 19(a)(b) are expressions of animus against the activities of those employees, such as Cox, who supported that organizational attempt. Such expressions of animus, if found, would tend to prove the validity of the complaint allegations made on behalf of Cox. Conversely, if Respondent could show that such expressions of animus were not true, it would tend to defeat the Cox allegation of the complaint. Therefore, the allegations of paragraph 19(a)(b) arise from the same factual circumstance as the Cox charge (the organizational campaign that began on March 2), the same legal theory is involved (that Respondent's actions are the products of animus toward that organizational attempt), and Respondent's defense is the same (that Respondent held no such animus). Accordingly, I conclude that the allegations of paragraph 19(a)(b) are closely related to, and supported by, the Cox charge.

The Cox charge also supports all other 8(a)(1) allegations that are found in the four complaints. All of the other 8(a)(1) allegations (other threats, interrogations, impressions of surveillance and the like) are also closely related to the Cox charge because all of them are premised on the theory that they were caused by Respondent's animus against the organizational attempt, they happened while that attempt was taking place, and Respondent's defenses are the same. Or, as stated in *Fiber Products,* 314 NLRB 1169 (1994):

> All allegations relate to the same alleged animus and pattern of reprisals against the [alleged discriminatees] for their perceived roles in encouraging concerted activities, ultimately including union organizing activit[ies] among Respondent's [employees].

See also *Recycle America*, 308 NLRB 50 (1992). Also, in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board indicated, at footnote 7, that it follows courts of appeals decisions that find sufficient relationships between charges and complaints in circumstances involving "acts that are part of the same course of conduct, such as a single campaign against a union" and acts that are "part of an overall plan to resist organization." The Board in *Nickles Bakery* cited *NLRB v. Central Power & Light Co*., 425 F.2d 1318, 1321 (5th Cir. 1970), and *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973). Finally, see also *Texas World Service Co.v. NLRB*, 928 F.2d 1426, 1437 (5th Cir. 1991), which holds the relationship between complaint allegations and a charge "need be close enough only to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge."

Therefore, complaint allegations of violative conduct that occurred within the 6-month period *before* the filing of the Cox charge are supported by that charge under the literal terms of Section 10(b) of the Act. Complaint allegations of violative conduct that occurred after the filing of the Cox charge are also supported by that charge under Section 10(b). In *NLRB v. Fant Milling Co*., 360 U.S. 301, 306–307 (1959), the Court clearly stated:

> Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act

[32] For some of the listed complaint allegations, the Union did file identical charges, but only after the complaints had issued. I agreed with Respondent that these postcomplaint charges could not retroactively support complaints that had previously been issued, and I rejected them as exhibits. Those postcomplaint charges will not be referred to again.

[33] Respondent also objects to the litigation of many of the 8(a)(3) complaint allegations as not being supported by unfair labor practice charges; these objections will be considered as the 8(a)(3) cases are decided.

> for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.

Under the standards of *Redd-I* and the other cases cited supra, the allegations that Respondent continued to conduct unlawful acts in interference, restraint and coercion to defeat the Union's organizational campaign are related to the charge that Cox was discharged for participating in that campaign.

That is, all of the 8(a)(1) allegations in the four complaints are based on conduct that allegedly occurred within 6 months before the filing of the Cox charge (or allegedly occurred after the filing of the Cox charge), they concern Respondent's alleged opposition to the organizational attempt that began on March 1, and, if prima facie cases of the 8(a)(1) violations are made out by the General Counsel, Respondent is required to prove the nonexistence of the animus underlying those alleged actions. I therefore find and conclude that all of the above-indicated 8(a)(1) complaint allegations before the Board are supported by the Cox charge.

Additionally, some of the 8(a)(1) allegations of the complaints are supported by more than one charge. As well as being supported by Cox's charge, 8(a)(1) complaint allegations that the alleged discriminatees were threatened because of, or interrogated about, their protected activities are supported by the indisputably timely filed charges that Respondent discriminated against those employees in violation of Section 8(a)(3). For example, the indisputably timely filed charge that alleges that employee Barbara Marshall was discharged in violation of Section 8(a)(3) supports the 8(a)(1) allegation of paragraph 20 of the second complaint that Marshall was threatened with discharge because of her prounion sympathies. This is because the allegation that Marshall was threatened with unlawful discharge is obviously related closely to the timely filed charge that Marshall was, in fact, discharged in violation of Section 8(a)(3); therefore, the complaint's allegation of the threat is supported by the charge that Marshall was unlawfully discharged, even though there is no charge which, in heac verba, alleges that threat. Equally, the timely filed charge that alleges that employee Mark Cancienne was unlawfully transferred supports the 8(a)(1) allegation of paragraph 60 of the second complaint that Cancienne was told that his transfer was caused by his support of the Union. The other complaint paragraphs that are supported by indisputably timely filed charges of unlawful discrimination, as well as Cox's charge, are listed as the narrative progresses. (The dates and numbers of the timely filed 8(a)(3) charges that support the 8(a)(1) complaint allegations are entered above in the listings of all of the charges that support the allegations of the four complaints. In the narratives of the discrimination cases, those dates and numbers are not repeated; the relevant charge numbers and dates may be easily found by reference to the names of the alleged discriminatees in the above listings of all of the charges.)

2. Alleged threats and other coercive remarks in speeches by Bossier

As the second complaint originally issued, paragraph 19 alleged:

> About late April or early May 1993, on a date not more precisely known to the General Counsel, Respondent, by Al Bossier, at its facility, threatened its employees with plant closure if they selected the Union as their bargaining representative.

The General Counsel called three witnesses in support of the original paragraph 19. Those three witnesses testified that during one of the Bossier speeches that they attended, Bossier made statements to the effect that the plant would be closed if the Union were selected as the employees' collective-bargaining representative. These three witnesses placed the Bossier speeches at some point between early March and May 25.

Respondent contends that Bossier spoke to the employees only on five dates: May 24, June 1, 15, 21, and 23. In presenting its case, Respondent placed into evidence a copy of a transcription of a tape recording of Bossier's June 1 speech.[34] Thereupon, the General Counsel moved to amend paragraph 19 so that the above-quoted original complaint language is now subparagraph (a) of paragraph 19, and a second subparagraph is now:

> (b) About June 1, 1993, Respondent by Al Bossier at its facility:
>
> (i) Disparaged, ridiculed and/or swore at its employees because they aided or supported the Union by, inter alia, referring to employees supporting the Union as whiners, malcontents and slackers;
>
> (ii) Characterized the activities by its employees in support of the Union as disloyalty to Respondent;
>
> (iii) Threatened its employees with plant closure and/or job loss if they selected the Union as their bargaining representative, and thereby informed its employees it would be futile for them to support the Union;
>
> (iv) Promised to consider [improving] the employees' wage rates and the employees' wage [scales if the employees] rejected the Union as their bargaining representative.

I shall consider the April-May allegations and the June 1 allegations separately.

a. Threat of plant closure by Bossier in the April or May 1993 speeches

The first witness that the General Counsel called in support of the allegation that Bossier threatened the employees with plant closure in April or May was alleged discriminatee Phillip Perera. Perera (vol. 10) testified that he attended three plant-wide meetings conducted by Bossier. At one such meeting, which he placed "in late March or early April, '93":

> Mr. Bossier stated that if the Union were to get in, Avondale would not be able to stay competitive and get any more contracts, and that they would probably have to close down, and he referred to other unionized shipyards that already closed down, such as NASCO in California.

The second witness that the General Counsel called in support of the April-May allegation was former employee George Pecot. Pecot (vol. 56) testified that he attended Bossier meetings that were conducted "during the month of April up until about May 25." Pecot was asked by the General Counsel, and he testified:

[34] The recording was surreptitiously made by an employee. Respondent placed the transcription in evidence in an effort to discredit the three witnesses whom the General Counsel called in support of par. 19(a). I have discredited those witnesses on other grounds, infra.

Q. [By Mr. Morgan] [for the General Counsel]: [D]id you ever hear any member of supervision speak about the Union?

A. Yes, sir. Al Bossier, the president of the Company.

Q. And where was this?

A. This was at a speech he was giving at the shot house.

Q. Who else was present at these speeches?

A. Everybody in the yard. It was a command performance.

Q. Do you recall anything that Mr. Bossier said at any of these speeches about the future of Avondale? . . .

THE WITNESS: All right. What he had told us during one of his speeches is that, if the Union was voted in, Avondale would not be able to compete with other shipyards, would be forced to shut down and he would lock the gates.

MR. MORGAN: Okay. No further questions.

While Pecot was on cross-examination, counsel for the General Counsel conceded that the phrase "lock the gates" was not in Pecot's pretrial affidavit.

The third witness that the General Counsel called in support of the allegation that Bossier threatened the employees with plant closure in April or May was current employee Clifford Dumas.[35] Dumas (vol. 58) testified that he attended a meeting conducted by Bossier "in March or April, '93." On direct examination Dumas was asked, and he testified:

Q. Did you ever hear Mr. Bossier say anything concerning the future of Avondale?

A. Well, he spoke about if the Union would come into the shipyard, that we would be like a shipyard down in Mississippi—Ingalls, I think it was—that we would lose contracts and they might have to lay off some people or close the yard.

On cross-examination Dumas testified that he thought it was more likely that the speech at which he heard this remark was in March.

Bossier is Respondent's chief executive; a plant-closure threat by him would be among the strongest possible types of evidence of antiunion animus.[36] The credibility resolution on this issue is, therefore, one of the most important in this case. I discredit the General Counsel's three witnesses and I credit three of the witnesses who were called by Respondent on the point.

As Pecot stated, employee attendance at the Bossier meetings was compulsory. The General Counsel called 169 witnesses in the presentation of his case-in-chief. Of those witnesses, 44 were employee-applicants (who had been denied employment), or they were supervisors or other nonemployees. Alleged discriminatee Donald Varnado was discharged on April 7; therefore, he would not have heard any of the speeches.[37] And the General Counsel's witness alleged discriminatee Patrick Noah was discharged on June 10; therefore, Noah would not have heard all of Bossier's speeches. Therefore, in addition to Perera, Pecot and Dumas, there were 120 witnesses who were called to testify by the General Counsel, all of whom were employed continuously between March 2 and the Board election of June 25. Because attendance was mandatory, all 120 of those witnesses would presumably have been present at all of the Bossier meetings. Of those 120 witnesses who could have been, but were not, asked about the Bossier meetings, at least 50 were no longer employed by Respondent at time of trial and had absolutely nothing to fear by giving (more) testimony that was adverse to Respondent. That is, of the 123 witnesses who presumably heard the speeches (50 of whom certainly should have been asked about the Bossier meetings), the General Counsel called only 3 witnesses in support of paragraph 19(a) of the second complaint: Perera, Pecot, and Dumas. On many other issues the General Counsel offered witnesses to the point of being cumulative. I draw an adverse inference against the General Counsel for his failure to call, or question, more witnesses in support of paragraph 19(a).

Moreover, instead of simply being asked, "What, if anything, do you recall that Bossier said?," Pecot and Dumas were directly led to the topic of the "future of Avondale." This leading was improper because the General Counsel did not first attempt to exhaust the witnesses' recollections about Bossier's speeches.[38] Additionally, any lock-the-gates statement by Bossier in his speeches would have produced a mind's image not likely to have been forgotten by any employee who heard it. Yet, no employee, other than Pecot, testified that such a statement was made by Bossier. Pecot, himself, also omitted the statement from his pretrial affidavit; I was left with a most unfavorable impression when that omission was left unexplained during Pecot's redirect examination. Again, a lock-the-gates statement would have been so dramatic, and would have made such an impression, that Pecot would not likely have left it out of his affidavit if it had been made by Bossier. And, if it had occurred, the lock-the-gates statement by Bossier would have been mentioned during the testimony by other of the General Counsel's witnesses, especially Perera and Dumas. Finally, Perera impressed me unfavorably as he testified in his case that a doctor misdated an excuse that he submitted for an absence *three times*, and that factor has a negative impact on his credibility on this point.

In summary, I do not believe the testimonies of Pecot, Dumas, or Perera that Bossier told the employees in any of his speeches (whether given in the March–April period or later) that the plant would close if the Union were selected as the

[35] In this decision, I used the term "current employee" to describe witnesses who were employed by Respondent at the time that they testified. Such employees are readily subject to recriminations (subtle or otherwise) for false testimony against their employers, the sanctions of Sec. 8(a)(4) notwithstanding. Therefore, while there is no presumption of credibly that is afforded to current employees, their employment status is a significant factor in assessing credibility because their testimony "is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745 (1995), citing *Gold Standard Enterprises*, 234 NLRB 618, at 619 (1978); and *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961). However, on the basis of other factors that I have considered, I discredit Dumas' testimony. Elsewhere in this decision, I discredit many other current employees, despite their employment status, because of their demeanor or other factors that I mention infra.

[36] See *Gissel Packing Co*., 395 U.S. 575 (1969).

[37] When Varnado was on cross-examination, he acknowledged his pretrial affidavit that stated that he attended a meeting held by Bossier; it is apparent to me that Varnado had confused Bossier and Simpson (who gave a speech on March 2).

[38] I repeatedly warned all counsel against such leading, but it still sometimes occurred. Where the leading turned out to be significant, I have used it as a factor in determining credibility.

employees' collective-bargaining representative. Conversely, I did find credible the testimony of Simpson, Respondent's vice president for production, that Bossier gave speeches to the entire yard only on May 24 and June 1, 15, and 23. I further found credible the testimonies of Simpson, former Shipfitting Department Supervisor Anthony Bishop (vol. 84), and carpenter Andrew Barker (vol. 150) that Bossier made no such threats in any of his speeches. Accordingly, I shall recommend dismissal of paragraph 19(a) of the second complaint.

b. Threats and promises by Bossier in a June 1, 1993 speech

As noted, for proof of the allegations of paragraph 19(b) of the second complaint, the General Counsel relies upon a transcription of a tape recording of Bossier's June 1 speech (which transcription Respondent placed in evidence). The transcription is eight pages long, double spaced. After the first line, there are no paragraph breaks. For the part that I quote, I insert paragraph breaks and I insert certain words, and certain grammatical marks, in brackets. Notations of "(sp?)" and underlines are in the original of the transcription.[39] In the speech, Bossier mentions: Philip Miller, the chief organizer for the Union; NASCO, another American shipbuilder; and Texaco, a customer of NASCO. The transcription of Bossier's speech begins:

> [A]n incident recently happened that could have affected our ability to get future [N]avy work [,] possibly even future commercial work. I need to tell you about that incident. But before I do that I want to bring you up to date on the current state of the ship building industry in the United States and I would also like to tell you how I see it[,] the way Avondale fits in that industry[,] not only now but the next five years.

The next four pages of the transcription contain Bossier's description of industry competition and the necessity for good production. Bossier thereafter continued:

> Now you have to believe that a union at Avondale will increase our cost to do work. I certainly believe that. Go look at Nasco (sp?) on the west coast, our prime competitor. That it can even cost you [a shipyard] actually getting the [contract for a] job due to the action that a union will take against the Company if it doesn't get what it wants.

Bossier then read portions of a letter from a union representative of employees at NASCO to Texaco; then Bossier stated that, after the representative of the union at NASCO sent the letter to Texaco, NASCO was thereafter prohibited from bidding by Texaco; Bossier continued:

> Now I believe the Union is trying to do the same thing here at Avondale that they were trying to do at NASCO and I'm gonna tell you why. On May 3 of this year Phil Miller, the Union boss, the one that is the head of this campaign, decided to belly ache to Captain Donohue. He is our chief Navy customer. He is in charge of all the work that is out here. I want to quote you from the letter that the Union boss wrote to Captain Donohue at the Naval Station about us. Here is what he said[:]

Bossier then read from a copy of a letter from Miller to the Navy. In the letter Miller complained that Avondale had charged the Navy for time that the employees had spent attending employer campaign meetings. Bossier continued:

> [U]nquote, signed Philip Miller, Organizer, New Orleans Metal Trades Council.
>
> What do you think about a low down lie like that[?] He's got more man hours charged to any Navy contract. All of the time its charged to account number 828–199[40] as it should have been. . . . This guy Miller[,] the Union boss[,] could have cost us the LSD C 52 job what we need badly. He could have cost us the ice breaker job. He could have cost us the [S]ealift conversions. He could have disqualified Avondale for bidding on the 12 new [S]ealift ships that are vital to our long term future.
>
> Now let me tell y[']all something[.] [T]hose of you who signed union authorization cards I want to ask you [:] [I]s that the kind of representation you want[?] Do you want the Union boss Miller, that you signed your authorization card for, to represent you in trying to get Avondale in trouble with its best, largest and only customer right now[,] the U.S. Navy[,] and have possibly caused us to be disbarred and disqualified from getting any future work just [like] they [the Union at NASCO] tried to do at NASCO with the Texaco job[?] God I can't, I just can't believe this. . . .
>
> You know Miller's efforts to bash Avondale didn't work this time. But we certainly don't need any more of this. Let me tell you[,] look what the Union's just done in this short period of time. They have slandered Avondale with its biggest customer. *I think they are trying to put us out of business.* I still wonder why they came from Ingles [another Gulf Coast shipbuilder] over here. As we told you earlier in this campaign. You know[,] those of [you] who are for Avondale already understand how serious this is. Those of you who are undecided need to think[,] and really think[,] about what this union is doing to Avondale. I tell you what this shows me. It shows me they want their dues money and if they can't get it they don't give a damn what happens to Avondale.
>
> Now those of you who are for this union I can only conclude that you hate this company so much you don't give a damn if the Union takes actions to destroy us. And this letter show[s] me this is what they are trying to do. If you really want to destroy Avondale you oughta go support and vote for the damn union. You know[,] those of you who don't want to destroy Avondale[,] you better make sure these whiners, malcontents and slackers don't even come close to winning this election.
>
> You know[,] to get future [contracts] we are going to have show our customers, both the Navy and commercial ones[,] that we are reliable shipbuilders so that they will want a contract with us in the future. Don't let the Union put a cloud over Avondale's future. Secure your future by rejecting this union and its bosses. Now lets all go back to work and help secure Avondale's future. Thank you very much.

The transcription ends at this point.

Bossier's June 1, 1993 Speech—Conclusions

In his June 1 speech, Bossier said that a successful organizational attempt "will increase our cost to do work." Bossier fur-

[39] I do not use "[sic]" in this quotation of the transcription; there would be so many that it would be unreadable.

[40] Actually, this should have been "82A0199," a job account number that was designated for the employees' time that was not billed to the Navy.

ther accused the Union of trying to harm Respondent, just as another union had tried to harm another employer, NASCO. And Bossier said that Respondent may be harmed by what Miller had done. Nowhere, however, did Bossier state that Respondent was, or would be, harmed by what Miller had done. In fact, Bossier told the employees that what Miller had done, "didn't work this time." Bossier assuredly did not say that Respondent would close its plant because of what the Union, through Miller, had done. Nor did Bossier say that what some employees were doing (organizing, and potentially increasing costs) would cause the plant to close. Nor did Bossier in haec verba characterize the prounion employees' conduct as "disloyalty." And nowhere in the speech did Bossier promise changes in wages or wage rates if the employees reject the Union. I shall, therefore, recommend dismissal of the last three subparagraphs of paragraph 19(b) of the second complaint.

I find, moreover that the allegations of the first subparagraph of 19(b) are not proved by the text of the June 1 speech. It is true that Bossier called prounion employees "whiners, malcontents and slackers," but, nevertheless this appears to have been only simple name calling. There was no threat in these words or any other part of the speech. I shall therefore recommend that all of paragraph 19(b) be dismissed. (As discussed below in the Section 8(a)(3) cases, however, I do find Bossier's June 1 speech contained evidence of animus toward the protected activities of the alleged discriminatees and other employees.)

3. Gerdes' threat of more strict enforcement of work—rules

Gerald (Jerry) Gerdes is classified as a general foreman in the electrical department, but actually he functions as an assistant superintendent to Robert Terry who is the superintendent of the department. Gerdes has over 350 individuals reporting to him, including several general foremen and many more line foremen. Gerdes is the alter ego of Terry when Terry is absent for any reason. His office is adjacent to Terry's, and Terry has Gerdes present for important conferences that Terry conducts with others. Terry (vol. 93) admitted that he considered Gerdes his "senior general foreman."

Alleged discriminatee Chad Durocher (vol. 9) worked in the electrical department at the time of the June 25, 1993 Board election. Durocher testified that on June 28, the first workday after the election, he was standing on one side of an open doorway on a ship when he overheard parts of a conversation between Gerdes, General Foreman Mark Poche, and Foreman Jerry Kaywood. Durocher testified:

> Q. What was Gerdes saying?
>
> A. Gerdes said, "Yes, we are going to put a stop to all this good time they have been having; we are going to crack down—yes. We are going to put a stop to all this good time they have been having; we are going to crack down on them; and we are going to force time limits on them going to the bathroom; and we are going to post watches on the workers to make sure that they don't have a chance to have a break."
>
> And I saw somebody was coming towards the door, and I left.
>
> Q. Do you recall anything else that was said?
>
> A. No. I left.
>
> Q. Do you recall anything being said by Gerdes about the Union?
>
> A. He said he had an idea who the union supporters were, that they were going to crack down on the good times they had been having.

Based on this testimony by Durocher, paragraph 58 of the second complaint alleges that Gerdes unlawfully threatened Respondent's employees with more strict enforcement of work rules.

When called by Respondent, Gerdes (vol. 122) was asked and he testified:

> Q. [By Mr. Hymowitz]: I want to recall your attention to June 28, 1993, which is the Monday following the election. Okay?
>
> A. Yes, sir.
>
> Q. Did you have any kind of meeting in—with any of your foremen on that day, specifically Mark Poche, Jerry Kaywood, and several other foremen on board one of the ships in an electrical shop on the ship, in which you told those individuals—
>
> JUDGE EVANS: Wait a minute.
>
> MR. HYMOWITZ: Yes.
>
> JUDGE EVANS: Did you have such a meeting?
>
> THE WITNESS: Yes, sir, I did. . . .
>
> Q. [By Mr. Hymowitz]: Did you tell those individuals, We are going to have to—we are going to put a stop to all this good time they have been having. We are going to crack down. We are going to put a—we are going to force time on them going to the bathroom. We are going to post watches on workers to make sure they don't have a chance to have a break, and that you had an idea of who the union supporters were, and you were going to crack down on the good times they were having. Did you ever say anything like that?
>
> A. No, sir. . . .
>
> Q. Okay. What was the subject of discussion of that meeting?
>
> A. There were several. . . .
>
> Q. [By Mr. Hymowitz]: Well, let's hear what the several were.
>
> A. First of all, we had lost the election. Well, we didn't lose it, but we didn't win it, but it was business as usual. . . . And then we did go into other issues, such as compartment completion, testing, cable-pulling, which we normally do.
>
> Q. Was anything discussed on that occasion concerning employees being in the bathroom between 3:20 and 3:30 p.m.?
>
> A. No, sir.
>
> Q. Was anything discussed on that occasion concerning putting time limits on employees in the bathroom?
>
> A. No.

Poche testified for Respondent (vol. 77), but he was not asked about any discussions that he had with Gerdes during the week in question; specifically he was not asked if he discussed disciplinary rules with Gerdes on the first workday following the Board election. Respondent did not call Kaywood to testify.

I had repeatedly warned all counsel against leading where matters were important and likely to be disputed, and where they were not just preliminary. For example, on day 50 of trial, well before Gerdes testified, I ruled on an objection by Respondent:

Q. [By counsel for the General Counsel] All right. To what extent, if any, did either Mr. Pertuit or Mr. Foret, Sr. explain to you that answering the question was voluntary?

A. They didn't.

MR. HYMOWITZ: Objection, Your Honor. That is a leading question.

JUDGE EVANS: Yes, it is. And we are getting now to matters that [are] going to apply to many other allegations. Let's ask the witness in completely non-leading form first, and get—exhaust his [recollection]. All right.

MR. HYMOWITZ: Move to strike that testimony, that question and the response, Your Honor.

I granted Respondent's motion to strike, but, of course the damage had been done.

In making the instant credibility resolution, it is to be noted that there are only two witnesses who testified on this most important allegation, Durocher and Gerdes. It is to be noted that the General Counsel first asked Durocher what was said; after exhausting his recollection, the General Counsel then led Durocher only to a general topic, mention of the Union. Conversely, despite repeated warnings with other witnesses, despite the fact that I stopped the testimony in an obvious attempt to get Respondent's counsel not to lead the testimony beyond the fact that Gerdes attended such a meeting, and despite the fact that Gerdes was claiming at least some memory of what had been said, Respondent led Gerdes directly to the gravamen of the allegation to elicit a denial. Only after that leading did counsel ask Gerdes what had been said during the conversation that Durocher had overheard. This factor of the leading of Gerdes, coupled with the failure of Respondent to ask Poche about the incident and Respondent's failure to call Kaywood, is decidedly a factor in my discrediting Gerdes. (Also, Gerdes was most unconvincing in his "business-as-usual" testimony.) Moreover, I found Durocher credible in his testimony. Although Durocher required being led to the general topic of "the Union," he was not led to the "idea-who-the-union-supporters-were" testimony. Also, after being led to the general topic of "the Union," Durocher's response was immediate, and he sounded convincing. Finally, although Durocher is an alleged discriminatee, his testimony that Gerdes had threatened more strict standards of rules-enforcement (including, specifically restroom time rules' enforcement) would not tend to help his case. Durocher was discharged for allegedly threatening a supervisor; he was not discharged for violation of the comparatively minor conduct rules to which Gerdes referred.

I find that Gerdes spoke to others in circumstances where an employee could hear, and Gerdes said that Respondent was going to retaliate against employees because of Respondent's nonvictory (if not a loss) in the June 25 Board election. Gerdes specifically threatened retaliation against those whom Respondent knew or suspected of being "union supporters." (Terry admitted (vol. 42) that, during the last weeks before the Board election, he maintained a list of "prounion supporters.") The form of retaliation that Gerdes announced was the application of more strict standards of rules enforcement.

I therefore conclude that, in violation of Section 8(a)(1), Respondent, by Gerdes, on June 28, 1993, threatened its employees with more strict enforcement of work rules because they had aided or supported the Union or because Respondent suspected them of having aided or supported the Union.

4. Threats by DeNicola

a. DeNicola's threat of plant closure

The second complaint, at paragraph 43, alleges that on two occasions during the week of June 14, 1993, Respondent, by Sheet Metal Department Foreman Joe DeNicola, threatened employees with plant closure in violation of Section 8(a)(1). The General Counsel called two witnesses in support of this allegation, alleged discriminatee Peter Legaux and current employee Junius Duplantis. Legaux testified to one such occasion during the week of June 14, when Duplantis was not present; that testimony is considered in the discussion of Legaux's discharge, infra. Duplantis testified to another such occasion during the week of June 14, when Legaux was not present. I address that testimony by Duplantis in this section.

According to Duplantis (vol. 29), during the 2 weeks before the Board election, he and Robert St. Pe, a helper,[41] were working when they were approached by DeNicola, and:

> Joe DeNicola had told us that if the Union got in Al Bossier was going to close the yard down, put a lock on the gate, and shut it down, or just let the work run out at the yard and let the yard close up.

Duplantis testified that he did not respond to DeNicola. St. Pe was not called by either side.

On direct examination, DeNicola (vol. 119) was asked about the TIPS instructions that he had received; then DeNicola was asked about Duplantis and he testified:

Q. Now, Mr. DeNicola, I am going to ask you some questions and I need you to answer them for me. Did you ever have a conversation with Mr. Duplantis in his work area or anywhere in which you told him that, if the Union gets in—or got in, Al Bossier was going to close the yard down, put a lock on the gate, and shut it down, or just let the work run out at the yard and let the yard close up?

A. No, never have.

Q. Did you ever say anything like that to Mr. Duplantis?

A. Never have.

Q. Is there any reason why you wouldn't have used a statement like that?

MR. LURYE: Objection.

JUDGE EVANS: Overruled.[42]

Q. [By Mr. Hymowitz]: Go ahead.

A. Yes. It doesn't make any sense. How can Joe DeNicola say that Al Bossier is going to close the yard down? And . . . another thing, too, I would be intimidating myself or whatever. No, I wouldn't say nothing like that. I didn't say that. I did not say that.

Duplantis is a current employee who was testifying against the interests of his employer. As noted above, witnesses in that position who testify with nothing apparent to gain have much to

[41] Vol. 29 of the transcript, where it states that the helper's name is "St. Pete," is corrected.

[42] During the hearing, I permitted questions on direct examination of why the witnesses did, or did not do, certain things. Over consistent objections by the Union, I further allowed Respondent's witnesses to testify about why they would have said, or would not have said, certain things.

lose, the existence of Section 8(a)(4) notwithstanding.[43] In *Flexsteel*, supra, 316 NLRB 745, the Board held that, although there is no presumption of credibility that is to be afforded to the testimony of current employees, such status is a factor that the trier of fact may weigh in assessing credibility. I give considerable weight to the factor, although I have discredited many current employees in this decision on the basis of other factors that I indicate as the narrative progresses. I do credit Duplantis who had a more credible demeanor than DeNicola, as well as being a current employee.

It does not matter that DeNicola was a first-level supervisor and felt that he could not speak for Bossier. In the case of *NLRB v. Champion Laboratories*, 99 F.3d 223 (7th Cir. 1996), a supervisor named Tate was alleged to have made threats that the employer would close if an organizational attempt was successful. The court held:

> Champion also contests the NLRB's conclusion that supervisor Tate violated the NLRA when she commented, "I hope you guys are ready to pack up and move to Mexico." According to Champion, the NLRB's conclusion that Tate's remark constituted a threat of plant closure was unreasonable because Tate lacked decision-making power, and none of the workers could reasonably believe either that she could carry out the threat, or that it was made on behalf of the Company. Moreover, Champion argues, there is no indication that Tate's comments intimidated or coerced anyone.
>
> Our case law makes clear that Champion cannot succeed on these arguments, which confuse the standards applicable to threats with those applicable to coercive interrogation[s]. *Guardian Industries* [*Corp.* v. *NLRB*], 49 F.3d [317] at 322. Unlike an interrogation, which is coercive only if a reasonable employee would perceive it as such, a threat of plant closure is per se a violation of Section 8(a)(1). *NLRB v. Electro-Voice, Inc*., 83 F.3d 1559, 1570 (7th Cir. 1991). The rationale behind this difference in treatment is that any threat of plant closure "reasonably tend[s] to coerce employees in the exercise of their rights." *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989); *Electro-Voice*, 83 F.3d at 1570.

Like DeNicola, Tate was at the lowest level of the Employer's supervisory structure. Nevertheless, Champion makes clear that a threat of plant closure is a per se violation of the Act.

I conclude that Respondent, in violation of Section 8(a)(1), by DeNicola, about June 14, 1993, threatened its employees with plant closure if they selected the Union as their collective-bargaining representative.

b. DeNicola's threats of more strict enforcement of work rules

Duplantis further testified that on June 28, the first workday after the June 25 Board election, DeNicola addressed his crew. According to Duplantis:

> Joe had told us after the first whistle had blown to be careful, don't get caught walking around too much, picking up [stopping work] before the whistle. Don't go to the bathroom a lot because there would be supervisors walking around in the area to take down badge numbers off of your hardhats and keep track of how many times you went to the restroom. They are looking to get rid of the dead heads.

Duplantis further testified that he had not previously been told that there would be a limit on the number of times that employees could use the restrooms, and employees had gone whenever they needed to. Alleged discriminatee Legaux (vols. 7, 8) also testified about DeNicola's June 28 meeting with the crew. According to Legaux:

> I remember right after the whistle blew, he [DeNicola] told us to hold on, he wanted to have a little meeting with us, and he said that, "You are going to have a lot of rumors around this yard and we have a lot of people getting fired, a lot of people get written up, because Avondale is taking charge."
>
> And he said, "People going to the bathroom too many times and people hanging around, walking around, people picking up early, and people hanging around the bathrooms [are] going to start getting fired and start getting written up."

Based on this testimony by Duplantis and Legaux, paragraph 55 of the second complaint alleges that DeNicola unlawfully threatened Respondent's employees with more strict enforcement of work rules. DeNicola denied the testimony, but I found Duplantis and Legaux more credible, and I do credit their testimony.

Like Gerdes who, on the same day, made essentially the same remark that was overheard by Durocher, DeNicola did not mention the results of the immediately preceding Board election or the prounion sympathies that so many employees (if not an unquestioned majority) had expressed in that election. Like the timing of Gerdes' remarks, the timing of DeNicola's remarks made the objects of the threat clear, as any reasonable employee would understand.

I therefore conclude that, in violation of Section 8(a)(1), Respondent, by DeNicola, on June 28, 1993, threatened its employees with more strict enforcement of work rules because they had aided or supported the Union or because Respondent suspected them of having aided or supported the Union.

c. *DeNicola's threat against wearing union insignia*

Duplantis further testified that about a month after the June 25 Board election, when he and mechanic Edward Eugene were working together, DeNicola approached. According to Duplantis:

> Joe had mentioned that the guys walking around with stickers and shirts on better hope that the Union gets in because if it don't, they are gone.

At the time, some employees were wearing prounion T-shirts or prounion stickers on their clothing. Based on this testimony by Duplantis, paragraph 65 of the second complaint alleges that DeNicola threatened Respondent's employees with discipline for wearing union insignia.

DeNicola denied this testimony by Duplantis; however, again, I found Duplantis to be credible. To be "gone," of course, means discharged, and that is what DeNicola told Duplantis the wearers of prounion insignia would be. I therefore conclude that Respondent, in violation of Section 8(a)(1), by DeNicola, in late July 1993, threatened its employees with discharge because they had worn prounion insignia.

[43] Arguments to the contrary under estimate the subtleties of the workplace, and they over estimate the effectiveness of the administration of Sec. 8(a)(4).

5. Torres' threat against serving as election observer for the Union

A third allegedly violative incident that occurred on June 28, 1993 (again, the first workday after the Board election), was raised in Respondent's case. Michael Torres is a general foreman over the inside sheet metal shop at the plant; that shop has about 135–150 employees. Current employee Michael James Boudreaux[44] was an observer for the Union at the June 25 Board election. Early in the hearing, the General Counsel called Boudreaux to testify, inter alia, about certain remarks made by Torres. The General Counsel offered Boudreaux's testimony only as evidence of animus, not as evidence of a violative threat. In its case, Respondent called Torres, inter alia, to deny the remarks attributed to him by Boudreaux. On direct examination Torres (vol. 118) further testified:

> I walked up to him [Boudreaux] one morning—I think it was the day after the election—and we greeted each other and I said, "You took part in the poll watching?"
>
> And he said, "Yes, I felt like I had to."

Torres testified that he then told Boudreaux that it was too noisy to talk in the shop, and he asked Boudreaux to come into his office. When they got there, further according to Torres:

> I said, "I didn't have no idea you was going to do that [be an observer for the Union]."
>
> And he said, "Well, I made up my mind that morning that I was going to be a poll watcher and I decided to go the Union's way."
>
> And I said, "I didn't have any idea, Mike."
>
> And he said, "No, I just did this the day before the election."
>
> I said, "Well, it is your privilege. I don't have any problem with it. You know, you and I are friends and if you felt that way, it wouldn't have made any difference anyway."
>
> He said, "No, I know that; I could have talked to you, but I just really made up my mind that morning."
>
> I said, "Okay, that is fine."
>
> He said, "Do you have any problem?"
>
> I said, "No, the only problem I had, Mike, was that you pointed out your fellow employees and you challenged your fellow employees; how you could do that?"
>
> And he said, "I had to do what I had to do." . . .
>
> [H]e asked me: "Are we still friends?"
>
> And I said, "Well, you know how I feel; I am on Avondale's side and, of course, you took sides with the Union, but, hey, I mean, you have got to do what you have got to do, and I have got to do what I have got to do." [A]nd I said, "No problem."
>
> And we both put our hands out over the table, shook hands, and I said, "Just keep doing me a good job."
>
> He said, "No problem with that, Mike." . . .
>
> He walked out [of the office].

Upon the conclusion of this part of Torres' testimony, the General Counsel moved to amend the second complaint to include an allegation, as paragraph 35(b), that Respondent, by Torres, "[t]hreatened an employee concerning his participation in a Board-conducted election."

[44] This is not the alleged discriminatee Michael James Boudreaux.

After the motion was granted, Respondent's counsel further asked Torres, and he testified:

> Q. Now, what did you tell Mr. Boudreaux once you got to the office?
>
> A. I said I didn't know he felt that way about the Union—and of course, that is when I just found out the day before—and the only other big question was why he challenged his fellow employees.

Once in the office, Torres told Boudreaux that the "only problem" with his acting as observer lay in the "big question": how could he have challenged his "fellow employees?" A question of "how could you have—" is a statement that the addressee has done something wrong. Wrongs are punished, as any child knows. Torres also told Boudreaux that there was "no problem" in his acting as an observer for the Union, but if Torres had really wanted Boudreaux to believe that, he would not have brought up the matter, much less bring Boudreaux into the office, the locus of managerial authority, to bring up the subject. Whether it was noisy in the shop or not, the coercive atmosphere of the office remained; in the office the supervisor and the employee were on even less of an equal footing than they had been on the factory floor.

When Boudreaux told Torres that he felt that he had to challenge some employees, and asked if the two were still friends, Torres replied that he was on Respondent's "side," and he would have to do what he had to as a response. To emphasize that he meant that he would do what he had to as a supervisor, Torres additionally told Boudreaux to be sure that he always did a good job. This conduct by Torres would reasonably tend to cause an employee to fear that his job tenure was in peril because he had engaged in the protected concerted activity, and the union activity, of acting as observer in a Board election.

I conclude that in violation of Section 8(a)(1) Respondent, by Torres, on June 28, 1993, threatened an employee with unspecified reprisals because of his participation in a Board-conducted election.

6. Autin's threat against wearing union insignia

Adeline Plaisance (vol. 51) had been employed by Respondent for 20 years when she retired in June 1994. Plaissance was a mechanic in the inside shop of the sheet metal department. Plaissance testified that during an afternoon in April or May 1994, she placed two small union stickers on her hardhat. Foreman Cliff Autin, who reports to Torres, came to Plaisance's work area to get coffee from a pot that is maintained there. According to Plaisance:

> Mr. Autin came over and got some coffee. And while he was by the coffee pot, he looked over toward me. He says, "I don't believe you would do something like this."
>
> And I looked over towards him, and I says, "What are you talking about?"
>
> And he says, "Well, the stickers on your hat." And he walked over by me.
>
> And he turned around and says, "If the wrong people got ahold of it, it could hurt you."
>
> And I said, "Well, it is just a bad joke."And I took the stickers off.
>
> And then I turned around, and he said, "I am just telling you this for your own good."

Based on this testimony by Plaisance, paragraph 12 of the fourth complaint alleges that Autin threatened employees with

unspecified reprisals if they "continued to wear clothing bearing the Union's insignia."

Autin did not testify. I found Plaisance credible, and I do credit her testimony. I conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Autin, in April or May 1994, threatened its employees with unspecified reprisals because they had worn prounion insignia.

Another such threat by Autin was attested to by current employee Michael James Boudreaux who testified (vol. 46) that 2 weeks before the June 25 Board election he was in the work area when he spoke to Autin. Boudreaux was asked and he testified:

> Q.[By Mr. Bensinger]: Could you tell us what was said, please?
>
> A. I asked Mr. Autin if [I] put a "Union Yes" sticker on my hat, would I be fired.
>
> Q. What, if any, response did he make?
>
> A. He stated, "Not right away."

There is no complaint allegation based on Boudreaux's testimony, but the testimony is further evidence of Respondent's animosity toward those employees who would wear prounion insignia. The undenied testimony by Boudreaux further shows that this specific vein of union animosity existed a long time before Autin's 1994 threat to Plaisance, and it fortifies my decision to credit Plaisance.

7. Fedrick's threat of plant closure

Tyrone Brousseau (vol. 42), a former fitter in Respondent's pipe department, testified that he began wearing "Union-Yes" stickers on his hardhat from the inception of the organizational attempt. Brousseau testified that in May 1993, he and his helper, "Kirt" (whose last name Brousseau did not know), were in the field office of General Foreman William Fedrick to get supplies that were stored there. According to Brousseau:

> Well, he [Fedrick] was asking us what we was doing in the shack together because normally you wouldn't have a helper and a fitter come to the shack at the same time. . . .
>
> I was telling him that we hadn't just come down just to get material, we had to get some pipe too on the outside of the shack. . . .
>
> Well, he say, "What you doing with those stickers on your hardhat because you know there ain't no union coming in this yard. Before they would let a union come in they would close the yard down." . . .
>
> Well, me and my helper, we left to go on the outside of the shack to get the pipe.

Kirt was not called to testify. Based on this testimony by Brousseau, paragraph 23 of the second complaint alleges that Fedrick unlawfully threatened Respondent's employees with plant closure. Fedrick (vol. 77) denied that he made any such statement to Brousseau or any other employee.[45] Brousseau had been discharged by Respondent at the time that he testified, but I detected in him no hostility toward Respondent, certainly none that would rise to the level of that which would cause him to commit perjury. Brousseau had a favorable demeanor, and I do credit his testimony.

I conclude that Respondent, in violation of Section 8(a)(1), by Fedrick, in May 1993, threatened its employees with plant closure if they selected the Union as their collective-bargaining representative.

8. Falgout's threat against wearing union insignia

Richard Bell (vol. 36), a current employee, worked under Shipfitting Department Foreman Walter (Coonie) Falgout in October 1993. Bell testified that during October, he wore a "Union-Yes" sticker on his hardhat. Bell further testified that on October 22, Falgout told Bell to stop working and come into Falgout's office. When he and Falgout were alone, Falgout hesitated at first; then:

> After he got in there he start—he asked me did I like working for him, and I told him yes. . . .
>
> I told him to just come out and say what he had to say.
>
> He said, "Well, can we have a confidential conversation?"
>
> And I told him, "Go ahead on and say what you got to say."
>
> He asked me did I like working for him, and I told him yes.
>
> He said, "Well, if you like working for me and I was you I would take that sticker off your hat because if you-know-who found out, he would have a fit about the sticker."

Bell testified that Falgout did not say who "you-know-who" was. Based on this testimony, paragraph 76 of the second complaint alleges Falgout threatened employees because they wore prounion insignia.

As Respondent's counsel did with all of the General Counsel's witnesses, she asked Bell on cross-examination to whom he had ever spoken about his testimony. Bell acknowledged that he had discussed his testimony with a union representative. Bell was then asked and he testified:

> Q. Do you recall when you discussed it with the Union agent?
>
> A. Approximately—had to be around about the second day.
>
> Q. Around approximately what?
>
> A. The second day after that—no, excuse me. I am wrong. It was the same day I received that write up.
>
> Q. Was it after work the day—I am sorry. It was the same day as what?
>
> A. It was the same day I got told.
>
> Q. It was the same day as your conversation with Mr. Falgout?
>
> A. Right.
>
> Q. So it was on October 22?
>
> A. Right.
>
> Q. Was it after work that day?
>
> A. It was after work.

(Bell further testified that when he talked to the union representative, the union representative told him that, in view of what had happened, it would be best if he took off his "Union-Yes" sticker.)

The "writeup," or warning notice, to which Bell referred had not been shown to him, and it was never placed in evidence. On brief, without any support in the record, Respondent states that Bell received a warning notice (for "intentional negligence") on October 15; also without support in the record, Respondent states that Bell was not working on Falgout's crew when he received that warning notice. From these two unsupported fac-

[45] Vol. 77 of the transcript refers to Brousseau as "Rousseau"; it is accordingly corrected.

tual assertions, Respondent argues that Bell must have been lying about being threatened by Falgout. Respondent states on brief:

> Mr. Bell said he discussed this purported statement by Coonie Falgout with a union representative "the same day I received that write up," the October 15, 1993 citation for intentional negligence. Thus, as noted above, Mr. Bell contended that he received a citation which was the subject of an unfair labor practice charge on the same day as the purported statement about his union sticker was made to him at 9:00 a.m. Not only did Mr. Bell not work for foreman Falgout at the time he received the citation, but Mr Bell testified that when he talked to the union representative the day he received the citation he was advised by the union representative to take the union sticker off his hardhat and did so.[46]

To make this argument, as well as relying on two unsupported factual assertions, Respondent relies on Bell's testimony that he had immediately corrected. That is, as quoted above, Bell first testified that he spoke to the union representative on the day that he received a warning notice, but then he immediately corrected himself and testified: "It was on the same day I got told" about his prounion insignia by Falgout. There was no question that Bell had corrected himself; as also quoted above, in her next two questions to Bell, counsel additionally confirmed that Bell was testifying that his discussion with the union representative occurred "on October 22," the same day that he "got told" by Falgout that he should not wear prounion insignia.

Obviously, Bell had not, at first, remembered the date that he talked to the union representative. This is not surprising; the date was probably not too important to him. But for Respondent to attempt to get the Board to make a factual finding based on a witness' statement that was immediately corrected is nothing short of a misrepresentation of the record. If that were not reprehensible enough, Respondent's counsel compounds her misconduct by adding two factual assertions that are not supported by the record (that Bell received a warning notice on October 15, and that Bell was not working for Falgout on that date). Respondent's counsel is severely admonished for this conduct.[47]

Also to be noted is another statement that is made by Respondent's counsel on brief. As well as Falgout, Respondent called employee Hashem Salomon, who was a leadman for Falgout. Counsel asked both if they had seen Bell wear prounion insignia. Falgout (vol. 95) was asked about Bell and he testified:

> Q. Do you recall whether or not he wore a union sticker or union insignia?
> A. No, ma'am. I can't say.

Salomon was asked about Bell and he testified:

> Q. Do you remember whether or not he wore union stickers or T-shirts or anything like that?
> A. Not really. I didn't pay that much attention to it.
> Q. Do you remember seeing if he had any or not? . . .
> A. He might have had one or two.

On brief, however, counsel states in argument that Bell never wore prounion insignia:

> To the contrary, not only Coonie Falgout, the foreman alleged to have made a remark about the statement (sic: "sticker"?), but also hourly employee Hashem Salomon who worked on the same crew as Mr. Bell at the time of the purported statement, both testified they had never seen any union sticker or other union insignia worn by Mr. Bell.[48]

This statement is false. As the above-quoted testimony reflects, neither Falgout nor Salomon testified that he had not seen prounion insignia on Bell. Falgout said that he did not remember, and Salomon testified that Bell "might have had one or two" prounion stickers on his wearing apparel. Respondent's counsel is further admonished against making misrepresentations of the record.

Salomon testified that he did not hear Falgout mention union stickers to Bell, but, again, Bell testified that he and Falgout were alone in the office when the alleged threat was made. Falgout denied calling Bell into his office on October 22, but he did not deny speaking to Bell in the office that day; Falgout was further asked on direct examination and he testified:

> Q. Did you have a conversation with Mr. Bell in your office that day that you recall?
> A. Not that I can recall.
> Q. On October 22 of 1993, did you tell Mr. Bell that if he liked working for you, "if I were you, I would take that sticker off your hat, because if you-know-who found out, he would have a fit about that sticker." Did you say that?
> A. No, ma'am.
> Q. Did you say that to Mr. Bell at any time he worked for you?
> A. No, ma'am.
> Q. Did you say something to that effect to Mr. Bell even if you didn't use those exact words?
> A. No, ma'am.

It is to be noted that counsel led Falgout by reading Bell's testimony to him and asking for a denial. Of course, counsel could have led Falgout with a question that incorporated a noncritical part of Bell's testimony (such as, "Did you have a conversation with Bell in which you asked if he liked working for you?"). Instead, Falgout was led directly to the answer; then he was asked to, in effect, confirm the testimony of counsel, again.

I found current employee Bell quite impressive, and Falgout was quite the opposite. I do credit Bell's testimony. I conclude that, in violation of Section 8(a)(1), Respondent, by Falgout, on October 22, 1993, threatened its employees with unspecified reprisals because they had worn prounion insignia.

9. Terry's threat against filing unfair labor practice charges

Donald Lund (vol. 44) is a 5-year employee of the electrical department. In July 1993, he reported to Foreman Kenny Webre.[49] Dennis Foret is another electrical department foreman.

[46] R. Br. p. "Shipfitting-8."

[47] Respondent further asserts on brief that I prevented her from examining a union custodian of records about the search for the notes that the union representative may have made when talking to Bell. The only such examination that I prevented was one that was requested over a year after production had been made; I felt that counsel was guilty of laches in her request.

[48] R. Br. p. "Shipfitting-21."

[49] This is a stipulated spelling of Webre's name, and the transcript is accordingly corrected where it differs.

Lund, a known prounion employee,[50] testified that, on a day in July 1993, he confronted Webre about something that happened earlier in the day. (That earlier event had something to do with Webre's speaking to Lund while Lund was in a line.) According to Lund:

> I saw Kenny Webre standing outside of Mr. Foret's office. And when I approached him, I told him he might want a witness for what I was about to tell him. And he did want a witness, so we stepped inside Mr. Foret's office.
>
> . . . .
>
> [With Foret present] I said, "Kenny, I am afraid I am going to have to file an unfair labor practice charge against you with the NLRB for the incident that happened an hour ago. It [an unfair labor practice charge] is kind of like the citations [warning notices] that you all issue around here, except possibly a bit more serious in that you and I will have to go to NLRB court and explain what happened."
>
> And he said innocently, "What happened?"
>
> And I said, "I feel that you harassed me unfairly in that you singled me out in the line that I was standing in and told me to, 'Get your materials and get to work,' and you didn't tell that to any of the other people who were standing in line." And I [told Webre that I] felt intimidated and harassed.
>
> . . . .
>
> [Webre] said, "I don't want to hear any of that crap. Just get back to work."
>
> And I said, "Fine."

Lund testified that somewhat later in the morning he was stopped by Electrical Department Superintendent Terry in a work area and:

> And when he [Terry] saw me, he said, "Don, come here a minute; I need talk with you." And Dennis Foret and a foreman named Darrell Hall also happened to be standing in the area close to Bob, and he called them over.
>
> . . . .
>
> He said, "Don, I am here to tell you right now that you are here to work for us; We are not here to work for you; I am not going to tolerate any attempts on your part to intimidate any of my foremen."
>
> He said, "If I ever hear of an incident like this happening again, I want you to know that you will be history."
>
> And he was yelling quite emphatically right in my face at that time.
>
> He continued: "Now, I just am giving you a final warning in front of two witnesses who will swear in court that you have just been given a final warning; Do you understand everything that I have just said?"
>
> And I said, "Yes, but." I wanted to speak, but he didn't allow it. He cut me short, and he said, "Now get back to work," again, yelling. And I did; I went back to work, and that was the end of that incident.

Based on this testimony by Lund, paragraph 63 of the second complaint alleges that Terry threatened an employee with discharge because of his intent to file an unfair labor practice charge.

Respondent did not call Webre or Foret to testify. Terry (vol. 90) testified that Webre telephoned him and reported his exchange with Lund. Terry went to the area and spoke to Lund. Terry testified that Gerdes was present; he did not deny that he called Foremen Hall and Foret to step near so that they could also be witnesses to what he was going to say to Lund. Terry testified that, in calm fashion, he told Lund that he was there to do his job and not intimidate any foremen such as Webre. Terry generally denied telling Lund that he would be discharged, and he denied telling Lund that he was getting a final warning, but he did not deny telling Lund that he "would be history" if he again threatened to file unfair labor practice charges. Gerdes testified consistently with Terry, and Gerdes did not deny that Terry told Webre that he would be "history" if again he threatened to file unfair labor practice charges. Respondent did call Hall (vol. 148), but did not ask him about the confrontation between Terry and Lund. (On cross-examination, Hall acknowledged that Terry had stopped him and asked him to be a witness to what he was going to say to Lund. Hall was not asked on cross-examination, or redirect examination, what Terry said.)

To secure the denial that he told Lund that he was getting a "final" warning, Terry was asked on direct examination and he testified:

> Q. Did you ever tell Mr. Lund that, "I am giving you a final warning in front of witnesses who will swear in court that you have just been given a final warning"?
>
> A. I did not.

It is to be noted that, for this denial, Respondent's counsel read to Terry a portion of Lund's testimony as quoted above. This was a technique that Respondent used when counsel apparently felt more confident in the denial that was forthcoming. (And, indeed, Lund had acknowledged on cross-examination that Terry had not expressly stated that he was giving Lund a "final" warning.) Whether Terry expressly used the term "final," however, is not the ultimate factual issue. The ultimate factual issue is whether Terry told Lund, as Lund testified: "If I ever hear of an incident like this happening again, I want you to know that you will be history." Such a statement could only have been comprehended by the employee as a final warning, even if the word "final" was not used.

Terry did not deny telling Lund that he would be "history" if he again threatened to file unfair labor practice charges against a supervisor. To the extent the testimonies of Terry and Gerdes can arguably be said to contain such a denial, I discredit it against the unequivocal testimony of Lund who is a current employee and who had a convincing demeanor. I further credit Lund's testimony that Terry "was yelling quite emphatically right in my face at that time," and I credit Lund's testimony about all other aspects of the exchange between him and Terry.[51]

[50] When asked on direct examination what he knew of Lund's prounion sympathies, Department Superintendent Terry testified: "Only that Mr. Lund outwardly was wearing union paraphernalia and that it was logical for me to assume he was supporting the Union."

[51] As will be seen, Terry's willingness to lie under oath was demonstrated in the case of alleged discriminatee Michael Molaison. Terry was willing to testify that he accepted a confession of misconduct from Molaison, and that he discharged Molaison for that misconduct, on a day that Terry was not even at the plant.

Terry's testimony is that he spoke to Lund because Lund had "distracted" his supervisor and said that he "wanted" the supervisor to stand before witnesses. Even as Terry related what he had been told by Webre, however, the "distraction" to Webre was necessarily minimal; even according to Terry, Webre was asked, and only asked, to come outside his office. Moreover, according to Lund's uncontradicted testimony, Webre was standing outside Foret's office, not sitting in his own office, when he was approached by Lund. Webre first agreed to go into Foret's office so that Foret could be a witness to what Lund was going to say to Webre. Webre withdrew from this agreement when Lund mentioned the NLRB. Then Webre told Lund to go back to work, and then Webre called Terry.

Terry's statement to Lund that he would be "history" was prompted by Lund's statement to Webre that Lund intended to file charges under the Act. To tell an employee that he will be "history" is to tell him that he will not be seen in the work place any longer. As such, the statement is a threat of discharge that would reasonably have the tendency to coerce any employee in the exercise of his Section 7 right to file charges under the Act. I conclude that, in violation of Section 8(a)(1), Respondent, by Terry, in July 1993, threatened its employees with discharge if they filed charges under the Act.

10. Fruchtnicht's threat against filing charges and impression of surveillance

In May and June 1994 current employee Roger McGee worked in the paint department under Foreman Robert Fruchtnicht. In early June, McGee filed an unfair labor practice charge against Respondent. (That charge, which is not before me, involved an assignment that Fruchtnicht had given McGee.) McGee (vol. 53) testified that during the week following the filing of that unfair labor practice charge he was in Fruchtnicht's office, asking about some vacation-leave credit. Then, according to McGee:

> [Fruchtnicht] told me that I had filed a grievance against him and that he didn't appreciate it and that he hadn't did anything to anybody in the shipyard. . . .
>
> He told me that he knew that I was affiliated with the Union and that he didn't know what those people over there were telling me. . . .
>
> And I said, "Yes, I am a union supporter, and it is for the protection of my job, and what was did was nothing personal."
>
> . . . .
>
> He informed me that he was taking it personally and that he had to do whatever he had to do.

Based on this testimony by McGee, paragraphs 19(a) and (b), respectively, allege that Fruchtnicht created an impression of surveillance and threatened an employee with unspecified reprisals.

On direct examination Fruchtnicht (vol. 83) testified:

> I think there was a discrepancy or a problem with a vacation day, and he came in my office to talk to me about it, and while we were in there discussing that, I brought up that I was not satisfied because he filed a complaint against me.
>
> . . . .
>
> [I said] that I took it as a personal insult that he would file it against me, because I thought we were friends, you know.
>
> [McGee] said, "Well, I did what I had to do."
>
> And I said, "Well, that is exactly what I got to do; I got to do what I got to do." . . .
>
> I said, "I have done nothing to hurt you; I have always tried to help you. I can't understand why you are doing this."
>
> And he said that, "Don't take it personally."
>
> I said, "Well, I am."

Fruchtnicht did not deny stating to McGee that he knew that McGee "was affiliated with the Union." Fruchtnicht testified that he knew that McGee was in favor of the Union because McGee had worn union T-shirts several times. On cross-examination, Fruchtnicht testified that, previous to the exchange in question, he had twice caused McGee to be transferred to get him out of work that would irritate a lung condition that McGee had developed. Fruchtnicht acknowledged that, at the time that he testified, he was still angry with McGee "a bit" over the charge that McGee had filed. Cross-examination further made clear that the "complaint" or "grievance" that Fruchtnicht was speaking about in the exchange with McGee was an unfair labor practice charge.

In summary, Fruchtnicht had previously afforded McGee favors in the form of job transfers. When Fruchtnicht learned that McGee had filed unfair labor practice charges, he became angry, and Fruchtnicht remained angry "a bit" continuing through the date that he testified. In expressing his anger over the employee's protected concerted activity of filing unfair labor practice charges, Fruchtnicht told McGee that he was taking the matter "personally," and he would do, thereafter, what he had to do, obviously in the form of retribution. Given the history behind his statement, Fruchtnicht was, at minimum, threatening that he would no longer afford McGee transfers because he had filed unfair labor practice charges.[52]

I conclude that in violation of Section 8(a)(1), Respondent, by Fruchtnicht, in early June 1994, threatened its employees with unspecified reprisals if they filed charges under the Act.

McGee regularly wore union T-shirts, and, given such circumstance, no reasonable employee would feel coerced by a statement that a supervisor knew that the employee was "affiliated" with a union. I shall recommend dismissal of the allegation that by Fruchtnicht's remark Respondent conveyed the impression of unlawful surveillance to employees.

11. Interrogations by Reeves

The first complaint, at paragraph 11, alleges that on various occasions in March or April 1993, Respondent, by Daniel J. Reeves, interrogated its employees. The only witness called by the General Counsel to testify about this allegation was Reeves, himself. Reeves was employed by Respondent in the electrical department for 13 years, the last 2 or 3 of which were as a foreman. As a foreman, Reeves reported to General Foreman James Kelly who, in turn, reported to senior General Foreman Jerry Gerdes and Superintendent Robert Terry. Reeves was friendly with alleged discriminatee James Cox; Reeves partici-

[52] On brief, Respondent's counsel describes McGee as Fruchtnicht's "quisling friend." Apparently Fruchtnicht felt the same way, but only after McGee exercised his statutorily protected right to file unfair labor practice charges.

pated in some of Cox's protected concerted activities; and Reeves was discharged on May 17, the day after Cox was discharged. (Reeves' discharge is not alleged as a violation under any theory of Section 8(a)(1); ultimately herein, I find that Cox's discharge was not violative of Section 8(a)(3).)

Reeves testified (vol. 46) that in a meeting in March or April 1993, Kelly told all of the foremen under him that he had received instructions from Terry to meet with employees individually and read a letter from Respondent that stated arguments against the Union's organizational attempt. Reeves did not retain a copy of the letter; he described it: "It is Avondale's viewpoint on the Union, you know, how the Union would be bad for Avondale and that we don't need a union, that sort of thing." According to Reeves:

> We were told to take a letter they had given us giving Avondale's view of the Union to our employees, each employee individually, and read them to them, and then ask their opinion whether they agree with Avondale, disagreed or had no comment. . . .
>
> And then we were supposed to report back numbers only to James Kelly of how many agreed, how many disagreed and how many had no comment. . . .
>
> I asked him [Kelly] if he was sure that was legal to do because we had been informed by the lawyer that we weren't supposed to ask that kind of questions. But he told me because we were just asking for numbers and not names, that we could go ahead and do it.

Reeves testified that, the same day, he did as he was told and met with 17 or 18 electricians. He reported the numerical results to Kelly. He testified that he told Kelly that he thought that any "no comment" should be considered prounion, and Kelly agreed.

Kelly testified (vol. 136) that in March, before he attended a TIPS meeting, he was asked by someone to tell his foremen to observe their crews and report back to him how many were for or against the Union. Kelly did this; his foremen reported numbers (but not names) of employees who favored (or did not favor) the Union. He reported the results to Gerdes. He testified that he had never before, or since, been asked to have his foremen make such observations. Nevertheless, Kelly testified that he could not recall who asked him to have the survey conducted in the first place. I found incredible Kelly's testimony that he could not recall who asked him to make his one-and-only assessment of the Union's strength among his employees, even though he did remember to whom he reported the results, Gerdes. (This early survey is not alleged as an interrogation; however, the evidence of it shows Respondent's disposition for systematic inquiries about the employees' prounion sympathies, and Kelly's testimonial forgetfulness reflects his indisposition to tell the truth, a factor to be considered in comparing his credibility with that of Reeves.)

Kelly testified that he gave copies of Respondent's campaign letters to his foremen and told them to read the letters to employees; he denied that he told his foremen to solicit the employees' opinions of the contents of the letters. Kelly testified that he learned not to do such things in the TIPS meeting that counsel and Simpson conducted. Kelly testified that counsel read the TIPS card and gave examples of what the supervisors could not do. Kelly was not asked to repeat any of counsel's examples of what supervisors could not do, and Kelly did not testify that he heard Simpson or counsel say in the TIPS meeting that supervisors should not interrogate employees. (It is to be noted that the acronym of the TIPS card does not use the "I" for "interrogate." The TIPS card uses the "I" for "intimidate," a factually vague term, at best. The "Foreman's Guide to a union-free Policy for Avondale" warns against interrogating employees, but Kelly testified that he never received that document.)

In summary, Kelly was an unimpressive witness. I have considered the fact that Reeves had been discharged by Respondent by the time he testified, and Reeves clearly felt that his discharge was unfair. Nevertheless, I felt that Reeves was testifying truthfully on this issue, and I do credit his testimony. Specifically, I credit Reeves' testimony that he was told by Kelly to solicit and record the opinions of the employees about the organizational attempt. I further credit Reeves' testimony that when he reported back to Kelly, he and Kelly agreed that the employees who gave noncommittal answers should be counted as prounion.

That Reeves and Kelly did not record the names of the questioned employees is not a controlling consideration. In the first place, according to this record, the employees were given no assurances that their names were not being recorded along with their answers. Even if such assurances had been given, every questioned employee would know that his name could be remembered, even if it was not written down at the time. Additionally, the questioning was done systematically; most assuredly, it "lacked the casual, amiable character which frequently typifies innocuous union-related conversations in the workplace," as phrased by *UARCO, Inc*., 286 NLRB 55 (1987), which is cited by Respondent on brief. Whether Reeves talked to the employees in private or not, the employees must have known that their opinions, collectively as well as individually, were being counted. Finally, the totality of the circumstances surrounding the interrogations included a background of multitudinous violations, including violative discharges; therefore, under the tests of *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and *Rossmore House*, 269 NLRB 1176 (1984), it must be held that the questioning itself was coercive. Also see *Reeves Bros*., 320 NLRB 1082 (1996), where an unlawful interrogation was found where an employer's agent showed an employee a business letter and asked him how he stood on the employer's position that was consistent with the letter.

I find that the systematic interrogations of employees by Reeves, conducted in a background of violative discharges, constituted conduct likely to coerce employees in their Section 7 rights. I therefore conclude that, in violation of Section 8(a)(1), Respondent, by Reeves, in March or April 1993, interrogated its employees about their union membership, activities, or desires.

12. Interrogation by Foret

Lester Friloux was employed by Respondent in the shipfitting department as a fitter during the first 6 months of 1993. He was discharged on June 15, 1993, but that discharge is not alleged to be violative. His immediate foreman was Ray Raffey; Raffey reported to General Foreman Emil Foret Jr. Friloux testified that about June 1, he was approached in his work area by Foret; no one else was present. According to Friloux:

> He said, "I heard you was getting Union pamphlets at the gate and talking to the Union people."
>
> I said, "Yes. Everybody else did it. So, you know, I got my pamphlet."
>
> He said, "I heard you was for the Union."

I said, "Well, you know, I am neutral."

Friloux testified that nothing else was said between Foret and him at the time. Based on this testimony by Friloux, paragraph 20 of the first complaint alleges that Foret unlawfully interrogated Respondent's employees.

Foret did not testify. I credit Friloux's testimony. I conclude that, in violation of Section 8(a)(1), Respondent by Emil Foret Jr., about June 1, 1993, interrogated its employees about their union membership, activities, or desires.

13. Minchew's interrogation by offering a "Vote-No" stencil

Before he was discharged in July 1993, Barry Ross was employed as a shipfitter under Foreman James Minchew. (Ross' discharge is not a subject of the complaint.) Ross testified (vol. 36) that for a few weeks before the June 25 Board election, he wore two "Union-Yes" stickers on his hardhat. During the week before the election, according to Ross, "[e]veryone had to get them [their hardhats] spray-painted, whether they wanted or not." According to Ross, when Minchew approached him with the spray-paint, he took the two "Union-Yes" stickers off his hardhat. Later in the day, Minchew approached Ross with a "Vote-No" stencil. Minchew asked Ross if he wanted "Vote-No" painted on his hardhat. Ross testified that replied that he did not; Minchew said nothing in reply. Based on this testimony, paragraph 44 of the second complaint alleges that Minchew unlawfully interrogated Ross.

Minchew (vol. 99) testified that he may have painted Ross' hardhat in "early June," but he denied offering Ross a "Vote-No" stencil. Minchew testified that he was absent from work on vacation and military leave from June 11 through 25, and he identified documentary evidence to show that this testimony was true. Ross was credible in his testimony that Minchew offered him a "Vote-No" stencil, and it is apparent to me that he was mistaken only about the date.

Offering employees "Vote-No" stickers to wear has been held to be a method of interrogating employees because the practice requires employees to declare whether they favor a union. In this case, however, the employee had just peeled his prounion stickers from his hardhat in front of the supervisor. Ross' sympathies were clear; he had been, until the moment, declaring his sympathies to the supervisor involved (and anyone else who ever got close enough to see the stickers). According to this record, no other employee was offered "Vote-No" stencils at the time; therefore, the interrogation, if any, was hardly systematic. Also, Ross was not threatened in any way. Finally, there is no other factor that implies a coercive element to Minchew's offer to Ross of the "Vote-No" stencil. For these reasons, I shall recommend dismissal of this allegation of the complaint.

14. Toledono's threat of unspecified reprisals

Johnny Burton is a current employee of Respondent's Cleanup During Construction Department (CDC). Burton testified (vol. 52) that in May 1994 he had an exchange with Foreman Roy Toledono:

> [Toledono] asked, "What are you going to do if the Union don't get in here?"
>
> I said, "Well, God makes a way for everybody. I mean, I believe that He would make a way for me to get another job because I believe in the Union, now. I have been in it before."

Based on this testimony, paragraph 14 of the fourth complaint alleges that Toledono unlawfully threatened an employee with unspecified reprisals.

Toledono did not testify. I found Burton credible, and I do credit his testimony. I do not, however, find any threat or other coercive remark to be contained in that testimony. Toledono did not tell Burton that he would be subject to any adverse consequences if the Union was, or was not, ultimately successful in the organizational attempt. Burton may have guessed that Toledono was implying that he would have to seek work elsewhere if the Union was successful, but he did not do so on any rational basis that appears in the record. Therefore, I shall recommend dismissal of this allegation of the complaint.

15. Clement's threat to deny a transfer

As it was originally issued, the second complaint, at paragraph 74, alleged a threat by Glen Clement, a general foreman in Respondent's paint department. The General Counsel called former employee Reynard Smith (vol. 23) to testify in support of that allegation. Cross-examination of Smith went beyond the direct examination. On the basis of the testimony that went beyond the direct examination, the General Counsel moved at trial to amend paragraph 74 to allege additional violations of Section 8(a)(1). I granted the motions. Paragraph 74, as originally issued, is now paragraph 74(a). An allegation that Foreman Carl Mott Jr., unlawfully warned the employees that their collective-bargaining efforts would be futile is now paragraph 74(b). An allegation that Paint Department Superintendent Charlie Bourg Sr. unlawfully interrogated employees, solicited their grievances, and impliedly promised to remedy those grievances, is now paragraph 75(c).

Smith was employed in the paint department from 1982 to July 1993, at which time he was discharged. The Union filed a charge over the July discharge, and Smith was re-hired (or possibly reinstated) in August. Smith was then placed in the sheet metal department where he was working when he was again discharged in November 1993. The stated bases for both discharges was absenteeism. (There is no allegation in this case that either of Smith's discharges was violative.)

The second complaint, at paragraph 74(a), alleges:

> About late September 1993, on a date not more precisely known to the General Counsel, Respondent, by Glenn Clement at its facility, advised its employees that an employee was not wanted back in the Paint Department because the employee [had] complained to the Union and was named as a discriminatee in an unfair labor practice charge filed with the Board.

In support of this allegation, Smith testified that during his tenure in the sheet metal department, he approached Clement and:

> Well, I asked Mr. Clement if he would consider having me work back in his department. . . .
>
> And he told me he didn't want me back . . . because I had went and filed a complaint with the Union, and which caused him to go and have to give a statement, and so he didn't want me back. . . .
>
> I just walked away.

On direct examination, Clement, was asked about the exchange with Smith, and Clement testified (vol. 86):

> He wanted to know if he could come back into the Paint Department because he wasn't making overtime with Sheetmetal. . . .
>
> I told him he blew his chance with the Paint Department by missing too much time [before Smith's July discharge for absenteeism]. . . .
>
> I told him it was nice to see him, because we were friends when he was working for us. And basically, that was it.

After that testimony about what had been said between him and Smith, Clement was (properly) led to the following denials:

> Q. Did you give a statement on Reynard Smith to anyone?
>
> A. No, ma'am.
>
> Q. In the conversation you described, did either you or Mr. Smith say anything about giving a statement concerning his termination?
>
> A. No, ma'am.
>
> Q. Did either you or Reynard Smith say anything about giving a statement to the Labor Board on any subject?
>
> A. No, ma'am.

Of course, the reference to an unfair labor practice charge (complaint), not some "statement," was the specific subject of paragraph 74(a) of the complaint, and it was the ultimately important element of Smith's testimony about Clement's conduct. Clement was not, however, asked to deny that, during the exchange with Smith, he had referred to an unfair labor practice charge, or a "complaint," as Smith had testified. To the extent that Clement's testimony could possibly be construed to constitute a denial of Smith's testimony about Clement's reference to, and expressed resentment of, an unfair labor practice charge having been filed on Smith's behalf, I discredit it. Smith was the more believable witness on the issue of what was said in the exchange in question, and I do credit Smith's testimony. I conclude that, in violation of Section 8(a)(1), Respondent, by Clement, in late September 1993, threatened an employee that it would deny him a transfer because an unfair labor practice charge had been filed on behalf of that employee.

16. Mott's threat of futility

When Smith was asked during cross-examination about other statements by other supervisors that he had witnessed, Smith testified that during his first tenure with Respondent, Paint Department Foreman Carl Mott Jr. addressed his crew at an employer campaign meeting. Smith testified:

> I remember that he spoke against the Union coming into Avondale. And he advised us to use our heads and our judgment in voting, and stuff like that, saying that the Union—voting for the Union is not going to help us. I recall that conversation. . . . Just basically, you know, "Hey, we don't want to be having a union at Avondale." You know, basically, that was it.

It was on the basis of this testimony that the General Counsel moved to include in the second complaint, as paragraph 74(b), the allegation that:

> [A]bout a date between March 1, 1993 and June 25, 1993, on a date not more precisely known to the General Counsel, Respondent, by Carl Mott, Jr., at its facility threatened its employees that their selection of the Union as their bargaining representative and/or their union or protected concerted activities was futile.

Mott testified for Respondent, but he did not deny that he made such statements to a group of employees during the preelection period.

Smith's testimony goes no further than that Mott told the employees "stuff like" voting for the Union was not going to help the employees. Smith did not say that Mott said this. As it appears in print, and as his demeanor indicated, Smith was summarizing Mott, or expressing his opinion of Mott's words, but not necessarily what Mott had said. At any rate, Smith was not testifying that Mott had used words that would reasonably cause an employee to conclude that the organizational effort would be futile because of anything that Respondent might unlawfully do. For this reason, I shall recommend that this allegation of the complaint be dismissed.

17. Bourg's interrogation, solicitation of grievances, and promise of remedy

Counsel for Respondent also elicited from Smith testimony about another employer campaign meeting that was held during Smith's tenure in the paint department during the spring of 1993. To place Smith's testimony in context, it is here noted that the production and maintenance employees had received annual, unit-wide, wage increases for several years through January 1990; however, in 1991, 1992, and 1993, no such increases were given. According to Smith, after several supervisors spoke against the organizational attempt during the employer campaign meeting, Superintendent Charles Bourg Sr. spoke. Smith testified:

> [Bourg] asked the employees what is the best—what was their thoughts of the Union coming in and why weren't the employees happy at Avondale.
>
> . . . .
>
> Well, I told him one of, some of, the reasons why we weren't happy was because of our wages and how, they was not—we wasn't getting no annual raises in years—hadn't been given raises in years, and how he [had, on a previous occasion] lied and told us that we all was going to be given a raise on this particular job that they had in the dry dock.
>
> And [I said that] he [had, on that prior occasion] said that, "Yes; Well, all you guys is going to get a raise, [n]o matter what, [if] you all get this job out in time." And we did get the [dry dock] job out ahead of time. And I said, "You didn't give us no raise; you didn't give us nothing."
>
> And [Bourg then replied that] it was [now] out of his hands to give us a raise and he couldn't do nothing for us. So that was it.

It was on the basis of this testimony that the General Counsel moved to include in the second complaint, as paragraph 74(c):

> About a date between March 1, 1993 and June 25, 1993, on a date not more precisely known to the General Counsel, Respondent, by Charlie Bourg, Sr., interrogated its employees and solicited their grievances and thereby implied[ly] promise[d] to address their respective grievances if they did not select the Union as their bargaining representative and did not engage in union or protected concerted activities.

Additionally, the General Counsel relies on certain testimony given by Clement during his cross-examination as support for this allegation. Clement testified that during some employer campaign meetings at which Bourg spoke:

> Basically, he [Bourg] was saying if anybody had any kind of safety problems, bring them up to their supervisors. If their supervisors didn't take action on them, come to him. That is what he [Bourg] was there for.
>
> . . . .
>
> Equipment problems. The same thing. If anybody had problems with equipment, you know, he was—in other words, we was out there to solve the problems that [employees] had because it was a hot topic at the time. . . .
>
> You know, we touched on contracts we were bidding that was future contracts coming up. That was another hot topic, that we weren't getting any work. We touched on that. He [Bourg] touched on the safety program. He touched on equipment being used by the Paint Department, and that if anybody had any problems, he was there to help. We were there to help.

On direct examination Bourg testified that Production Vice President Simpson had issued "questionnaires" to superintendents that contained topics to talk about during employer campaign meetings. Bourg was asked, and he testified:

> Q. [By Ms. Canny]: Aside from what you told Mike Simpson afterwards about the meeting, what did you tell employees or ask employees in terms of what their problems were?
>
> A. I didn't ask anyone personally their problems; only what was outlined on the questionnaire.
>
> Q. What, to the best you recall, did you ask or say to the group of employees that were at the meeting concerning what their problems might be?
>
> A. Again, I didn't ask them personally; only what was the topic and then what they said about the topic. And we wrote down their comments on the form that was presented to us.
>
> Q. Did you ever say or ask employees to tell you in a group what problems they had with Avondale or something like that?
>
> A. Not to say—you know, we asked them what their problems were, you know. We wanted to know, we wanted to find out if they had [problems] with working at Avondale, and what the problems were.
>
> Q. And what do you recall, if anything, employees said in response?
>
> A. I can't recall exactly what they said, because there was different things that they said. And what was said, you know, I can't remember exactly what was said.
>
> Q. Did you tell them anything in response, that you would fix those problems or anything to that effect?
>
> A. I couldn't . . . promise anything.
>
> JUDGE EVANS: Did you respond at all?
>
> THE WITNESS: I didn't respond. All I did, I wrote—I just made note of it and turned it in.
>
> Q. [By Ms. Canny]: And what kind of a note did you make?
>
> A. It was just on the forms that was presented to us to write down and turn in to Mike Simpson.
>
> Q. Did you make note of the names of any employees?
>
> A. No, we did not.
>
> Q. And what did you turn in to Mr. Simpson, that you recall?
>
> A. Only what was said, that their grievance was or what they thought should be done.

In *Uarco, Inc*., 216 NLRB 1–2 (1974), the Board stated:

> [T]he solicitation of grievances at pre-election meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board had found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

In *Uarco*, the Board found no violation because the employer rebutted the inference by repeatedly informing the employees that it could make no promises regarding the grievances that had been raised. Additionally, the Board found the record devoid of any showing of union animus or concurrent unfair labor practices on the part of the employer. This case is different.

Bourg testified that he could not promise the employees anything, but he did not testify that he told the employees that he could not promise them anything. (Indeed, Bourg testified that he did not respond at all.) Smith testified that Bourg told the employees that he could do nothing about wage increases, but Smith did not testify that Bourg told the employees that he could not do anything about the other things that might be causing the employees not to be "happy" and causing the attempt of "the Union coming in." Moreover, Clement's testimony was clear that Bourg was promising "to help" and remedy safety and equipment problems immediately, if the employees would just tell Bourg what the problems were. That is, rather than telling the employees that he could make no promises, Bourg left open the hope that the expressed grievances would receive remedy.[53] At minimum, this was an implied promise of benefits to make the employees "happy," and keep the Union out. Finally, even if there was no express promise to remedy grievances that Bourg solicited, the solicitation of the grievances during an employer campaign meeting, and asking employees "what they thought should be done," implies a promise to remedy the employees' grievances. This is especially true when, as here, the solicitation is made in a context of antiunion animus.

I conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Bourg Sr., in the spring of 1993, solicited its employees' grievances and promised to remedy them in order to discourage prounion sympathies.

I do not find in any of the testimony, however, an interrogation by Borg about the employees' union activities, memberships or sympathies; accordingly, I shall recommend dismissal of this allegation of the complaint.

[53] Although Smith did not use the word "grievance," Bourg did.

18. Benoit's threat to withhold a wage increase

Betty Dumas is an employee of the pipe department who works immediately under Foreman Timmy Benoit. Dumas testified (vol. 52) that for most of 1994 she essentially covered her hardhat with "Union-Yes" stickers. At trial, Dumas displayed her hardhat that had about 10 "Union-Yes" stickers on each side. Also she has worn prounion buttons and T-shirts to the plant.

Sometime during the spring of 1994, Benoit recommended Dumas for an upgrade (and wage increase) from third-class to second-class fitter. By June 9, Dumas had not received the upgrade or the wage increase. Dumas testified that on June 9, she went to Department Superintendent Frank Fradella and asked some questions about employee pay raises. After that, she approached Benoit and:

> I told Timmy, "I just finished talking to Frank about a raise."
>
> He say, "You keep pushing the issue, you ain't going to never get a raise like that. Look what you are wearing."
>
> . . . .
>
> I say, "I can't help it."

At the time, Dumas was wearing a union T-shirt, and her hardhat was covered with the "Union-Yes" stickers as described above. She also had one safety sticker on the hardhat. Based on this testimony, paragraph 18 of the fourth complaint alleges that Benoit unlawfully threatened to withhold a wage increase from Dumas.

Benoit (vol. 80) flatly denied making any such statement to Dumas, but he did not deny that her hardhat was covered with prounion stickers in early June. I credit Dumas who had a more credible demeanor and who was testifying against her immediate superior. On brief, Respondent argues that, even if Dumas is credited, her testimony is ambiguous because Benoit could have been referring to the safety sticker that was on Dumas' hardhat. While the safety sticker was large, the "Union-Yes" stickers plainly were the most salient aspect of Dumas' clothing. Moreover, Benoit did not qualify his threat to the safety sticker; his reference was to all of Dumas' clothing, and the insignia on it. In this circumstance, any reasonable employee would feel that Benoit was referring to the prounion insignia as well as the safety insignia (if the safety insignia was being referred to at all).

I find and conclude that, in violation of Section 8(a)(1), Respondent, by Benoit, on June 9, 1994, threatened to withhold wage increases from an employee because that employee had been wearing prounion insignia.

19. Interrogations of employees in preparation for—litigation

In *Johnnie's Poultry Co*., 146 NLRB 770 (1964), the Board enumerated certain safeguards that must be afforded employees when agents of an employer interrogate them in preparation for litigation. The safeguards (which include, inter alia, telling the employees the purpose of the inquiries and telling them that their participation in interviews is voluntary) are "designed to minimize the coercive impact of otherwise unlawful employer interrogation into the concerted protected and union activities of its employees." *Holyoke Visiting Nurses Assn*., 313 NLRB 1040 (1994).

The third complaint, at paragraph 7, alleges:

> About June 29, 1993; about the last week of July 1993, a more precise date being unknown to the General Counsel; about mid-October 1993, a more precise date being unknown to the General Counsel; and about December 3, 1993, Respondent, by an unnamed agent or agents, at its facility, interrogated its employees about their union membership, activities and sympathies and the Union membership, activities and sympathies of other employees.

As made clear by counsel for the General Counsel at trial, this is an allegation that an attorney for Respondent interrogated an employee without affording him the safeguards of *Johnnie's Poultry*.

As it was originally issued, the third complaint also included, as paragraph 8, an allegation that an attorney for Respondent had, in a telephone interview, interrogated an employee, without affording that employee the *Johnnie's Poultry* safeguards. At trial, the General Counsel moved to renumber paragraph 8 as paragraph 8(a) and add two other subsections. Paragraph 8(b) of the third complaint is now an allegation that Supervisors Ernest Foret Sr. and Norris Pertuit interrogated an employee on February 22 or 24, 1994, without affording that employee the *Johnnie's Poultry* safeguards. Paragraph 8(c) is now an allegation that an attorney for Respondent interrogated an employee on February 28, 1994, without affording that employee the *Johnnie's Poultry* safeguards.

In support of paragraph 7, the General Counsel called Donald Huber (vol. 60). The General Counsel contends that an attorney for Respondent unlawfully interrogated Huber on the dates mentioned in the complaint because the attorney asked Huber some questions about the conduct of the June 25 Board election without assuring him that he need not talk to the attorney. Huber, however, verified his signatures on three separate documents in which Huber acknowledged receipt of the *Johnnie's Poultry* safeguards.[54] Moreover, the questioning, as described by Huber, did not involve his, or other employees, protected concerted activities, or union activities. Therefore, the *Johnnie's Poultry* safeguards were not required. I shall, therefore, recommend dismissal of paragraph 7 of the third complaint.

At trial, I dismissed paragraph 8(a) on grounds which the General Counsel does not question on brief. In support of paragraph 8(b), the General Counsel called current employee Lawrence Arabie who testified (vol. 50) that on February 22 or 23, he was ordered to the office of Welding Department Superintendent Norris Pertuit. There, Pertuit and General Foreman Ernest Foret Sr. asked Arabie to look at three pieces of paper, and they asked him if he had seen them before. Arabie could not read the words on the papers because he was not then wearing his glasses. He could tell that two of the papers were cartoons; one of the cartoons showed bags of money, but he could testify to nothing more about them. Arabie told the supervisors that he believed that he had seen the cartoons on a soap dish in the restroom. Pertuit began reading the third document; according to Arabie, Pertuit indicated that it was a letter from someone who predicted an ultimate union victory in the Board election (apparently after the then-pending objections and challenges were resolved) and the author of the letter said that the supervisors let him down. Arabie interrupted the reading and

[54] I discredit Huber's testimony that he did not remember signing the documents.

asked if that was a letter that had been signed by Bossier, Respondent's president. Pertuit replied that the letter purported to be from Bossier, but Bossier had not signed it.[55] Arabie told Pertuit that another employee had shown him a copy of such a letter, but he did not know anything else about it. Pertuit told Arabie to go back to work. According to Arabie's testimony, neither Pertuit nor Foret told him the purpose of the inquiry, and they did not tell him that his participation was voluntary.

In support of paragraph 8(c), Arabie further testified that on February 28 his supervisor ordered him to go to Simpson's office suite. There he was met by a woman who represented herself to be one of Respondent's attorneys. The attorney showed Arabie some papers but, again, he was not wearing his glasses. The attorney asked Arabie if he could tell if he had seen the papers before and if he knew anyone who could tell her the source of the papers. Arabie told the attorney that, if they were the same papers that Pertuit and Foret had previously shown him, he could not. The attorney then asked Arabie if he would sign a paper that indicated that his participation in the interview was voluntary; Arabie replied that he would not sign the paper because his supervisor had ordered him to be there. Arabie then left the office and went back to work.

While the interrogators of Arabie did not give Arabie the *Johnnie's Poultry* assurances, neither did they ask him about his union or protected concerted activities or the protected concerted activities of other employees. Therefore, the *Johnnie's Poultry* safeguards were not required. I shall, therefore, also recommend dismissal of paragraphs 8(b) and (c) of the third complaint.

B. The 8(a)(3) Allegations and the Remaining 8(a)(1) Allegations

As mentioned above, there are 136 8(a)(3) allegations decided herein. Of those, 113 are allegations of unlawfully imposed discipline (such as warning notices and discharges) and allegations of unlawful transfers and onerous work assignments. (For convenience, I refer to these as the "disciplinary allegations" or "disciplinary cases," although, strictly speaking, the transfers and assignments were not imposed as discipline.) The remaining 23 8(a)(3) allegations are refusal-to-hire allegations. The disciplinary allegations will be decided first.

I have divided all disciplinary allegations into 65 cases. There are 61 disciplinary cases involving separate alleged discriminatees. There are four cases involving more than one alleged discriminatee; these include allegations for alleged discriminatees: (1) Cornelius King and Leroy Jackson who received warning notices together; (2) Marty Bourgeois, Dwayne Braud, and Glen Zeringue who were discharged together; (3) Archieve Triggs and Gerald Leban who were issued warning notices and allegedly harassed together; and (4) seven other employees who were denied compensation for appearing as witnesses for Respondent in the postelection hearing on objections and challenges in the representation case. I have arranged the disciplinary allegations according to the types of misconduct that Respondent attributes to the alleged discriminatees. Each of the disciplinary cases is introduced by a syllabus that contains a summary of the allegations of the complaint, the contentions of the parties, and my ultimate findings and conclusions for the 8(a)(3) allegations of that case. (The syllabuses do not include recitations of my ultimate conclusions for the 8(a)(1) allegations that are discussed in the discrimination cases.) These syllabuses are designed only to assist the reviewer, and they are couched in most general terms. The full and precise statements of the positions of the parties, and the full and precise statements of my reasons for my findings and conclusions, are contained in the texts that follow the syllabuses. (For the sake of brevity, I do not recite in each syllabus the finding of a prima facie case; I do, of course, mention in the syllabuses any failure of the General Counsel to present a prima facie case.)

The law that determines the dispositions of the 8(a)(3) allegations is stated in *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). The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or concerted activity that is protected by the Act was a motivating factor in an employer's action that is alleged to constitute discrimination in violation of Section 8(a)(1) or (3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct "would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. To meet its burden under *Wright Line* it is not enough for an employer to show that an employee engaged in misconduct for which the employee could have been discharged or otherwise disciplined. As the Board has emphasized, the employer must demonstrate that it "*would have"* discharged, or otherwise disciplined, the employee for the misconduct in question. *Structural Composites Industries*, 304 NLRB 729, 730 (1991); the emphasis is the Board's. Such evidentiary demonstration must be by a preponderance of the evidence,[56] and, if it is not, a violation will be found.

Respondent's animus came from the top of its organization. In his June 1 speech to all employees and supervisors, Bossier accused the Union of trying to harm Respondent, just as another union had tried to harm another employer, PASCO. Bossier further called all prounion employees "whiners, malcontents and slackers," and he told all employees and supervisors that such employees "want to destroy Avondale," simply because they do support the Union. Although Bossier did not threaten the employees with discharge or plant closure in all of this, such a diatribe toward prounion employees, because they are prounion employees, is raw evidence of animus toward the employees' protected activities.[57] Supervisory presence for Bossier's June 1 speech was mandatory. Bossier's diatribe of that date was unlikely to have been forgotten by any supervisor who was thereafter presented with an actual, or only putative, disciplinary situation. Bossier's June 1 speech, therefore, is evidence of the animus with which the supervisors would have approached disciplinary issues.

For all alleged discriminatees, the prima facie element of animus is further proven in this case by the multitude of 8(a)(1)

[55] Arabie never possessed the letter, and he could not identify a document that the General Counsel offered as a copy of the letter that Pertuit had read to him; therefore, no such letter is in evidence. It was not established at the hearing that Bossier ever signed such a letter.

[56] *Wright Line*, supra at 1087; *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

[57] See, for example, *Ready Mixed Concrete Co*., 81 F.3d 1546, 1552 (10th Cir. 1992), as cited by Respondent on brief at page "Applicable Legal Standards-51," where a supervisor stated that union adherents were "those scum-sucking, lazy, sorry-ass son of a bitches." The court concluded: "These statements alone sufficiently indicate antiunion animus."

violations that I find herein. In *Monroe Mfg., Inc*., 323 NLRB 24 (1997), the Board found animus sufficient to support an inference of unlawful discrimination in the great number of violations that "cover almost every type of unfair labor practice that an employer may commit." Such is the case here.[58] Also, there is undenied evidence that Respondent's animus rises to the level of that which would cause its supervisors to discharge any employee who supported a union. Alleged discriminatee Ramona Edwards testified that in November 1992, about 5 months before the Union's organizational attempt had its overt beginning, she delivered some papers to the office of then Pipe Department Superintendent Ken Genter. While she was there, Edwards asked Genter about a complaint that she had previously made. According to Edwards (vol. 17):

> I said, "Well, you haven't done anything about the situation."
>
> He said, "Well, you might as well just leave matters alone."
>
> I said, "Well, this is why I really feel Avondale needs the Union, because you are just handling things unfair."
>
> And he told me, "I am going to ignore that remark. Do you know that you can be fired immediately for that?"
>
> I said, "No, sir, I did not." And after that conversation ended; that was it.

Genter was not called to deny this testimony by Edwards, and I found the testimony credible. In Respondent's supervisory hierarchy, a departmental superintendent is just below the level of a vice president. (Indeed, according to the testimony of current Pipe Department Superintendent Frank Fradella, Genter became a vice president on April 1, 1993.) This statement by Genter, therefore, was about as strong a statement of animus as Respondent could have made, and it was made by one of its highest officials.

The categorical threat of discharge that Genter made to Edwards was not made the subject of any allegation of the complaint. (It occurred more than 6 months before the filing of any of the charges.) There were, however, many other undenied supervisory threats that were made subjects of 8(a)(1) allegations of the complaints; those upon which I have found 8(a)(1) violations are: (1) Alleged discriminatee Ancar testified, without contradiction, that Paint Department Foreman Jay Pertuit told him that employees who sign union authorization cards "could get fired." (2) Alleged discriminatee Andre Duhon testified, without contradiction, that Outside Machine Shop Foreman Jesus Rammel told him that, in the words of Duhon: "He would bring me back to the night shift because I was a pretty good worker, but I talked too much 'union shit.' If I would stop talking union, he would bring me back to the night shift." (3) Alleged discriminatee Ronald Johnson testified, without contradiction, that Sheet Metal Department Foreman Jesse Caston told employees that their collective-bargaining efforts would be futile because, even if they did select the Union as their representative, they would be forced to strike and would be replaced. (4) Alleged discriminatee Charles Bennett, current employee James Lanham and former employee Donald McGee testified, without contradiction, that Paint Department General Foreman Tommy Bourgeois told employees that if the Union were selected as their collective-bargaining representative the business would close. (5) As is undisputed, and as found above, Inside Machine Shop Foreman Clifford Autin told retired employee Adeline Plaissance that if the "wrong people" knew that she was wearing prounion insignia it could "hurt" her; Autin further told Plaisance that he was telling her this for her "own good." (6) Alleged discriminatee Michael Molaison testified, without contradiction, that Electrical Department Foreman A. S. Russell instructed him not to wear prounion insignia. (7) Alleged discriminatee Barbara Marshall testified, without contradiction, that Bourgeois told a group of paint department employees during the preelection period that "if we get caught wearing the [Union] sticker on our hardhat, that we would be fired." I have found infra that by each of these threats Respondent violated Section 8(a)(1).

Of these seven undenied, violative threats to employees, it is to be noted that the last three were premised on the employees' wearing prounion insignia.[59] The wearing of prounion insignia was a common thread among many of the cases, and I have found infra that there were, in fact, many other threats against employees for wearing prounion insignia in addition to those that went undenied.[60] Therefore, as I will state many times, Respondent's animus toward employees who desired representation by the Union, and specifically Respondent's animus against employees who displayed prounion insignia, is established throughout this decision.

Although not made the subjects of specific 8(a)(1) allegations of the complaints, there is much other undenied testimonial evidence of Respondent's animus toward its employees protected activities; to wit: (1) Employee Lawrence Arabie testified, without contradiction, that Welding Department Foreman Joe Alvarez told him that: (a) Respondent had a list of employees who had signed union authorization cards and those employees "will probably lose their jobs"; (b) two employees, including alleged discriminatee Mark Cancienne, were supporting the Union and Alvarez had orders to "put pressure on them"; (c) Arabie could lose his job for being friendly with Cancienne; and (d) Cancienne was being transferred to the crew of Welding Department Foreman Robert Ramirez because General Foreman Ernest Foret Sr. wanted Ramirez to "wring him out because of his union activities." (2) Ramirez, himself, admitted at trial that he told Arabie that: "They [unidentified] stuck him [Cancienne] with my ass, wanting me to burn his ass, and I never did." (3) It is undenied that Electrical Department General Foreman Kenny Danos told alleged discriminatee Richard St. Blanc that "I am not trying to tell you what to do, but I want you to know that word of you wearing this button has reached Jerry Gerdes [the assistant superintendent of the department]." (4) It is undenied that in the spring of 1994, Electrical Department Foreman John Crutchfield admitted to current employee Romalis Martin that he (Crutchfield) had removed a "Union-Yes" sticker from Martin's hardhat because "some

[58] As noted in fn. 8, in a collateral proceeding, the Board has found that Respondent has violated Sec. 8(a)(5).

[59] Also, as noted above, although not made subject of a specific complaint allegation, current employee Boudreaux testified, without contradiction, that Autin told him that he would be discharged for wearing prounion insignia, albeit "[n]ot right away."

[60] A summary of findings to come is: Foremen Joseph DeNicola, Walter Falgout, and Lonnie Sanchez, threatened employees with discharge because they had worn prounion insignia; Foremen Timmy Benoit and Nathan Howard threatened employees with losses of wage increases because they had worn prounion insignia; and Foremen Jim Grimes and Keith Folse threatened employees with unspecified reprisals because they wore prounion insignia.

superintendents were asking who were wearing stickers and who weren't."

Finally, although they were all contradicted by supervisory testimony, I have found a host of other threats that were alleged as 8(a)(1) violations in the four complaints. Therefore, there is abundant evidence of Respondent's animus against the protected activities of its employees.

In its arguments on brief that there is insufficient evidence of animus sufficient to support any inferences of unlawful discrimination, Respondent repeatedly cites *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996). In *Asarco*, the Fifth Circuit refused to enforce a decision by the Board that the discharge of one Halford was caused by antiunion animus. The court viewed the Board's decision as finding antiunion animus only in evidence of disparate treatment of Halford. The court disagreed with the Board's finding of disparate treatment, and it refused to enforce the Board's order. Aside from the fact that I am immediately bound by the Board's decision in *Asarco*, there is in this case, again, abundant evidence of antiunion animus that exists independently from the evidence of disparate treatment of some of the alleged discriminatees. *Asarco*, therefore, is not controlling authority for disposition of the 8(a)(3) cases now before the Board.

The prima facie element of knowledge of prounion sympathies is denied in most of the disciplinary cases. In this decision, where I find that alleged discriminatees openly wore prounion insignia at work during a given period of time, I conclude that supervisors who would have seen them at work during those periods also would have seen the displayed prounion insignia.

1. Employees discharged for multiple disciplinary offenses

a. Barbara Marshall

Barbara Marshall (vol. 17), a painter's helper, was issued a warning notice on October 1, and she was discharged on October 27, 1993.[61] The second complaint, at paragraphs 124 and 130, respectively, alleges that by warning and discharging Marshall, Respondent violated Section 8(a)(3). The General Counsel contends that Respondent warned and discharged Marshall because of her known union activities and expressions of sympathy which included wearing a prounion sticker on her tote bag, speaking up for the Union at one employer campaign meeting, and refusing to give a negative response to a violative interrogation. The complaint further alleges that, in violation of Section 8(a)(1), Marshall was threatened, interrogated, and instructed not to wear prounion insignia. Respondent denies that the threat, interrogation, or instruction occurred. Respondent further denies that its supervisors had knowledge of any prounion sympathies that Marshall may have held at any relevant time. Respondent further answers that Marshall was discharged solely because she committed three disciplinary offenses in a 12-month period including: (1) an offense of loafing on April 22; (2) being out of her work area on October 1; and (3) again being away from her work area when she should have been working on October 27. The General Counsel does not dispute the validity of the April 22 warning notice. The General Counsel disputes the validity of the second warning notice by contending that Marshall was not out of her work area on either October 1 or 27, and the General Counsel contends that the accusations are pretexts for her discharge. Alternatively, the General Counsel replies that, even given the fact that Marshall had validly been issued one warning notice on April 22, and even assuming the validity of the October 1 warning notice, and even further assuming that Marshall engaged in another disciplinary offense on October 27, Marshall was nevertheless treated disparately because other employees received three or more warning notices in 12-month periods without being discharged. Ultimately, I find that Marshall engaged in the disciplinary offenses of being out of her work area (loafing) on October 1 and 27, and I find and conclude that the issuance of the warning notice of October 1 did not violate Section 8(a)(3). I further find, however, that a significant number of other employees had been allowed to commit, within 12-month periods, three or more disciplinary offenses without being discharged. I therefore find and conclude that Marshall was treated disparately and that Marshall was discharged in violation of Section 8(a)(3).

As a painter's helper, Marshall was directly supervised by various line foremen including Charles Bourg Jr., Randall Laborde, Eldon Pierre, Larry Danos, and Carl Mott Jr. All of these foremen reported to General Foreman Tommy Bourgeois. There is an issue of who made the decision to discharge Marshall; ultimately, I agree with the General Counsel that it was Bourgeois.

Marshall testified[62] that beginning in April or May, and continuing through the date of her discharge, she maintained a "Union-Yes" sticker on her tote bag that she took to work and to each assignment. She attended several employer campaign meetings, and she asked a question at one. Marshall testified that in an employer campaign meeting Bourgeois predicted a "landslide" vote against the Union; he further exhorted the employees to "do the right thing." According to Marshall, I asked him, "Why is we meeting now; why is Al Bossier meeting with us now and he never did before?" And he said that Al Bossier was a busy man."

The General Counsel offered this testimony as evidence of knowledge of Marshall's prounion sympathies by all supervisors, including particularly Bourgeois, the supervisor who ultimately made the decision to discharge Marshall. Bourgeois (vol. 132) generally denied ever hearing Marshall make a statement in favor of the Union, but he did not deny that Marshall asked during one of his employer campaign meetings why Bossier was then meeting with the employees. I found Marshall's testimony on the point credible.

Paragraphs 13 and 22 of the second complaint allege that Respondent, by Bourg Jr., threatened employees with discharge, solicited them to campaign against the Union, and in-

[61] Unless otherwise indicated, all dates mentioned hereafter are in 1993.

[62] Respondent did not cross-examine Marshall after she had testified for the General Counsel, and Respondent advanced no reason for not doing so. In its case, however, Respondent attempted to cross-examine Marshall's direct testimony by calling her as its witness. A petition to revoke Respondent's subpoena to Marshall was duly filed by the Charging Party. I ruled that, when it did not cross-examine Marshall after she gave her direct testimony Respondent waived its right to later cross-examine her on that testimony. Allowing Respondent to re-call Marshall for cross-examination would have opened the door to re-call of the over 300 other witnesses for the same purpose (or for "further" cross-examination). I further agreed with the Charging Party's contentions that the other matters that Respondent advanced as reasons for enforcing the subpoena to Marshall were irrelevant and unduly burdensome to the record. I therefore revoked Respondent's subpoena to Marshall, and she did not testify again.

structed them not to wear prounion insignia.[63] Marshall testified that Bourg did such things, but Bourg credibly denied that testimony. After Bourg testified (vol. 101), the General Counsel moved to amend the complaint to allege, alternatively, that it was (sometimes-supervisor) Scott Sutherland who committed the violations specified in paragraphs 13 and 22. Sutherland is a first cousin to Bourg, and the two men have similar physical features. Marshall did not testify, however, that it was Sutherland who made the remarks to her, and there is no basis, other than speculation, for concluding that it was Sutherland (if anyone) who made the remarks. I shall recommend dismissal of paragraphs 13 and 22 of the second complaint.

Marshall further testified that, in an April or May employer campaign meeting, Bourgeois told the employees of the paint department

> that the Union was giving us our union stickers and paper, and if we get caught wearing the sticker on our hardhat, that we would be fired, and if we get caught reading the paper, that we was going to get fired.

Based on this testimony by Marshall, paragraph 20 of the second complaint alleges that Bourgeois unlawfully threatened employees with discharge.[64] Bourgeois did not deny this testimony by Marshall,[65] and I found the testimony credible. I find and conclude that Respondent, in violation of Section 8(a)(1), by Bourgeois, in April or May 1993, threatened its employees with discharge if they wore prounion insignia or were seen reading prounion literature.

Marshall further testified that in April or May she was approached by Foreman Eldon Pierre at her work station. According to Marshall:

> He asked me how I felt about the Union, and I told him, "No comment."
> And he said, "You have nothing to say about it[?]"
> And I told him, "No comment."

Based on this testimony by Marshall, paragraph 21 of the second complaint alleges that Pierre unlawfully interrogated an employee.[66] Pierre denied the testimony, but I found Marshall credible on the point. I find and conclude that Respondent, in violation of Section 8(a)(1), by Pierre, in April or May 1993, interrogated its employees about their union membership, activities, or desires.

(1) Marshall's warning notice for loafing in restroom

Background

As noted, Marshall received a warning notice on April 22, and the issuance of that warning notice is not alleged as a violation or otherwise contested by the General Counsel. Marshall's April 22 warning notice was initiated because Pierre witnessed Marshall and another employee loafing when they should have been cleaning their work areas between 3:20 and 3:30 p.m.

Supervisors Bourgeois, Mott, and Pierre testified to an event that is further relevant background to Marshall's case: In September, when Marshall had been working on a ship, Mott and Pierre stood at the railing of the ship and observed Marshall and employee Martha Cox remaining in the area of the women's restroom on the ground, immediately below the ship, for about 45 minutes. Mott and Pierre decided to issue Cox and Marshall warning notices, and they told Cox and Marshall of their decision as the two employees came up the gangway to the ship after leaving the restroom area. Marshall and Cox protested that they had been detained because they needed to investigate the fact that a hole had been cut in the wall between the men's side and the women's side of the restroom building. Pierre and Mott reported the incident to General Foreman Bourgeois. The matter was investigated, and the hole was indeed found. Bourgeois reversed the decision by Mott and Pierre to issue warning notices to Cox and Marshall. Cox was not called by either party. Although, on direct examination, Marshall generally denied having been previously spoken to about spending excessive amounts of time in the restroom, she was not called in rebuttal to deny Respondent's specific testimony about this September event. I found the testimony of Mott, Pierre, and Bourgeois credible on the point.

Marshall's Conduct and the Issuance of the Warning

On October 1, Marshall worked on an LSD under Foreman Randall Laborde. Marshall first testified that during the morning:

> I asked Randall, could I go to the restroom. And he had told me when I finished my work, that I could go at 11:00 o'clock.

Later in her direct examination, however, Marshall was asked and she testified:

> Q. [T]he October 1 write-up, when you got it, when you spoke to Mr. Randall [Laborde] before leaving your area, what exactly did you tell Mr. Randall?
> A. I asked Randall if I could go to the bathroom at 11:00 o'clock when I finished my work.
> Q. And what did Randall say?
> A. He had told me yes.
> Q. Was anything else said?
> A. No.

Marshall testified that at 11 p.m., she left the ship and went to a restroom on the ground. When she finished, she returned to the ship by going up the gangway. As she did so, Marshall testified, Mott and Pierre were coming down. According to Marshall:

> [A]s I was coming up on the ship, they was coming down, and Pierre asked me what I was doing, "playing in the restroom?." And I . . . told him I wasn't playing in the restroom, and I was trying to explain to him what was going on, and he said he was going to write me up for wasting time. And I told him that I had got permission from Randall to go to the restroom.

Marshall testified that during the next day Bourgeois called her into his office and asked her for her account of what had happened. She told Bourgeois that Laborde had given her permission to go to the restroom. Nevertheless, Marshall testified, Bourgeois gave her a warning notice. As were all other Paint Department warning notices that were received in evidence, the

[63] Respondent contends that these 8(a)(1) allegations are not supported by timely filed charges. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that the allegations are supported by the timely filed charge of discrimination against Marshall, as well as the charge in Case 15–CA–12171–1.

[64] Id.

[65] Respondent's statement on brief that Bourgeois did not make the threat is not supported by the record.

[66] See fn. 63.

warning notice that was issued to Marshall was drafted by a clerical who entered the signature of Bourg as the "Department Head." Mott signed as the "Witness," a circumstance that will be explained below. The warning notice has checked the square for notation of General Offense-4 of the Avondale Employees' Guide ("Wasting time, loitering or leaving the working place without permission"); the warning notice cites as the time and date of the offense October 1 at "10:00 a.m. to 10:45 a.m." The "Reason for Warning" space was completed by entry of: "You are hereby notified that you were wasting time, loitering or leaving the working place without permission. Should you continue to do this, immediate disciplinary action will be taken." Marshall refused to sign the warning notice.

According to Marshall, after Bourgeois gave her the warning notice, "[H]e just told me, write my comment over again on another piece of paper, the reason." (The reason for Marshall's words "over again" was made out in Respondent's case, as discussed, infra.) On direct examination Marshall was asked and she testified:

> Q. How long were you gone to the bathroom that day?
> A. I was gone for at least ten minutes.

Marshall was not asked for how much longer than 10 minutes she stayed away from her work area. Marshall acknowledged that, when employees leave their working areas to go to the restroom they are not supposed to be gone longer than 10 minutes.

Marshall's Warning Notice—Respondent's Evidence

Laborde (vol. 124) testified that during the morning of October 1, he walked through an area that was in sight of restrooms that were on the helicopter deck of the LSD (as opposed to the restrooms that were on the ground). He was stopped by Foreman Pierre who had been watching the helicopter deck restrooms. Pierre told him that Marshall and Cox had been in the helicopter deck women's restroom for 20 minutes. Laborde further testified that he stayed to watch the restroom, and it was 20 more minutes before Marshall and Cox came out together. (Laborde testified that he could not remember if Pierre stayed with him; Marshall was working under Laborde that day, not Pierre.) Laborde testified that he confronted Marshall and Cox and, "I told them they would be getting a citation for spending 40, 45 minutes in the bathroom."

October 1 was a Friday. Laborde testified that at the end of the day on October 4, he gave warning notices to Marshall and Cox. (As explained infra, these were not the warning notices that were ultimately received in evidence; the ones that Laborde issued were destroyed before the hearing; I shall refer to the warning notices that Laborde issued as the "original" warning notices.) Both Marshall and Cox wrote comments in the space provided on the original warning notices. Without Laborde's noticing it, both Marshall and Cox extended their comments on the backs of the third copy of the triplicate, carbon, forms. Laborde testified that he observed that the comments of Cox and Marshall were "very similar," although he could not remember what they were. On October 5, Laborde presented the original forms to Bourgeois and Mott (Laborde's lead foreman). Bourgeois said that the warning notices had been ruined by the employees' having written on the backs of the third copies and that they would have to be reissued.

Mott (vols. 126, 127) testified that he and Bourgeois agreed that the original warning notices had to be reissued, not only because Marshall and Cox had written on the backs of the third (carbon) copies, but because the employees had written their comments "word for word" the same. Mott testified that he and Bourgeois called Marshall and Cox into Bourgeois' office separately and gave them the opportunity to rewrite their (own) comments, and they did so. Mott then signed as the "Witness" because Laborde was not present when the warning notices were reissued.

Bourgeois also testified that Marshall and Cox had originally written identical statements in the "Employee Comment" spaces of the original warning notices. Bourgeois testified that both of the original statements claimed that Marshall and Cox were delayed at the restroom area by someone throwing water on them from the men's side of the restroom building. Bourgeois testified that he did not believe this excuse because it was too similar to the excuse that Marshall and Cox had offered in September (when they had said that they had stayed in the restroom area for an extended amount of time because of the hole that they found in the wall). When he gave Marshall and Cox the opportunity to re-draft their comments, Cox essentially repeated her original statement which was quite lengthy. (Cox's statement was received in evidence.) Marshall, however, entered four conclusion-filled sentences that said nothing about water being thrown.

Cox and Marshall were issued, and reissued, identical warning notices. The warning to Cox is not alleged as a violation. There is no evidence that Respondent's supervisors suspected Cox of being a union supporter, and, according to this record, no charge was filed on her behalf.

Marshall's Warning Notice—Conclusions

The first issue is whether the General Counsel has presented prima facie cases that Marshall's warning notices and discharge were imposed unlawfully. I find and conclude that, by the time of the alleged discrimination against her, Respondent's supervisors had knowledge of Marshall's prounion sympathies. All of those who ever supervised Marshall in 1993 (Mott, Danos, Laborde, Bourg, Pierre, and Bourgeois) testified that they had no knowledge of any prounion sympathies that Marshall might have held. All of those supervisors denied seeing Marshall "wear" a "Union-Yes" sticker, but none was asked if they saw one on her tote bag, as Marshall had testified. To the extent that the supervisors' testimony can be construed as denying having seen the prounion sticker on her tote bag, I discredit it. I find that Marshall openly displayed prounion insignia on her tote bag as she worked. From this factor, alone, I conclude that all supervisors who worked around Marshall knew of her prounion sympathies, the supervisory denials notwithstanding. Also, Marshall's "no comment" response to Mott's unlawful interrogation was obviously not the response that the supervisor sought, and it necessarily constituted a declaration of, if not prounion sympathies, at least a resistance to Respondent's countercampaign against the Union. (The response was further made to one of the supervisors who participated in her ultimate discharge.) Finally on this point, Marshall spoke up at an employer campaign meeting and asked Bourgeois, the supervisor who made the decision to discharge her, why Bossier was then making his above-discussed speeches. This was an expression of cynicism revealing that Marshall thought Bossier would not care about the employees if the Union were not then undertaking an organizational attempt. This was a "point" that was made in favor of the organizational attempt which Bossier was so

vehemently opposing. Such statements have been recognized by the Board as expressions of prounion sympathies, even if the employee's comment did not expressly encourage support for a union.[67]

Respondent's animus toward the organizational attempt in general, and Respondent's animus toward those who wore prounion insignia, in particular, is found throughout this decision. Respondent's animus was made clear in the June 1 speech by Respondent's chief executive, Bossier, who labeled such prounion employees as Marshall "whiners, malcontents and slackers" who "want to destroy Avondale," solely because they did support the Union. Moreover, such prounion insignia as that which Marshall displayed were often made the objects of threats to employees, as I have found above, or as I do find infra; to wit: (1) Sheet Metal Department Foreman Clifford Autin told employee Adeline Plaisance that he could not believe that she would wear prounion insignia because, "Well, the stickers on your hat. . . . If the wrong people got ahold of it, it could hurt you. . . . I am just telling you this for your own good." (2) Sheet Metal Department Foreman Joe DeNicola told employee Junius Duplantis that: "the guys walking around with stickers and shirts on better hope that the Union gets in because if it don't, they are gone." (3) Shipfitting Department Foreman Walter Falgout told employee Richard Bell that, "Well, if you like working for me and I was you I would take that sticker off your hat because if you-know-who found out, he would have a fit about the sticker." (4) Electrical Department Foreman A. S. Russell told alleged discriminatee Michael Molaison, who was wearing a "Union-Yes" sticker on his hardhat, that "we wasn't supposed to have anything on our hardhats except the numeral that represented what department we was in, our badge number and our name on our hardhat." (5) As is undenied, as late as the spring of 1994, Electrical Department Foreman John Crutchfield told employee Romalis Martin that he had removed the "Union-Yes" sticker from the hardhat of Martin "because some superintendents were asking who were wearing stickers and who weren't." (6) As mentioned before, it is undenied that Electrical Department General Foreman Kenny Danos told alleged discriminatee Richard St. Blanc that "I am not trying to tell you what to do, but I want you to know that word of you wearing this button has reached Jerry Gerdes [the assistant superintendent of the department]." (7) Electrical Department Foreman James Grimes told alleged discriminatee Richard St. Blanc that he was "fucking up" by wearing a union button. (8) Shipfitting Department Foreman Keith Folse threatened alleged discriminatee Robert Ruiz with unspecified reprisals because he was wearing prounion insignia. (9) Sheetmetal Department Foreman Nathan Howard, on May 13, 1994, instructed alleged discriminatee Kenneth Patterson and another employee to remove union insignia from their clothing. (10) Howard further told Patterson on May 18, 1994, that he would not receive a wage increase because he had been seen wearing prounion insignia. (11) Finally (and again), one of the undenied expressions of such specific animus was made by Bourgeois, the supervisor who made the decision to discharge Marshall; Bourgeois told his employees that they would be discharged if they were caught "wearing" a prounion sticker, which was a logical reason for Marshall's placing her "Union-Yes" sticker on her tote bag rather than "wearing" it. Therefore, the General Counsel has presented prima facie cases that Marshall's October 1 warning notice and her October 27 discharge were unlawfully motivated, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Marshall even in the absence of her known protected activities. Respondent's defenses must therefore be examined.

Marshall did much, too much, to establish that she was at her work station at the times indicated by the October 1 warning notice, 10 to 10:45 .a.m. First Marshall testified that Laborde told her she could not go to the restroom until 11 a.m.; then she testified that she asked if she could go to the restroom at 11a.m.. I do not believe either account. Moreover, Marshall did not claim in her "Employee Comment" that she had received permission from Laborde to be out of her work area in the first place, a core element of the General Counsel's theory of what happened. (Marshall is not very articulate, but, if she really had been given permission to leave her work area, and especially if she had been given permission to leave precisely at 11 a.m., she would have entered something to that effect in her comment.) I believe that Marshall's account of her being told to wait until 11 a.m. to leave the work area, and her account of having asked to leave the work area at 11, both were fabrications designed simply to defeat her warning notice's designation of "10:00 a.m. to 10:45" as the time of the offense.

Marshall acknowledged that she stayed away for her work area for "at least ten minutes." I find that it was a great deal more than 10 minutes, and Marshall acknowledged that stays for more than 10 minutes were excessive. Moreover, although Pierre did not testify about how long, if any, he watched Marshall (or Cox, or Marshall and Cox) at the helicopter deck restroom, Laborde was credible in his testimony that he observed their failure to come out of the helicopter deck restroom for about 20 minutes. I credit Bourgeois' testimony that Marshall (along with Cox) offered the water-throwing excuse for being in the restroom an excessive amount of time; as she did so, Marshall necessarily acknowledged that she had stayed away from her work for an excessive amount of time. I further find that Bourgeois rejected the water-throwing excuse for Marshall's delay for a logical, legitimate reason: essentially the same excuse had successfully been used for restroom dawdling in September, and it was unbelievable in October.

On the basis of my credibility resolutions as entered above, I shall recommend dismissal of paragraph 124 of the second complaint.

(2) Marshall's discharge for being absent from work area and having prior warning notices

Marshall testified that at 2:05 p.m. on October 27, she left her work area to empty trash and get some supplies; she also went to the restroom. She returned to her work station, she testified, at 2:20. She was met by Foreman Larry Danos who accused her of being out of her work area for more than 40 minutes. Marshall explained what she had been doing and that she could not have been gone that long. Danos told her to go back to work.

Later in the afternoon, Danos and Mott (lead foreman over Danos and several other line foremen who reported to Bourgeois) approached Marshall and told her that she was discharged. According to Marshall:

[67] See *Neff-Perkins Co*., 315 NLRB 1229 fn. 1 (1994), where the Board states: "[W]e note that employee questions and comments concerning working conditions raised at a group meeting called by an employer come within the definition of concerted activity under Board precedent."

> [Danos] asked me to give me [him] my badge, asked for my badge, and I asked him, "For what?"
>
> And he said, "Because you are fired."
>
> And I asked him, "Why? What am I fired for?"
>
> And he said, "Because you was out of your work area."
>
> . . . .
>
> I said, "Well, why are you coming at this time of day, a whole hour after to fire me. You should have fired me on the spot."
>
> Mott said that the reason why he took so long to fire—to come back to fire me, [was] because Danos [had been] looking for him [Mott] earlier and he [Danos] couldn't find him [Mott], and when he [finally] did find Mott, Danos had told Mott what had happened, and then [Mott and Danos] went down to the ground to Bourgeois' office and told Bourgeois what had went on. And they [Mott and Danos] said Bourgeois told them to fire me, because he had looked into my record, my past record, the citation, saying there was—Bourgeois was looking into my record, and so he told them to fire me because I had two prior citations. And that one they was going to give me, [what would have been] the third citation, was going to cause me to get fired.

(In fact, Marshall did not receive another warning notice, which warning notice would have been her third in 12 months.) Danos took Marshall's badge at that point. Marshall went to Bourgeois' office. Further according to Marshall:

> I asked Bourgeois if he had knew what had happened, that I got fired, and he said, yes, he had [known] what happened.
>
> And he said himself that the reason why I got fired, because he had looked—they [Danos and Mott] came and told him what happened, and he had looked in to my files, and he [Bourgeois] seen I had two citations, prior citations, being warned about wasting time or whatever, leaving out of my work area.
>
> And I asked him to see my file, and he had refused. And so I told him I want my citation right on the spot. And I didn't get a citation saying why I got fired or anything.

Marshall then left the premises.

Marshall's Discharge—Respondent's Evidence

Danos (vols. 88, 89) testified that he timed Marshall on October 27, and she was out of her work area for over 40 minutes. That much of Danos' testimony was credible. Danos also testified that he, alone, decided to discharge Marshall. That part of Danos' testimony was incredible.

Danos testified that, after he sent Marshall back to work, he conferred with Mott. Mott made a telephone call and found out that Marshall had some number of warning notices that Danos could not recall.[68] Upon hearing that (forgotten) number from Mott, Danos testified, he decided to discharge Marshall. As he was cross-examined about this portion of his testimony, Danos would not look at the General Counsel; he would not take his eyes from Respondent's counsel. (Of course, all Respondent's counsel could do was look down at her papers.) In so doing, Danos presented a most unfavorable impression. Danos had been a supervisor for less than 30 days. As he testified on the point, I did not believe that he, an extremely timorous man as well as a novice supervisor, took it upon himself to discharge anyone on his own. I do not believe it now. As seen elsewhere in this decision, no other line foreman took it upon himself to fire anyone on the basis of what he observed (or discharged an employee "on the spot") without the approval of higher supervision, as Danos professed to have done.[69]

On direct examination Mott stated flatly that Danos made the decision to terminate Marshall. As Mott admitted on cross-examination, however, his pretrial affidavit[70] states:

> We [Mott and Danos] went to Tommy Bourgeois, who called the office and asked how many warnings were in Barbara Marshall's file. I understood from him [Bourgeois] that he was told she already had two written warnings for wasting time, loitering or leaving the work area in the past several months. . . . Because this would be her third written warning for that type of offense, Tommy said she should be terminated instead of given another citation.

This discrepancy between Mott's affidavit and his trial testimony is serious; the mendacity that it reflects further fortifies my conclusion that Mott was not a truthful witness and should not be credited in his denial of his interrogation of Marshall.

On direct examination Bourgeois testified that Mott informed him that Danos wanted to issue Marshall a warning notice but Mott had stopped the process because he knew that Marshall had some prior warning notices that should be considered. After hearing this from Mott, Bourgeois called the main Paint Department office and found that Marshall had received two warning notices during the preceding 12 months. Bourgeois testified that he called Mott back and "recommended" that Marshall be discharged. He was asked on direct examination and he testified:

> Q. [By Ms. Canny]: Why did you give Mr. Mott an okay or recommend that she be terminated on that day?
>
> THE WITNESS: After checking her files and knowing what was in her files and the previous problems that I had with her and the offense she did for that date is why I fired her—I recommended she be fired.

I find that Bourgeois' first answer ("I fired her") was the truth, but I do not rely on this apparent Freudian slip alone. Mott swore in his affidavit that Bourgeois made the decision to discharge Marshall and I credit that affidavit.[71] The cross-examination of Bourgeois further made it clear that he, not First-Level Supervisor Danos (nor Second-Level Supervisor

[68] As will be seen, Respondent's supervisors frequently testified that they could not recall how many warning notices the alleged discriminatees had before they were discharged. This testimony was consistent with Respondent's theory of the autonomy of first-line supervisors, which theory was offered in an attempt to defeat the General Counsel's disparate treatment contentions, but it was also incredible.

[69] Foreman Mott discharged alleged discriminatees Vincente Hernandez and Donald Varnado without consulting with Bourgeois or other superiors, but Mott was a lead foreman (and, in effect, an assistant general foreman to Bourgeois) to whom several other foremen reported.

[70] Pretrial affidavits of supervisors were secured by Respondent for purposes of defending against a request by the General Counsel under Sec. 10(j) of the Act. (The district court denied that request, but, contrary to the assertion of Respondent on brief, page "Paint-74," its findings and conclusions are not binding on the Board.)

[71] See *Alvin J. Bart & Co*., 236 NLRB 242 (1978).

Mott), made the decision to discharge Marshall; Bourgeois was asked and he testified:

> Q. So you got the information from the paint office [clerk], and then did you make a decision in your own mind at that point?
> A. Yes, I did.
> Q. And what was that decision?
> A. That she should be terminated.
> Q. And what did you do then?
> A. I called Carl Mott back and told him that in my decision, she should be terminated.
> Q. And what happened then?
> A. They did what they had to do on the ship.

"On the ship," of course, was where Marshall was still at work and where she was first told that she was discharged.

I find that Danos, Mott and Bourgeois reasonably believed that Marshall had, on October 27, been out of her work area for an excessive amount of time. I further find that the decision to discharge Marshall, rather than issue her another warning notice, was made by Bourgeois.

Marshall's Discharge—Conclusions

I have held above that the General Counsel has presented a prima facie case of unlawful discrimination for Marshall's discharge as well as her October 1 warning notice. At this point, the defense that Respondent has advanced for the discharge must be examined. On brief, Respondent states, "Ms. Marshall was terminated for wasting time, loitering and being out of her work area without permission, because that was her third offense in 12 months." This statement is consistent with Marshall's testimony about what she was told by Mott and Bourgeois.

At one point on direct examination Bourgeois was asked and he testified:

> Q. [By Ms. Canny]: Other than the offenses that you mentioned where you think [immediate] termination is appropriate, such as sleeping or theft, is there a number of citations, in your view, that an employee should have before termination becomes appropriate or a possibility?
> A. I usually go by three, but with two citations they could be terminated.

That is, even though counsel suggested to the witness that there was a number of warning notices at which employees "should" be discharged, Bourgeois refused to so testify. Bourgeois testified that before he and his foreman issue warning notices they call the main paint department office and ask what other warning notices an employee has received within 12 months. Bourgeois was specifically asked on direct examination and he testified:

> Q. What instructions or guidelines, if any, do you give your foremen about what to do once they know somebody's record?
> A. If their folder has, for instance, three citations in it, I tell them to look at it real hard because that is a critical path right there, I think.

That is, Bourgeois testified that an employee is not even on the "critical path" until he commits an offense *after* having received three warning notices that had already been placed in his file. Bourgeois further testified that even if an employee had been issued a final warning, he would not necessarily be discharged upon his third offense. As he further testified on direct examination:

> Q. What is a final warning?
> A. Usually they will put final warning on a citation and you tell that person the next time they commit that offense, it is a possibility they could be fired.

This is another admission that employees are not always fired upon their third infraction within a 12-month period. Further on examination Bourgeois was shown sets of three and four warning notices that different employees had received. On cross-examination Bourgeois was asked and he testified:

> Q. [By Mr. Bensinger]: Do you recall when Ms. Canny had the citations in front of you, the four citations and the three citations and you testified to the effect that the person could be discharged?
> A. Yes.
> Q. You know there is a difference between the word, could, and would?
> A. Yes.
> Q. And you chose your word correctly?
> A. Yes.

That is, Bourgeois testified that, even after an expressed "final" warning, and even after a fourth warning notice within 12 months, an employee is not necessarily discharged; Bourgeois testified only that the employee could be discharged.

Although Respondent's discussion on brief is quite lengthy, it fails to address two critical factors: (1) Bourgeois, who made the decision to discharge Marshall, stated repeatedly that employees "could" be terminated for three offenses within 12 months, but he never stated that employees are always, or even usually, discharged for three offenses within 12 months; and Bourgeois did not even testify that there was some sort of rule or policy that employees "should" be discharged after their third offense.[72] (2) During the 5-year period, 1990 through 1994, a significant number of employees received three, or more, warning notices within 12 months, and those employees were not discharged.

In fact, there is a great deal of evidence that employees are not necessarily discharged after their third warning notice within a 12-month period.[73] As noted in section III(C) of this decision, Respondent maintains a personnel card for each employee. Office employees are supposed to enter on the personnel cards the dates of each warning notice that each employee receives. Elaine Colligan is a paralegal employee in the law firm of counsel for the Charging Party. Colligan was supplied

[72] As quoted above, an attorney for Respondent stated in a February 4, 1994 letter to the Region that employees who had received three warning notices in a 12-month period "should" be discharged, but Bourgeois never testified to the existence of a mandatory policy. Moreover, as seen in the case of alleged discriminatee Vincente Hernandez, Mott flatly testified that the policy is not mandatory. As Mott defined the practice of discharging employees after a third warning notice, "[i]t depends on the employee." Again, Mott is, in effect, Bourgeois' assistant general foreman.

[73] The nonmandatory nature of the three-warning-notice rule is what undoubtedly forced Respondent into attempting to prove the palpably false proposition that Danos, not Bourgeois, discharged Marshall. Respondent's theory essentially is that supervisors such as Danos are autonomous; they do not always discharge for three warning notices within 12-month periods, but they can, and Danos chose to do so. This theory of the case was not supported by the evidence.

with the subpoenaed personnel cards of over 7000 of Respondent's production and maintenance employees who were employed between January 1, 1990, and December 31, 1994. Colligan (vol. 63) testified that she reviewed those cards to see if they reflected that some employees had received three or more warning notices within any 12-month periods without their being discharged. Colligan selected the personnel cards of those employees who had been issued three or more warning notices within a 12-month period; she eliminated those which also showed that the employee was terminated within a few days following the date of the last warning notice. The General Counsel's Exhibit 364 is a listing that Colligan made from this search. The exhibit is a table that shows the names and badge numbers of employees who received three or more warning notices in 12-month periods, but who were not discharged. As received, the document contained 817 entries. Respondent, however, showed that the personnel cards that it had furnished pursuant to the General Counsel's subpoena duces tecum had accidentally included a few (nonunit) guards. Respondent further brought out that one entry on the General Counsel's Exhibit 364 went beyond a 12-month period; additionally, on one entry the underlying personnel card was obliterated, so that it was not clear that at least three warning notices had been issued to the employee within only a 12-month period. The Charging Party provided electronic (floppy disk) copies of General Counsel's Exhibit 364 to all parties and to me. The General Counsel's Exhibit 364, as received in evidence, was not sorted in any discernable way. I have used the disk-copy of the General Counsel's Exhibit 364 that was furnished to me to create appendix B of this decision. Appendix B is a copy of the General Counsel's Exhibit 364, with the erroneously included employees eliminated and the remainder sorted, in descending order, according to the number of warning notices that the employees received within various 12-month periods; i.e., the one employee who received 10 warning notices in 12 months without being discharged is listed first; the five employees who received nine warning notices in 12-month periods are listed next, and so on, down through all of those who were issued 3 warning notices in 12-month periods without being discharged.[74] In order to display the count of the total number employees who received three or more warning notices in 12-month periods without being discharged, I have added a column designated "Tot." for total. In order to display the count of employees who received 10, or 9, or 8, etc., warning notices, I have added another column designated "#" on appendix B.

As appendix B and Colligan's testimony demonstrate, the subpoenaed personnel cards reflect that during the 1990–1994 period, there were 802 times that production and maintenance employees received 3 or more warning notices in 12-month periods without being discharged: 451 employees received 3 warning notices; 208 employees received 4 warning notices; 79 employees received 5 warning notices; 39 employees received 6 warning notices; 15 employees received 7 warning notices; 4 employees received 8 warning notices; 5 employees received 9 warning notices; and 1 employee received 10 warning notices (all within 12-month periods and all without being discharged).

In addition to the employees listed in Exhibit 364, the General Counsel introduced additional documentary evidence that during the 1990–1994 period additional employees received three or more warning notices within 12-month periods without being discharged. That is, although the General Counsel subpoenaed all personnel cards of all employees, either all personnel cards were not produced for Colligan's examination or the personnel cards did not reflect (as they should have) all warning notices that had been issued to all employees in the relevant period. This additional documentary evidence was received as the General Counsel's Exhibits 760 and higher during the rebuttal stage of the General Counsel's case. Attached as Appendix C is a table that I have created that displays the badge numbers of those additional employees who received three, or more, warning notices within 12-month periods. Eighty-eight of those additional employees are shown by the General Counsel's Exhibits 770 (and higher) to have received three warning notices within 12-month periods, but I do not include them in my analysis because it was not shown that they were not discharged on receiving their third warning notices, as opposed to the situation for the employees listed in the General Counsel's Exhibit 364.[75] Although the General Counsel failed to establish that the employees who, according to General Counsel's Exhibits 760 and higher, received only three warning notices within 12-month periods were not discharged, those who received four or more warning notices within 12-month periods assuredly were not discharged on the occasion their third warning notice within a 12-month period. As appendix C reflects, 27 employees (in addition to those who are included on the G.C. Exh. 364) received 4 warning notices; 27 also received 5 warning notices; 12 received 6 warning notices; 3 received 7 warning notices; 6 received 8 warning notices; 1 received 9 warning notices; 3 received 10 warning notices; 1 received 12 warning notices; and 1 received 14 warning notices, all within 12-month periods during the 1990–1994 period.

[74] Of course, the floppy disks are not in evidence, just the hard-copy of the G.C. Exh. 364. I feel constrained, however, to state for the benefit of the parties (in case they have not already noticed it) that the disk file has two tables that are contiguous. I combined the two tables before sorting them as described.

[75] My exclusion of these 88 employees is somewhat problematical, and possibly prejudicial to the General Counsel. Of the 47 of the alleged discriminatees who were discharged in this case, only 13 received a warning notice for their last offense. (These were: Edward Armstrong, Dwight Ballard, Vernon Charles, Leroy Clark (who received a warning notice only after he was discharged), Carlos Henriquez, Eddie Johnson, John Joseph, Charles Kent, Kevin Lockett, Aubrey May, Joseph Melton, Molaison, and Cox.) Marshall, herself, was told by Mott and Danos that Bourgeois had said that she could not be issued another warning notice because she already had two warning notices in her file. As Bourgeois had obviously recognized, it is seemingly inconsistent to "warn" an employee who is being discharged.

A combination of appendices B and C shows:

Numbers of Employees Receiving Three or More Warning Notices in 12-Month Periods Without Being Discharged (1990–1994)

Number	3	4	5	6	7	8	9	10	11	12	13	14	Totron
Appendix B	451	208	79	39	15	4	5	1	0	0	0	0	802
Appendix C		27	27	12	3	6	1	3	0	1	0	1	81
Totals	451	235	106	51	18	10	6	4	0	1	0	1	883

That is, it has been shown by documentary evidence that during the 5-year period of 1990 through 1994, a total of 883 production and maintenance employees received three or more warning notices in 12-month periods without being discharged. Even in a unit of up to 4100 employees, this is a significant amount. It is also significant that employees received up to 13 warning notices without being discharged. (This last assertion assumes that the employee who received 14 warning notices in a 12-month period was discharged upon issuance of the last.)

Episodic though it may be, testimony by Michael Simpson, Respondent's vice president of production, further demonstrates that there is no consistent practice of discharging employees who accumulate three warning notices in 12-month periods. As discussed in detail in the case of alleged discriminatee Edward Armstrong, infra, Simpson testified that on June 21, 1993, when he felt that Armstrong had been wasting time, he ordered Armstrong's supervisors to his office. Simpson then reviewed Armstrong's file, himself, and found four warning notices that had been issued within the preceding 12 months. Simpson did not order Armstrong's discharge. Simpson testified that he instructed the supervisors to discharge Armstrong on his next offense rather than issue any more warning notices to Armstrong. On July 13, however, the supervisors issued to Armstrong his fifth warning notice for the 12-month period. When he found out about the fifth warning notice, Simpson did nothing. That is, Simpson, the penultimate supervisor of 4000 production and maintenance employees, had personal knowledge of five warning notices having been issued to an employee in a 12-month period, and still he did not order a discharge. In all of his testimony about Armstrong's case, Simpson did not testify that he even mentioned to his subordinate supervisors[76] any policy that employees should be discharged if they receive three warning notices (or four, or five) within a 12-month period.

Bourgeois, who made the decision to discharge Marshall, never testified that all employees who commit three disciplinary violations during 12-month periods *should* be discharged. And, certainly, Bourgeois never testified that all employees who received three warning notices during 12-month periods were always, or even usually, discharged. Bourgeois testified that employees who received three or more warning notices in 12-month periods *could* be discharged, and, for that reason, he decided that Marshall *should* be discharged. The law, however, is that Respondent does not meet its burden under *Wright Line* merely by advancing a reason which *could* justify the discharge,[77] and this is all that Bourgeois' testimony tended to prove. To the extent that Bourgeois' testimony could be argued to support the conclusion that Respondent has a consistently enforced policy that employees are always discharged if they have committed three disciplinary offenses within a 12-month period, it is belied by the evidence that a substantial number of employees had been allowed to accumulate three or more warning notices in 12-month periods without being discharged.[78]

That is, to the extent that Respondent can be said to have presented some evidence that it would have discharged Marshall even absent her prounion sympathies, the General Counsel has shown that Marshall was treated disparately in comparison to the 883 other employees who were issued three or more warning notices in 12-month periods without being discharged. Respondent therefore has not demonstrated by a preponderance of the evidence that it *would have* discharged Marshall even absent her prounion sympathies. I therefore find and conclude that, by discharging Marshall Respondent violated Section 8(a)(3) and (1) of the Act.

b. Vincente Hernandez' discharge for loafing and having prior warning notices

Vincente Hernandez (vols. 18, 19) was employed as a painter until he was discharged on May 13, 1994.[79] The second complaint, at paragraph 148, alleges that by discharging Hernandez Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Hernandez because of his known union activities and expressions of sympathy which included his wearing three "Union-Yes" stickers on his hardhat. The General Counsel further alleges that, in violation of Section 8(a)(1), Hernandez was instructed to remove the "Union-Yes" stickers from his hardhat. Respondent denies that the

[76] Ken Genter, then a vice president who was subordinate to Simpson, ordered Armstrong's fifth warning notice, and Genter had been present when Simpson had previously ordered that Armstrong receive no more warning notices but be discharged on his next offense.

[77] *Structural Composite Industries*, supra.

[78] At the hearing Respondent argued that interdepartmental transfers were one reason that employees who are listed on G.C. Exh. 364 could accumulate three warning notices without being discharged; Respondent suggested that employees' warning notices from other departments might go unnoticed. Respondent adduced no evidence that any of the employees listed in G.C. Exh. 364 escaped discharge because some of their warning notices were issued in different departments. Moreover, aside from this defense's being purely theoretical (as opposed to being supported by record evidence), it is to be noted that Respondent defends the discharges of alleged discriminatees Edward Armstrong, Vernon Charles, and Audra Scott partly on the basis that they were issued warning notices in departments other than those in which they were working at the times of their discharges.

[79] Unless otherwise indicated, all dates mentioned in Hernandez' case are in 1994.

instruction was given. Respondent further answers that the supervisors who discharged Hernandez had no knowledge of any prounion sympathies that Hernandez may have held at any relevant time. Respondent further contends that Hernandez was discharged solely because he committed the disciplinary offense of loafing on May 13, and that offense was his third within a twelve-month period. The General Counsel replies that the loafing defense is a pretext because Hernandez paused in his work on May 13 only to take a short break, something that employees were regularly allowed to do. Alternatively, the General Counsel replies that, even given the fact that Hernandez had validly been issued two warning notices during the 12 months prior to May 13, and even assuming that on May 13 he committed another disciplinary offense, Hernandez was treated disparately because: (1) another employee engaged in the same conduct at the same time but was not disciplined, and (2) a great number of other employees committed three or more disciplinary offenses in 12-month periods without being discharged. Ultimately, I find and conclude that Hernandez did some loafing on May 13 (though not as much as Respondent attributes to him); however, I further find that a significant number of other employees had been allowed to commit, within 12-month periods, three or more disciplinary offenses without being discharged. I therefore find that Hernandez was treated disparately, and I conclude that Hernandez was discharged in violation of Section 8(a)(3).

In the spring of 1994, Hernandez worked on the crews of various paint department foremen, all of whom reported to Lead Foreman Carl Mott Jr. and General Foreman Tommy Bourgeois. Hernandez testified that in April he placed three "Union-Yes" stickers on his hardhat, and he continued to wear those stickers through the day of his discharge. Current employee Leonard Watkins (vol. 44) fully corroborated this testimony; specifically, Watkins testified that he saw Hernandez immediately before he was discharged and Hernandez was then wearing the stickers on his hardhat. I found this testimony by Hernandez and Watkins to be credible.

That Hernandez had received two valid warning notices during the 12 months before May 13 is not disputed. Hernandez acknowledged that on April 11 Mott saw him leaving the ship upon which he was working a few minutes before the 3:30 whistle blew. Mott told Hernandez to return to the ship. Hernandez refused and kept walking away from the ship. Mott told Hernandez that he was going to cause a warning notice to be issued to Hernandez. Hernandez responded, "Why don't you give me three instead." On cross-examination, Hernandez acknowledged that, by his remark, he was challenging Mott to issue him a third warning notice and discharge him under the progressive disciplinary system of the Avondale Employees' Guide. Hernandez further acknowledged that he additionally told Mott that he wanted to be fired because he "wanted to get a grant to go back to school." (How being discharged would have helped Hernandez get some grant was, of course, never asked.) On April 13 Mott caused a warning notice to be issued to Hernandez over the April 11 incident. The notice checks the box for, and quotes, the Avondale Employees' Guide's General Offense-4 ("Wasting time, loitering or leaving the working place without permission").

Hernandez' second warning notice was also initiated by Mott. The warning notice, dated April 20, checks and quotes General Offense-5 ("Quitting work . . . before the specified time"). Although the validity of this warning notice is also not in issue, an 8(a)(1) complaint allegation is based on the circumstances surrounding its delivery to Hernandez. Hernandez testified that while his then-Foreman T.—C. Bunch was presenting the warning notice to him, Foreman Lonnie Sanchez approached. Hernandez was asked, and he testified:

> Q. And what if anything happened when Mr. Sanchez approached?
>
> A. He hit me over the head on the hat with a thick roll of brown paper. . . .
>
> Q. And how many times, if any, did he strike you?
>
> A. About two, three times.
>
> Q. And what if anything was said?
>
> A. He said, "Man, get those things off your hat."
>
> Q. And what if anything was on your hardhat at the time?
>
> A. The three union stickers.

Based on this testimony by Hernandez, paragraph 79 of the second complaint alleges that Sanchez, "told an employee to remove union insignia from his hardhat and struck him on his hardhat with rolled-up paper."[80] Bunch (vol. 103) testified that Sanchez was not present when he presented the warning notice to Hernandez; Bunch denied that any such incident occurred in his presence. Sanchez (vol. 101) also denied the testimony by Hernandez, but he admitted that in the past he had playfully tapped Hernandez and other employees on the head with rolls of paper that he routinely carries around as he works.

I found Hernandez credible that Sanchez hit Hernandez with the paper and told him to get the prounion insignia off his hardhat. I further found credible Sanchez' testimony that he often tapped employees on the head, but in a friendly way. Therefore, I find that an unlawful instruction was given to Hernandez by Sanchez, but there was no sort of unlawful (under the Act) assault or battery involved, and Sanchez' striking Hernandez is not something for which an order should be issued. I conclude that Respondent, in violation of Section 8(a)(1), by Sanchez, on or about April 20, 1994, instructed an employee to remove prounion insignia from his clothing.

Hernandez' Discharge

On May 13, Hernandez was assigned to the crew of Foreman Randall Laborde. On that date, the crews of Laborde and Pierre, and at least one Cleanup During Construction Department (CDC) employee, were assigned to sweep and shovel blasting sand that lay on a deck of the ship. (Sandblasting on a ship, as opposed to sandblasting on a unit that is on the ground, is usually done at night; this "sand," which is really graphite, apparently was the residue from one such operation.) During the sweeping operation, several of the employees took a morning break. Laborde and Pierre acknowledged that, during the mornings, they allow their employees to take "informal" breaks of about 10 minutes, but they testified that Hernandez took a much longer break on May 13, as described infra.

Hernandez testified that about 9:40 a.m. he saw a group of four or five employees taking a break in a shaded area. Hernandez walked over to the shade and began talking to CDC employee Scott Blanchard (who did not testify). Hernandez credi-

[80] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Sanchez, as well as the charge in Case 15–CA–12171–1.

bly testified that Blanchard was not wearing any prounion insignia. Hernandez testified that "after about two minutes" the other employees went back to work, but he and Blanchard continued talking in the shade. Hernandez testified that he and Blanchard had stayed in the shade "for about five minutes," when they were approached by Pierre. (Therefore, Hernandez estimated the duration of his not working when Pierre approached as seven minutes.) Hernandez testified that when Pierre first approached him and Blanchard, Pierre told them both to go to the paint department office that was on board the ship. Hernandez did not testify that he or Blanchard were asked why they were being instructed to go to the office.

Hernandez testified that he went to the office, but he was not asked if Blanchard did so. Hernandez testified that he waited in the office for a few minutes; then Mott and Pierre arrived. According to Hernandez, Pierre told Mott that Hernandez had been taking "a 30-minute break" during which he was talking to Blanchard. Hernandez testified that he replied, "Thirty minutes? I have been doing my job, and it wasn't no 30 minutes." Further according to Hernandez, "Then Carl Mott said, 'Just let me tell you one thing, Vince; give me your ID card [i.e. badge]; you are fired."' Hernandez did not testify that, during the interview, he told Mott how much of a break that he had taken. After collecting the tools that he owned, Hernandez left the premises. Respondent's counsel acknowledged (vol. 47) that Blanchard received no discipline over the events of May 13. On cross-examination Hernandez denied that Pierre told him and Blanchard to get to work before he ordered them to the office.

Watkins testified that on May 13 he saw Hernandez and Blanchard standing and talking for about 2 minutes. He walked toward them, to join them, but, as Watkins put it, "Well, I was going to stop, but I heard Pierre tell Vince and Scott to meet him at the paint office. . . . I just kept going." Watkins testified that he did not know if either Hernandez or Blanchard actually went to the office as instructed.

Hernandez' Discharge—Respondent's Evidence

Pierre (vol. 114) testified that he saw Hernandez and Blanchard standing and talking instead of working. Pierre was asked and he testified:

> Q. Did you ever say anything to Mr. Hernandez or Mr. Blanchard?
>
> A. I did. . . . I gave them a verbal warning.[81] I told them to go back to work because they had been taking a break for too long. I told them to go back to work.
>
> Q. Approximately how long had they been taking a break at the time you spoke to them?
>
> A. About 30 minutes. . . .
>
> Q. [By Ms. Canny]: What, if anything, did either Mr. Blanchard or Mr. Hernandez do after that?
>
> A. Blanchard went back to work. Hernandez . . . continued to talk to people.

(It is to be noted that Pierre testified that Hernandez and Blanchard "had been taking a break for too long"; he did not testify that the employees were violating some rule by taking at least some break. This is consistent with the preponderance of the evidence that, although Respondent had no established breaks other than lunch, it allowed employees short breaks in the mornings, and sometimes during the afternoons.) Pierre testified that he then asked Laborde to be a witness to "the fact that he (Hernandez) wasn't doing his job." Pierre stepped over to Hernandez, where Hernandez was still talking to other employees, and told him to go to the office. When he, Mott and Hernandez were in the office, further according to Pierre:

> I told [Mott that] me and Randall Laborde observed him (Hernandez) up there doing nothing; I had verbally warned him, and he continued it, so I didn't need him up there because he wasn't doing nothing. . . . [Mott] just took his badge and told him he was terminated.

Laborde (vol. 124) testified that after he gave Hernandez and the rest of his crew assignments to sweep sand, he saw Hernandez standing and talking to Blanchard. On direct examination Laborde was asked and he testified:

> Q. Approximately how long did you see him talk to Scott Blanchard?
>
> A. Twenty minutes.
>
> Q. Did you do anything at any point when you observed him speaking to Scott Blanchard?
>
> A. I believe Pierre went over there and had told him to break it up. . . .
>
> Q. And what did you see Scott do after Mr. Pierre went to speak to them?
>
> A. He left the area.
>
> Q. And what did you see Vincente Hernandez do at that point?
>
> A. He fiddled around a little while and then went back to doing the same thing he was doing before.
>
> Q. And what was that?
>
> A. Nothing.

On cross-examination Laborde was asked and he testified:

> Q. And when you saw the man [Hernandez] standing around talking, did you at first think he was taking one of those informal breaks?
>
> A. At first, yes.
>
> Q. And how long is a reasonable time for an informal break?
>
> A. Ten minutes or so.
>
> Q. And how long did you watch the man take an informal break?
>
> A. Approximately a half hour.
>
> Q. And what, if anything, was he doing during that 30 minutes?
>
> A. Talking.
>
> Q. And who was he talking to, sir?
>
> A. Well, I remember one person was Scott [Blanchard] with CDC. That is the only person that stands out in my memory.
>
> Q. How long did he talk to Scott in CDC?
>
> A. About ten minutes.

Mott (vol. 126) testified on direct examination that in the office, Pierre reported that "he had had enough of Vince. He was standing there talking, and he wasn't doing his job." Mott testified that immediately upon that report, "I told Vince he was terminated, and I took his badge." Mott testified that he would not have terminated Hernandez were it not for Hernandez' warning notices of April 13 and 20.

On direct examination Mott was asked if he had knowledge of Hernandez' prounion sympathies before Hernandez' April

[81] Throughout the hearing, witnesses (and even the lawyers) used the word "verbal," when "oral" was obviously meant.

20 warning notice, but he was not asked on direct examination if he became aware of Hernandez' prounion sympathies after April 20. When asked on cross-examination, however, Mott denied that he "ever" knew that Hernandez was a union supporter. Further on cross-examination Mott denied that Pierre had given him an estimate of how long it was that Hernandez had been loafing.

After Hernandez was discharged and had left the plant, Pierre and Laborde signed a written memorandum to Hernandez' personnel file. (This was not a warning notice.) The memorandum states:

> 5–13–94. General Offense #4. Employee was instructed to remove sand from 06 level. He was observed for 30 minutes wasting time and loitering, stopping other employees from working. [9:30]-10:00

At trial, however, neither Laborde nor Pierre testified that they saw Hernandez stopping other employees from working.

Hernandez' Discharge—Credibility Resolutions and Conclusions

The first issue is whether the General Counsel has presented a prima facie case that Hernandez' discharge was imposed unlawfully. I have found that, from sometime in April through his discharge on May 13, Hernandez openly displayed three "Union-Yes" stickers on his hardhat as he worked. The supervisors who worked around him during that period are thus charged with knowledge of Hernandez' prounion sympathies.[82] There is further evidence that, despite his narrow denial on direct examination and his broad denial on cross-examination, Mott knew of Hernandez' prounion sympathies. Respondent has an employee stock-option plan (ESOP). On May 6, Respondent conducted a shareholders' meeting at its administration building. Several employee-shareholders, wearing union T-shirts, signed out and attended the meeting; Hernandez was one of them. Before he was discharged, the Union filed a charge on Hernandez' behalf alleging harassment. The harassment charge is not before me, but in a position letter addressed to the Regional Office dated May 12 Respondent's counsel acknowledges that Mott knew that Hernandez wore a union T-shirt to the May 6 meeting; counsel further stated that, from that knowledge, Mott had concluded that Hernandez had "union affiliation." Counsel would not have made this admission if it were not true. Mott testified falsely on this point.[83] Mott knew of Hernandez' prounion sympathies at the time of the discharge. The prima facie element of knowledge has thus been established for Hernandez' case.

Animus, in general, has been established through the proof of the numerous 8(a)(1) violations that I have found herein. Specific animus against those who wore prounion insignia has also been established by the numerous threats made to employees who wore such insignia. For Hernandez' case, the most important among these is, of course, the undenied threat of his general foreman, Bourgeois. As discriminatee Marshall testified, Bourgeois told the paint department employees that any employee caught wearing prounion insignia "would be fired." Animus specifically directed against Hernandez' display of prounion insignia was established by proof of Sanchez' violative instruction to Hernandez to remove the three "Union-Yes" stickers from his hardhat. Additionally, on cross-examination Sanchez was asked and he testified:

> Q. And not to say anything about Mr. Bourgeois but you knew that if Mr. Hernandez wanted to make a good impression on Mr. Bourgeois, the best thing to do was not to wear union stickers?
>
> A. I guess if you want to make a good impression.

Sanchez had apparently understood Bourgeois' attitude of animus toward those who wore prounion insignia. Presumably all other supervisors under Bourgeois, including Midlevel Supervisor Mott, had also understood Bourgeois' animus. The prima facie elements of knowledge and animus having been established by the General Counsel, the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Hernandez even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

The memorandum that Pierre and Laborde signed after Hernandez' discharge states that Hernandez had loitered for 30 minutes, and it states that Hernandez had stopped other employees from working. Pierre and Laborde have conceded the appropriateness of at least 10 minutes of Hernandez' "loitering," therefore, the estimate of 30 minutes of loitering in the memorandum is, at least, an exaggeration. The memorandum's statement that Hernandez stopped other employees from working was simply false; if there had been any truth in that assertion, Laborde or Pierre would have so testified. Nevertheless, the memorandum was drafted postdischarge, and, therefore, Mott could not have relied on the exaggerated, and false, statements in it. Mott discharged Hernandez upon receiving Pierre's oral report, and, although the memorandum is a demonstration of the lack of credibility of Pierre and Laborde, the oral report to Mott, and its basis, is that which must be examined to determine the merits of the allegations based on Hernandez' discharge.

Although Mott and Pierre denied that Pierre told Mott how long it was that Hernandez had been loafing, Hernandez testified that Pierre told Mott only that he (Hernandez) had taken "a 30-minute break." That testimony was credible. Moreover, I cannot believe that Pierre did not volunteer, or Mott did not ask for, an estimate of how long it was that Hernandez had been loafing. The questions therefore become whether Hernandez took a 30-minute break, and, even if he did not, did Mott reasonably believe that Hernandez had done so.

To decide this issue, I first address the question of whether, at any time before he ordered Hernandez to the office for discharge, Pierre told Hernandez and Blanchard, jointly, to get to work. I find that he did. Even according to Hernandez' account, neither he nor Blanchard asked Pierre why they were being sent to the office. There is an obvious reason for this; I find that Hernandez knew that he was being ordered to go to the office because he had previously been told to get back to work, and he had not done so.

I do find that Pierre told Hernandez, individually, to go to the office. Hernandez and Watkins testified that Pierre told Hernandez and Blanchard to go to the office, jointly. If credited, this testimony would tend to prove that Blanchard and Hernan-

[82] Both Sanchez and Bunch testified that they could not remember if Hernandez wore prounion insignia on his hardhat. These nondenials were incredible, and they fortify my decision to credit Hernandez' testimony about what Sanchez did in Bunch's presence.

[83] Again, as noted in the case of discriminatee Marshall, Mott's willingness to lie under oath was more than demonstrated by his contradictions of his pretrial affidavit.

dez loafed, instead of sweeping, for exactly the same amount of time, and it would tend to prove that they were not previously instructed to get back to work. I do not, however, believe that testimony. If that had happened, there would have been some explanation from Hernandez of what Blanchard did when Hernandez went to the office. It is undisputed that Hernandez met Mott and Pierre alone in the office, so Blanchard did not go there. If Hernandez' account had been true, he would have remembered the point at which he and Blanchard parted company, but Hernandez was not asked.

I find that Mott did approach Blanchard and Hernandez and tell them to get to work. When Pierre turned his back, Blanchard "left the area," as Laborde testified. Hernandez, who had previously invited his supervisors to discharge him, did more loafing. Then Pierre returned to Hernandez and ordered him to go to the office. The fact issue, however, remains: For what period of time, if any, did Hernandez and Blanchard loaf before they were approached by Pierre?

Pierre and Laborde testified that Hernandez and Blanchard took a 30-minute break; then, after Mott spoke to them, Hernandez took even more time to loaf. In view of his bad attitude (including specifically his request to be discharged), I am strongly suspicious that Hernandez had stayed on break for more than the 7 minutes that he admits. On the other hand, I do not believe that the supervisors stood and watched Hernandez and Blanchard take a 30-minute break before one of them spoke to the employees.[84] No half-diligent supervisor would allow an employee to overstay a break 5 minutes, much less 20, without saying something to the employee, such as "get to work." Therefore, I find that Hernandez and Blanchard had loafed for no more than 5 minutes beyond the (informal) 10-minute break period when Pierre approached them.

Although Pierre testified that Blanchard got to work when he told Blanchard and Hernandez to do so, Laborde testified that, after Pierre spoke to Hernandez and Blanchard, Blanchard left the area. Laborde would not have so testified if it had not been true. Therefore, both Hernandez and Blanchard ignored Mott's instruction to get to work; Hernandez did so by continuing to loaf, and Blanchard did so by leaving the area. Blanchard's act, which could only be characterized as insubordination, was ignored by Pierre. However, Pierre told Hernandez to go to the office where, as he admitted on cross-examination, Pierre recommended the discharge of Hernandez. Therefore, Blanchard and Hernandez engaged in equivalent conduct at the same time, but they were treated differently. Mott did not testify that he treated Hernandez and Blanchard differently because of Hernandez' prior request that he be discharged. The only distinguishing factor that remained was that Hernandez had been wearing prounion insignia, and Blanchard had not.

Hernandez had been told to get rid of the "Union-Yes" stickers on his hardhat by Sanchez, but he had not done it. In fact, he added the T-shirt to his regalia and wore it to the ESOP meeting of May 6, as Respondent's counsel admitted by letter. There was no reason for Mott's denying such knowledge, except that Mott was attempting to hide the real reason for the discharge which came exactly 1 week after the ESOP meeting. Hernandez' wearing of the T-shirt was simply too much for Mott, who discharged Hernandez for doing so, using as a putative basis the palpably incredible report of Pierre that he had watched Hernandez take a 30-minute break. Therefore, a case of disparate treatment is made out by comparing the treatment of Hernandez with that of Blanchard, as the General Counsel contends.

Moreover, Hernandez' treatment is not to be measured only against Blanchard's. Mott testified that Hernandez was discharged because his offense of May 13 was Hernandez' third within 12 months. However, Mott, like Bourgeois, also testified that employees are not always discharged upon the commission of their third offense within 12 months. Mott was asked on direct examination and he testified:

> Q. Is it mandatory to terminate an employee who commits an offense and has two prior citations in the last year?
>
> A. No, it is not.
>
> Q. What do you consider in terms of whether or not an employee should be terminated in those circumstances, where they have two prior written citations in the past year, and they commit another offense?
>
> A. It depends on the employee.

That is, as Bourgeois did in Marshall's case, Mott testified only that employees "could" be discharged upon their third offense. He did not testify that there was an immutable rule, or even a usual rule, that employees are to be discharged upon their third offense under the Avondale Employees' Guide within 12 months. Mott testified "[i]t depends on the employee." Moreover, as held in *Wright Line* and *Structural Composite Industries*, supra, advancement of a reason for which an employee "could" be discharged is not a defense to a prima facie case such as that which was presented for Hernandez. Respondent must have come forward with evidence that Hernandez "would have" been discharged for his third offense within 12 months even in the absence of his union activities. This evidence, of course, was impossible to produce because, as was shown in the case of discriminatee Marshall, during the 1990–1994 period 883 other employees received three warning notices within 12-month periods without being discharged.[85] I therefore find and conclude that Hernandez was discharged in violation of Section 8(a)(3).

c. Donald Varnado's discharge for loafing and having prior warning notices

Donald Varnado (vols. 15, 16, 128, 129, and 149) was employed as a painter until he was discharged on April 7, 1993. The second complaint, at paragraph 82, alleges that by discharging Varnado Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Varnado because of his known union activities and expressions of sympathy which included his wearing prounion insignia, displaying union authorization cards in the presence of supervisors, and speaking up to supervisors on behalf of the Union at employer campaign meetings. The General Counsel further alleges that, in violation of Section 8(a)(1), Varnado was twice threatened and once interrogated. Respondent denies that the threats and interrogation occurred. Respondent further denies that its supervisors had knowledge of any prounion sympathies that Var-

[84] The unreliable nature of the supervisory testimony is demonstrated by Laborde's first testifying that he saw Hernandez talking to Blanchard for 20 minutes, and then his reduction of that estimate on cross-examination to 10 minutes.

[85] Knowledge of the existence of such evidence is undoubtedly why Bourgeois and Mott did not testify that any employee who received three warning notices within a 12-month period *would* be discharged.

nado may have held at any relevant time. On brief, Respondent further answers that Varnado was discharged solely because he committed the Immediate Discharge Offense of "deliberate loafing" under the Avondale Employees' Guide. The testimony of Respondent's supervisors, however, was that Varnado was discharged for committing three general offenses under the Avondale Employees' Guide. Although not disputing the validity of the two prior warning notices, the General Counsel contends that Varnado was not loafing on April 7, and, to the extent Varnado was idle at any time on that date, his idleness was attributable to medicine that Varnado had been given by the Respondent's medical department, as his supervisors knew before Varnado was discharged. Alternatively, the General Counsel answers that, even given the fact that Varnado had validly been issued two warning notices during the 12 months before April 7, and further assuming that he committed another disciplinary offense on April 7, Varnado was treated disparately because other employees had been issued three or more warning notices in 12-month periods and they were not discharged. Ultimately, I find that Varnado committed the General Offense of wasting time or loitering on April 7; however, I further find that a significant number of other employees had been allowed to commit, within 12-month periods, three or more disciplinary offenses without being discharged. I therefore find that Varnado was treated disparately and that he was discharged in violation of Section 8(a)(3).

Varnado testified that he began wearing two "Union-Yes" stickers on his hardhat at the beginning of the organizational attempt in March, and he testified that he continued to wear those stickers through the date of his discharge. Current employee Lilly Dumas (vol. 44), former employee Donald McGee (vol. 58), and alleged discriminatee Joe Simpson (vol. 18) corroborated this testimony. I find that Varnado did wear the prounion insignia as he testified.

Varnado, whose shop nickname was "Rambo," testified that during the week of March 8, Lead Foreman Carl Mott Jr. called the members of his crew together and, from the group, Mott singled out Varnado and asked him how he felt about the organizational attempt that had just begun. Varnado testified that he told Mott that the Union would keep the employees from being harassed and being issued warning notices and that the Union would get the employees wage increases and do something about pay scales that some employees thought were inequitable. Further according to Varnado:

> He said, Well, Rambo, I simply wouldn't vote a union in here because of—and lose—he said, Lose my job, my home and my car because if the Union gets in here, that—if we had no blasting to do, he would have to send us home because the Union wouldn't let us do any other crafts' work.

This is an exact reproduction of the transcript. As it seemed to me at the time, and as it appears in print, Varnado was testifying that Mott was saying that Mott would lose his (own) job, home and car if the Union were selected as the employees' collective-bargaining representative. Based on this testimony, however, paragraphs 7(a) and (b) of the second complaint allege that Respondent, by Mott, (a) interrogated its employees, and (b) "threatened its employees with discharge and the loss of their real or personal property if they selected the Union as their bargaining representative."[86]

Mott acknowledged that he once conducted an employer campaign meeting at which Varnado spoke up and asked about the two-tier wage system that Respondent then had in effect. Mott denied, however, that Varnado stated that he favored the Union, or that he asked Varnado how he felt about the Union, or that he (Mott) stated in any meeting that, if the Union were selected, *he* would lose *his* job, *his* house or, *his* car. In this last denial Mott was not attempting to refute the allegation that he threatened the employees with loss of their jobs. He was, however, properly addressing the testimony by Varnado. I believe Mott's testimony that he did not tell the employees that he would lose his (own) job, house and car, and that is all that Varnado's testimony can reasonably be made out to suggest. I further do not believe that Mott singled out Varnado from a group to ask his opinion; Varnado did not sound believable at the time he gave that testimony, and I remain in that view. I shall recommend dismissal of these allegations of the complaint.[87]

Varnado also testified that during a morning between March 8 and 11:

> I check in and sign the MCR, and I was bending down to get my tools and all. And as I was getting ready to walk off, Carl Mott, Jr. asked me what I was going to do with all those Union cards I had in my back pocket. . . . I didn't respond to his question. I just went on to my job site.

The General Counsel relies on this testimony as further evidence of Varnado's prounion sympathies. Mott denied seeing Varnado with union authorization cards or making any such statement to Varnado, but I found Varnado credible on the point.

Varnado further testified that on March 11, Paint Department General Foreman Tommy Bourgeois conducted a meeting of the crews of Foremen Mott and Randall Laborde. According to Varnado:

> This meeting started by Mr. Bourgeois passing out these guarantee cards for the Union bosses to sign and bring them back to him. . . . Well, he said to—when the Union guys signed these cards, to bring them back to him. And then he also stated that with the Union getting in here, we would lose contracts and Texaco [a customer of Respondent] would go elsewhere, and that if the Union was in the yard and if they had no blasting to do, we couldn't do [the work of] any other crafts, and he would have to send us home or lay us off.

As mentioned above in the discussions of paragraph 74 of the second complaint, Reynard Smith was employed in the paint department from 1982 to July 1993; he was twice discharged, but neither discharge is alleged as violative. Smith testified (vol. 48) consistently with Varnado about Bourgeois' March 11

[86] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Varnado, as well as the charge in Case 15–CA–12171–1.

[87] No separate allegation is made over Mott's (undenied) statement that, if the Union were successful in the organizational attempt, employees would be sent home rather than given indoor work.

remarks. Varnado and Smith testified that, theretofore, when work was slack, they would be given assignments in other areas rather than be sent home. (On cross-examination, Bourgeois agreed that such was Respondent's practice.)

Based on this testimony by Varnado and Smith, paragraph 8 of the second complaint alleges that Respondent, by Bourgeois, "threatened its employees with discharge and layoffs if they selected the Union as their bargaining representative."[88] When he testified (vol. 132), Bourgeois quibbled with the testimony by Smith and Varnado about the setting of the employer campaign meetings that he conducted, but he did not deny the testimony by Varnado and Smith that he told employees that Respondent would send employees home when work was slack if the Union was selected. I found the employees' testimony credible. I conclude that, as alleged, Respondent, by Bourgeois, on March 11, 1993, threatened its employees with layoffs (but not discharge) if they selected the Union as their collective-bargaining representative.[89]

Varnado testified that following the March 11 meeting, he was approached by Bourgeois who told Varnado that he was to transfer to the night shift. (Varnado protested, and, eventually, he did not have to transfer.) Varnado testified that during his March 11 exchange with Bourgeois:

> Well, I told him okay; Well, if I did [transfer to the night shift], from now on, I—when they hold meetings for us to tell us not to vote for the Union, that I didn't want to hear it or attend any of them—any more of the meetings.

Smith testified that he overheard this exchange between Varnado and Bourgeois, including Varnado's complaint about not wanting to attend any more employer campaign meetings. Bourgeois did not deny this testimony, and I found it credible.

Background of Varnado's Discharge

That Varnado had received two valid warning notices in the 12-month period before April 7 is not disputed. On October 27, 1992, Varnado was issued a warning notice for, as it states:

> Sleeping or deliberate loafing during hours of work. Foreman (W401) [Luther Bishop] observed employee sleeping on the job. No witnesses to verify employee's action. Verbal warning and written citation was given. Violation of any other Company rules or regulations will result in your termination.—Final Warning—

No general offense or major offense box numbers are checked on the warning notice. "Sleeping or deliberate loafing" is Immediate Discharge Offense-2 under the Avondale Employees' Guide. Foreman Richard Sahuque testified (vol. 101) that he issued this warning notice to Varnado on the report of Bishop. Sahuque testified that Varnado was not discharged on October 27 solely because Bishop reported to him that Bishop could find no other witnesses to Varnado's sleeping. (The necessity of a witness for discharges based on sleeping is discussed infra, where other alleged discriminatees were discharged for that offense.) Varnado was issued a second (valid) warning notice on December 7, 1992. This second warning notice was for failing to report to work on a Sunday, a day that his foreman's crew was working an irregular workweek.[90]

Varnado testified that while working on March 22 or 23 he injured his back. He went to the medical department where he was given a supply of Parafon Forte, a muscle relaxant. Varnado was treated with ice packs, fitted with a back brace, and sent back to work. Respondent's in-house physician, Dr. Mabey,[91] told him to wear the brace at all times when working and to begin coming for treatment the next day. Varnado returned to his job which was, at the time, power-tooling. Power-tooling is the operation of a power-chisel to remove rust and welding detritus-hard, heavy work. Varnado complained to his foremen that the job was aggravating his injury. Varnado went back to the medical department where Dr. Mabey told him to go home to rest. Varnado did not come to work again until April 6. Varnado testified that he lost the supply of Parafon Forte that he had been furnished on March 22, and that he never took any of it.

Varnado further testified that when he reported to work on April 6, he was again assigned to the job of power-tooling. Varnado asked if he could have a light-duty job, but Bourgeois, and Laborde, told him that there were no light-duty jobs available.

On April 6, after first being denied light-duty work by Bourgeois, Varnado went back to the medical department and complained; he was then given a light-duty slip. Varnado testified that the slip stated that he should be required to perform "No lifting, climbing or bending." All of Varnado's records were produced by Respondent pursuant to subpoena; no such light-duty slip was offered by the General Counsel. An April 6 light-duty slip for Varnado was produced in Respondent's case; it states only that, if possible, Varnado should be given jobs that "restrict repetitive climbing." When called by Respondent in its case, Varnado denied that the light-duty slip that had been produced by Respondent was the one that he had received. I have no reason, however, to believe that (1) copies of the light-duty slip that was described by Varnado were withheld by Respondent; or (2) the April 6 light-duty slip that was produced by Respondent was a fabrication. I discredit Varnado's testimony that he was given a light-duty slip that prohibited "lifting, climbing or bending."

Varnado's Discharge

On the morning of April 7, Varnado reported to the first aid department for therapy, as had been scheduled. He testified that he was again given a supply of the muscle relaxant Parafon Forte. He took one immediately; then the nurse told him that he was supposed to take it only with food. Varnado testified that he had eaten nothing that morning. Although Parafon Forte would make one drowsy, especially on an empty stomach, Varnado went back to his work area where Foreman Eldon Pierre assigned him to sweeping duties. Varnado did not then tell Pierre or any other of his supervisors that he had taken a drug that could affect his performance.

[88] See fn. 86.

[89] The fact that Mott told the employees the same thing fortifies my conclusion that Varnado and Smith were testifying truthfully.

[90] Although the October 27, 1992 warning notice had been marked as "Final," and although it contained the categorical warning that violation of any other rules by Varnado would result in his termination, Varnado was not discharged upon his December 7 offense. As will be seen, the noneffectiveness of "Final" warning notices was quite common.

[91] The transcript, where it spells Dr. Mabey's name in various other ways, is corrected.

Varnado testified that he was sent to the main deck of a ship and assigned to sweep "sand" (actually, graphite granules and the detritus from sandblasting). Varnado was supposed to do this with two other employees, Lilly Dumas, who testified, and another woman whose name Varnado could not remember (herein called Doe). Varnado testified that he, Dumas and Doe were assigned to sweep an area on the main deck of a ship below a point where other employees were sandblasting that day. Varnado testified that he swept and the women carried off the buckets of sand. Varnado testified that he did not carry off the buckets because, "I had restricted duties when I was working with the ladies." As noted, Varnado's restrictions actually did not include one against lifting. Varnado testified that he, Dumas and Doe were required to wait until the sandblasters above them stopped to move their equipment before they could do any sweeping. Between those times, the sweepers waited.

Varnado testified that twice that morning he was required to leave the area to seek out a toilet; Varnado testified that he left his work area a third time to go to a restroom "[b]ecause the medication I had took, it started affecting me; light-headed and wooziness." Varnado acknowledged on direct examination that for 10 minutes that morning, he conversed with passing employee Lumas Rose; Varnado denied, however, that he could have been sweeping at that point because of the sandblasting that was then being conducted.

Varnado testified that after his third trip to the restroom he was approached by Lead Foreman Mott. According to Varnado, Mott said: "Rambo, when are you going to finish this area; You have been walking back and forth in this area all morning; I think I am going to fire you; Give me your badge." Varnado was, in fact, discharged at that point. Varnado further testified that, as he was leaving the plant, he saw General Foreman Bourgeois; he appealed to Bourgeois to reinstate him, but Bourgeois said that there was nothing that he could do.

In addition to testifying about Varnado's wearing prounion insignia, employee Dumas also testified about the work that Varnado had done on April 7. Dumas testified that while she, Varnado and Doe were sweeping there was "steady" sandblasting going on. She also testified that Varnado was constantly working that morning before Mott approached and discharged Varnado.

Varnado's Discharge—Respondent's Evidence

Mott, Laborde, and Pierre testified that blasting was not being performed on April 7; the sand that Varnado was required to sweep was left over from blasting done the night before (when blasting is usually done on the ships because of its obvious effects on other operations). Pierre testified (vol. 114) that when he first assigned Varnado to sweep, Varnado stood around and talked to passers-by, despite Pierre's admonitions to get to work. Pierre moved Varnado to another part of the deck. Mott testified that, three times, he saw Varnado standing around in the area of the deck to which Pierre had moved Varnado. Mott testified that he spoke to Varnado on the first two occasions and told him to get to work. Then Pierre reported to Mott that he had previously moved Varnado to the area in which Mott had seen Varnado because Varnado had been loafing. Mott testified that, after that report from Pierre, he again saw Varnado standing around a third time. At that point, Mott testified, he decided to discharge Varnado. Mott testified that he decided to discharge Varnado: "Because of his previous record, and he wasn't doing nothing that day." By "his previous record" Mott testified, he meant the warning notices that he knew to have been in Varnado's file. Mott testified that he was not sure how many notices were in Varnado's file, but he thought that there were three.

Mott testified that, when he approached Varnado and told him that he was discharged, Varnado "told me he couldn't be terminated, because he was on medication through First Aid." Mott called Bourgeois and reported to Bourgeois what Varnado had said about medication. Bourgeois told Mott to call the security department and have Varnado escorted from the premises. Mott did so. Mott further testified that when Security personnel came to get Varnado, Varnado then began to display the symptoms of light-headiness, but Varnado had not done so before.

Mott was asked on cross-examination and he testified:

> Q. In regard to these three prior citations you are sure at the time that you probably knew about them, do you have any estimate as to how old you felt those citations were when you fired Rambo?
>
> A. They were less than a year old.
>
> Q. How do you know that, sir?
>
> A. Because I couldn't have fired him if he didn't have two previous citations.
>
> Q. When you say that you could not have fired Rambo if he did not have two previous citations, why did you say that?
>
> A. Unless he—I didn't mean that I couldn't have fired him. I needed to check his record, and as long as he has two citations; on the third citation, you can be terminated.

Mott was further asked on cross-examination and he testified:

> Q. You are aware that there are immediate discharge offenses at the shipyard?
>
> A. Yes, I am.
>
> Q. Was Rambo engaged in an immediate discharge offense on the day he was fired?
>
> A. No.
>
> Q. Are you aware that there is under the general offense category a rule about wasting time?
>
> A. Yes, I am.
>
> Q. Is that what Rambo was doing on the day he was fired, wasting time, under general offense 4?
>
> A. Yes, if he was caught doing nothing, yes.

On cross-examination, Bourgeois was asked why, when Varnado appealed to be reinstated, he had not revoked Mott's decision; Bourgeois replied: "The previous problems he had and citations he had, and the offense he committed that day."

Varnado's Discharge—Credibility Resolutions and Conclusions

The first issue is whether the General Counsel has presented a prima facie case that Varnado's discharge was imposed unlawfully. I credit the corroborated testimony of Varnado that he continuously wore prounion insignia on his hardhat from the start of the organizational attempt until he was discharged; I further credit his testimony that he once told Bourgeois that he did not wish to attend any more employer campaign meetings. I further have found that Mott once asked Varnado what he was going to do with the union authorization cards that he had in his back pocket. In summary, I find that Respondent's supervisors had knowledge of Varnado's prounion sympathies at the time of his discharge. Animus toward those employees who supported the Union, and specific animus toward those who wore

prounion insignia, is established throughout this decision. (To be remembered especially is the undenied testimony of discriminatee Marshall that Bourgeois, Mott's general foreman, told her group that those employees who wore prounion insignia would be discharged.) I therefore find that a prima facie unlawful case of discrimination against Varnado has been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Varnado even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I credit the testimony of Mott, Laborde, and Pierre that sandblasting was not being conducted at the same time that the employees were sweeping. Aside from the logical inconsistency of a requirement that sweeping be done while the sanding detritus was still being generated, I believe that Varnado created the testimony of the spasmodic sweeping to fit into his three-fold theory of why he was working lethargically on April 7: (1) the effect of the Parafon Forte, (2) the required pauses between blasts, and (3) his required waiting while the women carried off the buckets of sand—an activity from which he was not actually exempted by the Medical Department, contrary to Varnado's testimony.[92] Also, Dumas was incredible in her testimony that there was "steady" sandblasting when Mott approached to discharge Varnado, and she was incredible in her testimony that Varnado worked continuously without talking to other employees—two things to which Varnado did not testify himself. Realizing that I have discredited Mott (severely) elsewhere, I nevertheless do credit testimony of Mott and Pierre that during the morning of April 7, Varnado was observed by the supervisors standing around, at least three times, loafing.

I do not believe that the Parafon Forte caused Varnado's lethargy. Parafon Forte, it is undisputed, will make a new user drowsy. I do not, however, believe Varnado's self-serving testimony that he had lost the bottle of Parafon Forte that he had been given the week before; that is, I do not believe that he was a new user. I discredit Varnado's testimony that he took the drug on an empty stomach, and that made him drowsy, and that caused his lethargic performance. At any rate, at the time that he discharged Varnado, Mott did not know that Varnado was drowsy or that Varnado was taking medicine that might make him drowsy (if, indeed, Varnado was drowsy).

On brief, Respondent states, "Mr. Donald Varnado was terminated on commission of the immediate discharge offense of deliberate loafing during hours of work." While counsel characterizes Varnado's conduct as that which would require no prior offenses to warrant discharge under the literal terms of the Avondale Employees' Guide, Mott, the supervisor who discharged Varnado, did not. As quoted above, Mott firmly denied that Varnado had done anything more than waste time under General Offense-4. Further, Mott clearly testified that he discharged Varnado because Varnado's offense of April 7 was his third within 12 months; moreover, Bourgeois testified that he declined to reverse Mott's decision because of Varnado's "previous" problems and warning notices coupled with Varnado's conduct of April 7. That is, the lawyer's post hoc theory of the case notwithstanding, Varnado was not discharged because he had committed an immediate discharge offense under the Avondale Employees' Guide.

Again, as stated in the cases of discriminatees Marshall and Hernandez, Mott testified that he discharged Varnado because employees "can," or "could," be terminated upon their third disciplinary offense within 12 months; Mott did not, however, testify that there was any rule of practice that employees were, or should be, discharged upon their third disciplinary offense within 12 months.[93] Moreover, as further demonstrated above, during the 1990–1994 period Respondent allowed 883 employees to accumulate three, or more, warning notices without discharging them. At most, therefore, Respondent has shown only that employees such as Varnado "could" be discharged on their third offense within 12 months; it has not demonstrated that Varnado "would" have been discharged for his third offense within 12 months even in the absence of his expressions of prounion sympathies. That is, Respondent has not come forward with a defense under *Wright Line*; to the extent that it can be said to have come forward with any defense, the General Counsel has shown that Varnado was treated disparately. Accordingly, I find and conclude that Varnado was discharged in violation of Section 8(a)(3).

d. Donald Thompson's discharge for loafing and having prior warning notices

Donald Thompson (vols. 29, 30) was employed as a welder until he was discharged on July 16, 1993. The second complaint, at paragraph 101, alleges that by discharging Thompson Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Thompson because of his known union activities and expressions of sympathy which included his wearing prounion insignia and his speaking favorably about the organizational attempt at an employer campaign meeting. The General Counsel further alleges that Thompson was unlawfully interrogated about his union activities and sympathies. Respondent denies that the interrogation occurred. Respondent further denies that its supervisors had knowledge of any union activities or sympathies of Thompson at any relevant time. Respondent further answers that Thompson was discharged solely because, on July 15, he committed the disciplinary offense of quitting work before his shift ended and, within the 12-month period prior to July 15, Thompson had been issued two other warning notices. Although not disputing the validity of the two prior warning notices, the General Counsel replies that Thompson did not quit work early on July 15. Alternatively, the General Counsel replies that, even given the fact that Thompson had been issued two valid warning notices during the 12 months before July 15, and further assuming that he committed another disciplinary offense on that date, Thompson was treated disparately because other employees received three or more warning notices in 12-month periods without being discharged. Ultimately, I find that Thompson did not quit work early on July 15, that the reason assigned for his discharge is a pretext, and that his discharge violated Section 8(a)(3).

Thompson worked on the 3:30–to-midnight shift under Foreman Charles Rotolo. Thompson testified that in May he attended an employer campaign meeting conducted by Welding

[92] At his unemployment compensation hearing Varnado offered a fourth reason for his halting performance on April 7; in that hearing Varnado testified that he was stopped by passers—by who inquired about his health.

[93] As Mott defined the practice of discharging employees after a third warning notice, "[i]t depends on the employee."

Department Superintendent Norris (Black) Pertuit. According to Thompson:

> Well, Mr. "Black" Pertuit mentioned something about the Union, and I told him, "Well Avondale does anything they want to do, so I am going to vote for what is best for me. And . . . maybe the Union could make a change for the better in the yard."

The General Counsel relies on this testimony as evidence of knowledge of Thompson's prounion sympathies, specifically knowledge by Pertuit, who ultimately made the decision to discharge Thompson. Pertuit denied recollection of any such statement by Thompson at an employer campaign meeting. I do not credit that disclaimer of recollection; I find Pertuit knew of Thompson's prounion sympathies at the time of Thompson's discharge.

Thompson further testified that about 2 weeks before the June 25 Board election, when he and Rotolo were in a work area where no one else was present:

> Well, he [Rotolo] asked me how did I feel about the Union, and I just told him, "Well, John [sic], Avondale has been mistreating the employees anyway, so a man would have to be crazy not to vote for the Union."

Based on this testimony by Thompson, paragraph 40 of the second complaint alleges that Respondent unlawfully interrogated its employees.[94] Rotolo denied the interrogation, but, when asked on direct examination if Thompson had ever told him that an employee would have to be crazy not to vote for the Union, Rotolo answered: "I don't remember."

Thompson testified that in his response to the interrogation he called Rotolo "John," although Rotolo's given name is Charles. This does cause me to wonder somewhat about the testimony, but Thompson was not asked to explain why he called Rotolo "John," and I do not draw any conclusion from this factor. I found Thompson credible in his testimony that Rotolo asked him how he felt about the Union. I conclude that Respondent, in violation of Section 8(a)(1), by Rotolo, in mid-June 1993, interrogated its employees about their union membership, activities, or desires. Moreover, Rotolo's testimony that he did not remember if Thompson had told him that an employee would have to be crazy not to vote for the Union was less than a denial; I find Rotolo's nondenial to be more evidence that, at the time of his discharge, Respondent's supervisors knew of Thompson's prounion sympathies.

Thompson testified that he began wearing a "Union-Yes" sticker on his hardhat during the week before the June 25 Board election, and he continued to wear it through the date of his discharge. Rotolo denied remembering that Thompson ever wore a "Union-Yes" sticker; Pertuit was not asked if he saw Thompson wearing a "Union-Yes" sticker. I find that Thompson wore a "Union-Yes" sticker, as he described, and this is further support for the conclusion that Respondent's supervisors, specifically Pertuit, knew of Thompson's prounion sympathies at the time of Thompson's discharge.

[94] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Thompson, as well as the charge in Case 15–CA–12171–1.

Background of Thompson's Discharge

On November 16, 1992, Thompson was issued a warning notice. The supervisor checked the box for Major Offense-2 under the Avondale Employees' Guide; the stated reason for the warning is: "Failure to do job assigned. . . . Unless you improve this situation, you will be subject to immediate discharge." On March 30, 1993, Thompson was issued another warning notice; no box for a general offense or major offense number is checked; the foreman's statement of the reason for the warning is: "Failure to do job assigned. THIS IS YOUR FINAL WARNING."

Regarding the subject of Thompson's alleged disciplinary offense of July 15, Rotolo (vol. 99) was asked and he testified:

> Q. What is the rule for the second shift employees regarding working—what is the rule, if any, regarding working between let's say 11:00 and 12:00?
>
> A. That all employees are supposed to work until ten minutes till [midnight]. The Company allows them ten minutes to roll up their equipment and go to the bathroom, wash their hands or whatever they want.

To "roll up" or to "pick up" is to gather one's tools and supplies and place them where they belong. Rotolo further testified that "several times" in the weeks before Thompson's discharge he warned his crew about their rolling up before 11:50 p.m. Rotolo testified that he gave his crew, including Thompson: "A verbal [oral] warning. I told them that they were rolling up too early and that it was getting out of hand." Rotolo further testified that he told his crew that, if they continued to roll up early, "That I would have to give them a citation."

Thompson's Discharge—General Counsel's Evidence

Thompson testified that on July 15, about 8 p.m., he had trouble with his welding machine. He and Rotolo tried to fix it, but they were unable to do so. Someone was called from another department, and that person was able to get the machine to work again. The machine worked until about 11:30, when it failed again. Thompson again reported the trouble to Rotolo. Rotolo was not able to get the machine working again, and Rotolo left Thompson's work area. Thompson testified that he continued working on the machine until less than five minutes before midnight. At that point he started picking up his tools in preparation for leaving. Thompson testified that his working after 11:50 caused him to punch out after midnight.

When Thompson reported for work on July 16, he was met by Rotolo. According to Thompson:

> Well, Mr. Rotolo rode up to me on a bicycle and told me that I was terminated.
>
> I asked him why, and he said, "For picking up too early."
>
> I said, "Well, why are you saying that now?"
>
> And he said, "Well, a lot of them was"—that they were standing at the restroom.
>
> I said, "No, Charlie, it couldn't have been me because I had problems with my machine. I was still working on my machine at the time."

Thompson was discharged at that point. Thompson testified that he did not go to the restroom during the last hour of work on July 15. On cross-examination, Thompson further testified that Rotolo also told him that he was being discharged because he had "two previous warnings."

Thompson's Discharge—Respondent's Evidence

Rotolo testified that when he issued assignments at the start of the shift on July 15, he spoke to all of his crew and: "I told them to make sure not to roll up early." Rotolo testified that he assigned Thompson to work at one end of a platen with Kevin Pernell, Bobby Phelps, Manuel Penaranda, and Freeman Keel. Rotolo testified that he made several rounds of the area that night. On his first round, about 4:30 p.m., he stopped and helped Thompson get his welding machine working, and Rotolo testified that Thompson reported no other problems with the machine during the shift. During a round that he made about 10:30, Rotolo testified, he spoke to each member of his crew and, "I told them make sure that they didn't roll up too early."

Rotolo testified that "about 20 minutes to 12:00," when he went to the end of the platen where Thompson, Pernell, Phelps, Penaranda, and Keel were working, he saw that all five employees: "already unplugged their hand lights and already was rolled up." Rotolo testified that some of the five employees were standing near the restroom and some were standing on the unit; both groups were doing nothing but standing around, loafing. Rotolo testified that "I don't recall which ones" were standing near the restroom. When asked where Thompson was standing, Rotolo responded: "If I remember, he was up on the unit." Rotolo testified that he watched both groups for 10 minutes, "[b]ecause I wanted to see what they were going to do." According to Rotolo, he walked to the group in which Thompson was standing, and he asked the men what they were doing; Rotolo was asked and he testified:

> Q. What, if anything, did Donald Thompson say?
>
> A. I don't recall offhand what he said.
>
> Q. Did you get any response from anybody at that time?
>
> A. I don't remember that they did. . . .
>
> JUDGE EVANS: Can you recall anything that was said out loud between you and the five employees?
>
> THE WITNESS: Not offhand.

Rotolo testified that after he confronted the five employees, he went to the office and left a note for the clerk to type out five warning notices for the employees.

Rotolo testified that when he arrived at work the next day, July 16, the clerk had typed out the five warning notices. He was preparing to leave the office and issue the warning notices when Pertuit commented that Thompson had been issued two warning notices within the preceding 12 months; Rotolo replied that he had forgotten about Thompson's two prior warning notices. Pertuit told Rotolo to terminate Thompson when Thompson arrived at work.

Rotolo testified that he met Thompson when Thompson came to the work area at 3:30. Rotolo disclaimed all memory of what he said to Thompson, other than that he told Thompson that he was discharged. Rotolo distributed the warning notices to Pernell, Phelps, Penaranda, and Keel; Respondent placed copies of those four warning notices in evidence.[95]

Pertuit (vol. 104) testified that on July 15, Rotolo reported to him that he was having trouble with employees on rolling up early. Pertuit told Rotolo to give them oral warnings. On July 16, Pertuit further testified, Rotolo reported to him that, the night before, five employees had rolled up early again, after being orally warned against doing so. Rotolo told Pertuit that he would like to issue warning notices to all of them. Pertuit told Rotolo to do so. After that, the welding department clerk told Pertuit that Thompson had two prior major offense warnings, one of them "final." Pertuit testified that he then decided to discharge Thompson. Further on direct examination, Pertuit was asked and he testified:

> Q. In your department, Mr. Pertuit, what happens—what can happen if an employee receives three warnings?
>
> A. He could be terminated. It all depends on the warnings, if it is serious warnings.
>
> Q. Do you have any rule in your department regarding three warnings?
>
> A. Yes. We will write up a major offense most of the time—what I call major—leaving [out a flow] meter sometime which could kill people, failing to do your job, failing to do poor [sic] work. You could get two of the same, and on the second one you will get the final written warning. And on the third one, if it is another major offense that we feel it is a major offense, you could get terminated with a 22 [ASI-22 Discharge] form.

On cross-examination, Pertuit testified that a third offense (within 12 months) need not be a major offense under the Avondale Employees' Guide for an employee to be discharged; it would only have to be a "serious" disciplinary violation. As quoted above, Pertuit also testified that an offense might cause discharge if it was a "major" offense, as he defined it. Pertuit was further asked on cross-examination and he testified:

> Q. And could you tell me for your own working purposes what do you mean by a major offense—what things come to your mind as a major offense category?
>
> A. Refusing to do the job, job assignments, not doing your job assignments, leaving flow meters out, things like that. I call that major because you can kill people.
>
> Q. All right. So major are things that result in somebody's death?
>
> A. Correct.

Then, on redirect examination, Pertuit was led, and he testified:

> Q. Under your work rules as Welding Department superintendent, does a major offense have to be one that would result in accident or death of a worker?
>
> A. No, it could be failing to do job assignments. It could be failing to—not listen to a foreman's order.
>
> Q. Do you consider rolling up early after an employee has been warned to be a major offense? . . .
>
> THE WITNESS: Yes, if he has been verbally warned and he continued doing it. Yes.

Then, on recross-examination, Pertuit was asked and he testified:

> Q. So to determine if the other citations made rolling up early a major offense, what, if anything, are you looking for in the earlier citations?
>
> A. It could be any other major offense, flow meters, job assignments, not listening to a foreman, too many safety glasses—it could be a number of things—coming in late too many times, he can maybe have been seen for—

[95] It is to be noted that, although the circumstances are similar, Respondent did not offer copies of all of the warning notices that were supposedly issued in the case of alleged discriminatee Vernon Charles, as discussed infra.

what other—lateness, tardiness, coming in late, glasses, if it is too many, or flow meters. So many other ways we write up people—not following safety rules, going on the place that don't have handrails after you warn them—many ways you could look at it.

Q. So you would look for those types of things, consider whether or not the employee was orally warned before, and then determine if failing to roll up was a major offense?

A. In other words, rolling up after he is verbally warned, we write him up as a major offense. We verbally warn everybody.

Q. Well, do you have to have the other discipline in your file and the verbal warning to make rolling up early a major offense, or just the verbal warning?

A. In other words, if he had two major offense, and I put in a second final written warning, and he was verbally warned, and he still did it again, I will terminate you.

Q. All right. But do you need all those things for rolling up early to be a major offense, or were you just—

A. I consider it after being verbally warned to be a major offense.

Thompson's Discharge—General Counsel's Rebuttal Evidence

Pertuit conceded that Penaranda, one of the four employees who received warning notices on July 16, was still employed by Respondent at the time of trial. On rebuttal, the General Counsel showed that on March 8 Rotolo had issued to Penaranda a warning notice for Major Offense-2 under the Avondale Employees' Guide, "Failure to do job assigned." Next after that came Penaranda's warning that was issued following the events of July 15; it is marked for General Offense-4, and Rotolo wrote as the reason for the warning, "Quitting work, going to the timeclock area before the specified time." (The warning notices to Phelps, Keel, and Pernell are identical; any warning notice that may have been drafted for Thompson was not presented to him.) On February 4, 1994, Rotolo issued to Penaranda another warning notice for violation of Major Offense-2; Rotolo wrote: "Failure to follow instructions issued by supervisor. . . . Unless you improve this situation you will be subject to immediate discharge." Pertuit was not called in surrebuttal to explain why Penaranda was still employed at the time of trial even though, within a 12-month period, Penaranda had received two major offense warnings, as well as the warning notice of June 16.

Further rebuttal evidence to be considered lies in the proof that at least 883 employees were issued three or more warning notices within 12-month periods from 1990 through 1994 without being discharged.[96] This proof is detailed in the above discussion of the case of alleged discriminatee Barbara Marshall and Appendices B and C of this decision.

Thompson's Discharge—Credibility Resolutions and Conclusions

I have credited Thompson's testimony that he wore prounion insignia as he worked, that he spoke up in favor of the Union at an employer campaign meeting that Pertuit conducted, and that he responded affirmatively to a violative interrogation by Rotolo. Knowledge of Thompson's prounion sympathies is thus established. Respondent's animus was made clear in the June 1 speech by Respondent's chief executive, Bossier, who labeled such prounion employees as Thompson "whiners, malcontents and slackers" who "want to destroy Avondale," simply because they did support the Union. Moreover, such prounion insignia as Thompson displayed were often made the objects of threats to employees, as I have found above, or as I do find infra. In view of Respondent's animus toward the employees who favored the Union, especially those who wore prounion insignia, I conclude that a prima facie case of unlawful discrimination against Thompson has been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Thompson even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Rotolo testified that he could not remember which employees were loafing at the restroom, and which employees were loafing on the unit, on July 15. Rotolo testified that he asked Thompson and the four employees who received warning notices what they were doing, but Rotolo disclaimed memory of what Thompson replied. Rotolo also denied ability to remember anything that he said to Thompson on July 16, except he told Thompson that he was discharged. Thompson was the only one of the five employees who was discharged; it is unlikely to the point of disbelief that Rotolo could not remember what was said when he confronted Thompson on July 15, and Rotolo's own testimony raises the immediate suspicion that there was no such confrontation. Moreover, as well as denying that such a confrontation occurred, Thompson testified, without contradiction by Rotolo, that in the discharge interview of July 16 Rotolo told Thompson that he had seen "a lot" of employees rolling up early, but Rotolo did not then tell Thompson that he had seen Thompson picking up early. Rotolo also told Thompson in the discharge interview that some of the employees had been standing around the restroom, but he did not tell Thompson that he saw Thompson standing around the restroom. I believe that Rotolo was so vague and forgetful in his testimony because he had not seen Thompson roll up early on July 15, and he did not confront Thompson on that date.

I believe, and find, that Thompson did not roll up early on July 15. Moreover, I do not believe that Rotolo, in good faith, believed that Thompson had rolled up early. I believe that, when Rotolo reported to Pertuit on July 16 that some employees had rolled up early on July 15, Pertuit ordered Rotolo to include Thompson in the group to be disciplined. Rotolo did so, even though Rotolo knew that Thompson was not one of those who had rolled up early. (At least, Rotolo, as shown by his vague testimony, did not remember Thompson's being in the group that had rolled up early.)

Thompson wore prounion insignia as he worked, and he spoke up to Pertuit and stated that "maybe the Union could make a change for the better in the yard." Moreover, in response to a violative interrogation, Thompson had told Rotolo that a man would have to be "crazy" not to vote for the Union. I find that these are the reasons that Thompson was falsely[97] included in the group of employees who had rolled up early on July 15, and the reasons that he was ultimately discharged.

[96] One of these employees was Thompson who received three warning notices in 1990, well before the organizational attempt began.

[97] Thompson testified that he actually punched out after midnight. Respondent, who has all such records, did not dispute this testimony.

Even if Thompson engaged in some degree of misconduct, Respondent has not come forward with probative evidence that he would have been terminated even absent his protected activities. Penaranda received three warning notices in 12 months, two of which were marked "Major" under the Avondale Employees' Guide. Nevertheless, Penaranda was not terminated. Penaranda's case is a perfect paradigm of disparate treatment.[98] Moreover, Respondent has not demonstrated why as many as 883 employees were issued three or more warning notices in 12-month periods without being discharged (as discussed in Marshall's case), but it was necessary, for some reason, to discharge Thompson. Additionally, Pertuit testified that Thompson was discharged because his conduct of July 15 was "serious," or "major," as he defined those terms. Pertuit gave a variety of examples of "serious," or "major" conduct; until he was led on redirect examination, many of these examples consisted of misconduct that would result in injury or death. Then Pertuit testified that a violation is "serious," or "major," under his definition, if an employee has had a prior oral warning for the same offense. All supervisors who were questioned on the point testified that they issued oral warnings before they issued warning notices. (And, as Pertuit testified, "We verbally warn everybody.") Therefore, under Pertuit's amended definition of "serious," or "major," all offenses for which warning notices are issued are "serious," or "major," because all warning notices are preceded by oral warnings. Such reasoning would, of course, defeat the progressive disciplinary system of, and any distinctions between, major offenses and general offenses under the Avondale Employees' Guide.

Finally, according to Pertuit, even if all of his criteria could be satisfied, an employee is not necessarily discharged for his third offense within 12 months. Pertuit testified that if the offenses committed by an employee were "serious," or "major," the employee "could be terminated." Pertuit did not testify that, in each case where his criteria are met, an employee is always, or even usually, terminated. If the matter remains optional with Respondent, Respondent has not demonstrated that it would have discharged Thompson absent his protected activities.

In summary, I find that Respondent has not met its burden under *Wright Line* with evidence that Thompson would have been discharged for some misconduct on July 15 even in the absence of his protected activities, because: (1) Thompson did not engage in the misconduct attributed to him; (2) Respondent's supervisors did not, in good faith, believe that Thompson engaged in the misconduct attributed to him; (3) assuming that he engaged in some misconduct, Thompson was treated disparately in comparison to Penaranda; and (4) again assuming that Thompson engaged in some misconduct, Respondent has not demonstrated why Thompson was discharged for having received three warning notices in a 12-month period but as many as 883 similarly situated employees were not (as demonstrated in Marshall's case). I therefore conclude that by Thompson's discharge Respondent violated Section 8(a)(3).

[98] On brief, Respondent does not mention the comparison of Penaranda; Respondent only states that: "*At the time*, Thompson was the only other employee with two previous major warnings in his file." Brief, page "Welding-6." The qualification, which I emphasize, is telling.

e. Michael Molaison's discharge for quitting work early and having prior warning notices

Michael Molaison (vol. 6) was employed as an electrician until he was discharged on June 4, 1993. The first complaint, at paragraph 27, alleges that by discharging Molaison Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Molaison because of his known union activities and expressions of sympathy which included his wearing prounion insignia and his making favorable comments about the organizational attempt at employer campaign meetings. The General Counsel further alleges that, in violation of Section 8(a)(1), Molaison was threatened, interrogated, and instructed not to wear prounion insignia. Respondent denies that the supervisor who discharged Molaison knew of his prounion sympathies, and it denies that the threat, interrogation, or instruction occurred. Respondent further answers that: (1) Molaison had two prior warning notices; (2) during the last 10 minutes of a shift, the employees are required to clean their work areas, and they may not go to the restroom without the express permission of their supervisors; (3) on June 2, between 3:20 and 3:30, Molaison went to the restroom without permission; (4) on June 3 Molaison was issued a warning notice for his conduct of June 2,[99] and (5) Molaison was discharged because his offense of June 2 was his third similar offense within 12 months. While not disputing the validity of his two prior warning notices, the General Counsel contends that Molaison was treated disparately because Molaison had quit work during the period between 3:20 and 3:30 only to go to the restroom to relieve himself, something that other employees were allowed to do without prior expressed permission. Alternatively, the General Counsel answers that, even given the fact that Molaison had validly been issued two warning notices during the 12 months before June 3, and further assuming that he committed another disciplinary offense on June 3, Molaison was treated disparately because other employees received three or more warning notices in 12-month periods without being discharged. Ultimately, I find and conclude that Respondent had not, before June 3, required prior permission for restroom trips such as that made by Molaison on that date, that Molaison did not engage in a disciplinary offense on that date, that his discharge therefore rested on a pretextual basis, and that by discharging Molaison, Respondent violated Section 8(a)(3).

Molaison was a first-class electrician and fitter-welder in the layout section of the electrical department. Molaison reported directly to Foreman Chester Christiansen; Christiansen reported to General Foreman Mark Poche who, in turn, reported to Senior General Foreman Gerald Gerdes and Electrical Department Superintendent Robert Terry. (As previously noted, Gerdes functions as Terry's assistant superintendent and acts as Terry's alter ego when Terry is absent.)

Molaison testified that he regularly accepted union handbills at Respondent's gates during the organizational campaign, and he frequently read the handbills in the presence of supervisors when waiting to start work in the mornings. Molaison also wore a union sticker on his hardhat, and he regularly wore a union pin on his clothing. Molaison testified that in early March, or about the time the organizational activity began, several supervisors conducted an employer campaign meeting. Christiansen

[99] Molaison's June 3 warning notice is not alleged separately as a violation, but, without objection by Respondent, its validity was litigated as if it had been.

spoke first, then Terry. Molaison openly challenged both of these supervisors on points that they made during the meeting. Molaison specifically asked Terry why certain pay rates had decreased, rather than increased.[100]

Christiansen was first called by the General Counsel as an adverse witness; in that examination, Christiansen was asked and he testified (vol. 40):

> Q. [By Mr. Morgan]: During the period March '93—the first of March 1993 to the election, end of June 1993, who did you consider to be for the Union that was on your crew?
>
> A. It was Molaison, Michael Molaison . . . [on my crew whom] I can definitely remember. Now, anyone else I can't recall at this time. There was—he was the one that wore the [Union] badge and was more or less outspoken on my crew. Now, there were some other individuals that worked for another foreman that wore badges also, but they wasn't working for me.
>
> Q. And did you report to a general foreman or Mr. Terry that Michael Molaison was supporting the Union?
>
> A. Yes, sir.

Christiansen further testified that he and other foremen were instructed to tell their general foremen who was speaking for the Union or wearing prounion insignia; he testified that he told his general foremen about Molaison's being outspoken for the Union and wearing prounion insignia (but, according to Christiansen, the general foreman already knew it). Christiansen also testified that, before the June 25 Board election, Terry maintained a list of known union supporters; Christiansen further acknowledged that he once saw the list, and Molaison's name was on it.

Terry was also called by the General Counsel as an adverse witness; Terry was asked and he testified (vol. 42):

> Q. And you had meetings with your foremen and general foremen concerning Avondale's campaign against the Union?
>
> A. Probably hundreds of meetings.
>
> Q. With your foremen and general foremen?
>
> A. Yes. Concerning the campaign. Yes.
>
> Q. And at these meetings you directed your foremen and general foremen to do what they could to ascertain the strength of the Union support in the Electrical Department. Isn't that true?
>
> A. I directed my general foremen. Okay. I don't normally direct the foremen; I don't normally deal at a foreman's level. I deal at the general foreman level. I directed my general foremen to direct the line foremen to give me some feedback for the purposes of communicating the Company's position on the issues to the employees that they really perceived as being union supporters so that we could hopefully sway their vote in favor of the Company. . . .
>
> Q. Okay. You asked your general foremen to direct their foremen to try and ascertain the strength of the Union in their department. Is that correct?
>
> A. What I asked them, sir, was to give some feedback to me, real or perceived, as to who was, in their opinion, actively supporting the Union. . . .
>
> Q. [By Mr. Morgan]: Okay. And this, in fact, happened. Correct?
>
> A. It did happen.
>
> Q. And certain names were passed back from foremen to general foremen to you as superintendent. Correct?
>
> A. That is correct.
>
> Q. When you learned of these names you started keeping a list. Isn't that correct?
>
> A. That is correct.
>
> Q. Approximately when did you start keeping this list?
>
> A. I think it was probably close to 30 days prior to the actual election—the last month of the campaign, if you will.

Also, during his direct examination Terry was asked and he testified (vol. 91):

> Q. [By Mr. Hymowitz]: Did you maintain a list of union supporters at any time during the election campaign? . . .
>
> THE WITNESS: Yes. I did.

On cross-examination (vol. 92), however, Terry was asked, and he testified:

> Q. [By Mr. Morgan]: Mr. Terry, on the list of employees that you kept as union supporters, was Mr. Aubrey May's [another alleged discriminatee herein] name on that list?
>
> A. I am not going to answer that. The way it was asked, that is not a fair question.
>
> MR. MORGAN: I object, Your Honor.
>
> JUDGE EVANS: Sustained.
>
> THE WITNESS: It was not a list of union supporters, number one.

There is no surveillance allegation based on Terry's maintenance of a list of "Union supporters" or those "actively supporting the Union" (to employ the Day-40 words of Terry, himself). This testimony, however, is relevant in deciding issues of knowledge of employees in the electrical department such as Molaison. Moreover, Terry's denial of his own phraseology is an indicator of Terry's lack of credibility. There are more of such indicators, as discussed infra.

But, to return to the narrative of Molaison's case: Molaison further testified about a confrontation with Christiansen after the early March meeting in which he questioned Terry about pay rates going down, rather than up; according to Molaison:

> Immediately after the meeting we were asked to return to work and when I walked out of the office my immediate supervisor, Chester Christiansen, pulled me into the materials shack to talk to me alone. . . . Mr. Christiansen told me that I was very outspoken and I had better watch myself.

Based on this testimony by Molaison, paragraph 7 of the first complaint alleges that Respondent, by Christiansen, threatened its employees with unspecified reprisals. When he was called in Respondent's case, Christiansen (vol. 81) denied making such a remark to Molaison. The cross-examination of Christiansen on this seemingly simple credibility conflict needs to be quoted at length. Christiansen was asked and he testified:

> Q. Would you say Mr. Molaison was the most outspoken[?]
>
> MR. CUPP: Objection. Relevance.

[100] The Tr., Vol. 6, p. 833, L. 16, is corrected to change "didn't inquire" to "did inquire."

JUDGE EVANS: Overruled. Would you say that?
THE WITNESS: Not really.
JUDGE EVANS: Next question.
THE WITNESS: No more so than other individuals.
JUDGE EVANS: All right. Next question.
Q. [By Mr. Morgan]: Could you name the other people on your crew that you considered as outspoken in their support for the Union as Mr. Molaison?
A. I didn't have any in my crew. In the department[?]
Q. Pardon me?
A. In the—you keep saying my crew. In the department?
Q. No. I am saying, your crew.
A. In the crew of 15, not really, no.

First of all, the completely frivolous objection by Respondent's counsel should be noted. Of course, whether Christiansen believed Molaison to be "outspoken" was obviously relevant to the test of Christiansen's denial of Molaison's testimony that he had warned Molaison because he was "very outspoken." Too many times during the cross-examinations of Respondent's witnesses, frivolous objections were attempted by Respondent's counsels. After such objections, Respondent's witnesses often became evasive, forgetful or ignorant. For example, here, Christiansen gave an evasive "not really" answer after the frivolous objection, although he had previously testified that Molaison was "outspoken."[101] Another thing to be noticed about this cross-examination is Christiansen's injection of the references to "in the department." As noted, Respondent answers many of the disparate treatment allegations in this matter with replies that treatment of employees in different departments cannot be compared; Respondent extends this argument to say that treatment of employees in different crews in the same department cannot be compared. Respondent's supervisors, such as Christiansen at this point, were obviously primed to testify that they did not know how disciplinary problems were handled by different departments, or even by different foremen within their own departments; as the quoted cross-examination demonstrates, Christiansen attempted to deny knowing what was happening on other electrical department crews, even though he had not been asked.

In his cross-examination about his alleged threat, Christiansen rendered himself incredible when he first said that Molaison was "not really" outspoken, and then interjecting the references to other crews. Molaison was more credible than Christiansen, and I do credit his testimony that Christiansen warned him about being too outspoken for the Union's organizational attempt. Telling an employee that he is outspoken and that he should "watch" himself is a violative threat where the employee's outspokenness is exercised to voice collective concerns of some of the employees (such as concerns about wages) during an employer's campaign meeting. *Baton Rouge Hospital*, 283 NLRB 192, 204 1987). I therefore find and conclude that Respondent, in violation of Section 8(a)(1), by Christiansen, in March, 1993, threatened its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

Molaison further testified that about the third week in April, when he and employees Donald Poland and Calvin Landry were in a work area, Christiansen spoke to them. According to Molaison:

> Christiansen asked us what did we think about the Union. I told him that I thought the Union would be a great thing for us, bring us a higher pay scale and some more representation. . . .
>
> During this meeting that was going on with Mr. Christiansen, Donald Poland and myself and Calvin Landry, another supervisor from the Paint Department, Ernie Cantrelle walked up at the time that we was having the meeting with Christiansen and he joined in the conversation also. . . .
>
> Mr. Cantrelle said that he didn't think the Union was the best way to solve our problems. And I asked about the pay scale, about the $11.75 that it used to be and now it is down to $10, instead of going up it is going down, and he couldn't give me an answer on that.

Based on this testimony by Molaison, paragraph 10 of the first complaint alleges that Respondent, by Christiansen, interrogated its employees.

On direct examination Christiansen acknowledged the occurrence of a work-area meeting with Molaison, Landry and Poland (or "Powers," as Christiansen called the third employee) in which Cantrelle joined. Christiansen testified that he was "letting them know that the Union wouldn't benefit them any," and that Molaison spoke in favor of the Union at this time. Christiansen was asked and he testified:

> Q. On that day in MMR-II, did you walk up to the group of people and ask anyone in that group whether they were supporting the Union?
> A. No, sir.

Counsel did not, however, ask Christiansen if he had asked the group what they thought about the Union, which is what Molaison had testified to. This was true even though counsel had possessed the transcript of Molaison's testimony for months before Christiansen testified. At other times when Respondent was seeking denials, counsel read the transcript of exactly what the General Counsel's witnesses had testified to. Such overly narrow, or misdirected, questions as that asked Christiansen left me entirely suspicious of the denials obtained.

Christiansen testified that he received the TIPS instructions, and that: "As instructed, we were not to inquire as to the affiliation for or against the Union." It is problematical whether Christiansen considered asking an employee what he thought about the Union was the same as asking what his "affiliation" was. Christiansen testified that he certainly knew what Molaison's thoughts were about the Union, and that he did not need to ask; however, Christiansen did not testify that he knew what Landry and Poland (or Powers) thought about the Union. In this regard, Christiansen was asked on cross-examination and he testified:

> Q. [By Mr. Morgan]: Going back to the question, you did receive instructions, did you not, Mr. Christensen, from superiors to try and find out who in your crew sup-

[101] Another tactic that detracted from the credibility of the witness who were called by Respondent was its making of frivolous "foundation" objections; most often thereafter, as if on cue, Respondent's witnesses usually claimed lack of knowledge or loss of memory. A third such tactic was Respondent's too-frequent objecting to leading, but proper, cross-examination questions on the basis of "misquotes the witness." Almost invariably, the cross-examination question had not quoted the witnesses at all. Again, negative answers usually followed.

> ported the Union and who in your crew didn't support the Union?
>
> A. Yes, sir.
>
> Q. And you did that, didn't you?
>
> A. To the best of my ability, yes, sir.

I find that, despite his TIPS training, Christiansen asked the group what they thought of the Union. Christiansen asked the group what they thought of the Union only as something of a lead-in to his pitch to the group that "the Union wouldn't benefit them any," but it was nevertheless an unlawful interrogation. I conclude that Respondent, in violation of Section 8(a)(1), by Christensen, in mid-April 1993, interrogated its employees about their union membership, activities, or desires.

Molaison further testified that on "[a]pproximately June 2" (or 1 day before the event that precipitated his discharge on June 4), he went to the office of Foreman Jimmy Pretlove; Pretlove was not there, but Foreman A.—S. Russell was there. (Also present was an employee who has since deceased.) According to Molaison:

> Well, when I walked into Jimmy Pretlove's office where Mr. Russell was, I asked him why had he told Christiansen something about the "Vote-Yes" sticker on my hardhat. He then replied that we wasn't supposed to have anything on our hardhats except the numeral that represented what department we was in, our badge number and our name on our hardhat. . . .
>
> I told him that I wouldn't remove my "Vote-Yes" sticker until everybody in management removed their "Vote-No" stickers which they wore on their hardhats.

Based on this testimony by Molaison, paragraph 19 of the first complaint alleges that Respondent, by Russell, "told its employees that they were not supposed to wear any stickers on their hardhats." Respondent did not call Russell or offer a reason why it did not do so, and Molaison's testimony stands undenied. I credit that testimony.

Instructing employees that they are not to wear prounion insignia has a tendency to interfere with the employees' right to wear that insignia. It is excused only where an employer can show legitimate reason for a prohibition against wearing any type of insignia. Here, Respondent made no attempt at such showing; moreover, other employees were freely allowed to wear antiunion insignia, especially "Vote-No" stickers. That Molaison continued to wear his prounion insignia, and defiantly so, does not detract from the fact that such remarks have the tendency to interfere with statutorily protected rights of employees to wear prounion insignia. I therefore conclude that Respondent, in violation of Section 8(a)(1), by Russell, about June 2, 1993, instructed its employees not to wear prounion insignia.

The Last 10 Minutes of a Shift

At 10 minutes before the end of each shift, horns (or whistles) sound throughout the production and maintenance areas. The Avondale Employees' Guide states that General Offense-5 is: "Quitting work, washing up, or going to the timeclock area before the specified time." The rule does not specify what the "specified time" for washing up is. Respondent contends that it is not the last 10 minutes of a shift. That period, Respondent contends, is only to be used for cleaning up the work areas, and employees may then go to the restroom only with prior expressed permission from their supervisors. Respondent placed in evidence several memoranda to supervisors from Vice President Simpson and Electrical Department Superintendent Terry dealing with the matter of work time; none of those memoranda states, however, that employees are not to use the restroom during the last 10 minutes of a shift. Also, General Offense-5 prohibits "washing up . . . before the specified time." This necessarily implies that there is some "specified time" for "washing up," and, seemingly, that time would be before a shift's end, when employees are free to do whatever they want. The specified time would seem therefore to be, if anything, during the last 10 minutes of a shift. That is, the only logical construction of the Avondale Employees' Guide is, as Welding Department Foreman Charles Rotolo testified: "The Company allows them ten minutes to roll up their equipment and go to the bathroom, wash their hands or whatever they want." Nevertheless, Respondent contends that, at least in the electrical department, employees are not to use the restrooms during the last 10 minutes of a shift without prior permission of foremen. Again, there is no document setting out a special electrical department rule in this regard,[102] and the existence and application of special rules for the electrical department are issues in Molaison's case.

Molaison's Discharge—Background

On December 10, 1992, Molaison was issued a warning notice for violation of General Offense-4, "Wasting time, loitering or leaving the working place without permission." As the "Reason for Warning" the supervisor stated that Molaison had been "wasting time and not doing anything productive." On February 19, 1993, Molaison was issued another warning notice for violation of General Offense-4. The warning states that Molaison had left his work area at 11:45, rather than 12 noon (the latter time being when a horn sounds for lunch).

Respondent contends that, as well as these two warning notices, on April 14 Molaison was given a specific oral warning against going to the restroom between 3:20 and 3:30. This oral warning was not alleged as a violation; however, its importance to the contentions of the parties requires that the evidence on it be developed and credibility resolutions be made. Although Respondent contends that Molaison was given a specific oral warning on April 14, the General Counsel contends that, not only was there no oral warning issued to Molaison on April 14, Molaison was in effect told on April 15 that he could go to the restroom between 3:20 and 3:30 without prior permission (as he had done on April 14). For this reason, and others, the General Counsel contends that Molaison's final warning notice was invalid and only a pretext for discharging him.

In April, both General Foreman Poche and Foreman Christiansen maintained offices on the helicopter deck of an LSD. Those offices were in the proximity of a restroom. Molaison testified that on April 14, as he exited the restroom, he met Gerdes and Poche (but not Christiansen). Gerdes asked Molaison who his foreman was; Poche interjected that it was Christiansen. Molaison went back to work. That evening Molaison called Christiansen at home and reported the matter; Molaison asked Christiansen to arrange a meeting the next day with Poche; Christiansen replied that he would. The next day,

[102] On brief, page "Electrical-58," Respondent states that Terry's "production notes" to foremen contain the electrical department rules in this regard; those notes were contained only in an exhibit that Respondent withdrew.

April 15, General Foreman Kelly gave a speech urging, in the strongest of terms, better productivity. After that meeting, further according to Molaison, he and Christiansen approached Poche in the presence of Kelly and Simpson, and:

> In the conversation I asked Mr. Poche why had he [on April 14] pointed me out in front of Mr. Gerdes like that, and he told me it was to make himself look good. . . . They [Kelly and Poche] told me that they had no problem with my work and as long as Mr. Christiansen didn't have any complaints, they didn't have any complaints.

On the basis of this testimony, the General Counsel argues that on neither April 14 nor 15 did Molaison receive an oral warning about using the restroom without permission between 3:20 and 3:30; in fact, the General Counsel contends that on April 15 Molaison was effectively told that he could do so.

Christiansen testified that he was with Gerdes and Poche during the April 14 event. Christiansen testified that he, Poche, and Gerdes were, "just standing there, watching to make sure [that] everybody was staying active and busy during the clean-up period." (To the extent that this testimony was designed to convey the impression that the supervisors were doing something other than watching who exited the restroom between 3:20 and 3:30, I discredit it; three levels of supervision were not standing in a single, comparatively small, area, to watch whatever work might also have been going on in that area.) Christiansen testified that Molaison came out of the restroom between 3:20 and 3:30, but nothing was said by the supervisors to Molaison, and the supervisors did not discuss the matter among themselves. That evening, further according to Christiansen, when Molaison called him at home, Molaison asked Christiansen if he was in trouble. Christiansen told Molaison that he would see what he could do for Molaison. The next day, Christiansen spoke to Poche and asked if Molaison could be let off with an oral warning. Poche agreed. Christiansen further testified that he was not present when such a warning was given. (Christiansen gave two pretrial affidavits that dealt with the April 14 incident; neither mentions that he was with Gerdes and Poche when Molaison exited the restroom.)

Poche (vol. 77) testified that on April 14 he was standing on the helicopter deck where "I observed Mr. Molaison going into the restroom between 3:20—well, at 3:20, right after the whistle had blown." Then, according to Poche:

> Well, my supervisor, Gerry Gerdes, had approached me. We were standing on the deck, and we observed Mr. Molaison coming out of the restroom. . . .
>
> We approached Mr. Molaison, asked him, where was he supposed to be. He said he was supposed to be in the clean-up area, but he wanted to go into the restroom. At that point I told him he is not supposed to be in the restroom between 3:20 and 3:30. That is the designated time for all employees to clean up. He was supposed to be in his assigned work area, cleaning. . . .
>
> [I gave Molaison] a verbal warning at that time not to do it—not to let it happen again; that if it did happen, further action would be taken.

Even though Molaison was one of the more active prounion employees, and even though it was Gerdes who ultimately discharged Molaison, when Gerdes was called to testify as a witness for Respondent (vols. 122, 123), Gerdes was not asked on direct examination about the April 14 incident or anything else having to do with Molaison. This was no oversight by Respondent's counsel. Before Gerdes testified, Terry had testified (at Vols. 90–94) that he had personally discharged Molaison. This testimony by Terry was not true, as discussed below, but it effectively prevented Respondent from asking Gerdes anything about Molaison while Gerdes was on direct examination. Gerdes was, however, asked several questions about Molaison on cross-examina-tion.

Gerdes testified on cross-examination that on April 14, he and Poche "walked the ship" (conducted an inspection round) between 3:00 and 3:20; they got to the helicopter deck just before 3:20, and he and Poche stopped where they could see the restroom. (Gerdes made no mention of Christiansen's being there with Poche and himself). Gerdes testified that he saw Molaison exit the restroom at 3:25. Gerdes testified that he told Poche: "The man is knocking off early. Why—what has happened? Go do something about it—right now." Poche walked 50 feet away from Gerdes and spoke to Molaison. Poche returned to Gerdes, and, further according to Gerdes, "He [Poche] told me the man [Molaison] has had problems before. He warned the man. He gave him a verbal warning—one more time. And I said, Okay. And that was it."

Therefore, there are conflicts in Respondent's testimony about the events of April 14 because: (1) neither Poche nor Gerdes mention Christiansen's being present, and Christiansen's two pretrial affidavits do not mention his being present, but Christiansen testified that he was there; (2) Poche testified that "I" observed Molaison going into the restroom; then he was joined by Gerdes, but Gerdes testified that he and Poche had been walking the ship when they got to the area of the helicopter deck restroom and saw Molaison only as he left the restroom; (3) Poche testified that, when he and Gerdes observed Molaison exiting the restroom, he "at that point" warned Molaison, but Gerdes testified that he sent Poche 50 feet away to warn Molaison, and that, when Poche walked back to him, Poche reported that he had just warned Molaison and that he had previously warned Molaison about the same thing. Poche, however, did not testify that he had previously (i.e., before April) warned Molaison about such conduct, and Poche certainly did not testify that he reported to Gerdes that he had warned Molaison "one more time."

Molaison credibly testified that Poche asked him who his foreman was; this would have been unnecessary if Christiansen had been present, and I do not believe that Christiansen was present. Only Christiansen testified that nothing was said to Molaison when Molaison exited the restroom. Christiansen testified that he drives a bus, and his passengers are anxious for him to get to the bus promptly after 3:30. (Some quotations of this testimony by Christiansen are entered below.) I believe, and find, that Christiansen, Poche and Gerdes, were watching the restroom to see who entered (or left) between 3:20 and 3:30. Then Christiansen left the helicopter deck before Molaison exited the restroom, and that is why he did not know that at least something was said to Molaison as he exited the restroom.

(Christiansen would, therefore, have left the ship well before 3:30. I believe that Poche and Gerdes withheld the testimony that Christiansen had been there when Molaison went into the restroom, and Christiansen lied about being there when Molaison exited the restroom because, in other cases, alleged discriminatees are disciplined for leaving the ship before 3:30, and

supervisors and employees are subject to a prohibition against exactly that.)

There is no way of explaining the difference in the testimonies of Poche and Gerdes about when an oral warning was given to Molaison on April 14, except to credit Molaison and find, as I do, that no such warning then occurred. When Molaison exited the restroom, Gerdes asked Molaison who his foreman was, and that was all that was then said to Molaison.

The next question is whether, as Molaison testified, on April 15 Poche admitted in front of Kelly, that his confronting Molaison the day before was just to make himself "look good" in the eyes of Gerdes. Kelly and Poche denied that any such remark was made. I do not believe Molaison's testimony that, immediately after Kelly gave a strong speech urging more productivity, Poche, in Kelly's presence, told Molaison that he had pointed Molaison out to Gerdes only to make himself "look good." (I need not speculate about what, if anything, Poche might have said to Molaison on April 15.)

Therefore, I find that Molaison was not issued an oral warning on April 14, but I also find that on April 15 he was not given some sort of expressed or implied imprimatur for going to the restroom without permission during the last 10 minutes of his shifts.

Molaison's Discharge—General Counsel's Evidence

Molaison testified that on June 3 his work area was at the bottom of the ship, but Christiansen had assigned him, individually, to clean an area on the helicopter deck between 3:20 and 3:30. Molaison further testified that at 3:26, he went into the restroom that was steps away from the area that he had been cleaning. As he exited the restroom he was met by Poche and Christiansen. Molaison testified:

> Mr. Poche asked me what was I doing in the bathroom. I told him I was taking a piss. . . . I told him that "when you got to go, you got to go." He told me I wasn't supposed to be in there is what he told me. . . . Well, as they were talking to me and he asked me what time it was, that is when the 3:30 whistle blew. I said, "Well, it is 3:30 now." I didn't stick around and talk anymore; it was time for me to go home.

Molaison did leave the plant after this exchange with Poche.[103]

On June 4, when he reported to work, Poche presented Molaison with a warning notice; the warning notice was signed by Poche and Christiansen, and it was marked for General Offense-5, the "Date and Time of Offense" space is filled in: "06–03–93—3:26 p.m." The "Reason for Warning" space is filled in: "Quitting work, washing-up before specified time." Molaison refused to sign the warning notice. Poche called for a Security Department truck to drive Molaison and himself to the electrical department office. There, Molaison and Poche met with Gerdes, but not Terry. (Molaison testified, without contradiction: "When we got there we found out that he [Terry] wasn't present that week, and in turn we talked to Mr. Gerry Gerdes who is [the] Assistant Superintendent over the Electrical Department.")

Gerdes first spoke to Poche; then he called Molaison into his office. Gerdes had placed on his desk the three warning notices that Molaison had received since December 10, 1992. Molaison testified: "He [Gerdes] looked at the three written warnings and said that due to the three written warnings and my actions that I was being terminated." As was the usual routine for terminated employees, a security department truck was ordered, and Molaison was driven to the ship to collect his personally owned tools; then he was escorted out the gate.

Molaison's Discharge—Respondent's Evidence

Christiansen was asked and he testified:

> Q. Now, on that particular day, where, if anyplace, was Molaison assigned to clean?
>
> A. We were—as my group of employees on my MCR, we were assigned the helicopter deck, and also the 01 level all the way forward.
>
> Q. Was Mr. Molaison assigned to clean down in the engine room?
>
> A. No, sir. He was—as stated before, you cleaned up your own mess, which would be a little group, and then you go to your assigned area.

Poche testified that between 3:20 and 3:30 on June 3, when he was standing in the area of the helicopter deck restroom:

> Again, I was standing out on the helo deck, outside my office, which is a normal occurrence every day, to make sure that we have no one on the helo deck, as we are not assigned to clean that specific area. . . . I observed Mr. Molaison going into a restroom after the 3:20 whistle had blown.

(Therefore Christiansen and Poche conflict on whether Christiansen's crew (or "group") was assigned to clean in the area of the helicopter deck.) Poche further testified that he stepped over to Christiansen's office and asked Christiansen to come out. Poche asked Christiansen if he had given Molaison permission to use the restroom in that 3:20 to 3:30 period. Christiansen replied that he had not. Further according to Poche:

> When Mr. Molaison came out, it was just before the 3:30 whistle had blown. I asked him what he was doing. He said he went into the bathroom. Again I told him, "You know you are not supposed to be in there at that time of the day."

Poche testified that Molaison left without responding; Poche then told Christiansen to draft a warning notice to be issued to Molaison; Christiansen replied that he did not have time because he had to drive a bus of workers promptly at 3:30. Poche went to his office and drafted the warning notice himself.

Christiansen testified that he was present when Poche confronted Molaison as Molaison left the restroom on June 3. Contrary to both Molaison and Poche, Christiansen testified:

> Well, he [Molaison] seen us there and kind of like—I don't recall him saying anything. He had a little frown on his face, and then the whistle blew, and that was about the extent of that thing. . . .
>
> Well, the [3:30] whistle blew, and we left the ship. . . . I took off. I left the ship also. I got a bus, 3:30 people; I got to get out there. You know, they don't want to wait on me, and I don't want to wait on them, and we try to get off the ship as soon as possible.

[103] That is, Molaison was in as much of a hurry to leave the plant on June 3 as I have found that Christiansen was on April 14, and as much of a hurry as Christiansen admits that he was on June 3, as discussed infra.

Christiansen did not testify that Poche asked him if he had granted Molaison permission to use the restroom.

Poche testified that after Christiansen and Molaison had left the ship, he drafted a warning notice for Molaison and called Gerdes. Gerdes and Poche testified that during that telephone conversation Poche reported Molaison's conduct and Gerdes told Poche to bring Molaison to the electrical department office at the first of the following morning, June 4.

Although Molaison testified that he was discharged by Gerdes, and although (as will be seen) Poche and Gerdes also testified that Molaison was discharged by Gerdes, Terry, during direct examination, was asked and he testified (vol. 90):

> Q. Who made the decision to terminate Mr. Molaison?
> A. As the department head, I made that decision.
> Q. And why did you terminate—why did you decide to terminate Mr. Molaison?
> A. Excessive absenteeism, also quitting work early, washing up, not cleaning his work area, things of that nature. There was three offenses in a row, as I recall, for quitting work early and leaving the workplace.

It is undisputed that Molaison had no absenteeism problem; certainly, he had no warning notices for absenteeism. On cross-examination, Terry nevertheless insisted that absenteeism was part of his reason for deciding to discharge Molaison. Terry further testified on cross-examination that he was informed of Molaison's June 3 conduct in a telephone call from Poche; according to Terry (vol. 91):

> I recall him [Poche] saying, "Bob, I got Mike Molaison here. This—I am writing him a citation. He quit work early. He was washing up. It was witnessed by Chris and I. He has got two prior warnings for the same offense."

Terry testified that Poche then brought Molaison to him for discharge. Terry was further asked on cross-examination, and he testified (vol. 91):

> Q. [By Mr. Morgan]: Was Mr. Gerry Gerdes in any way involved in the decision to terminate Michael Molaison?
> A. I am not aware of any involvement in the decision-making there by Mr. Gerdes.
> Q. Did you talk to Michael Molaison before you discharged him?
> A. Yes. . . . The day I discharged him.
> Q. And where was that conversation?
> A. In the main electrical office.
>
> . . . .
>
> Q. Do you recall what if anything was said when you met with Mr. Molaison in your office prior to telling him he was discharged?
> A. I asked him if he had gone to the restroom early to wash up. And he said yes. . . .
> Q. And did you say anything else?
> A. I go, "I am discharging you. This is your third offense. You are being terminated."

Terry testified that there was a critical distinction between (1) an employee's going to the restroom in the 3:20 to 3:30 period to "wash up," which Terry did not permit without a supervisor's prior permission, and (2) an employee's going to the restroom in the 3:20 to 3:30 period to urinate, which Terry did permit, even without advance supervisory permission. As Terry testified (vol. 93):

> You know, if an employee told me, "Mr. Terry, I had to relieve myself," hey, I am not going to challenge that. But to go there specifically to wash up, especially between 3:20 and 3:30, that is not in compliance with the rules.

I was constrained to ask:

> JUDGE EVANS: So you make a distinction in that case between urinating and washing your hands?
> THE WITNESS: Absolutely. I would not accept a citation otherwise.

Terry approves or disapproves all electrical department warning notices; by "accept," of course, Terry meant that the warning notice will be placed in an employee's file. As Terry testified at volume 94:

> And if a foreman had a problem with an employee and he questioned him when [he] came out of the restroom—[And the foreman said to the employee:] "Man, I just saw you washing up," and the employee said, "Well, I know I am supposed to be cleaning up my work area, but I had to use the restroom."
> If my foremen ever wrote up a person for something like that, I would reject it; I would not accept it.

And, as Terry was further asked and he testified on cross-examination:

> Q. [By Mr. Morgan]: Mr. Terry, in response to the questions you were asked yesterday about washing up and going to the bathroom, as I understand it, if an employee has to go to the bathroom at Avondale, he can go to the bathroom at any time during the day without supervisory permission. Correct? . . .
> THE WITNESS: In the Electrical Department, that is true.
>
> . . . .
>
> Q. Is an employee permitted to wash his hands between 3:20 and 3:30 in the Electrical Department?
> A. If an employee quit work and left his immediate work area and did not clean his immediate area and went during that time frame to the restroom specifically just to go clean up at the end of the work shift, that would not be acceptable.
> Q. But if an employee had to go to the restroom and urinate and thenwashed his hands after that between 3:20 and 3:30, you would not give that employee a citation, would you?
> A. No, I would not, Mr. Morgan.

Therefore, in the Electrical Department, according to its "head," Terry, the stated purpose for which an employee goes to the restroom in the 3:20 to 3:30 period is critical.

Gerdes did not dispute Molaison's testimony about what was said when he (as opposed to Terry) discharged Molaison. Gerdes additionally testified on cross-examination that, on June 4, while Molaison waited outside his office, he and Poche reviewed Molaison's departmental file. Gerdes testified that when he saw Molaison's two prior warning notices he decided to discharge Molaison; then he called Molaison into his office. Gerdes was asked and he testified:

> Q. And tell us the conversation that took place once you three men were in the office together.
>
> A. The conversation went that he had to use the bathroom and he was out of his work area and he was sweeping up around it or something of that nature. . . . [I said to Molaison,] "You are an infraction of Company policy. What do you have to say?" That is when he replied that he . . . had to use the bathroom. And he was cleaning up in that area.
>
> . . . .
>
> Q. And just so we are clear, only for that purpose, when you—when Mr. Molaison told you he had to use the bathroom, he told you in so many words he had to urinate. Is that correct?
>
> A. Yes.

Gerdes testified that he, and he alone, made the decision to discharge Molaison; Gerdes testified: "And if I remember correctly, Mr. Terry came in the next morning [June 5], and him and myself both signed [the ASI-22, form], and it went through the channels. So that was it." Finally on cross-examination, Gerdes was asked and he testified:

> Q. And you decided to fire Mr. Molaison?
>
> A. Yes.
>
> Q. And could you tell us why, sir?
>
> A. Mr. Molaison was out of his work area twice, and the third time, which would have been April, I think it was—got a verbal warning. And the same occurrence occurred again in June. At that point, he was terminated.
>
> . . . .

(The reference to "April," of course, was to the April 14 incident described above.)

Molaison's Discharge—Credibility Resolutions and Conclusions

The first issue is whether the General Counsel has presented a prima facie case that Molaison's discharge was imposed unlawfully. On redirect examination, Gerdes denied knowledge of Molaison's prounion sympathies, something about which Christiansen admitted telling his superiors. Again, as Christiansen admitted, Molaison was an "outspoken" proponent of the Union, he regularly wore prounion insignia, and he was on Terry's list of prounion supporters.[104] I do not credit Gerdes's denial of knowledge of Molaison's prounion sympathies, and his denial contributes to my discrediting Gerdes elsewhere. Molaison was one of the more active prounion employees, a fact that probably got his name placed on Terry's list of prounion employees; knowledge of Molaison's union activities and prounion sympathies is clear. Respondent's animus was made clear in the June 1 speech by Respondent's chief executive, Bossier, who labeled such prounion employees as Molaison "whiners, malcontents and slackers" who "want to destroy Avondale," simply because they did support the Union. Moreover, such prounion insignia as Molaison displayed were often made the objects of threats to employees, as I have found above, or as I do find infra. In view of Respondent's animus toward the employees who favored the Union, especially those who wore prounion insignia, I conclude that a prima facie case of unlawful discrimination against Molaison has been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Molaison even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I do not believe Christiansen's testimony that his entire crew (or "group") was assigned to the area of the helicopter deck. Poche testified, about the helicopter deck: ". . . we are not assigned to clean that specific area." I believe, and find, that, as Molaison testified, Christiansen had given Molaison permission, individually, to be in the helicopter deck area, far away from his work area in the bottom of the ship. (Molaison and Christiansen are, or were, personal friends; very possibly Christiansen gave Molaison permission to be on the helicopter deck to give him a "jump" in getting off the ship immediately at the 3:30 horn.) I also do not believe Christiansen's testimony that nothing was said (or that he could remember nothing that was said) when Molaison exited the restroom. I also do not believe Poche's testimony that Molaison only told him that "he went into the bathroom"; Poche could see that much when Molaison exited the restroom. I believe, and find, that Molaison told Poche that he had gone to the restroom to relieve himself (albeit in common shop-talk vernacular).

Poche and Gerdes testified that it was an absolute rule that employees were not to go to the restroom during the last 10 minutes of a shift without prior supervisory permission. Terry, who is the departmental superintendent and should know its rules, testified, however, that if an employee needed to use the restroom to urinate during the 3:20 to 3:30 period he could do so without prior permission of his supervisor.[105] Specifically, Terry testified that he would not "challenge" an employee's representation that he had needed to use the restroom during the 3:20 to 3:30 period. Terry further testified that he would not accept a warning notice from one of his subordinate supervisors if an employee had claimed that he had gone to the restroom in the 3:20 to 3:30 period because he needed to urinate.

Terry testified that: (1) he made the decision to discharge Molaison, without any participation by Gerdes; (2) Poche had reported to him that Molaison had used the restroom to "wash up" during the 3:20 to 3:30 period on June 3; and (3) Molaison admitted to him in Molaison's discharge interview that he had used the restroom only to "wash up." All of this testimony was false. The decision to discharge Molaison was not made by Terry; Poche did not make his report to Terry; the discharge interview did not happen; and, most assuredly, Molaison's confession to Terry that he had gone to the restroom only to "wash up" did not happen.

Poche and Gerdes testified that Poche reported Molaison's June 3 conduct to Gerdes, not Terry. Molaison, Poche, and Gerdes testified that Terry was absent on June 4 and that Poche brought Molaison to Gerdes, not Terry, for discharge. Molaison, Poche, and Gerdes testified that Gerdes, not Terry, discharged Molaison. Finally, Gerdes testified that he made the decision to discharge Molaison and he told Terry about it the "next day." That is, Terry created the report from Poche that Molaison had gone to the restroom to "wash up" in the 3:20 to

[104] As discussed above, Terry first admitted, then denied, that the list that he maintained was of "prounion supporters."

[105] The testimony by Gerdes and Poche, that prior permission is always required, not only conflicts with the testimony of Terry and a host of other witnesses, it is belied by the fact that these construction employees do not always work along side their supervisors and their supervisors are not always available between 3:20 and 3:30.

3:30 period; Terry created the discharge interview with Molaison; Terry created Molaison's confession of going to the restroom solely to "wash up"; and Terry created his decision to discharge Molaison as well as the reasons for that decision.

It is obvious that Terry created Molaison's confession, and all the rest, so that he could fit Molaison's June 3 conduct into his definition of a disciplinary offense. Terry is one of the most important witnesses in this case, and he is, in my opinion, a perjurer.[106]

I have credited Molaison's testimony that, when he was confronted by Poche on June 3, he told Poche that he had needed to go to the restroom to urinate. In addition, Gerdes testified that in the (actual) discharge interview Molaison told him that he had gone to the restroom because he had needed to urinate. This claim, Department Head Terry testified, is one that would excuse an employee for going to the restroom between 3:20 and 3:30, even if the employee had not previously received the expressed permission of his supervisor. That is, according to Terry, Molaison did nothing wrong.

In summary, there was no published rule against electrical department employees (or any other employees) use of the restrooms in the 3:20 to 3:30 period, and General Offense-5 of the Avondale Employees' Guide seemingly permits employees to do so. Molaison had not been told of any special electrical department rule that prohibited employees from going to the restroom during the 3:20 to 3:30 period. Moreover, under the departmental rules as Terry stated them, Molaison did not engage in any disciplinary offense on June 3 because he went to the restroom to urinate, as Molaison had told both Poche and Gerdes. Gerdes, however, discharged Molaison for doing exactly that.[107] Molaison's discharge was therefore based on pretext because he had not committed a third disciplinary offense within 12 months as Respondent contends.[108] Finally, Molaison was told by Gerdes that he was discharged because he had received three warning notices within the preceding 12 months; assuming that he did engage in some degree of misconduct, Respondent has not demonstrated why Molaison was discharged but at least 883 employees were allowed to accumulate three warning notices, or more, within 12-month periods from 1990 through 1994 without being discharged, as demonstrated in Marshall's case. Therefore, Molaison was treated disparately, and his discharge violated Section 8(a)(3) on this account also.

f. Vernon Charles' discharge for loafing and having prior warning notices

Vernon Charles (vols. 51, 158) was employed as an electrical department helper until he was discharged on August 2, 1993. The third complaint, at paragraph 10, alleges that by discharging Charles Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Charles because of his known union activities and expressions of sympathy which included his wearing prounion insignia and speaking favorably about the organizational attempt during an employer campaign meeting. Respondent does not deny that Charles' immediate supervisor had knowledge of his prounion sympathies, but it contends that Robert Terry, superintendent of the electrical department and the supervisor who made the ultimate decision to discharge Charles, had no such knowledge. Respondent further answers that Charles was discharged solely because he committed the disciplinary offense of loafing on July 30 and he had received warning notices for two other offenses in the preceding 12-month period. While not disputing the validity of the prior warning notices, the General Counsel replies that Charles was not loafing on July 30 and that any lack of job performance by Charles on that date was caused by the fact that he had been given an assignment for which he was not qualified; to wit: serving as a leadman on a cable-pulling crew even though he was only an inexperienced helper. The General Counsel argues, therefore, that the defense, that Charles engaged in misconduct on July 30, is pretextual. Alternatively, the General Counsel answers that, even assuming that Charles had validly been issued two warning notices during the 12 months before July 30, and further assuming that he committed another offense on that date, Charles was treated disparately because other employees received three warning notices of the same kind within 12-month periods without being discharged. Ultimately, I find and conclude that Respondent has not demonstrated that Charles was loafing on July 29, that the reason assigned for his discharge is a pretext, and that his discharge violated Section 8(a)(3).

During his first 3 years of employment with Respondent, Charles worked in the paint department as a helper and forklift operator. On September 3, 1992, a paint department warning notice was issued to Charles for being "observed sleeping in tank." That warning notice concludes: "Violation of any other Company rules or regulations will result in your termination." Despite this language of finality, Charles was not discharged when he received a second paint department warning notice; to wit: a November 18, 1992 warning notice for violation of the Avondale Employees' Guide's General Offense-4, wasting time; the supervisor's comment on the warning notice includes "Employee was lying down in the work area."

On May 5 Charles was transferred to the electrical department as a helper on an LSD under Foreman Adolph (Ace) Riggins. Riggins reported to two general foremen, Mark Poche and Jimmy Mancuso. Mancuso was the senior general foreman on the LSD. Mancuso reported to Senior General Foreman (and de facto Assistant Superintendent) Gerald Gerdes and Terry. From May 5 until his discharge, Charles usually pulled electrical cable on crews that did nothing else. Cable-pulling is physically arduous work, and it is complex. Cable-pulling is performed according to diagrams and coded "point books" that determine in which wireways throughout the ship that a cable must be routed and secured before it is connected at a terminus. As part of its established training program for electrical department employees, Respondent provides classes for helpers that include, inter alia, instruction on cable-pulling.

Charles testified that he began wearing "Union-Yes" stickers on his hardhat in May. According to Charles, about 2 weeks before the June 25 Board election, he attended an employer campaign meeting conducted by Riggins. At that meeting,

[106] To be sure, Terry's is not the only case of demonstrated perjury. See the listing in the case of alleged discriminatee (and demonstrated perjurer) Octave Rouege, infra.

[107] As I have found in the discussion of the allegations of par. 58 of the second complaint, Gerdes later told his foremen that such monitoring of the restrooms was a good way to retaliate against the prounion employees because of the Union's strong showing in the Board election.

[108] Actually, Respondent contends that there were four disciplinary violations by Molaison within 12 months. Respondent includes, however, the April 14 event for which, as I have found, Molaison was not warned; moreover, as Molaison credibly testified, Gerdes told him that he was discharged for three, not four, offenses.

Charles spoke up and said that he was going to vote for the Union. Riggins did not deny that Charles spoke at an employer campaign meeting and stated that he would vote for the Union in the election. Moreover, Riggins admitted that Charles wore a "Union-Yes" sticker on his hardhat as he worked. Such knowledge is imputed to Respondent's other supervisors who worked around Charles, including Terry, who made the decision to discharge Charles. *Jenkins Index Co*., 273 NLRB 736 (1984). I discredit Terry's denial of that knowledge. I find that, at the time of his discharge, Respondent's supervisors, including Terry, had knowledge of Charles' prounion sympathies.

Charles received an electrical department warning notice on July 12. The notice states that it is for "interference with the performance of an employee's work duties. In reference to GO–16–93." GO–16–93 is a statement of policy against sexual harassment, no copy of which was placed in evidence. The warning notice concludes: "Final Warning." the General Counsel does not contend that by issuance of this warning notice Respondent violated the Act.

At the time of the events in question, Riggins supervised several crews that pulled cable on the LSD. During the week that began on July 26, three leadmen reported to Riggins: Aubrey Cheatham, Keith Riley, and Alton Williams. Cheatham and Williams were mechanics; Riley testified that he had been a helper, and leadman, since 1988. There was a great deal of confusion in the testimonies about a sequence of events that began on Thursday, July 29, and ended on Monday, August 2. This confusion was caused by the fact that the three principal witnesses who testified about what happened at the jobsite, Charles, Riggins, and Poche, tended to combine the events of 2 days into one. As I discuss infra, the overall chronology is this: (1) On Thursday, July 29, Williams took a vacation day, and Riggins assigned Charles to work as a leadman with two other helpers on a cable-pulling job. (2) On Friday, July 30, Williams returned from his 1-day vacation, but Charles continued to act as leadman; on that date General Foreman Poche ordered Foreman Riggins to issue to Charles a warning notice because of the lack of production that Charles' crew had accomplished. (3) On Monday, August 2, Charles was discharged and a crew led by Cheatham completed the cable-pulling job that Charles' crew had been assigned. (All witnesses agree that Riggins first told Charles to serve as leadman on July 29; other than that agreement, the testimonies of Charles, Riggins and Poche are so badly confused about the dating of significant events that in the following narrative, where I say that one of these witnesses testified that something happened on the date of "X," I thereby indicate that the witness testified to something that happened on a date that must have been "X.")

Charles testified that at the start of the July 29 shift, Riggins told him to act as a leadman on a crew of three employees (including himself). Charles testified that he had never acted as a "leaderman" (as he and other witnesses sometimes used the term) before this assignment was given to him. Charles testified (and documents discussed infra prove) that the two employees whom Riggins assigned to work with him had been working in the electrical department for only two days, both having transferred from another department. The assignment that Riggins gave to the crew was to pull cable from the main deck of the LSD up to the control room on the 06-level. Charles testified that he had twice before helped pull cable from the main deck of the ship up one level (to the 01-level), but never any further. Charles protested to Riggins; Charles testified:

> At that time, I told Ace that I didn't know how to pull—I didn't want to be a leaderman, because I didn't know how to pull a cable, because I had barely been there three months myself. . . . I told him that I didn't know how to read schematics or blue prints, because I haven't been to classes, because I haven't had classes so you can understand blueprints. . . . [and that] I didn't get paid to be a leaderman.
>
> . . . .
>
> [Riggins] said he wanted me to help them and assist the two other guys to pulling the cable. . . . He wanted me to be a leaderman and assist and help lead the cable with these two new guys from the Shipfitting Department.

Further according to Charles, Riggins then "walked off." (As I find infra, Riggins did not just walk away; he took Charles to Poche's office.)

The two employees who were initially assigned to work with Charles were helpers Matthew King and Darryl Bannister. (Charles did not know the names of these two helpers. It is certain that one of the two men was King because King ultimately got a warning notice for his conduct on Charles' crew. Additionally, both Riggins and Charles testified that the two employees who first assisted Charles had only been in the department for 2 days at the most. The personnel cards of all employees listed on Riggins' MCR for July 29 were placed in evidence. Those cards reflect that the only two employees who had not been in the electrical department for at least several weeks were King and Bannister. The personnel cards of King and Bannister show that they were tacker-welders who were on short-term "loans" from the shipfitting department.) At some point later in the day of July 29, or possibly on July 30, Riggins assigned employee Ray Benson to be the fourth member of Charles' crew. Like Charles, King and Bannister, Benson was also classified as a helper, but Benson had come to the electrical department on the same day that Charles did, May 6.

Charles testified that Riggins did not show him the routing that the cable was to take on either day that he served as leadman. (Below, I find that Riggins showed Charles the routing once.) According to Charles, on July 29, after he got the assignment to lead King and Bannister (and, later in the day, Benson):

> Me and the three other guys, the three other guys that I was working we . . . we proceeded to run the cable, the cable route that I knew—as far as I knew how to run it to, and we ran it from the main deck to the 01 level. Everything was all right at that particular time [about 10:00 a.m.]. . . . [T]hen we proceeded to run it to the 02 level [by 2:30]. We ran into difficulties by crossing up the cable, running it through another cable, so we had to pull the cable back, and then after we pulled it back from out the ring, out the cross that we did, we ran it back, and it was okay.
>
> . . . .
>
> At that time, I went looking for Ace Riggins.

Charles testified that he began to look for Riggins at that point because he did not know how to get to the third level with the wiring. Then, about 3:00, Riggins came to where the crew had been working and, according to Charles:

> Mr. Riggins said, "This is all the cable you have pulled?"
>
> And I told him, "Yes. We had to pull the cable back because we ran into a little difficulties, so we had to pull the cable back."
>
> . . . .
>
> Ace Riggins asked, where was the other guys.
>
> . . . .
>
> I told him they went to the bathroom. And Ace Riggins said, "When the other guys come back, I would like this cable finished by 3:20."
>
> . . . .
>
> Mr. Riggins walked off.

The other helpers returned from the restroom at 3:15. At 3:20, the cleanup period began. When Charles went to sign out, he told Riggins that the job was not finished. Riggins replied by saying no more than "Okay."

Further according to Charles, on Friday, July 30, Riggins assigned electrician Aubry Cheatham to work with his crew. (Counting Charles, Benson, King, Bannister, and Cheatham, this would have brought the crew complement to five. As I discuss later, this testimony was not credible; Cheatham was not assigned to the job until after Charles was discharged on August 2.) With Cheatham on the crew, further according to Charles, the job was finished by 3:20 that day. Charles testified to no confrontation with Riggins on July 30.

Charles testified that when he signed in on Monday, August 2, Riggins presented him with a warning notice. The warning notice is dated "7–30–93"; the box for "Other" Major Offense is checked; the "Date and time of offense" space is completed as: "7–30–93 [2:30] p.m." The "Reason for Warning" section is completed:

> Failure to complete job assignment. Employee's [sic] was to finish running cables from main deck [description of work]. I, A. Riggins, sup., went to employee work area about [2:30] p.m. [I] walked [the] main deck stb. 29 [starboard side, ship's frame number 29] to 06-level [ship's frame number] 24, and all four workers were standing around not doing anything. So I looked to see what all was done and they hadn't even completed one cable. So I said, "this is all in seven hours?" So I went to Gen. foreman Jimmy Mancuso to inform him of this matter.

Warning notices to two of the three other members of the crew were placed in evidence, as discussed, infra. On Charles' warning notice, but not the other two, is printed beneath the above-quoted words, obviously in a hand other than Riggins': "Unacceptable Low Production." As will be explained later, these three words on Charles' warning notice had been written by Terry before Riggins presented it to Charles. The "four workers" to whom Riggins referred were Charles, King, Benson and Bannister.[109]

[109] In surrebuttal, Riggins testified that he had assigned Bannister to another crew on July 30. For the purposes of this narrative, this does not matter; the fourth member of the crew may have been another employee, but I shall call him "Bannister" for convenience. The ultimate significance is that, although the other members of Charles' crew were issued warning notices, Bannister (or whoever the fourth man in the crew on July 30 was) was not.

When presented with the warning notice, Charles told Riggins that he would not sign it, "because the accusations that he wrote was false, that I didn't know how to do it." Charles then proceeded to his work area. Charles testified that "a few moments later" Riggins returned and told him that Poche wanted to see him. Charles testified that he went to Poche's office. At some point while Charles was in Poche's office, Poche gave Charles an opportunity to write his comments on the warning notice. Charles wrote:

> I'm not going to sign this warning notice because I told Ace Riggins that we had to pull our cable back. [As] far as low production [goes], Ace gave me three new guys from a different craft that don't know anything about pulling cable.

As noted, King and Bannister were from "a different craft," shipfitting; Charles considered Benson also to be an inexperienced worker; the "new guys" could not have included Cheatham, who was an experienced mechanic. Charles' use of the term "low production" in his "Employee Comment" demonstrates that Terry had made his "unacceptable low production" comment on the warning notice before Riggins presented it to Charles. A point in Terry's direct examination, as discussed below, fortifies this conclusion.

Poche took Charles to Terry's office. Poche first went in to confer with Terry. Then Charles was shown into the office where Terry, Gerdes, and Poche were present. Further according to Charles:

> [A]nd he [Terry] was looking over my files, over my personal files that I had while I was in the Paint Department. He said, "You have been busy."
>
> Then he said, "If I was your foreman, a long time ago you would have been fired."

Charles further testified that Gerdes asked him why he had written a comment on the warning notice but had not signed it; Charles replied to Gerdes that neither he nor the other helpers knew how to do the job. At that point, Terry called to have Riggins report to his office. When Riggins arrived, further according to Charles, Terry asked Riggins if Charles knew what he was supposed to do. Riggins told Terry that he did. Further according to Charles:

> And then I said, "Ace, I told you that I didn't know how to run a cable, because I barely knew how to run the cable, because I had been there for three months. And the guys that you gave me was new and they didn't know how to run the cable neither."
>
> . . . .
>
> At that time, Bob Terry told me to go wait in the other room, so he could talk to Ace Riggins. A few moments later, Mark Poche, Bob Terry, and Ace Riggins came in the room where I was sitting there. Bob Terry said that, "We looked over your files and I think we have to let you go." Then he looked at Ace Riggins and told Ace Riggins to stop my time at 10:45 a.m.

Charles did sign out on Riggins' MCR of August 2 (at 10:30), and then he left the premises. Charles testified that, of the employees on his cable-pulling crew, he was the only one who displayed union stickers.

Cheatham (vol. 56) was employed by Respondent from 1988 through October 1993, at which time he quit. Cheatham testi-

fied for the General Counsel that, as a third-class mechanic, he often served as leadman on cable-pulling crews; he testified that the ability to read schematics, as well as blueprints, is necessary to serve as a leadman for cable-pulling. Cheatham testified that Charles worked as a helper with him, pulling cable, during the 3 months of Charles' employment in the electrical department. Cheatham further testified that running cables up from level-to-level (as Charles was assigned to do on July 29 and 30) is much more difficult than running them along one level, or running them down from level-to-level. Cheatham further testified about the complexities of pulling cable and the fact that in his experience, first, second and third-class electricians are usually used as leadmen; helpers or forth-class electricians never are.

Cheatham testified that he could not remember Charles ever working with him above the second level of a ship, although he acknowledged on cross-examination that his pretrial affidavit states that Charles "may have" run a cable to the 06-level once before with Cheatham's "direct supervision." Cheatham further testified that he was present on July 29 when Riggins told Charles to act as leadman. He heard Charles protest his assignment to act as leadman by saying to Riggins: "Look, I don't know enough to be a leaderman; I barely know how to pull cable myself."[110]

Cheatham testified that he saw the union stickers on Charles' hardhat, as Charles claimed; Cheatham further testified that he saw no helpers on the ship who wore union insignia, other than Charles. This testimony was not rebutted, and was credible.

First-class electrician Donald Lund testified (vol. 60) that he was sent to classes because cable-pulling is so complex. Current employee Raymond Stewart testified (vol. 61) to the manifold complexities involved in pulling cable, and to the fact that usually the more experienced employees are assigned to lead crews. The General Counsel further introduced exhibits that show that attending cable-pulling classes is a regular part of an electrician's education. It is undisputed that Charles was never sent to such classes. And, as will be seen, alleged discriminatee Sidney Jasmine, a first-class electrician, was transferred from skilled work to pulling cable because Terry wanted only experienced employees on the ship to which Jasmine was transferred.

Charles' Discharge—Respondent's Evidence

Riggins testified (vols. 76, 165) that, "three days before" July 29, he assigned Charles to be a leadman on another job, and Charles "did it perfectly." Riggins further testified that as a supervisor he had previously assigned two other helpers to lead cable-pulling crews; these were Cheatham (before he became a mechanic) and Riley. Riggins testified that when he assigned Charles to act as leadman on July 29, he also assigned Cheatham and Riley to act as leadman of other crews. Riggins testified that he told Charles that he needed another crew, and that he was choosing Charles to lead it because he was "one of the older guys." Riggins testified that, in fact, he had no other employees who were more experienced than Charles to assign to be the third leadman that he needed on July 29. Riggins testified that, when he originally gave Charles the assignment to function as leadman, he took Charles and "pinpointed" the job, or "walked" the route that the cable was going to take to show Charles where the cables would go. Riggins testified that after he walked the route with Charles:

> Charles said that he wasn't experienced enough to go on his own.
>
> . . . .
>
> I told Charles, "Charles, right now I have got too many [inexperienced?] people and you are the next guy in line, you were told that two weeks ago that you were going to have your own crew." . . .
>
> So Charles . . . said, "I don't want to do this nigger job." . . . And [Charles told me that] I am just a slave for the white guy.

(Both Charles and Riggins are African Americans.) At that point, Riggins testified, he told Charles to come with him to Poche's office. When they got to Poche's office, Riggins did not tell Poche (who is white) about Charles' racial remark. Riggins testified that in Poche's office:

> Mark [Poche] asked him [Charles] what was his problem, and he [Charles] said that he didn't want to do this kind of job, to send him back to where he came from [the Paint Department], and Mark said, "Right now where you came from the job is slow, that is why they sent you to us, to hold your job; so you either have to do this job or you don't have a job because this is the only thing left what you have to do."
>
> . . . .
>
> Well, then Charles said he didn't know what to do with the cable, and I explained to Mark that I had pinpointed him how the cable goes up to the 06-level. At that point Mark told me to walk with him on the route again to show him the run of the cable.

Riggins testified that he and Charles left Poche's office, and he then walked the route with Charles for a second time. When they finished walking the route, further according to Riggins, Charles "said everything was fine, he was going to do it." About 9, Riggins left Charles with Bannister and King to begin the job.

Riggins testified that at the end of the day on July 29, Charles' crew had run one cable, of seven, to the 06-level, but even that one cable was not tied down as it should have been. According to Riggins: "I told Charles that he didn't give me enough productivity that day; one cable was not enough. . . . I told Charles that his work was low production and, we couldn't tolerate that; this is the first warning, don't let it happen again." Riggins further testified that Charles responded that he needed more help.

Riggins testified that on July 30 he assigned one more man to the crew and, "I even went back and showed him the route again of the cable." (This would have been, according to Riggins' testimony, the third time that Riggins showed the cables' routing to Charles.) The additional man was Benson and, whether Benson was assigned to Charles' crew later on July 29 (as Charles testified) or early on July 30 (as Riggins testified), the crew then consisted of four men; these were Charles, Bannister, King and Benson. Again, all four employees were classified as helpers by Respondent.

[110] On brief, in proposing a chronology different from that which I have found herein, the General Counsel ignores testimony of his witness Cheatham that (1) on the second day that Charles acted as leadman, Cheatham worked in another part of the ship, and (2) Cheatham was assigned to finish Charles' assignment only after Charles was discharged.

Riggins testified that about 2:30 on July 30, he went to the 06-level and found all four members of Charles' crew just doing nothing but talking, or "standing around," as Riggins wrote on the above-quoted warning notice that was issued to Charles. Riggins further noted that Charles' crew had only pulled one more cable to the 06-level, and that cable, like the one that Charles' crew had pulled to the 06-level on July 29, was lying on the deck, unsecured. Riggins testified that he asked Charles what the problem was and Charles replied that it was "too hot." Riggins further testified that he then told Charles to gather his tools and come with him to Poche's office.

Riggins testified that, when he and Charles met with Poche on July 30, he recommended to Poche that Charles be discharged and that the other three crew members (Bannister, King, and Benson) be given warning notices. This testimony was contradicted by both Poche and General Foreman Mancuso, as discussed below, and I found it incredible. Poche testified that he did meet with Riggins on July 30, but Charles was not there. Poche further testified that Riggins did nothing more than report the incident to Poche, and he (Poche) made the decision to issue a warning notice to Charles, but not the other crew members.

Riggins further testified that when he left the meeting with Poche, he drafted and issued warning notices to the three other members of Charles' crew. Respondent's counsel, however, did not show any warning notices to Riggins as he was testifying. This was no oversight. Warning notices to Charles, Benson, and King were offered by Respondent through Mancuso when he testified after Riggins, Poche, and Terry. Respondent did not offer a fourth warning notice, which warning notice would have been issued to Bannister (or some other employee if I am incorrect in my conclusion that the fourth member of the crew on July 30 was Bannister). Respondent has suggested no reason why, if the fourth warning notice was actually issued, it did not offer a copy of it in evidence. As I find infra, the fourth warning notice was never issued.

Riley (vol. 80) testified for Respondent that he was present when Riggins initially assigned Charles to be leadman. Riley testified that Charles replied that he was not a leadman and added: "You ain't using me as a house nigger." Riley further testified that at the end of the workday of July 29, he inspected the work that Charles' crew had done. Riley testified that he found that none of the cables had been pulled above the 01-level. (This would have been less work than that described by Riggins, and I discredit Riley's testimony on this point.) Finally, Riley testified on direct examination that it was on "about the third day" of his employment that he was first assigned to be a leadman, and he continued to lead cable-pulling crews thereafter. On cross-examination, however, Riley testified that it was 30 days after he was hired that he was first made a leadman; in view of the fact that being a leadman on a cable-pulling crew has at least some complexity, the latter estimate is undoubtedly closer to the truth. (Even then, there was no testimony that Riley's first cable-pulling job approached Charles' in terms of its complexities.)

Poche testified (vol. 77) that his first encounter with the problem was when Riggins brought Charles to his office on July 29 and:

> Mr. Riggins explained to me that he [Charles] didn't want to pull cable, he didn't understand the cable from how to be pulled. He just didn't want to do it; he wanted to do something else.
>
> I explained to Mr. Charles that at the state of the ship we were in, that is the only thing we had to do was pull cable.
>
> . . . .
>
> [Charles responded only that] he didn't understand how to do it, and I asked Mr. Riggins if he had explained it to him, and he said, yes, he did. He had showed him the route of the cable, where the cable went. I again told Mr. Riggins to go once more and show the man exactly where the cable goes, how to pull it, where to tie it, and for him to do the work.

Poche was led to denials that Charles claimed that he did not have enough experience to pull the cable. Assuming that this was a denial that Charles claimed that he did not have enough experience to act as leadman, Poche nevertheless knew that Charles was making that claim. Poche admitted that Riggins told him that Charles was claiming that "he didn't understand the cable from how to be pulled." This was a claim that would be made only by someone who had been placed in the position of leadman, as Poche assuredly knew.

Poche further testified that during the afternoon of July 30, Riggins came to him and reported how many feet of cable that Charles' crew had pulled, and, according to Poche: "When he told me how much cable was issued, I told him to issue a citation for lack of production." Poche did not testify that, on July 30: (1) Riggins brought Charles to his office, or (2) Riggins first suggested that he was going to issue a warning notice to Charles, or (3) Riggins said that he was recommending discharge for Charles, or (4) Riggins told him that he intended to issue warning notices to the three other members of the crew. Riggins' testimony to these four points is therefore uncorroborated, and it is incredible.

Poche was asked and he testified:

> Q. Now, when you told Mr. Riggins to issue Mr. Charles the citation, what were the specific factors for making that recommendation?
>
> A. The amount of work that was done and the amount of time used.

Poche repeated this answer twice. It is first to be noted that Poche did not testify that Riggins reported to him that Charles or his crew was "standing around," or otherwise loafing. It is further to be noted that Poche did not testify that he ordered Riggins to issue a warning notice to Charles because of what Charles, alone, had done, or not done; Poche invoked the passive voice ("work that was done") to indicate that he was holding Charles responsible for the work product of the entire crew.

Poche testified on direct examination that on August 2 he took Charles to Terry's office because Charles' warning notice was for "lack of production." (There is no testimony that Terry wanted employees brought to him when a notice is issued for "lack of production"; nevertheless, this testimony makes clear that it was Poche who brought the matter to Terry's attention; Terry claimed that he could not remember which supervisor did so.) Poche testified that he conferred with Terry first; then Charles was called into Terry's office. According to Poche, Terry first asked Charles if he had been shown what he had to do; Charles admitted that he had. Then, according to Poche, "Mr. Terry explained to him it was totally unacceptable the amount of production that was done in the time frame, and that he was going to be terminated for lack of production." Poche

denied that, in Terry's office, Charles claimed that he did not have the experience "to pull the cable." He did not deny that, as Charles testified, when Riggins arrived at Terry's office during the discharge interview, Charles told Riggins that: "And the guys that you gave me was new and they didn't know how to run the cable neither."

At the conclusion of his direct examination about what happened in Terry's office, Poche was asked and he testified:

> Q. Did you recommend termination [of Charles]?
> A. Yes, sir.
> Q. And why did you recommend termination?
> A. Due to the extent of the nature of the violation, lack of production and unfair cost to the Company.

On cross-examination, however, Poche was asked and he testified:

> Q. What was the reason that you recommended the discharge of Vernon Charles?
> A. I didn't recommend the termination of Vernon Charles.
> Q. You didn't?
> A. No, sir. If I had made a recommendation, it would have been so noted on the citation.

Poche also denied seeing the "Union-Yes" sticker that Charles maintained on his hardhat.

Terry (vol. 91) testified that:

> I received a citation from my supervisors, and also a phone call to the effect that the previous day Mr. Charles and another group of Electrical Department employees—a total of four people—had spent approximately 32 man-hours and not accomplished any meaningful work. And I was very concerned about that.
>
> . . . .
>
> I told the supervisor to bring the employee to the main electrical office.

Terry testified that he could not remember who the "supervisor(s)" was (or were). I find that the telephone call came from Poche, as indicated above. (This testimony that Terry received the warning notice and the telephone call separately, and before Charles came to his office, explains how Charles could have made his argument to Poche that a criticism of "low production" was not warranted. It is apparent that Terry made his "unacceptable low production" comment on the warning notice and then sent it back to Poche for issuance to Charles before Terry met with Charles. Therefore, Terry's testimony, as quoted below, that he made the comment on the warning notice while Charles was in his office was, at least, incorrect.)

Terry testified that, while reviewing the warning notice that had been sent to him by the supervisor (Poche), he noted that the period of low productivity would have been 28 man-hours over a 7-hour period for the four men on Charles' crew, not 32 man-hours over a 8-hour period, as the warning notice originally indicated, but he still considered the crew's performance to be substandard.[111] Terry testified that he called for Charles' personnel file and noted:

> It [Charles' July 12 Electrical Department warning notice for sexual harassment] was a final[112] warning, number one, that had been issued to the employee during the time period he had been in the Electrical Department, which I think was approximately three months. The employee was a transfer from the Paint Department, and when I looked for currency within the last twelve-month period, there were two or more citations that were issued to the employee by the Paint Department for the same or similar type offenses . . . [t]hat being deliberate loafing, out of the work area, intentional negligence, things of that nature. . . . And in my mind, there was a pattern here. This fit the pattern.

Terry further testified that Riggins, as well as Poche, brought Charles to his office. Terry testified that he first conferred separately with Poche and Riggins; because of Charles' comments on the warning notice, he asked if Charles had been properly lined up. Riggins and Poche assured Terry that Charles had been. Then Terry called Charles into his office and:

> He [Charles] said that the supervisor had given him three people to work with him that weren't qualified to pull cable. They were new. And that he went to—after he was lined up, that he went to pull the cables. There was a group of cables, and he got in trouble with the first cable and he had to end up pulling it back and that is why he didn't make any real progress with a full-man cable crew.
>
> And I asked him, "Well, what about the standing around not working thing [that Riggins had alleged on the warning notice]? Your foreman goes back to check on you. You are standing around not working. If you had a problem with the cable pulling, you should [have] contacted your foreman to point the problem out so that he could have assisted you. But to . . . spend 28 hours of production and not get any meaningful work accomplished is unacceptable. I cannot accept that."
>
> I wrote "unacceptable, low production" on it [the warning notice].

(Again, it is clear that Terry had written those three words on the warning notice before Poche presented it to Charles, not in this discharge interview.) Terry testified that he considered Charles' September 3, 1992 paint department warning notice for sleeping, and Charles' November 18, 1992 paint department warning notice for wasting time to be of "similar type" to the offense listed on Charles's warning notice of July 30, "Failure to complete job assignment." Terry testified that he decided to discharge Charles "due to the fact that the employee had two final warnings in there [in Charles' personnel file]. One from the Electrical Department, one from the Paint Department. Had three or more current within a twelve-month period warning notices for the same or similar type of offenses." Terry also testified on direct examination that the detail of the warning notice gave him enough information to know that the assignment that Charles had been given was not difficult, and could be done by a helper.

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[111] In advancing a chronology different than that which I have found, the General Counsel argues on brief that Terry's arithmetic somehow indicates that Charles served as a leadman for only one day before Cheatham took over. As well as ignoring Cheatham's testimony, as discussed above, the General Counsel ignores the fact that Respondent does not attempt to justify Charles' warning notice and discharge on the basis of his crew's performance on July 29 as well as July 30.

[112] The Tr., Vol. 91, p. 21,079, L. 4., is corrected to change "file" to "final."

On direct examination Terry placed Riggins at the discharge interview, from the start of that interview. Of course, neither Poche nor Riggins placed Riggins at the interview, and Charles testified that Terry called Riggins to the interview after it had started. These differences are important because Charles claimed that Riggins was called to the interview because he (Charles) was claiming that he did not have enough experience to serve as leadman. In order to test Terry's testimony on this point, as well as other points that Terry had made on direct examination, the General Counsel asked Terry on cross-examination, and Terry testified:

> Q. At some point in time, you talked to Vernon Charles before you discharged him. Is that correct?
> A. I don't recall.

That is, after detailing the discharge interview on direct examination, including his testimony of Charles' alleged acknowledgment that he had been "lined up" correctly, Terry disclaimed any memory of the discharge interview. Later, the General Counsel tried again:

> Q. [By Mr. Morgan]: You had a meeting in your office before you discharged Mr. Vernon Charles with Mr. Poche or Mr. Riggins. Correct?
> A. I really don't recall that meeting, Mr. Morgan.
> Q. So is your testimony here today that you don't recall any meeting with either Mr. Poche or Mr. Riggins in your office before you discharged Vernon Charles?
>
> . . . .
>
> THE WITNESS: I don't recall speaking to Mr. Charles. I am not positive, but I think I spoke to Mark Poche. I am not positive on it, though.
> Q. [By Mr. Morgan]: And when we are—I want to be clear here, Mr. Terry—we are talking about before you discharged Vernon Charles, in your office do you have any remembrance of speaking with either Mr. Mark Poche or Mr. Ace Riggins?
> JUDGE EVANS: Or both at the same time.
> Q. [By Mr. Morgan]: Or both at the same time?
> A. I am a little vague on this one. I don't have a memory on that.

Then, again:

> Q. At any time before you discharged Mr. Vernon Charles on July 30, did you have any opportunity to talk to him that you remember?
> A. I do not recall speaking to Mr. Charles.

And, still later in the examination:

> Q. [By Mr. Morgan]: Do you—did you ever meet Mr. Vernon Charles, sir?
> A. I don't recall speaking to Mr. Vernon Charles.
> Q. Okay.
> A. I do not know Mr. Vernon Charles.

Terry made these disclaimers of recollection of knowledge on the same day of trial that he completed his above-quoted direct examination about the discharge interview with Charles, including Charles' admission of being lined up correctly for the job to which he had been assigned.[113] By this I-don't-remember tactic Terry successfully insulated himself from cross-examination about Charles' case, and it is a factor which contributes to my conclusion that Charles' testimony about what was said during the discharge interview must be credited. Other factors are Charles' credible demeanor on the point and the proven unreliability of Terry's testimony (as demonstrated especially in the case of discriminatee Molaison) and the proven unreliability of Poche's testimony (as demonstrated especially by his claim, and denial, that he recommended the discharge of Charles).

As previously noted, Poche was Charles' general foreman at the time in question. Mancuso was the ship's general foreman, over Poche. Mancuso testified (vol. 131) that, at some point in time that he could not recall, Riggins told him about, and showed him, some work that Charles had done (or not done). Mancuso further testified that Riggins told him that a warning notice was being issued to Charles; Mancuso testified that he told Riggins that he agreed that a warning notice should be issued to Charles. (Riggins did not testify about this exchange; Mancuso's testimony would explain the reference to Mancuso that Riggins made on Charles' warning notice.) Mancuso further testified that, at some time "later on," he received a telephone call from Terry. According to Mancuso: "He [Terry] told me that Mr. Riggins had to give a citation to the rest of the people also; he couldn't just give it to Mr. Vernon Charles; and told me to tell Mr. Riggins to write them up." Mancuso testified that did not know how long it was after Riggins told him that Charles was receiving a warning notice that Terry called him and ordered warning notices to be issued to the other members of the crew. Terry testified before Mancuso, and he did not testify about this telephone call.

Mancuso testified that, after Terry called him, he told Riggins to issue warning notices to the other members of Charles' crew. (This testimony impeaches Riggins' testimony that, as soon as he left the meeting with Poche, he drafted and issued the warning notices to the other members of the crew.) Mancuso identified two warning notices that were issued pursuant to Terry's instructions, one to Benson and one to King. Benson's and King's warning notices are not carbon copies or photocopies, but, except for the "unacceptable low production" remark that Terry testified that he wrote on Charles' warning notice, the wording on Benson's notice and King's notice is the same as the wording on Charles' warning notice (even down to the same strike-over of the word "the" and insertion of the word "this" in the final sentence). Like Charles' warning notice, the spaces for "Date and Time of Issuance" in Benson's and Kings' warning notices are left blank. On the copies received in evidence, Riggins signed the warning notices as supervisor, and Mancuso signed as the witness. Mancuso identified Riggins' signature on Benson's and King's warning notices. (Respondent had called Riggins to testify before Mancuso, but Respondent did not show Riggins any warning notices. Therefore, Riggins' bare statement that he had issued warning notices to all four members of Charles' crew, which would have included Bannister, then went unchallenged.)

On cross-examination (vol. 141) Mancuso claimed total lack of memory about when it was that Terry told him to have warn-

[113] And, as I have also found, Terry was consulted about the Charles matter even before Riggins issued the warning notice; otherwise Terry would not have been able to write on Charles' warning notice "unacceptable low production," and Charles would not have been able to respond to that notation in his written "Employee Comment" on the warning notice.

ing notices issued to other members of Charles' crew; Mancuso even claimed lack of memory as to whether it was before or after Charles' discharge. Also on cross-examination, Mancuso testified that his foremen typically decided who was going to lead cable-pulling crews on the basis of who was experienced and who could "catch on to the drawings." On redirect examination Mancuso testified that he would expect a foreman to choose, "[t]he person that would show the most initiative, you know, interested in the job, whether it be a helper or a mechanic."

Charles' Discharge—General Counsel's Rebuttal Evidence

In addition to Mancuso, several other electrical department foremen and general foremen (including de facto Electrical Department Assistant Superintendent Gerdes) agreed during their cross-examinations that they would prefer to, and would if they could, assign more experienced employees to serve as leadmen on cable-pulling crews. General Foreman Henry McGoey (vol. 118) testified that cable-pulling crews had to have mechanics, as well as helpers; as McGoey put it:

> Well, I mean, I am not saying that, you know, you are using mechanics 100 percent of the time. You have got to mix and match, you know. You can't just put all helpers. You can't put all helpers on cable, or you will be doing it two and three times.

Riggins testified that, although Charles had only 2 months' experience at cable-pulling, that was the most of any of his helpers, and Riggins testified that he had no other mechanics available to lead the third crew on July 29 and July 30. In rebuttal, the General Counsel introduced the personnel cards of the employees who where listed on Riggins' MCR for July 29; these cards show that on Riggins' July 29 MCR there were other helpers and mechanics who had worked longer than Charles in the electrical department, and presumably had more cable-pulling experience. However, in surrebuttal, Riggins testified (vol. 165) that during the week of July 26 he carried on his MCRs the crew of Foreman Sam Le who was on vacation, and he could not assign those other employees to any jobs because they had been assigned to a "special" job before Le went on vacation. There was no corroboration for this self-serving testimony about the "special" job which prevented Riggins from assigning one of the others to be leadman, and I do not believe this testimony by Riggins.

Charles' Discharge—Remaining Credibility Resolutions

Charles testified that he had never acted as a leadman, but Riggins testified that Charles had served "perfectly" as a leadman during the preceding week. Riggins testified that, when Charles resisted the assignment on July 29, he told Charles, "[Y]ou are the next guy in line, you were told that 2 weeks ago that you were going to have your own crew." Riggins did not testify that he replied to Charles that Charles had, once before, served as leadman ("perfectly" or otherwise). If Charles had served as a leadman before, Riggins would assuredly have reminded Charles of it, and Riggins would have so testified. I credit Charles that he had not, before July 29, served as a leadman.

Riggins appeared to be ready to say most anything about Charles; at one point, he testified that part of the reason that he recommended Charles' discharge was that Charles kept things "stirred up . . . and he really had the crew out of control." This point went undeveloped on direct examination, and Riggins did not reassert it on cross-examination. Further, as noted above, Riggins testified that he went to Poche and told Poche that he wished to discharge Charles and issue warning notices to the members of Charles' crew; Poche, however, did not testify that Riggins made such recommendations, and Mancuso testified that he told Riggins to issue the warning notices to the remaining members of Charles' crew only after Terry ordered it. Riggins' willingness to lie under oath was clear.

In rebuttal, Charles disputed the testimony of Riggins and Riley that he had used racial terms to protest his assignment to Riggins on July 29. I have just stated what I thought of Riggins' credibility. In his testimony about Charles' racial statement, Riggins was corroborated by Riley, but I have previously demonstrated that Riley is not a reliable witness. I credit Charles' denial.

When called in rebuttal, Charles did not deny being taken to Poche's office on July 29; therefore, there is no issue about what was said there: Poche told Charles that cable-pulling work was all the work that there was for Charles to do. Riggins testified that Charles also told Poche that "he didn't know what to do with the cable"; Poche testified that Charles said, "[H]e didn't understand the cable from how to be pulled." Knowledge of what to do with the cable is an issue only for someone who had been appointed leadman; that is also why Charles, and not some other member of the crew, was shown the route by Riggins. I find, based on Poche's and Riggins' testimonies, that Charles protested being a leadman on his expressed feelings that he did not have enough knowledge and experience to be leadman.

I further find that on the morning of July 29 Poche told Riggins to walk the route with Charles; Riggins did so after the meeting with Poche. Contrary to Charles' testimony, I find that Riggins did show him the cable-routing; contrary to Riggins' testimony, I find that Riggins only showed Charles the routing once. Charles began complaining about the assignment as soon as he got it; Riggins took him immediately to Poche without taking time to walk the route with the employee. Riggins did not show Charles the route for a third (or second) time on July 30; even according to Riggins' testimony, Charles was not then complaining about the assignment, or then disclaiming knowledge of how to do it, and there would have been no point in an additional demonstration.

There is a credibility resolution to be made whether, at the end of the day on July 29, Riggins warned Charles about getting more done (as Riggins testified) or he just said "O.K." to Charles' report of poor progress (as Charles testified). If Riggins had felt the necessity of warning Charles at the end of the day on July 29, he would have checked on Charles and his crew before 2:30 on July 30, which is all he did. I credit Charles.

I find that on the afternoon of July 30 Riggins went to the 06-level and found that Charles' crew had pulled only one more cable, but it (like the cable that had been pulled to the 06-level on July 29) had not been tied down. Riggins also found Charles and the crew standing around; Charles excused that conduct only by saying that it was hot.[114] Riggins then went to Poche, but, as I further find, he did not recommend discharge of Charles and he did not recommend that warning notices be issued to the other three members of the crew. Poche decided

[114] Although he was called in rebuttal, Charles did not deny Riggins' testimony in this regard.

that Charles, and only Charles, should receive a warning notice because of the lack of performance of the entire crew, and he told Riggins to draft it. After getting that instruction from Poche, but before he drafted the warning notice, Riggins went to get confirmation from the ship's general foreman, Mancuso.

On Monday, August 2, Poche gave (or sent) Riggins' draft of Charles' warning notice to Terry for review; Terry added "unacceptable low production" to the warning notice and gave (or sent) it back to Poche; Poche gave the warning notice to Riggins who presented it to Charles. Charles refused to sign the warning notice and Riggins took him to Poche. In Poche's office, Charles wrote a comment that he had to pull a cable back and that the help he had was totally inexperienced. Poche then took Charles to Terry's office where, as Poche admitted on direct examination (although not on cross-examination), he recommended discharge of Charles.

When Charles first got the assignment, when Riggins first brought Charles to Poche, when Poche presented the warning notice to Charles, and when Charles was brought to Terry for discharge,[115] Charles protested that he did not know how to serve as leadman and that two of the employees who had been assigned to him only had 2 days' experience in the electrical department. Poche denied that Charles made this protest to him, but he admitted that Charles had said that "he didn't understand the cable from how [it was] to be pulled." Moreover, Poche would not have ordered Riggins to walk the routing with Charles (a second time, according to Respondent's testimony) if Charles had not been making such a protest to him. Terry (on direct examination, although not on cross-examination) denied that Charles claimed insufficient knowledge and experience in the discharge interview, but Charles had made exactly that point in his "Employee Comment" on the face of the warning notice, and Terry would not have asked Poche if Charles knew what to do if Charles had not been claiming that he did not know what to do. I find that, from Riggins to Poche to Terry, Charles claimed that he did not have enough knowledge or experience to serve as leadman.

At some point after Charles was discharged, warning notices were drafted for two of the three other members of his crew; no warning notice was drafted for Bannister. The General Counsel introduced the personnel cards of all of those employees listed on Riggins' MCRs for July 29 and 30. Only the personnel cards of Charles, King and Benson reflect the issuance of a warning notice dated July 30 (or any time thereabouts). Specifically, Bannister's personnel card does not list receipt of a warning notice on or about that date. The fourth warning notice simply was not issued even though, as Riggins stated on the warning notices to Charles, King, and Benson, "all *four* workers was standing around not doing nothing." (Emphasis added.) In view of this documentary evidence and Respondent's failure to introduce a warning notice to Bannister,[116] or explain why it did not offer into evidence a copy of a notice that was given to Bannister, I discredit Riggins' bare testimony that he issued warning notices to all four employees involved. (As mentioned above, in surrebuttal, Riggins testified that Bannister could have worked with Cheatham on July 30; if so, the fourth warning notice should not have gone to Bannister, but it should have gone to some employee because, again, Riggins' testimony was that Charles had three other employees with him on July 30, and the warning notices that were issued refer to the "four workers" on Charles' crew.)

Charles' Discharge—Conclusions

From the time that he was transferred to the electrical department on May 5 through the date of his discharge, Charles wore prounion insignia on his hardhat, and he was the only subordinate of Riggins who did. Additionally, Charles spoke up at an employer campaign meeting that Riggins conducted in June and said that he was going to vote for the Union in the June 25 Board election. I have found that all of Charles' supervisors, including specifically Terry, knew of Charles' prounion sympathies. Knowledge of Charles' prounion sympathies is thus established. Respondent's animus was made clear in the June 1 speech by Respondent's chief executive, Bossier, who labeled such prounion employees as Charles "whiners, malcontents and slackers" who "want to destroy Avondale," solely because they did support the Union. Moreover, such prounion insignia as Charles displayed were often made the objects of threats to employees, as I have found above, or as I do find infra. In view of Respondent's animus toward the employees who favored the Union, especially those who wore prounion insignia, I conclude that a prima facie case of unlawful discrimination against Charles has been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Charles even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Cable-pulling is complex (as well as arduous), as the General Counsel's witnesses credibly testified (and as Respondent's witnesses essentially agreed). Its complexity is necessarily part of the reason that Respondent's training program for electrical department employees has a segment for cable-pulling. Charles was not given the benefit of that program before he was told to be a leadman. Mancuso testified that he would expect his foremen (such as Riggins) to chose the most experienced employees available to lead cable-pulling crews. On redirect examination Mancuso also testified that he would expect one of his foremen to chose as a leadman: "The person that would show the most initiative, you know, interested in the job, whether it be a helper or a mechanic."

At minimum, Charles was not "interested" in the job; in fact, he protested doing it strongly.[117] Moreover, Charles was not the most experienced employee available to lead the crew; others (who usually worked on Foreman Le's crew) were available on July 29 and 30. Additionally, on July 30 Leadman Williams had returned from his 1-day vacation and was available, but Riggins assigned Williams to do something alone. That is, even if there had not been available a more experienced employee to serve as the third leadman on July 29, there was one on July 30, Williams. The General Counsel argues that Charles was selected to do a job that Respondent's supervisors knew he could

[115] Although Gerdes testified, he was not asked about being at the discharge interview as Charles had testified. I draw the inference that he would have testified consistently with Charles about what was said in the discharge interview.

[116] It is to be noted that Respondent offered all warning notices that were supposedly issued in the case of alleged discriminatee Donald Thompson, infra, whose circumstances of discharge were essentially the same as those of Charles'.

[117] Perhaps helper Riley had demonstrated the required interest when he began leading cable-pulling. It is also more than likely that a supervisor stayed with Riley for at least part of his first assignment as a leadman.

not do, and then they discharged him when he did not do it. In view of the testimony of the General Counsel's witnesses and the cross-examinations of Respondent's supervisors, other than Riggins, there is the strongest support for the conclusion that Charles' original selection as leadman was spurious; however, I need not decide. It is quite clear, and I do find, that on July 30 Charles was maintained on the job as leadman, over his protests, for spurious reasons. Riggins saw on July 29 that Charles was not getting the job done. But when experienced Leadman Williams reappeared on July 30, Riggins did not put Williams back in his leadman slot; instead, Riggins found other work (of no expressed urgency) for Williams to do by himself and left Charles struggling to serve as leadman. Then Riggins failed to check on Charles until late in the afternoon. There is no reason for this failure other than that Respondent was looking for a putative justification for discipline of Charles. Even if, as Riggins testified, Charles said on the morning of July 30 that he thought he could do the job, what Riggins had seen on July 29 told him that, if his real objective had been production, he would have checked on Charles before late in the afternoon of July 30. I find that, absent his wearing prounion insignia and absent his expressed intention to vote for the Union in the Board election the month before, Respondent would not have assigned Charles to be a leadman on July 29; alternatively, even if that assignment was legitimate, absent his prounion sympathies Respondent would not have kept Charles on the job as leadman after Williams returned to work on July 30.

Riggins testified that when he did check on Charles' crew on July 30 he saw them standing around. Riggins did not testify that he knew if the crew had been standing around more than momentarily, and there is no evidence that they did. Where an employer has no established breaks, at least momentary periods of standing around are to be expected, as Riggins assuredly knew. Moreover, if the element of standing around were the basis of the warning notice, even in part, Riggins would have mentioned it to Poche and he would have issued warning notices to all (four) members of the crew without being told to do so by Terry, through Mancuso. (Again, Riggins lied when he testified that he recommended to Poche that Charles be discharged and warning notices be issued to all other members of the crew, as Poche's testimony demonstrated. Riggins further lied when he testified that he issued the warning notices immediately after his conference with Poche on either July 30 or August 2.) I find that Charles' alleged "standing around" was not part of the real reason that his warning notice was issued; to the extent it was at least a part of the real reason, it was pretextual. Finally on this point, assuming that to some extent Charles and the other three employees on his crew were loafing, Respondent suggests no reason why Bannister was not issued a warning notice.[118] Charles was treated disparately because only he and two of the other three employees on the crew were issued warning notices, and those two others were issued warning notices only as an afterthought by Terry who told Mancuso (who told Riggins) to issue those warning notices.

When asked on cross-examination why, before Terry's order, he had thought that Charles should get a warning notice, but the other members of the crew should not, Mancuso testified, "Probably at the time when I was thinking that he was the leadman, and he should have known better." There is other evidence that Charles was being held accountable as a leadman. The warning notice to Charles charged all hours of the crew against him.[119] Moreover, Poche testified that he ordered the warning notice to Charles because of "The amount of work that was done and the amount of time used." Clearly, Poche was holding Charles responsible for the performance of the whole crew. Also, because Riggins had not told Poche that Charles (and the crew) had been standing around before Poche ordered the warning notice, it is clear that Poche was ordering the warning notice to Charles, and only Charles, because of the performance of the crew. As demonstrated above, Charles was not in the position of leadman for any legitimate reason, at least on July 30. As Respondent has not demonstrated why Charles was in the position for which he was held accountable, I find that Respondent has not demonstrated that, absent his prounion sympathies, Charles would have received any warning notice for his conduct of July 30. Without this warning notice, of course, there is no *Wright Line* defense and a violation must be found. Assuming, however, that there was some basis for the warning notice to Charles, the questions remain: (1) why did the matter even come to Terry's attention, and (2) why did Terry decide to discharge Charles?

When Poche learned from Riggins that there was a putative basis for discipline of Charles, Poche alerted Terry. Poche did not testify that he alerted Terry because he knew that Charles already had a certain number of warning notices in his file. Poche testified that he alerted Terry because Charles' warning notice was for low production. There was no corroboration that Terry wanted his supervisors to notify him if a warning notice for poor production was being issued; certainly, Terry did not testify that he had an outstanding order to that effect. And, most certainly, Terry, who mendaciously avoided all cross-examination about Charles, did not testify that he ordered the other crew members to his office because they were issued warning notices for low production also.[120] Moreover, Mancuso did not testify that, when Terry ordered him to have warning notices issued to the (three) other members of Charles' crew, Terry also told him to bring those three others to his office. That is, there is no legitimate reason that Poche would have specially notified Terry about the situation. I find that Poche brought Charles to Terry's attention because of Respondent's demonstrated animus toward those who wore prounion insignia, such as Charles. That is, as the record stands, Respondent had not shown that Charles would have received a warning notice for his conduct of July 30 even in the absence of his known prounion sympathies. And, even if it can be said that Respondent would have issued some warning notice to Charles for his conduct of July 30, it has not been shown that Terry

[118] On brief, Respondent does not mention the other crew members or the warning notices that were issued to two of the three of them.

[119] The warning notices issued to Benson and King also mentioned the total hours of the crew, but these warning notices were belatedly issued, if they were issued at all. (There is the strongest suspicion that they were not actually issued to the employees. Riggins lied about deciding to issue those warning notices, and he was not shown the warning notices and asked to describe their issuance. Moreover, if at any time before he testified Terry had ordered the issuance of the warning notices, he presumably would have been asked about it on direct examination. Finally, Mancuso was incredibly forgetful about when it was that Terry ordered the issuance of the warning notices to the three crew members other than Charles.)

[120] Again, Terry made no mention on direct examination of the warning notices that were supposedly issued to the other crew members.

would have ordered Charles to his office even in the absence of his prounion sympathies.

Again assuming that Charles deserved some warning notice, and further assuming Terry had a legitimate basis for reviewing the matter, I would nevertheless find a violation in the discharge.

Terry testified that he decided to discharge Charles because Charles had committed two similar disciplinary violations in the paint department during the 12-month period before July 30, and one of those warning notices was a final warning notice. Charles had received those paint department warning notices, but the one that was a final warning notice was not the second one that was issued to Charles; it was the first. After Charles received the final warning notice for loafing in the paint department on September 3, 1992, he received another warning notice for loafing on November 18, 1992. (The second paint department warning notice even noted: "Employee was lying down in the work area.") Nevertheless, Charles was not then discharged, even though he had a prior warning notice marked "Final." The effect of Terry's action was to give greater force to Charles' paint department final warning notice than did the paint department itself. The paint department is another department, not another employer. The organizational drive was still 3 months away when Charles received his second paint department warning notice, and Charles was simply treated differently, or discriminated against, after the organizational attempt began and he joined it by wearing prounion insignia.

Even if all of Terry's testimony is credited, Respondent has not proved a *Wright Line* defense. Terry admitted that there is no rule or practice that requires him to discharge all employees who have committed three similar offenses within a 12-month period. Terry was asked and he testified:

JUDGE EVANS: No. But assuming they are same or similar conduct, you don't always fire—do you always fire them if they have three warnings notices within 12 months—

THE WITNESS: No, sir.

JUDGE EVANS: —or do you use your discretion?

THE WITNESS: Yes. Discretion.

And at another point:

> Q. [By Mr. Lurye]: Is it correct, Mr. Terry, that it is your policy, the Electrical Department's policy, that for general offenses, a person is subject to discharge if he or she has three written warnings for the same offense within a 12-month period?
>
> A. No.
>
> Q. All right. What is incorrect with what I just stated?
>
> A. It depends on the gravity of the situation. There are some areas where three, maybe even more than three, offenses within a 12-month period of the same nature would not be considered severe enough to consider termination. There are other areas on the first or second offense termination is in order. It depends—
>
> Q. Speaking of general offenses, now; just general offenses.
>
> A. Regardless.

Terry's self-allowance for the factor of discretion negates any proposition that Charles *would have* been discharged, as opposed to *could have* been discharged, as required by *Wright Line*.

Moreover, Terry did not testify that Charles' alleged loafing on July 30 was "severe" in any regard. Terry obviously used no "discretion" in the matter; he mechanically counted the warning notices in Charles' file, found three loafing-type warning notices, and discharged him. (If Terry had used some discretion, he might have considered that Charles was a helper who had been doing a job that is usually assigned to more experienced employees, and, as far as the "standing around" went, it was literally "as hot as New Orleans in July" and perhaps at least some pause in the work was called for. Terry did not testify that he considered such matters in exercise of his discretion.)

As well as Terry's admissions, a review of the disciplinary records of just Riggins' crew of July 29 and 30 demonstrates that electrical department employees are not always discharged for accumulating three similar warning notices in 12-month periods. According to documents offered by the General Counsel in rebuttal, among the employees on Riggins' crew of July 29 and 30: (1) Spencer Brown received three warning notices in 1993: his first was issued on February 11 for failure to complete work and intentional negligence; his second (marked as a "Final Notice") was issued on March 5 for failure to complete work and intentional negligence; and his third was issued on June 7 for quitting work early. These were similar disciplinary violations,[121] and the second warranted an express "final notice," but Brown was not discharged upon the third. (2) Bennie Jackson had six warning notices in a 12-month period (three for loafing-type offenses, and three for absences); Jackson's fourth warning notice included an apparently ineffective expression of "Final Warning" (underlined twice, plus an exclamation mark). Therefore, Jackson had two rounds of three similar-type warning notices, yet he was not discharged by Terry even though he was issued two more warning notices after a (doubly underlined) electrical department final warning notice. And (3) Eddie Harris received three warning notices for wasting-time type offenses between August 1992 and March 1993 (and Harris received other warning notices later). Finally, Terry testified that he discharged Charles for three of the warning notices that he accumulated within the prior 12 months; left unexplained is why as many as 883 other employees were allowed to accumulate three warning notices in 12-month periods from 1990 through 1994 without being discharged as demonstrated in Marshall's case. Charles was therefore treated disparately, and unlawfully, on this account also.

Respondent, therefore, has not demonstrated by a preponderance of the evidence that, it would have discharged Charles even in the absence of his prounion sympathies. I therefore find and conclude that Respondent discharged Charles in violation of Section 8(a)(3).

g. John Joseph

John Joseph (vols. 62, 157), who was employed as a first-class electrician, was issued two warning notices on April 15, 1994; the first warning notice was dated as April 15, 1994, and the second was dated as December 7, 1993. The April 15 warning notice (as I shall call it) alleged that Joseph had been out of his work area, and had failed to sign out on his foreman's MCR, on April 14; the December 7 warning notice (as I shall call it) alleged various attendance problems with Joseph during November and December 1993. On May 9, 1994, Joseph was

[121] It is to be noted that Terry considered Charles' paint department warning notices for intentional negligence and loafing to be for the same or similar type of notices.

issued a third warning notice, and he was then discharged.[122] The fourth complaint, at paragraphs 24 and 26, alleges that by issuing these three warning notices to Joseph, and by discharging him, Respondent violated Section 8(a)(3). The General Counsel contends that Respondent issued the warnings to Joseph and discharged him because of his known union activities and expressions of sympathy which included his wearing prounion insignia and his expressing prounion sympathies to supervisors, both individually and during an employer campaign meeting. Respondent denies that its supervisors had knowledge of Joseph's prounion sympathies at any relevant time. Respondent further answers that all three warning notices were issued solely because of Joseph's misconduct; more particularly, Respondent answers that: (1) the December 7 warning notice was issued because Joseph had three unexcused absences within a 30-day period and, during the same period, he punched out early twice (albeit with supervisory permission) and he was late for work once; (2) the April 15 warning notice was issued because, on April 14, Joseph quit work before his shift ended and he left the premises without signing out on his supervisor's MCR; (3) the May 9 warning notice was issued because of Joseph's misconduct on April 29; to wit: quitting work well before the noon lunchbreak and leaving his area to do nothing but loaf; and (4) Joseph was discharged solely because of his conduct which immediately followed an express final warning notice. The General Counsel replies that: (1) One of the absences listed on the December 7 warning notice should have been considered excused and that the warning notice includes a matter that is not the subject of any of Respondent's disciplinary rules, punching out early; (2) Joseph did not quit his shift early on April 15, and his failure to sign out was caused by his foreman's not being available; alternatively, the General Counsel contends that failure to sign out was not a cause for a warning notice under Respondent's disciplinary rules; (3) Joseph was absent from his assigned working area on April 29 only to approach his supervisor and ask for permission to leave for the day, something that employees are routinely permitted to do. Ultimately, I find and conclude that all of the warning notices issued to Joseph were valid, that Joseph's union activities were minimal, that there was no possible nexus between that minimal union activity and Joseph's discharge, and that Respondent's conduct toward Joseph did not violate Section 8(a)(3).

Joseph was a maintenance electrician on the day shift; his hours were 7 a.m. to 3:30 p.m., with a half-hour lunchbreak at noon and no other scheduled breaks. Maintenance electricians, as opposed to construction electricians, have the job of erecting, moving, and removing temporary lighting and power facilities for employees of different crafts when those other employees work in areas where permanent power and lighting facilities are not yet available or where permanent lighting will never be installed. Joseph worked under the direct supervision of Foreman Leroy Chaisson and General Foreman Henry McGoey. Joseph was also supervised occasionally by Foreman Carl Shropshire who substituted for Chaisson whenever Chaisson was absent.

Current employee Glenda Joseph Dennis[123] testified (vol. 62) that she saw Joseph wearing union stickers on his hardhat during March 1993. Joseph, however, testified that he did not begin wearing prounion insignia until about 2 months before the June 25 Board election. Joseph testified that, from that point through the date of his discharge, he wore "Union-Yes" stickers on his hardhat, or Union buttons on his shirt, or a union button on the strap of his hardhat (where the strap crossed one of the occipital areas), or he used some combination of those methods of displaying prounion insignia. Joseph further testified that in early 1994 Chaisson asked him where he had gotten his training; Joseph testified, "I told him that I had went through four years' apprenticeship program with IBEW." Joseph also testified that during the preelection period, he attended an employer campaign meeting that was conducted by Electrical Department Superintendent Robert Terry. His then-foreman, Bobby Robicheaux, was also present. According to Joseph:

> [Terry] just was telling us that he was concerned about his future, and he was not going to allow outsiders to come in and ruin what he had worked for over the years. . . .
>
> I asked him if he didn't think that we were concerned about our future. . . .
>
> [Terry] said that whoever didn't want to hear what they had to say they could excuse themselves at the time.

At that point Joseph walked out of Terry's meeting. Joseph further testified that about 2 weeks before the Board election, when no other persons were present, Robicheaux spoke to him. According to Joseph:

> [H]e had prefaced the meeting, saying that his supervisor had asked him to find out if we had any complaints concerning the . . . management, and if we had any complaints, they wanted to hear them. That is what he said the meeting was for. . . .
>
> I just told him that if we had a good relationship between management and the employees, that we wouldn't be considered about having the Union.

Terry, who made the decision to discharge Joseph, testified that he could not remember any employee's being excused from any of his meetings, and he denied any knowledge of any prounion sympathies held by Joseph. Robicheaux did not testify; Chaisson testified, but he did not deny Joseph's testimony that he told Chaisson about his history with the IBEW.

(1) Joseph's warning notice for absenteeism

(Joseph testified that on April 15 Terry presented him with two warning notices, one for his alleged conduct of April 14 and one for his absenteeism in November and December. Respondent contends that Terry presented Joseph with only one warning notice on April 15, the one for his April 14 conduct, but Respondent offered no evidence of when the December 7 warning notice might have been presented to Joseph. General Foreman McGoey testified that he signed the December 7 warning notice in December because Chaisson had come to him and complained that Joseph was being chronically absent or late and that he was leaving early too many times. McGoey testified that, after completing the warning notice, he sent it to the electrical department office marked "not present" in the space for the employee's signature. In all other instances in which warning notices were issued, employees were given opportunities to sign their warning notices and to make entries in the "Employee Comment" spaces. Moreover, McGoey testified: "I don't recall if he [Joseph] got a copy of this one or not."

[122] All dates mentioned in Joseph's case are from May 10, 1993, through May 9, 1994.

[123] This is not the alleged discriminatee Glenda Dennis. If Glenda *Joseph* Dennis is a sister or other relative of John Joseph, the fact was never established in the record.

McGoey and Terry testified that Terry did not give Joseph a copy of the December warning notice on April 15, but no supervisor testified that he issued the December 7 warning notice to Joseph on December 7 (or at any other time). I credit Joseph's testimony that he did not receive a copy of the December 7 warning notice until he was in Terry's office during the morning of April 15, as detailed below. All of that having been said, the General Counsel makes no contention on brief that the delay in actual issuance of the December 7 warning notice is somehow an indicia of its violative nature; therefore, the December 7 warning notice will be considered as though it had been issued on that date.)

As a matter of background it is to be noted that Joseph received several other warning notices during the year prior to his December 7 warning notice: (1) On December 18, 1992, Joseph was issued a warning notice for not wearing safety glasses. (2) On February 25, Joseph was issued a warning notice for "Quitting work before time. Not cleaning between 3:20–3:30." (3) On May 10, Joseph was issued a warning notice because he "[r]eported back from lunch late—12:35 p.m." (4) On October 21, Joseph received a warning notice signed by General Foreman McGoey and Foreman Chaisson; the warning notice cites General Offense-2 (being tardy three times within a 30-day period), and it states: "This is your final warning for any offense."

The December 7 warning notice was also signed by McGoey and Chaisson. The supervisors checked the box for General Offense-1 of the Avondale Employees' Guide (three unexcused absences in 30 days). The supervisors wrote:

> Nov. 12, punched out early, [at 3:15 p.m.]. Nov. 24, punched out early, [at 11:45 a.m.]. Nov. 29, unexcused absence. Nov. 30, punched in late, [at 7:15 a.m.]. Dec. 3, unexcused absence. Dec. 7, unexcused absence.
>
> Employee has a final warning already, and had a verbal [oral] warning. (Recommend termination.) [Parentheses original.]

Respondent introduced MCRs that reflect that Joseph was absent or late, or punched out early, on the dates which were referenced by the December 7 warning notice. Joseph admitted that he was absent, and did not call in, on November 29; Joseph further testified that he could not remember whether he was absent on December 3 or 7. Joseph further testified that he could not remember if he had punched out early on November 12. He did recall that he punched out early on November 24, the day before Thanksgiving. Joseph testified that, according to established practices, he notified Chaisson that he wanted to leave early; Chaisson presented him with an MCR to sign; Joseph signed it, and Joseph left for the day. Joseph testified that Chaisson did not indicate in any way that Joseph should not be signing out early on November 24. Joseph acknowledged that he did not report to work, or call in, on November 27; he testified only "I was out of town that weekend." Further in reply to the allegations of the December 7 warning notice, Joseph testified that he punched in at 7 a.m. on November 30; he took about 2 minutes to get to the point at which he was to sign Chaisson's MCR. Shropshire's crew was to sign in at the same place that day. When he got to Chaisson, Chaisson told him to write in 7:15 a.m. as his starting time. Joseph testified that employee Kevin Williams signed in on Shropshire's MCR after he signed in on Chaisson's MCR. According to Shropshire's MCR for that date, Williams was allowed to sign in as of 7, and he was to be paid from that point. Joseph testified that under previous foremen (Robicheaux, Jerry Kaywood, and Darryl Hall), he was allowed to sign in for 7 if he punched in by 7 and had arrived at where any of the foreman were, "[n]ot late, but a little after 7:00." Finally in reply to the allegations of the December 7 warning notice, the General Counsel contends that Joseph's absence of that day should have been treated as excused because the electrical department's call-in log for that date shows that, before the shift, Joseph called in and reported that he would be absent because he was experiencing car trouble.

On cross-examination McGoey testified that supervisors always grant a "pass-out" (or permission to leave the plant early) when an employee asks for one; McGoey further agreed that there is no rule in the Avondale Employees' Guide against an employees' clocking out early, and he testified that employees are not punished for leaving early if they do not "abuse the system." McGoey was asked if there was a limit to the number of times that an employee can leave with the permission of his supervisor (as Joseph had done); McGoey responded: "I can't put a number on it; no, I can't."

Joseph's Warning Notice for Absenteeism—Conclusions

The first issue is whether the General Counsel has presented prima facie cases that Joseph's warning notices and discharge were imposed unlawfully. I do not believe that Joseph wore prounion insignia in March 1993 as Glenda Joseph Dennis testified; if he had worn prounion insignia that early in the organizational campaign, Joseph would have so testified. Joseph, however, testified that he did not start wearing prounion insignia until 2 months before the June 25 Board election. I also do not believe that Joseph wore prounion insignia after March 1993. As detailed infra, electrician Wayne Cousin was presented in Joseph's case as a corroborating witness for Joseph on other aspects of his case; Cousin worked along beside Joseph, but he was not asked if he saw Joseph wear any prounion insignia. The General Counsel usually asked corroborating witnesses if they had seen prounion insignia in cases in which the alleged discriminatees claim to have worn prounion insignia. Nevertheless, Joseph credibly testified that, during an employer campaign meeting, he challenged remarks made by Terry, and Terry invited him to leave the meeting. Moreover, Joseph's testimony is unchallenged that, about 2 weeks before the Board election he told his then-foreman, Bobby Robicheaux that, "[I]f we had a good relationship between management and the employees, that we wouldn't be considered about having the Union." Also, Joseph credibly testified that during the preelection period he told Chaisson that he had received training in an IBEW apprenticeship program. I find that, at the times of the alleged discrimination against him, Joseph's supervisors, including Superintendent Terry, had knowledge of Joseph's support for the Union. Respondent's animus against such prounion employees having been more than amply demonstrated, by Bossier's subsequent (June 1) speech and elsewhere, I find that, the General Counsel has presented prima facie cases of unlawful discrimination against Joseph, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Joseph even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On the December 7 warning notice McGoey mentioned other factors that he considered to have been problems with Joseph's

attendance, but he checked only the box for General Offense-1 (having three unexcused absence within 30 days). The General Counsel concedes that Joseph had unexcused absences on November 29 and December 7; the General Counsel contends, however, that Joseph's absence of November 3 should have been excused because he did call in that day. The call-in log reflects that Joseph called in November 3 to report car trouble, and there is evidence that such call-ins are counted as excused if, when the employee returns to work, he produces documentation such as a receipt for repairs. Here, however, Joseph made no such production, and it cannot be found that Respondent, absent his prounion sympathies, would have counted Joseph's absence of December 3 "excused." Therefore, the December 7 warning notice for violation of General Offense-1 was clearly valid. There is a suspicion about the warning notice's references to Joseph's early punch-outs because Respondent had no rule in that regard, as McGoey's testimony showed; also, there is a suspicion about the reference to Joseph's tardiness of November 30. Nevertheless, the warning notice was only for General Offense-1, three unexcused absences within 30 days, and there is no evidence that Joseph was subsequently penalized for the tardiness or the early punchouts that are mentioned on the warning notice. Finally, the warning notice of December 7 was Joseph's fifth in 12 months,[124] and nothing can be made of the statement by the supervisors that they "[r]ecommend termination." I shall, therefore, recommend dismissal of this allegation of the complaint.

(2) Joseph's warning notice for quitting work early and failing to sign out

At the time of the events in question, Joseph was working on an LSD that was still on the land. On an LSD, the casualty control office is a space used by several crafts for various business purposes. Casualty control is also the location of the broadcast facilities of the ship's central public address system. At the end of each shift, usually during the last half-hour, supervisors carry their MCRs to the employees where they are working and have the employees sign to verify that they have worked certain hours on a given day (starting times, quitting times, and any times off-the-clock). When an employee is working on a ship, and he cannot be found to sign the MCR, the supervisors will go to the casualty control office on the ship and page the employee on the public address system, telling the employee to report to casualty control, or elsewhere, to meet the foreman.

On April 14 Chaisson was absent and Shropshire acted as Joseph's supervisor; Joseph was therefore required to sign in and out on Shropshire's MCR on that date. Joseph did not wear a watch while working, but he testified that about 3 he was paged to casualty control where he met Shropshire and two pipefitters. Shropshire told Joseph to go with two pipefitters and remove some temporary lighting that was in the way of the pipefitters' work. Joseph left casualty control with the pipefitters and followed them to the lights in question. The lights turned out to be in a fuel-storage tank that was about 50-feet deep. Further according to Joseph, he and the pipefitters descended into the tank. Joseph denied that, while in the tank, he could hear pages from casualty control. Joseph testified that about 3:15 (a time, again, that Joseph estimated without benefit of a watch) he was required to climb back out of the tank and to a point on the deck that was immediately below a stairwell that led to casualty control. At that point, he was to disconnect the power supply to the temporary lights and reconnect other lights by which the pipefitters could work. While he was between connections, the pipefitters were "in the dark." Joseph testified that, as he was working on the deck, there was no reason why he could not have heard pages from casualty control, but he heard none. As he worked on the deck, Joseph testified, Cousin (who was also a maintenance electrician) walked by. Joseph testified that (although he had not heard a page for himself, and although Cousin did not tell him that he had been paged to come to casualty control) he told Cousin to tell Shropshire that he would come to casualty control shortly to sign the MCR. Joseph testified he continued working on the deck after Cousin left him. At 3:20 he heard the daily cleanup whistle blow. At that point Joseph left the two pipefitters "in the dark" (because he had not finished making the connections) and he started searching for Shropshire so that he could sign the MCR. He went to casualty control where he found Cousin, but not Shropshire. He told Cousin to tell Shropshire that he had more work to do in the tank but would return to sign the MCR. Joseph went back to the tank, finished hooking up the supply to the lights, and climbed into the tank to retrieve tools that he had left there; then he climbed back up to the deck and picked up tools that he had left there. At that point, which Joseph (again, without a watch) placed at 3:25 or 3:26, his job at the tank was finished. Joseph went back to casualty control where he found Cousin "still waiting," but Shropshire was still not there. Joseph went to Shropshire's office on the ground to look for him there. Not finding him in his office, Joseph looked around the area for Shropshire, but still did not find him. Joseph testified that he gave up and stopped looking "about 3:30" because he had a car pool to catch. Then he went to punch out and leave.

On April 15, when Joseph arrived at work, Shropshire presented him with a warning notice that had been drafted by McGoey and Shropshire. No general offense number or major offense number was checked. As the date and time of offense, Shropshire had entered: "4–14–94–3:00 p.m. to 3:30 p.m." As the reason for warning, Shropshire had entered: "Failure to sign MCR." Beneath that McGoey had written:

> Employee disappeared for the last 35 minutes of work shift. Supervisors looked for him for 35 minutes in tanks; he was not in his work area. Supervisors stayed 1 hour after work looking for him, afraid something could have happened to him. Also made several pages on intercom systems.

Shropshire asked Joseph to sign the warning notice; Joseph refused, stating that what was written on the warning notice was not the truth because both he and Cousin had looked for Shropshire to sign the MCR. Shropshire sent Joseph to McGoey who also asked Joseph to sign the warning notice. Joseph testified that he also told McGoey that he would not sign the warning notice because "what was written was not the truth, and that I was in my area."[125]

McGoey took Joseph to Terry's office. According to Joseph, in Terry's office:

[124] Joseph is included among the 197 employees listed in Appendices B and C as having received five or more warning notices within 12-month periods without being discharged.

[125] This undisputed reply demonstrates that the "work area" language was on the notice when Joseph first received it, contrary to certain testimony by Shropshire.

> Well, after looking at the records, Mr. Terry said that I was . . . a nuisance to the Company, and he also wanted me to sign the citation. . . .
>
> Well, I told him that I wasn't going to sign it, because what was written was not true, and I also went on to explain that I had three witnesses in that area that could say that I was in my work area at that time. . . . I told him it was two pipefitters, and I also told him it was one of the electricians in our crew. . . .
>
> Well, he said he didn't care how many witnesses I had. . . . .
>
> [Terry] said in his words, said, I have done this one [other] time . . . and then he went on to tell me that he was going to give me a "Final, Final" warning.

On the April 15 warning notice, immediately below what Shropshire and McGoey had written, Terry wrote:

> This is your Final, Final, warning. Termination for *ANY* future offences.

(As always, emphasis in original.) Joseph was sent back to work.

Current employee Wayne Cousin was also a maintenance electrician at the time of the events in question. The General Counsel called Cousin (vol. 54) who testified that on April 14, about 3:10, he heard Shropshire paging Joseph "over and over" to come to casualty control. He was walking through an area that he called "the jungle deck" on the way to casualty control to sign the MCR when he came upon Joseph where Joseph was working. Cousin testified that on the jungle deck, the page could not be heard because of blowers that were there. He told Joseph that he was being paged to sign out, but Joseph replied that there were other employees in the tank and he needed to stay because they were then in the dark and they were in danger. Cousin quoted Joseph as saying to him, "I have got to finish giving these people lights because they are working late."

Cousin further testified that he stayed on the jungle deck for a while, helping Joseph; then, at 3:30, he left Joseph, who was still working, to attempt to find Shropshire and sign out on the MCR. Cousin testified that he found Shropshire at his office on the ground. Shropshire told Cousin that he had been looking for him and Joseph. Further according to Cousin, "I told him I left John Joseph working and I came looking for him." Shropshire made no reply. Cousin further testified that on April 15, when he came to casualty control to sign in for the day, Shropshire was telling some persons (whom Cousin could not identify) that he had issued a warning notice to Joseph for not signing the MCR on April 14. According to Cousin: "I told him [Shropshire], 'I left that man working, if he was talking about yesterday.' And he told me, 'You get out of here and go to work.'"

In his cross-examination, Joseph (who was called after Cousin) testified that he did not know what the "jungle deck" was, and he specifically denied that, when he came out of the tank, he was ever at a point where blowers would have interfered with his hearing of a page that was being made. Joseph further denied that anyone, which presumably would include Cousin, came to where he was working and told him that he was being paged. Finally, Joseph testified on cross-examination that no one helped him as he worked on deck; specifically, Joseph testified that he worked, "[a]ll the time" by himself on the job of disconnecting the temporary lights that had been in the tank.

Joseph's Warning Notice for Quitting Work Early and Failing to Sign Out—Respondent's Evidence

Shropshire (vols. 99, 100) testified that shortly after lunch on April 14, Cousin approached him and said that Joseph had told him that he needed assistance stringing lights in a tank. Shropshire told Cousin to assist Joseph, but, when they finished, to go back to doing previous assignments. Shropshire further testified that, between 2 and 2:30, Cousin came to him and told him that he and Joseph had finished the work in the tank. Shropshire testified that about 2:45 he saw Joseph on an upper deck (not on a lower deck where Joseph would have access to a tank), and that Joseph was doing nothing, but he did not give Joseph another assignment, and he did not see Joseph for the remainder of the day.

Shropshire further testified that beginning at 3 he began going to his crewmembers and getting them to sign the MCR. By 3:15 he had all signatures collected except those of Joseph and Cousin. He went to casualty control and began paging them to come there. Shropshire paged them "about five or six times" until the 3:30 whistle blew, but he got no response. About 3:35, looking over the side of the ship, he saw Cousin on the ground. He went to Cousin and got him to sign the MCR. Shropshire asked Cousin where Joseph was, and Cousin replied that Joseph "should be on the boat." Shropshire further testified that, after signing Cousin out, he then contacted McGoey, and they began a search for Joseph. Shropshire testified that he and McGoey were afraid that Joseph might have come to physical harm while working somewhere. The search lasted until about 4:10 or 4:15, at which time he and McGoey decided that Joseph must have gone home. As quoted above, the April 15 warning notice states that the supervisors looked for Joseph "for 35 minutes in tanks." Shropshire, however, testified on direct examination that:

> We went up there. We went and he [McGoey] said he was going to search a certain place and I went and searched a certain area all over the boat. Mostly in that area, except for the tanks. We didn't go in the tanks. We went all up another area of the boat.

Shropshire testified on cross-examination that he and McGoey did not look for Joseph in any of the tanks because there was a rule against any electrician, or electrical supervisor, going into a tank without another electrician, so he and McGoey had no reason to believe that Joseph might have been in a tank. (Shropshire also denied giving Joseph an assignment to work in a tank; however, Joseph did not testify that Shropshire assigned him to work in a tank—Joseph testified that Shropshire assigned him to go with the pipefitters to remove lights, which turned out to be in a tank.)

On cross-examination Shropshire was asked if he could explain why, if he and McGoey did not search the tanks (as he had testified), McGoey would have written on the warning that the supervisors did, in fact, search the tanks and did so "for 35 minutes." Shropshire replied, "I don't know, unless McGoey went down in the tanks after 3:30."

McGoey (vols. 117, 118) testified that when Shropshire contacted him on April 14 and told him that he could not find Joseph, he and Shropshire searched for Joseph, but they did so separately: "[W]e went separate ways looking for him, and I went down in the tanks looking for him." Shropshire testified that he went to "about eight" tanks to look for Joseph and climbed half-way down the ladders into the tanks, shining his

flashlight around, and made sure that Joseph was not there. When asked why he went into tanks to look for Joseph, McGoey testified:

> Because he [Joseph] is a lighting maintenance man, and basically they light up a bunch of tanks. Anywhere else on the ship, they normally gots lights. Tanks—a maintenance man is always in tanks. So that is the number one spot that I wanted to check first.

McGoey further testified that about 4:30, after 35 or 45 minutes of looking for Joseph, he and Shropshire met and decided that Joseph had gone home.

McGoey testified that before 7 a.m. on April 15 he radioed Shropshire and told him to issue a warning notice to Joseph because: "Well, for one thing, [Joseph's] failing to sign the MCR, and basically, you know, us wasting our time, staying there looking for him." According to McGoey, Shropshire wrote the language "Failure to sign MCR" on the warning notice, and he wrote the other entries in the "Reason for Warning" area, as quoted above. McGoey further testified on direct examination that, after the warning notice was drafted, he called the electrical department office and was told by a clerk that Joseph had "a final warning." McGoey told Shropshire to let him know when Joseph got to work because he wanted to take Joseph to Terry's office, "because he had a final warning." The only "final" warning in Joseph's file at that point was the October 21 warning notice, for tardiness, as quoted above. On cross-examination, McGoey was asked to explain why he wrote on the warning notice that "supervisors" (plural) had looked for Joseph in the tanks; McGoey replied that it was "a mistake."

Terry testified (vol. 91) that on April 15, when McGoey brought Joseph into his office, he gave Joseph a chance to explain his conduct. Joseph told Terry that he had been working in the tanks and could not hear the page and that he had searched for his foreman to sign the MCR but could not find him. After listening to Joseph, Terry separately conferred with McGoey and Chaisson and, according to Terry, he told them:

> I said, "Look, guys. This is not clean-cut here." Mr. Joseph has given me his version of what happened. And it is possible. Maybe it did happen that way, you know. We didn't see him leave the work area.
>
> "He says he was working. He is a first-class lighting mechanic. He has been with us a period of time now. He has a final warning in his record, but I don't think this is—this event is sufficient for me to consider termination of this employee."

(Neither McGoey nor Chaisson testified that they had recommended discharge for Joseph over the matter, but McGoey did testify that, when he brought Joseph to Terry's office, he had Joseph bring his personal tools with him, the usual procedure in discharge situations.) Terry further testified that he called Joseph back into the room and:

> I said, "John, I have heard your supervisor's version of this event and I have heard your version of it. I have reviewed your file. You have a final warning already in your file. You have been recommended for termination once.
>
> 'I don't feel that it is appropriate for me to terminate you at this point. So what I am going to do—you know, I have read your statement here on the citation.[126] I am going to put on here 'Final, Final warning.' Okay? And that you are going to be discharged for any future conduct of this same or similar type.
>
> 'I want you to understand that; that you are very close to being terminated if you don't correct these type of problems.'"

Terry testified that he wrote "Final, Final" on the April 15 warning notice because Joseph had already had one "final" warning notice. Actually, Joseph had two warning notices that could be fairly classified as final; to wit: the October 21 warning notice, for tardiness, which, as quoted, above stated that it was "final," and the December 7 warning notice in which McGoey recommended termination. (The latter notice was apparently in Joseph's file, even though, at that point, it had not been delivered to Joseph.)

On cross-examination, Terry testified (vol. 92): "Mr. Joseph already [had] a final warning active in his file. But I accepted his explanation as to, it was not totally conclusive that he was totally at fault with this particular offense; so he was not discharged even though he had a final warning."

Joseph's Warning Notice for Quitting Work Early and Failing to Sign Out—Conclusions

There is no rule against electrical department employees and supervisors going into tanks without another member of the electrical department. As well as Shropshire's testimony on this point being totally uncorroborated, it is belied by the facts that: (a) McGoey, Shropshire's general foreman, testified to the existence of no such rule; (b) McGoey testified that maintenance electricians are "always" in the tanks; and (c) McGoey did, in fact, look for Joseph in eight tanks before giving up the search of April 14. The apparent reason that Shropshire concocted the rule against employees' going into the tanks alone, or going into the tanks with other than electrical department personnel, was that Shropshire wanted to deny that he knew, or should have known, that Joseph had been working in a tank where he could not hear a page. I therefore discredit Shropshire's testimony that the last assignment that he gave Joseph on April 14 was to go to a tank with Cousin, and that Cousin reported that job was finished in the early afternoon. I credit Joseph's testimony that, about 3, Shropshire sent Joseph to go with two pipefitters to move temporary lights, and those lights turned out to be in a tank. (Because of the nature of the work described, the craft was probably shipfitting, not pipefitting, as Joseph testified, but that does not matter.) The assignment to go with the pipefitters came somewhat before 3, and it was done without a thought of Joseph's signing the MCR for the day. This is the only logical explanation for Shropshire's failing to get Joseph to sign the MCR before he left casualty control where he gave Joseph the assignment.

However, I credit Shropshire's testimony that he continued to page Joseph until 3:30. Joseph may not have heard the page in the tank, but he would have heard it when he came up on deck. At any rate, Joseph knew that he needed to sign out for the day, and he knew where he should do so; Joseph testified that Cousin had walked by Joseph's work area and told him that he was going to casualty control to sign out. Joseph necessarily knew that he needed to do the same, even if he did not hear the

[126] Actually, Joseph had written nothing on the warning notice at that point; he had, however, explained his position orally to Terry.

page, and even if no one told Joseph that he was being paged to casualty control (which Cousin testified that he did).

There are irreconcilable differences between the testimonies of Joseph and Cousin: (a) Cousin testified that he saw Joseph on the jungle deck where Joseph could not possibly hear the page because of some blowers; however, as well as not knowing what the jungle deck was, Joseph testified that when he was out of the tank, and on a deck immediately below casualty control, there was nothing that could have interfered with his hearing a page; (b) Cousin testified that Joseph told him that he would not leave the area because other employees were in the tank and he would not leave them without lights; however, Joseph testified that he left the two pipefitters "in the dark," at least long enough to go to casualty control and search for Shropshire; (c) Joseph testified that, after 3:20, he twice went to casualty control looking for Shropshire, and both times he saw Cousin there; however, Cousin did not testify that he saw Joseph at casualty control; (d) Cousin testified that he was on the ship, working with Joseph until 3:30; however, Joseph testified that no one helped him as he worked on deck; and (e) most importantly, Cousin testified that Joseph was still on the ship, working, at 3:30, but Joseph testified that he was on the ground at 3:30, looking for Shropshire. That is, Cousin's scenario was that Joseph knew that he was being paged (because Cousin told him), but Joseph was too busy to go to casualty control; Joseph's scenario was that he did not hear the page, but he went to casualty control anyway (twice). In the process, both Joseph and Cousin rendered themselves incredible in their accounts of Joseph's conduct on April 14.

I find that Shropshire continued to page Joseph to come to casualty control after 3:20. Joseph heard the page to come to casualty control, but he ignored it. Joseph knew that he was required to sign the MCR before he left each day, and he knew where to find Shropshire (at casualty control, where Cousin also had told him that he was going to sign the MCR), but he simply did not go there. Joseph did not fail to go to casualty control because he was concerned about providing lights to the pipefitters (again, as Joseph testified, he left them "in the dark"). Joseph failed to go to casualty control to sign Shropshire's MCR because he wanted to go home as soon as he could get to the timeclock and punch out. If Joseph had punched out more than one minute after 3:30 (because he had been working on the ship until the last minute, as Cousin testified) Joseph assuredly would have so testified. I believe, and find, that Joseph worked somewhat later than 3:20, without Cousin, but then he went straight for the timeclock to punch out, ignoring the repeated pages which he assuredly heard rather than taking whatever time that was required to go to casualty control and sign out.

(One matter does not involve a credibility conflict. Cousin testified that on both April 14 and 15 he told Shropshire that he had left Joseph "working." Cousin did not testify that, either on April 14 or April 15, he told Shropshire that he had left Joseph working at 3:30. The effect of Cousin's testimony was that he told Shropshire that he had left Joseph working, but that could have been any time during the day; i.e., whatever time Cousin had seen Joseph last. To the extent, however, that Cousin's testimony was designed to convey the impression that he told Shropshire, on either April 14 or 15, that Joseph was had been working at 3:30 on April 14, I discredit it. I also discredit Cousin's testimony about what Shropshire said to him on the morning of April 15.)

On the warning notice that Terry reviewed, McGoey had written that Joseph had "disappeared for the last 35 minutes of his work shift." This was an exaggeration; however, Joseph did leave the ship before 3:30, without doing work that he should have done, sign out.[127] That is, the warning notice was correct in its conclusions that Joseph had failed to sign out and that he had left his work area (casualty control) to avoid signing out. Contrary to the contention of the General Counsel on brief, Terry's doubts about exactly what had happened was not an admission that the warning notice was completely invalid and that no notice should have been issued at all; Terry's doubts were of sufficient magnitude only to prevent discharge of Joseph at that point. I find and conclude that Respondent has shown that Joseph would have received the warning notice of April 15 even in the absence of his prounion sympathies. I shall therefore recommend that this allegation of the complaint be dismissed.

(3) Joseph's discharge for loafing and having prior warning notices

A "container" is a boxcar without undercarriage. Some containers are used for field offices and some are used for storage. A storage container that held the supplies of the maintenance electricians was on the ground near the ship to which Joseph was assigned on April 28 and 29. The container had a loose wire-mesh front, and it was called "the cage." Openings in the mesh structure are about three inches in diameter; therefore, for some distance, someone outside can see who is inside the container.

Maintenance electricians install temporary lighting with "streamers," which are strings of lights that are about 25-feet long. Streamers are purchased commercially, but some assembly is required; generally, this assembly consists of cutting, stripping and fitting wires to desired lengths, fitting protective covers into bases, and inserting the light bulbs. Assembly of streamers is done in the cage, and sometimes partially assembled streamers are stored in the cage.

At some time before the events in question, Joseph was scheduled to take vacation from May 2 through 6. Joseph testified that on April 28 Chaisson assigned him to place lights in another of the ship's tanks. He started the job on that date but did not finish. On Friday, April 29, Joseph made several trips between the ship and the ground to retrieve streamers from the cage. Joseph testified that, at some point, he became aware that he needed to assemble more streamers, so he again went to the cage. Joseph testified that he got to the cage and sat down to assemble streamers "about 11:35." (This time estimate, again, was without benefit of a watch because Joseph did not wear one at work.) Joseph testified that he assembled streamers in the cage "until it was close to lunch." (When asked on direct examination how he knew it was "close to lunch," Joseph replied: "Well, the employees starting flowing, you know, coming more and more off of the ship, the closer it gets to lunch. That is how I could tell.")

[127] The General Counsel presented two employees who testified that they were not punished for failing to sign out on MCRs. Even if credited, this testimony was not probative; certainly, it is not a significant number which would lead to the conclusion that the rule requiring employees to sign the MCRs was disparately enforced.

Joseph testified that, while he was in the cage, he decided to leave the plant at noon to start his vacation early.[128] After he made that decision, Joseph left the cage and began looking for Chaisson. When he found Chaisson, Chaisson told Joseph that he was off the ship early and that he would be issued a warning notice. Joseph testified that he replied to Chaisson that he wanted to leave for the day and he asked to sign out on Chaisson's MCR, but he did not testify that he told Chaisson that he was in that area because he had been looking for Chaisson. After signing the MCR, Joseph left the premises.

When Joseph returned to work from vacation on May 9, Chaisson presented him with another warning notice. The warning notice was signed by Shropshire, Chaisson and McGoey; the supervisors cite April 29 at 11:45 a.m. as the date and time of the offense; the box for General Offense-4 is checked, and the notice recites:

> Wasting time, leaving work place without permission. Employee has final warning notice and has also been verbally warned by electrical supt. Employee walked off ship at 11:45, sat down in maintenance cage, then started walking toward gate at 7 min. to 12.

Chaisson called McGoey and McGoey came to the area. Joseph asked McGoey to come to the cage to see the streamers that he had assembled, marked and stored on April 29. McGoey looked at the streamers, but McGoey told Joseph to come with him to Terry's office anyway. While Joseph and McGoey were waiting to see Terry, Joseph wrote on the warning notice as his "Employee Comment": "Maintenance electrician en route to obtain streamers in connection with job assignment. Was not aware of time."

According to Joseph, when he was called into Terry's office:

> Well, then Mr. Terry asked us to come into the office, and when he looked at the citation, he said, "What is this?" And I went on to try to explain to him what had happened. . . . I told him that I was inside of the container, making streamers. . . .
>
> [Terry] just said that, "You are fired."
>
> And I told him, God bless him.

Joseph left the premises at that point.

Joseph's Discharge-Respondent's Evidence

On June 15 Respondent's counsel submitted to the Regional Office a statement of position on Joseph's discharge. After noting that Joseph was seen by Shropshire at 11:45, counsel states:

> [Joseph] asserts that as a maintenance electrician he was not required to get permission to go to the maintenance container. This is true only if the employee goes to the maintenance container to work. [Joseph] did not go to the maintenance container to work; he went to the container and sat down, wasted time, and then left the ship area before 12:00 noon without his supervisor's permission.

This statement of position would seem to immediately narrow the issue to what Joseph was doing when he was on the ground; either working or loafing. Shropshire, Chaisson, and McGoey, however, testified that Joseph should not have been on the ground in the first place. Those three supervisors testified that there was some unwritten, but absolute, rule against employees, including maintenance electricians, going to the ground between 11:30 and 12. The General Counsel's witnesses denied ever hearing of such a rule. In deciding whether such a rule existed, the first thing to be noted is that, if any such absolute rule existed, and it was a factor in the supervisors' decision to discipline Joseph, it assuredly would have been mentioned by counsel in his June 15 statement of position. Moreover, Electrical Department Superintendent Terry mentioned no such rule in his extensive testimony about electrical department rules. But most importantly, Gerdes, the de facto assistant superintendent of the electrical department, testified unequivocally on cross-examination (vol. 122) that maintenance electricians are allowed to go to the ground, without permission from their foremen, for materials at any time between 7 and noon.[129] Also, on this point Respondent called construction electrician (but not maintenance electrician) Kevin Williams (vol. 99). Even after blatant leading on direct examination, Williams refused to say that the employees had been given any other instruction about the period between 11:30 and noon, other than to "stay busy." On cross-examination, Williams flatly denied that the supervisors had told the employees that they could be disciplined for going to the ground between 11:30 and noon, even if they were working. Finally on this point, Joseph credibly denied that he had ever been told by any foreman that he was not to go to the ground between 11:30 and noon without permission. I find that no rule against maintenance electricians' going to the ground between 11:30 and noon existed; at least, no such rule was ever communicated to Joseph. Nevertheless, if Joseph was on the ground, but not working, between 11:30 and noon of April 29, some discipline would seemingly have been in order.

The ship to which Joseph was assigned on April 29 had six levels above the main deck. Shropshire testified that on April 29, about 11:45, he looked over the side from the sixth level and saw Joseph on the ground leaving a construction elevator that takes personnel between the ground and the main deck. According to Shropshire, he saw Joseph proceed to the cage and sit on a bucket, with nothing in his hands. Shropshire watched Joseph sit there for "two or three minutes." Shropshire went to check on his crew for another 2 or 3 minutes, and then he returned to where he could see Joseph again. Again he observed Joseph sitting on the bucket, again for 2 or 3 minutes, doing nothing. After that, Joseph got up from the bucket, went out the doorway of the cage, and walked out of Shropshire's field of vision. Shropshire specifically denied that Joseph was assembling streamers. Shropshire testified that, after lunch that day, he reported what he had seen to McGoey.

On April 29 there was a second ship on the ground in the proximity of the ship to which Joseph had been assigned. Chaisson testified that he had been to another area of the yard that morning and he returned on a bicycle several minutes before noon. As he approached the area where Joseph's ship and the other ship were positioned, he looked up and saw Shropshire

[128] Joseph's testimony in this regard impeaches other testimony by Cousin that, earlier in the morning, Joseph told him that Joseph had planned to leave at noon.

[129] There was an overnight break in Gerdes' cross-examination. Then, when cross-examination was terminated the next day, Respondent's counsel pleaded for an additional 30-minute break for preparation of Gerdes' redirect examination. Upon return from that (second) break, Gerdes changed his testimony to say that there was a rule against maintenance electricians' going to the ground between 11:30 and 12 noon without permission from their foremen. Gerdes' revised testimony was incredible.

standing on an upper level of Joseph's ship. Shropshire, who could not have been heard from that distance, was motioning to Chaisson to look toward the maintenance cage. Chaisson stopped, and, shortly thereafter, Joseph came out from between the two ships. Chaisson and Joseph made eye contact; then Joseph stopped and turned around, and he started walking in the opposite direction (back toward the cage). Joseph stopped again, then turned again to face Chaisson. Chaisson, who was then within speaking distance, told Joseph, "John, you got caught again." (Chaisson testified that he was referring to previous times that he had caught Joseph loafing and that he had, on those occasions, told Joseph to get to work.) Chaisson further testified that Joseph replied that he wanted to sign out on the MCR and go home. As Joseph described, Chaisson handed Joseph the MCR to sign out, but he also told him that he would be receiving a warning notice for being off the ship early. Joseph then signed the MCR and left. By that time, Chaisson further testified, it was still 8 or 10 minutes before noon. After the lunch period was over at 12:30, Chaisson contacted McGoey and told him what had happened; McGoey told Chaisson to draft a warning notice to issue on May 9 when Joseph returned from his vacation.

Terry testified that when McGoey brought Joseph to him on May 9 and told him what had happened, he again reviewed the file and noted that Joseph had the "Final, Final" warning notice quoted above, and he noted that Joseph had a "final" warning notice before that. He spoke to Joseph and:

> I reminded Mr. Joseph of the previous citation that I was directly involved in with the—my handwriting of the Final, Final warning for any future offenses. As I recall, it was within a 30-day period. They were very close to one another, and I told him that my decision was based on his actions of quitting work early and leaving the work place. I had decided that I would terminate him. . . .
>
> Mr. Joseph tried to explain to me that he had gone down to the container to do some work. And he didn't admit to me that he had actually left early, as I recall.
>
> But I told him that the supervisors had told me that they had observed him sitting down in the cage and not doing any productive work during work time.

Further on direct examination, Terry was asked and he testified (vol. 91):

> Q. Okay. Why did you make the decision to terminate Mr. John Joseph?
>
> . . . .
>
> THE WITNESS: I have already explained that. I will go through it again, if you would—think it is necessary.

Actually, Terry had "explained" only what he had told Joseph, but he had not testified that what he told Joseph was, in fact, the reason for Joseph's discharge. Terry's only prior explanation of the discharge came when he was called by the General Counsel (vol. 59) and examined pursuant to Federal Rules of Evidence 611(c). Terry had then testified: "Well, this man had a Final, Final warning, sir. I have already testified to that. And now we have a similar or same offense. He is a prime candidate for termination."

It is true, as the General Counsel points out on brief, that during cross-examination Terry was asked and he testified:

> Q. Could you tell us the reason that Mr. Joseph was discharged?
>
> . . . .
>
> THE WITNESS: He was discharged for leaving the work place without permission and quitting work early.

However, immediately before giving that answer Terry testified that, when contemplating Joseph's discharge on May 9, he reviewed Joseph's April 15 warning notice; Terry testified: "So here is an employee with a current history of goofing off, if you will, and disappearing from the job. And I [had] personally put him on notice that this was unacceptable conduct, and the conduct continued." Therefore, a fair construction of Terry's testimony is that Joseph was discharged because of his conduct of April 29 and because that conduct closely followed Joseph's conduct of April 14 for which he had received a "Final, Final" warning notice. The General Counsel contends that, although Terry testified that he told Joseph that he was discharging Joseph because his conduct of April 29 had closely followed his conduct of April 14 (when Joseph got the "Final, Final" warning against exactly such conduct), Terry did not testify that, in fact, this was the reason for the discharge. I believe that this argument comes too close to a contention that Respondent's witnesses must use some "magic words," to meet its *Wright Line* burden, and I reject it.

Joseph's Discharge—Credibility Resolutions and Conclusions

As his "Employee Comment," Joseph wrote on the May 9 warning notice: "Maintenance electrician en route to obtain streamers in connection with job assignment. Was not aware of time." He did not write on that warning notice that he was "en route" to sign out on the MCR because he had been planning to leave on vacation at noon on April 29. Nor did Joseph testify that he told Terry that he had been away from his working area because he had been looking for Chaisson to sign out; Joseph testified that he told Terry that he had been inside the cage making streamers. Moreover, even according to his own testimony, Joseph's statement to Chaisson that he wanted to sign the MCR and leave for the day came in reply to Chaisson's statement that he was going to be issued a warning notice. From his own testimony I would conclude that Joseph had no thought of leaving at noon until he was seen, out of his work area, by Chaisson and told that he was to be issued a warning notice.

I do not believe certain testimony by McGoey that he also witnessed loafing by Joseph on April 29, but I do believe Shropshire's testimony that he saw Joseph in the cage, about 11:45 and for about 5 or 6 minutes thereafter, sitting, doing nothing. Most importantly, I further believe Chaisson's testimony that, about 11:52, when he first saw him, Joseph was walking away from the area of the maintenance cage; then, when Joseph saw Chaisson, he turned away from Chaisson; then Joseph turned around again, and, facing Chaisson, asked if he could sign out for the day. Again, if Joseph had previously decided to leave early that day, and if he had been looking for Chaisson in order to sign the MCR, he would have immediately greeted Chaisson with a request to sign the MCR; Joseph would not have initially turned his back on Chaisson as Chaisson, credibly, described. Moreover, when he was told that he would be issued a warning notice for being away from his work area, Joseph did not protest that he was where Chaisson had found

him because he was then looking for Chaisson to sign out. That is, the request to leave early was a thought that came to Joseph after, not before, he was seen well out of his work area by Chaisson.

In summary, I do not believe Joseph's testimony that he decided to start his vacation at noon on April 29 while he was still in the cage, working. I believe, and find, that Joseph had possessed no intention of leaving at noon until he was seen by Chaisson at a place that could not be explained in terms of Joseph's doing any work. Joseph had been loafing, and he had been away from his workplace, and his supervisors knew it. I find the warning notice of May 9 was issued for this reason. I conclude that Respondent has shown that it would have issued a warning notice to Joseph for his conduct of April 29 even in the absence of his prounion sympathies, and I shall recommend dismissal of the allegation that the warning notice was issued in violation of Section 8(a)(3).

Terry testified that he discharged Joseph for his conduct of April 29 which followed so closely Joseph's conduct of April 14, for which Joseph had been issued a "Final, Final" warning notice. This much of Terry's testimony was true. Additionally, when Joseph received the "Final, Final" warning notice of April 15, he also received the December 7 warning notice that included, "Recommend termination." And Joseph had also received, on October 21, another "final" warning notice. The General Counsel has shown no similar circumstance where an employee was allowed to remain employed. Finally, Joseph did not wear prounion insignia, and his prounion conduct (asking Terry if he did not think the employees cared about their futures, telling Robicheaux that there would be no interest in the Union if there were a better relationship between management and the employees, and telling Chaisson that he had received training in an IBEW apprenticeship plan) can only be described as minimal. I find no possible nexus between that minimal prounion conduct and Joseph's discharge. I further conclude that because of his proven misconduct, Respondent has shown that it would have discharged Joseph even absent any prounion sympathies that he may have held. I shall therefore recommend dismissal of that allegation of the complaint.

h. Julie George's discharge for loafing and having prior warning notices

Julie George (vol. 29) was employed as a laborer in the Clean-up During Construction (CDC) Department until she was discharged on July 28, 1993. The second complaint, at paragraph 108, alleges that by discharging George Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged George because of her known union activities and expressions of sympathy which included her speaking up for the Union at an employer campaign meeting and, after the June 25 Board election, wearing prounion insignia. The General Counsel further alleges that, in violation of Section 8(a)(1), George was interrogated and threatened with discharge or other discipline. Respondent denies that the threats and the interrogation occurred. Respondent further denies that its supervisors had knowledge of any union activities or sympathies of George at any relevant time. Respondent further answers that George was discharged solely because she committed the disciplinary offense of loafing on July 28, at which time she had a poor disciplinary record. George's disciplinary record at the time of her discharge included the receipt of five warning notices that she had been issued within the 12 months preceding her discharge and one warning notice that had been issued some 16 months before her discharge. Respondent concedes that this last notice, dated March 30, 1992, was a factor in the discharge. While not disputing the validity of the five warning notices that George received in the 12 months prior to her discharge, the General Counsel contends that George was not loafing on July 28 and that the assigned reason for discharge is a pretext. The General Counsel further argues to be further evidence of pretext the undisputed fact that the supervisors who discharged George additionally counted against her the 16-month-old warning notice, although supervisors consistently admitted that warning notices in excess of 12 months old should not be counted against employees. Alternatively, the General Counsel answers that, even given the fact that George had validly been issued five warning notices during the 12 months before July 28, and further assuming that she committed another disciplinary offense on that date, George was nevertheless treated disparately because other employees received six or more warning notices in 12-month periods without being discharged. Ultimately, I find and conclude that George committed the disciplinary offense of loafing on July 28; however, I further find that Respondent's supervisors used the 16-month-old warning notice against George as part of a pretextual basis for the discharge, in contravention of its own policies, and that George was discharged pretextually, and disparately, in violation of Section 8(a)(3).

George did cleaning work under the supervision of Foreman Billy Ledet and Lead Foreman Ruben Barrios. George testified that in late April or early May, she and other employees attended an employer campaign meeting that was conducted by Barrios, Ledet, and CDC superintendent Leroy Cortez. At the end of the presentation, when questions were taken, George asked, "[I]f the Union came in would the workers be treated fairly and that the friends and relatives won't be the only ones with good jobs." George testified Cortez answered that the employees would be treated fairly.

Ledet (vol. 150) acknowledged on cross-examination that he did not remember George. Neither Cortez (vols. 96, 97) nor Barrios (vol. 149) denied that George asked such a question in an employer campaign meeting. I found George's testimony on the point to be credible, and I find that her statement was one that voiced a commonly held complaint (real or imagined) about favoritism and a suggestion that the Union might remedy such.

George testified that in late May Ledet gave her conflicting orders as she worked. She testified: "I told him that was why the Union was coming in because of crazy things like that." Ledet, red-faced, replied that George should not mention the Union in such exchanges. Ledet then left the work area. Later, Ledet returned and took George to meet Cortez in Barrios' office. There, according to George:

> [Cortez] told me that he didn't care if I voted for the Union or not. I was not to say anything about the Union.
>
> . . . .
>
> I told him that Billy Ledet was harassing me because I was for the Union.
>
> After he told me that I wasn't supposed to say anything about the Union, [then] Billy Ledet came in, and he [Cortez] told him [Ledet], "She said 'the word'; sign her out and send her to Employee Relations."

George testified that she told Cortez that she did not want to go to "Employee Relations," apparently the human resources department, but Cortez insisted. George testified that she went to the "employment building" after Ledet signed her out on his MCR; at the human resources department she was told that her accusations about Ledet would be looked into. Based on George's testimony, paragraph 30 of the second complaint alleges that Respondent, by Cortez, threatened its employees with unspecified reprisals.[130]

In an attempt to undermine George's testimony about what Cortez told her, Respondent presented Ledet who flatly denied taking George to Cortez to talk about the Union and denied that Cortez ever told him to sign an employee out and send him or her to the human resources department. Of course, Ledet also acknowledged not remembering George, so this is not a credible denial of what Cortez may have said to George. Respondent also introduced George's MCRs for the period from May 17 through June 28; none shows that she was ever signed out "to employee relations." Ledet's MCR for May 26, however, shows that George was signed out on a "Pass to First Aid" from 9:09 until 9:33. A 24-minute round-trip to the first aid department would be remarkable; moreover, there is no testimony that George asked for a pass to go to, and went to, the medical department at that time. The personnel building is adjacent to the medical department's building. Ledet was not asked if Cortez ever used the expression "the word," in reference to what should be done with an employee. More importantly, Cortez did not make the denials that were attempted for him by Ledet (and attempted for him by Counsel through presentation of the MCRs). Specifically, Cortez did not dispute George's testimony about what she said to Cortez and what Cortez said to her; and Cortez did not deny telling Ledet to sign out George and send her to the "Employee Relations" department because she had said "the word," to wit: "Union." I credit George's testimony.

The issue thus becomes whether telling an employee not to use the word "union" in confrontations with management, and sending the employee to its personnel department, over the employee's objection, constitutes a threat of unspecified reprisals, in violation of Section 8(a)(1). At minimum, the objecting employee is not going to feel too comfortable about the situation. Moreover, being sent away from the work place, if ever so briefly, would give the employee the distinct impression that she is being singled out for punishment, if not opprobrium (much like an elementary school child who is told by a teacher to go to the principal's office). The employee is naturally going to be inhibited in future dealings with her supervisors. And, in this case, the fear is engendered because of the employer's outrage at the employee's using the term "union" in discourse with the supervisor. To create such fear in an employee is necessarily to threaten her. I conclude that Respondent, in violation of Section 8(a)(1), by Cortez, in late May 1993, threatened its employees with unspecified reprisals because they mentioned the word "union" in discourse with supervisors.

George testified that 1 or 2 days after being sent to the human resources department, she was approached by Ledet as she worked. According to George:

> He came up to me and asked me how I felt about the Union. . . . He told me that his boss had wanted him to ask all the employees how they felt about the Union. . . .
>
> I told him I didn't have anything to say. . . .
>
> He kept on asking the same questions over and over again saying that he had to go back and tell him something. . . .
>
> I told him that I had a couple of questions about the Union.

Ledet told George that Cortez could answer her questions; Ledet escorted George to Barrios' office in the platen area where she again met Cortez. Ledet left, and George conversed with Cortez. According to George:

> I started asking him questions. I asked him if the Union came in would the yard close down? . . . He said yes. . . . I asked him if the Union comes in will we get more money. . . .
>
> He said, "If Avondale doesn't have any money, we won't get any." . . .
>
> I [asked] him that if it rains in the morning, and we get sent home will we get paid for the time that we came up if the Union comes in. . . . He said no. . . .
>
> He asked me if I had any more questions. . . .
>
> I told him no. . . . I went back to work.

Based on this testimony by George, paragraph 32 of the second complaint alleges that Respondent, by Ledet, interrogated its employees.[131] Further based on this testimony, paragraph 31 of the second complaint, alleges that Respondent, by Cortez, "threatened its employees with plant closure, more onerous working conditions, and reduced benefits if they selected the Union as their bargaining representative."[132]

On direct examination Ledet denied having asked any employee about his or her prounion sympathies; Ledet was asked what instructions he could remember from the TIPS meetings; he responded: "It is too far back." On cross-examination, as noted, Ledet acknowledged that he could not remember George. Ledet denied taking any employee to Cortez to talk about the Union. Cortez, however, testified that "many times" his foremen brought employees to him to get answers about the effects of organization by the Union. George impressed me favorably in her testimony about her approach by Ledet, and I do credit her testimony. I conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Ledet, in late May 1993, interrogated its employees about their union membership, activities, or desires.

George's testimony that Cortez told her that employees would not get money that Respondent did not have, and that employees would not be paid for reporting ("the time that we came up") on days that they got rained out, were not threats of reduced benefits or more onerous working conditions. The comment about wages was pure argument, and the employees were not being paid reporting pay at the time, anyway. Finally, I do not believe that, upon being threatened with plant closure, George then asked if the employees would get a raise if the Union were selected as their collective-bargaining representative. I credit Cortez' denial of the threat of plant closure. I shall

[130] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against George, as well as the charge in Case 15–CA–12171–1.

[131] Id.

[132] Id.

recommend that paragraph 31 of the second complaint be dismissed.

George testified that she was absent for surgery for the 3 weeks before the June 25 Board election. When she went to vote, she wore, for the first time, a union sticker on her blouse. On the first workday after the election, June 28, she placed the sticker on her hardhat, and she did not remove it through the date of her discharge. The supervisors involved in George's discharge denied remembering that George wore prounion insignia, but I credit her testimony in this regard.

George's Discharge—the General Counsel's Evidence

On July 28, George and employee Abbey Howard were assigned cleaning duties in the fabrication area under the direct supervision of Lead Foreman Barrios (not Ledet, who was then assigned to another area of the yard). On that date George and Howard were accused of loafing. George was discharged, and Howard was given a warning notice. Howard did not testify.

George testified that she and Howard were cleaning on the second level of a unit when, about 9:30, they decided to sit down to take a break. Except for the half-hour unpaid lunch period, there are no established breaks during the day; however, on cross-examination, Barrios testified that CDC employees are permitted to take 10-minute breaks, between 9 and 10, at which time they may just relax or they may eat something they have brought with them; Barrios also testified that employees may even leave the work area to get something to eat or drink from vending machines. Therefore, there is no dispute that CDC employees, such as George and Howard, could take some break during the morning; the questions are when, and for how long, George and Howard did so on July 28.

George testified that after she and Howard sat down, two men came up a ladder to the second level of the unit. George did not know who the men were, but she knew they were supervisors because they were wearing white hardhats. The men looked around the area for 5 minutes, and then they left without saying anything to George or Howard. George and Howard continued to sit after the two men left the second level. Then, further according to George, Carol Danos, vice president for construction, climbed the ladder to the second level. (George knew Danos by sight; the March 1992 warning notice mentioned above was issued after Danos found George loafing.) George testified that she and Howard stood up as soon as they saw Danos. Danos walked over to George and Howard and asked them only where they were taking their trash that day; upon receiving the answer, Danos left the area. George testified that the break that she and Howard took lasted "[a]bout 15 minutes."

On cross-examination, George was asked and she testified:

> Q. Why did[n't] you stay seated when you saw Carol Danos coming up?
>
> A. Because he was—because I needed to get up.
>
> Q. When you say you needed to get up, what do you mean? . . .
>
> THE WITNESS: He was our boss.
>
> Q. [By Ms. Canny]: And why did you know you had to get up when you saw your boss?
>
> A. Because I didn't want him to see—catch me sitting down.
>
> Q. Is that because you weren't supposed to be sitting down?
>
> A. Yes.

George further testified on direct examination that later in the morning, Barrios appeared and told Howard and George that Cortez wanted to see them. George and Howard went to Barrios' office where Cortez interviewed them separately; Howard was interviewed first. George testified that, after Howard left the office and she went in, Cortez told her that she and Howard had been caught sitting down on the unit by Danos. George told Cortez that she and Howard had taken a break because it was hot, and, furthermore, some birth control pills that she had recently taken for the first time had made her sick. Cortez asked if she and Howard had been eating, and she denied it. George further testified:

> He [Cortez] told me that Danos had told him to write us up, and [then] he said, "In your case you can't be written up, so go back to work and I will see what I can do about you."

At trial, George denied that she or Howard had been eating when Danos came on the platen; she did not, however, testify that the birth control pills had, in fact, made her sick.

George further testified on direct examination that she left Cortez' office and went back to work, as Cortez had instructed. Later in the morning she was approached by Barrios who told her that she was discharged; Barrios walked George to the area of his office. George was asked and she testified:

> Q. And what, if any, conversation did you have with Mr. Barrios as you went with him?
>
> A. He told me that . . . they were firing me because I had seven citations.

George went to the office to retrieve a bag that she had left there. In Barrios' office she again met Cortez. According to George, Cortez told her: "Whoever or whenever you go to make a claim with the Union or whoever, don't forget to tell them that I didn't fire you, the vice president did." George left the plant.

George's Discharge—Respondent's Evidence

Welding Department Superintendent Norris Pertuit (vol. 104) testified that he was present with Danos and Shipfitting Department General Foreman David Zeringue on July 28 when they came across George and Howard on the platen. Neither Danos nor Zeringue testified. Pertuit testified that, "around 8:00, 8:30—somewhere around there," he and Zeringue climbed the ladder to the second deck and found George and Howard sitting, "eating breakfast." Further according to Pertuit, "And when Carrol Danos came up, that is when they got up. And he [Danos] went and talked to them." Pertuit did not hear what was said between the women and Danos. After Danos finished speaking to them, the women went to work. Danos rejoined Pertuit and Zeringue, but the three men did not discuss what George and Howard had been doing (or not doing) among themselves. On cross-examination, Pertuit acknowledged that he could not remember what it was that George and Howard had been eating on the unit that gave him the impression that they were "eating breakfast."

Barrios testified that he was first informed of the conduct of George and Howard during the morning of July 28 by Ledet. Barrios was out in the yard when he was radioed by Ledet who asked Barrios to return to Barrios' office. When Barrios arrived, Ledet was there with Howard and George. According to Barrios:

> He [Ledet] told me that one of the vice presidents and some superintendents had observed these two people sitting on a unit, eating, and they made no attempt to move. And when they asked them what they were doing, they said they were eating.

Barrios testified that Ledet did not tell him where he had gotten his information about what the vice president and superintendents had seen. (This testimony, of course, conflicts with George's testimony that she and Howard went to the office area upon Barrios' coming to their work area and telling them that Cortez wanted to see them. Also, Ledet testified that he had been transferred to a different area of the shipyard by July 28 and that he had nothing to do with George's discharge; Ledet testified that he learned of the incident only when he was subsequently reassigned to the area.)

Barrios further testified that upon receiving Ledet's report, he called Cortez and asked Cortez to come to Barrios' office. (As it will be seen, however, Cortez testified that he did not speak to Barrios that morning before he went to the area; Cortez testified that he went to the area that morning only after a call from Danos that indicated that he should do so.) Further according to Barrios, when Cortez arrived, and as Howard and George stood next to him:

> I told [Cortez] that Mr. Carrol Danos and Mr. [Laurence] Torres and Mr. Zeringue observed these people sitting on the unit as they climbed the unit. They were going up to the unit to check it out or something, and as they climbed they saw them. They were right there, sitting down eating. And they were asked what they were doing, and they said they were eating, and they didn't make any attempt to get up or get out of the way.

(On cross-examination, Barrios testified that Ledet was also present when he gave this report to Cortez. Again, Ledet testified that he was not in the area that day. Laurence Torres was superintendent of the shipfitting department; Pertuit did not identify Torres as being someone who was with the Danos party when it discovered Howard and George; Pertuit identified only himself, Danos, and Zeringue as being there.)

Further according to Barrios, Cortez left Barrios' office to return to his own office. Barrios, George, and Howard waited in Barrios' office area for Cortez, saying nothing to each other. Cortez returned with the departmental personnel files of George and Howard. After reviewing the files in Barrios' office, Cortez interviewed George and Howard separately. Barrios further testified that he was present when, after Cortez reviewed the personnel file of George, Cortez told George that "he could not give her another write-up. He would have to terminate her."

On cross-examination, Barrios, who, again, was the direct supervisor of Howard and George on July 28, was asked and he testified:

> Q. So if you saw someone eating—taking a break for about ten minutes, that would be tolerable?
>
> A. To me, it would be, providing it wasn't in a conspicuous place where they could be seen by every Tom, Dick, and Harry in the yard. . . . Some of them [the employees] go to the [vending machine] stands and they buy their drink, and they drink it on their way back to the job.

On redirect examination, Barrios was asked and he testified:

> Q. You were asked some questions about taking breaks and eating a snack in the mornings. What was wrong, if anything, with what you were informed Julie [George] and Abby [Howard] had been doing? . . .
>
> THE WITNESS: They were considered—since—I mean, anybody that is sitting down on the job, and a superintendent or something like that walks in—even though you are caught, you should get up. And they were just—they just stayed there. They didn't care, you know, as far as I know. And they considered them [to be] loitering.

Presumably, the "they" to whom Barrios referred were Danos and the supervisors who had been with him.

On direct examination Cortez (vol. 96) testified that, between 8 and 8:30 on July 28:

> Mr. [Carroll] Danos called my office that morning and told me that he had caught two employees on one of his inspections of a unit sitting down, eating breakfast at—roughly between 8:00 and 8:30 in the morning, and that at that time he told me over the phone that he had wanted both employees terminated. . . . He told me to get to the unit immediately and [then] to see him.

Cortez started toward the area; he got to the levee where he came upon Danos and Pertuit. According to Cortez:

> Again, Mr. Danos explained to me pretty much what the conversation of the foreman was. He had caught two employees—he and the group of gentlemen that was walking with him, being supervisors and foremen, walked upon two of my employees sitting on the unit. These two employees were eating breakfast.
>
> And when Mr. Danos and the group of people approached them, they had—were not in a rush at all to get up. They just continued to eat, and they was taking their own good old time about getting up and returning to work.
>
> And that point he told me, "I want you to investigate it and I want you to terminate both of the employees."

Cortez testified that Danos did not say who the employees were that Danos had seen. Cortez testified that he then went on to Barrios' office where Barrios told him that Danos had spoken to him about the conduct of George and Howard. (Cortez was asked who was at Barrios' office when he got there; Cortez named Barrios, George and Howard; he did not place Ledet there, as did Barrios. Also, Cortez testified on cross-examination that Barrios told him that he got the information contained in his report from Danos "personally.")

Cortez testified that, after listening to Barrios, George, and Howard, he called his clerk, Sharon Cortez. (Sharon Cortez is not related to Leroy Cortez; in this section of the decision, references to "Cortez" are to Leroy Cortez, not Ms. Cortez.) Cortez testified that Ms. Cortez told him that Howard had one or two warning notices, but that George had been "what we called blue-lined." Cortez was then asked and he testified:

> Q. And what does blue-lined mean?
>
> A. Blue-lined means an employee has a group of citations in their folder, and they have come to a point where we are not going to write—we can't write them up any more, or they are in—they have got themselves in trouble where we have got to look at this folder closely before we write them up anymore.

> Q. Is there a number of citations that results in someone getting blue-lined? . . .
>
> THE WITNESS: When it gets to the four or five mark, or it ould be the two mark, depending on what the violation is. If the employee does the same violation twice, then the third citation would warrant a discharge. But then, again, if an employee has different violations—absenteeism, safety violation, and only one wasting time, then those matters are taken into consideration.

On cross-examination, Cortez testified that the blue-lining records were maintained by Ms. Cortez, and, when a foreman or general foreman under him asks that a warning notice be drafted, "Sharon can automatically look at the book and note how many citations the employee already has. And if he or she has more than three citations, or more than two citations, for a certain violation, it is just a code—the way we use the blue line; it means I should go look at the folder."

Cortez testified that upon hearing from Ms. Cortez, he went to his office, and then he returned with the departmental files of Howard and George. Cortez testified that his review of Howard's file disclosed that she only had two warning notices, both for attendance problems. Cortez testified that he decided only to give Howard a warning notice because her two prior warning notices were for absenteeism, not loafing. He called Howard into Barrios' office and told her that she would be getting a warning notice. After Howard left, he called George into his office and reviewed her prior warning notices with her.

Cortez testified that his review of George's file disclosed six prior warning notices, all of which he considered: (1) a March 30, 1992 warning notice signed by Cortez, himself; the box for General Offense-4 is marked, and it states, "Employee was noted out of work area and talking to two other employees. Noted by L. Cortez and C. Danos." (2) a September 14, 1992 warning notice for absenteeism; (3) a November 20, 1992 warning notice for quitting work between 3:20 and 3:30 (a loafing-type of offense, as will be discussed in more detail in the cases of other alleged discriminatees); (4) a December 21, 1992 warning notice for not wearing safety eyewear in a production area; (5) an April 15, 1993 warning notice, again, for not wearing safety eyewear; and (6) a July 8, 1993 warning notice for absenteeism. Both the fourth and fifth warning notices were marked "Final Warning." Cortez was asked if he considered any of these six warning notices more important than the others. Cortez testified:

> Exhibit 473 [the March 30, 1992, warning notice] is important because of the handwritten a the bottom, and my handwriting, "Employee was noted out of the work area and talking to another employee by myself and Mr. Danos." It was the second time that our vice president had caught this employee apparently not doing the work assigned.[133]
>
> And 472 [the September 14, 1992, warning notice] is because—it is on the same lines as wasting time, so that is quitting work early, washing up. It is wasting time, not being in the work area that is assigned.

[133] The Tr., vol. 96, p. 22,375, LL. 19–21, is corrected to move the reporter's closing quotation mark from the ending of the second sentence of this paragraph to the ending of the first sentence.

The March 30, 1992 warning notice was, of course, more than 12 months old; precisely, on July 28 it was 2 days short of being 16 months old.

Cortez testified that after going over the warning notices with George, he asked George "to step out while I further investigated—out of the office." Cortez testified that, while George was outside of the office, he called Personnel Officer Bruce Nunez, "[b]ecause it was Mr. Danos and other foremen that caught her, and I wasn't exactly sure how I would handle it and if I was doing the proper thing." Cortez testified he reviewed all warning notices with Nunez. According to Cortez:

> He [Nunez] told me that my decision to terminate[,] or Mr. Danos' decision to terminate[,] was very—that the Company would agree with that[,] or his [Nunez'] stance would be with that[,] because of the number of citations and the number of times that this employee has broke company rules, and this being the third time that she has created a—broke a rule such as wasting time.

(As I indicate by the bracketed commas, Cortez here was not using "or" as a conjunction; he was using it to "back up" and change his testimony. When Nunez testified (vols. 65, 66, 117, 154, and 156), he was asked nothing about George's case.

Cortez testified that after speaking to Nunez:

> I told Ms. George that I had reviewed her files and talked to Personnel, Mr. Bruce Nunez, and at that point she was being terminated for the fact that she was also caught once before by Mr. Danos and myself . . . . And I told her that she was being terminated at that time for excessive citations and wasting time.

Cortez testified that George had not been terminated before July 28 because she had never before received a third citation for one type of misconduct, two of her prior warning notices having been for safety violations, two for absenteeism, and two for loafing-type offenses, one of which, again, was the March, 30, 1992 warning notice.[134] Cortez denied that he told George that it had been the vice president who had caused her discharge.

On cross-examination, Cortez testified that he discharged George immediately after hanging up the telephone from his conversation with Nunez; on direct examination, however, Cortez had testified that he spoke to George later in the day. Cortez' direct examination on this point is more consistent with the facts as I find them. Cortez acknowledged that his reference to "once before" when discharging George was a reference to the March 1992 incident.

Further on cross-examination Cortez testified that he, not Danos, made the decision to discharge George. Cortez was then asked and he testified:

> Q. And do you have any recollection of why you fired [Julie George]?

[134] As noted, George's warning notice of April 15 for not wearing safety eyewear, and her July 8 warning notice for absenteeism, are both marked "Final Warning." Additionally, the April 15 warning notice further stated "Violation of any other company rules or regulations will result in your termination." Of course, George was not terminated upon receipt of the July 8 warning notice for absenteeism, despite the "any other company rules or regulations" language on the April 15 warning notice. Again, the actual finality of Respondent's finality language on warning notices was a sometimes thing.

A. She was terminated, if I am correct, sir, for—she was caught on the job by Mr. Carroll Danos.

Q. So is that the reason you fired her, because he was caught on the job by Carroll Danos?

A. She was fired because of the number of citations which was in her folder and the number of times that she broke the rule of wasting time.

As noted, George's March 20, 1992, warning notice was 16 months old, and Cortez testified that he considered it "important" in determining to discharge George on July 28, 1993. On cross-examination Cortez was further asked and he testified:

Q. [By Mr. Bensinger]: And could you tell us in what circumstances, if any, you consider citations more than 12 months old when deciding to discipline or fire someone?

A. When a citation is so close to the 12 months and the person was caught twice by the same assistant vice president or vice president, that would warrant to be closer looked at.

Q. Now, is there any other circumstance other than the one you just specified where you consider citations more than 12 months old?

A. As I said earlier in my testimony, there is exceptions for every rule. We do look at all citations.

Aside from the circumstance where a vice president witnesses an infraction (or second infraction), Cortez could name no other circumstance where, when contemplating a discharge, he would count against an employee warning notices that were more than 12 months old.

Ms. Cortez (vol. 144, 145) testified that, as she serves as the CDC clerk, foremen call her and ask that warning notices be drafted for employees and that all warning notices are reviewed by Cortez. On cross-examination Ms. Cortez was asked about the blue-line procedure and for how long warning notices are considered by Cortez. She testified that warning notices that are more than 12 months old are "voided."

George's Discharge—General Counsel's Rebuttal Evidence

As rebuttal evidence, and as evidence of disparate treatment of George, the General Counsel relies on the facts represented by Appendices A and B; to wit: during the 5-year period from 1990 through 1994, some 91 employees received six or more warning notices in 12-month periods without being discharged. Also, the General Counsel relies on further cross-examination of Cortez and other facts that were proved as evidence that George was treated disparately.

Cortez testified on cross-examination that Howard was not discharged along with George because his review of Howard's file proved that she had only two prior warning notices, neither of which were for loafing. Howard's two prior warning notices are dated April 14 and May 3, 1993. The former is for failing to call in absences; the latter is for three absences in a 30-day period. The latter is also marked "Violation of any other Company rules or regulations will result in your termination. Final Warning." In explaining why Howard was not discharged on July 28, despite the broad language of this final warning, Cortez testified:

Again, if she [Howard] would have had a number of different violations of different company rules, it would have been taken into consideration. Again, if she would have missed time, those two [warning notices of April 14 and May 3] would have—yes. They were taken into consideration, but, again, as I stated before, she did not—she was [on July 28] being reprimanded for something of a totally different nature, and that is why these didn't carry much weight.

Cortez was then asked, and he testified:

Q. Now, the language, "Violation of any other company rules or regulations"—that is construed to only apply to absenteeism and call-in procedure?

A. That is the way I would read it. Yes. I understand what you read it into, but that is the way my system works and that is the way I would read it. Yes.

After Cortez testified, Respondent placed in evidence a warning notice that Howard received on September 27, after the discharge of George but, of course, within 12 months of her April 14 and May 3 warning notices. The September 27 warning notice was also for absenteeism. Howard was not discharged for this third absenteeism offense in 12 months, as proven by Howard's personnel card that shows that she continued her employment into 1994.

Further on cross-examination, Cortez was shown three warning notices that had been issued to employee Johnnie Burton (who was the General Counsel's witness on other matters). The three warning notices were issued within a 12-month period ending June 28, 1994. All were issued by CDC Foreman Roy Toledano, and are for wasting time. Cortez testified that he did not discharge Burton, even after his third similar offense, because:

All three of these citations [to Burton] are for the same thing. Correct. But they are also all by the same foreman, so in my mind, I wanted to make sure that Mr. Burton and Mr. Roy Toledano didn't have some kind of problem with one another, so I thought Mr. Burton deserved another chance to prove himself for another foreman.

Further in rebuttal, the General Counsel also showed that CDC employee Anthony Davis received six warning notices between March 15, 1993, and February 24, 1994. Five of these are for attendance-related discipline offenses; the sixth warning notice (which is one of the attendance-related warning notices) is marked "Final Warning." I find that Davis was not discharged upon issuance of this last warning; I do so because (1) Cortez presumably would not have given an express "Final Warning" to someone he was discharging; and (2) more importantly, Respondent did not challenge the testimony in support of the General Counsel's Exhibit 364 which lists Davis as not being discharged after receiving three warning notices in February 1994 (as explained above in the case of discriminatee Marshall).

George's Discharge—Credibility Resolutions and Conclusions

The first issue is whether the General Counsel has presented a prima facie case that George's discharge was imposed unlawfully. I have credited George's testimony that she voiced the commonly held grievance against favoritism at an early employer campaign meeting, and she suggested that the Union might remedy such grievance. Moreover, in May, George told Ledet that the Union would be successful because of the "crazy" way that he was supervising her. Ledet told her not to mention the Union again and took her to Cortez' office. There, as I have further found, she told Cortez that Ledet was harassing her "because I was for the Union." This was the plainest

statement of prounion sympathies. Moreover, as I have further found, it was strong enough of a statement for Cortez to threaten George by sending her to the human resources department. Finally, I have credited George's testimony that, from June 28 through her discharge on July 28, she wore a "Union-Yes" sticker on her hardhat. By doing so, George charged all of her supervisors with knowledge of her prounion sympathies, the denials notwithstanding. Specifically charged with this knowledge is Danos who, as I find infra, made the decision to discharge George. Respondent did not call Danos to deny George's testimony that, when she was confronted by Danos on July 28, she was wearing the "Union-Yes" sticker on her hardhat. In *International Automated Machines*, 285 NLRB 1122, 1123 (1987), the Board rejected the rationale that, if a witnesses is equally available to both the parties, no adverse inference can be drawn if neither party calls him. As the Board stated, because the respondent in that case had failed to call one Davis, a supervisor:

> That rationale conflicts with the familiar rule, accepted by the Board, that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. (2 Wigmore, *Evidence*, § 1A286 (2d ed. 1940); McCormick, *Evidence*, § 1A272 (3d ed. 1984). See *Greg Construction Co*., 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974).) In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. Ibid. Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management, and it supports the judge's findings on the issues on which Davis' testimony would have been probative.

I do draw the inference that, had Danos been called to testify, he would have admitted that George was wearing prounion insignia when he approached her on July 28.[135] I further draw an adverse inference from the fact that, although he did testify, Respondent did not ask Pertuit if George was wearing prounion insignia on July 28.

Knowledge of George's prounion sympathies is thus established. Respondent's animus toward such prounion employees was made clear in the June 1 speech by Respondent's chief executive, Bossier, who labeled such prounion employees as George "whiners, malcontents and slackers" who "want to destroy Avondale," simply because they did support the Union. Moreover, such prounion insignia as George displayed were often made the objects of threats to employees, as I have found above, or as I do find infra. In view of Respondent's animus toward the employees who favored the Union, especially those who wore prounion insignia, I conclude that a prima facie case of unlawful discrimination against George has been established, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against George even in the absence of her known protected activities. Respondent's defenses must therefore be examined.

It is first necessary to make a finding about something that did not happen; Ledet did not tell Barrios about George's conduct of July 28; I find that Danos did. Barrios testified that Ledet brought George and Howard to Barrios' office and that Ledet told him that Howard and George had been loafing in the presence of Danos, but Ledet did not tell Barrios how he got his information (and, supposedly, Barrios did not ask). Ledet, however, testified that he was not working in the area and had nothing to do with the events of July 28; he did not find out that George was discharged for several days afterward. Barrios testified that he called Cortez and asked him to come to Barrios' office; Cortez testified that he did not speak to Barrios about the matter before he got to Barrios' office. Cortez testified that, when he got to Barrios' office, Barrios told him that he had gotten his information from Danos "personally"; Barrios, again, testified that he got his information from Ledet. It is Respondent's position that Danos, not Cortez, made the decision to discharge George, and it is obvious to me that Barrios was making an attempt to take Danos out of the picture, as far as the decision to terminate George was concerned. That is, Barrios was lying in an attempt to convey the impression that it was Cortez, not Danos, who made the decision to discharge George. It was, indeed, Danos from whom Barrios had gotten his information "personally" (as Cortez testified), and that information undoubtedly included an imperative that George be discharged, as I find herein.[136]

I find the facts to be as follows: It is clear enough from the testimony of both Cortez and Barrios that employees are allowed to stop work for about 10 minutes between 9 and 10; and they are allowed to eat a snack when they do so. George presumably knew this, but she did not testify that on July 28 she told Danos (whose presence caused her to end her break) or later Cortez (as he was contemplating the discharge) that she was on a snack break to which she was entitled (because the time had been closer to 9:30, as she testified). Also, George admitted that she took a break for 15 minutes, and she did not testify that she had been given reason to believe that she was entitled to a break of that length. Pertuit was credible in his testimony that, when he and Zeringue found Howard and George, the employees were eating something. Moreover, George's admission on cross-examination that she and Howard had not wanted Danos to catch them seated was an admission that she and Howard were loafing when they should have been working, whether they were eating or not. One matter, however, that is not in issue is what George and Howard did when Danos reached the second level of the platen; as Pertuit testified: "And when Carrol Danos came up, that is when they got up." Although George and Howard rose when Danos came on the second level, they obviously were not able to do so before Danos saw them sitting. After Danos, and his party, saw George and Howard sitting, Danos called Cortez and gave him orders.

There can be no doubt that Danos made the decision to discharge George. As quoted above, Cortez testified that, twice, Danos "told" him to discharge George (and, according to Cortez, Danos also told him to discharge Howard). Also, as quoted above, at one point Cortez testified that when he called Nunez:

[135] And, even if Danos did not make the decision to discharge George, his observations and report to Cortez were what caused Cortez to act against George.

[136] Barrios' lie, that he heard about the Danos-George incident from Foreman Ledet and not Vice President Danos, had to be conscious. A lead foreman would not confuse a telephone call from his vice president with a telephone call from his subordinate line foreman. This factor contributes to my discrediting Barrios elsewhere.

"He [Nunez] told me that my decision to terminate[,] or Mr. Danos' decision to terminate . . . ." That is, although Cortez first said that the decision was his, he immediately corrected himself and said that it was "Mr. Danos' decision." And "Mr. Danos' decision," I find, was that George, but not Howard, be discharged.

The testimony of Cortez is that Danos gave him orders to discharge both Howard and George, but he did not discharge Howard because she had accumulated an insufficient number (or kind) of warning notices. I do not believe this. I do not believe that Cortez got an order from his vice president that he was to discharge Howard, as well as George, and then he just disregarded the order because he did not think Howard had accumulated a sufficient number of warning notices; certainly, he did not do this without getting back to Danos and explaining why the order to discharge both employees was not being carried out. If Cortez had reconferred with Danos, and explained why Howard was not being discharged, he would have so testified; and, presumably, so would have Danos. Moreover, Cortez gave an extensive account of what he told Howard when he told her that she was to get a warning notice; Cortez did not testify that in that recitation he told Howard that the vice president had ordered her discharge but he was letting her off with a warning notice. If the vice president had told him to discharge Howard, Cortez assuredly would have told Howard so, if for no other reason than to impress upon Howard the seriousness of her offense. And, if Cortez had told Howard that Danos had ordered her discharge, he would have so testified. I further do not believe Pertuit's testimony that, after Danos spoke to Howard and George, he returned to his party and said nothing. If Danos was angry enough to order the discharge of either Howard or George, he would have said something. It is safe to infer, as I do, that Danos told his party that he was ordering to happen what, in fact, did happen, the warning of Howard and the discharge of George. In sum, I believe that Cortez did exactly as he was told; Danos told Cortez to issue a warning notice to Howard and to discharge George. George was the employee who was wearing the prounion insignia.[137]

If, after he had been told to discharge George, Cortez had reviewed George's file and seen that there were sufficient grounds to discharge her, he would simply have done it. Instead, he sent George back to work (as George testified), and then he called Nunez. (That is, contrary to Cortez' testimony, he did not simply make a quick call to Nunez while George was waiting outside the door of Barrios' office.) Cortez' testimony that he called Nunez because he did not know if he could discharge an employee when his own vice president was the witness was palpably incredible; of course, he could do what his vice president told him. (Additionally, Cortez had to be led to testify that Nunez told him, "Yes, it was within my rights to do so.") Obviously, Cortez knew that George could not be discharged under any legitimate standard, and he called Personnel Officer Nunez to express his concern; again, if he had not possessed strong reservations against discharging George, Cortez would have done so as soon as he tallied the warning notices that he had seen in George's file, and Cortez would not have bothered to bother Nunez about the matter.

[137] In these findings, of course, I draw the strongest adverse inference against Respondent for its failure to call Danos, its vice president, to testify.

As Cortez testified, it was in his telephone conference with Nunez that the "stance" was developed that the 16-month-old warning notice to George could be counted against her. This "stance," of course, was needed to defend the unfair labor practice allegations that would assuredly be filed because a known prounion employee was being discharged and a nonunion employee who had engaged in the identical conduct was not being discharged. The "stance," as Nunez developed it, was that "because of the number of citations and the number of times that this employee [George] has broke Company rules, and this being the third time that she has created a—broke a rule such as wasting time." Again, a "stance" would presumably not be needed if an employee was being discharged for legitimate reasons. Nevertheless, this "stance" must be examined.

As Cortez admits, George was discharged, at least in part, because her loafing of July 28 was the "third time." It was the "third time" only if her loafing of March 1992 was counted. Cortez testified that, in making discipline decisions, he considers warning notices over 12 months old, "[w]hen a citation is so close to the 12 months and the person was caught twice by the same assistant vice president or vice president." Specifically, he testified that George's 16-month-old warning notice for loafing was "important" because the July 28 incident constituted: "the second time that our vice president had caught this employee apparently not doing the work assigned." When asked on cross-examination, Cortez could cite no other instance of a warning notice's having any effect beyond 12 months; and Respondent, who offered proof of the existence of all other rules that it advanced in this proceeding, offered no other proof of a rule, or practice, that would extend the effective life of a warning notice beyond 12 months. No other supervisor in this long case testified that an employee could be penalized for an offense that was over 12 months old. Finally, Respondent's legal representatives are in the best position to articulate Respondent's disciplinary policies. As mentioned in the introductory section of this decision, in a letter to the Region dated October 15, 1993, counsel states: "ASI's policy [is] that three warning notices within a 12-month period results in termination." More specifically, in defending the charge filed on behalf of George, counsel states in a second letter, dated February 4, 1994, that:

> In conclusion, the decision to terminate Charging Party [George] was made by Mr. Cortez solely on the basis that Charging Party violated ASI's [Respondent's] policy by loafing, and because Charging Party had several other warnings in her file, including a final warning notice.[138] In accordance with ASI policy, if an employee receives three warning notices *within a twelve-month period*, the employee should be terminated. [Emphasis added.]

In these letters to the Regional Office, counsel suggests no rule, or reason, that a warning notice older than 12 months could be held against any employee. In fact, the letters are the clearest of expressions that Respondent would not do such a thing.

Each time he was asked about the reason for George's discharge, however, Cortez included reference to her March 1992

[138] Counsel's remarking about George's "final" warning notice is not part of the defense asserted at trial. George's "final" warning notices were for safety and absenteeism violations, and Cortez did not testify that their expressed finality had anything to do with the discharge. Also, as seen throughout this decision, many employees, including George, received multiple "final" warning notices without being discharged.

offense. For example, Cortez testified that, when discharging George, he told her that "she was being terminated for the fact that she was also caught once before by Mr. Danos and myself . . . . And I told her that she was being terminated at that time for excessive citations and wasting time." In arguing that Cortez made the decision to discharge George, and in quoting Cortez' testimony as a statement of the reason that he did so, Respondent's brief[139] excises from this quotation Cortez' phrase: "for the fact that she was also caught once before by Mr. Danos and myself . . . ." Of course, this phrase is critical; it reflects that Cortez considered the 16-month-old incident to be indispensable in the decision to discharge George. The evidence is clear, however, that Respondent considered warning notices over 12 months old to be "voided," as Ms. Cortez testified. Therefore, Respondent's reliance on the 16-month-old disciplinary offense of George is reliance on a pretext.[140] A statement of defense that indispensably relies on a pretext is not a statement of a defense under *Wright Line*.

After he had orders from Danos, and a putative theory of justification from Nunez, Cortez sent Barrios to tell George that she was discharged. Barrios then went and told George that she was discharged for the "seven" warning notices that she had in her file, as George further testified.[141] Finally, as George also testified, when she met Cortez in Barrios' office for the second time on July 28, Cortez told her that, "Whoever or whenever you go to make a claim with the Union or whoever, don't forget to tell them that I didn't fire you, the vice president did." Again, Cortez would not have made this statement to George if he had not known that she was being discharged pursuant to a standard that had not existed before. That is, Cortez knew the truth; George was being discharged on a pretextual basis.

Appendices B and C further demonstrate that during the 1990–1994 period, some 91 other employees received six or more warning notices within 12-month periods without being discharged. This factor also compels the conclusion that George was treated disparately in regard to the total number of warning notices that she received within 12 months. Also, disparate treatment of George is shown by the nondischarges of other CDC employees who received three or more warning notices for disciplinary violations of the same types within 12-month periods; these employees were: (1) Burton, who received three warning notices for wasting time, just as George was wasting time,[142] (2) Howard, who received three warning notices for the offense of absenteeism, and (3) Davis, who received six warning notices, five of which were for the identical offense of absenteeism.

[139] Br. p. "CDC-CS-94."

[140] At one point in his testimony, Cortez compared his counting the 16-month-old warning notice against George to the situation where a warranty benefit is extended in favor of a customer if an appliance breaks just after its warranty expires. This is a false analogy. For George, Cortez was not extending a period of grace; he was extending a period of liability.

[141] Strictly speaking, it was George's seventh offense, not seventh warning notice, that Respondent was using as a basis for the discharge. Of course, one of those offenses had happened 16 months before.

[142] Cortez testified that he did not discharge Burton for his third warning notice for the same offense because there might have been a "problem" between Burton and his supervisor. Such could be said about virtually any disciplinary situation. The testimony was an admission that, if any three-of-a-kind rule actually existed, its enforcement was inconsistent.

In view of all of this evidence of pretext and disparate treatment, I find that Respondent has not come forward with evidence that George would have been discharged even absent her union activities, and I conclude that George was discharged in violation of Section 8(a)(3).

I am further constrained to point out that, on brief, Respondent does not state a *Wright Line* defense in its argument that:

> As noted above, Mr. Cortez' rule was that an employee would be "blue-lined" for a particular offense on the second offense of the same kind, and thus in consideration for termination on the next offense of that kind; an employee would be blue-lined regardless of the nature of the offense on the fourth or fifth offense in 12 months, and thereupon in consideration for termination for the next offense regardless of the nature of that offense.[143]

Assuming that Cortez had so testified (which he did not), absent from this argument is any assertion that Cortez had a rule that uniformly requires, or even usually requires, the discharge of an employee when he commits his third similar offense within a 12-month period (or in even greater than a 12-month period). And, again assuming that Cortez had testified consistently with the above-quoted lawyer's argument on brief, there is no representation that Cortez uniformly requires, or even usually requires, the discharge of an employee when he commits his sixth offense of any kind within 12 months. That is, Respondent's argument on brief is a statement of how employees could be discharged, but it is not a statement of a *Wright Line* defense that employees similarly situated to George would be discharged even absent their prounion sympathies. See *Structural Composite Industries*, supra. Moreover, at most Cortez testified that, if an employee commits another offense after being blue-lined, "we have go to look at this folder closely before we write them up any more." Cortez did not testify that employees are always, or even usually, discharged when they commit one more offense after being blue-lined.

i. Dwight Ballard

Alleged discriminatee Dwight Ballard (vols. 14, 55, 56) was a fourth-class mechanic who worked in the sheet metal department until he was discharged on April 2, 1993. Pursuant to unfair labor practice charges and a settlement agreement of those charges,[144] Ballard was reinstated on January 31, 1994. On June 30, 1994, Ballard was again discharged. Lennie Valentine (vols. 19, 20, 53, 54) is a fourth-class mechanic who, continuing through time of trial, also worked in the sheet metal department. Valentine was discharged along with Ballard on April 2, 1993, and he was reinstated along with Ballard, pursuant to the same settlement agreement, on January 31, 1994. Valentine was discharged again by Respondent on August 2, 1994, but he was immediately reinstated. Ballard's and Valentine's 1993 discharges are not the subjects of the complaints before the Board; Ballard's and Valentine's 1994 discharges are. Also before the Board are allegations that, before their 1994 discharges, Respondent took several other unlawful actions against Ballard and Valentine.

(Editing note: All of the alleged 1994 discrimination against Ballard is discussed here in Ballard's case. Valentine's 1994 discharge, and most of the other alleged 1994 discrimination

[143] R. Br. p. "CDC-CS-80."

[144] The Tr., vol. 14, p. 2,495, L. 14, is corrected to change "attorney" to "activity."

against him, will be discussed below in his case; however, two aspects of the alleged 1994 discrimination against Valentine will be discussed here in Ballard's case: On February 2, 1994, Respondent allegedly harassed and admittedly suspended both Ballard and Valentine. The admitted suspensions were ordered by the same supervisor; because of this, and other reasons that will become apparent, I shall discuss the harassment-suspension element of Valentine's case here in Ballard's case.)

Respondent's actions against Ballard are the subject of eight 8(a)(3) allegations of the complaints: (1) the second complaint, at paragraphs 138, alleges that Ballard was harassed on February 2, 1994,[145] by being required to submit to a tool-check (an examination to see if an employee owns and possesses certain hand tools); (2) the second complaint, at paragraph 137, alleges that Ballard was suspended on February 2 when, after the tool-check, he was found not to possess certain tools;[146] (3) the second complaint, at paragraph 147, alleges that Ballard was issued a warning notice on April 26; (4–5) the fourth complaint, at paragraphs 30 and 36, alleges that Ballard was issued warning notices on May 18 and June 6, respectively; (6–7) the fourth complaint, at paragraph 40, alleges that Ballard was issued two warning notices on June 28;[147] and (8) the fourth complaint, at paragraph 41, alleges that Ballard was unlawfully discharged on June 30. The General Counsel contends that these eight actions against Ballard were taken because of his being reinstated pursuant to the settlement of the 1993 unfair labor practice charges and his known union activities and expressions of sympathy that occurred after he was reinstated on January 31; those activities include Ballard's wearing of prounion insignia and his posting of union handbills on two of Respondent's bulletin boards. The complaints further allege that Ballard was threatened and "denigrated" because of his union activities in violation of Section 8(a)(1). Finally, the complaints further allege that, in 1993, in violation of Section 8(a)(1), supervisors told other employees that Ballard and Valentine would not be reinstated from their 1993 discharges because of their union activities and sympathies.

Respondent denies that the reinstatement remarks to other employees, the threat, or the "denigration" remark occurred. Respondent further answers that: (1) On February 2, Ballard's and Valentine's tools were checked just as any other employee's tools would have been checked, and they were not harassed; (2) Ballard and Valentine were suspended solely because they did not possess all required personally owned tools at the time of the tool-checks; (3) Ballard's warning notice of April 26 was issued solely because Ballard, in violation of an established work rule, posted items on company bulletin boards without permission; (4) Ballard's May 18 warning notice was issued solely because Ballard had been loafing; (5) Ballard's June 6 warning notice was issued solely because Ballard was in a production area without wearing his safety glasses in contravention to an established employee work rule; (6) Ballard's first June 28 warning notice was issued solely because, during working time, Ballard went outside Respondent's gate without permission, something that Ballard had done before;[148] (7) Ballard's second June 28 warning notice was issued solely because, when supervisors approached Ballard with the June 28 warning notice for gate-exiting (as I shall call it), they found him again in a production area not wearing his safety glasses; and (8) Ballard was discharged solely because he had been chronically violating Respondent's work rules.

The General Counsel replies that: (1) Ballard's and Valentine's tool checks were conducted pretextually because Respondent's supervisors were responsible for Ballard's and Valentine's not having their tools when they were reinstated from their 1993 discharges; (2) Ballard's and Valentine's suspensions were imposed disparately because, although there were published requirements for tool-possession, other employees who were found without required tools were not suspended immediately for noncompliance; also, Ballard's and Valentine's supervisors gave them a week to obtain the required tools, but then, punitively, the supervisors required them to have the tools immediately; (3) Ballard's April 26 warning notice was issued disparately because other employees placed notices on the bulletin boards without management's approval, but those employees were not disciplined; (4) the defense for Ballard's May 18 warning notice is pretextual because Ballard was not loafing on that date; alternatively, the General Counsel contends that Ballard was treated disparately because other employees, when found loafing,
were no more than told to get to work, if that much; (5) the
defense for Ballard's June 6 warning notice is pretextual because Ballard had only removed his safety glasses momentarily to wipe perspiration from his face; alternatively, the General Counsel contends that Ballard was treated disparately because other employees, when found without safety glasses, were no more than told to put them on, if that much; (6) the defense for Ballard's first June 28 warning notice is pretextual because Ballard did not exit the gate without permission on that date; (7) the defense for Ballard's second June 28 warning notice is pretextual because, again, Ballard had removed his safety glasses only to wipe perspiration from his face; alternatively, again, the General Counsel contends that Ballard was treated disparately because other employees, when found without safety glasses, were no more than told to put them on; (8) Ballard's discharge was discriminatory because it was premised, at least in part, on violative warning notices.

Ultimately, I find and conclude that Ballard and Valentine were not harassed by the tool-checks, but they were unlawfully suspended for failure to have the tools. I further conclude that Ballard's June 28 warning notice for exiting the yard without permission during working time was valid, but Respondent violated Section 8(a)(3) by the issuances of the remainder of the warning notices in issue. I further conclude that, because Respondent partially premised Ballard's discharge on the basis of warning notices that it had issued in violation of Section 8(a)(3), that discharge was also a violation of Section 8(a)(3). I further conclude that a 1-day suspension of Ballard that immediately preceded the discharge was also violative of Section

[145] All dates mentioned in Ballard's case are in 1994, unless otherwise indicated.

[146] The identical suspension allegation for Valentine is contained in paragraph 136 of the second complaint. There is no separate allegation of harassment-by-tool-check for Valentine, but there were no objections to the presentation of evidence on the issue, and the matter was fully litigated.

[147] Par. 40 is cast in the singular, but Ballard was issued two warnings on June 28, and the lawfulness of both was litigated without objection.

[148] As I find here, Ballard also left the yard without permission on March 31, and he then received a warning notice that is not alleged to be violative.

8(a)(3), even though that suspension is not separately alleged as a violation in the complaint.

1993 Allegations Pertaining to Ballard's and Valentine's 1994 Cases

First 1993 allegation specific to Ballard and Valentine. Alleged discriminatee, and former welding department employee, Keith Collins (vol. 5) testified that on May 17, 1993, while he was on loan to the pipe department, he went to the office of Sheet Metal Department Foreman Jesse Caston; there, according to Collins:

> Well, after work, I went to his [Caston's] office, and he was sitting in his office. And I would say, "Jessie, I heard Lennie Valentine and Dwight Ballard was terminated. What is the story on those two?"—because I know those two had worked under his supervision.
>
> And he say, "They was working in their work place, and they had this Navy supervision working on the unit, too, and they was talking about the Union, and they made him [the Navy supervisor] nervous. And he [the Navy supervisor] left off the job site and went told someone what they [Ballard and Valentine] was talking about."

Based on this testimony by Collins, paragraph 16 of the first complaint alleges that Respondent, by Caston, "threatened its employees with discharge by telling them that other employees had been terminated by the Respondent because they aided or supported the Union."

Additionally, current employee Eric Evans, a shipfitter, testified (Vol 59) that on April 21, 1993, he saw Foreman Jesse Caston in a working area and:

> Caston was heading toward me, I was—I stopped him and spoke to him. And then I asked him what happened to Lennie Valentine; I hadn't seen him in awhile. . . .
>
> He said, "Nothing happened to Lennie Valentine, but I had to fire him because he was for the Union and against Avondale."

There is no separate allegation of the complaint based on this testimony by Evans.

Caston (vol. 106) testified that he did supervise Ballard and Valentine in 1993 and, after they were discharged, two or three employees did ask him about their discharges. Caston testified that in each case he told the inquiring employees that Ballard and Valentine had been discharged because they had intimidated Navy personnel with racial slurs. Caston denied telling any employee that Ballard and Valentine had been discharged because they talked about the Union in the presence of Navy personnel.

If Collins had wanted to lie and help his own case, he more likely would have selected a supervisor in a line of authority above him to attribute Caston's alleged statement about Ballard and Valentine. When Collins attributed the threat to Caston, however, he attributed to a supervisor in another department, and a low-level supervisor at that. I found Collins credible in his testimony on the point. I further found to be credible the testimony of current employee Evans, and this factor fortifies my conclusion that Caston made the comment to alleged discriminatee Collins. I conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Caston, on or about May 17, 1993, threatened its employees by telling them that other employees had been discharged because of their union activities.

Second 1993 allegation specific to Ballard and Valentine. Current employee Junius Duplantis (vol. 29) testified that about 2 weeks after the June 25, 1993 Board election, Foreman Joe DeNicola conducted a safety meeting for his sheet metal department crew. According to Duplantis:

> All I can recall was after the meeting was over someone had asked Joe DeNicola if Lennie [Valentine] and Dwight [Ballard] had a chance of getting their jobs back.
>
> And Joe told us, "No, those guys don't stand a chance of getting their jobs back. The Union is not going to come into this yard and tell Avondale what to do; [Company president] Bossier runs this yard."

Based on this testimony by Duplantis, paragraph 61 of the second complaint alleges that Respondent, by DeNicola: "(a) created the impression among its employees that their union activities were under surveillance by the Respondent; (b) told its employees that two union supporters had no chance to be reinstated; and (c) . . . informed its employees that it would be futile for them to select the Union as their bargaining representative . . . by telling employees that the Union was not going to come into the yard and tell Respondent what to do."

DeNicola (vol. 119) denied making any such statements to Duplantis or any other employees. As he did when denying other remarks attributed to him, DeNicola cited his instructions from the TIPS card as a reason why he would not have made the remarks. As noted in the discussions of the allegations of paragraphs 43, 55, and 65 of the second complaint, DeNicola testified that he learned from the TIPS instructions that he should not intimidate *himself*. Again, I found Duplantis more credible than DeNicola, and I do credit Duplantis' testimony on this issue.

Nothing in this credited testimony of Duplantis would lead a reasonable employee to conclude that Respondent found out about the prounion sympathies of Ballard and Valentine by means of surveillance or other unlawful means, and I shall recommend dismissal of paragraph 61(a). Telling employees that union adherents had no chance for reinstatement, and assigning as a reason only the idea that the Union was not going to tell Respondent what to do, however, is a statement that the employees would not be reinstated because of their prounion sympathies, and the statement is violative of Section 8(a)(1). Finally, telling employees, without qualification, that the Union will never be their collective-bargaining representative is an unlawful expression of futility of the employees' efforts to secure collective bargaining, as alleged in paragraphs (b) and (c). I therefore find and conclude that Respondent, in violation of Section 8(a)(1), by DeNicola, in mid-July 1993, told employees that other employees would not be reinstated because they were prounion, and DeNicola told employees that it would be futile for them to select the Union as their collective-bargaining representative.

The Prima Facie Cases of Unlawful Discrimination Against Ballard and Valentine

It is undisputed that, from the time that they were reinstated in 1994 until the times of their discharges, both Ballard and Valentine wore union T-shirts, and they maintained several prounion stickers on their hardhats. Given this element of undisputed employer knowledge of Ballard's and Valentine's prounion sympathies, and the general animus against all employees who shared those sympathies as found in this decision,

and given the specific animus against Ballard's prounion sympathies as revealed by DeNicola's threat to Duplantis and other employees, and given Caston's threat to Collins, regarding both Ballard and Valentine, I find and conclude that the General Counsel has presented prima facie cases of unlawfulness in Respondent's subsequently described 1994 acts against Ballard and Valentine that are alleged herein to be violative of the Act. (Further findings of specific animus against the prounion sympathies of Ballard and Valentine will be discussed below.)

(1) Harassment and suspensions of Ballard and Valentine

Sheet metal mechanics are required to own and possess certain numbers and types of hand-tools, called "personal tools." Respondent issues "tool lists" that specify which tools are required. Gang boxes are large (about 60 cubic feet), heavy, metal boxes that are owned by Respondent and found throughout the yard. Once the gang boxes served other purposes, but during 1993 and 1994 Respondent permitted the employees who were required to own tools to use the gang boxes as outer-boxes in which they could lock their personally owned toolboxes which, in turn, held their personal tools. Although the term "gang" would seemingly imply use by several employees, many times only one employee stored his tools in one gang box. As the employees changed work stations, Respondent would permit the use of power equipment to move their gang boxes to newly assigned areas.

On Monday, January 31, 1994, their first day of reinstatement from their 1993 discharges, Ballard and Valentine went through personnel office procedures; they did no production work. On February 1, Ballard and Valentine reported to the office of Sheet Metal Department General Foreman Arthur Schloegel. Schloegel assigned Valentine to work under Foreman Alan Kitzman, and he assigned Ballard to work under Foreman Nathan Dubois. When they appeared for work on February 1, Ballard and Valentine carried no personal tools. Both testified that they had left their tools in gang boxes that had been assigned to them when they were discharged in 1993. They did not take the tools with them when they were discharged in 1993, they testified, because security guards prevented them from collecting the tools at the time. Ballard and Valentine each testified that he expected his tools to be there when he was reinstated. The tools are quite valuable; if the guards had prevented Ballard and Valentine from securing their tools when they were discharged, Ballard and Valentine assuredly would have contacted management about the matter (by telephone if nothing else). Moreover, if Respondent had appropriated their tools in such fashion, Ballard and Valentine assuredly would have told the Regional Office about it, and replacement of the tools by Respondent would have been an issue that would have been resolved in compliance before the settlement agreement, which required reinstatement, was approved by the Regional Director; either that would be the case or the settlement agreement would have been set aside and the issue of full reinstatement from the 1993 discharges would have been litigated before me. That is, there is no reasonable basis for the testimony that the employees believed that their personal tools would be waiting for them in 1994, and I do not believe it.

In support of a theory that at least Valentine reasonably expected his tools to be there when he was reinstated, the General Counsel called current employee Berthard Lotten (vol. 35) who testified that, immediately after Valentine's 1993 discharge, Foreman Caston cut the lock on the gang box that Valentine had been using. Lotten did not testify that he saw Caston take the tools. Although I credit Lotten, the gang box was, nevertheless, Respondent's property; Valentine necessarily knew that the lock was going to be cut at some time after his 1993 discharge (so that other employees could use the gang box), and Valentine had no reasonable expectation that the tools would be there when he returned to work if he had not collected them, for whatever reason, when he was first discharged.

Harassment and Suspensions of Ballard and Valentine—Valentine's Testimony

Valentine (vols. 19, 20) testified that on February 1:

> When I reported to Mr. Kitzman he asked me did I have any tools, and I told him I didn't have no tools with me.
>
> And he said, well, I would have to have them by the 7th, that Monday, of February, and I told him okay.

Valentine was assigned to do glueing work with mechanic Raymond (T-Ray) Matherne; Matherne did not testify. Valentine testified that the glueing work required the use only of Respondent's tools; he did not need any personal tools for the job.

On February 2, Valentine and Matherne continued the glueing work. After lunch, Valentine was paged to Kitzman's office. According to Valentine:

> Al Kitzman asked me did I have my tools and I replied to him that: "You told me that I didn't need my tools until Monday."
>
> He said, "Well, I was told to send you home if you didn't have your tools."
>
> I said, "But you told me I didn't need my tools until Monday." And I asked him, "Well, who is sending me home?"
>
> And he said, "Well, I am not going to tell you who is sending you home, but I am told to send you home if you don't have your tools."
>
> He gave me a tool list and I went home to go to the store to buy the tools that was on the list that I didn't have.

On February 3, Valentine reported back to work. At 7 a.m., Kitzman checked Valentine's personal tools against the tool list, and he sent Valentine back to work with Matherne. Valentine testified that, from the date of his suspension through the date that he testified, he did not use the personal tools that he bought during his suspension.

Valentine testified that he had undergone only one other tool check during his 10-year employment with Respondent; that was in 1992 when Caston checked the tools of Valentine and four other employees (Ivory Johnson, Maurice Williams, Earl Bennett, and Donald Lyons). All five of the employees had some of the tools missing. None was sent home by Caston. Caston told each employee that he had 30 days to come up with the missing tools. Caston never did recheck to see if he had purchased his missing tools, Valentine testified.

Harassment and Suspensions of Ballard and Valentine—Ballard's Testimony

According to Ballard, on February 1, when he reported to Dubois:

> [Dubois] asked me did I have all of my tools. And I told him, "No, I do not have all of them."

> He said, "Well, I am going to give you until the following Monday [February 7] to have all your tools."
>
> And I said, "Okay." And he assigned me to a job site.

Ballard testified that for the rest of the day he was assigned to do taping work, work that did not require any of the tools on the tool list for sheet metal mechanics.

According to Ballard, on February 2:

> Approximately about 12:45, Mr. Dubois came up to me, and he told me that [Sheet Metal Department Superintendent] Mr. Allen Poleto had . . . asked him concerning my tools, did I have all of my tools.
>
> And he [Dubois] told him [Poleto] no, that he had told me that on the following Monday, I could bring them all in. And Mr. Poleto said for him [Dubois] to send me home and not for me to return to work until I bring all my tools in.

Ballard signed out; as he did so, Dubois gave him a copy of the tool list for sheet metal mechanics. That day Ballard purchased all of the tools that he did not have. Ballard testified that he returned to work on February 3 with the tools. Dubois checked Ballard's tools at 7:30, and, upon being satisfied, Dubois gave Ballard the day's MCR and allowed him to write in his time ("sign in"). Dubois sent Ballard back to doing taping work; again, this was work that did not require use of any of the tools on the tool list. Ballard further testified that he did not use any of the tools on the tool list until late April.

The periods of the suspensions alleged for Valentine and Ballard are for those of the afternoon of February 2 and, additionally in Ballard's case, for one-half hour during the morning of February 3, when Dubois conducted the tool-check and allowed Ballard to sign in.

Harassment and Suspensions of Ballard and Valentine—Respondent's Evidence

Sheet Metal Department Superintendent Poleto (vol. 105) testified that upon progressing from the rating of a helper to that of fourth-class mechanic, employees are presented with a list of tools that they must buy and possess at all times when working. When one employee borrows tools from another, it slows down work because of the time that is consumed in the process. Foremen notice when workers are borrowing tools, and they then conduct tool-checks of all mechanics to see who is in compliance with the requirement that all tools on the list be owned, as well as possessed. When asked what the foreman should do if an employee does not have all the tools, Poleto testified: "Well, if it was just a minimal amount, he would give him to the following payday to retrieve them. But if it was numerous where it affected his productivity, they could be sent home." ("Sending home" was a shop term used by the witnesses to indicate suspensions.) General Foreman Arthur Schloegel (who was absent the first week in February and who was not involved in the suspensions of Ballard and Valentine) and Foremen Dubois and Kitzman testified consistently with Poleto on this point.

Poleto further testified that on February 2, he called Dubois and Kitzman "to find out how the guys were doing." Kitzman and Dubois reported that Valentine and Ballard had appeared without any tools, and the foremen were using them as helpers. Poleto testified that he replied to each foreman (separately):

> I said that we didn't hire him back as a helper. He is a fourth-class mechanic and if he didn't have any of his tools, send him home until he comes back with his tools, because he was a fourth-class mechanic prior to leaving . . . and not let him come back to work until he had his tools.

On cross-examination Poleto testified that he could not recall whether Kitzman and Dubois had told him that they had given Valentine and Ballard, respectively, until the following Monday to obtain their tools. Further on cross-examination Poleto expressed confusion on whether he called Kitzman and Dubois or they called him. He further contradicted himself about whether he first asked Kitzman and Dubois if Valentine and Ballard had their tools or the foremen volunteered the information that they did not. Finally, on redirect examination, after a counsel-requested break, Poleto testified that he did not first ask either Dubois or Kitzman whether Ballard or Valentine had their tools.

Kitzman (vols. 107, 115) testified that when Valentine reported to him without any tools on February 1, he told Valentine to have "a majority" of his tools the next day and all of them by the following Monday, February 7. Kitzman testified that he put Valentine to work as a helper to Matherne[149] because Valentine did not have his tools, or even a majority of them. The work that Valentine and Matherne were doing was "screening," which Kitzman called "very difficult, tedious" work. Kitzman acknowledged, however, that the only personal tool that was needed to do the screening was a 12-foot measuring tape; Respondent furnished the other tools that were used in the process. Kitzman testified that when Valentine again appeared on February 2 with no tools, he again told Valentine that he must have a majority of his tools on the next day and all of them by February 7. Again, Kitzman placed Valentine with Matherne, again as a helper, and again on the screening jobs. Kitzman testified that after lunch on February 2, Poleto called and:

> [H]e asked how Lennie was doing, if I was having any problems with him. And I told him, no, I really wasn't having any problems with him, except I was using him as a helper. And when he asked me why, I told him, "Well, he didn't bring any tools with him, so I am using him in a helper's capacity." . . . I had told him [Poleto] that I told him [Valentine] the day previously to get a majority of his tools. . . .
>
> He [Poleto] told me to give him [Valentine] a copy of the tool list and send him home.

(Kitzman specifically denied that Poleto asked about Valentine's having, or not having, tools first.) On cross-examination, Kitzman added that, when he was talking to Poleto on February 2, he told Poleto that he had told Valentine "to bring the majority of the tools the following day to work, and all of his tools by that following Monday."

Further according to Kitzman, after the telephone call with Poleto, he immediately went to where Valentine was working, gave Valentine a tool list, and told him that Poleto had ordered that Valentine be sent home. Valentine protested that Kitzman had previously told him that he had until February 7 to have all of his tools; Kitzman replied that he had also told Valentine to have a majority of his tools the next time he reported to work; the "next time" had been that morning, but Valentine had (again) come to work without any personal tools. Valentine then left. Kitzman acknowledged that, from the time that Val-

[149] In Vol. 107 of the transcript, Ray (T-Ray) Matherne is referred to as "T. Ray."

entine returned to work on February 3, he has continued to do screening work. Kitzman testified that Valentine quickly showed that he could do the screening work better than Matherne, and, since Valentine returned from suspension, he has assigned all such work to Valentine. Finally, Kitzman testified on direct examination that all sheet metal department mechanics are required to have all personal tools all of the time because assignments could change from day-to-day.

Friday, February 4, was a payday. On cross-examination, Kitzman acknowledged that he gives employees who are missing tools until after an intervening payday to appear with a complete set of personal tools, but he insisted that he does so only when an employee has only a few tools missing; Kitzman testified that he would not allow an employee an intervening payday if he were missing all of his tools, as was Valentine. Kitzman testified, however, that never before had an employee presented himself for work with no tools at all. And Kitzman further admitted that, until Poleto told him to do it, he had not considered suspending Valentine for not having his tools (or a majority of them) on February 1 or 2.

Whether Kitzman told Valentine on February 1 to have "a majority" of his tools by February 2 is a matter in dispute. Further on cross-examination Kitzman was asked if he required the employees to possess one more than half the tools on the tool list. Kitzman testified:

> THE WITNESS: I wouldn't say one more than half. It would depend on the job that the mechanic was doing. If the mechanic was installing spiral duct, and he had tools sufficient enough to do that job [but not the] other tools that are on the tool list that aren't required to do that job, I wouldn't send him home for that reason because he didn't have those tools, but I would tell him that he would have to have all his tools together by that following Monday. It depended on the—it depends on the situation: what type of duct he is installing.

Kitzman acknowledged, however, that, had Valentine been missing only the 12-foot measuring tape, he would not have suspended him.

Kitzman was further asked and he testified:

> Q. [By Mr. Morgan]: What is the difference between the work he [Valentine] was doing on February 1 and 2nd and the work he was doing on February 3?
>
> A. On February 1 and 2nd, he was working in a helper's capacity. He was helping another mechanic install the screen. And, like I said, Lennie—the first couple of days he showed that he was going to be good at this job, and I let Lennie do it by himself on the third day.
>
> And so instead of helping him—another mechanic—assisted him, holding the screen, tacking it here and tacking it there—Lennie was doing it by himself.
>
> Q. [By Mr. Morgan]: The change that you described from February 2 to February 3 had nothing to do with tools, did it, Mr. Kitzman?
>
> A. It had nothing to do with tools.

On direct examination, Dubois (vol. 116) testified that, if sheet metal mechanics are found without any tools, they are given until the next day to purchase them. Dubois testified that when Ballard reported to him on February 1 without any tools, Ballard told him that he had some tools in his automobile but they were covered with grease and could not be used. Dubois told Ballard to bring in the next day whatever tools he had and that he had a week to get all of his tools; he gave Ballard a tool list. Dubois put Ballard on a unit with another mechanic who provided tools that Ballard would use in addition to those that Respondent provided. Ballard left work that day at noon (with permission). On February 2, Ballard reappeared without any tools; Dubois asked Ballard where the tools were that he had said were in his automobile; Ballard replied that he actually had not had any tools in his trunk; Dubois put Ballard back to doing the same work that he had been doing the day before, assisting another mechanic from whom Ballard borrowed the tools that Respondent did not furnish. After lunch that day, Dubois testified, he "heard" that Kitzman had sent Valentine home, "so I called my superintendent, which is Allen Poleto, and I told him that Ballard never had any tools neither." At that, Dubois testified, Poleto told him to send Ballard home. Dubois went to Ballard and told Ballard that "my boss" had said to send him home because he had no personal tools. Without saying anything, Dubois testified, Ballard left the unit and punched out. On February 3, Ballard returned to work with a new toolbox and a new set of tools. (Dubois asked Ballard why he had new tools, and Ballard told him that the Union had bought them for him.) On that day, and thereafter, Dubois assigned Ballard to work that required several of the personal tools on the tool list, and Dubois described that work in detail. Dubois denied that Ballard continued to do the same work that he had done on the first two days. On cross-examination, Dubois flatly denied that Poleto called him and asked how Ballard was doing.

Harassment and Suspensions of Ballard and Valentine—Conclusions

It is clear that Respondent requires its sheet metal department mechanics to have a complement of personally owned tools. There is therefore no element of "harassment" involved in Dubois' and Kitzman's asking Ballard and Valentine, respectively, where their tools were. I shall therefore recommend dismissal of the allegations of the complaint that, by the tool-checks, Ballard and Valentine were harassed. The actions that Respondent's supervisors took after the lawful tool-checks, however, raise different considerations.

It is undisputed that Dubois and Kitzman initially gave Ballard and Valentine, respectively, until February 7 to secure all of the personal tools on the department's tool list for sheet metal mechanics. This factor, alone, belies certain testimony by the supervisors that all sheet metal department mechanics must have all tools at all times. At least it shows the formalistic, rather than substantive, nature of the requirement that the sheet metal mechanics own and possess all personal tools at all times. The formalistic, rather than substantive, nature of Poleto's demand that Valentine secure all tools before doing any other work is further demonstrated by the fact that the change in Valentine's work after February 2, in Kitzman's words, "had nothing to do with tools."

Kitzman also added that on February 1 he gave Valentine only until the next day to come up with a "majority" of the tools on the list. This portion of Kitzman's testimony was incredible. If there had been any truth in it, Kitzman would not have put Valentine to work on February 2, when, again, Valentine showed up without tools. Kitzman further retreated from his testimony by stating that by "majority" he meant only the most important tools. Then Kitzman reversed himself on that by acknowledging that, had Valentine been missing only the

12-foot measuring tape on February 2, the only personal tool that he used on the screening job, he nevertheless would not have sent Valentine home. Finally on this point, on February 1, Dubois placed no "majority" requirement on Ballard; he told Ballard just to bring what tools that he had. (Then, when Ballard turned up with nothing on February 2, he was still put to work.) I discredit Kitzman's testimony that on February 1 he told Valentine to come back to work the next day with a "majority" of his tools.

Poleto testified that on February 2 he called Kitzman to see how Valentine "was doing," and he called Dubois to see how Ballard "was doing." Of course, Poleto and Dubois squarely conflict on whether Poleto called them and asked how Ballard "was doing," and Poleto vacillated on whether he called the foremen or they called him. The resolution of these conflicts lies in Kitzman's testimony: Kitzman credibly testified that Poleto did call him and asked how Valentine was doing; Kitzman told Poleto that it was not causing any "problems," but Valentine did not have his tools. Poleto, even though he was told that it was not causing problems, told Kitzman to suspend Valentine until he secured all of his personal tools. When he hung up the telephone after talking to Kitzman about Valentine, Poleto, obviously sensing that Ballard might be vulnerable to the same putative cause for adverse action, called Dubois to find out if Ballard had all of his tools. These are my findings; I discredit all testimony to the contrary.

It was not by coincidence that the two foremen, Dubois and Kitzman, gave Ballard and Valentine the same period of time to remedy the same problem; to secure their personal tools, the supervisors gave the employees until Monday, February 7, which was the Monday following the next (Friday) payday. Such consistency of treatment is reflective of an established practice, the testimony of the supervisors to the contrary not withstanding. That practice was to allow employees at least one intervening payday to come up with missing tools, whether it was few or many tools that the employee did not have. (This point is amply demonstrated in the case of alleged discriminatee Ronald Johnson, infra, who was given many chances to come up with many missing tools.) The forbearance afforded would, of course, cause some diminution in productivity, but it was something that Respondent's supervisors had theretofore allowed, and which they had initially afforded to Valentine and Ballard. The forbearance afforded by Kitzman had not caused any "problem" in Valentine's case; in fact, it showed Kitzman a better way to get the "very difficult, tedious" screening done. That is, in Valentine's case, the missing tools were not, to use Poleto's words, "numerous where it affected his productivity." (And when Kitzman told Poleto that he had given Valentine a week to come up with all of the tools, Poleto did not tell Kitzman that he should not have done so.) Dubois credibly testified that he would have had Ballard doing other things if Ballard had had his tools, but it was still something that he could live with, at least until after the next payday.

Kitzman admitted that he knew that Valentine had gotten reinstated through an NLRB settlement agreement; although he denied it, Poleto, Kitzman's superintendent, assuredly knew the same. The above-quoted testimonies of Duplantis and Collins demonstrate animus that would engender resentment against Respondent's employees who had been reinstated after filing unfair labor practice charges. I find that resentment against the settlement agreement was the proximate reason that Poleto disregarded past practices, overruled his foremen, and ordered the immediate suspensions of Ballard and Valentine. That is, Respondent has not demonstrated that, absent their protected activities, Ballard and Valentine would have been suspended on February 2. I therefore conclude that by those suspensions Respondent violated Section 8(a)(3) of the Act.

(2) Ballard's first warning notice for exiting gate without permission (not alleged)

(As noted above, on March 31 Ballard was issued a warning notice for exiting a gate during working time without permission. This warning notice is not alleged as a violation, but it is an important part of the defense because part of the reason for Ballard's discharge was that he committed the same offense on June 28; therefore, some credibility resolutions about the event of March 31 are necessary.)

In March, Ballard was assigned to the crew of Sheet Metal Department Foreman Archie Frickey. On March 31 Frickey was absent, and Caston supervised Frickey's crew as well as his own. On April 2, Frickey returned to work and issued to Ballard a warning notice dated March 31. The notice had been signed by Caston who had entered as the date and time of offense, "Thursday, 3/31/94 at 2:20 p.m." Caston had checked General Offense-4, and stated as the reason for the warning: "Leaving the working place without permission. Employee was observed coming from Personnel at 2:20 p.m. by his foreman." It is undisputed that for an employee to leave the yard during working time he should have the permission of his supervisor expressed in the form of a pass for that purpose, a "blue pass" as the witnesses called it.

The details of the March 31 incident will not be fully developed here. It suffices to say that, over denials by Ballard, I credit Respondent's witnesses, and I find as follows: During the day, while he was in Caston's office, Ballard called the human resources department office about some insurance forms that he needed. Caston was present during this telephone call, and he heard Ballard's side of the conversation. At 2:05 p.m., at a time that Ballard should have been working, and without the permission of Caston or any other supervisor, Ballard exited the yard through gate 22, passing plant guard Patricia Winfield (vol. 151) and ignoring her requests that he show her a blue pass or tell her his badge number. (Winfield, however, could identify Ballard through a previous encounter.) Winfield saw Ballard walk toward the human resources department office, which is just outside gate 22. Ballard returned through the gate at 2:25, again ignoring Winfield's request for a blue pass and his badge number. Before he could reach his work area, Ballard was confronted by Caston. Ballard offered an explanation for his conduct, but Caston rejected the explanation as false (as do I). Caston told Ballard to go back to work, and Caston contacted General Foreman Schloegel. Schloegel and Caston conferred with Winfield and found that Ballard had gone out through the gate and walked toward the human resources department at the times indicated above. Caston then completed and signed the above-quoted warning notice and left for vacation. As Ballard's pretrial affidavit admits, while Caston was still on vacation Frickey presented the above-quoted warning notice to Ballard. As the affidavit further admits, Ballard read the warning notice when it was presented to him by Frickey. (I point out this last fact because Ballard falsely testified that he had not read the warning notice. By this lie, Ballard was apparently hoping to premise an argument that, before he was issued a warning notice for exiting the gate on June 28, he had never been warned

against such conduct. As will be seen, Ballard was consistently incredible when testifying about his own conduct.)

(3) Ballard's warning notice for unauthorized postings on bulletin boards

In mid-April Ballard was assigned to Caston's crew. On April 26, the Union distributed handbills that encouraged adoption of certain resolutions for changes to Respondent's ESOP plan to be voted on at the aforementioned May 6 shareholders' meeting. Respondent issued literature in opposition to those resolutions. Ballard testified that as he arrived at Respondent's gate on the morning of April 26, he received several of the union handbills. Ballard testified that he then went to Caston's office to sign in; after doing so, he took some tape from Caston's desk and taped one of the handbills on the wall outside Caston's office in a space where other notices are sometimes posted (the bulletin board). Ballard testified that at the time that he posted the handbill, there were on the bulletin board "other leaflets with garage sales, boat sales, house sales, go-cart sales and suppers—benefits suppers." Ballard testified that he also posted a copy of the handbill on another bulletin board in the area; that bulletin Board, Ballard acknowledged, previously had nothing on it.

Later in the day, Ballard was called to the office of Samuel Capaci, Respondent's assistant director of security. Capaci presented Ballard with the following warning notice:

> Employee is being warned on General offense #11 on page # 14 in Employee's Guide Book: "Posting or removing of any material on bulletin boards located on Company property or on any structure controlled by the Company without prior approval." As per Security Department investigation.

The warning notice was signed by Capaci and Schloegel.

Ballard testified that he returned to the bulletin board on April 27 and noted that the handbills for sales and the benefit supper were still posted.

On cross-examination, Electrical Department Foreman Delling Thibodeaux (vol. 130) testified that notices to employees are usually posted at a tool room. Annually, from October through December, Respondent posts United Way flyers at the tool room. Also, Thibodeaux testified that sometimes when electrical department employees are retiring, other employees post notices soliciting contributions toward gifts for the occasions.

Ballard's Warning Notice for Unauthorized Postings—Respondent's Evidence

Caston (vols. 106, 107) testified that on April 26, Ballard showed him a union handbill, grabbed a roll of tape off his desk, walked outside, and then came back in to the office and put the tape back on Caston's desk. Caston asked Ballard what he had done; Ballard replied that he had placed the handbill on the outside wall of the office; Caston stepped outside and immediately tore it down. Ballard told Caston not to "worry" because he had posted several others throughout the yard. Caston called General Foreman Schloegel. Later in the morning, Caston was ordered to go to Capaci's office where he gave a statement about the event.

On direct examination, Caston was first asked about Ballard's handbill and he testified:

> Q. Were there any other documents posted on the wall outside of your office at that time, on your area outside the wall of your office?
> A. I don't recall.

Then Caston was asked what sort of things should be posted outside his office; Caston replied that only company memoranda should be posted there. Caston was then asked and he testified:

> Q. Was there any—on the day that you took that document down, was there any document on that wall next to the door of your office—the wall right next to the door of your office where—that had anything to do with sales or advertising or anything like that?
> A. No.

On cross-examination, Caston testified that on April 27 Ballard brought to him copies of three handbills; one was advertising a benefit dinner for an employee; one advertised the sale of a boat; and the third was for the sale of a go-cart. (Ballard had not testified to having done this.) Referring to the handbills, Caston acknowledged that "I could have possibly seen them posted" at the plant premises, although not around his office. When asked if it were not frequently that he saw such "personal" postings, Caston replied, "I have seen them posted, you know, from time to time." When specifically shown the go-cart advertisement, Caston was asked and he testified:

> Q. You had seen something like that posted?
> A. I would say it is this one here. I can't guarantee it would be no 100 percent, 1,000 percent sure on it . . . .

Finally on the point, Caston was asked and he testified:

> Q. [By Mr. Morgan]: At the time Mr. Ballard brought you these posters or fliers that you just described, there were other posters or fliers of a personal nature posted around the Avondale yard. Isn't that true?
> A. I would imagine so.

On redirect examination, Caston denied seeing the go-cart advertisement posted at the plant premises.

Ballard's Warning Notice for Unauthorized Postings—Conclusions

I credit Ballard's testimony that when he posted the union handbill outside Caston's office there were also posted personal, for sale, handbills. Company Assistant Security Chief Capaci investigated the matter personally, but, although he was called to testify by Respondent, he was not asked what he found when (and if) he inspected the bulletin board in question. When Caston was asked about other postings, he first claimed loss of memory; then, after being brought back to the supposed sole purpose of the bulletin board, Caston claimed that there were no personal flyers on the bulletin board. Also, although he first testified that he "would imagine" personal postings such as the go-cart advertisement existed at the plant, Caston changed that testimony on redirect examination. When he slipped and acknowledged that one of the sample personal handbills (the go-cart handbill) had been posted at the plant, Caston tried an evasive back-track and stated that he could not be 100 or "1000" percent sure. Caston was most unimpressive in these exercises. Moreover, even if there were no such personal handbills posted outside Caston's office on April 26, Caston admitted that he "would imagine" that other such handbills were

posted in the yard at the time. This was an admission, as was Caston's testimony that he had seen posted in the yard at least two of the handbills that Ballard brought to him on April 27. Finally, Thibodeaux admitted that postings for solicitations of gifts are permitted in the electrical department, and, at least in the electrical department, there are annual postings of United Way flyers.

Respondent argues that electrical department posting policies are not relevant to what happened in the sheet metal department. Apparently, however, union-related postings are the subject of some over-all company policy-otherwise Company Assistant Security Chief Capaci would not have been called in to investigate the matter and to issue the warning notice himself. Even accepting the Respondent's argument, however, Caston admitted seeing personal, for-sale, flyers posted in the yard. Finally, I have credited Ballard's testimony and found that such were posted in one of the spaces where Ballard posted the union handbill.

Allowing personal notices, and even United Way notices, to be posted, while prohibiting and punishing the posting of union-related postings,[150] is discrimination that would tend to discourage union or protected concerted activities. That is, I find that Respondent has not demonstrated that it would have issued the April 26 warning notice to Ballard even in the absence of his protected activities. I therefore conclude that Respondent violated Section 8(a)(3) of the Act by the issuance of that warning notice.

(4) Alleged threat to Ballard by Simpson

On May 17, as Ballard was standing in a roadway waiting for a power-vehicle to bring him his gang box, Production Vice President Michael Simpson, whom Ballard had never met before, drove by. Simpson stopped and asked Ballard his name; Ballard told Simpson and, then, according to Ballard:

> Then he said, "Oh, you are the famous Dwight Ballard."
>
> I say, "Yes, I am the famous Dwight Ballard."
>
> He said, "Who do you work for?"
>
> I told him I worked for Jessie Caston.
>
> He said, "Oh, are you still working for Jessie? I thought Jessie would been to fire you by now."
>
> I said, "He trying to; all you all are trying to, but you all won't succeed at it."
>
> Then he looked at me, and he got back in his truck and got on his phone, and he drove off.

Based on this testimony by Ballard, paragraph 15 of the fourth complaint alleges that Respondent, by Simpson, "threatened its employees with discharge because they aided or assisted the Union."

Simpson testified that on May 17 he saw Ballard standing in the road, apparently doing nothing. According to Simpson (vol. 139):

> I asked him what his name was, and he said, "Dwight Ballard."
>
> It surprised me. I said, "Oh, you are the famous Mr. Ballard."
>
> And he said, "Yes, I am."
>
> I asked him where his foreman was, and he said, "I don't know."
>
> I asked him who is foreman was, and he said, "Jessie Caston."
>
> And I said, "I thought Jessie had gotten rid of you."
>
> And Ballard said, "He did, but I came back."
>
> I asked him, "Isn't there something you can be doing here instead of just standing?"
>
> And he said, "Yes, but I am waiting for my gang box."

As one can see, there are no substantive differences in the two versions of the encounter between Simpson and Ballard. (The term "gotten rid of," as quoted by Simpson, and the word "fired," as quoted by Ballard, are essentially synonymous terms.) To the extent that they differ, however, I credit Simpson. At trial, Simpson gave explanations for his questions to Ballard, but, of course, the issue under Section 8(a)(1) is what impact the statements made by Simpson would have had on a reasonable employee. (Also, Simpson's explanations for his statements to Ballard were not credible.)

Telling an employee who has recently been reinstated pursuant a settlement of unfair labor practice charges that he is "famous" is telling him that he has brought attention to himself. If the management staff of the employer is bitterly hostile to the exercise of Section 7 rights by the employees, telling an employee that he is "famous" is telling him that he is infamous. A hostile employer's telling a recently Board-reinstated employee that he is infamous is telling him that he is a marked man, scheduled for adverse action. Such is the case here. If there could have been any doubt about the probable impact of his statement, Simpson removed it by telling Ballard that he was surprised that Caston had not already "gotten rid" of Ballard. I find that there was a probable coercive impact in Simpson's statements to Ballard, and that impact is only magnified by the fact that Simpson is the highest-level production manager, next to Company President Bossier. I conclude that, in violation of Section 8(a)(1), Respondent, by Simpson, on May 17, 1994, threatened an employee with discharge or other unspecified reprisals because he had engaged in union or other protected concerted activities.

(5) Ballard's warning notice for loafing

Ballard testified that on Wednesday, May 18, he was called to Caston's office. Caston presented Ballard with a warning notice that was dated May 12. Typed in the space for date and time of offense time was: "5/11/94, Wednesday, at approx. 2:30 p.m." The box for General Offense-4 of the Avondale Employees' Guide was checked, and the reason for the warning was stated as:

> Wasting time, loitering or leaving the working place without permission. Employee was observed sitting on material box next to water cooler out of work area by 2 Avondale Foremen, [badge number] W-33 Johnny Rome (Elect. Dept.) & Bobby Ramirez, [badge number] W-561 (Welding Dept.) at approx 2:30 p.m. Employee was verbally warned by his foreman Jessie Caston on [April] 25 about sitting on the job. He states that he was sitting in the shade to get out of the sun.

[150] Respondent argues that the postings were not protected concerted activity because they related only to a vote on the Union's ESOP proposals. Of course, postings about go-cart sales, and the like, are also not protected concerted activities. The issue, however, is disparate enforcement of Respondent's no-posting rule, not the protected nature of the content of the postings.

On direct examination, Ballard was not asked what was said between him and Caston on May 18 when Caston presented this warning notice to him, but he did testify about the event that was the subject of the warning notice.

Ballard testified that May 11 was a day that he wore his union T-shirt to work; he also then had four "Union-Yes" stickers on his hardhat. Ballard acknowledged that on May 11 he left his work area to get water. He testified that he did so because it was a hot day, and he had been working in the sun. He stood in line at the water cooler, got a drink, got back in line for another drink, and then "stood in the shade for about two or three minutes" before going back to work. During this time, Ballard testified, he saw Foremen Rome and Ramirez in the area, but neither spoke to him. Ballard denied that, at any time, he was sitting, and he denied that there was a "material box" (or gang box) in the area upon which he could have sat. Ballard denied that Caston had previously warned him about sitting when he should be working. Finally, Ballard testified on direct examination that May 18 (when Caston presented him with the warning notice) was the first time that any supervisor told him that he was to be disciplined for his conduct of May 11. (As will be seen, Caston testified that he spoke to Ballard about the matter on May 12.) On cross-examination, Ballard admitted that, on May 18, he told Caston that he had a "don't give a damn attitude" and should be able to spend time sitting, just as supervisors do in their offices. (As will be see, however, Caston testified that Ballard made these remarks on May 12 as well as May 18.)

Ballard's Warning Notice for Loafing—
Respondent's Evidence

It is undisputed that when the employees feel overheated they are free to walk to the nearest water cooler and get a drink; of course, they are supposed to return to work as soon as they do.

Caston testified that he had, in fact, found Ballard sitting, loafing, on April 25, as he stated in the above-quoted warning notice. When he then asked Ballard what he was doing, Ballard told him that he was "getting out of the sun." Caston told Ballard that such would not be tolerated, and he told Ballard that the next time that it happened Ballard "would be written up." Caston testified that he caused an internal memorandum to be created about that incident, and that testimony was not questioned by the General Counsel (who had subpoenaed all such memoranda). I found to be credible Caston's testimony about Ballard's April 25 loafing and his oral warning to Ballard on that date. I discredit Ballard's testimony that he had not received a prior oral warning about sitting when he went to get water.

One element of the General Counsel's contention that the May 18 warning notice was issued to Ballard in violation of Section 8(a)(3) is that pretext is shown by the delay between the events of May 11 and the May 18 issuance of the warning notice; therefore, Caston's explanations for that delay must be examined. The first question to be resolved is when Caston got his information about Ballard's May 11 conduct. Caston testified that Rome and Ramirez reported Ballard's May 11 conduct to him during the morning of Thursday, May 12, and they did so separately, first Rome "on the morning of 5/12" then Ramirez "shortly after that, about mid-morning." Caston testified that both Rome and Ramirez reported to him that, about 2:30 on May 11, they had seen Ballard "sitting down on the material box next to a water cooler right outside." Caston first testified that Rome named Ballard, but he immediately changed that testimony to state that Rome had indicated only that the individual loafing was "one of my guys." Then, on cross-examination, Caston changed his testimony again to state that Rome named Ballard by name. Caston was consistent that Ramirez did not indicate Ballard by name.

Further on direct examination, Caston testified that he told Rome and Ramirez (again, separately, and again, during the morning of May 12) that he would look into the matter. Caston then went to Ballard's work area that morning of May 12 and told Ballard to come to his office. In the office, further according to Caston, Ballard admitted that he had been sitting down near the water cooler and that he knew that he had been seen by Rome and Ramirez. Caston told Ballard that he would be receiving a warning notice. Caston testified that it was then that Ballard said that he had a "don't give a damn" attitude and should be allowed to sit just as supervisors sit in their offices.

Caston further testified that on May 12, after he told Ballard that he was going to be receiving a warning notice:

> I then told Dwight he could go back to work and I then called the clerk. Told her that I would need a written warning notice typed up. But I didn't have the other foremen's badge numbers and their—the proper spelling of their names. So I told her I would get that information for her as soon as possible. . . . [S]o during the course of the day, I got in touch with Johnny Rome, got his name, full name and badge number; and Bobby Ramirez and his badge number.

Caston further testified on direct examination that the warning notice was not given to Ballard on May 12 because:

> It hadn't been typed up yet because, like I said earlier, I hadn't got the information till later on that day. And my clerk—you know, once I gave her the information, the only thing I could do then was wait for her to get the—send the write-up to me.

Caston further testified that presentation of the notice to Ballard was further delayed because Ballard took a vacation day on Friday, May 13, and he (Caston) took vacation days on Monday and Tuesday, May 16 and 17. Respondent introduced MCRs reflecting those vacation dates for Ballard and Caston, and that part of Caston's testimony is not disputed.

Caston testified that when he gave the warning notice to Ballard on May 18 Ballard again stated that he had a "don't give a damn" attitude and that he should be able to sit on the job because supervisors did so. Caston denied that, either on May 12 or 18, Ballard told him that he had been sitting near the water cooler on May 11 because he was overheated. Caston further testified that employees may sit down when they are overheated, but, if that happens, he will call an ambulance to get the employee to the medical department.

On cross-examination, Caston again testified that Ramirez and Rome reported Ballard's May 11 conduct to him on the morning of May 12. When asked if he knew why they had not reported the incident on the afternoon of May 11, when it happened, Caston testified, "Chances are they didn't see me."

Ramirez (vol. 134) testified that on an afternoon in May, about 2:30, he went to the water fountain near Caston's office where he saw an employee whom he knew to be on Caston's crew, but he did not know the employee's name. The employee

was sitting on a gang box, with nothing in his hands, doing nothing. After 5 minutes of that, Ramirez started walking toward Caston's office and Rome walked up to Ramirez. Ramirez and Rome continued to watch the employee for about three minutes more. Ramirez testified that he could not recall if the employee was drinking anything, but he flatly denied that the employee went to the water cooler while he and Rome watched him. Ramirez testified that the employee who had been seen sitting on the gang box was not sweating and did not appear to be overheated. Ramirez further testified that he and the employee exchanged looks, but neither he nor Rome said anything to the employee. After Rome and Ramirez watched Ballard for about 3 minutes, further according to Ramirez, Ramirez told Rome, "I am going to go talk to his boss [meaning Caston]." Ramirez further testified that he then went directly to Caston's office, which was a 2-minute walk away. When he got to Caston's office, he told Caston, "[W]e have got a man sitting on a box over there. . . . You need to go check with him." Caston replied, "I am going to take care of it." Ramirez testified that he then "walked on."

On cross-examination, Ramirez testified that, when he reported the incident to Caston (again, that afternoon, between 2:30 and 3:00), he told Caston, "I don't know his name; he is sitting on a box. He is out there right now; go see him." When asked why he said nothing to the employee (like "get to work"), Ramirez replied that the employee's foreman was then in the immediate area, and it was his foreman's job to do something about it.

Rome (vol. 137) testified that the employee whom he and Ramirez observed on May 11 had a soda in his hand as he was sitting on the gang box; otherwise, his testimony was consistent with Ramirez's. Rome testified that he never knew the name of the employee. Rome also testified that it was Ramirez who went to see Caston, and not he. On cross-examination, Rome testified that later that same afternoon he met Caston, and Caston then thanked him for helping to cause the matter to be brought to his attention; Caston then told Rome that he intended to talk to the employee, but he did not say that he intended to issue a warning notice to the employee. Rome placed this meeting with Caston at "[a]bout three o'clock" of the same day that he and Ramirez had seen the employee loafing.

Ballard's Warning Notice for Loafing—Conclusions

The employees are allowed to take up to a 10-minute break during the afternoons, and during those breaks they can go to the soda machines and drink the sodas there or bring them back to their work areas. Ballard, however, made no pretense of being on such a break. He testified that he was hot, went to get some water (and water only) and stood in the shade a while. He did not claim to be on his afternoon break. Ballard denied sitting down for 8 minutes near the water cooler on May 11; he denied sitting down at all.

When his other warning notices were presented, Ballard strongly protested the accuracy of their allegations, but he did not protest to Caston that the May 18 warning notice was inaccurate. Instead, as shown by his cross-examination (and as tacitly admitted by the General Counsel's failure to conduct direct examination on the point), Ballard protested not being able to sit in the same manner that supervisors are permitted to sit. At the same time he acknowledged an attitude ("don't give a damn") that is consistent with sitting, and doing nothing, when he should have been working.

Although Ramirez was shown to have lied under oath at another point in the hearing,[151] his testimony was fully corroborated by the testimony of Rome, who was fully credible. I credit their testimonies that they saw an employee, who turned out to be Ballard, sitting for a total of 8 minutes on May 11, doing nothing and not getting a drink of water.

The credited testimony of Rome and Ramirez, however, squarely conflicts with the testimony of Caston in one significant respect. Caston testified that both Rome and Ramirez reported the events of May 11 to him on the morning of May 12. Ramirez and Rome testified, however, that only Ramirez made a report to Caston, and he did so on the same afternoon that they had seen the employee loafing, which would have been the afternoon of May 11.

Caston testified that it was not until he had the May 12 morning discussion with Ballard that he decided to issue the warning notice; after that, he had to contact Rome and Ramirez to get their badge numbers to fill out the warning notice; then ensued his and Ballard's vacation days, not making it possible to issue the warning notice until May 18. While the vacation days did occur, Caston did not have to know the badge numbers of Ramirez and Rome to fill out the warning notice; if he did feel he needed them, he could have gotten them immediately by calling the electrical department office (for Rome's) and the welding department office (for Ramirez'), or he could have had the sheet metal department clerk (who, after all, was going to type out the warning notice, anyway) make such telephone calls.

Caston concocted the May 12 morning reports from Rome and Ramirez, and he concocted the May 12 discussion with Ballard, to partially explain the delay in issuing the warning notice. I find that on the afternoon of May 11, Ramirez went to Caston and told him that he (Caston) had an employee loafing "right now"; Ramirez told Caston that he did not know the name of the employee, but Caston should then come out of his office and see which employee it was. As Ramirez further testified, Caston then started walking out of his office, obviously to see who the employee was, and Ramirez left Caston's office, and the area, at that point. I find that, when Caston went to see which employee Ramirez was referring to, Caston saw Ballard. Possibly Ballard was still sitting but possibly he was, by that point, walking back to his job. Either way, Caston saw Ballard on May 11, and he then knew who Ramirez was talking about. There is no other explanation of how Caston would have known that the loafing employee was Ballard. (Again, neither Rome nor Ramirez knew Ballard's name, and they certainly could not have told Caston that it was Ballard.) Rome's testimony on cross-examination that, about 3 the same afternoon, Caston thanked him for helping bring the matter to his attention and indicated that he intended to talk to the employee, is further evidence that Caston knew who the loafing employee was on May 11. Finally, another demonstration of Caston's incredibility on the point is contained in Caston's self-conflicting testimony that Rome named Ballard, then Rome did not name Ballard, then (on cross-examination) Rome did name Ballard when Rome gave his report during the morning of May 12.

I credit Ballard's testimony that no one mentioned a warning notice to him before May 18 when the warning notice was actually delivered by Caston. Although Caston knew who the

[151] See the discussion in the case of alleged discriminatee Mark Cancienne, infra.

loafing employee was on May 11, he did nothing about it, then or during the next day, May 12. I find that Caston did nothing about Ballard's loafing until he got back from his vacation on May 18. On May 18, it is obvious to me, Caston found out that Simpson had met Ballard on May 17, as discussed above, and Simpson had been surprised that Caston had not already discharged, or otherwise "gotten rid" of Ballard.[152] When Caston found that Simpson still harbored animus against Ballard, Caston then ordered the notice created. It is purely problematical to say that, even without Simpson's expression of animus, Caston at some time after May 11 (or even May 12) would have issued the warning notice to Ballard because of Ballard's May 11 conduct. Again, Caston did not speak to Ballard about the matter until he handed the warning notice to Ballard on May 18, the day after Simpson told Ballard that he thought Caston would have already gotten rid of Ballard. (And Caston did not testify that he did not create and issue the warning notice late on May 11, or during the full day of May 12, because he had been too busy, or that he decided to issue the warning notice on May 11 but just forgot to do it on May 12.)

That is, I find that Respondent has not demonstrated that it would have issued the May 18 warning notice to Ballard even in the absence of his protected activities. I therefore conclude that Respondent violated Section 8(a)(3) of the Act by the issuance of that warning notice.

(6) Ballard's first warning notice for not wearing safety glasses

Background

Respondent maintains a work rule that, when in production areas, employees must wear OSHA-approved safety eyewear, either glasses with safety lenses and frames and side-shields, or approved goggles (jointly, "safety glasses"). The degree of uniformity of enforcement of this rule is an issue in the cases of alleged discriminatees Darrell Smith and Leroy King, as well as an issue in Ballard's case. At minimum, it is fair to say that supervisors do not issue a warning notice each time that they see an employee not wearing safety glasses in production areas. More than that, a December 28, 1994 letter from Simpson to all employees indicates that a substantial number of employees had, to that date, refused to follow the rules regarding the wearing of safety equipment, and they had done so with impunity. As Simpson states in the letter:

> Recently I've noted some laxity in the wearing of personal protective equipment (PPE) in production areas. Your hardhat, safety glasses and safety shoes are your first line of defense. . . .
>
> By this letter, all Production Department Supervision is instructed to remind offenders of our PPE policy, regardless who they work for, including other departments, customers and vendors. I intend to place signs in many of the production areas to help remind people to use their PPE. If, by the end of January 1995, the use of PPE in production areas is not uniformly followed, we will ask for identification of offenders and order them out of the production area in question. Offenders outside the Production Department are to be brought to my attention. After 31 January, the Production Department offenders will be cited in accordance with standing Avondale policies.

(Again, to be "cited" is to be issued a warning notice.) Simpson's letter is an admission that the PPE rules, including the rule requiring safety glasses, were not being "uniformly followed" as late as the date of the letter. Simpson would not have issued such a letter if the lack of enforcement uniformity were not significant. Moreover, it is to be noted that Simpson's letter states that warning notices are to be issued consistently only after a grace period in which employees are to be reminded of the rule.

Sheet metal department supervisors, like the supervisors of many other departments, testified that they issued warning notices for failures to wear safety glasses only after one or more oral warnings failed to get the employees to abide by the safety glasses rule. For example, Frickey was asked and he testified:

> Q. [By Mr. Morgan]: Is it true, Mr. Frickey, that you only give citations for safety glasses after repeated verbal [oral] warnings to the employee?
>
> A. No.
>
> Q. Is that what you do most of the time concerning safety glasses, that you only do it after you have repeatedly verbally warned the employee concerning safety glasses?
>
> A. If I repeat—if he is warned twice in the day, he will get a citation.
>
> Q. And that is, would you say, your policy? If you have to warn him twice in a day, then you get a citation.
>
> A. Oh, yes.

Even after repeated violations of the safety glasses rule, warning notices were not always issued (at least not before Simpson's letter of December 28, 1994). For example, as discussed in this section, Caston testified that when Ballard was under his supervision, from mid-April through his discharge on June 30, Ballard "constantly" was without safety glasses in production areas; Caston, however, never issued a warning notice to Ballard for that reason.

Ballard's First Warning Notice for not Wearing Safety Glasses—the General Counsel's Evidence

On June 6, Ballard was still on Caston's crew. Ballard testified that June 6 was another day that he wore a union T-shirt to work. On that date, when he was in a production area, Foreman DeNicola, who was riding a motorbike, stopped near him. At the time that DeNicola approached Ballard, DeNicola was not wearing safety glasses.[153] Further according to Ballard:

> He [DeNicola] said, "You are not tired of wearing that shirt?"
>
> And I looked at him, and I said, "No, I am not tired of wearing this shirt." And I said, "You don't have nothing better to do than to worry about me wearing this T-shirt? That is the problem with the yard today, people like you."
>
> And then he said, "Put your safety glasses on."
>
> And I said, "Well, I was wiping my face because I was sweating."
>
> And he said, "Put your safety glasses on."

[152] Simpson did testify that, after his May 17 exchange with Ballard, he called Poleto, Caston's superintendent.

[153] Ballard also testified that DeNicola was not wearing earplugs at the time. Respondent, however, proved that ear plugs are required only in especially noisy areas, and, because of the risks of collisions, they are never required for those riding motorbikes.

And I said, "Soon I get through wiping my face I will put my safety glasses on."

He said, "Well, I am going to write you up."

I said, "Well, write up—write them up."

Then he drove off on his bike.

Ballard further testified that he was, in fact, wiping perspiration from his face with his handkerchief when DeNicola told him to put on his safety glasses. Based on Ballard's testimony about what DeNicola said about his T-shirt, paragraph 17 of the fourth complaint alleges that Respondent, by DeNicola, "denigrated its employees because they were wearing clothing bearing the Union s insignia."

Further according to Ballard, later on June 6, DeNicola approached Ballard and Ballard's helper, David Sanders. According to Ballard, Sanders was not wearing safety glasses at the time, but Ballard was. DeNicola said nothing to Sanders, but he told Ballard to come to his office. When he got to DeNicola's office, DeNicola told Ballard that he was issuing a warning notice to Ballard because Ballard had not been wearing safety glasses; Ballard again protested the he had been wiping perspiration from his face; DeNicola replied, "I am just doing what I am told to do." DeNicola then issued to Ballard a warning notice signed by himself and Schloegel. Checking and quoting General Offense-12 of the Avondale Employees' Guide, the warning notice states:

> Violation of Company safety rules and regulations through carelessness. Employee was observed not wearing safety glasses on job. Employee has been verbally warned on same [i.e., same offense] on several occasions. FINAL WARNING.

On direct examination, Ballard was asked, and he testified:

> Q. Prior to June 6, 1994, had you ever been verbally warned on several occasions about not wearing safety glasses?
>
> A. No, I have not.
>
> Q. At any time after your reinstatement at Avondale in January of '94 until Joe DeNicola gave you a warning on June 6 did any member of supervision at Avondale ever speak to you about wearing your safety glasses?
>
> A. No, they did not.

On cross-examination, however, Ballard was asked, and he testified:

> Q. [By Mr. Hymowitz]: June 6, 1994, was not the first time Mr. DeNicola spoke to you about not wearing safety glasses, was it?
>
> A. Not that I can remember.
>
> Q. You don't remember any time before that that Mr. DeNicola spoke to you about wearing safety glasses?
>
> A. He might have. I don't know.
>
> Q. Oh. He might have? Well, isn't it a fact that, on February 2, 1994, Mr. DeNicola saw you not wearing safety glasses while you were walking from the job site to the tool room?
>
> A. I don't remember.
>
> Q. And didn't he tell you to—that you had better put your safety glasses on at that time?
>
> A. I don't remember.

Ballard was then presented with his pretrial affidavit and asked:

> Q. [By Mr. Hymowitz]: And isn't it true in that affidavit that you say that Mr. DeNicola, on February 2, saw you without safety glasses and he said, quote, "You had better keep those safety glasses on your eyes?" Didn't he tell you that? . . .
>
> A. Correct.
>
> Q. And isn't it also true that you said in that affidavit, "I should have been wearing the safety glasses at the time?"
>
> A. Uh-huh. [Yes.] . . . I was coming out of the bathroom at the time. And I was—I had to wash the glasses in the bathroom, and I was wiping them off. And that was what happened and how he saw me on that incident.

From these admissions on cross-examination, I find that, on February 2, at a time that Ballard was not wearing safety glasses (but should have been), DeNicola told Ballard that he "had better" put them on.

As well as reflecting a lack of credibility in Ballard, the admission by affidavit raises the issue of whether DeNicola's February 2 statement to Ballard constituted a warning of discipline. Not every instruction constitutes a warning of discipline; certainly, no more than telling an employee to get to work (e.g., "Come on, Joe, let's get with it.") is such a warning of discipline. Anything more than that, however, would seem to constitute a warning of discipline. I believe that an oral warning of discipline is issued when supervisor tells an employee that he "had better" do something that the employee had not been doing (if, of course, the thing that the employee had not been doing is the subject of a disciplinary work rule). Based on Ballard's admissions and this reasoning and conclusion, I find and conclude that on February 2, DeNicola orally warned Ballard of discipline if he did not wear his safety glasses.

Ballard's First Warning Notice for not Wearing Safety Glasses—Respondent's Evidence

DeNicola (vol. 119) testified that twice on February 2 he saw Ballard in production areas without his safety glasses. DeNicola admitted that he knew at the time that Ballard had recently been reinstated from his 1993 discharge. The first time on February 2 that DeNicola saw Ballard without safety glasses, Ballard was walking toward a tool room; DeNicola asked Ballard where his safety glasses were, and Ballard told him that he did not have any yet. According to DeNicola, "I said, 'Go get you a pair and let's put them on.'" About two hours later, DeNicola saw Ballard in a production area, again without safety glasses. It was then that he told Ballard, as Ballard testified, that he "had better" put on his safety glasses. This second instruction, not the first, is the oral warning that I have found to have been issued by DeNicola to Ballard on February 2.

In mid-April, Ballard was moved from Frickey's crew to Caston's crew where he stayed until his discharge on June 30. On direct examination, Caston was asked about Ballard's diligence in following the rule requiring safety glasses, and Caston testified:

> Q. How often would this happen, from the time that he started working with you?
>
> A. Constantly. I would tell him to go on and put his safety glasses on, and he would go—generally go and get a pair of safety glasses and, usually the next day or after lunch, you know, two or three hours later, four hours later,

he wouldn't have his safety glasses on. He would still—he would go back to his sunglasses.

Q. And what would you do then?

A. I would tell him to put his safety glasses on. Take the sunglasses off, because they weren't OSHA-approved.

Only in general terms, which I have discredited, did Ballard deny this testimony.

DeNicola testified on direct examination that on June 6 he twice saw Ballard not wearing safety glasses in production areas. The first time, Ballard had safety glasses on a cord around his neck; DeNicola told Ballard that he would issue Ballard a warning notice if he did not wear the safety glasses. Ballard replied, "You can write me up 100 times; I don't care." DeNicola was not asked whether Ballard complied with his order to put on his safety glasses. DeNicola testified that later in the day DeNicola saw Ballard in a production area, again not wearing safety glasses. DeNicola was not asked what was said during that second confrontation of June 6; instead, he was led directly to deny that he asked Ballard if he were not tired of wearing the union T-shirt. After the denial, DeNicola was still not asked what had been said during the second confrontation with Ballard on June 6. DeNicola also was not asked whether Ballard's helper, Sanders, was present but not wearing safety glasses.

DeNicola testified that after he left Ballard, he told Schloegel that he intended to issue a warning notice to Ballard. DeNicola testified, "So Mr. Schloegel said, 'Well, let's write him up and make it a final warning.'" DeNicola further testified that, later in the day, after he had gotten the warning notice typed up, he sent his expediter to summons Ballard to his office (rather than going himself to summons Ballard, as Ballard testified). When Ballard arrived, DeNicola read the above-quoted warning notice. DeNicola was not asked what else, if anything, was said during the meeting in his office in which he presented the June 6 warning notice to Ballard.

As noted, Caston testified that Ballard "constantly" worked without his safety glasses, although many times he had told Ballard to put them on. Respondent relies on this testimony to show that DeNicola's warning notice was preceded by Caston's oral instructions to Ballard to put his safety glasses on. On cross-examination, however, DeNicola flatly denied that he discussed issuing the June 6 warning notice with Caston, and there is no evidence that DeNicola knew of Caston's experience with Ballard.[154] Caston, moreover, did not testify that he ever discussed his experiences with Ballard's not wearing safety glasses with DeNicola, and it is clear that he did not.

Schloegel (vol. 109) testified that DeNicola approached him on June 6 and told him that twice that day he had caught Ballard without safety glasses in production areas. DeNicola told Schloegel, "I don't know what to do any more." Schloegel testified that he told DeNicola:

I said, "What you need to do, Joe, is issue him a written warning. You know, you verbal, verbal, verbal. That is all right. But maybe you will snap him if you put him—put a written warning in his hand. . . . Go ahead and do that. Give him a written warning."

Schloegel further testified that he told DeNicola to make the warning notice "final." Schloegel was asked and he testified:

Q. And why did you want to make it a final written warning?

A. Repeats. Just repeats all the time. You know what I mean? He did it not—just a few minutes before. Okay?

[I told DeNicola,] "Give him a final written warning. Maybe he will snap out with that."

Schloegel did not testify that he knew, on June 6 (or thereafter), that Caston had observed Ballard not wearing safety glasses in production areas.

Respondent argues that the issuance of Ballard's warning notice could not have been violative because on the same day that he issued a warning notice to Ballard, DeNicola issued safety glasses warning notices to two other employees. Of course, many other employees were issued warning notices for safety glasses violations, but a significant number, as has been shown above, were not. The issue before the Board is why Ballard was issued a warning notice although a significant number of other employees were allowed, with impunity, to go without safety glasses in production areas.

Ballard's First Warning Notice for not Wearing Safety Glasses—Conclusions

Ballard denied remembering DeNicola's February 2 oral warning for not wearing safety glasses, but he testified that he was exiting a restroom, wiping his glasses, when he got it. Obviously, Ballard was not telling the truth about receiving that oral warning. Ballard's acknowledgment in his affidavit that he should have been wearing the safety glasses when he was orally warned on February 2 further shows that his excuse of wiping his glasses off was nothing more than a self-serving, incredible, rationalization. Moreover, the tactic shows that Ballard would concoct such an excuse to defend against valid accusations that he was found not wearing safety glasses when he should have been, as discussed below. I believe that Ballard was not wearing his safety glasses when he was approached on June 6 by DeNicola, and he did not take them off only to wipe perspiration from his face.

Nevertheless, DeNicola was not wearing safety glasses either. Also, DeNicola said nothing to Ballard about his safety glasses until Ballard gave an unsatisfactory answer to DeNicola's question of whether Ballard was not tired of wearing the union T-shirt. That is, I credit Ballard's testimony that DeNicola approached him with the question about his T-shirt, and DeNicola announced the warning notice for safety glasses only after Ballard gave his response. The key to making this credibility resolution lies in the fact that DeNicola spotted Ballard without safety glasses in the production area only once during the morning of June 6. Had there been a prior warning that morning (or even a prior instruction that morning) DeNicola assuredly would have mentioned it in the written warning; instead, DeNicola referred only to an indefinite time of "several occasions" to state when the employee had been warned before. Moreover, further reason to disbelieve DeNicola's testimony (that there were two occasions during the morning of June 6 that he saw Ballard without safety glasses) lies in the fact that DeNicola was not asked what was said when he saw Ballard without safety glasses in the production area for the second

[154] On redirect examination, after a break requested by Respondent's counsel, DeNicola changed his testimony to state that he did not remember discussing the matter with Caston; this was one more manifestation of DeNicola's lack of credibility, and another reason that I have credited Duplantis and other employees over DeNicola's denials of remarks alleged to have violated Sec. 8(a)(1), supra.

time. (DeNicola was asked, by leading questions, what was not said on that second occasion, but I discredit that testimony.)

After DeNicola left Ballard, he sought out Schloegel and told him that he was going to issue Ballard a warning notice; Schloegel told DeNicola to make the warning notice "final." Schloegel testified that he gave this instruction because of Ballard's "repeats" as Schloegel put it. Of course, there were no such repeats; Ballard had not, since his reinstatement, been issued a warning notice for not wearing safety glasses. (Ballard and DeNicola agree that in a production area on June 6, DeNicola told Ballard that DeNicola was going to issue to Ballard a written warning notice. This agreement, and DeNicola's testimony that he told Schloegel that he intended to issue a warning notice to Ballard, belies Schloegel's testimony that DeNicola told him that he did not know "what to do" about the situation. This is just one of the many points of incredibility in Schloegel's testimony; many others are discussed below.) After his conference with Schloegel, DeNicola returned to Ballard and his helper Sanders, and DeNicola then issued Ballard the warning notice. As he did so, according to Ballard's undisputed testimony, DeNicola ignored Sanders who was then working without safety glasses. Although Sanders, as Ballard admitted, was wearing prounion insignia, there is no contention or evidence that he was as active a prounion employee as Ballard; certainly, there is no evidence that Sanders had been reinstated pursuant to a Board settlement agreement.[155]

I find that on June 6 DeNicola introduced his remarks to Ballard by asking him if he were not tired of wearing a union T-shirt. When he did not get the response that he wanted, DeNicola told Ballard that he would be issued a warning notice for not wearing safety glasses. This DeNicola did, even though Ballard's then-immediate supervisor, Caston, had condoned Ballard's "constantly" failing to wear safety glasses in production areas. I further find that Schloegel and DeNicola decided to make the warning notice a final warning notice, not because of a second sighting of Ballard without his safety glasses that morning (something that did not happen), and not because of prior warnings on "several occasions" (something that was not corroborated), and not because DeNicola had known about Caston's instructions when Caston "constantly" found Ballard without safety glasses (because, as DeNicola testified truthfully on cross-examination, he did not talk to Caston before issuing the warning notice), and not because of DeNicola's oral warning to Ballard on February 2 (something that was remote, and something that DeNicola did not mention as a basis for the warning notice). DeNicola issued the warning notice, and made it a final warning notice, because of Respondent's animus against what the T-shirt stood for, in general, and Ballard's unsatisfactory answer to the T-shirt inquiry, in particular.

That is, I find that Respondent has not demonstrated that it would have issued the June 6 warning notice to Ballard even in the absence of his protected activities. I therefore conclude that Respondent violated Section 8(a)(3) of the Act by the issuance of that warning notice. I have further credited Ballard's testimony that DeNicola approached him and asked if Ballard were not tired of wearing his union T-shirt. DeNicola's remark, and Ballard's protected response to it, constitute relevant background for the finding about the warning notice of June 6; however, DeNicola's act did not constitute a separate violation of Section 8(a)(1). The General Counsel cites no authority for the proposition that denigration of an employee constitutes such a violation; moreover, the Board has only found such a violation where an employer denigrates a union and thereby conveys the impression to employees that their efforts to achieve collective bargaining will be futile. See, for example, *Albert Einstein Medical Center,* 316 NLRB 1040 (1995). I shall therefore recommend dismissal of this allegation of the complaint.

(7) Ballard's second warning notice for exiting gate without permission

On June 28 Ballard was still assigned to Caston's crew, but Caston was absent on that day, and Frickey supervised Caston's crew as well as his own.[156] Extensive discussion of the conflicting testimony is not necessary. Over testimony by Ballard, I again credit the testimony of gate-guard Winfield, and I find that at 9:57 a.m., Ballard again exited gate 22 and again ignored Winfield's requests that Ballard give her a pass or his badge number. Ballard came back through the gate, past Winfield, at 10:02. (The General Counsel argues that Ballard could not have accomplished anything during this 5-minute period, so it is unlikely that the event occurred. I disagree. I need not determine Ballard's motives, but he knew that he had received a warning notice for the identical conduct on March 31, and it could well be that he thought better of the venture and turned around.) Winfield called Schloegel and told him that Ballard had (again) exited the gate without showing a pass or giving his badge number. Schloegel located Frickey and asked if he had given Ballard a pass; Frickey told Schloegel that he had not; and Schloegel decided to issue a warning notice to Ballard. Schloegel and Frickey drafted and signed a warning notice to Ballard that states:

> Major offense #11: Unauthorized exit from Company premises at any location at any time. Employee left his work area without permission; he went out of gate #22 at 9:57 a.m.
>
> Major Offense #12: Failure to comply with instructions given by a Plant Protection officer, security representative or other proper authority in the performance of their duties: When employee left through gate #22, Security guard Patricia Winfield, Clock #1130, asked employee for his clock #; he refused to give it to her. FINAL WARNING.

Schloegel and Frickey then went to Ballard and presented this warning notice. (The circumstances of that presentation gave rise to Ballard's second warning notice of June 28, and I shall discuss those circumstances below. Now, however, I enter my conclusions about the first warning notice that Ballard received on June 28.)

There is no contention (or alternate contention) that Ballard was treated disparately by being issued the warning notice for exiting the gate, without permission, during his working time. Based on my credibility resolutions, I find and conclude that

[155] This factor distinguishes a case cited by Respondent on brief in which employees of equal degrees of prounion activity were disciplined.

[156] That is, the exact converse of the situation of March 31 existed. On March 31, Ballard was assigned to Frickey's crew, but Frickey was absent and Caston was substituting for Frickey when Ballard exited the gate during working time without permission. On June 28, as I find herein, Ballard was assigned to Caston's crew, but Caston was absent and Frickey was substituting for Caston when Ballard exited the gate during working time without permission for the second time.

Respondent has amply demonstrated that it would have issued this warning notice to Ballard, regardless of his protected activities, and I shall recommend dismissal of the allegation that the issuance of Ballard's first warning notice of June 28 violated Section 8(a)(3).

(8) Ballard's second warning notice for not wearing safety glasses

Ballard testified that at some point during the morning of June 28 (evidently after he had returned from gate 22) Frickey found him and told him that he needed to be in his own work area. Ballard testified, "So I proceeded to go back to more or less my work area."[157] Ballard testified that shortly after he returned to his work area, he was approached by Frickey and Schloegel who had ridden up to him on motorbikes. According to Ballard, Schloegel told him that he was being issued a warning notice for exiting the gate without permission. Ballard denied that he had done so and refused to sign the warning notice. Further according to Ballard:

> He [Schloegel] said, "Well, I guess you want a copy to take to the Union people."
>
> And I say, "Well, I would like to have a copy." . . .
>
> [A]fter he gave me the warning notice then I took my [safety] glasses off then, and I wiped my face. Then he [Schloegel] said [to Frickey], "Archie, look; he don't have no safety glasses on. We could write him up for no safety glasses."
>
> And I said, "Arthur, you don't wear safety glasses nor ear plugs."
>
> He told me, he said, "Fuck you."
>
> I say, "Look, Arthur, I respect you as my supervisor. I never disrespected you; I never got out of the way with you. I always respect you. You don't have to curse me. I am putting up with the write ups; I am putting up with the harassment; I am putting up with it all, but you don't have to curse me."
>
> And him and Archie [Frickey] got on their bike[s] and rode off.

Ballard further testified that within a few minutes he was again approached by Schloegel and Frickey. Schloegel gave Ballard another warning notice and asked Ballard to sign it. Ballard refused; Schloegel gave Ballard a copy, shook his hand and said, "Well, I will see you in court." The second warning notice issued to Ballard on June 28 is signed by Schloegel and Frickey. It cites as a time, "11:25 a.m."; checking and quoting Major Offense-23 of the Avondale Employees' Guide, the supervisors wrote:

> Deliberate violations of safety, security or plant protection regulations. Employee refused to wear safety glasses after being verbally warned on several occasions; has had prior written warning for same; also was asked to wear safety glasses today by Arthur Schloegel, Jr. FINAL WARNING.

Ballard testified that the only time that he had his safety glasses off during this confrontation with Schloegel and Frickey was when he was wiping perspiration from his face.

[157] This "more or less" testimony fortifies my conclusion that Ballard had gone through gate 22 as Winfield described.

Ballard's Second Warning Notice for not Wearing Safety Glasses—Respondent's Evidence

Schloegel and Frickey testified that when they approached Ballard with the notice for exiting the yard, they were wearing safety glasses. Frickey testified (vol. 116) that Schloegel gave Ballard the warning notice and told him "see you in court." Then he and Schloegel turned and walked away from Ballard. As they walked away, Ballard called out, in a mocking, sarcastic tone of voice, "When am I going to get my next citation?" Frickey and Schloegel turned around and saw Ballard, bent over at the waist, one hand on hip, and head up with a sneering expression on his face. This part of the testimony was undisputed, and I find that Ballard was using insolent body language toward Schloegel and Frickey, as well as sarcastic, taunting words.

Schloegel, further according to Frickey, immediately responded to Ballard, "Right now, you don't have any safety glasses on." Frickey was asked and he testified:

> Q. Now, after Mr. Schloegel told Mr. Ballard that he was going to give him a citation right now because he doesn't have any safety glasses on, did Mr. Ballard say anything?
>
> A. Yes, he did.
>
> Q. What did he say?
>
> A. He said, "Arthur, you don't have any earplugs on."
>
> Q. And what did Mr.—did Mr. Schloegel reply to that?
>
> A. Yes, he did.
>
> Q. What did he say?
>
> A. "Dwight, I don't need my safety glasses in this area"—I mean—I am sorry—"earplugs."
>
> Q. Okay. Would you repeat what you heard Mr. Schloegel say.
>
> A. Yes. "Dwight, I don't need my earplugs in this area."
>
> Q. Was there anything else said in that conversation between Mr. Schloegel and Mr. Ballard that you can recall?
>
> A. No.

Ballard's Second Warning Notice for not Wearing Safety Glasses—Conclusions

Although he caught himself and attempted a change (and counsel asked that the changed testimony be repeated), Frickey's first testimony was that Schloegel responded to Ballard, "Dwight, I don't need my safety glasses in this area." I believe that Frickey's first response was the truthful one. Frickey would not have given this reply if Schloegel had, in fact, been wearing safety glasses. That is, Ballard accused Schloegel of not wearing safety glasses because Schloegel, in fact, was not wearing safety glasses. I further find that to this valid observation by Ballard, Schloegel replied, "Fuck you."

Schloegel (vol. 109) admitted that, when he presented the gate-exiting warning notice to Ballard on June 28, he told Ballard, "[S]ee you in court." Schloegel testified that he did so: "Because whenever you dealt with Dwight or something happened with Dwight, I would see lawyers. There was always lawyers around." On cross-examination, however, Schloegel acknowledged that never before June 28 had he been in contact with a lawyer as a result of dealing with Ballard; he further admitted that he had had no dealings with or about Ballard since March 31 (upon the occasion of Ballard's first gate-

exiting episode). Further on cross-examination Schloegel was asked why he had not given Ballard a warning notice for not wearing safety glasses even before Ballard challenged him to bring his "next" warning notice:

> Q. [By Mr. Morgan]: When you stood there and talked to Mr. Ballard about him being outside of the yard, you realized he didn't have his safety glasses on at that time. Isn't that correct?
>
> A. No. That is the thing. I didn't even—I didn't realize that.

When Schloegel and Frickey approached Ballard, it was as plain as the safety glasses that were not on Ballard's face that Ballard was not wearing safety glasses. Schloegel's testimony that he had not realized that Ballard had not been wearing safety glasses until Ballard asked when he was going to receive another warning notice was necessarily untrue. Further on cross-examination Schloegel steadfastly denied that his "see you in court" statement to Ballard was a reference to NLRB proceedings. In fact, Schloegel denied that he had known that Ballard (and Valentine) had ever filed unfair labor practice charges or that they had ever claimed that they had been discharged in 1993 because of their union activities. These denials by Schloegel fly in the face of the testimony of his immediate subordinate Kitzman who testified that on February 1:

> Mr. Schloegel had called me and told me that Lennie Valentine was coming to work for me and to put him to work and treat him like any other employee, that he had understood that the Labor Board had got his—had gotten his job back, and I was to treat him like any other employee, and if I had any problems with him, to inform him.

Therefore, Schloegel's testimony that his "see you in court" remark referred to something other than NLRB proceedings was also false. Further evidence of Schloegel's mendacity lies in his testimony that on February 1 he told Dubois and Kitzman to treat Ballard and Valentine like any other employee because, "I didn't want no favoritism in anything," as if favoritism toward Ballard and Valentine were something to fear. Further evidence of Schloegel's untruthfulness lies in his denial on cross-examination that he considered Respondent's February 2 actions against Ballard and Valentine to be "suspensions," although an affidavit that he had previously signed used precisely that word. Finally, as mentioned above, Schloegel testified that it was he who first suggested to DeNicola the idea of issuing Ballard a warning notice on June 6, although DeNicola (as well as Ballard) testified that DeNicola had told Ballard at the time of their confrontation that Ballard would be getting a warning notice.

All of this is to say that Schloegel was not a truthful witness, and thusly fortified are my conclusions that Schloegel lied about having his safety glasses on, and he lied about cursing Ballard, on June 28 when he and Frickey then presented to Ballard a warning notice for leaving the yard without permission.

On the other hand, I do not believe that Ballard wore his safety glasses in the production area on June 28 except when he was wiping his face. That much of Schloegel's and Frickey's testimonies was credible. Ballard had invoked his usual face-wiping (or glasses-wiping) excuse for his failure to wear his safety glasses on February 2, even though he admitted (on affidavit) that he should have been wearing his safety glasses.

Perhaps a different case would have been presented to the Board if Schloegel had testified that he issued the second June 28 warning notice to Ballard in retaliation for Ballard's making an insolent challenge to his authority when he presented the first warning notice of June 28. It would have been a natural reaction and may well have constituted a complete defense to the allegation. Schloegel, however, testified that he issued the warning notice solely because Ballard was not wearing safety glasses, something that he noticed only after Ballard's exercise in insolence. That testimony, however, was untrue, as I have found above.[158] Respondent does not present a *Wright Line* defense when it presents only untruthful testimony. That is, I find that Respondent has not demonstrated that it would have issued the second (safety glasses) warning notice of June 28 to Ballard even in the absence of his protected activities. I, therefore, conclude that Respondent violated Section 8(a)(3) of the Act by the issuance of that warning notice.

(9) Ballard's discharge for having received multiple warning notices

Before 7 a.m. on June 29, Production Vice President Simpson met with Sheet Metal Department Superintendent Poleto, General Foreman Schloegel, and Foreman Frickey. All that came of that meeting was that Simpson told Poleto to go and find out what excuse Ballard might give for having exited gate 22 during working time, without permission, during the previous day. Poleto met Ballard at the start of the shift and asked Ballard why he had left the premises on the day before; Ballard denied that he had done so. As both Poleto and Ballard testified, Poleto told Ballard that he was not then fired, but "they" were discussing the matter with Respondent's attorneys. Poleto told Ballard to "go home." (That is, Poleto suspended Ballard for the day.)

On June 30, Simpson met with the same supervisors and Winfield. After getting the various accounts, Simpson excused all in attendance except Poleto. Simpson and Poleto reviewed copies of all of the warning notices to Ballard that are discussed above. Poleto testified:

> So after reviewing all of those documents since he [Ballard] has been back and several of them being final warnings, is when I made the decision that it was that Mr. Ballard deliberately didn't obey the instructions from his foreman and didn't abide by the policies of the Company.
>
> And at that time, I determined that he needed to be terminated because he wouldn't follow—he would deliberately wouldn't follow the rules of the Company or instructions from his supervisor.

Simpson (vol. 139) testified consistently with Schloegel. I do not believe that Poleto made the decision to discharge Ballard; Simpson did, but it does not matter. Ballard was being discharged because he had been issued all of the above-discussed warning notices.

On June 30, Schloegel met Ballard before Ballard could sign in. Schloegel told Ballard that he was discharged, "For not

[158] I believe that Schloegel ventured this untruthful testimony because he felt forced to deny the simple fact that supervisors do not issue warning notices each time that they see an employee not wearing safety glasses in a production area. As Electrical Department Superintendent Terry (vol. 92) put it: "You have got to be reasonable with it; otherwise, you would be writing up everybody in the shipyard every day. And, you know, that is not what we are there for."

following Company rules and regulations," according to Ballard.

Ballard's Discharge—Conclusions

Two of the warning notices (the ones for gate-exiting) that Ballard was issued after his return to work pursuant to the Board settlement agreement were valid, but there is no testimony by either Poleto or Simpson upon which a conclusion could be reasonably based that Ballard would have been discharged solely because of those two warning notices even in the absence of Ballard's prounion sympathies. I have concluded that Ballard's April 26 warning notice for unauthorized postings of handbills, Ballard's May 18 warning notice for loafing around the water cooler, Ballard's June 6 warning notice for not wearing safety glasses, and Ballard's May 28 warning notice for not wearing safety glasses, were issued in violation of Section 8(a)(3). According to the testimony of both Simpson and Poleto, Ballard was discharged, in part, because of these warning notices.

A discharge of an employee on the basis of an accumulation of warning notices, some of which were issued in violation of Section 8(a)(3), is itself a violation of Section 8(a)(3). I, therefore, conclude that by discharging Ballard on June 30, Respondent violated Section 8(a)(3) of the Act. The June 29 suspension of Ballard (while "they" were discussing the matter) was not specifically alleged in the complaint, but the matter was fully litigated; the suspension was just a 1-day step in imposing the violative discharge, and it is equally violative of Section 8(a)(3), as I further find and conclude.

2. Employees warned or discharged for absenteeism or tardiness

As previously noted, the Avondale Employees' Guide lists as its general offense-1, "Unexcused absences of three (3) working days within a 30-day period." The Guide also lists as major offense-1, "Unexcused absences of three (3) consecutive working days." Both offenses turn on whether Respondent's supervisors consider an absence to be excused or unexcused.

When a foreman completes his daily Man-hour Control Report (MCR), and he then considers an employee's absence to be excused, he will enter (or "code") an "05" on the MCR for that absence. If the supervisor considers the absence to be unexcused, he will place an "06" on the MCR. As noted above, the Avondale Employees' Guide requires employees to notify their superintendents or department heads of the reasons for absences and tardiness "on a daily basis." Such notifications are referred to as "call-ins." Call-ins by first- and second-shift employees are to be made before, or in the early part of, the shift; third-shift call-in requirements are discussed separately, below. Many supervisors testified that, if employees give them advance notice that they are going to be absent, they will code the employees' absences as "05," excused, on the days of those absences. Some supervisors testified that if they know that an employee has called in to their departmental office on the day of an absence, they will also code the employee as "05," even if the employee has not given advance notice that he will be absent. Employees are coded "06," unexcused, if they do not give their foremen advance notice or their foremen do not know that the employees have called to the departmental offices before they make out their MCRs.

Respondent's supervisors consistently testified that, whether an employee is coded "05" or "06" on the day of his absence, he is required to present documentation of the reason for his absence when he returns.[159] Respondent accepts most anything for documentation; doctors' excuses were the most common in this case, but Respondent also accepts receipts for automobile repairs, or even parts, if an employee claims that his absence was caused by a breakdown of his automobile.[160] If an employee fails to present documentation upon his return, his absence is considered to be unexcused, even if he had called in, or had given advance notice, and even if his absence had originally been coded as "05." On the other hand, even if an employee is recorded initially as "06," his absence may not be counted against him if he produces satisfactory documentation when he returns. (Whether he called in, or gave other advance notice, may be a factor in that determination.)

Records of attendance are maintained by departmental clerks. The clerks in some departments maintain call-in logs which reflect the days that employees call in and the reasons that they give for their absences. Employees usually present documentation to their foremen when they return from their absences. The foremen usually photocopy the documentation, return the originals to the employees, and send the copies to the clerks. The clerks record the documentation on departmental records. (The MCRs cannot be retroactively changed even if employees present satisfactory documentation when they return from absences; this is because, by the time an employee returns and presents the documentation, the MCR of the day of his absence has already been delivered to Respondent's central data processing department and recorded there.) The clerks confer with departmental superintendents (or sometimes general foremen) if employees' absenteeism records appear to warrant discipline under the Avondale Employees' Guide. Then decisions whether to discipline employees for absenteeism are made by superintendents or general foremen.

Absenteeism, like other disciplinary offenses, is subject to Respondent's progressive disciplinary system. As stated in the Avondale Employees' Guide, the progressive disciplinary system starts with warning notices and progresses through discharges. In this section of the decision, I consider the cases of the alleged discriminatees whom the General Counsel contends were issued warning notices or discharged on the pretext of absenteeism. (Also in this section, I consider the case of one alleged discriminatee who was discharged for tardiness, and I consider the case of another alleged discriminatee who was issued one warning notice for union solicitation as well as three warning notices for absenteeism.)

a. Isador Ancar's discharge for absenteeism

Isador Ancar (vols. 19, 20, 131, and 158) was a brush painter until he was discharged on June 29, 1993. The second complaint, at paragraph 94, alleges that by discharging Ancar Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Ancar because of his known union activities and expressions of sympathy which included his accepting and distributing union literature in view of super-

[159] There do appear to be a few examples where supervisors did not require documentation, but they were not enough in number to find that, when Respondent did require documentation from returning employees, it was engaging in disparate treatment, which is essentially what the General Counsel contends.

[160] Of course, some absences do not permit documentation; illness short of that which requires purchase of medicine or medical services would be an example. No such absence is an issue in this case, however.

visors at one of Respondent's gates, displaying union authorization cards in the presence of a supervisor, and placing a "Union-Yes" sticker on his lunchbox. The General Counsel further contends that Ancar's prounion sympathies were known because he responded affirmatively to an unlawful interrogation. The complaint further alleges that Ancar was threatened by a supervisor in violation of Section 8(a)(1). Respondent denies that the alleged threat and interrogation occurred. Respondent further answers that the supervisors involved in Ancar's discharge had no knowledge of any prounion sympathies that Ancar may have held at any relevant time, and Respondent answers that Ancar was discharged solely because of his record of absenteeism. Finally, Respondent contends that Ancar is barred from any possible remedy of reinstatement because, a few days after his discharge (when he returned to the plant to check in his company-owned tools and receive his final paycheck) Ancar attempted (unsuccessfully) to steal about 20 of Respondent's paintbrushes. The General Counsel replies that Ancar was discharged disparately, and unlawfully, because other employees had worse absenteeism records, but they were no more than issued warning notices for their conduct. The General Counsel further called Ancar in rebuttal to deny that he attempted to steal the paintbrushes. Ultimately, I find and conclude that Ancar was treated disparately, and he was discharged unlawfully, but the preponderance of the evidence is that he did attempt to steal paintbrushes from Respondent and he should be denied reinstatement for that reason.

Ancar was first employed by Respondent in 1988, and he worked until March 1992.[161] Ancar was rehired in October 1992. Ancar testified that he distributed union handbills at Respondent's gate three times before the June 25 Board election. Ancar testified that the following supervisors stood on the levee overlooking the gate and saw him distributing the handbills on one or more of those three occasions: General Foremen Tommy Bourgeois and Glenn Clement, Lead Foreman Erroll Rodrigue,[162] and Line Foremen Terry Knight and Randall Laborde. Ancar testified that twice he saw Bourgeois taking notes as he watched the handbilling in which Ancar participated. Ancar further testified that he maintained a "Union-Yes" bumper sticker on his lunchbox throughout the union campaign.

Ancar testified that, on April 17, he and two other employees, Calvin _____ and Connell _____ (the last names were unknown to Ancar) were looking at union cards that they had received at a gate. Foreman Jay Pertuit approached the three men, and Ancar put his card in his lunchbox. Pertuit took Calvin and Connell to another work area and then returned to Ancar to tell Ancar what job to do next. Ancar was asked and he testified:

> Q. What, if anything, was said when Mr. Pertuit came back and told you what to do?
>
> A. He told me if I sign a union card, I could get fired.
>
> Q. And what, if any, response did you make?
>
> A. I asked him what he meant by that.
>
> Q. And what, if anything, did Mr. Pertuit do then?
>
> A. He walked away.

Based on this testimony by Ancar, paragraph 17 of the second complaint alleges that Respondent, by Pertuit, "threatened its employees with discharge because they engaged in union activities."[163] Pertuit testified, but he did not deny this testimony by Ancar. I found Ancar's testimony on the point to be credible, and I conclude that, in violation of Section 8(a)(1) Respondent, by Pertuit, on April 17, 1993, threatened its employees with discharge if they signed union authorization cards.

In May, at his request, Ancar was transferred to wet dock-3 where Randall Laborde and Carl Mott Jr. became his foremen. Comeaux's Grocery Store (Comeaux's) is located near the plant. Ancar and alleged discriminatee Larry Gibson are friends; Laborde and Gibson are also personal friends; Laborde and Gibson often met at Comeaux's to drink beer after work. Ancar testified that in May, he went to Comeaux's and found Laborde and Gibson, and also Mott. Ancar joined the three other men for beer. (Ancar testified that he had drunk beer after work with Laborde at Comeaux's "several" times. Ancar testified that only twice before had he drunk beer after work with Mott at Comeaux's, once several years before, and once during the period following his being rehired in October 1992.) According to Ancar, as soon as he joined the three other men, Mott asked him and Gibson if they had signed union authorization cards.[164] Ancar and Gibson told Mott, and Laborde, that they had. Mott then asked Ancar and Gibson what the Union could do for them. Ancar testified that he answered: "better wages and need a change and better conditions." Gibson answered: "it would stop harassment by some of the foremen." Ancar testified that Mott and Laborde then denied that they had ever harassed employees. Then, further according to Ancar: "Mott asked . . . [i]f the election would come up, would we vote yes for the election." Gibson and Ancar replied that they would. After that, the men discussed other things. Gibson (vol. 26) testified that he and Ancar were at Comeaux's, talking about the Union, when Laborde approached them.[165] Laborde immediately waived Mott over to join them. Gibson testified that, immediately upon Mott's joining the conversation, Mott asked him and Ancar if they had signed union authorization cards. When the employees responded affirmatively, Mott asked them why. Gibson showed the supervisors some union literature. Mott, according to Gibson, responded that "the Union was just going to hurt us." Further according to Gibson, Mott and Laborde, "both asked us if we intended to vote for the Union in the election." Gibson testified: "We both told him [sic] yes." Based on this testimony by Ancar and Gibson, paragraph 28 of the second complaint (as amended at trial) alleges that Mott and Laborde unlawfully interrogated employees.[166]

Mott (vol. 126) testified that Ancar initiated the conversation about the Union at Comeaux's, and Ancar and Gibson both

[161] Ancar testified that he "resigned" in March 1992. Respondent's records, however, indicate that his first employment ended when he simply stopped coming to work, and he was terminated as assumed to have quit.

[162] In his testimony Ancar referred to Erroll Rodrigue as "Erol Mendez." The parties stipulated that the "Erol" to whom Ancar referred necessarily was Foreman Erroll Rodrigue.

[163] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Ancar, as well as the charge in Case 15–CA–12171–1.

[164] When he was called by Respondent (vol. 131), Ancar admitted that he was holding a union authorization card in his hand at the time of this incident.

[165] Gibson acknowledged that, from the first of the organizational campaign, he told Laborde that he supported the Union.

[166] See All dates mentioned in Clark's case are between March 1, 1993, and January 10, 1994, unless otherwise indicated.

volunteered that they supported the Union. Mott denied that he asked either Gibson or Ancar if they had signed a union authorization card or if they would vote for the Union in the scheduled June 25 Board election. Laborde (vol. 124) testified that Ancar, as well as Gibson, had told him from the beginning of the organizational campaign that he was "for" the Union. On direct examination, Laborde was asked who brought up the subject of the Union at Comeaux's. Laborde answered that he did not remember, but he knew that he did not. When asked specifically if Mott had brought up the subject of the Union, Laborde replied: "I don't recall." Laborde was then asked on direct examination and he testified:

> Q. [By Ms. Canny]: At any time that day at Comeaux's, did you ask Mr. Gibson or Mr. Ancar if they had signed a union card?
>
> A. No, I didn't.
>
> Q. At any point that day at Comeaux's, did you ask Mr. Gibson or Mr. Ancar if they were going to vote for a union?
>
> A. No.
>
> Q. Why not?
>
> A. There was no need to. I already knew how they stood.
>
> Q. Did you hear Mr. Mott ask Mr. Gibson or Mr. Ancar if they signed a union card?
>
> A. No, I didn't.
>
> Q. Did you hear Mr. Mott ask Mr. Gibson or Mr. Ancar if they were going to vote for a union at Avondale?
>
> A. No, I didn't.

It is to be noted that Laborde flatly denied that he brought up the subject of the Union, but he only testified that he could not remember if Mott had done so. Also, in answer to direct, unequivocal questions, Laborde flatly denied that he had asked Ancar and Gibson if they had signed union authorization cards or if they were going to vote for the Union. In answer to the equivocal, escape-providing, questions of whether he had *heard* Mott ask the same questions, Laborde testified that he did not. In my opinion, both supervisors were testifying untruthfully; Mott was just willing to do so more directly.[167] Although they differed on the sequence of how the four men gathered at Comeaux's, Ancar and Gibson agreed about what they were asked there. Gibson vacillated about whether he was questioned by one supervisor or both, and from the examination of Laborde it is clear that it was only Mott who questioned the employees. Even if both Gibson and Ancar had then, or previously, told the supervisors that they were "for" the Union, they had not revealed that their union activities had gone as far as signing union authorization cards. And even if there was an underlying friendship between Laborde and Gibson, Mott was not entitled to ask Gibson and Ancar if they had signed union authorization cards; nor was Mott entitled to ask if either Ancar or Gibson (still) intended to vote for the Union in the Board election. Accordingly, I find and conclude that, in violation of Section 8(a)(1), Respondent, by Carl Mott Jr. in mid-May 1993, interrogated its employees about their union membership, activities, and desires.

[167] As noted above, Mott's willingness to lie under oath was demonstrated, inter alia, in his testimony that Larry Danos discharged discriminatee Marshall, which testimony was squarely contradicted by his own pretrial affidavit.

Ancar's Discharge

Ancar received two written warnings for his absenteeism after he was rehired in October 1992. The first warning notice is dated December 14, 1992; citing absences of November 23 and 25 and December 4, the warning notice states: "Absences of 3 or more days in a 30-day period. Failure to submit paperwork for an excused absence for car repairs." (Apparently for one of the three cited absences, Ancar had given notice that he was, or would be, absent for needed automobile repairs, and his absence was preliminarily recorded as excused, but he did not submit documentation when he returned.) Ancar's second warning notice for absenteeism is dated February 5, 1993; citing absences of January 11 and 18 and February 4, the notice recites: "Absences of 3 or more days in a 30-day period. Failure to call into the main paint office during all of your absences. You have been notified of the call-in procedure during absences." Ancar testified that after he received the February 5, 1993 warning notice, he and employee Dee Singleton were spoken to by Foreman Roland Ongeron. As Ancar acknowledged, "He told us that if we missed any more days we would be fired."[168]

From June 1 until June 28, Pertuit was absent for jury duty and vacation, and Lead Foreman Rodrigue directly supervised Pertuit's crew. Ancar was again absent on June 1; he was coded "05" (excused) on Rodrigue's MCR. (Rodrigue testified that he believed that he coded Ancar "05" because Ancar had given him satisfactory prior notice of his need to be absent on June 1.) Ancar was again absent on June 21, one of the days that Pertuit was absent for jury duty. Ancar testified that he took the day off to get a marriage certificate. Ancar testified that he called in to report his absence, and Respondent's call-in log reflects that he did so. Ancar further testified that he brought documentation (the certificate) when he returned, but Rodrigue did not ask for it, and he did not offer it to Rodrigue. Rodrigue coded Ancar as "06" (unexcused) for June 21.

Ancar testified that he got married on Saturday, June 26, and he went on his honeymoon to Biloxi, Mississippi (which is less than a day's drive from New Orleans). Ancar testified that on Sunday night, he just decided not to come back to work on Monday. On June 28, he called departmental clerk Joy Plaisance to report that he would be absent. According to Ancar: "I told Joy that I wasn't going to be in, I was out of town, and she told me that I was fired."

Ancar testified that he made this call to Plaisance at 7 on June 28. In a claim that he made with the Louisiana Department of Labor, however, Ancar acknowledged that he did not call in until 9 on June 28. When she was called by Respondent, Plaisance (vols. 145, 146) identified the call-in log for June 28 which reflects no call from Ancar on that date. Respondent's counsel did not, however, ask Plaisance to admit or deny the exchange that Ancar described. I credit Ancar about the substance of the call, if not the time.[169]

[168] Singleton did have subsequent absences, and she was not discharged. The General Counsel contends that the treatment of Singleton proves disparate treatment of Ancar. Ongeron, however, was necessarily referring to future unexcused absences, and Singleton's absences subsequent to Ongeron's warning were excused.

[169] As it will be seen, well before 9 on June 28, Plaisance knew from Clement that Ancar had been discharged, and it is therefore unlikely that she would have bothered to enter Ancar's call in the call-in log if she knew that. Accordingly, there is no significance in the fact that the call-in log does not reflect Ancar's call of June 28.

On Tuesday, June 29, Ancar returned to the plant. He first found Lead Foreman Rodrigue and asked why he had been discharged; Rodrigue replied that Ancar should ask Clement, who was then riding up on a motor bike. According to Ancar: "I asked Glenn what was happening. He told me I was fired because I missed Monday." Ancar protested that he had been on his honeymoon. Clement replied that Ancar should have told Rodrigue (who had been substituting for Foreman Pertuit until Pertuit returned from leave on June 28) that he was going to be on his honeymoon on June 28. Clement further asked Ancar why he had not done so. Ancar testified, "I told him that was personal." Further according to Ancar: "He [Clement] told me I was fired and for Erol to escort me off the premises."

The General Counsel contends that, at most, Ancar should have been treated as having only one unexcused absence in June, that of June 28. Rodrigue testified that he treated Ancar's June 21 absence as unexcused because Ancar did not present documentation for his absence when he returned to work on June 22. Ancar denied that each day's absence required documentation; Ancar testified, "It is up to you if you want to bring paperwork." Then Ancar testified that it was up to the supervisor to decide if documentation would be required of employees who had been absent. Based on this and certain other testimony, the General Counsel argues on brief that, solely because Ancar called in on June 21, his absence on that date should have been treated as excused. The preponderance of the evidence, however, is that, as well as calling in, employees are required to present documentation for absences, if possible. Specifically in Ancar's case, he was warned, in part, on December 14, 1992, because he had failed "to submit paperwork" when he had been excused for 1 day for car repairs. Also, Ancar acknowledged that he did not offer his documentation to Rodrigue when he returned to work on June 22 (and he did not ask for more time to secure his documentation). There certainly is no argument that a supervisor must seek out an employee and ask for documentation of past absences; presumably, if an employee has it, he will tell his supervisor in order to validate an excuse he had previously tendered or to prevent a previous "unexcused" designation from being counted against him. I find that Ancar was properly charged twice with unexcused absences in June; once for June 21, and once for his final absence of June 28.

Ancar's Discharge—Respondent's Evidence

Respondent contends that Ancar was discharged solely because of: (1) his unexcused absences of June 21 and 28 which (2) occurred after he had already received two warning notices for absenteeism in the preceding 12-month period and, which (3) occurred after he had been given two specific oral warnings of discharge for any future absences. As I find herein, however, General Foreman Clement made the decision to discharge Ancar on June 28, and, at the time, Clement did not know of Ancar's June 21 absence or either of the prior oral warnings to Ancar.

(The following narration of Respondent's defense is complicated by the fact that the testimonies of Respondent's witnesses conflicted about when Clement made the decision to discharge Ancar, and they conflicted about what information Clement possessed when he decided to discharge Ancar. Clement testified that he made the decision on June 29, after Ancar returned to work from his June 28 absence. Clement further testified that he made the June 29 decision at the job site solely on the basis of (1) Ancar's June 28 absence and (2) Ancar's warning notice history. Clement further testified that he found out about Ancar's warning notice history on June 29. Much after Clement testified, however, Lead Foreman Rodrigue testified that Clement (and Superintendent Borg) made the decision to discharge Ancar in a supervisors' meeting on June 28, at which time he told Clement (and Borg) about (1) Ancar's June 21 absence and (2) Ancar's history of oral warnings. Ultimately, I conclude that the meeting described by Rodrigue did not occur and that Clement made the decision on June 28, without conferring with Rodrigue, when he knew only that Ancar was absent on that date and that Ancar had two prior (written) warning notices.)

Ancar's warning notices of December 14, 1992, and February 5, 1993, are quoted above. Also as noted above, Ancar admitted that on February 5 Ongeron orally warned him that any more absences would result in his termination. Respondent contends that a second oral warning was given to Ancar on June 22 by Lead Foreman Rodrigue. Again, Rodrigue substituted for Pertuit in June until Pertuit returned from jury duty and vacation on June 28. Rodrigue testified that on June 22, when Ancar returned from his June 21 unexcused absence, he told Ancar that "the next day you miss unexcused there is a possibility you will be terminated." Ancar was called in rebuttal, but he did not deny this testimony by Rodrigue.

When Pertuit returned from vacation and jury duty on June 28, he resumed being the supervisor of the crew upon which Ancar was scheduled to work. Rodrigue testified that he was present at the beginning of the June 28 shift when Pertuit signed in the crew. Rodrigue testified that when Ancar's absence was noted he went to the office and met with Paint Department Superintendent Bourg and General Foreman Glen Clement. Rodrigue testified that at the "supervisors' meeting," as I shall call it, Rodrigue reported: (1) Ancar's absence of that date, (2) Ancar's absence of June 21, (3) his June 22 warning to Ancar, and (4) Ongeron's February 5 oral warning to Ancar. (Rodrigue testified that he could make this report because he had previously been informed of Ongeron's February 5 warning to Ancar by Ongeron. Ongeron did not testify.) Further according to Rodrigue, he, Borg, and Clement also possessed at the June 28 supervisors meeting, and they reviewed there, Ancar's two prior warning notices for absenteeism. Rodrigue further testified that Clement checked with Plaisance and found that as of that hour, 8 a.m., Ancar had not called in. Rodrigue testified that he recommended that Ancar be discharged for absenteeism, and Bourg and Clement agreed.

All of Rodrigue's testimony about the supervisors' meeting is seemingly logical, and there exists the element of seeming consistency with Ancar's testimony that Plaisance told him on June 28 (as I have found, at 9) that he had been discharged. The problem with Rodrigue's testimony about the supervisors' meeting is that it is corroborated by neither Bourg nor Clement.

Clement was called by Respondent on day-86, well before Rodrigue testified. The first question that counsel asked Clement about Ancar's discharge was:

> Q. [By Ms. Canny]: Directing your attention to June 29, 1994, do you recall whether or not you saw Mr. Ancar that day?

That is, Clement was led directly to the day *after* Ancar's final absence on June 28. Clement was not asked how, or when, or even if, he discovered on June 28 that Ancar was absent. Spe-

cifically, Clement was not asked about any supervisors' meeting of June 28. (Clement also was not asked for any testimony that might explain how Plaisance could have told Ancar on June 28 that he had been discharged.)

After being led to testify only about June 29, Clement testified that, at the jobsite, when Ancar appeared, he asked Ancar where he had been on June 28. According to Clement, Ancar told him that he had been absent on June 28 because he had gotten married (and had not called in because it was "personal"). Clement testified that he then made a call on his portable radio. Clement was asked and he testified:

> Q. [By Ms. Canny]: What did you do or who did you speak to [then, on June 29]?
>
> A. I called the main paint office on my radio to check with Joy [Plaisance] and found out how many citations this employee had in his folder, and I went and told [Ancar] that he had enough citations in his folder now to warrant a termination, you know. He should have told us where he was at and why he missed.
>
> Q. And did he say anything else?
>
> A. Yes. He got very upset and name-calling went on. He said, "I don't think I had to do that. It was a personal problem, and I don't see what is the problem."
>
> Q. And what, if anything, did you do?
>
> A. I terminated him. . . . I called Security to escort him out of the yard.

Respondent's counsel did not ask Clement why he discharged Ancar. From all it appears from this testimony on direct examination, Clement discharged Ancar solely because of his June 28 absence and his history of two warning notices. Specifically, Clement did not testify that he discharged Ancar, even in part, because he had learned that Ancar had been absent on June 21 and had received two oral warnings.

Further, when he was on cross-examination, Clement was bluntly asked, and he bluntly replied:

> Q. And it is fair to say on the morning you fired him, you really didn't know how many days he had been absent when you fired him? . . .
>
> A. I did not.

Clement was then asked about who else he may have consulted with before deciding to discharge Ancar:

> Q. And it is fair to say other than what you have told us that Joy [Plaisance] told [you], no one else has told you what is in Mr. Ancar's personnel file.
>
> . . . .
>
> A. No one else has told me what is in Mr. Ancar's personnel file. . . .
>
> Q. Did you ever speak to Charlie Bourg about Isador Ancar?
>
> A. I may have.
>
> Q. You may have; you might not have; you are not sure?
>
> A. Well, I may have.
>
> . . . .
>
> JUDGE EVANS: Did Bourg ever speak about Ancar to you?
>
> THE WITNESS: No, he didn't.

In summary, Clement did not testify how he found out about Ancar's absence of June 28; he did not testify that he met with Bourg or Rodrigue on that date (in a supervisors' meeting or otherwise); he did not testify that Rodrigue told him about Ancar's absence of June 21; and he did not testify that he knew about the oral warnings that Rodrigue and Ongeron had given to Ancar.

Borg (vol. 81) testified twice on direct examination that he had nothing to do with the decision to discharge Ancar. On cross-examination, Borg specifically denied that there was any meeting such as Rodrigue described:

> Q. And you didn't deliberate in the decision to fire him the last time he was fired.
>
> A. No, I did not.
>
> Q. And no one discussed it with you.
>
> A. No.
>
> Q. For example, none of his general foremen or line foremen discussed it with you.
>
> A. No. The only time I knew about it, when I seen the papers on my desk that he was terminated.
>
> Q. For example, Mr. Erroll Rodrigue didn't discuss it with you.
>
> A. Erroll Rodrigue? I can't remember whether he did or not.
>
> Q. But you have no recollection.
>
> A. No.
>
> Q. And you didn't tell anybody anything that would cause them to fire Mr. Ancar.
>
> A. No, I did not.

That is, Borg's testimony squarely conflicted Rodrigue's testimony that there was a June 28 supervisors' meeting in which Ancar's absences of June 21 and 28, and Ancar's oral warnings and Ancar's written warning notices were discussed. And, of course, Borg's testimony squarely conflicts with Rodrigue's testimony that the decision to discharge Ancar was made at some "supervisors' meeting" on June 28.

It is clear enough to me, and I find, that the supervisors' meeting that Rodrigue described as having happened on June 28 did not occur; otherwise, Rodrigue's testimony about the meeting would have received corroboration, not contradiction, from Clement and Bourg . The next question is why Rodrigue's testimony was fabricated.

Like Clement, Pertuit (vol. 95) testified for Respondent, but he was not asked about the events of June 28. Like Clement, Respondent's counsel led Pertuit directly to the events of June 29; to wit:

> [By Ms. Canny]: Your second day back at work, Tuesday, June 29, did you have a crew?

Pertuit duly answered that he did, indeed, have a crew on June 29, something that is not in dispute. After meeting this nonissue, Respondent's counsel then asked Pertuit about what he witnessed being said between Clement and Ancar on June 29, another matter that is not in dispute. (Additionally, it is to be noted that, in his testimony about the June 29 exchange between Clement and Ancar, Pertuit did not corroborate Clement's testimony that, on June 29, after Ancar arrived at the job site, Clement used his radio to call anyone. This failure of corroboration by Pertuit is part of the reason that I find infra that Clement's radio call to Plaisance occurred on June 28, not June 29.)

Pertuit, not Rodrigue, was Ancar's direct supervisor on June 28. One would have expected Pertuit to have testified about the events of June 28 because, if Rodrigue's testimony about the supervisors' meeting had been truthful, Pertuit could have corroborated Rodrigue's testimony that he (Rodrigue) was present with Pertuit's crew at the start of the June 28 shift when Ancar's absence was first noticed. This was a critical element; after all, that testimony by Rodrigue was the predicate for his testimony that there was a June 28 supervisors' meeting at which Ancar's entire record (written, oral, and absenteeism) was reviewed by himself, Clement, and Borg. Although Pertuit could have provided this critical testimony, he was not asked for it by Respondent. The question is why.

It appears to me that Clement and Pertuit were steered around the events of June 28 because it was on that date, not June 29, that (1) Clement went to the jobsite, (2) found from Pertuit, not Rodrigue, that Ancar was absent, (3) radioed Plaisance, (4) found out that Ancar had two prior warning notices for absenteeism, and (5) announced to Pertuit and Plaisance that Ancar was discharged. I draw the strongest possible adverse inferences against Respondent for its failure to ask Pertuit about the events of June 28.

(Pertuit was, in all respects, a truthful witness; indeed, he was one of the very few completely truthful witness who testified at the hearing. It is apparent to me that his truthfulness was the reason that Respondent guided Pertuit around the events of June 28. It is also Pertuit's truthfulness that evidently caused Respondent not to ask him about the above-described threat to which Ancar testified; to wit: "He [Pertuit] told me if I sign a union card, I could get fired." On brief (p. "Paint-74") Respondent states that it "has declined to present testimony on this allegation because it is time-barred as a matter of law and a proper motion to dismiss was made at the hearing concerning the allegation." I do not believe this statement. Respondent invariably asked other supervisors for such denials, even though it also objected that there were no underlying charges for the allegations based on the conduct of those other supervisors. Also, even if there were no supporting charge for the 8(a)(1) allegation that Pertuit threatened Ancar, Ancar's testimony was evidence of the baldest kind of animus, and it was animus that was directed immediately against an alleged discriminatee who also claimed to have been interrogated (by Mott, at Comeaux's) about whether he had signed a union authorization card. In all other cases, Respondent adduced testimony in denial of such expressions of animus from its witnesses, even when the expressions were not separately alleged as violations.)

Clement testified that he did not routinely review MCRs; therefore, someone else must have told him of Ancar's June 28 absence. It was not Rodrigue, or Clement would have so testified. It is clear enough to me, and I find, that it was Pertuit who reported Ancar's June 28 absence to Clement, and I find that Pertuit did so on June 28. Pertuit did not then tell Clement that Ancar had also been absent on June 21 because Pertuit, himself, had been absent on June 21, and Pertuit did not even know about that absence.[170] Also there is no evidence that Pertuit had known about Ongeron's and Rodrigue's oral warnings to Ancar, so he could not have told Clement about those warnings before Clement discharged Ancar.

Therefore, on June 28, not June 29, with no more information than that Ancar was absent on June 28, Clement radioed Plaisance and asked how many warning notices Ancar had accumulated by that date. When Plaisance told Clement that the number was two, Clement, immediately, and without knowledge of any other absences of Ancar, and without knowledge of any prior oral warnings to Ancar, decided to discharge Ancar. Then, as Ancar described, at the start of the shift on June 29, Clement met Ancar and told him that he was discharged for missing June 28, and only June 28.[171]

(It is further apparent that Clement, on June 28, at the jobsite, announced his decision to Pertuit, and that is why the truthful Pertuit was not asked about the events of June 28. It is further apparent that Clement then, on June 28, on the radio, related his jobsite decision to Plaisance, and that is why Plaisance was not asked about the events of June 28 while she was on direct examination. I draw an adverse inference against Respondent for its failure to ask Plaisance when it was that Clement radioed her and asked for Ancar's record of warning notices. I further believe that Plaisance flatly lied when, on cross-examination, she disclaimed memory of any of the circumstances of Ancar's discharge. On June 28, Plaisance told Ancar that he had been discharged; it is unlikely that by time of trial she had forgotten that she did so, and why. Because the supervisors' meeting of June 28 did not occur, it is apparent that Plaisance learned of Ancar's discharge from her, undoubtedly memorable, radio call from Clement.)

All of which is to say is that, contrary to the contention of Respondent, Ancar was not discharged for two unexcused absences that followed two written warning notices and two oral warnings. The decision-maker, Clement, did not know about either oral warning or Ancar's June 21 unexcused absence. At best, Clement discharged Ancar because he was absent once after having received two warning notices for absenteeism within the preceding 12 months.

(It is further obvious to me that Respondent advanced (on day-110 of trial) Rodrigue's false testimony about the June 28 supervisors' meeting because Clement had previously (on day-86 of trial) made two admissions that are inconsistent with Respondent's theory of defense: (1) Clement admitted on cross-examination that he did not know what absences, other than June 28, that Ancar may have had. Therefore, Clement's testimony conflicted with Respondent's theory that Ancar was discharged, in part, because he had two unexcused absences after having received two warning notices for absenteeism. (2) Clement had also admitted that, in making his decision to discharge Ancar, he possessed only Plaisance's report of the number of warning notices that Ancar had accumulated; this was an acknowledgment by Clement that he did not rely on Rodrigue's and Ongeron's oral warnings. Therefore, Clement's testimony conflicted with Respondent's further contention Ancar that was discharged, in part, because he had received two oral warnings. It was after this two-point failure of testimony by the decision-

[170] Of course, it could have been someone other than Pertuit who notified Clement of Ancar's June 28 absence, but it was not Rodrigue or Plaisance; otherwise, Clement would have so testified. Whoever it was, there is no basis for assuming that he (or she) knew of, and could have told Clement about, Ancar's June 21 unexcused absence (or prior oral warnings).

[171] At one point on cross-examination, Clement testified that part of the reason that he discharged Ancar was that Ancar displayed an "attitude" on June 29 when he asked Ancar where he had been on June 28. If Ancar displayed an "attitude" on June 29, however, it was only after he had been told (by Plaisance, on June 28) that he had been discharged.

maker, I firmly believe, that Rodrigue's false testimony was procured.

(Rodrigue's testimony about a supervisors' meeting on June 28 was, I further believe, outright perjury. As discussed infra, Respondent contends that alleged discriminatee Octave Rouege should be denied any remedies under the Act because of his perjury. I shall note again Rodrigue's perjury when I consider Respondent's contention in regard to the effect of Rouege's perjury. At the same time I will also consider other cases of perjury that were demonstrated at the hearing.)

Ancar's Discharge—the General Counsel's Evidence of Disparate Treatment

In its case, Respondent called several paint department supervisors to testify that employees could (but not "would") be discharged after only one absence that followed two warning notices for absenteeism that were less than 12 months old. On rebuttal, in an effort to show Ancar was treated disparately, the General Counsel introduced many warning notices that Respondent issued in the 3 years prior to March 1, 1993, the date that the overt organizational campaign attempt began.

Under the Avondale Employees' Guide's general offense-1, warning notices are to be issued for three absences in a 30-day period. It goes without saying that any employee who is issued a third general offense warning notice for absenteeism has not been discharged on the occasion of his second absence following his second warning notice for absenteeism. As his Exhibit 800, the General Counsel introduced several hundred warning notices that demonstrated that, from 1990 through the inception of the overt organizational campaign, 58 employees were permitted to accumulate three warning notices for absenteeism.[172] As his Exhibit 792, the General Counsel introduced many other warning notices that demonstrated that, in the 3 years before the organizational campaign began, 66 employees were permitted to accumulate four or more warning notices for absenteeism.

(In considering Ancar's case, all of these comparative cases are relevant, even though some involve employees in other production departments. Respondent would have the Board treat its departments as separate employers for purposes of considering its discipline for absenteeism and some other offenses, but Respondent would have the Board treat its departments as one employer for purposes of considering its discipline for safety violations, theft, drug-use, vandalism and some other offenses. This the Board will not do; Respondent's separate departments are not the functional, or legal, equivalents of separate employers. Absent probative evidence that the employees have been informed of Respondent's supposedly differing standards for different departments, comparisons of Respondent's discipline of employees in different departments may be validly made. As it happens, however, a majority of the cases disclosed by the General Counsel's Exhibits 792 and 800, combined, involve the paint department. Of the 58 comparative cases disclosed by the General Counsel's Exhibit 800, 39 involve employees in the paint department. Of the 66 comparative cases disclosed by the General Counsel's Exhibit 792, 33 involve employees in the paint department.)

[172] G.C. Exh. 800 includes 64 series, and therefore 64 cases to be compared with Ancar, but I exclude the series marked 800(j),which covers more than a period of 12 months. For purposes of contrast only, I also exclude the series marked 800(z), (jj), (kk), (ll), and (ss), which were not issued before the organizational campaign began.

In appendix D of this decision, I have summarized the cases of employees who were shown by the General Counsel's Exhibit 792 to have been issued four or more warning notices for absenteeism in 12-month periods from 1990 through the inception of the organizational campaign on March 1, 1993. As appendix D is read, it should be noted that many of the third (or greater) warning notices conclude with words of "Final Warning." These comments necessarily create the presumption that the employee is not being discharged even for his third (or greater) series of more than three or more unexcused absences in 30-day periods; this is because there is no reason to expressly "warn" an employee who is being discharged. (And the presumption is even stronger where the departmental superintendents sign the warning notice; and Bourg signed all Paint Department warning notices.) Even if this inference is not drawn, however, it is again obvious that, when an employee received his third (or fourth, or greater) warning notice for absenteeism, he had been absent at least twice, without excuse, following his second warning notice for absenteeism, and he was still not discharged. Further to be noted as appendix D is read is the fact that, quite often, more than three absences were made the subject of one warning notice; indeed, a single warning notice was issued for 10 absences that an employee had in one 30-day period. Obviously, where there are six absences noted on one warning notice, for example, the employee could have received two warning notices under the Avondale Employees' Guide, as did Ancar.

(Editing note: In addition to entering the bare numbers and dates in appendix D, I also enter comments about aspects that are particularly relevant to Ancar's case. I also make some comments about the relevance of certain of the entries in appendix D to the cases of other alleged discriminatees whom Respondent contends were discharged for absenteeism. In appendix D, I have listed the comparative cases in chronological order according to the dates of the first warning notices that the comparative employees received. The documents upon which appendix D is based were identified at trial by employees' badge numbers; to facilitate review, especially review by computer search, I include those numbers in the appendix, in parentheses, after the employees' names.)

As noted above, the General Counsel's Exhibit 800 includes 58 comparative cases of employees who were issued three warning notices for absenteeism in 12-month periods before the organizational campaign began. In addition to those 58 cases, my examination of the General Counsel's Exhibit 792 reveals that nine cases included in that exhibit are reflective of three, not four, warning notices' being issued in 12-month periods. (That is, although presented by the General Counsel as evidence of four warning notices for absenteeism, and therefore offered as part of the GC Exh. 792, these nine cases disclose instances of three, not four, warning notices being issued for absenteeism during 12-month periods, and they should have been a part of the GC Exh. 800.) These nine (additional) comparative cases of three warning notices for absenteeism being issued in 12-month periods during the 3 years before the organizational campaign began on March 1, 1993, are:

1. On September 24, 1992, Paint Department employee Conrad Noil (447) was issued his third warning notice for absenteeism in the twelve-month period that began with his October 23, 1991, warning notice that is described in Appendix D; absences of September 1, 14, 23 and 24 are cited. Like his warning notice of March 16, 1992, that

is described in Appendix D this warning notice combines Noil's failures to call in on the dates of his absences, and, also like the March 16, 1992, warning notice, it is marked "Final Warning."

2. On January 26, 1993, Noil was issued his third warning notice for absenteeism in the twelve-month period that began with his March 16, 1992, warning notice; absences of January 4, 13 and 25 are cited. Again, the warning notice combines Noil's failures to call in on all days cited, and, again, the warning notice concludes: "Final Warning." (That is, Noil was still not discharged; he was, unlike Ancar, given another chance.)

3. On January 18 and September 12, 1990, Electrical Department employee Ronald Baldwin (12658) was issued warning notices for absenteeism. (The second of these was for five separate dates ending on September 12.) On December 28, 1990, Baldwin was issued his third warning notice for absenteeism; cited are his absences of December 3, 20 and 26, 1990.

4. On June 5 and July 31, 1991, Paint Department employee number 2411 (name illegible) was issued two warning notices for absenteeism. On September 5, 1991, this employee was issued another warning notice for three absences within a 30-day period .

5. On January 14, and March 25, 1991, Shipfitting Department employee Donald Harris (12281) was issued two warning notices for missing three days in a 30 day period. On May 27, 1991, Harris was issued his third warning for missing three days in a 30-day period.

6. On February 13, 1992, Harris was issued his third warning notice for absenteeism in the year that began on March 25, 1991. This warning cites Harris' absences on January 6, 27 and 28 and February 11, 12 and 13, 1992. Of course, these two rounds of absences could have been the subject of two warning notices as well as one. The warning notice concludes: "This is your last and final warning. Continue to miss time could result in your termination."

7. On September 21, and November 10, 1992, Harris was issued additional warnings for being absent. The latter warning notice, of course, was Harris's third for absenteeism in the 12-month period that began with his February 13, 1992 warning notice. Again this warning notice concludes: "This is your last and final warning for missing time. Continue to do so will result in your termination."

8. On November 16, 1992, Paint Department employee Gregory Martin (4290) was issued a warning notice for absenteeism, his second within the twelve-month period that began with his warning notice of March 19, 1992, that is described in Appendix D. Then, on December 3, 1992, Martin was issued his third warning notice within that twelve-month period for absenteeism. The dates of November 23 and 24, and December 2, 1992, are cited. This warning notice was marked "Final Warning."

9. On September 18, 1992, despite his prior expressed final warning, Paint Department employee Alvin Roussel (4122) was issued his third warning notice for absenteeism within the twelve-month period that began with his warning notice of October 23, 1991, that is described in Appendix D; the dates of September 1, 14, 17 and 18 are cited; the warning notice is marked "Final Warning."

Therefore, the General Counsel has demonstrated that, during various 12-month periods from 1990 through the inception of the organizational campaign, Respondent issued to employees three warning notices for absenteeism 67 times, and it issued to employees four or more warning notices for absenteeism an additional 66 times.

Ancar's Discharge—Conclusions

Respondent contends that Clement, the decision-maker in Ancar's case, had no knowledge of any prounion sympathies that Ancar may have held at the time of his discharge on June 29. Respondent further relies on testimony by Rodrigue and Clement that at one employer campaign meeting, Ancar made remarks that would tend to indicate that Ancar opposed the Union. Clement, however, did not deny that, at the time of the discharge, he knew that Ancar favored the Union. Clement's failure to deny knowledge of Ancar's prounion sympathies is to be contrasted with his testimony about alleged discriminatees Patrick Noah and Carlos Henriquez, as discussed infra. Clement discharged both Noah and Henriquez, and he categorically denied that he knew of their prounion sympathies. The failure of Clement to deny knowledge of Ancar's prounion sympathies at the time that he discharged Ancar belies any contention that Clement did not know of those sympathies.

Moreover, I credit Ancar's testimony that he distributed union handbills in the presence of supervisors and he displayed a "Union-Yes" bumper sticker on his lunchbox. I find that, because of this open and obvious conduct, Respondent's production supervisors over Ancar, such as Clement, had knowledge of Ancar's prounion sympathies. This finding, of course, requires an inference that Clement, and other supervisors, saw Ancar's prounion insignia. No inference, however, is necessary for other evidence of Respondent's knowledge of Ancar's prounion sympathies and union activities. It is undisputed that Pertuit saw Ancar with a union authorization card (and, again, it is undisputed that Pertuit told Ancar that he could be discharged for signing one). Additionally, Ancar was interrogated by Mott about whether he had signed a union authorization card, and Ancar responded affirmatively. Respondent's supervisors therefore clearly knew of this union activity, as well as Ancar's prounion sympathies, at the time that he was discharged.

Knowledge of Ancar's prounion sympathies and activities has been proved; Respondent's animus against all prounion employees also has been proved; and Respondent's specific animus against Ancar's protected activity of signing a union authorization card also has been proved. It must therefore be concluded that a prima facie case that Ancar was unlawfully discharged has been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Ancar even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

To recapitulate: Respondent contends that Ancar was discharged solely because, after twice receiving warning notices for absenteeism, and after twice being orally warned that any further absence could cause his discharge, he was twice absent (on June 21 and 28). As I have found, however, the decision-maker, Clement, did not know of the prior oral warnings to Ancar, and he did not know that Ancar had been absent on June 21. Therefore, the elements of two absences and two oral warnings could not have been factors in Clement's decision. As I have stated above, Ancar was discharged for no more than one unexcused absence after two warning notices. The General

Counsel has shown on rebuttal, however, that a significant number of employees (a majority of them in the paint department) were not discharged even though they had one (or even two) absences that followed two warning notices for absenteeism.

As detailed above, and in appendix D, during the 1990–1993 period there were 133 occasions that employees were issued their third, or greater, warning notice for absenteeism; on 66 of those occasions, the employees were issued their fourth, or greater, warning notice for absenteeism. (And some employees were issued their fourth absenteeism warning notices in 12-month periods multiple times; one employee was issued his fourth absenteeism warning notice in a 12-month period five times.) Because all of these cases involve employees' having three (or more) absences following their second warning notices, all of them involve employees with worse absenteeism records than Ancar's,[173] and none was discharged.

Indeed, some of the cases shown by the warning notices that I have detailed above and in appendix D involve employees' being issued one warning notice for more than Ancar's total number of absences. That is, Ancar had eight unexcused absences in 1994, but Clement knew of only seven at the time that he discharged Ancar; of the employees listed on appendix D, however, one was issued one warning notice for 10 absences, one was issued one warning notice for nine absences, one was issued one warning notice for eight absences, and seven were issued one warning notice for seven absences. Additionally, many, if not the majority, of the fourth (or greater) warning notices noted on appendix D are preceded by one or more "Final" warnings. And, as further shown by appendix D, employees were issued as many as eight absenteeism warning notices in 12-month periods without being discharged; moreover, the employee who was issued his eighth absenteeism warning notice (a paint department employee, as it so happened) had at least four absences after his seventh warning notice without being discharged.[174]

The case of one of the employees listed in appendix D is most illustrative of all of these points. As I state in appendix D, on November 1, 1990, paint department employee Fred Wilson was issued 1 warning notice for 10 absences in the month of October 1990. (Of course, these 10 absences could have been the subject of three separate warning notices and Wilson's subsequent absences would be viewed accordingly.) On April 10, 1991, Wilson was issued his second warning notice for absenteeism; seven absences within a 30-day period are cited, and the notice includes a warning for the offense of failing to call in on any of his days of absence. The warning notice concludes: "Final Warning." On May 13, 1991, despite his prior expressed final warning, Wilson was issued his third warning notice for absenteeism; five absences in a 30-day period are cited; to wit: April 15, 16, 17, and May 2 and 13, 1991; the notice also includes a warning for the offense of failing to call in on three of those dates. On June 7, 1991, Wilson was issued his fourth warning notice for absenteeism in 12 months; four absences within a 30-day period are cited, and it includes a warning for failing to call in on three of those dates.[175]

The points that Wilson's case well illustrate are these: Respondent contends that, because the Avondale Employees' Guide prescribes discharge for an employee's third offense, all second warning notices, specifically second warning notices for absenteeism, are final, even if "Final" is not expressly stated on the warning notice itself. This line of reasoning is the core of Respondent's defense for Ancar's discharge; again, Respondent contends that Ancar was discharged because he was absent twice after having received two warning notices for absenteeism within a 12-month period. (I leave aside for the moment my conclusion that Clement, the decision-maker in Ancar's case, only knew of one of Ancar's unexcused absences following his second warning notice.) Obviously, however, Wilson was not discharged immediately after his April 16, 1991 absence, even though that was his second unexcused absence after his second warning notice for absenteeism. Respondent offered no surrebuttal of why Ancar was discharged on his second unexcused absence after his second warning notice, but Wilson was not. Nor did Respondent offer such surrebuttal to the cases of the other employees listed in appendix D who were (a) not discharged on their second absence after two warning notices for absenteeism, and (b) allowed to accumulate other absences and only warned again, not discharged. It is further to be noted that Wilson's third warning notice was based, in part, on absences of three consecutive days, April 15 through 17. This was a violation of major offense-1 of the Avondale Employees' Guide; Ancar had no prior major offense violations, yet he was discharged and Wilson was not.[176]

In summary, under Respondent's theory of defense for Ancar's discharge, no employee should have received a third warning notice for absenteeism if he had already received two absenteeism warning notices within a 12-month period. That is, under Respondent's theory, no employee who had been issued two warning notices for absenteeism should have been employed long enough to receive another warning notice that was premised on three more absences. The exhibits introduced by the General Counsel, however, demonstrate that exactly that happened a significant number of times. Respondent offered no evidence in surrebuttal of why Ancar was discharged on his first (or second) unexcused absence after his second warning notice, but the other employees were not discharged on the occasion of their first (or greater) absence after two (or more) warning notices for absenteeism. On brief, Respondent also makes no suggestion of why the evidence of disparate treatment

[173] Respondent's supervisors testified with absolute consistency that they orally warned employees before they issued such warning notices; it must therefore be assumed that, like Ancar, these comparison employees were issued oral warnings as well as written ones.

[174] At one point during the trial, I commented that I was "monumentally unimpressed" with Ancar's case, and Respondent quotes that remark back to me on brief. My remark was made, however, over a year before I saw the General Counsel's rebuttal evidence which demonstrates that Respondent, especially in the paint department, regularly allowed other employees to compile attendance records that were worse than Ancar's without discharging them.

[175] For comparison with the case of alleged discriminatee Octave Rouege, infra, it is to be noted that Respondent offered no evidence to explain why Wilson, as well as many other employees mentioned in Appendix D, was issued single warning notices for being absent and failing to call in on those days of absences, but Rouege, as discussed infra, was issued one warning for an absence and another warning for a failure to call in on the date of that absence.

[176] In fact, as detailed in appendix D, on November 11, 1991, Wilson was issued his fourth warning notice for absenteeism in the year that began with his warning notice of April 10, 1991. (That warning also incorporated a violation of major offense-1 because Wilson had been absent on 5 consecutive days.) Indeed, on March 13, 1992, Wilson was issued his fifth warning notice for absenteeism in the year that began on April 10, 1991.

of Ancar should not be controlling in his case, other than to state that nonpaint department evidence may not be used as a comparison. In making that argument, as well as ignoring the evidence that is, in fact, from the paint department, Respondent is contending that historic, well-established theories of disparate treatment cannot apply to it because of the great autonomy that it vests in its various departments and that it vests in supervisors within various departments.[177] Again, Respondent is one employer, and the Board will not artificially treat its departments as conceptually separate employers when adjudicating its employees' rights under the Act.[178]

I find that Ancar was treated disparately, and, in view of the animus directed toward Ancar and the other employees who held prounion sympathies, I find that Ancar was treated disparately because of his protected activities.[179] That is, the General Counsel has presented a prima facie case that Ancar was discharged unlawfully, and Respondent has failed to demonstrate that it would have discharged Ancar even in the absence of his known prounion sympathies. Therefore, I conclude that Ancar was discharged in violation of Section 8(a)(3) of the Act.

Ancar's Postdischarge Misconduct

Terminated employees are required to return company-owned equipment to appropriate toolrooms before they will receive their last paychecks. If employees do not make such accountings on their last workdays, they are required to later return to the plant for that purpose. When such employees return to the plant, they report to Respondent's security department and guards drive them (often in pickup trucks) to wherever they may have stored company-owned equipment. When he was discharged on Tuesday, June 29, Ancar did not make his accounting of company-owned property that he had kept in a locked toolbox. Ancar returned to the plant on Friday, July 2, for such purpose.

Paint Department Foreman Ernie Cantrelle (vol. 103) testified that Ancar appeared about 8:30 with a guard at a satellite toolroom. With Cantrelle at the time was the toolroom attendant Warren Robicheaux (who did not testify). According to Cantrelle:

> Well, he [Ancar] said he was here to get his toolbox.
>
> I told him, "Go ahead and get it." . . .
>
> Well, he left the toolroom. He went around the back with the security guard, and Mr. Robicheaux went to help him to carry his toolbox. . . .
>
> Mr. Robicheaux came back and told me to go around the back and see what was going on. So when I went back there. . . .
>
> Mr. Ancar and the security guard was carrying the box to the truck, so I asked him to put it down and open it up. He refused. I told him he wasn't going to get out of the yard unless they opened the box, because I had to see if they had any tools left in there.
>
> So he put the box down and they opened it up at that point. He had a large number of paintbrushes, new paintbrushes that was never used. . . . Approximately 26 to 27 brushes, brand-new ones. . . . They were individually wrapped in cellophane, but they were loose.
>
> I put them [the brushes] back in the toolroom.

Pertuit testified that he came upon the scene. He saw the paintbrushes in the toolbox, but he estimated their numbers at "[r]oughly 20, approximately 20." Moreover, Pertuit described their condition as: "They were brand-new, most of them." On other than this point, the testimonies of Cantrelle and Pertuit are essentially consistent.

On rebuttal, Ancar denied that the toolbox was his and he denied that it was moved. Ancar testified that he took a respirator and a few other things out of the toolbox so that he could return them to the main toolroom, and he left Respondent's paintbrushes and everything else in the toolbox. Ancar denied attempting to steal any paintbrushes.

Ancar was an unimpressive witness; I have found his discharge to be violative only on the basis of the undisputed evidence of Pertuit's threat, the false nature of the defense presented, the undisputed evidence of disparate treatment, and the evidence of the interrogation by Mott at Comeaux's. (Ancar's testimony about that interrogation was disputed, but only by the equivocations of Laborde, and it was corroborated by Gibson.) On the other hand, Pertuit, as I have emphasized before, was an honest witness. I believe that Pertuit was telling the truth. I believe that Cantrelle also was telling the truth, except for his exaggerations about the numbers and conditions of the paintbrushes. I find that on July 2 Ancar attempted to steal about 20 of Respondent's paintbrushes, most of which were new. (That Ancar may not have been the owner of the toolbox is not conclusive, as the General Counsel argues on brief. Either Ancar was attempting to steal a toolbox, as well, or he wanted the box taken where he could sequester 20 brushes out of the sight of Respondent's production supervisors.)

Because of his attempted theft of Respondent's property, I shall recommend that the Board not order Ancar's reinstatement, and I shall recommend that it order back pay for Ancar only for the period of June 29 through 8:30 a.m. on July 2.[180]

b. Octave Rouege

Octave Rouege (vols. 48, 149), a painter, was issued two warning notices on June 9; Rouege was assigned to an allegedly more onerous job at Respondent's "Shot House" on July 15; and Rouege was discharged on August 4, 1993. In several different paragraphs, the second complaint alleges that Respondent violated Section 8(a)(3) by these actions; to wit: the allegations concerning the warning notices are located at paragraph 113(b), as amended at trial;[181] the allegation concerning the

[177] This contention of Respondent is extensively made in the "Overview" section of its brief.

[178] In considering the many other cases of alleged disparate treatment involved in this decision, I shall not repeat Respondent's contention in this regard, or my response.

[179] Other evidence of disparate treatment of Ancar exists in the cases of the 883 employees who were permitted to accumulate three or more warning notices in 12-month periods from 1990 through 1994 without being discharged, as demonstrated previously in the case of discriminatee Marshall.

[180] See generally *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993), which states that "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the conduct." There is no credible, probative evidence that Respondent allowed such thefts to occur without discharge

[181] Respondent contends that this amended allegation of the complaint is not supported by a timely filed charge. The warning notices were part of the putative reasons for Rouege's discharge, and they are therefore related to the complaint allegations concerning that discharge.

allegedly onerous job assignment is located at paragraph 100,[182] and the discharge allegation is located at paragraph 113(a). The General Counsel contends that Respondent warned Rouege, then assigned Rouege to work that was more onerous, and then discharged Rouege, all because of his known union activities and expressions of sympathy which included his wearing union insignia and speaking for the Union at an employer campaign meeting. The General Counsel further contends that, in violation of Section 8(a)(1), Rouege was threatened with discharge and unspecified reprisals, and the General Counsel contends that Rouege was warned by a supervisor that the employees' union activities were being maintained under surveillance.[183] Respondent denies that the threats and warnings occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Rouege may have held at any relevant time. Respondent further contends that Rouege was assigned to a different job solely because of business necessity and that Rouege's different job was no more onerous than that of other employees in his classification. Respondent further contends that Rouege was issued warning notices and discharged solely because of excessive absenteeism and a failure to call in to the paint department on one day of his absences. Finally, Respondent contends that, even if the Board does find a violation in Rouege's discharge, Rouege should be denied all reinstatement and backpay remedies because of (1) perjury that he committed during the hearing, and, independently, (2) because he submitted false documentation to it as excuses for some of his absences. The General Counsel replies that alleged supervisory statements demonstrate an unlawful motive for the allegedly onerous job assignment; the General Counsel further replies that, although Rouege was absent to the extent claimed by Respondent, Rouege was treated disparately because other employees had worse absenteeism records, but they were issued lesser, or no, discipline. Ultimately, I find and conclude that the work assignment in question was more onerous, but it was not made for unlawful reasons. I further find and conclude that the warning notices were unlawfully issued and that Rouege was unlawfully discharged. I do find that Rouege committed perjury at the hearing, but I conclude further that, because of certain demonstrated perjury that was committed by Respondent's supervisors, Rouege should not be denied reinstatement and backpay because of his perjury. I do, however, conclude that, because of his submissions to Respondent of false documentation as excuses for his absences, Rouege should be denied the remedy of reinstatement, and Rouege's remedy of backpay should terminate as of the time that Respondent discovered Rouege's submissions of false documentation.

Rouege's false testimony regarded only the circumstances of certain absences that he experienced, but, of course, Rouege's lying under oath necessarily affects some of the credibility resolutions that I must make in other aspects of his case. Rouege also admitted that, before being discharged for absenteeism, he lied to Respondent's clerks and supervisors about the circumstances of certain of his absences, and those admitted lies affect certain other of my credibility resolutions, as well.

Rouege testified that, beginning about a month before the June 25 Board election, he placed two "Union-Yes" stickers on his hardhat and three on his toolbox; Rouege testified that he "never" removed them. Rouege named one other of the General Counsel's witnesses as having worked with him, Donald McGee. The General Counsel asked McGee (vol. 58) for corroboration of certain testimony by Rouege about complaints to Paint Department Superintendent Bourg about the July 15 transfer from wet dock-3 to the shot house, as discussed below. McGee testified that he did make such a complaint; when he did so, he was accompanied by alleged discriminatee Charles Bennett, the General Counsel's witness James Lanham, and another man whose name he did not know. McGee described the fourth man as: "This guy—I would say he was about 5 feet, on a stocky build, Negro like myself, light complexion." This description fit Rouege well, and I find that the fourth man was Rouege. McGee testified that, when he and the others went to Bourg, Rouege was wearing two "Union-Yes" stickers on his hardhat. Also, as discussed below, Rouege testified that about July 16, with no one else present, he met twice with Bourg at the shot house to ask to at least trade shifts with another employee. Bourg did not deny this testimony, and he did not deny seeing prounion insignia that Rouege had on his hardhat at the time. Other supervisors testified that they did not notice Rouege's wearing prounion insignia, or they did not remember Rouege's wearing prounion insignia, or they flatly denied that he did so; however, I found Rouege's testimony on this point, as corroborated at least in part by McGee, and as undenied by Bourg, to be credible, even given Rouege's admitted lying about his absences as discussed infra. I find that Rouege wore prounion insignia on his hardhat from late May through the date of his discharge.

Rouege testified that about 2 weeks before the Board election Paint Department Superintendent Charles Bourg Sr. conducted an employer campaign meeting that he attended. According to Rouege, 13 other employees and several supervisors, including General Foreman Tommy Bourgeois, were present. At the conclusion of the presentation, Bourg asked if any of the employees had questions. Rouege testified that:

> I asked him why we didn't have any seniority in the yard or wages and promotions. All I knew was only family members was getting raises and promotions.
>
> . . . .
>
> [Bourg said that there] was a freeze in the yard. No one was getting raises and promotions.
> [I asked], How did Scott [get]—to [be] a foreman?

Moreover, I permitted the amendment only after Respondent introduced evidence that tended to show that the warning notices were issued on a spurious, and possibly unlawful, basis. See *Pincus Elevator & Electric Co*., 308 NLRB 684 (1992), where the Board held that such amendments are permissible after a respondent adduces evidence of its own misconduct. This factor distinguishes the instances in which I refused to allow other trial amendments to the complaint.

[182] Respondent contends that this allegation is also unsupported by a timely filed charge. The allegedly onerous job assignment is alleged to be a part of a violative course of conduct directed at Rouege that resulted in his discharge. Therefore, the allegation is supported by the undisputably timely filed charge over Rouege's discharge.

[183] Respondent further denies that timely filed charges support the 8(a)(1) allegations because no charge contains the in haec verba. I find and conclude that the allegations are supported by the charge on Rouege's discharge because that charge necessarily includes such allegations of specific expressions of animus that may have caused that discharge. Moreover, as I stated above, all such complaint allegations are supported by the first charge that was filed in this matter, the June 7, 1993 charge that was filed on behalf of alleged discriminatee James Cox in charge number Case 15–CA–12171–1.

"Scott" is Scott Sutherland, a nephew of Bourg. Sutherland was a sometimes-foreman in the paint department. Rouege testified that upon his questioning about Sutherland's promotion, Bourg asked him to leave the meeting, and Rouege did so. When Respondent's counsel called Bourg to testify, she asked him nothing about Rouege or whether he asked Rouege, or any other employee, to leave an employer campaign meeting that he conducted because of something that the employee said. Bourgeois testified that he could not remember such an event, something short of a denial. I credit Rouege.

Based on certain other testimony by Rouege, paragraphs 36 and 66 of the second complaint allege that Respondent, by Sutherland, threatened Rouege in both June and July.[184] Respondent denies that, at the times alleged, Sutherland was a supervisor within the meaning of Section 2(11) of the Act. Sutherland's supervisory status was attested to only by Rouege and alleged discriminatee Audra Scott. Neither witness offered credible, probative testimony that Sutherland possessed supervisory authority at any relevant time. Moreover, Respondent proved that Sutherland ceased being a foreman, and supervisor, on May 16. Therefore, I shall recommend dismissal of the allegations relating to Sutherland's conduct. For possible purposes of review, however, I here state that I do not credit Rouege's testimony that, shortly after he put the "Union-Yes" stickers on his hardhat, Sutherland noticed them and stated (as Rouege employed the mode of indirect quotation): "To be careful; Avondale didn't like union supporters." I also discredit Rouege's testimony that, in July, Sutherland told him that Respondent's supervisors wanted to discharge him. (In the latter case, however, even if I did credit the testimony, I would not find a violation of the Act because at the time, as discussed below, Rouege was compiling a substantial record of absenteeism, and a substantial degree of implicit ambiguity thus attended Sutherland's alleged remark.)

In early to mid-June, Rouege was transferred from the wet dock-1 area to the wet dock-3 area. (This transfer is not alleged to be violative.) Rouege testified that he was informed of the transfer by Foreman L.—J. Bishop. According to Rouege, Bishop told Rouege that he was being transferred because he was on a "hit list." Based on this testimony by Rouege, paragraph 46 of the second complaint alleges that Respondent, by Bishop, "threatened its employees with unspecified reprisals because they aided or supported the Union."[185] Bishop (vol. 117) did deny this testimony by Rouege, and, because of Rouege's demonstrated willingness to lie under oath, as discussed infra, I credit Bishop. I shall therefore recommend dismissal of this allegation of the complaint also.

Further according to Rouege, he attended a union meeting on July 10. On July 13, Paint Department Foreman James Knoblock approached Rouege and told him that he knew that Rouege had been at the union meeting because Respondent had its "spies." Based on this testimony by Rouege, paragraph 62 of the second complaint alleges that Respondent, by Knoblock, "created the impression among its employees that their union activities were under surveillance by the Respondent."[186] Knoblock (vol. 98) did deny this testimony by Rouege, and, because of Rouege's demonstrated willingness to lie under oath, as discussed infra, I credit Knoblock. I shall therefore recommend dismissal of this allegation of the complaint also.

(1) Rouege's two warning notices for attendance offenses

When Rouege was on cross-examination, he was asked and he testified:

> Q. You knew you had to call in to the paint office if you were going to be absent. Didn't you?
> A. Correct.
> Q. And you had to bring paperwork for an absence to be excused, didn't you?
> A. Correct.

That is, Rouege knew that for an absence "to be excused": (1) on the day of an absence, he needed to call in to the paint department clerk and state an excuse for that absence, and (2) on the day that he returned from an absence, he needed to present some documentation attesting to the validity of the excuse that he had given when he did call in.

Rouege was absent the entire week of June 7 through 11. He was also absent on Monday, June 14. Rouege was recorded by his foreman, Lyle Leche, as "06" (unexcused) on June 7 through 10, but, for reasons that were never disclosed (because Leche did not testify) Leche recorded Rouege's absences of June 11 and 14 as "05" (excused). As Rouege acknowledged on day-149 of trial, when he was called by Respondent as an adverse witness under Fed.Rules of Evid. 611(c), when he returned to work on June 15 Rouege presented, as documentation of an excuse for some of his absences, a completed form that was entitled "Appointment Verification." The form, received as Respondent's Exhibit 744, was on the letterhead of "Myrna L. Collado, D.D.S." I here quote the completed form, underlining the entries that were made:

> To whom it may concern:
> This is to verify that *Octave Rouege* was seen in our office on *6/7/93, 6/8/93 & 6/9/93* for dental treatment. He/she will be able to return to work/school on *6/10/93*.
> If you have any questions, please call our office.
> Because this document was produced by our office on our letterhead, no signature is required.

Rouege's foreman on June 15 was Lonnie Sanchez. At some point on June 15, apparently after Rouege had presented the "Appointment Verification," Sanchez presented two warning notices to Rouege. When he was on direct examination, Rouege was asked nothing about his June 7–0914 absences, or the warning notices that he received on June 15. The evidence concerning these warning notices, which were made the subject of a trial amendment to the complaint, was developed during Respondent's presentation, as noted above.

On day-48 of trial, when Respondent's counsel took Rouege on cross-examination, she showed him, and asked him about, one of the two June 15 warning notices that Sanchez presented to Rouege, but she did not show Rouege, or ask him about, the other warning notice that Sanchez presented to him on June 15. In response to Respondent's counsel's questions, Rouege identified Respondent's Exhibit 221 as a warning notice that he received on June 15. Dated "6/9/93," the warning notice is signed by Departmental Superintendent Borg as the issuing supervisor, and Sanchez signed in the "Witness" space. The box for Major offense-1 (unexcused absences of three consecu-

[184] Respondent contends that these 8(a)(1) allegations are not supported by timely filed charges. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that these allegations are supported by the timely filed charge of discrimination against Rouege, as well as the charge in Case 15–CA–12171–1.

[185] Id.

[186] Id.

tive workdays) is checked. Citing absences of June 7, 8, and 9,[187] the warning notice states: "You are hereby notified that you have been absent an excessive amount of workdays. Should you continue to do this, immediate disciplinary action will be taken. Final Warning."

Sanchez was called by Respondent on day-101 of trial. Sanchez testified that, as well as Respondent's Exhibit 221, he issued another warning notice to Rouege on June 15. Received then as Respondent's Exhibit 220, and also dated June 9 and signed by Bourg and Sanchez, the warning notice has the box for "Other" General offense checked. Citing June 9, the warning notice states: "On the above-mentioned date, you have neglected to notify the main paint office of your absence. Should you continue to do this, immediate disciplinary action will be taken."

On day-146 of trial, Respondent introduced its Exhibit 727, a paint department roll book. Clerk Joy Plaisance testified that absences are recorded in that book, and they are circled (in red) if the employee brings in documentation of what he had offered as an excuse when he called in. The roll book reflects that Rouege was recorded as having brought in documentation for all three absences of June 7, 8, and 9. Also on day-146 Plaisance identified the department's call-in log that included June 7 through 9. The call-in log reflects that Rouege called in on June 7 and 8, but not June 9.

Also, on day-146 of trial, apparently possessing no evidence on the matter other than what Respondent had adduced, the General Counsel moved to amend the complaint to allege that Rouege's two warning notices of June 15 were issued in violation of Section 8(a)(3).[188] In making the motion, the General Counsel contended (and now does contend) that, on the basis of Respondent's records, alone, it must be found that Rouege both called in and presented documentation for his absences of June 7 and 8, and the General Counsel argued that Respondent should have treated the absences of those two dates (if not June 9) as having been "excused." the General Counsel therefore argued that the warning notice for 3 consecutive days of *unexcused* absences was unlawfully issued. Also in making the motion, the General Counsel contended (and now does contend) that other employees were absent without calling in, but, if they were given any warning notices at all, their warning notices for absenteeism simply noted the failures to call in but the failures were not made the subject of separate warning notices in addition to their warning notices for absenteeism. The General Counsel therefore argued that Rouege was treated disparately and the warning notice for failing to call in on June 9 was unlawfully issued, as well as the warning notice for absences on June 7, 8, and 9.

At the time that the General Counsel made the motion to amend the complaint to include the two June 15 warning notices, there was no record evidence of any fraudulent nature of the "Appointment Verification" that Rouege had given to Sanchez; nor was there then any record evidence that Rouege had perjured himself during cross-examination. But the document was fraudulent, and Rouege had perjured himself on cross-examination, as I now show:

On Day-48 of trial, while Rouege was on cross-examination, he was shown a document and asked:

Q. I show you what has been marked for identification as Respondent's Exhibit 223. See if this refreshes your recollection as to whether or not you were absent from work on June 7, 8, and 9.[189] . . . Do you recall now whether or not you were absent from work on June 7, 8, and 9 of 1993?

A. Yes.

JUDGE EVANS: And were you?

THE WITNESS: Yes, I was. I had mouth surgery.

JUDGE EVANS: All right. Next question.

On day-149, when Respondent called Rouege as an adverse witness, Rouege was again asked about his absences of June 7 through 9; this portion of Rouege's cross-examination was extraordinary, and I quote it at length. It is to be read with the realization that Rouege ultimately admitted that he did not go to the dentist on June 7, 8, or 9, nor did his son, and Rouege also ultimately admitted that his sister, a secretary in the dentist's office, created the false "Appointment Verification" that he submitted to Respondent on June 15; also to be borne in mind is the fact that Rouege was also absent on August 2 and 3 and, as he further ultimately admitted, he testified falsely that those absences were caused by his needing to be at home to receive service for his air-conditioner.

Q. Did you testify here previously that you had mouth surgery on those days?

. . . .

THE WITNESS: Yes.

. . . .

Q. [By Ms. Canny]: Does that refresh your recollection as to why you were absent from work those days?

A. Yes.

Q. And why were you absent from work?

A. I had a dentist's appointment.

Q. You had a dentist's appointment, or you had mouth surgery?

A. Well, dentist, mouth surgery, ma'am—it is on my excuse paper. I seen it earlier [in pre-trial, before appearing on Day-149].

Q. Do you recall whether or not you called in on each of those days?

A. No, I cannot recall if I called in or not.

Q. I direct your attention to Respondent's Exhibit 741, [the Paint Department call-in log] the entry for June 7, 1993—6/7/93. Does that refresh your recollection as to whether or not you called in that day?

A. Yes.

Q. And did you report that your son had a filling that fell out?

A. That is correct.

Q. Did you call in to work to report your absence on June 8, 1993?

A. Yes.

[187] The warning notice did not mention Rouege's absence of June 10, even though Leche had also recorded that absence as unexcused. Apparently the notice was prepared on June 9, the date that it bears. I so find.

[188] Over Respondent's objection, I granted the motion for the reason stated in fn. 182.

[189] R. Exh. 223 was not offered under that number, but apparently it was the "Appointment Verification" that is quoted above. The "Appointment Verification" was received as R. Exh. 744 on day-146 when it was offered through paint department clerk Joy Plaisance.

Q. And do you recall why you were absent from work that day?

. . . .

A. Well, it [the call-in log] says, "Had a dentist's appointment, the air-conditioning was broken."

Q. Does that refresh your recollection as to why you were absent that day?

A. Yes.

Q. Why were you absent that day?

A. Because I had an appointment and my air-conditioner was broken.

Q. Did you have a dentist's appointment that day?

A. I don't believe, ma'am. I believe [sic] had been to the dentist already.

JUDGE EVANS: Well, was the only reason you were absent on the 8th [of June] because your air-conditioner broke down?

THE WITNESS: Yes.

JUDGE EVANS: Next question.

Q. [By Ms. Canny]: Not because you had a dental treatment that day?

A. That is correct.

JUDGE EVANS: Did you have a dental treatment on the previous day, the 7th?

THE WITNESS: Yes.

Q. [By Ms. Canny]: Didn't your son have a filling that fell out, and that is what you got dental treatment [for] on the day before?

A. That is correct.

JUDGE EVANS: So [who got] the treatment, you or your son?

THE WITNESS: My son.

After again being shown the "Appointment Verification" Rouege was further asked and he testified:

Q. And why were you absent from work on the 7th, 8th, and 9th? Does this refresh your recollection as to why you were absent?

A. Yes. Yes, it does.

Q. Why were you absent?

A. I went—brought my kid to the dentist and some other things. I can't remember.

Q. This states you were in the dentist's office—

A. Correct.

Q. —on the 7th, 8th, and 9th.

A. Correct.

Q. Is that true?

A. Yes, it is.

Q. So you were at the dentist with your son on those three days?

A. Correct. Not on all three days, ma'am.

Q. So is this excuse incorrect?

A. As far as?

Q. It says, "Octave Rouege was seen in our office on 6/7, 6/8, and 6/9 for dental treatment."

A. Right.

Q. Is that correct?

A. Yes, but not all three days, ma'am.

Q. What days were you actually at the dentist's office?

A. The 7th.

Q. And where were you the 8th and the 9th?

A. I couldn't tell you. It has been three years, ma'am.

Q. Do you know why this excuse says you were in the dentist's office on the 8th and the 9th if you weren't there?

. . . .

JUDGE EVANS: Overruled. Do you know?

THE WITNESS: No, sir.

. . . .

JUDGE EVANS: Sir, the 7th, 8th and 9th. . . . [d]id your son receive treatment on those three days?

THE WITNESS: Yes.

Q. [By Ms. Canny]: All three days?

A. No, ma'am.

Q. I am just trying to find out why this says he did or someone [else] received dental treatment at this dentist's office that explained your absence those three days. How many of those days did either he or you go to the dentist?

A. One day, ma'am.

Q. And do you know why this excuse says that it was three days?

A. No, I do not.

Q. Do you know why you were absent from work on the 8th, 9th, 10th, 11th, and 14th?

A. No, ma'am.

After these reassertions that either he, or his son, did have dental surgery, at least on June 7, and that he did not know why the "Appointment Verification" stated that Rouege had had treatment on June 7, 8, and 9, Rouege was further asked and he testified:

Q. [By Ms. Canny]: Mr. Rouege, who is Monique Rouege?

A. My sister.

Q. Your sister was employed by the dentist, Myrna Collado, in 1992 up until November of 1993. Isn't that true?

A. That is correct.

Q. When she provided you that excuse for June 7, 8th, and 9th, you or your son never went to the dentist on any of those days. Isn't that correct?

A. That is correct.

Q. In fact, your sister also provided you with absence excuses for [prior absences of] September 1 of '92, September 17 of '92, November 2 of '92, and December 16 of 1992, and you weren't at the dentist any of those times, either, were you?

A. That is correct.

Q. You never went to Dr. Collado . . . nor did your son?

A. That is correct.

Q. And when you testified here a few moments ago that you took your son to the dentist on June 7, 1992 (sic), that was not true, was it?

A. That is correct.

(After these admissions, Rouege also admitted submitting to the paint department other false documentation including documentation for his last absences before being discharged for absenteeism; the subject of that documentation was service to his air-conditioning that was actually not broken, as discussed below.) Ultimately, Rouege insisted that he could not remember why he did not go to work on the 6 workdays from June 7–

14. Rouge's testimony, that he waited for an air-conditioning service person on June 8, was made out to be another lie under oath, as well as a lie to Respondent's paint department clerk who took his call-in on that date. As discussed below, Rouege further admitted giving false testimony to this court, and he further admitted giving fraudulent documentation to Respondent's paint department concerning the reasons for his last absences before being discharged for absenteeism.

Sanchez was not Rouege's foreman during his absences of June 7–11 and 14, but he was Rouege's foreman on June 15 when Rouege returned. Sanchez (vol. 101) testified for Respondent that he issued the two warning notices of June 15 to Rouege only because they were sent to him, through interoffice mail, by someone in the paint department office. Respondent offered no evidence of who made the decision to issue the two warning notices of June 15, or why; specifically, Respondent offered no evidence of who decided to issue separate warning notices (one for the absences and one for the failure to call in on June 9), or why.

As evidence of disparate treatment in the issuance of Rouege's June 15 absenteeism warning notice, the General Counsel relies on Respondent's definitions of "excused" and "unexcused," claiming that Rouege met the requirements for "excused" absences on June 7 and 8, if not June 9. As evidence of disparate treatment in the issuance of Rouege's June 15 call-in warning notice, the General Counsel relies on the many warning notices listed above in the case of Ancar, which notices combine the offenses of unexcused absences with the offenses of failures to call in; the General Counsel argues that, absent unlawful discrimination, Rouege's offenses would have been combined on one warning notice rather than spread to two. In addition to those warning notices listed in Ancar's case, the General Counsel relies on a warning notice that was issued to Rouege well before the Union's organizational campaign began. On October 25, 1991, Bourg and Knoblock issued to Rouege a warning notice that has the box for General offense-1 checked. The warning notice cites absences by Rouege on September 30 and October 3, 9, and 14, 1991. The Reason for Warning space is completed: "Absences of 3 or more days in a 30-day period. Failure to call in to the main paint office during absences of 9/30 [and] 10/9, 1991." Respondent offered no evidence in surrebuttal on this point.

Rouege's Two Warning Notices for Attendance Offenses—Conclusions

It is undisputed that during an employer campaign meeting Rouege spoke up to Bourg and complained about lack of wage increases, seniority rights, and promotional opportunities. Rouege was thereby voicing traditional concerns of employees, and his action was one of protected concerted activity.[190] In this context of an organizational campaign, it was also protected union activity. I have credited Rouege's testimony that he wore prounion insignia, the "Union-Yes" stickers on his hardhat, from late May through the date of his discharge. By these open and obvious displays, Rouege charged Respondent's supervisors who worked around him with knowledge of his prounion sympathies. I find that Respondent's supervisors knew of Rouege's prounion sympathies and union and protected concerted activities at the time they issued the June 15 warning notices to him. (And, of course, as discussed infra, they knew of his prounion sympathies at the time of Rouege's July 15 assignment to the shot house, and they knew of his prounion sympathies at the time of Rouege's August 4 discharge which are also subjects of the complaint.) Respondent's animus toward prounion employees, especially those prounion employees who wore prounion insignia, is established throughout this decision. Therefore, the General Counsel has established prima facie cases of unlawful discrimination by these acts toward Rouege, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Rouege even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Respondent has shown that it tells employees that, as well as calling in for each day's absence, they are required to furnish documentation to support their claims of excuse, *when they return from those absences*.[191] Simply stated, Respondent does not require its employees to submit documentation in advance of their returns. The warning notice for 3 consecutive days of unexcused absences that Rouege received on June 15 was created, according to the date it bears, on June 9, well before he returned. Then that warning notice for 3 consecutive days of unexcused absences was issued to Rouege on June 15, even though Rouege had, by then, produced documentation which, at least facially, would have excused at least 2 of those days' absences (June 7 and 8), if not all three. (The "Appointment Verification" was not even putatively effective to excuse Rouege's absence of June 9 because he had not called in on that date.) Respondent offers no reason for its suspension in Rouege's case of its practice of allowing employees to present documentation before a determination is made whether to issue a warning notice. Nor does Respondent offer any evidence of why a warning notice for 3 consecutive days of unexcused absences was actually issued to Rouege on June 15, even though he did bring in facially adequate documentation for two of them. That the documentation was at least facially valid is shown by the fact that the absences were red-circled in Respondent's roll book because the documentation was presented.[192]

This complete failure of evidence, of course, is a failure to show that Respondent would have issued the June 15 warning notice to Rouege even in the absence of his protected activities. I, therefore, find and conclude that by that action Respondent violated Section 8(a)(3) of the Act.

Respondent further issued to Rouege on June 15 a warning notice for failing to call in on June 9. In 1991, before the organizational campaign and Rouege's participation in it, Rouege received a warning notice for unexcused absences on September 30 and October 3, 9, and 14, 1991. That one warning notice also noted that Rouege had failed to call in on two of those dates, September 30 and October 9. Additionally, of the 66 cases listed in appendix D in which employees were issued four or more warning notices for absenteeism, 26 of the warning notices described included warnings about failures to call in on days of absences. Although Respondent has shown that, during the 1990–1993 period, a few (but very few) separate warning notices were issued for unexcused absences and failures to call

[190] *Neff-Perkins Co*., 315 NLRB 1229 fn. 1 (1994).

[191] Again, Rouege admitted as much.

[192] Respondent did not know at the time that the documentation that Rouege presented on June 15 was fraudulent and, certainly, Respondent does not contend that the false nature of that documentation had anything to do with the issuance of the warning notice that was drafted on June 9.

in on the dates of those absences, it has produced no evidence of why a significant number of employees, including Rouege, were previously spared the imposition of separate warning notices for failures to call in, and their written warnings for absences and failures to call in on the dates of those absences were combined. Issuing a separate warning notice to an employee, of course, has a significant impact on the employee because it puts him one step closer to discharge under the terms of the progressive disciplinary system of the Avondale Employees' Guide.

As Respondent has offered no evidence of why Rouege was issued a separate warning notice for a type of conduct that was not made the subject of a separate warning notice in a significant number of other cases, it has failed to demonstrate that it would have issued to Rouege the June 15 warning notice for failing to call in. I, therefore, find and conclude that, by that conduct, Respondent has also violated Section 8(a)(3) of the Act.

(2) Rouege's allegedly onerous assignment to the shot house

The shot house is a facility that is used for blasting large metal surfaces that are later to be painted. The blasting in the shot house is done with metal "shot," or pellets, as opposed to sand which is used for blasting in other areas of the plant. Rouege testified that he, as a fourth-class (lowest) painter-blaster, had done sand-blasting before the events of this case, but only for about 2 days. (When he was called as a witness by Respondent, Rouege also admitted to a few hours of sand-blasting experience before he was promoted to fourth-class mechanic; contrary to the arguments of Respondent on brief, I do not find this admission to be significant for purposes of credibility resolutions.)

On July 15 Rouege was reassigned from wet dock-3, where he had been working on the day shift doing touch-up painting, to the 11 p.m. shift at the shot house. Rouege acknowledged that several other employees were simultaneously assigned to the shot house, both to the 3 and 11 p.m. shifts. On the first day of his reassignment, Rouege did not complete his first shift; he went home early. At the end of his second shift (as noted above in the discussion of Respondent's knowledge of Rouege's prounion sympathies), Rouege met with Departmental Superintendent Bourg and asked if he could be assigned to a day job. Rouege testified that he told Bourg that he was going through a divorce, that he had custody of his son during the summer, that he had enrolled his son in a day camp, and that it was more "convenient" to deliver his son to camp, and pick him up, when he was assigned to the day shift. Bourg told Rouege that he would look into the matter. The next day, further according to Rouege, he again met Bourg and: "Well, Mr. Bourg told me then there was nothing he could do about it, and if I didn't go on nights I wouldn't have a job on the night shift from 11:00 to 7:00." Rouege argued to Bourg that he knew another employee who wanted to trade shifts with him, and Rouege argued to Bourg that he knew of other employees who had been allowed to trade shifts. Bourg still refused.

Rouege testified that working in the shot house was: "Dark, noisy, scary, and very dangerous." Rouege testified that the employees with whom he was assigned to work told him that they had more than 10 years' experience in the shot house, and, by the way they worked, Rouege could tell that they were experienced in what they were doing. Rouege testified that the other employees complained that he did not know what he was doing, so, "almost a week" after he was sent to the shot house, he was ordered to do only cleanup work, and that is what he did for the remainder of the 2 weeks that he was assigned to the shot house.

Rouege compared shot-blasting with blasting with sand:

> Shot is a rougher—it is like metal almost, little beads of metal. Sand is just raw sand. It does the same, but the shot is just a little more dangerous and a little bit more stingier. The shot could cut you—the sand can cut you with a force, but the shot could really cut you. . . . When you get hit with shot you nine out of ten [times] will bleed severely. . . . Sand you may have brush burns or something if it is not direct. It is more of a stinging with sand.

About July 30, Rouege was reassigned to wet dock-3 on the day shift, again doing brush painting.

The General Counsel argues that the assignment of Rouege to the night shift was onerous to Rouege because of: (1) Rouege's family problems and (2) the dangers involved when an employee who is comparatively inexperienced in blasting with sand is required to blast with metal shot. The General Counsel also argues that Rouege was treated disparately because, before the organizational campaign began, discriminatee Varnado was permitted to switch shifts with another employee to avoid going to the night shift, but Bourg did not allow Rouege to make such a trade.

Contrary to certain testimony by Respondent's witnesses, blasting with metal shot is obviously more perilous, and more onerous, than blasting with sand, especially for an employee like Rouege who was comparatively inexperienced in all blasting. Nevertheless, other employees were assigned to the Shot House at the same time that Rouege was assigned there, and Rouege did not claim at the time that he could not do the work. Moreover, Rouege testified that the night shift presented problems only of convenience to his schedule; Varnado, on the other hand, presented testimony about a threat that was presented to his family if he were not present at night. (Also, the one case of Varnado is hardly significant evidence of disparate treatment of Rouege.) Finally on this issue, it is to be noted that Rouege was relieved of his blasting duties after less than a week and assigned only cleanup work. At the end of the second week, he was reassigned to painting. This treatment by Respondent is not indicative of an intent to harass Rouege because of his prounion sympathies or any other reason.

I shall therefore recommend dismissal of this allegation of the complaint.

(3) Rouege's discharge for absenteeism

Rouege was absent on August 2 and 3, the first 2 days of his reassignment to the day shift. On direct examination, Rouege testified that he was absent on August 2 and 3 because there was an "[a]ir conditioning failure" at his house during the night of August 1–2. This testimony was false, as Rouege admitted when he was later called by Respondent as an adverse witness.

On August 2, Rouege called the paint department office clerk and told her that he would not be in that day because he had to wait for an air-conditioning mechanic. The clerk told Rouege to bring a receipt when he returned to work. Rouege testified that a mechanic did come to his home on August 2 and did fix the air-conditioning. This testimony was also false, as Rouege later admitted. After lunchtime on August 2, Rouege again called the clerk and told her that he would also be absent

on August 3 because "I had to wait on a part." Again, the clerk told Rouege to bring a receipt when he returned. While still on direct examination, Rouege was asked and he testified:

> Q. Was it true that you were waiting on a part?
> A. No, it wasn't.

On the morning of August 3, Rouege again called the clerk for the purpose of "[r]eminding her that I would be out of work that day." Again, Rouege was told to bring documentation when he returned to work. When asked on direct examination if he recalled what he did on August 3, rather than go to work, Rouege replied, "Not actually."

Rouege testified that the air-conditioning mechanic gave him a receipt that he presented to Respondent when he returned to work on August 4. Rouege identified the General Counsel's Exhibit 248 as that receipt. The receipt is on a form of a firm named "Barard Refrigeration and Air Conditioning." It is signed by one "Barard." The receipt is dated "8/2/93" at three different points: (1) the date that the order was received; (2) the date that the work was promised, and (3) the date the work was completed. The work description is: "Repaired Freon leak in liquid line. Replaced entire liquid line tubing. Pulled vacuum on system, and recharged to proper pressure." The charge is recited as $175. While still on direct examination, Rouege testified that the receipt was erroneous because: "The work that is on the receipt, that work wasn't done."

Rouege testified that he first presented the August 2 receipt to clerk Plaisance when he appeared at work on August 4. Rouege testified that he then went to Bourgeois' office with the receipt. General Foreman Terry Merna, as well as Bourgeois, was present, according to Rouege.[193] Rouege was asked and he testified:

> Q. And once you got to Mr. Bourgeois' office could you tell us, please, what happened?
> A. I handed him the receipt. He looked at it, told me to "get the fuck out" of his office, threw the paper at me, told Terry Merna to call security.
> Q. And what, if anything, did you say or do?
> A. I couldn't do nothing. I was shocked.
> Q. And what, if anything, did Mr. Bourgeois say in regard to your employment at Avondale?
> A. That I was fired.

On cross-examination Rouege was asked and he testified:

> Q. [By Ms. Canny]: Do you recall when it was that your air conditioning actually broke?
> A. Sometime during the night [of August 1-2].
> Q. And you called in on August 3 also stating you would be absent, didn't you?
> A. That is correct.
> Q. Do you recall what reason you gave for your absence on August 3?
> A. The same reason, waiting for the mechanic.
> Q. And it was when you came back to Avondale after those two days of absences that you were terminated. Isn't that right?
> A. That is correct.
> Q. Now, the air conditioning repairman came and fixed your air conditioner on August 2, didn't he?
> A. Correct.
> Q. And you didn't have any repairman on August 3, did you?
> A. That is correct.
> Q. Your air conditioning wasn't broken on August 3. Isn't that right?
> A. That is correct.
> Q. And you weren't waiting for a part on August 3.
> A. That is correct.
> Q. So the receipt that you have from the air conditioning repairman for August 2 has the correct date on it, doesn't it?
> A. That is correct.
> Q. I believe you testified that the receipt wasn't completely accurate, though, because the description of what was done that is listed on that receipt isn't really what was done.
> A. Correct, ma'am.
> Q. Do you know why the receipt has listed on it work that wasn't actually done?
> A. For an excuse, ma'am.
> Q. The repairman listed on that receipt, a Mr. Barard . . . is that a friend of yours?
> A. Yes.
> Q. And he gave you that receipt so you would have some paperwork to bring to work. Is that right?
> A. Correct.
> Q. Even though what he listed on it was not accurate.
> A. That is correct.
> Q. You don't have a receipt or paperwork to support your absence on August 3. Isn't that right?
> A. That is correct, ma'am.
> Q. And when you showed up for work you didn't have any paperwork for August 3. Isn't that right?
> A. That is correct.
> Q. So August 3 would be an unexcused absence. Isn't that right?
> A. That is true.
> Q. [By Ms. Canny]: What did you do on August 3, 1993?
> A. I cannot recall, ma'am. I really—I don't know—could have cleaned the yard or something. I don't know.
> Q. But the reason that you gave when you called in was not true. Isn't that right?
> A. Yes. That is what I am saying, ma'am.

When called as an adverse witness on day-149, Rouege admitted that he had air conditioning work done on neither August 2 nor 3, and that the documentation that he presented on August 4 was what his friend Barard gave him to use as an excuse.

I allowed Respondent's counsel to ask Rouege about other documentation that he had presented as excuses for absences for which he was not disciplined even though his other absences were collateral matters. I did this because of the demonstrated basis to attack Rouege's testimony, especially his testimony about his absences. The only other absence for which Rouege admitted presenting false documentation, and the only absence about which Rouege was again proved to be lying under oath, involved an absence of June 28. Rouege acknowledged that on June 28, he called in and stated that he would be absent for "business," as the call-in log for that date reflects. Rouege acknowledged that, when he returned to work on June 29, he submitted as documentation for his absence a piece of

[193] As I find infra, it was actually Foreman Terry Knight, not Foreman Terry Merna, who was also present.

letterhead stationery from the office of a New Orleans lawyer. The letter is dated June 28, and it states:

> To whom it may concern:
>
> This is to inform you that Octave Rouege had an appointment at our office for legal services on June 28, 1993.

The letter is signed by "Michelle Brown, Secretary." Respondent's counsel showed Rouege this letter; then Rouege was asked and he testified:

> Q. Why were you absent?
>
> A. Talking to a lawyer, preparing for a divorce.

Later in the examination as an adverse witness, Rouege was asked and he testified:

> Q. Do you recall testifying a few moments ago that on June 28, 1993, you went to see a lawyer about a divorce, a Mr. Donald Pinkston?
>
> A. Yes.
>
> Q. In fact, Mr. Pinkston never was a lawyer for you, was he? You never had him as a client?
>
> A. No, he didn't—no, we spoke about it, ma'am. I didn't say he handled the case. We—I just spoke to him about it.
>
> JUDGE EVANS: When you say you spoke to a lawyer, who did you speak to?
>
> THE WITNESS: I went to the office, and I am not sure who was the guy name, but I went in his office. I asked him a price on a divorce and everything. And before I left, I asked for something to show where I have been, for work.
>
> JUDGE EVANS: Next question.

Still later, Rouege was again shown the letter that he submitted to Respondent as documentation for his June 28 absence; Rouege was asked and he testified:

> Q. [By Ms. Canny]: Do you see the signature, Michele Brown?
>
> A. Right. . . .
>
> Q. Does that refresh your recollection that you had somebody prepare this for you as an excuse although you did not speak to the doctor [sic] that day?
>
> A. That is correct, ma'am. . . .
>
> JUDGE EVANS: All right. But . . . who is Michele Brown?
>
> THE WITNESS: She is their secretary.
>
> JUDGE EVANS: And did you physically go to her office?
>
> THE WITNESS: I spoke to her.
>
> JUDGE EVANS: How? On the phone?
>
> THE WITNESS: Yes.
>
> JUDGE EVANS: Next question.
>
> [By Ms. Canny]: And she gave you this excuse even though you were not speaking to a lawyer that day about a divorce . . . or [for] any other reason.
>
> A. That is correct.

That is, as well as submitting false documentation to Respondent, and lying to Respondent about the reason for his June 28 absence, Rouege lied under oath when he testified that he "went to the office." Of course, Rouege also lied under oath by being specific that, "before I left . . ." the lawyers office, he had received the documentation that he later presented to Respondent.

Rouege's Discharge—Respondent's Evidence

Bourgeois (vols. 132, 133) testified about his discharge of Rouege:

> He came in to show me his documentation; I looked at it. It was written up for one day only, so I asked him where the documentation was for the other day.
>
> He said, "Oh, they put the wrong date on it."
>
> So I said, Well, if that is the documentation for that date, where is the documentation for the date he put the wrong date on?
>
> And he couldn't explain it to me, and he said he didn't have the documentation for that one date; and at that time I terminated him.

Bourgeois testified that this incident happened "a couple of days" after August 4, and that on August 4 he had suspended Rouege indefinitely until he produced documentation for both August 2 and 3. Respondent's documents, and certain testimony by Foremen Terry Knight (vol. 115)[194] and Richard Sahuque (vol. 102), as well as the testimony by Rouege, establish that Rouege was discharged on August 4, when he first appeared with the (bogus) documentation for his absence of August 2.[195]

Bourgeois further testified: "I terminated him for his previous citations that he had and for absenteeism. Absenteeism was the reason he was terminated." Later, after acknowledging that Rouege had missed only 2 days after receiving the warning notices of June 15 (one for absenteeism and another for failing to call in), Bourgeois was further asked on direct examination and he testified:

> Q. Why is [it] that you terminated Mr. Rouege on the day that he brought you this paperwork?
>
> A. I terminated him for the previous violations that he had committed which was the citations he had in his folder, plus for not bringing in documentation for the days that he had missed at this time.
>
> Q. But to your knowledge, he had missed two days prior to his being terminated?
>
> A. Yes.
>
> Q. How come he was terminated after missing two days following a final warning, rather than three days?
>
> A. He didn't have to miss three days to be terminated; he could have been terminated at one day. The reason he was terminated with two [absences] was because he missed two [days] in a row.

The ASI-22 (discharge) form that effectuated Rouege's discharge was signed by Sahuque and Bourg. Entered in the "Explanation for Action" space is: "Excessive absenteeism—employee has been given (1) one citation for this offense on 6–099–0993. He has also been verbally [orally] warned several times by his supervisor, but he continued to miss time."

At no point did Bourgeois testify that oral warnings that Rouege may have received played any part in his decision to discharge Rouege. (Indeed, Bourgeois did not testify that he knew of any such oral warnings.) Also, at no point did Bour-

[194] It was Foreman Terry Knight, not Foreman Terry Merna, who was present when Bourgeois discharged Rouege.

[195] Bourgeois did not dispute Rouege's testimony about the language that he used as he told Rouege to leave, and he did not deny throwing the documentation at Rouege. I found that testimony by Rouege to be credible.

geois testify that Rouege was discharged because he had submitted false documentation for some of his absences. (Until some point after he testified on day-48 of trial, Rouege's lying during his call-ins to the paint department, and his submissions of false documentation for some of his absences, were apparently unknown to anyone but Rouege, his sister, and his friends.)

Rouege's Discharge—Conclusions

The ASI-22 (discharge) form that effectuated Rouege's termination expressly refers to his June 15 warning notice for absenteeism as part of the reason for his discharge. Also, referring to Rouege, Bourgeois testified: "I terminated him for the previous violations that he had committed which was the citations he had in his folder, plus for not bringing in documentation for the days that he had missed at this time [August 2 and 3]." The only warning notices in Rouege's "folder" that were less than 12 months old, and the only warning notices to which Bourgeois referred, were the two warning notices of June 15. As I have found that both of these warning notices were issued unlawfully, the discharge which, according to Bourgeois' testimony, would not have been imposed but for those warning notices, was similarly unlawful. Moreover, even assuming the validity of the warning notices upon which Bourgeois partially premised Rouege's discharge, Rouege had no worse record than the employees involved in the 133 comparative cases in described in Ancar's case, each of whom had three or more warning notices for unexcused absences within 12-month periods from 1990 through the inception of the overt organizational campaign on March 1, 1993. (The details of the 66 of those cases which involved employees being issued four or more absenteeism warning notices in 12-month periods are presented in App. D of this decision.) In each of those 133 cases, employees who received a third (or fourth, or greater, up to eight) warning notice for absenteeism necessarily had two prior warning notices for absenteeism after which they had two, or more, absences without being discharged.[196]

Respondent offered no evidence, and makes no argument on brief, why all of this evidence should not compel the finding that Rouege was treated disparately.[197] I do so find. Respondent has not shown why it treated Rouege disparately, and it has therefore not shown that it would have discharged Rouege even absent his protected activities. I conclude that, by discharging Rouege on August 4, Respondent violated Section 8(a)(3) of the Act.

The Appropriateness of Backpay and Reinstatement Remedies for Rouege

Respondent first contends that Rouege should be denied all backpay and reinstatement rights because of his perjury at trial.

I would not, in any way, minimize the fact that Rouege perjured himself. Rouege looked directly at me and testified that: (a) he had "mouth surgery" on June 7, (b) he did receive dental "treatment" on June 7, (c) he did not know why the documentation that he presented to Respondent on June 15 asked that he be excused on all 3 days of his absences from June 7 through 9, (d) his son had dental treatment on June 7, 8, and 9, (e) the "only" reason that he was absent on June 8 was that his air-conditioning had broken down, and (f) on June 28, he "went" to a lawyer's office to get the price of representation in a divorce proceeding. In addition to these responses to my questions, Rouege further lied at other points by answering Respondent's counsel's questions and stating that (g) he went to the dentist's office on June 7 because he "brought [his] kid to the dentist" because his son's filling had fallen out over the weekend, (h) he "actually" went to the dentist's office on June 7, and (i) he was absent on August 2 and 3 because his air-conditioning was, in fact, broken down. These are nine lies under oath, at least eight of which (excluding the lie about June 28) directly bear on the discharge issues in Rouege's case.

In making its contention that Rouege should be denied all reinstatement and backpay remedies because of this perjury, Respondent cites only *Precision Window Mfg. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), for the proposition that false testimony is a per se ground for denial of remedy. In *Precision Window Mfg*., the Eighth Circuit refused to enforce a Board order of reinstatement on the dual, independent, grounds that (1) the alleged discriminatee, one Manso, had perjured himself and (2) he had also threatened to kill a supervisor after his discharge. I reject Respondent's arguments based on *Precision Window Mfg*. Aside from the fact that the Board has never held that perjury is a per se ground for denying reinstatement, in *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994), the Supreme Court reviewed *Precision Window Mfg.,* and approved of it (at the Court's fn. 7) only on ground that the alleged discriminatee had threatened to kill a supervisor. Moreover, the Court (510 U.S. at 325) stated categorically:

> Notwithstanding our concern about the seriousness of Manso's ill-advised decision to repeat under oath his false excuse for tardiness, we cannot say that the Board's remedial order in this case was an abuse of its broad discretion or that it was obligated to adopt a rigid rule that would foreclose relief in all comparable cases.

The Court thus effectively rejected the Eighth Circuit's conclusion in *Precision Window Mfg*. that perjury was a per se ground for denial of reinstatement and backpay (something of which I am perfectly confident that Respondent's counsel knew when she briefed me on this point).

In *ABF Freight System*, the Court stated, at 322 fn. 8:

> We limited our grant of certiorari to the third question in the petition: "Does an employee forfeit the remedy of reinstatement with back pay after the Administrative Law Judge finds that he purposely testified falsely during the administrative hearing?"

That is precisely the issue that is presented in Rouege's case. Ultimately, the Court rejected the contention that the Board must always deny remedies to witnesses who perjure themselves; the Court held that whether the Board did so was a matter within the Board's "broad discretion" in fashioning remedies of the Act. In Rouege's case, the issue under *ABF Freight System* thus becomes: How should the Board exercise its discretion?

[196] Moreover, one of Rouege's previous warning notices was for failure to call in during an absence, not for absenteeism as such. Respondent's supervisors acknowledge the validity of this distinction because Rouege's ASI-22 (discharge) form did not mention the warning notice for failing to call in as a basis for Rouege's discharge.

[197] Other evidence of disparate treatment of Rouege exists in the cases of the 883 employees who were permitted to accumulate three or more warning notices in 12-month periods from 1990 through 1994 without being discharged, as demonstrated previously in the case of discriminatee Marshall.

Although many, if *possibly* not the majority, of the witnesses told some under-oath lies during this hearing, there were only five cases of demonstrated perjury other than Rouege's: (1) An employee-applicant testified that he responded to an advertisement by Respondent even though that advertisement had not been published at the time that he applied for employment. That witness declined to continue with cross-examination after his lie was exposed, and the General Counsel ultimately moved to dismiss the allegations of the complaint in regard to that alleged discriminatee. (2) Electrical Department Superintendent Robert Terry, as noted, testified that on June 4, 1993, he met with discriminatee Molaison, accepted Molaison's confession of misconduct, and discharged Molaison for that confessed misconduct; Terry further testified that Gerdes, his first assistant, had nothing to do with the discharge of Molaison. As all other witnesses to the discharge agreed, however, Terry had been absent on June 4, and Gerdes discharged Molaison. (3) In the immediately preceding case of Ancar, Foreman Erroll Rodrigue falsely testified that there was a supervisors' meeting on June 28, 1993, at which time he told Paint Department General Foreman Clement and Superintendent Bourg that Ancar had been absent on June 21, as well as June 28, and that he and Foreman Roland Ongeron had orally warned Ancar that the next time that he was absent he would be discharged. As the testimonies of Bourg and Clement make clear, however, no such supervisors' meeting occurred. (4) Welding Department Foreman Robert Ramirez testified that he did not tell an employee that he had been ordered to "burn" alleged discriminatee Mark Cancienne because of his union activities; after a tape recording was played for him, however, Ramirez admitted that he did exactly that. (5) Pipe Department General Foreman William Fedrick flatly denied that, on June 1, 1994, he did no "paperwork" (or anything else) as he stood by a ship's railing and watched alleged discriminatee Eddie Johnson walk about the main yard, wasting time. Fedrick was then proved to be an under-oath liar by *Respondent* who, after Fedrick left the stand, produced and offered as its exhibit notes that Fedrick had taken while he stood and watched Johnson.

If Terry, Rodrigue, Ramirez, and Fedrick are not prosecuted for perjury, nothing adverse is going to happen to them, or Respondent, or Respondent's lawyers.[198] In *ABF Freight Systems,* the Court recognized the inequities of not punishing, or even rewarding, supervisors for false testimony while punishing alleged discriminatees for theirs; the Court stated at 325:

> Notably, the ALJ refused to credit the testimony of several ABF witnesses [citations omitted], and the Board affirmed those credibility resolutions, [citations omitted]. The unfairness of sanctioning Manso while indirectly rewarding those witnesses' lack of candor is obvious.

The greater includes the lesser; perjured testimony has a stronger call for the exercise of Board discretion than does testimony that is simply discredited.

Employers such as Respondent should know that, if their supervisors commit perjury, they may be required to reinstate and pay backpay to alleged discriminatees who otherwise may receive neither remedy. If employers such as Respondent do know this, they will be more forthright about their presentations of testimony to the Board in discrimination cases. (If the Board would accordingly invoke its broad discretion to form remedies under the Act, and not automatically bar alleged discriminatees from remedy under such circumstances as these, it would not encourage alleged discriminatees to perjure themselves; an alleged discriminatee would be unlikely to risk perjury in the hope that his employer's supervisors might commit perjury also when they testify.) Therefore, because of the perjury committed by supervisors of Respondent, I would not bar Rouege from reinstatement or backpay solely because of his perjury at trial.

On the other hand, I do conclude that Rouege's remedy should be reduced because of the false documentation that he presented to Respondent while he was employed. Rouege submitted false documentation to Respondent as excuses for his absences before his discharge. Respondent does not require much in the way of documentation (receipts for automobile parts are even accepted), but it does require the documentation to be truthful.[199] Presumably, any employer would. If an employer satisfies its burden of establishing that a discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. I therefore recommend that the Board find that Rouege's rights to reinstatement and backpay ended as of day-149 of trial, February 28, 1996, when Rouege admitted that he had submitted false documentation for his absences, or such earlier date that Respondent can establish at the compliance stage of this proceeding that it had earlier knowledge that Rouege's submissions of documentation for his absences were bogus.

c. Audra Scott

Audra Scott (vols. 61, 62), who was employed as a painter's helper (laborer), was issued a warning notice on January 19, and she was discharged on May 6, 1994.[200] The fourth complaint, at paragraphs 23 and 25, respectively, alleges that by warning and discharging Scott Respondent violated Section 8(a)(3). The General Counsel contends that Respondent warned and discharged Scott because of her known union activities and expressions of sympathy which included her wearing prounion insignia and speaking favorably about the organizational attempt at an employer campaign meeting. Respondent answers that its supervisors had no knowledge of any union activities or sympathies of Scott at any relevant time and that Scott was discharged solely because of excessive absenteeism. The General Counsel replies that Scott was treated disparately because other employees had worse absenteeism records, but they were issued lesser, or no, discipline. Ultimately, I find and conclude that Scott was treated disparately and that her discharge was unlawful.

Scott testified that she wore a "Union-Yes" sticker in the middle of the back of her hardhat from about 2 months before the June 25 Board election until a few weeks afterwards when she took it off. The sticker remained off Scott's hardhat until

[198] I feel constrained to point out that, although Terry's perjury seems to have been purely something of his own doing, I cannot see how Rodrigue's perjury could have been anything other than suborned. It fit altogether too nicely into Respondent's theory of Ancar's discharge, it required the maneuvering of Clement's and Pertuit's testimonies around the events of June 28, and it was shown to be completely false by the cross-examinations of Clement and Bourg.

[199] I now reverse my ruling at trial and receive R. Exh. 791(b)(7), an ASI-22 (discharge) form dated March 1, 1993, pursuant to which another employee was discharged for submission of false documentation.

[200] All dates mentioned in Scott's case are from June 1993 through May 1994, unless otherwise indicated.

November, at which time Scott replaced it. Further according to Scott, she then continued to wear the sticker on her hardhat through the date of her discharge. As I find infra (contrary to the assertion of Respondent on brief) General Foreman Tommy Bourgeois made the decision to discharge Scott. Bourgeois described an unrelated incident involving Scott that occurred in December. Bourgeois testified (vol. 132) that he could not recall if Scott was then wearing prounion insignia. Bourgeois further testified on cross-examination (vol. 133) that he could not recall if Scott was wearing her hardhat at the time she was discharged. This testimony by Bourgeois is less than a convincing denial by Bourgeois that he knew that Scott wore prounion insignia from at least November through the date of her discharge. Nor did Scott's other supervisors present convincing denials of Scott's claims about when she wore prounion insignia. I find that Scott did wear prounion insignia on her hardhat during the periods that she indicated in her testimony.

Scott further testified that during the month before the Board election she attended an employer campaign meeting that was conducted by her foreman whose name she thought was "Pierre." The only paint department supervisor named "Pierre" was Eldon Pierre, according to a table of organization that was introduced, and according to the testimony of Lead Foreman Richard Sahuque (vol. 102). According to Scott, at the employer campaign meeting:

> [Pierre said that] the Union ain't no good. . . .
>
> I asked him how he know the Union wasn't no good.
>
> And then he was saying things like about other companies that had the Union; how the Union brought them down and stuff like that.
>
> I asked him how he know if they never tried the Union.
>
> And he tells me stuff like he had to come back with the answer.

Pierre testified (vol. 114), and he gave some testimony about Scott, but he did not deny this testimony. Respondent contends that this testimony could not be true because Respondent's attendance logs for this period listed Scott on crews other than Pierre's. This factor does give me pause, but as stated in Respondent's brief, at page "Paint-185," Scott, "was moved between foremen on a frequent basis," and the MCRs maintained by the foremen, not the attendance logs maintained by departmental clericals, were the primary sources of evidence used throughout the hearing to determine who supervised whom, and when. Absent any denial by Pierre that Scott made these prounion remarks to him, I find that she did so. (Also, only foremen, general foremen, and superintendents conducted employer campaign meetings; if the foreman in question was not Pierre, it was some other foreman to whom Scott made her prounion statement.)

As a matter of background for the alleged unfair labor practices in Scott's case, it is to be noted that on May 31, 1993, at a time that she had been temporarily transferred to the electrical department, Scott was issued a warning notice for "5 unexcused absences." Respondent's supervisors testified, and Respondent's ASI-22 (discharge) form for Scott states, that this warning notice was part of the reason for Scott's ultimate discharge.

(1) Scott's warning notice for absenteeism

On January 19, Scott received a written warning notice that was signed by Paint Department Superintendent Bourg. Bourg checked the box for General offense-1 of the Avondale Employees' Guide; *to wit*: "Unexcused absences of three (3) working days within a 30-day period." The warning notice cites as the days of Scott's unexcused absences December 2, 7, and 29 and January 18. Scott acknowledged being absent on all of 3 days, and the General Counsel does not contend that these absences should have been considered excused. The General Counsel argues, however, that General offense-1 forbids three unexcused absences if they occur within 30 days and, in this instance, Scott was warned for absences in a period in excess of 30 days. The General Counsel contends that the Board should therefore infer that the warning notice was actually issued because of Scott's prounion sympathies.

Scott did have three days of unexcused absences between December 2 and 29, a period of less than 30 days, The warning notice of January 19 does mention Scott's unexcused absence of January 18 as well, but the notice does not depend on that absence, nor is there any evidence, or reason to believe, that Scott would ultimately have received different treatment if January 18 had not been mentioned on the warning notice. (For all it appears, Scott's December absences simply went unnoticed until she was absent again on January 18.) I shall therefore recommend dismissal of this allegation of the complaint.

(2) Scott's discharge for absenteeism

Scott was absent again on May 5. She called in first to say that she would be late because her ride was late in picking her up; then she called in to say that she would not be at work at all because the ride had not come. Scott testified that she stayed at home all day, May 5.[201] Scott's absence of this date was recorded as unexcused, and, contrary to the arguments of the General Counsel, there is no probative evidence of why it should not have been.

As mentioned several times in this decision, May 6 was the date of Respondent's annual shareholders' meeting that was conducted at Respondent's administration building. Many prounion employees made a point of wearing union T-shirts that day. The Union distributed T-shirts at the gates that morning. Scott testified that she reported to work on May 6 wearing a union T-shirt that she received that morning. Her foreman that day was Carl Mott Jr.

Scott testified that as she approached Mott to sign in, Mott told her that Bourgeois wanted to see her, and Mott escorted her to Bourgeois' office. Bourgeois asked her if she had any documentation for missing May 5. Scott replied that she did not. Bourgeois asked Scott to give him her badge, an action that signified that Scott was discharged. Scott surrendered the badge and left the premises.

Scott's Discharge—Respondent's Evidence

Mott testified that he could not remember whether Scott was wearing a union T-shirt on the day of her discharge. Bourgeois denied it. On direct examination, Bourgeois testified that on May 6, a clerical employee told him that Scott had been absent on May 5 and she showed him Scott's prior warning notices. Bourgeois called Scott and Mott to his office. Bourgeois was asked and he testified:

[201] The Tr. p. 12,854, L. 24, is corrected to change "errors" to "areas."

> Q. After you had asked her about why she was absent and whether she had any documentation, was anything else said?
>
> A. Only that I gave—I had looked at her citations she had, and I determined for the prior citations she had and for not bringing documentation for the days she had missed, that Carl Mott should terminate her.

Bourgeois used the plural "days," but, other than May 5, Scott's other absences following her January 19 warning notice had been recorded as excused. Immediately, Bourgeois made clear that he did not mean the plural, but that he meant only Scott's absence of May 5. Bourgeois was asked and he testified:

> Q. Why was she terminated?
>
> THE WITNESS: She was terminated for the citations that she had accumulated prior to missing that day and for not having documentation for the day she had missed.

As noted in Rouege's case, Bourgeois testified that any employee "could have been terminated at one day" of unexcused absence after having received two warning notices for absenteeism, and Respondent contends that Scott was discharged because she was absent one time after having received two warning notices for absenteeism.

Scott's Discharge—Conclusions

It is undisputed that Scott spoke up for the Union at an employer campaign meeting. Also, although her supervisors denied, or claimed inability to remember, that Scott wore a "Union-Yes" sticker on her hardhat, I have found that she did so during the month before the Board election and from November through the date of her discharge. Therefore, the General Counsel has also shown that Scott engaged in the open and obvious union activity of wearing prounion insignia, and I find that all supervisors who worked around her were aware of her prounion sympathies at the time of her discharge.

As indicated by the above-quoted testimony of Bourgeois ("I determined . . ."), he, not Mott, made the decision to discharge Scott.[202] As noted above, discriminatee Marshall testified that, in April or May 1993, at an employer campaign meeting, Bourgeois told the employees of the paint department:

> that the Union was giving us our union stickers and paper, and if we get caught wearing the sticker on our hardhat, that we would be fired, and if we get caught reading the paper, that we was going to get fired.

As further mentioned in Marshall's case, although this threat was made the subject of a specific allegation of the complaint,[203] Bourgeois did not deny it. Therefore, as well as showing that Respondent harbored animus toward all prounion employees, especially prounion employees who wore prounion insignia, the General Counsel has shown that the very supervisor who discharged Scott had categorically threatened employees with discharge for wearing prounion insignia such as the "Union-Yes" sticker that Scott wore. Scott, I further find, did wear a union T-shirt on May 6, and its prounion insignia would come within the ambit of Bourgeois' undenied threat.

I therefore find and conclude that the General Counsel has presented a prima facie case that Scott was unlawfully discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Scott even in the absence of her known protected activities. Respondent's defenses must therefore be examined.

On brief, Respondent states: "Ms. Scott was terminated because of her unexcused absence after two prior citations for attendance in the previous 12 months, consistent with the rules *as enforced in the Paint Department*." I emphasize the last phrase because it is most meaningful. By expressing it, Respondent concedes the controlling nature of the issue of consistent enforcement of its absenteeism rules. Respondent however, did not consistently enforce its absenteeism rules, at least before the organizational campaign began. As demonstrated in Ancar's case, the employees involved in 133 comparative cases were issued three or more warning notices for unexcused absences within 12-month periods from 1990 through the inception of the overt organizational campaign on March 1, 1993. (The details of the 66 of those cases which involved employees being issued four or more absenteeism warning notices in 12-month periods are presented in App. D of this decision.) In each of those 133 cases (the majority of which involved employees in the paint department), employees who received a third (or fourth, or greater, up to eight) warning notice for absenteeism necessarily had two prior warning notices for absenteeism after which they had two, or more, absences without being discharged. Respondent offers nothing to explain this disparity. As I did in the cases of Ancar and Octave Rouege, I find that evidence of disparate treatment to be compelling, and I find the inference that Scott was unlawfully discharged to be plainly warranted.

That is, Respondent has failed to show why it allowed a significant number of other employees to compile absenteeism records that were worse than Scott's, but Scott was discharged and those other employees were not.[204] Because it has failed to adduce such evidence, Respondent has not shown that it would have discharged Scott even absent her protected activities. I therefore conclude that Respondent discharged Scott in violation of Section 8(a)(3) of the Act.

d. Carlos Henriquez

Carlos Henriquez (vol. 16), who was employed as a sandblaster-painter, was issued warning notices on February 1 and 4, and he was discharged on February 9, 1994.[205] The second complaint, at paragraphs 135 and 140, respectively, alleges that by issuing the warning notices and discharging Henriquez, Respondent violated Section 8(a)(3). The General Counsel

[202] Respondent's dismaying attempt to make out Mott, rather than Bourgeois, to be the decision-maker in Scott's case is to be compared with its dismaying attempt to make out Larry Danos, rather than Bourgeois, to be the decision-maker in the case of discriminatee Marshall, supra. It is obvious that Respondent made the attempt in Marshall's case to bolster its claim that all foremen are completely autonomous (and that disparate treatment theories may not be used against Respondent for that reason), and it is further obvious that Respondent made the attempt in Scott's case because it was Bourgeois, not Mott, who had threatened such employees as Scott for wearing prounion insignia.

[203] Second complaint, par. 20.

[204] Other evidence of disparate treatment of Scott exists in the cases of the 883 employees who were permitted to accumulate three or more warning notices in 12-month periods without being discharged, as demonstrated previously in the case of discriminatee Marshall.

[205] All dates mentioned in Henriquez' case are from March 1993 through February 1994, unless otherwise indicated. At various points in the transcript Henriquez' name is misspelled "Enriquez," and the transcript is corrected.

contends that Respondent warned and discharged Henriquez because of his known union activities and expressions of sympathy which included his wearing and otherwise displaying prounion insignia and his telling one supervisor that he intended to vote for the Union in the June 25 Board election. Respondent denies its supervisors knew of any prounion sympathies that Henriquez may have held at any relevant time. The February 1 warning notice was issued for absenteeism; the General Counsel challenges Respondent's treatment two of the absences that are covered by that warning notice as unexcused, but Respondent offers no reason for its including those dates. The February 4 warning notice was issued for tardiness, and Respondent answers that Henriquez was, in fact, tardy on the dates covered by the warning notice. Respondent further answers that Henriquez was discharged solely because he was tardy on February 9 after having received the tardiness and absenteeism warning notices. The General Counsel replies that Henriquez' warning notice for absenteeism, if not also his warning notice for tardiness, was unlawfully issued and, therefore, his discharge which was partially premised on that warning notice was also unlawful. The General Counsel also contends that Henriquez was treated disparately because other employees had worse attendance records without being discharged. Ultimately, I find that Respondent issued the tardiness warning notice to Henriquez lawfully, but the absenteeism warning notice was unlawfully issued to Henriquez, and I conclude that the discharge which was based, in part, on that warning notice was also unlawful.

Henriquez testified that, from about a month before the Board election through the date of his discharge, he wore a "Union-Yes" sticker in the front-middle of his hardhat, he regularly wore a union button on his shirts,[206] and he maintained a "Union-Yes" bumper sticker on his lunchbox which he kept with him as he worked. Henriquez' supervisors denied ever seeing any prounion insignia that Henriquez wore, or displayed, but I found Henriquez credible on the point. Henriquez further testified that on the date of the election he and other employees on his crew were told by his then-foreman T.—C. Bunch where to go to vote. Henriquez testified:

> He explained to us the way we going to go into the place, go in and go out, you know, for the vote place. And then he come to us. He told me, he said, "Who you going to vote for." And I tell him, "I vote for the Union." And John and Larry [Townsend], he say—also say the same thing, Union.

(Henriquez' English is somewhat limited.) Henriquez did not know John's last name. Townsend did not testify. There is no 8(a)(1) allegation based on this testimony, but the General Counsel relies upon it for evidence of knowledge of Henriquez' prounion sympathies. After Bunch acknowledged on direct examination (vol. 103) that he knew who Henriquez was, he was led directly to a denial of this testimony by Henriquez. I credit Henriquez.[207]

(1) Henriquez' warning notice for absenteeism

As Henriquez testified, and as Respondent's records reflect, on January 17 and 18 Henriquez called in to the paint department office to report that he would be absent because of illness in his family. As Respondent's records further reflect, on January 19, when he returned to work, Henriquez presented to Foreman Ernie Cantrelle documentation which reflected that he had, in fact, taken his son and wife to a physician's office on January 17 and 18. The legitimacy, and adequacy, of the documentation that Henriquez presented to Cantrelle is not questioned by Respondent.[208]

On February 1, Foreman Cantrelle presented to Henriquez a warning notice that was signed by Cantrelle and Paint Department Superintendent Bourg. No numbered box on the warning notice is checked, but it appears to be issued under General offense-1 of the Avondale Employees' Guide (three unexcused absences within a 30-day period). In the space for "Date and Time of Offense," Bourg entered: November 23, 1993, and January 11, 17, and 18, 1994. In the "Reason for Warning" space Bourg entered: "You are hereby notified that you have been absent an excessive amount of workdays. Should you continue to do this, immediate disciplinary action will be taken." In the space for employee comments, Henriquez wrote that some his absences were caused because of "bad health in the family."

Cantrelle (vol. 103) acknowledged on cross-examination that he received Henriquez' documentation for his absences of January 17 and 18; Cantrelle further acknowledged that when he issued the warning notice to Henriquez, Henriquez told him orally that his absences had been caused by illnesses in his family. Cantrelle further acknowledged reading the comment that Henriquez made on the warning notice about his family. Glenn Clement, Cantrelle's general foreman, also acknowledged (vol. 86) that he reviewed Henriquez' comment on the February 1 warning notice before he placed it in Henriquez' personnel file. Neither Cantrelle nor Clement was asked why he did not take Henriquez' documentation, or written or oral comment, into consideration, or why he did not otherwise review the matter before processing the warning notice to Henriquez' personnel file. Bourg (vols. 81, 82) was not asked by Respondent why he authorized or signed the February 1 warning notice that was issued to Henriquez.

In summary, Respondent's supervisors offered no explanation of why Henriquez' absences of January 17 and 18 were made the subject of the February 1 warning notice. Neither on brief nor reply brief does Respondent argue any theory of validity for the February 1 warning notice, although the General Counsel briefed the matter thoroughly in his original brief.

[206] Respondent contends that the legend of the button would have been unintelligible to its supervisors because it was in Spanish. The largest word on the button is "Union." Also the Union's round emblem occupies the "o" in "Union," and it would be easily recognizable, as well. Finally, the legend has a large "Si" which most people would recognize as meaning "Yes," and it has the same large check mark in a box, just like the format of the "Union-Yes" stickers that the Union distributed.

[207] Bunch acknowledged on direct examination that he did not attend any of the TIPS instructional meetings that Respondent held for supervisors during the preelection period. (Bunch also acknowledged that he had never heard of the TIPS cards that were distributed at those meetings.)

[208] Cantrelle's general foreman, Clement, attempted evasion on cross-examination, but he ultimately admitted that a documented absence to take a family member to a doctor is considered an excused absence.

Henriquez' Warning Notice for Absenteeism—Conclusions

Henriquez told at least one supervisor, Bunch, that he would vote for the Union in the Board election. Moreover, Henriquez engaged in the open and obvious union activity of wearing, and displaying on his lunchbox, prounion insignia. Any supervisor who worked around Henriquez would have seen that display of prounion sympathies. Respondent's animus toward employees who maintained prounion sympathies, and Respondent's animus especially toward those employees who displayed prounion insignia, is established throughout this decision. Therefore, the General Counsel has presented a prima facie case that the February 1 warning notice was issued unlawfully to Henriquez, and Respondent is required to demonstrate that the warning notice would have been issued to Henriquez even absent his protected activities. Respondent, however, has not done so (or even attempted to do so). Accordingly, I find and conclude that by issuing the February 1 warning notice to Henriquez, Respondent violated Section 8(a)(3).[209]

(2) Henriquez' warning notice and discharge for tardiness

Henriquez testified that on the morning of February 2, and on the mornings of most of the 30 days before February 2, he arrived at work early by a margin of 2 minutes or more. On February 2, as he was approaching his work area (on the ground), he was approached by General Foreman Glenn Clement. According to Henriquez, "And he came to me, and he say, `You are late; don't let it happen again.' And I said nothing. I just went back to work."

Henriquez further testified that he was on time for work on February 3. On February 4,[210] Cantrelle issued another warning notice to Henriquez, dated February 3, the warning notice is signed by Bourg and Cantrelle. The box for the general offense-2 under the Avondale Employees' Guide ("Tardiness three (3) times within a 30-day period") is checked. In the space for "Date and Time of Offense," "(several)" was entered. In the "Reason for Warning" space, was entered the following: "You are hereby notified that you have been tardy three (3) times within a 30-day period. Should you continue to do this, immediate disciplinary action will be taken. *Final Warning*." Henriquez testified that, when Cantrelle gave him the warning notice, he said only "Carlos, you got a citation."

Henriquez testified that on February 9, the day of his discharge, he punched in, and he was "about 15 feet" from the point at which he was to sign in on Cantrelle's MCR, when the 7 a.m. whistle blew. Clement was present with Cantrelle as Henriquez approached the sign-in area. According to Henriquez: "And Glenn Clement told me, 'You are late; you are fired.' I didn't say nothing." Henriquez denied being late at any time from February 4 through 8.

The MCRs have a column that is designated for "Late Arrival." When an employee is to be docked for being late, the foreman enters the time that an employee should have started and the time that the employee actually did start. Respondent offered into evidence Henriquez' foremen's MCRs covering the period from January 14 through February 9. On the MCR for February 9, Henriquez is recorded as being discharged. On none of the remainder is Henriquez recorded as being a "Late Arrival," and he was paid for 8 hours on each day, unless he was absent (January 17, 18, and 31) or left early (February 1).[211]

Henriquez' Warning Notice and Discharge for Tardiness—Respondent's Evidence[212]

Cantrelle runs crews of sandblasters and touchup painters. Cantrelle testified that by 7 a.m., employees on his crew should have (1) punched in at a timeclock, (2) presented themselves at the point where he maintains his MCRs,[213] (3) signed in, (4) received their assignments, (5) gathered their tools, and (6) at least have begun walking toward their assigned jobs, if not already be there. Cantrelle testified that he begins assigning jobs at 6:30.[214] Cantrelle described his method of assigning work to sandblasters as:

> Well, it is first-come, first-served. If you come to me at quarter to 7, or at 6:30 a.m., I am going to assign you my hardest job, because I need to make sure that that job gets done today. If you wait till the last one, I might not need a blaster that day. I might have—some days, I only use seven; somedays, six; some days, only three.
>
> Whoever comes up to me first that morning gets assigned a blasting job, providing he is a blaster.

Cantrelle testified that, beginning on the morning of January 24 (after Henriquez claimed that he had a back injury), Henriquez began a practice of standing 20 to 25 feet away from the point at which Cantrelle maintained his MCR and waiting until the 7 a.m. whistle blew. As the whistle started to blow, Henriquez would begin walking to Cantrelle and present himself "[e]xactly at 7 o'clock when the whistle quit blowing." Cantrelle further testified that: "At 7:00 o'clock, he is supposed to have his shield, his hood in his hand, and walking to his jobsite." (Blasters wear hoods, as well as shields.) Cantrelle testified that Henriquez did this on six occasions beginning on January 24 through February 8. I number these occasions as I narrate Cantrelle's testimony:

> (1) Cantrelle testified that on January 24, Henriquez stood near a food-vendors stand until the 7:00 whistle began blowing, and he reached the MCR area as the whistle stopped blowing. After being directed to his MCR of January 24, Cantrelle was asked and he testified:
>
> Q. [By Ms. Canny]: What is Column 20 for on the MCR?

[209] The General Counsel further argues on brief that the February 1 warning notice was invalid because, contrary to the substance of general offense-1, it covers a period of greater than 30 days, as well as including two excused absences. This contention is also valid, and it fortifies my conclusions here.

[210] Henriquez testified that he received his second warning notice on February 3, but Cantrelle testified that it was February 4, and that appears to be the case.

[211] Henriquez was not disciplined for his absence of January 31 or his leaving early on February 1.

[212] It is first to be noted that, as opposed to the case of Henriquez' warning notice of February 1, Respondent presented detailed testimony about Henriquez' warning notice of February 4 and his discharge of February 9.

[213] There are over 100 timeclocks in the yard, and, especially for those employees who were not working on ships that are in the water, timeclocks are usually located close to the areas where foremen maintain their MCRs for signing in.

[214] According to Marybeth Arnold (vol. 18), Respondent's supervisor of timekeeping, the pay of employees who are to begin work at 7 a.m. begins at 7 a.m., even if they punch in earlier; if they punch in after 7 a.m., they are paid from the point that they punch in, or the time that they sign in on an MCR, whichever is later.

A. Column 20 is the shift start—the time of the shift and the shift start.

Q. And what do you use that column for?

A. For when somebody is late.

Q. Directing your attention to 519(g), why isn't there anything written in that column if Mr. Henriquez was tardy [on January 24]?

A. He was tardy; he wasn't late.

Q. What time did he arrive at the work area?

A. Exactly 7:00 o'clock.

Q. Why was he tardy? . . .

THE WITNESS: Because he wasn't ready for work at 7:00 o'clock.

Cantrelle testified that he told Henriquez, "You have to be here on time, ready to go to work." (2) Cantrelle testified that Henriquez did the same thing on January 25, and Cantrelle told him: "Carlos, the job requires you to be here at 7:00 o'clock ready to go to work, not stand over there at 7:00 o'clock and wait for everybody to get assigned a job and then come over to me. The job requires you here. At 7:00 o'clock, you are supposed to be walking with your equipment to the job." (3) Cantrelle further testified that Henriquez did the same thing on January 28; Cantrelle could not remember if he repeated his instructions to Henriquez on that date. (4) Cantrelle further testified that on February 2, Henriquez did: "The same thing. He would stand off 25—20 to 25 feet. He would not approach me until the 7:00 o'clock whistle would blow." Further according to Cantrelle, Clement was present on February 2 when Henriquez again presented himself "tardy." According to Cantrelle:

> [W]hen Carlos stood off and again and didn't come until 7:00 o'clock or right after 7:00, he [Clement] verbally warned him [Henriquez] and told him that this was the final warning, that he [Clement] was going to write him up. If it happened again, he was going to get terminated.

(5) Cantrelle testified that on February 4, Henriquez again stood away from the sign-in point until the 7 a.m. whistle began blowing. Later in the day, he gave to Henriquez the warning notice quoted above which had been prepared, and dated, February 3. Cantrelle testified that on February 4, as he presented the warning notice, he told Henriquez that: "this was his last chance." (6) Cantrelle further testified that on the morning of February 8, Henriquez again stood away from the sign-in point until the 7 a.m. whistle began blowing. Cantrelle did not testify that he said anything about the matter to Henriquez that day.

Finally, Cantrelle further testified that on February 9, Henriquez arrived "like seven or eight minutes after the 7:00 whistle." Foremen Errol Rodrigue and Jay Pertuit (who signed in their crews at the same point on the ground) were also present. Clement, also, was present as Henriquez approached. Cantrelle testified that Clement terminated Henriquez after saying, "You remember what I told you what was going to happen if you come in late one more time?"

Henriquez' Warning Notice and Discharge for Tardiness—Conclusions

As the last quote indicates, Cantrelle was not always consistent with his distinction between the terms "late" and "tardy." Other supervisors testified that there was no difference in the terms, but the articulated distinction appears to be something more that just Cantrelle's own creation. As evidence of disparate treatment that I will consider infra, the General Counsel placed in evidence the warning-notice history of several employees who, without being discharged, compiled worse tardiness and absenteeism records than Henriquez. As quoted below, two of those warning notices describe conduct that seems essentially identical to that ascribed to Henriquez, and in each of those cases, the employee is cited for a violation of general offense-2 under the Avondale Employees' Guide. Even if the tardiness/lateness distinction were only Cantrelle's creation, however, the issue before the Board is whether Henriquez was unlawfully disciplined on February 4, no matter what wording was used on the warning notice (or how Cantrelle articulated the offenses at trial).

Henriquez was not called in rebuttal to deny that, although he punched in by 7 a.m., he did not sign the MCRs by that hour on January 24, 25, and 28 and February 2, the four dates that are the apparent subject of the warning notice that was drafted on February 3 and issued to Henriquez on February 4. I credit Cantrelle's testimony in this regard. The General Counsel has not shown that other employees were allowed to delay signing in as Henriquez did and not be disciplined. Thus, there is no element of discrimination involved in the warning notice of February 4, and I shall therefore recommend dismissal of this allegation of the complaint.

I credit Cantrelle's testimony (which was corroborated by Pertuit and Rodrigue, as well as Clement) that Henriquez did not come close to signing the MCR by 7 a.m. on February 9. I further accept Respondent's contention that Henriquez was therefore again "late." The issue under the Act therefore becomes: Why was Henriquez discharged?

When Clement was on direct examination (vol. 86), Respondent did not ask him why he discharged Henriquez. On cross-examination, however, Clement was asked and he testified:

Q. And could you tell us, please, why you fired Mr. Henriquez?

A. For repeatedly coming to work late.

Q. And did you consider anything else?

A. His past record.

. . . .

Q. So you knew on the day you fired him that he had at least one written citation [for tardiness], and also there was a verbal warning.

A. And I knew he had a citation written up for missing time.

This "missing time" warning notice was, of course, the February 1 warning notice which, as I have previously concluded, was issued in violation of Section 8(a)(3). According to Clement's testimony, however, the unlawfully issued warning notice of February 1 was an indispensable part of the putative reason for Henriquez' discharge. Henriquez' discharge being based, in part, on an unlawfully issued warning notice is, itself, therefore unlawful.

Even if Henriquez' February 1 warning notice for absenteeism, as well as his February 4 warning notice for tardiness, was issued lawfully, the General Counsel has shown that, within various 12-month periods from 1990 through 1994, the following employees compiled worse records of tardiness, or absenteeism and tardiness combined; still, they were not discharged. Almost all of the following employees were issued one or more warning notices for tardiness after already having been issued at least one warning notice for absenteeism and one warning

notice for tardiness (and many of those preceding warning notices were marked "Final"). That is, these employees, unlike Henriquez, were not discharged on their first day of tardiness after having been issued two warning notices; they were allowed to compile 3 (or more) days of tardiness and simply issued another warning notice. (It is also to be noted that several of the following employees were issued one warning notice for more days of tardiness than all of those accumulated by Henriquez. That is, any set of three dates of tardiness in a 30-day period by the following employees could have warranted a separate warning notice, if not discharge, under General offense-2 of the Avondale Employees' Guide. Therefore, some of these employees had more tardiness even than that indicated by a simple count of their warning notices. And, again, the following employees had more tardiness than Henriquez without being discharged.)

10. On June 21, 1990, Electrical Department employee Forres Collins, badge 9660, was issued a warning notice that states that on June 21: "Employee was not on the job ready to work at 12:30. (Lunch end) He was on the ground waiting for the elevator when the whistle blew." The box for "other" major offense is checked. On June 28, 1990, Collins was issued a warning notice for four days of tardiness in that month. On July 25, 1990, Collins was issued a warning notice for unexcused absences of five working days within a 30-day period.

11. On September 20, 1990, Collins was issued a warning notice for five additional absences during a 30-day period. On November 13, 1990, Collins was issued a warning notice for leaving the work place without permission.

12. On November 26, 1990, Collins was issued a warning notice for being late four times during the month of November. This was Collins' sixth warning notice in the 12-month period that began June 21, 1990, and it was his fourth during that period for being absent or tardy.

13. On September 11, 1991, Collins was issued another warning notice for tardiness. This was Collins' fourth warning notice in the 12-month period that began on September 20, 1990, and his second for tardiness following his warning notice for absenteeism.

14. On September 23, 1991, Collins was issued a warning notice for six unexcused absences during the month of September. The warning notice concludes "Last And Final Warning Notice." This was Collins' fourth warning notice in the 12-month period that began on November 13, 1990, and his third during that period for absenteeism or tardiness.

15. On April 10, 1992, Collins was issued a warning notice for being absent on April 9, 10, 14 and 15. This was Collins' third warning notice for tardiness during the 12-month period that began on September 11, 1991.

16. In the period from November 20, 1990, through March 22, 1991, Paint Department employee Doug Drago, badge 2071, was issued three warning notices for wasting time and intentional negligence. On April 18, 1991, Drago was issued a warning notice for unexcused absences on four dates during a 30-day period. On May 1, Drago was issued a warning notice for being tardy on April 8, 18 and 23. And on May 3, Drago was issued a warning notice for being tardy on April 26, 29 and 30 and May 1, 2 and 3. (That is, because Drago assuredly was not discharged on May 2, he was allowed eight days of being tardy, five of which were consecutive, after having been issued a warning notice for absenteeism.)

17. On December 11, 1990, Electrical Department employee Reginald Beaco, badge 10550, was issued a warning notice for tardiness on six days in the preceding month. (Obviously, under General offense-2 of the Avondale Employees' Guide, Beaco could have been issued two warning notices for these six tardy arrivals, but he was not.) On March 13, 1991, Beaco was issued a second warning notice for tardiness, this time for three tardy arrivals in the preceding 30 days. On March 27, 1991, Beaco was issued a third warning notice for three tardy arrivals. The warning notice states in part: "Mr. Beaco was late three times (3-25, 3-26, 3-27, 1991) since he received his last warning. Final warning."

18. On May 27, 1991, despite his prior express final warning, Beaco was issued his fourth warning notice for tardiness on eight more days; to wit: May 1, 3, 7, 8, 17, 21, 22 and 24, 1991. (Again, this string of tardy arrivals could have been the subject of multiple warning notices.)

19. On June 7, 1991, Beaco was issued a warning notice for absenteeism; absences of May 13, 14 and 31 were noted; also the warning notice states: "He was also late on June 7, 1991."

20. On June 18, 1991, Beaco was issued a warning notice for Major offense-1 under the Avondale Employees' Guide for absences on three consecutive working days. The notice states: "Mr. Beaco was absent on June 12, 13 and 14, 1991. Mr. Beaco received a written warning on March 13, May 27, June 7, and June 18, 1991. Fourth warning." Actually, this warning notice was Beaco's sixth warning notice in the 12-month period that began on December 11, 1990.

21. On January 10, 1992, Beaco was issued another warning notice for tardiness on three consecutive days; to wit: January 8, 9 and 10. This was Beaco's sixth warning for absenteeism or tardiness in the twelve-month period which began on March 13, 1991, as well as his second Major offense warning notice under the Avondale Employees' Guide.

22. On March 2, 1991, Electrical Department employee Michael Simmons was issued a warning notice because: "Employee was tardy 5 days in a week." The notice concludes: "Final warning." On March 22, 1991, Simmons was issued another warning notice for tardiness on that day. The notice concludes: "Recommend termination." Simmons was not discharged, a fact proved by another warning notice that he was issued on July 15, 1991; that notice states: "Mr. Simmons was absent on June 17 and July 15; he was late on June 20, and July 11. He went home early on June 28, 1991."

23. On April 26, 1991, Paint Department employee Dematrice Hudson, badge 3870, was issued a warning notice for being tardy four days during a 30-day period. On October 23, 1991, Hudson was issued another warning notice for five absences in the month of October. On November 6, 1991, Hudson was issued another warning notice for tardiness on that day. On December 6, 1991, Hudson was issued another warning notice for four dates of absenteeism within a 30-day period. Then on December 6,

1991, Hudson was issued another warning for tardiness on that date.

24. On May 1, 1991, Electrical Department employee Julius Holmes was issued a warning notice for tardiness on April 11, 18 and 25, 1991. On June 14, 1991, Holmes was issued a warning notice stating that he had been tardy on May 20, 24, 28, 30 and 31, 1991. The warning notice states: "Mr. Homes was given a warning for missing time on April 30, 1991. Second warning." Then, on July 19, 1991, Holmes was issued a third warning notice for being tardy on June 18 and 19, and July 2. The warning notice concludes: "FINAL WARNING," plainly indicating that he was still not discharged.

25. On June 27, 1991, Electrical Department employee Anthony Robinson, badge 480, was issued a warning notice for being tardy on May 28 and June 5, 20, 1991. On July 23, 1991, Robinson was issued another warning notice for being tardy on July 1, 10, 18 and 19, 1991. On August 28, Robinson was issued a warning notice for the major offense of falsifying his time records. On September 13, Robinson was issued another warning notice for quitting work early. On December 5, 1991, Robinson was issued a third warning notice for being tardy on November 20 and December 3 and 5, 1991. Robinson was still not discharge as evidenced by the fact that he was issued warning notices for failure to punch out properly, insubordination and intentional negligence on February 13, 1991, January 22 and June 9, 1992, respectively.

26. On June 15, 1992, Robinson also was issued a fourth warning notice for tardiness and absenteeism.

27. On November 21, 1991, Machinery Department employee K. Jones, badge 11933, was issued a warning notice for being late eight times in October and six times, then to date, in November. The warning notice concludes: "This employee was verbally warned prior to this warning." (Of course, these days of tardiness could have resulted in multiple warning notices, but they did not.)

28. On December 18, 1991, Paint Department badge 5690 (name not legible) was issued a warning notice for tardiness; the notice states: "Employee reported to work after the 7 a.m. whistles starting work." On January 6, 1992, employee 5690 was issued a warning notice for three absences within a seven-day period. On January 14, 1992 the employee was issued a second warning notice for tardiness; the notice states: "Employee has repeatedly reported to the work area after the 7 a.m whistle. You are to be in your work area and working by 7 a.m."

29. On March 13, 1992, badge 5690 was issued a warning notice for four unexcused absences during the preceding 30 days.

30. On July 30, 1992, badge 5690, was issued a warning notice for unexcused absences on five dates during the previous month. The warning notice concludes: "Violation of any other company rules or regulations will result in your termination. Final warning."

31. On August 10, 1992, despite his prior, express, categorical, final warning badge 5690 was issued a third warning notice for tardiness on four dates during the preceding month. The warning notice concludes: "Continued absences or tardiness may result in termination. Final warning."

32. On January 15, 1992, Operators Department employee Sterling Landry, badge 739, was issued one warning notice for being tardy 11 times from December 5, 1991, through January 15, 1992. (Of course, the first nine of these could have been the basis of three warning notices for tardiness under the Avondale Employees' Guide.)

33. On March 5, 1992, Operators Department employee Bert Menge, badge 1700, was issued a warning notice stating: "This employee is habitually late for his shift. He was late at least 12 days in January and again in February he was late on 12 separate occasions. This is your final warning!" (Of course, these 24 days of tardiness could have been the subjects of at least eight warning notices under the Avondale Employees' Guide, if not discharge.)

34. On November 16, 1992, Shipfitting Department employee Chris Carley was issued one warning notice for unexcused absences on November 11 and 12, for being one hour late on November 13, and for being late again on November 16. The warning notice concludes: "Final warning." On November 23, 1992, Carley was issued another warning notice for being late again on that day. On November 25, Carley was issued another warning notice for three unexcused absences within a 30-day period. The notice concludes, again, "Final Warning."

35. On November 24, 1992, Sheet Metal Department employee Ronnie Sandifer, badge 2920, was issued a warning notice for being absent on three days in that month. On June 1, 1993, Sandifer was issued a warning notice for being tardy three days during the preceding 30 days. On July 16, 1993, Sandifer was issued a warning notice for wasting time, loitering or leaving the work place. The notice concludes: "Final warning." On August 30, 1993, however, Sandifer was issued still another warning notice for tardiness on three days that month.

36. On October 29, 1993, Sandifer was issued a warning notice for being absent four days in October. Also, on November 19, 1993, Sandifer was issued a warning notice for: "Wasting time, loitering or leaving the work place without permission. Employee has [been] observed by Jesse Caston just walking around without permission. Prior warning issued on same on 7/16/93. Has had several verbal warnings also. Final warning." As well as being Sandifer's sixth warning notice in the 12-month period that began on November 24, 1992, Sandifer by this point had accumulated two warning notices for tardiness as well as two warning notices for absenteeism.

37. On December 10, 1993, Sandifer was issued another warning notice for being tardy three days during the preceding 30-day period. The warning notice recites. "Prior warnings issued on 10/29/93 and 8/30/93. FINAL WARNING." As well as being Sandifer's sixth warning notice since his warning notice of June 1, 1993, this was Sandifer's third warning notice for tardiness during that six-month period.

38. On April 25, 1994, Sandifer was issued another warning notice for three unexcused absences in a 30-day period. This was Sandifer's seventh warning notice in the period that began June 1, 1993, and it was his fifth warning notice for absenteeism or tardiness within that 12-month period.

39. On June 29, 1994, Sandifer was issued another

warning notice for three days of tardiness in a 30-day period. This was Sandifer's seventh warning notice in the 12-month period beginning July 16, 1993, and it was his fourth warning notice for tardiness or absenteeism in that period.

40. On December 11, 1992, Electrical Department employee Hardon Palmer was issued a warning notice for six unexcused absences from November 20 through December 11 of that year. On December 14, 1992, Palmer was issued another warning notice for being tardy five times in the period from November 16 through December 3, 1992. Then on February 10, 1993, Palmer was issued another warning notice for being tardy on February 3, 4 and 10, 1993. The warning notice concludes: "Final notice," plainly implying that Palmer was still not discharged.

41. On January 12, 1993, Pipe Department employee Ansley Smith was issued a warning notice for being tardy four times in the month of January. His prior warning notices do not appear of record, but this warning notice states: "Unexcused tardiness. This is your third citation this week. Next violation of any kind will result in termination." On February 25, 1993, however, Smith was issued a warning notice for eight absences in the month of February. The warning notice concludes: "If employee misses any more time within 30 days will result in termination."

42. On August 25, 1993, CDC Department employee Jane Kennedy, badge 188, was issued a warning notice for being tardy three times within a 30-day period. On September 29, 1993, Kennedy was issued a second warning notice for being tardy three times in thirty days. On October 1, 1993, Kennedy was issued a third warning notice for tardiness because she return late from lunch. The notice concludes: "Final warning on tardiness."

For Henriquez' case, of course, the most striking of these comparisons is the case of paint department badge 5690 (numbers 19—22, above). That employee had one warning notice for tardiness and one for absences, just like Henriquez; then he was issued a warning notice for "repeatedly" signing in late; then he was issued two more absenteeism warning notices, and one more tardiness warning notice, without being discharged. (In making these comparisons, again, it is not to be forgotten that I have held that Henriquez' absenteeism warning notice was issued unlawfully; Henriquez has an even better comparative attendance record when only his one prior, lawful warning notice is considered.)

Respondent does not suggest on brief (or reply brief) why this significant evidence of disparate treatment should not determine Henriquez' case. I find that this evidence would determine Henriquez' case, if the invalid nature of the February 1 warning notice does not, of itself, do so.[215] That is, Respondent has not shown that it would have discharged Henriquez even in the absence of his protected activities. I therefore conclude that Respondent discharged Henriquez in violation of Section 8(a)(3).

e. Marie Joseph's discharge for absenteeism

Marie Joseph (vol. 36), a laborer in the Cleanup-During-Construction (CDC) Department, was discharged on July 20, 1993. The second complaint, at paragraph 103, alleges that by discharging Joseph Respondent violated Section 8(a)(3) of the Act. The General Counsel contends that Respondent discharged Joseph because of her known union activities and expressions of sympathy which included her displaying prounion insignia and responding positively to an interrogation that was conducted in violation of Section 8(a)(1). Respondent denies that the interrogation occurred. Respondent further answers that its supervisors had no knowledge of any union activities or sympathies of Joseph at any relevant time and that Joseph was discharged solely for excessive absenteeism. The General Counsel replies that Joseph was treated disparately because other employees had worse absenteeism records but they were issued lesser, or no, discipline. Ultimately, I find and conclude that Joseph was treated disparately and that her discharge was unlawful.

Joseph testified that she worked under the supervision of Foremen Joe Cardella and E.—B. Nealy. Respondent stipulated that Cardella is a supervisor within Section 2(11) of the Act, but there is an issue about the status of Nealy. The second complaint alleges that "E.—B. Nealy Jr." is a supervisor, but Respondent denies that "E.—B. Nealy Jr." exists. On day-31 of trial, when called by the General Counsel as an adverse witness, CDC Superintendent Leroy Cortez acknowledged a 1993 departmental table of organization that lists "E. Nealy" as a foreman. Cortez testified that the listed "Nealy"[216] was a foreman in 1993, and that Nealy was in charge of "[m]any different jobs." Cortez acknowledged that, as such a foreman, Nealy "had authority to use his independent discretion to assign work." Later in the hearing, when called by Respondent on day-96, Cortez also mentioned Nealy (on cross-examination) as one of the foremen that he had to move in the spring or summer of 1993 because of the needs of a job. In denying that "E.—B. Nealy Jr." exists, Respondent is apparently relying on the fact that the General Counsel did not establish that Nealy was a "Junior," as stated in the complaint. Cortez testified on day-96, however, that E.—B. Nealy was the only "E. Nealy," in the CDC department. I find and conclude that at all relevant times, E.—B. Nealy was a supervisor within Section 2(11) of the Act.

Joseph testified that she wore a "Union-Yes" sticker on her hardhat from April through the date of her discharge. Joseph further testified that during the week before the June 25 Board election, Foreman Nealy spoke to her outside a restroom in the yard. According to Joseph:

> Nealy asked me what I think about the Union, and I told him that I hope the Union can get in; I was going to vote yes.
>
> He said it was up to me.

Based on this testimony by Joseph, paragraph 42 of the second complaint alleges that Respondent, by Nealy, interrogated its employees.[217] Respondent did not call Nealy to testify, and this

[215] Other evidence of disparate treatment of Henriquez exists in the cases of the 883 employees who were permitted to accumulate three or more warning notices in 12-month periods from 1990 through 1994 without being discharged, as demonstrated previously in the case of discriminatee Marshall.

[216] In vol. 31 of the transcript, Nealy's name is misspelled "Neely," and it is accordingly corrected.

[217] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Joseph, as well as the charge in Case 15–CA–12171–1.

testimony by Joseph stands undenied. Joseph's testimony was credible, and I find and conclude that Respondent, by E.—B. Nealy, on or about June 18, 1993, interrogated employees about their union sympathies.

On June 29, Joseph was issued a warning notice by Cardella; the notice cites absences on June 2, 8, and 17, and it states: "Absence of 3 or more days in a 30-day period. Failure to call in during your absence on 6/17. Violation of any other Company rules or regulations will result in your termination. Final Warning." The issuance of this warning notice is not alleged to be a violation of the Act.

On July 19, Joseph was absent again. As Respondent's call-in log for July 19 reflects, Joseph called in and stated that she would be absent because her aunt was "missing." Joseph testified that, on July 20, when she reported to work, she was met by Cortez. Cortez told Joseph that she was discharged, but he did not tell her why, according to Joseph. Joseph testified that her first notice of the reason for her discharge was her receipt of a copy of Respondent's submission to the Louisiana Department of Labor which stated that Respondent would contest any application for benefits by Joseph on the ground of: "Chronic or excessive absenteeism."

Joseph's Discharge—Respondent's Evidence

Cardella (vol. 150) testified that, when he gave the June 29 warning notice to Joseph, he told her that she "could" (not "would") be terminated on the occasion of her next absence. Cardella coded Joseph as discharged (code "04") on his July 19 MCR.

Cortez (vol. 96) testified that he was near his clerk's desk when Joseph called in on July 19. The clerk told him that Joseph was on the line stating that she could not come to work because her aunt was missing. Cortez told the clerk to tell Joseph to bring in documentation such as a police report, and the clerk did so. Cortez testified that he then reviewed Joseph's personnel file which had, as well as the above-quoted absenteeism warning notice dated June 29, two other warning notices; to wit: a March 21, 1993 warning notice for failing to call in on the day of one absence and an August 11, 1992 warning notice for three unexcused absences in a 30-day period (general offense-1 of the Avondale Employees' Guide). Cortez testified that he then told his clerk to type up an ASI-22 (discharge) form for Joseph because he did not believe that Joseph would bring any documentation when she returned from her July 19 absence; Cortez told the clerk that the ASI-22 (discharge) form would be processed if Joseph did, in fact, appear the next day without documentation. Cortez further testified that he told the clerk to inform Joseph's foreman at the time, Cardella, of his decision.

Cortez further testified that when Joseph appeared on July 20, without documentation: "I just let the employee know that because of her failure to bring in documentation the way she was, that she was being terminated for excessive absenteeism." Cortez further testified that he then signed the ASI-22 (discharge) form and had it processed through to the human resources department to effectuate Joseph's discharge. As introduced by Respondent, the form states "7–0919–0993" in the space for "Date Prepared." In the space for "Effective Date" of the discharge, the form also states: "7–0919–0993." In the space for "Explanation for Action" the form states:

> Employee has been terminated for absenteeism. Employee received a final warning for absenteeism on 6–29–93. Employee was informed by the foreman not to miss anymore time from work when the citation was issued on 6–29–93. Employee did not report for work on 7–19–92. Absence was unexcused. Employee was terminated.

Cortez testified on direct examination that he did not sign this form until July 20, when Joseph returned to work without documentation. Cortez acknowledged that he would not have discharged Joseph if she had brought a police report, or something like that, to indicate that Joseph's aunt was considered a missing person by the local authorities.

Although he insisted that he signed this form for Joseph on July 20, Cortez' signature on the form is clearly dated: "July 19, 1993." On cross-examination, when Cortez admitted that he did date his signature as July 19, he attempted the explanation:

> THE WITNESS: Sir, if I may . . . many a times when I sign a paper, I just look at the date that is up there. I could have signed it on the 20th; I could have signed it on the 19th. That is my problem here.

The form also bears a large, distinctive "B" after Cortez' signature. Respondent's placement supervisor, Bruce Nunez (vol. 117), identified that "B" on another document as the initial of Julie Bolden, manager of employment and his immediate superior in the human resources department, Julie Bolden. Bolden clearly dated her initial "7/19/93." This act by Bolden creates the presumption that the ASI-22 (discharge) form reached Bolden's desk, and she approved of the discharge, on July 19. Respondent did not call Bolden to testify to the contrary. I find that Cortez signed the ASI-22 (discharge) form on July 19, and it was processed through to the human resources department on that date.

Further on cross-examination, Cortez acknowledged that when he reviewed Joseph's personnel file, he found no warning notices other than Joseph's August 1992 warning notice for absenteeism, her March warning notice for failing to call in, and her June 29 warning notice for absenteeism; these warning notices were received in evidence as Respondent's Exhibits 475, 476, and 477, respectively. Cortez was asked and he testified:

> Q. Was this, in fact—were these three exhibits, 475, -76, and -77, all being Respondent exhibits, did you give them any weight at all when you decided to fire Marie Joseph?
>
> A. Yes.
>
> Q. And as best you can, explain to us what weight if any you actually gave to these three exhibits.
>
> A. In the very short time that the employee had really had an absentee problem[;] she created it; it was there; it was in black and white; and that is what added weight to this decision.

Cardella testified, and Respondent contends, that Cardella actually made the decision to discharge Joseph. This testimony by Cortez, of course, belies such testimony and contention. I find that, as he testified, Cortez made the decision to discharge Joseph.

Joseph's Discharge—Conclusions

It is undisputed that Joseph was unlawfully interrogated by Nealy. In response to that interrogation, Joseph told Nealy that she would vote for the Union in the June 25 Board election. Also, Joseph wore prounion insignia on her hardhat. This open

and obvious display of prounion sympathies would have been known to all supervisors who worked around Joseph, including Cortez. I find that, because of her response to Nealy's interrogation, and because of her display of prounion insignia, Respondent's supervisors had knowledge of Joseph's prounion sympathies. Respondent's animus toward all prounion employees, especially those employees who wore prounion insignia, is established throughout this decision. I, therefore, find and conclude that the General Counsel has presented a prima facie case that Joseph was unlawfully discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Joseph even in the absence of her known protected activities. Respondent's defenses must therefore be examined.

On brief, at page "CDC-CS-61," Respondent states that "Ms. Joseph was terminated for her unexcused absence [of July 19] only 7 workdays after a [June 29] final warning for absenteeism." As I have found, Cortez made the decision to discharge Joseph, but Cortez did not testify that the amount of time between the issuance of the June 29 warning notice and Joseph's absence of July 19 was a factor in making his decision. Absent such testimony, of course, it appears that the "7 workdays" defense is nothing but a creation of Respondent's counsel.[218] Moreover, on July 19 Joseph had not been absent since June 17, more than 30 days' earlier; giving credence to the "seven workdays" defense would make the employee's offense a function of when Respondent got around to drafting a warning notice. Finally, the Avondale Employees' Guide, which punishes three unexcused absences within 30 calendar days, does not inform employees that they may also be punished according to the number of working days that elapse between the times that they are issued a warning notices and the times that they are next absent, and none of Respondent's supervisors testified that employees were ever informed of such a rule.

Actually, Cortez never did give a reason for discharging Joseph. Cortez testified about what happened, but not why. Certainly, Cortez did not testify that anything that Joseph did was a ground, consistently enforced or otherwise, for discharge of an employee. Placing Cortez' testimony in the artificial light of the best post hoc construction that can be made, Respondent is left with the contention that Joseph was discharged because, prior to July 20, she had been issued three warning notices (one of which was for a failure to call in during 1 day's absence and one of which was marked "Final"), and, on July 20, she did not present documentation for her absence of July 19.

The first problem with Respondent's defense is that Cortez made the decision to discharge Joseph on July 19, well before he could have known that Joseph would not present documentation on July 20. Cardella recorded Joseph as being discharged on his July 19 MCR, something that would not have happened if, on July 19, Respondent intended to give Joseph the opportunity to excuse her absence by producing documentation when she returned from her absence on July 20.[219] Cortez clearly dated his signature on the ASI-22 (discharge) form as July 19, and he acknowledged that: "I could have signed it on the 19th." The form further belies any contention that Cortez decided to discharge Joseph on July 20, as it designates the "Effective Date" as July 19. Finally, the discharge form reached the human resources department, and Bolden initialed it to complete the discharge process, on July 19. That is, Cortez made the decision to discharge Joseph before he knew if, ultimately, Joseph's absence would be excused or unexcused. I find to be pretextual the entire defense that Joseph was discharged because she did not bring in documentation on July 20. It is apparent to me, and I find, that Cortez seized upon Joseph's absence of July 19, alone, as a pretext for discharging her.[220]

Assuming, however, that the decision to discharge Joseph was reached on July 20, and further assuming that Joseph's failure to present documentation had something to do with that decision, it is to be noted that one of the three warning notices that Joseph had received was not for absenteeism, but for failure to call in on a day of absence. Again, although the Avondale Employees' Guide tells employees that they should call in on each day's absence, it does not list such failures as even a general offense. Therefore, Joseph had only two warning notices for absenteeism when she was discharged for one absence in excess of those warning notices. This is precisely the circumstance of the 133 employees enumerated in Appendix D of this decision who received two, or more, warning notices for absenteeism (many of them "Final") without being discharged on the occasion of their next unexcused absence (as evidenced by their listed third, or greater, warning notice for absenteeism). Respondent offers no explanation of why those other employees were allowed to accumulate three, or more, warning notices for absenteeism without being discharged.[221]

Assuming, however, that the decision to discharge Joseph was made on July 20, and further assuming that her failure to present documentation had something to do with that decision, and further assuming that all three of her preceding warning notices should be counted against her, Respondent offers no explanation of why 66 of the employees listed on appendix D were permitted three warning notices for absenteeism (many of them "Final") without being discharged on the occasion of their next absence (as evidenced by their listed fourth, or greater, warning notice for absenteeism). As I did in the cases of Ancar and Rouege, I find this evidence of disparate treatment to be compelling, and I find the inference that Joseph was unlawfully discharged to be plainly warranted.

That is, Respondent has failed to show why it allowed a significant number of other employees to compile absenteeism records that were worse than Joseph's, but Joseph was discharged and those other employees were not.[222] Because it has

[218] Even if there were some factual basis for Respondent's assertion about Cortez' reasoning, it is to be noted that, as detailed in appendix D of this decision, on November 7, 1991, paint department employee Joseph Bonier was issued a warning notice; then he was absent on November 8, 12, 13, 18, and 25, 1991. Bonier, however, was still not discharged; instead, he went on to receive his fourth and fifth warning notices for absenteeism.

[219] When Cardella was falsely testifying that he made the decision to discharge Joseph he offered, also incredibly, that he recorded Joseph as being discharged on July 19 because it did not matter whether Joseph's absence of that date was excused.

[220] I find totally incredible certain testimony by Cortez that Joseph was on a "probationary period" when she was absent on July 19. No one told Joseph about it; Cortez could not name any other employee who was ever placed on such a probationary period; and no other supervisor testified that Respondent had any probationary periods for any purpose.

[221] It is also to be noted that a clear majority of those instances were in the "Paint/CDC" department, before CDC was split off from the paint department in February 1993.

[222] Other evidence of disparate treatment of Joseph exists in the cases of the 432 employees who were permitted to accumulate four or more warning notices in 12-month periods from 1990 through 1994

failed to adduce such evidence, Respondent has not shown that it would have discharged Joseph even absent her protected activities. I therefore conclude that Respondent discharged Joseph in violation of Section 8(a)(3) of the Act.

f. Michael Boudreaux's discharge for absenteeism

Michael James Boudreaux (vol. 48) was a mechanic in the sheetmetal department until he was discharged on September 9, 1993. The second complaint, at paragraph 121, alleges that by discharging Boudreaux Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Boudreaux because of his known union activities and expressions of sympathy which included his speaking in favor of the Union to three supervisors. Respondent answers that its supervisors had no knowledge of any union activities or sympathies of Boudreaux at any relevant time and that Boudreaux was discharged solely because of his excessive absenteeism. The General Counsel replies that Boudreaux was treated disparately because other employees had worse absenteeism records but they were issued lesser disciplines than discharge. Ultimately, I find and conclude that Respondent has failed to show that, even under its own standards, Boudreaux had a record of excessive absenteeism. I, therefore, find that the defense asserted is a pretext and that Boudreaux was unlawfully discharged.

In the sheetmetal department, Boudreaux worked under the supervision of Foreman Nathan Dubois during 1992. Boudreaux also worked for Dubois in 1993 until July 13 when he was moved to the crew of Foreman Joe DeNicola. On his last day at work, September 9, Boudreaux was assigned to the crew of Foreman Archie Frickey.

Boudreaux testified that during the preelection period, he would regularly take handbills from union organizers at the gate. He testified that he read them "on company time," sometimes in the presence of Frickey and Dubois. Boudreaux testified that some time in June he was in Frickey's office when Frickey had a "pretty good stack" of "Vote-No" stickers on his desk. According to Boudreaux, "Archie had told me that the stickers he had on his desk was for anyone that wanted them. And I told him I didn't want any." Frickey testified for Respondent, and he denied knowing of Boudreaux's "union affiliation," but he did not deny this testimony by Boudreaux.

Boudreaux further testified that 2 days before the June 25 Board election he raised the topic of the Union with Dubois:

> Well, I started talking to Nathan about why I think the Union should get in the Company, and he was trying to tell me why he thought the Union shouldn't get in the Company. And he finally just got irritated, and he was walking off . . . telling me, "You are Union all the way, Mike."

Dubois testified for Respondent, but he did not deny this testimony by Boudreaux.

Boudreaux further testified that, on the day before the election, he was on the ground when Frickey and Dubois drove by in a pickup truck. In the back were several employees. Boudreaux testified:

> And Nathan and Archie hollered out, "Come picket with us against the Union." . . .
>
> I told them that I wasn't interested in going to picket against the Union.

Dubois did not deny this testimony. Contrary to the assertion of Respondent on brief, Frickey did not deny this testimony. Frickey merely testified that on the day that he and a truck full of other persons went to picket against the Union, he did not recall anyone calling to Boudreaux and asking him to join in that picketing.

Boudreaux further testified that about 3 weeks before he was discharged, he was in the office of Foreman Joe DeNicola. DeNicola, according to Boudreaux, told Boudreaux that he wished certain factual statements in union handbills were true. Boudreaux responded that DeNicola knew that they were true. DeNicola testified for Respondent, but he did not deny this testimony by Boudreaux.

Discharge of Boudreaux

During the investigation of the charge that was filed on behalf of Boudreaux, Respondent provided a summary of Boudreaux's 1992 and 1993 record of absences, tardiness and passouts.[223] The summary does not distinguish between excused and unexcused absences, other than to note vacation days.

According to the summary, in 1992 Boudreaux was absent (other than vacation days) on 25 occasions. Boudreaux was absent 3 of more days during 6 different months of 1992; *to wit*: January, June, August, October, November, and December. Under general offense-1 of the Avondale Employees' Guide, of course, Boudreaux could have been issued six warning notices for such absenteeism, if not discharged. Boudreaux, however, was issued only two warning notices on these six occasions. Boudreaux's first warning notice was issued on September 2, 1992, for being absent on 4 days during August. Boudreaux's second warning notice was issued on December 31, 1992; it cites 3 days of unexcused absences and 3 days of tardiness in December. It concludes: "Employee has previous warning on absenteeism on 9/2/92. FINAL WARNING." According to the testimony, and Respondent's records, this was the last warning notice that Boudreaux received before his discharge on September 9, 1993.

Further according to the summary, Boudreaux was tardy 15 times during 1992; in addition to those that are cited by the December 31 warning notice, Boudreaux was tardy three times, each, during the months of March, April, and September 1992. Under the literal terms of the Avondale Employees' Guide's general offense-2, of course, Boudreaux could have been issued four warning notices for such tardiness, if not discharged.

In 1993, before his discharge on September 9, Boudreaux was absent (other than vacation days) on 12 occasions; *to wit*: January 4, 5, 6, and 15; February 22; March 3, 25, 26, and 29; April 6; August 18 and September 8. Although Boudreaux was absent for 3 consecutive days in January, and he could have been issued a warning notice under Major offense-1 of the Avondale employees' guide, he was then issued no warning notice. Although Boudreaux was absent for four days in March,

without being discharged, as demonstrated previously in the case of discriminatee Marshall. (Of the 883 employees listed in Marshall's case as having received three or more warning notices without being discharged, 451 received only three; therefore, I have subtracted that number from 883.)

[223] "Passouts" are excused early departures for the day. Boudreaux's supervisors did not testify, and Respondent does not contend, that Boudreaux's history of passouts was a factor in his discharge, and it will not be mentioned further.

and could have been issued a warning notice under general offense-1 of the Avondale Employees' Guide, he was issued none then, either. Further according to the summary of Boudreaux's attendance, Boudreaux was tardy 12 times in 1993; he was tardy three times in July, but he was issued no warning notice for that.

When he returned from his August 18 absence, Boudreaux presented documentation that he had been absent to secure parts for his automobile, his transportation to work. Respondent placed this documentation in evidence, and Arthur Schloegel, the general foreman who ordered Boudreaux's discharge, acknowledged that Boudreaux's August 18 absence should have been treated as excused, as discussed infra.

Boudreaux testified that he was sick on September 8, and, as he had been instructed, he called in to Schloegel's office that day before 7 a.m. to report that he would be out, and why. When he reported to work on September 9, Boudreaux was met by Frickey, who had just been made his foreman. According to Boudreaux:

> Archie Frickey asked me if I had a doctor's slip, and I told him, No, I didn't have one, but I could get one. And he said that if I didn't have one right now, "[T]hey told me to fire you." . . .
>
> I told him I could get one, but he said, "They told me to fire you."
>
> And I said, "Okay." And I went and got my tools and I went through the procedure of being fired.

Boudreaux testified that he had never before been required to have documentation for 1 day's absence.

Boudreaux's Discharge—Respondent's Evidence

Prior to 1992, Frickey supervised Boudreaux directly. Frickey (vol. 121) described Boudreaux as "one of my best mechanics . . . a great worker," other than his attendance. Frickey identified a February 14, 1992 memorandum from Schloegel to the foremen under him; the memorandum states: "All days absent will be considered unexcused unless proper paper work is bought in through my office to cover the day[s] absent." (That is, according to the memorandum, all absences by employees under Schloegel are to be treated as presumptively unexcused; Schloegel testified consistently, as discussed infra.) Frickey testified that when he issues warning notices to employees for absenteeism, such as Boudreaux's December 31, 1992 warning notice quoted above, he tells employees, "To bring paperwork to protect themselves." (The terms "paperwork" and "documentation" are used interchangeably in this context.)

Frickey testified that on September 6 he went to Schloegel's office.[224] At the time, Boudreaux was still working on DeNicola's crew. Frickey was asked and he testified:

> Q. And what, if—what was said in that conversation so if the Judge was there, he would have heard it?
>
> A. Well, Arthur [Schloegel] and I was talking about other aspects of the job, and he brought up that Mike was being—you know, his service was being terminated. . . . He was going to be terminated. . . .
>
> I then asked Arthur if he would please send Mike with me and let me give him a chance. I knew Mike personally, and he was a friend of mine. So . . . I asked Arthur to send Michael with me.
>
> Q. [By Mr. Cupp]: And what, if anything, did Arthur say?
>
> A. He said he would, but if Mike missed another day, he was terminated.

Frickey further testified that he called Boudreaux to his office that afternoon. According to Frickey, he told Boudreaux: "that they was getting ready to terminate him; that if he had to miss any time, to make sure that he brings paper work—to protect himself." On cross-examination Frickey added that, as well as telling Boudreaux that he needed to bring documentation to "protect himself," he then told Boudreaux that he would be discharged if he was ever absent again without bringing in documentation of his excuses for his absences.

Frickey further testified that on September 8, when Boudreaux did not appear, he called Schloegel. Frickey, testified that Schloegel responded: "[I]f he doesn't show up tomorrow with paper work if he came out, he was terminated."

Frickey testified that on September 9, when Boudreaux appeared without a doctor's note, he called Schloegel. He told Schloegel what had happened, and Schloegel told him to discharge Boudreaux. Frickey then told Boudreaux that he was terminated. Frickey denied that Boudreaux offered to bring in documentation for his September 8 absence. On direct examination Frickey was further asked and he testified:

> Q. Mr. Frickey, have you ever allowed workers to bring in excuses several days after they are absent?
>
> A. No more than two.
>
> Q. And under what circumstances will you allow that? . . .
>
> A. If they are not continually abusing the system, you know. . . . He [Boudreaux] was an abuser.

Frickey acknowledged that Schloegel did not tell him what Boudreaux's prior absenteeism record was, and he did not otherwise find out before telling Boudreaux that he was discharged.

On cross-examination Frickey testified that he considered an employee "an abuser" if he "continually" failed to bring in documentation for absences, but, again, he did not know if Boudreaux had done so before September 9. Frickey further admitted that he had never told any employee that he would not be allowed to bring in documentation 1 or 2 days late if the employee had been "an abuser."

Finally on cross-examination, Frickey was shown the summary of Boudreaux's absences. After being pointed to the fact that Boudreaux had no 1993 absences between April 29 and August 18, Frickey was asked and he testified:

> Q. All right. Now, after looking at the General Counsel's 252 [the summary of Boudreaux's absences], do you know why Mr. Schloegel told you on Monday, September 6 that Mr. Boudreaux was about to be fired?
>
> A. Just because of excessive termination—I mean excessive absenteeism.
>
> Q. And that is the only reason you know of?
>
> A. That is the only one I know of, yes.
>
> Q. Sir, from March 29 to September 8, would you consider two absences to be excessive?

[224] September 6, 1993, was Labor Day, but, at any rate, Frickey was placing the date at just 1 or 2 days before Boudreaux's last absence and discharge.

A. No.

(At the point that the General Counsel cross-examined Frickey, Schloegel had not yet testified and acknowledged that Boudreaux's August 18 absence was actually excused; therefore Boudreaux actually had only one unexcused absence from March 29 to September 8, not two.)

Schloegel (vols. 134, 135) testified, several times, that he decided to discharge Boudreaux because of "excessive absenteeism." Schloegel testified that on August 23, DeNicola brought Boudreaux to him and complained that Boudreaux was late that day.[225] When asked what he told Boudreaux, Schloegel testified:

> I said, "Mike, why don't you go out there and do your job. . . . And, Mike, if you can't handle that or if you can't go out there and do your job, why don't you just go get another job."

Schloegel further testified that on the same day, August 23, Frickey approached him and asked if Boudreaux could be assigned to him because they were friends, "and maybe he could snap Boudreaux back into a productive worker." Schloegel agreed. (This testimony, of course, conflicts with that of Frickey because: (a) Frickey testified that the decision to send Boudreaux to his crew occurred on "September 6," or just before September 8, not as early as August 23; (b) Schloegel did not testify that he broached the subject of Boudreaux to Frickey, (c) Schloegel did not testify that he had been contemplating the discharge of Boudreaux before September 8, and (d) Schloegel did not testify that he told Frickey that he had been contemplating Boudreaux's discharge.)

Schloegel testified that on September 8, when he found that Boudreaux was absent, he told Frickey to discharge Boudreaux if Boudreaux returned from his absence without documentation. (Schloegel did not, however, testify that Frickey called him before discharging Boudreaux on September 9; Schloegel testified that Frickey called him after the fact and reported that he had discharged Boudreaux because Boudreaux had returned from his absence without documentation.)

Schloegel identified a memorandum that he sent to his foremen on March 30, 1992; it states, inter alia: "Abusive absenteeism may require an employee to provide written verification of the reason for their absences." At the close of his direct examination on day-134, Schloegel identified two such 1993 excuses as having been taken from Boudreaux's personnel file. The first is a March 3 doctor's note, and the second is an August 18 automobile parts receipt.

Schloegel had first been called by Respondent on day-109 of trial. When he was on direct examination that day, he was asked nothing about the circumstances of Boudreaux's discharge. The General Counsel, however, then asked Schloegel how absences were handled by him and his subordinate foremen. Schloegel testified that (consistent with his February 14, 1992 memorandum mentioned above) even if an employee calls in or gives advance notice of an absence, he is recorded "06," unexcused, on the foreman's MCR for that day. Although the MCR will never be changed, if an employee brings in documentation the absence will not be counted against him when Schloegel later reviews his records. As Schloegel put it: "The 6 ["06"] will stay there [on the MCR]. When I do my 30-day write-ups, if they brought in a piece of paper—let's call it a note or something—from the doctor, he [the employee] would never see that 6. I won't—I will just put that ["06"] on the side." Schloegel testified that for an "06" not to be counted against an employee, he should bring his paperwork the next day. As Schloegel put it: "He needs the paperwork . . . to clear him. If he lets it go three or four days, I won't accept that. I want it the day he comes back, that morning." In summary, Schloegel testified that absences that are excused by paperwork are never held against employees; employees should bring paperwork upon their returns from their absences, and, if they do not bring it within 2 days, or possibly three, their absences will be treated as unexcused and they may be disciplined.

During the cross-examination of day-135 of trial, Schloegel specifically acknowledged that Boudreaux's August 18 automobile parts receipt would, and did, excuse him for his absence on that day. (And, on redirect examination, Schloegel reaffirmed that, even if an absence is originally recorded as unexcused, the absence will not be "held against" the employee if he presents such documentation.)

Further on cross-examination Schloegel was shown his memorandum of March 30, 1992, that states: "Abusive absenteeism may require an employee to provide written verification of the reason for their absences." Then Schloegel was asked and he testified:

> Q. All right, sir. I am going to direct your attention to the last sentence in paragraph 1. It starts out with the phrase, "abusive absenteeism."
>
> A. Okay.
>
> Q. Sir, missing one day is not abusive absenteeism, is it?
>
> MR. CUPP: Objection. Argumentative.
>
> JUDGE EVANS: When would one day's absence be abusive?
>
> THE WITNESS: Three days in a 30-day period, and if this continues, month after month after month, it is abusive. . . . If you miss one day, it is not abusive.

On the issue of why he considered Boudreaux's absenteeism excessive, Schloegel was further asked and he testified:

> Q. You are aware that the employee handbook says an employee may be given a citation for having three unexcused absences in a 30-day period.
>
> A. Yes.
>
> Q. And at the time you discharged Mr. Boudreaux, he did not have three absences, unexcused, in a 30-day period, did he?
>
> A. He had excessive absenteeism.
>
> Q. My question, sir, is: He didn't have three absences, unexcused, in a 30-day period on September 8 or 9, 1993, did he?
>
> A. I don't know.

Further on Day-109, Schloegel was asked about the progressive disciplinary system of the Avondale Employees' Guide and how he applied it in the sheetmetal department. The follow-

[225] Respondent introduced an August 23 memorandum in which DeNicola complained of other aspects of Boudreaux's performance. As well as Boudreaux's tardiness of that date, and certain slow work by Boudreaux, the memorandum includes references to 1 day's vacation that Boudreaux took, and it also includes reference to Boudreaux's (excused) absence of August 18. Schloegel did not testify that DeNicola orally complained to him about those other aspects of Boudreaux's performance. Finally, cross-examination proved that Schloegel did not read DeNicola's memorandum until after Boudreaux was discharged.

ing was included in the interrogation (after frivolous objections from Respondent's counsel which caused me to take over the questioning myself):

> JUDGE EVANS: . . . But in 1993 and `94, what was the significance of an employee receiving three warning notices, let's say, within 12 months, if any.
>
> THE WITNESS: It all depends on the circumstance, Judge. If—he could have seven. He could have five. He could ten. It all depends on the circumstances. Okay? If—that is it. You could have more than three.

Schloegel, however, acknowledged that he did not know how many warning notices that Boudreaux had been issued at the time that he ordered Boudreaux's discharge. In fact, Boudreaux's warning notice of December 31, 1992, was the only warning notice that he had received during the 12-month period preceding his absence of September 8.[226] Because of this, Schloegel was further asked and he testified:

> Q. [By Mr. Morgan]: And, sir, did you know on September 8 or 9, 1993, that Mr. Boudreaux did not have three warnings or three citations in a 12-month period?
>
> A. I didn't know that.
>
> Q. Did you check?
>
> A. No. . . .
>
> Q. Sir, are you aware—at the time you discharged or directed Mr. Frickey to discharge Mr. Boudreaux, were you aware that he had no citations for the calendar year 1993?
>
> A. No.
>
> Q. When you discharge an employee or direct that an employee be discharged, don't you generally review his personnel file prior to his discharge?
>
> A. In most cases, I do.

On redirect examination, Schloegel was not asked why he made an exception in Boudreaux's case.

Boudreaux's Discharge—Conclusions

I credit Boudreaux's testimony about his expressing his prounion sympathies to his supervisors, all of which is undenied. In June, Boudreaux declined Frickey's offer of a "Vote-No" sticker. Two days before the Board election, Dubois pronounced Boudreaux to be "Union all the way" because of the prounion arguments that Boudreaux had made to that supervisor. On the day before the Board election, Boudreaux declined calls by Frickey and Dubois to join them, and others, in the pickup truck, and go picket against the Union. (Frickey testified that he went to picket in a truck on the day of, not the day before, the Board election. Boudreaux might have been in error about the date, but there is no important difference in the effect of the credited testimony.) Finally, about 3 weeks before his discharge, Boudreaux assured DeNicola that he could trust certain factual representations that had been made in a union handbill. Frickey and Schloegel, who discharged Boudreaux, denied knowing of any "Union affiliation" that Boudreaux may have had. They did not, however, deny that they knew of his prounion sympathies. To the extent that their testimonies can be said to incorporate such denials, I discredit them. I find that, at the time of Boudreaux's discharge, Respondent's supervisors knew of his prounion sympathies. Respondent's animus toward employees who held such sympathies is established throughout this decision. I therefore find and conclude that the General Counsel has presented a prima facie case that Boudreaux was unlawfully discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against Boudreaux even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, page "Sheetmetal-7," Respondent states: "Boudreaux was discharged on September 9, 1993, for chronic and excessive absenteeism after numerous written and [oral] warnings and counseling from his supervisors in the Sheetmetal Department." By stating this, Respondent concedes the importance of warning notices (plural) to its defense of Boudreaux's case. Schloegel admitted on cross-examination, however, that he did not know how many warning notices Boudreaux had accumulated at the time that he ordered the discharge. Indeed, Schloegel admitted that even though he usually checks to see how many warning notices an employee has before discharging him, he did not do so in Boudreaux's case. As noted, Boudreaux's warning notice of December 31, 1992, was the only warning notice that he had received during the 12-month period preceding his absence of September 8.

Although the Avondale Employees' Guide warns employees that they can be discharged for a second general offense, the supervisors who were asked universally agreed that they require at least three general offenses before they discharge employees. Schloegel, however, testified: "He could have five. He could have ten. It all depends on the circumstances. Okay? If—that is it. You could have more than three." Nevertheless, Schloegel afforded Boudreaux only one warning notice before ordering his discharge. This failure to allow Boudreaux more than one warning notice, and thus afford him the benefit of Respondent's established progressive disciplinary system, causes the strongest suspicion that Boudreaux's discharge was unlawfully motivated.

Further suspicion arises when it is noted that Schloegel testified that employees who do not present paperwork for their absences within 3 or 4 days of their returns are charged with an unexcused absence, and they may be punished for three unexcused absences in 30-day periods. At no point, however, did Schloegel testify that he ever discharged an employee, other than Boudreaux, for his failure to bring paperwork on the first day that he returned from an absence. Schloegel and Frickey attempted to justify making Boudreaux a special case because he was an "abuser" of the system. Ultimately, Frickey conceded that Boudreaux was not an abuser of Respondent's system for controlling absences. Schloegel did not relent, but he could not explain how Boudreaux had been abusive. For example, Schloegel was asked what he meant, in his 1992 memorandum and in his testimony, by the term "abusive," so that an employee would be required to bring documentation for one day's absence. Schloegel replied: "Three days in a 30-day period, and if this continues, month after month after month, it is abusive." Of course, the last month that Boudreaux had been absent three times was March; it had not continued, "month after month after month," since at least then. And even in March, Boudreaux was not disciplined other than to have been charged with unexcused absences. Simply stated, even according to the rules that Schloegel and Frickey announced at court, Boudreaux had been treated infinitely more leniently before he announced his prounion sympathies in June.

[226] As well as the testimony, the General Counsel introduced human resources department records to prove this point.

It is plain enough why a supervisor would consider Boudreaux an abuser if he looked only at Boudreaux's absenteeism record for 1992 and the first 3 months of 1993. For all of that absenteeism, Boudreaux was issued two warning notices (the warning notices of September 2 and December 31, 1992), but Boudreaux was not discharged. Then, from April 6 through September 7, Boudreaux had only one absence, that of August 18. Schloegel conceded, however, that, because of the documentation that Boudreaux had produced (the automobile parts receipt), the August 18 absence was excused. Therefore, Boudreaux had no unexcused absences between April 6 and September 8. Schloegel could not explain at trial, and counsel does not attempt to explain on brief, how Boudreaux's absenteeism record could have been considered "excessive" immediately before his absence of September 8. Indeed, Schloegel admitted that he did not even know what Boudreaux's absenteeism record was before he ordered the discharge.

I fully believe, and credit, Boudreaux's testimony that on September 9 he told Frickey that he had been to the doctor's office, and he could get documentation of the fact. If, like other employees, he had been allowed a second chance to present the documentation, his absence would have been excused, even according to the standards announced by Schloegel at trial. Even if he had not offered to secure the documentation on September 9, or even if he could not have secured it if he had been given a chance, however, Boudreaux still would not have had an unexcused absence for 150 days before that point.[227] That is, again, Schloegel defined "abusive" absenteeism as: "Three days in a 30-day period, and if this continues, month after month after month, it is abusive," but neither by Schloegel's definition, nor any that Respondent can suggest on brief, was Boudreaux's absenteeism "excessive" at the time of his September 8 absence.[228]

Because Boudreaux did have such a good attendance record through September 7, I further do not believe Schloegel's testimony that he told Frickey to tell Boudreaux that he would be discharged if he ever appeared without documentation for an absence, and I do not believe Frickey's testimony that he did so. There was simply no occasion for Schloegel and Frickey to have threatened Boudreaux with discharge for his next unexcused absence in light of Boudreaux's 150-day record that was clear of unexcused absences. Finally, I simply do not believe Frickey's account of how he took on the burden of supervising Boudreaux just to protect Boudreaux from a discharge that Schloegel was contemplating. The accounts of how that was supposed to have happened varied substantially between Frickey and Schloegel, as noted above. At minimum, I do not believe that Frickey took it upon himself to assumed the role of Boudreaux's protector. Again, Boudreaux had been protecting himself by good attendance and by bringing in documentation on the one occasion during the preceding 5 months that he had been absent, August 18. Frickey's professed paternalism was not a factor in Boudreaux's discharge; rather, it appears that the reassignment of Boudreaux to Frickey's crew was nothing more than a normal change of personnel, and it was something that Frickey and Schloegel retroactively grasped to justify their discharge of Boudreaux. In summary, the scenario that Boudreaux was sent to Frickey's crew to receive Frickey's guidance in handling a nonexistent absenteeism problem is a pretext that is "so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive." *Montgomery Ward & Co*., 316 NLRB 1248 (1995).

An inference of wrongful motive is fortified by two separate elements of discrimination that are intrinsic to Boudreaux's case. The first element is found in the fact that Respondent's usual penalty for an employee's failure to present documentation for an absence was only the charging of an unexcused absence to that employee's record; the penalty for a failure of documentation was not, until Boudreaux's case, discharge. (And Respondent's putative basis for the greater penalty meted out to Boudreaux, his prior "excessive absenteeism," is nothing but a pure sham.) The second element of discrimination that is intrinsic to Boudreaux's case is found in the fact that, in 1992, Boudreaux was allowed a substantially greater number of absences without punishment. Then, after he voiced his prounion sympathies to his supervisors beginning in June, he was discharged on the occasion of his first unexcused absence in 150 days. Even that last absence could have been retroactively excused if Respondent had allowed Boudreaux (as it usually did allow employees) to present documentation within a day or two after his return.

In light of the expansive evidence of animus toward prounion employees that the General Counsel has proved, either of these dual factors of intrinsic discrimination would compel the conclusion that Boudreaux's discharge was unlawful. Additionally, the General Counsel also introduced as evidence of disparate treatment of Boudreaux documents that attest to 132 cases of employees being allowed from three to eight warning notices for absenteeism in 12-month periods during the 3 years before the organizational campaign began, as discussed in Ancar's case, and as detailed in Appendix D of this decision.[229] On brief, Respondent suggests no reason why this evidence should not be found by the Board to compel the conclusion that Respondent treated Boudreaux disriminatorily, and unlawfully.[230]

For all of the above reasons, I find that Respondent has not shown that, even absent his known prounion sympathies, it would have discharged Boudreaux, and I therefore conclude that Respondent had violated Section 8(a)(3) of the Act by that discharge.

g. Kevin Lockett's discharge for absenteeism

Kevin Lockett (vols. 13, 14) was an electrician's helper until he was discharged on July 27, 1993. The second complaint, at paragraph 107, alleges that by discharging Lockett Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Lockett because of his wearing of prounion insignia. The General Counsel further alleges that, in

[227] Again, as Schloegel conceded, Boudreaux's August 18 absence should have been treated as excused.

[228] On brief, Respondent emphasizes Boudreaux's absenteeism before April. I do also, but I reach the opposite conclusion because Boudreaux's record before April demonstrates that he was discriminated against thereafter.

[229] The General Counsel's brief at chapter VII, pp. 27–0929 lists exhibits reflecting approximately 100 more cases of employees who received three or more warning notices for absenteeism. I need not detail all of these comparative cases because the discrimination intrinsic to Boudreaux's case, and the documentation discussed in Ancar's case and App. D of this decision, prove the point.

[230] Additionally, even if one assumes that Boudreaux committed some disciplinary offense on September 9, evidence of his disparate treatment exists in the cases of the 883 employees who were permitted to accumulate three or more warning notices in 12-month periods from 1990 through 1994 without being discharged, as demonstrated previously in the case of discriminatee Marshall.

violation of Section 8(a)(1), Lockett was interrogated, threatened, instructed not to wear prounion insignia and warned that his union activities were being kept under surveillance. Respondent denies that the interrogation, instruction, threat, or surveillance warning occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Lockett may have held; to the contrary, Respondent asserts that Lockett voluntarily wore "Vote-No" stickers, distributed such stickers to other employees and picketed against the Union on the day of the Board election, June 25. Respondent further answers that Lockett was discharged solely because of excessive absenteeism. The General Counsel replies that Lockett was treated disparately because other employees had worse absenteeism records, but they were issued lesser, or no, discipline. Ultimately, I find and conclude that Lockett was an antiunion employee and the General Counsel has not presented a prima facie case that he was unlawfully discharged.

Lockett testified that Dell Thibodeaux was his foreman until June 1993 when Foreman Louis Lester became his immediate supervisor. Thibodeaux and Lester reported to General Foreman Mark Poche and Departmental Superintendent Robert Terry. Lockett testified that, about 3 weeks before the June 25 Board election, Lester and Thibodeaux conducted a joint meeting of their crews. According to Lockett, Lester spoke at the meeting and told the employees that:

> "[I]f we were ever caught talking about the Union on Avondale property by anyone in supervision that we were going to be terminated." . . . If we were caught defacing property with union paraphernalia that we would be terminated on the spot. . . . It didn't matter if it was five to ten people that was talking about the Union while they was at work on Avondale's property, they were all going to get fired. And he also said that if any individual was caught trying to influence another one that they would get fired for trying to influence another individual to vote for the Union.

Based on this testimony by Lockett, paragraph 41(a) of the second complaint alleges that Respondent, by Lester, "threatened its employees with discharge if they continued to . . . speak to other employees about the Union or to influence other employees to support the Union."

Lockett testified that some employees at the meeting felt offended by what Lester had said, so they painted on their (privately owned) hardhats: "Freedom of Speech . . . Watch What You Say . . . Vote Yes." Lockett testified the he was the only one on Lester's crew that painted those words on his hardhat. Additionally, Lockett testified, he placed a "Union-Yes" sticker his shirt, but he did not testify about how often he wore a union sticker.

Lockett testified that on another occasion during the same week, when he and Lester were alone in a work area, when Lockett had a union sticker on his shirt, Lester asked him to take it off because "I wasn't supposed to be wearing it on Avondale property. . . . He said that I could be terminated on the spot and lose my job, it would cost me my job for wearing that tag." Based on this testimony by Lockett, paragraph 41(b) of the second complaint alleges that Respondent, by Lester, "threatened its employees with discharge if they continued to wear union insignia, and . . . told its employees that they could not wear union insignia at Respondent's facility."

Lockett further testified that during the week before the Board election, he was working near Poche's office and:

> I was already up on the deck [that] his office was on and I was passing it and he called me in. And when I went in there he said that I stabbed him in his back. I asked him what he was talking about. He told me somebody had told him I was with the Union.
>
> And I asked him where he heard that from because I said it was lies.
>
> He told me [that] if he found out that it was true that he was going to cut my water.

Based on this testimony by Lockett, paragraph 49 of the second complaint alleges that Respondent, by Poche: "(a) created the impression among its employees that their union activities were under surveillance by Respondent; (b) interrogated its employees about their union membership, activities and sympathies; and (c) threatened its employees with unspecified reprisals if they aided or supported the Union." Lockett testified that, before this incident, Thibodeaux had drafted several warning notices that Poche had destroyed; these included "three or four" warning notices for absenteeism, two for wearing a large, wooden-pendant, necklace in violation of Respondent's safety rules, and two for sleeping.

On cross-examination, Lockett acknowledged that his pretrial affidavit included no reference to the writing on his hardhat of the slogan: "Freedom of Speech . . . Watch What You Say . . . Vote Yes." Lockett further acknowledged that his affidavit states that, at the time that Poche said that he had heard that Lockett favored the Union, he had been telling Poche that he was against the Union. Further on cross-examination Lockett acknowledged that, on his preemployment application with Respondent, he stated, falsely, that he had not been convicted of a felony. Lockett was asked and he testified:

> Q. Why did you mark that box "no" when you were in fact convicted of a felony in 1989?
>
> A. Because I was afraid they weren't going to hire me if I would have put "yes," because every place of business that I want to try to get a job at, they refuse me because of that.
>
> Q. So you marked that box "no" in order to help you get a job at Avondale. Is that correct?
>
> A. Yes.

These answers, I find, are nothing short of admissions that Lockett would lie to get, keep or retrieve (with backpay) his job. As I discuss below, I believe that Lockett did give false testimony in regard to his union sentiments. Also, on redirect examination Lockett was not asked for any explanation of how, if it was true, his affidavit could have failed to mention the "Freedom of Speech" slogan that he claims to have placed on his hardhat.

Poche (vol. 77) testified that Lockett repeatedly asked him for "Vote-No" stickers, and Lockett regularly (and without prompting from him) wore two "Vote-No" stickers on his hardhat. Also, Poche testified that, on the morning of the Board election, Lockett (along with alleged discriminatee Chad Durocher) marched at one of the Company's gates with a "Vote-No" poster. Lockett was not called in rebuttal to deny any of this testimony by Poche, and I found it credible. From this factor, alone, I would find that Lockett was never a prounion employee. Additionally, as I discuss below, I have discredited Lockett's testimony that Lester told the employees that they could not talk about the Union or they would be fired; therefore, I certainly do not believe that, in reaction to that alleged

statement, Lockett placed the "Freedom of Speech" slogan on his hardhat. (Lockett was further impeached on this point, I find, by his failure to include it in his pretrial affidavit.) It is further to be noted that Lockett testified that, when Poche told him that he (Poche) had heard that Lockett was prounion, Lockett responded, "I asked him where he heard that from because I said it was lies." That much of Lockett's testimony was believable, and I believe that Lockett was then telling Poche the truth. I find that Lockett expressed no prounion sympathies before he was discharged, and I conclude that the General Counsel has not presented a prima facie case that his discharge violated Section 8(a)(3). I shall therefore recommend dismissal of that allegation of the complaint.

Antiunion employees, however, can still be threatened in violation of Section 8(a)(1), and I find that antiunion employee Lockett was threatened and interrogated by Poche, but not by Lester. Lockett was extremely unimpressive when testifying about the threats by Lester. Moreover, Lester (vol. 135) credibly denied all of the threats and instructions that Lockett attributed to him. Poche, however, was not credible in his denial that he told Lockett that Lockett had "stabbed" him in the back, and Poche was not credible in his denial that he told Lockett that someone said that Lockett favored the Union. Poche further was not credible in his denial that he told Lockett that he would "cut [Lockett's] water" if he did turn out to be prounion. Lockett, as I have indicated, was believable in this part of his testimony. Lockett credibly testified that Poche had theretofore destroyed several warning notices that Thibodeaux had drafted for him. A threat to "cut your water off," or words to that effect, is a common way to tell someone that he would not receive indulgences that theretofore had been afforded.

Poche was sounding out Lockett about possible prounion sympathies when he told Lockett that he had heard that Lockett was favoring the Union. That was an unlawful interrogation. Poche apparently accepted Lockett's declaration that he was still antiunion, but he threatened Lockett that, if he ever did become prounion, the indulgences that Lockett had theretofore been afforded (for whatever reason) would stop. This threat was plainly unlawful. In summary, I find and conclude that Respondent, in violation of Section 8(a)(1), by Poche, in late June 1993, interrogated an employee about his union membership, activities, or desires, and threatened an employee that indulgences or privileges would be withdrawn if that employee supported the Union. Moreover, Poche's statement to Lockett that he had heard that Lockett was then a prounion employee may have been a bluff, but it was nevertheless a statement that the employee's protected activities were being made note of, and the statement was coupled with the unlawful threat that if what the supervisor had heard was true, Lockett was to suffer. Such statements necessarily would have had a coercive impact on any employee who heard it, even an antiunion employee such as Lockett. Poche's action, therefore, was further a creation of an impression of surveillance of the employee's protected activities in violation of Section 8(a)(1), as I further find and conclude.

h. Philip Perera

Philip Perera (vols. 10, 50), who is currently employed as an electrician, was issued warning notices on June 30 and July 27, 1993, and March 10 and 16, 1994.[231] The third complaint, at paragraph 9, alleges that the four warning notices were issued in violation of Section 8(a)(3). The General Counsel contends that Respondent issued the warning notices to Perera because of his known union activities and expressions of sympathy which included his wearing of prounion insignia, his serving as an alternate union observer at the June 25 Board election, and his speaking directly to supervisors in favor of the Union. Respondent does not deny knowledge of Perera's prounion sympathies, but it answers that the first three warning notices were issued to Perera solely because of Perera's excessive absenteeism, and Respondent contends that Perera's fourth warning notice was issued solely because he was soliciting or distributing literature in violation of Respondent's facially valid no-solicitation and no-distribution rules. The General Counsel does not dispute the absences that Respondent attributes to Perera, but the General Counsel contends that Perera was disciplined disparately because other employees' absences were excused under similar circumstances. The General Counsel disputes that Perera was soliciting or distributing literature before the fourth warning notice was issued to him. Alternatively, the General Counsel contends that Perera was disciplined for his solicitation disparately because other employees conducted known solicitations without punishment. Ultimately, I find and conclude that Respondent violated Section 8(a)(3) by its issuance of two of the three warning notices for absenteeism and by its issuance of the warning notice for Perera's solicitation or distribution.

Perera has been employed by Respondent since 1989. On March 19, 1993, Perera began working on the crew of Foreman James Imhoff. Imhoff reported to General Foreman Jimmy Mancuso, senior General Foreman Gerald Gerdes, and Electrical Department Superintendent Robert Terry.

Perera testified that he placed two union stickers on his hardhat at the first of the organizational attempt in March 1993. In early May, according to Perera, he was spoken to by Imhoff and:

> He asked me why I wanted the Union. I said, "Well, it can't be any worse than what I have now, and it can only make me better; it can only make us better off." I told him I feel it would help better me, because I needed somebody to represent me, because I feel like I had been there so long and they cut out raises; nobody could get a raise; you couldn't get anyplace. You were just stuck in a rut. You couldn't get anyplace.

Perera testified that Imhoff did not reply. There is no interrogation allegation based on this exchange between Perera and Imhoff; the General Counsel introduced it to show the degree of Perera's union activities and expressions of sympathies. Perera further testified that on May 10 Terry conducted an employer campaign meeting. During the meeting, according to Perera:

> He started off the meeting, he said if the Union got in, they would take our vacation and sell it back to the Company and have the Company take our dues out of our check and send it right back to them. . . .
>
> And I made a statement as to which he didn't know what he was talking about because he never belonged to a union and I had, and I never had the Union tell any com-

[231] All dates mentioned in Perera's case are between April 1, 1993, and March 31, 1994, unless otherwise indicated.

pany to take any money out of my check to mail it to them.

Perera was an alternate union observer for the Board election. During the voting, Perera stood outside Respondent's administration building, apparently waiting to be called if needed. As he stood around the entrance to the building, Perera also hand-billed passers-by. As he did so, according to Perera, he was approached first by Paint Department Foreman Randall Laborde and then by Imhoff. Perera was asked and he testified:

> Q. And what, if anything, happened when Mr. Laborde approached you?
>
> A. He asked me if I was crazy. I told him, no, I wasn't. I was a man making up my own decision and doing what I thought was right.
>
> Q. And when Mr. Imhoff approached you, could you tell us, please, what happened.
>
> A. He told me, "What are you doing?"
>
> I said, "I am standing out here handbilling."
>
> He says, "Why? Why are you not coming to work? You are not getting paid."
>
> I said, "Well, I am not worried about being paid; I am out here doing what I think is right for myself, to better myself."

Neither Terry, nor Laborde, nor Imhoff denied this testimony which was offered as further evidence that Respondent knew of Perera's strong prounion stance. Terry further admitted (vols. 42, 92) that, because of the prounion insignia that he had worn, Perera's name was on his list of "prounion supporters." A picture of Perera, standing before Respondent's main gate on the day of the Board election, positioned behind a large "Vote Yes" sign, along with alleged discriminatee Richard St. Blanc, appeared in the financial section of the *Times Picayune* on Sunday, July 18. All of which is to say that Perera was one of the most prominent union supporters in the entire plant.

(1) Perera's three warning notices for absenteeism

On May 21, 1992, Terry issued a memorandum to all electrical department employees. The memo states, in part:

> Absences other than vacation will also not be tolerated unless you provide proof of a legitimate, serious nature explaining why you were absent.
>
> Examples of acceptable proof are letterhead stationery properly signed by a doctor, hospital, dentist, judge, court clerk and [sic] the I.R.S. When you provide your supervisor with this proof, your supervisor will signify acceptance by countersigning the documentation and forwarding it to the Main [Electrical Department] office for inclusion in your personal records. Just to call in and state that you will be absent by no means qualifies you for an "excused absence."

Gerdes credibly testified (vol. 122, 123) that the May 21, 1992 memorandum from Terry was posted in the main electrical department office and it was posted at all electrical department toolrooms. (Perera acknowledged that he had read the notice when it was posted on a wall of the place where he usually signed in during that period of time.) Gerdes also attended meeting where, pursuant to Terry's instructions, foremen reviewed the memorandum with their crews. Gerdes testified that he also distributed to all foremen on the LSDs a memorandum from Terry that was issued on October 26, 1992. On the subject of absenteeism, Terry states, inter alia:

> To insure that all of our employees (both new-hires and long-standing employees) are aware of our policy concerning absenteeism, we ask that you please review the following with them.
>
> If you must be absent from work, you must contact the main Electrical Office at either [two local telephone numbers] before 7:30 a.m.
>
> You must call each and every day that you are absent, no exceptions.
>
> On your return to work, you must be able to provide your supervisor with proof that your absence was indeed necessary.

Gerdes further credibly testified that he passed this memorandum to all foremen and told them to read it to all employees (because some of them could not read).

Gerdes further identified a memorandum that he issued to all LSD foremen and general foremen on the subject of absenteeism. Dated February 2, 1993: it states, in its entirety:

> It has become quite evident that many supervisors are not issuing warning notices to frequent offenders. If a person misses three days (06) in a 30-day time period, a warning notice should be issued. A second notice could result in termination. Please review and explain the 5–0921–0992 and 10–0926–0992 memos to all employees. Your cooperation is expected.

Gerdes testified that he circulated this memorandum, with Terry's two 1992 memos on absenteeism, to all of his subordinate foremen and saw to it that they conducted meetings with their crewmembers on the topic.

Despite the above-quoted memoranda, and certain testimony by Terry and Gerdes, that employees are required to present documentation for each absence, Perera testified that during the last half of 1992 and the first half of 1993, he was absent at least twice a month, and sometimes three times in a month. On none of those occasions was he asked for documentation for his absences and on none of those occasions did he receive a warning notice for the absenteeism. Further, Perera testified that he was absent because of an injury during the last 4 months of 1993, and he was not asked to supply any documentation for those absences. None of this testimony was contradicted by Respondent's witnesses or exhibits. Also, as quoted below, Imhoff admitted on cross-examination that, in the electrical department, the requirement of documentation was not enforced on a "serious" basis until 1995.

Records of electrical department call-ins are maintained in call-in logs. One "log" is created for each day by the clericals in the department's main office. Several of the call-in logs were introduced into evidence by both parties. Clerk Gayle Digregorio testified for Respondent (vol. 151) that, during the periods in question, she or clerk Jan Adams (who did not testify) arrived at work as early as 6 a.m. to accept call-ins. Digregorio and Adams recorded the employee's badge number, name, the name of the employee's foreman, the reason for the call-in (such as "sick" or "car trouble" or "late" or "personal business"), and the initials of the clerical who took the call, usually Digregorio or Adams. Unless the employee was taking an unscheduled vacation day, the clericals did not call a foreman to report that one of his employees had called; the foremen

would call the clericals to see if an absent employee had called in. Digregorio denied that she had ever knowingly failed to enter an employee's call in the call-in log; she testified that she knew "it could mean a man's job." Digregorio testified that she was present when Adams or other clerical employees took employees' calls and followed the same procedures. Digregorio was credible in all of this testimony.

(a) Perera's first warning notice for absenteeism

On Monday, June 14, at a time that he was still assigned to the crew of Imhoff, Perera was absent. Perera testified that he called in to the office and reported that he would be absent. The General Counsel introduced the electrical department call-in log for June 14; it does indicate that Perera called in "sick" on that date. On his MCR for June 14, Imhoff coded Perera "06" (unexcused). Perera was also absent on June 16. Perera testified that he again called in, but the call-in log for June 16 does not reflect that any such call was made. I discredit Perera's testimony that he called in on June 16.[232] Perera was absent again on June 21; he acknowledged that he did not call in on that date. As well as Perera's absence of June 14, his absences of June 16 and 21 were coded "06" by Imhoff.

On June 30 Imhoff presented Perera with a warning notice for a violation General offense-1 of the Avondale Employees' Guide. The warning notice cited: "3 unexcused absences [for] the month of June—Dates being 6–0914, 6–0916, 6–0921 of 1993." Perera testified that he told Imhoff that he had called in June 14 and 16; Imhoff replied that he was just doing as he was told. Perera testified, and it is not disputed, that Imhoff did not tell him that he should have presented documentation for his absence of June 14 (or June 16 or June 21).

Imhoff, who was not a supervisor at the time that he was called by Respondent, testified (vol. 148) that he usually coded an employee as "05" (excused) if the employee called in. Imhoff testified that he coded Perera "06" on June 14, even though Perera had called and reported that he was ill, because of Perera's "chronic abuse of absenteeism." Imhoff testified, "[I]f it only happened once or twice, he would have got an `excused.'" Imhoff testified that, when he presented the June 30 warning notice to Perera he told Perera that his absenteeism had to stop, but he did not testify that he then also told Perera that he must furnish documentation for each absence.[233]

On cross-examination Imhoff was asked and he testified:

> Q. And the way you could decide whether or not to give the citation was by looking at your MCR. Is that correct?
>
> A. Correct.
>
> Q. Now, you mentioned that sometimes people did bring in documentation for their absences?
>
> A. Sometimes they did. At that time it wasn't department policy to have it done so.
>
> Q. And when you say it wasn't department policy at that time, do you mean in 1993?
>
> A. Correct.
>
> Q. And, if you know, could you tell us . . . when it became department policy to bring in documentation for absences? . . .
>
> A. I would say maybe early '95 was when it really became serious about requiring it.

Imhoff testified that the department became "serious" in early 1995 after another memorandum was issued by Terry.

Perera's First Warning Notice for Absenteeism—Conclusions

Knowledge of Perera's extensive union activities is not denied. Perera wore prounion insignia, something for which so many supervisors in this case are found to have threatened employees. As quoted above, Perera spoke up to Imhoff and Terry in favor of the Union, and he was on Terry's list of prounion supporters. Perera even was pictured in the July 18 issue of the local newspaper as he campaigned at Respondent's main gate on the day of the June 25 Board election. As he engaged in that campaigning, Paint Department Foreman Laborde and Imhoff saw Perera's election-day campaigning; Laborde told Perera that he was "crazy," and Imhoff reminded him that, at least, he was not being paid for his time campaigning. In view of the great deal of the proven animus toward those who favored the Union, in general, and in view of the proven specific animus toward those who wore prounion insignia, in particular, I find and conclude that the General Counsel has presented prima facie cases of unlawful discrimination against Perera for each of the warning notices that Perera was issued, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Perera even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On June 14, Perera called the electrical department office to report that he would be absent that day, and he was. Imhoff testified that usually, if an employee simply calls in, he is given an "05" (excused absence) on the daily MCR. Perera was coded "06," Imhoff testified, because Perera was guilty of "chronic" absenteeism. This testimony by Imhoff was directly impeached by the cross-examination of Gerdes (vol. 123) where Gerdes admitted, without qualification, that Perera should have been coded "05" because Perera had called in "sick" on June 14. Also, although Respondent introduced hundreds of MCRs, none was introduced to indicate that, in any objective sense, Perera's absenteeism had reached the "chronic" level. Certainly, there is no record of Perera's having previously received a warning notice for his "chronic" absenteeism. Nor is there any credible evidence that, on June 14, Imhoff had held some subjective sense that Perera's absenteeism was in a "chronic" state. Certainly, Imhoff did not give Perera an oral warning before June 14, something the supervisors insist that they do before issuing written warnings. And, certainly, Imhoff had not told Perera that his absenteeism, although not rising to the level of deserving a warning notice, had risen to the level of subjecting him to receiving an "06" when, otherwise, he would have received an "05" for his absences.

Perera's warning notice of June 30 was not issued because of any failure on his part to bring in documentation for his absence of June 14. The above-quoted October 26, 1992 memorandum by Terry does not say that documentation is required for each absence. The memorandum says that call-ins are required for each absence, with "no exceptions," but it says: "On your re-

[232] Aside from the fact that I believe Respondent's business records to be accurate, I was most unfavorably impressed by Perera's testimony about his absences. The element that goes far in coloring Perera's credibility is his testimony, as discussed below, that a doctor misdated an excuse three times.

[233] Imhoff testified that Perera brought him no documentation for his June 14 absence, but, contrary to the assertion in Respondent's brief, Imhoff did not testify that Perera's failure to bring in such documentation had anything to do with his issuance of the June 30 warning notice.

turn to work, *you must be able to provide* your supervisor with proof that your absence was indeed necessary." (Emphasis added.) The plain inference from the notice is that documentation will be required when an absent employee is asked for it. Perera was not asked to provide documentation, or given the opportunity to "provide" documentation, for his June 14 absence.[234] Instead, Imhoff recorded the "06" before he gave Perera a chance to bring in the documentation (again, even though Perera had called in). When Perera appeared the next day, Imhoff did not ask Perera for documentation; Imhoff did not tell Perera that, contrary to past practices, Perera had been coded "06" on June 14; Imhoff did not tell Perera that, if he did not want the warning notice held against him in the future, he should produce documentation.

There is even further evidence that documentation for absences was not really required of electrical department employees, and this is evidence that requires no inference: (1) Imhoff did not testify that Perera's failure to bring in documentation for his June 14 absence had anything to do with his coding Perera's absence "06" on that date or that Perera's failure to present documentation had anything to do with the warning notice; and (2) Imhoff admitted that the department was not "serious" about requiring documentation until 1995.

I find that the General Counsel has shown that Perera was coded "06" on June 14 on a pretextual basis. As the June 14 coding of Perera's absence as unexcused was an indispensable part of the reason for the issuance of the June 30 warning notice, the General Counsel has also shown that the warning notice was issued also on a pretextual basis. I therefore find and conclude that, by its issuance of the June 30 warning notice to Perera, Respondent violated Section 8(a)(3) of the Act.

(b) Perera's second warning notice for absenteeism

Perera was absent again on Monday, July 19; he testified, "My knee was swollen; I couldn't walk." On Friday, July 23, Perera was absent again; he testified: "Again, my knee was swollen." On Monday, July 26, Perera was absent again; he testified: "My knee was swollen again." Perera testified that on the days of each of these absences he called in to the office to report that he would be absent because of his physical condition. Respondent introduced the call-in logs for July 19 and 26; they reflect that Perera called in to report that he was going to be "late" on those days. Respondent introduced the call-in log for July 23; it reflects no call by Perera. I credit the call-in logs over Perera's testimony; I find that Perera called in on July 19 and 26, but only to say that he would be late, and he did not call in at all on July 23.

On the MCRs for July 19, 23, and 26 Imhoff coded Perera's absences as "06." On July 28, Perera was presented with another warning notice by Imhoff. The warning stated: "Employee missed 3 unexcused days in a one-month period. Due to 2 violations for unexcused absences and 1 for safety, this will be your final warning notice." Perera testified that, when Imhoff gave him this second warning notice, he told Imhoff that he had called in on all 3 days; Imhoff again told Perera that he was just doing as he had been told. Perera testified without contradiction that Imhoff did not tell him that he should have presented documentation for any of the three absences that were the subject of the warning notice that he was then receiving.

Imhoff testified that he issued the warning notice of July 27 to Perera because the MCRs of July 19, 23, and 26 showed "06" for each day. Imhoff did not testify that Perera's failures to bring in documentation for his July absences had anything to do with the July 27 warning notice.

Perera's Second Warning Notice for Absenteeism—Conclusions

When an employee calls in and says that he will be late, and then he does not appear at all, he has hardly offered an excuse for his absence. Although Imhoff admitted that he sometimes had coded employees "05" under such circumstances, there is no reason to believe that, even absent his union activities and sympathies, Perera would have been afforded such indulgence. On June 21 Perera was absent without calling at all, as I have found above; less than 30 days transpired before his July 19 "late" call-in. Perera's July 26 "late" call-in was made on a Monday after he had been absent without calling in ("late," or otherwise) on Friday, July 23. It seems to this trier of fact that Perera was playing something of a game of "King's-X," or "magic word" with his practice of "late" calls when he was not going to come to work at all. I shall recommend dismissal of the allegation that Perera's warning notice of July 27 was issued in violation of Section 8(a)(3).

(c) Perera's third warning notice for absenteeism

During the week of February 22–0926, Perera worked on the first shift under Foreman Jerry Rhoto Jr. Perera was absent on February 22 and 25; the call-in logs for those dates reflect no call-ins by Perera. Perera testified that he did not recall the absences of February 22 and 25 and, of course, the General Counsel does not contend that Perera did call in on those dates. Rhoto recorded both absences as "06."

On Monday, February 28, Perera began working under Foreman Joe Hanson on the 11 p.m. to 7 a.m. (third) shift. Gerdes testified that when employees on the third shift are unexpectedly absent, they are permitted to call in by 7:30 the next morning and "retroactively" (as I use the word) explain why they had been absent. This retroactive call-in procedure exists because no one is in the electrical department office to take such calls from about 3:30 p.m until about 6 a.m. the following day. (Contrary to the contention of the General Counsel on brief, although Terry testified (vol. 93) that there is no "specified time" by which third-shift employees are required to call in, Terry was hardly testifying that there was no requirement for third-shift employees to call in whatsoever. The conflict between Terry and Gerdes on this point is resolved by finding, as the employees assuredly knew, that they should call in within a reasonable amount of time after the electrical department office opens at 6 a.m., and certainly before their foremen, who marked the MCRs, would be expected to leave the premises in the mornings.)

Hanson credibly testified (vol. 153) that, when he works the 11 p.m to 7 a.m. shift, he does not code absences on his MCRs until the morning following an employee's failure to appear. Hanson then checks with the office to see if an employee has called in that morning to retroactively explain his absence. If such calls are received before he turns in the MCR and leaves the premises (as late as 8 a.m.), he will mark the MCR as "05"

[234] Other evidence that documentation for absences was not really required by Perera's supervisors lies in the fact that Perera acknowledged having many absences in the year before June 14, and his testimony that he never was required to produce documentation was not disputed.

or "08" (again, the latter being for personal illnesses and the former being for any legitimate-sounding reason).

Perera was absent for the shift that began at 11 p.m. on Thursday, March 3 and ended at 7 a.m. on March 4. Perera testified that he had called the electrical department office during the morning of March 3 to report that he was ill and would not be at work that night. The call-in log for March 3 reflects no call by Perera, and I discredit his testimony that he called in on that date, at any time.

Hanson testified that on the morning of March 4, before he (Hanson) left the premises, he called the electrical department office, and the clerical "told me who called in and who didn't." Hanson further testified that "pretty quick" thereafter, he received a call from Gerdes who said that Perera had a bad absenteeism record and that he (Gerdes) was drafting a warning notice for Perera, "and that if he (Perera) continues to miss time to advise him." (Gerdes testified that General Foreman Kenneth Danos told him of the problem with Perera's absenteeism record; Danos did not testify, but I reject the General Counsel's argument on brief that I should draw an adverse inference from that fact; of course, anyone who happened to have been in the office when Hanson called on March 4 could have informed Gerdes of the problem.)

The call-in log for Friday, March 4 reflects that Perera called in "sick" on that day. (Perera did not testify that he made any call-in on March 4.) Consistent with the above statements of how call-ins are handled for the 11 p.m. to 7 a.m. shift, Hanson credibly testified that Perera's call that is recorded on the March 4 call-in log must have been received after he left the premises the morning of March 4.[235] Hanson left the premises on the morning of March 4 without entering any code for Perera's absence from the March 3 shift. As Respondent's supervisor for timekeeping Mary Arnold testified (vols. 18, 154, 156), an absence for which an MCR shows no code is treated as if the supervisor had entered "06."

Perera was also absent for the shifts that began at 11 p.m. on Friday, March 4, Monday, March 7, and Tuesday, March 8. Perera appeared for work on March 9.[236] On March 10, at 6:45 a.m., as the March 9 shift was ending, Hanson presented Perera with his third warning notice for absenteeism. The notice had been drafted and signed by Gerdes. In the space for "Date and time of Offense" Gerdes cited Perera's absences of February 22 and 25, and March 3 (but not March 4, 7, or 8). In the space for "Reason for Warning," Gerdes had written: "If employee is absent on or before July 27, 1994, immediate termination will take place. Absence for any reason on a scheduled workday. ***Final Final Notice***." (Double underlines in original.)

Hanson credibly testified that early on the morning of March 10, he had called the office to advise Gerdes that Perera had returned for the shift that had begun at 11 p.m. on March 9. Gerdes told Hanson that he had drafted the notice that he had mentioned on March 4, and he wanted Hanson to issue it. Hanson received the warning notice from Gerdes and gave it to Perera. Hanson credibly testified that, as he gave Perera the March 10 warning notice for his absences of February 22 and 25, and March 3, he further told Perera, "You have got a citation coming for those three days, and if you don't bring me something in for the other [the absences of March 4-8], you will probably get another one for the rest of the time you missed." Perera told Hanson that he already had an excuse for his first three days of absence.[237]

Perera testified that during the morning of the day that he returned to work (which date he erroneously placed at March 8), he visited his doctor to get "released" to go back to work. (Perera had not testified that a doctor had told him not to go to work.) The release form that Perera secured, on whatever date, is from a local clinic. It is entitled "Certificate to Return to Work or School." I underline here the blanks that the doctor filled in or marked:

> Mr. *Perera, Philip* has been under my care from *3–10–94* to [space left blank] and is able to return *to work* about *3–10–94. Pt. [patient] ill since 3–2–94.*
>
> [*Doctor's (illegible) signature*] Date *3–10–94*.

Perera testified that he brought this doctor's release to Hanson at the beginning of what would have been, if Perera is to be credited at all, the shift that began at 11 o'clock on March 9.

Hanson credibly testified that Perera did not bring in the (thrice-dated) March 10 doctor's release until the March 10 shift began at 11 o'clock. Even if Hanson had not so testified, I am constrained to state that I do not believe Perera's testimony that the doctor had made a mistake in dating the release "3–0910–0994" *three times*. If it were true that Perera had presented the March 10 release on March 9, he would assuredly have mentioned it to Hanson on the morning of March 10 when he got the warning notice. (Perera was quick to claim that he had called in when he was presented with his other warning notices.) I believe, and find, that the doctor dated the release (three times) as March 10 because that was the day, and the only day,[238] that Perera visited the doctor during this sequence of events. I believe that Perera got the warning notice at 6:45 on March 10, and then he went looking for documentation that he had been ill during his latest period of absences. And then, Perera testified falsely about all of this at trial.[239]

Perera's false testimony about the dating of the doctor's release does not, however, end the inquiry. On cross-examination Hanson was shown his MCR for March 3. On it, two employees are listed as absent, Perera, whose badge number is 4397, and Joseph A. Pennington, whose badge number is 955. On his MCR, Hanson coded Pennington's absence "05," and, as noted, he did not code Perera's absence (which failure is the equivalent of marking it "06"). Hanson testified that when he called Adams, the office clerk, on the morning of March 4, he: "Just asked her if these two people called in, 955 and also 4397." Hanson first testified that Adams had told him that Pennington had called in, but then he acknowledged that he could not really

[235] The Tr., vol. 153, p. 38,761, L. 2, is corrected to change "3394" to "3/3/94."

[236] Perera testified that he returned to work on March 8, but the records are persuasive evidence that he did not.

[237] Perera further testified that, apparently after he got the warning notice from Hanson, he saw Gerdes who "made reference" to Perera's absences of the year before. On brief, the General Counsel argues that whatever Gerdes said was some sort of admission by Gerdes, but Perera did not testify about what the "reference" was, and his testimony is too vague to be meaningful.

[238] I also do not believe other testimony by Perera that he visited the doctor on March 3; if he had, the doctor would not have stated on the above-quoted release that Perera had been under his care only from March 10.

[239] Ultimately, the credibility resolution made in this paragraph makes no difference to the holding on Perera's March 10 warning notice. I enter it because of the importance of Perera's credibility to the allegation of a plant-closure threat by Bossier, as discussed above.

remember if Adams had done so. Hanson then stated that Pennington might have told him during the shift of March 2 that he was going to be absent, and that is why he coded Pennington's absence "05" on March 3, but he acknowledged that he really could not remember if Pennington had done so. The call-in log dated March 4, which contains the call-ins for those who missed the shift that began on March 3, shows that Pennington, as well as Perera, failed to call in as required. (Actually, as explained above, Perera called in on the morning of March 4, but after Hanson had left the premises.)

Perera's Third Warning Notice for Absenteeism—Conclusions

The putative basis for the March 10 warning notice was Perera's absences of February 22 and 25, and March 3. The General Counsel admits that Perera did not call in for his absences of February 22 and 25, and I have found that Perera also did not call in timely for his absence of March 3. According to the call-in log for March 3, however, neither did Pennington. Hanson coded Pennington "05," but he coded Perera "06." This is a prima facie case of discrimination, unlawful discrimination given the evidence of Respondent's animus that exists in this case.

Given the existence of this prima facie case, under *Wright Line* Respondent has the burden of coming forward with a preponderance of the evidence that Perera would have been issued the March 10 warning notice, even absent his very extensive union activities. At minimum, part of this burden includes probative evidence of why, on March 3, Hanson coded Pennington "05" but he coded Perera "06." Neither Hanson's incorrect guess that Pennington did call in, nor his rationalization that Pennington must have given him advance notice of his March 3 absence, is such evidence.[240] I find, therefore, that Respondent has failed to come forward with probative evidence to rebut the General Counsel's prima facie case that Perera's March 10 warning notice was unlawfully issued, and I conclude that the warning notice was issued to Perera in violation of Section 8(a)(3).

(2) Perera's warning notice for union solicitation

Perera testified that on March 15, shortly after his 11 p.m. arrival on his shift:

> I was walking to my work area where I was going, and I took a cigarette out of my pocket, and also out of my pocket fell a union sticker. And one of the other guys [electrician Joe Smith] was working, and he asked me what was that, and I just showed it to him.
>
> I said, "It is a union sticker."
>
> And as I was putting it back in my pocket Mr. Hanson came up behind me and said, "I saw it."
>
> And I said, "Saw what?"
>
> And he said, "I saw you give that man [Smith] a union sticker."
>
> I said, "I didn't give him anything."
>
> And he told me, "Well, go ahead back to work now." I went on back to work.

On cross-examination, Perera acknowledged that Smith had been working when he was passing by. Perera testified that his exchange with Smith took "[a] minute or two" before Hanson approached and said something. Smith was not called to testify.

On March 16, Hanson issued to Perera a warning notice that was completed and signed by Gerdes, and it was also signed by Hanson. On the warning notice Gerdes checked the block for Major offense-2 ("Intentional negligence, inefficiency, or failure to complete job assigned.") Gerdes cited 11:15 on March 15 as the time of the offense; in the space for reason for warning, Gerdes stated: "Intentional Negligence; this is your final warning notice. If you violate any other company policy, you will be immediately discharged."

Hanson testified that as he was making his rounds on March 15, he came upon a compartment where Perera and two other employees were talking. Perera was out of his work area; the other employees were not. Perera was showing the other two employees some paper, but as Hanson got nearer, Perera put the paper in his shirt pocket. Hanson denied seeing Perera pick anything off the deck. Further according to Hanson:

> When I came up I asked him why he was out of his work area and what he was doing in there talking. And he said, "Nothing."
>
> And I said, "Well, what was that that you just stuffed into your pocket?" And Phil looked at me kind of funny like, and he pulls out these union stickers that he had.
>
> . . . .
>
> Well, I said, "[Y]ou know that that is against company policy. You are supposed to be working and not soliciting." And [I] told him to go back to his work area where he belonged.

The stickers that Hanson saw were "Union-Yes" stickers, the kind that is so often mentioned in this decision. Hanson called Gerdes at home and told him what had happened; the next morning Gerdes called Hanson back and said that he was sending to Hanson another warning notice to issue to Perera.

On direct examination Gerdes acknowledged that Hanson had told him that Perera had been distributing "Union-Yes" stickers to employees who had been working. Gerdes testified that Perera was issued the above-quoted warning notice: "Because he was disruptive to the employees during working time."

On cross-examination Gerdes testified that Perera was issued the March 16 warning notice because: "Number one, he was distributing on Company time. Number two, he was not working when he was supposed to be." Although he acknowledged that he drafted the warning notice, Gerdes testified that he did not know why Perera was cited for "intentional negligence," and Gerdes further testified that he did not know why there was no reference on the warning notice to Perera's having violated Respondent's no-solicitation rule or no-distribution rule that are stated as Major offenses-20 and 21 of the Avondale Employees' Guide. Gerdes further acknowledged that Perera could have been issued a warning notice for violation of General offense-4 (wasting time).

[240] It is true that I have accepted Hanson's "rationalization" that Perera must have called in on March 4 after Hanson left the premises. In that case, however, Perera had not even testified that he had called in on March 4; instead he tried to backdate his call-in to March 3, just like he tried to backdate his doctor's release to March 8 or 9, with false testimony. Moreover, Hanson's testimony about leaving the plant at 8 o'clock was testimony of how the system had to work, and no more.

The General Counsel's Evidence of Disparate Treatment—Solicitations and Distributions

As noted in the introductory section of this decision, Respondent maintains facially valid no-solicitation and no-distribution rules. The General Counsel introduced evidence, however, that shows that the rules were not enforced against many solicitations and distributions during 1993 and 1994.

Working time and area solicitations and distributions proved in the electrical department were: (1) Alleged discriminatee John Joseph credibly testified (vol. 62) that Foreman Carl Shropshire sometimes sold candy after safety meetings. (2) Alleged discriminatee Sidney Jasmine credibly testified (vol. 52) that Foreman Jerry Kaywood regularly sold tickets to Friday night suppers on working time; Kaywood did this once during the 2-week period before Jasmine testified. (3) Jasmine (and other employees) also credibly testified that an employee who worked in the Casualty Control office on board a ship regularly sold food items during working time. During the month before he testified Jasmine saw Electrical Department Foreman Jerry Rhoto Jr. purchase eggs from that employee during working time. (4) As mentioned in the case of alleged discriminatee John Joseph, on cross-examination, Electrical Department Foreman Delling Thibodeaux testified (vol. 130) that notices to electrical department employees are usually posted at a toolroom. Annually, from October through December, Respondent posts at the toolroom United Way flyers. Also, Thibodeaux acknowledged that sometimes when electrical department employees are retiring, other employees post notices soliciting contributions toward gifts for the occasions. (5) General Foreman Mark Poche testified (vol. 77) that during the preelection period he supplied the toolroom with "Vote-No" stickers to be picked up at the window by any employee who wanted them. The toolroom is closed during the nonworking time of lunch, but open throughout working time. (6) Also, throughout the workday, Poche would give "Vote-No" stickers to any employee who asked for them. (7) Alleged discriminatee Leroy Clark credibly testified (vol. 10) that he was in a working area when he was offered a "Vote-No" sticker by his foreman, P.—J. Sprunk.

There was also credible testimony about solicitations and distributions in other departments: (1) Current employee Michael James Boudreaux (not the discriminatee Michael James Boudreaux) credibly testified (vol. 46) about gambling pools that were conducted in the sheet metal department during 1993 and 1994. The pools (including football and race-car pools, pools based on the games of the company softball team, and pools based on the Louisiana lottery) were operated from the toolroom, during working time. Boudreaux saw employees and supervisors, including Foremen Hector Navarro, Clifford Autin, Eli Duhe, and Sal Gaspar, go to the toolroom during working time to pay for squares on betting sheets. Also, the toolroom employees, or others who operated other pools, went around to working employees and supervisors (including Navarro and Autin), collected money for the wagers that the employees and supervisors would make, and had them initial their chosen squares on the betting sheets. Boudreaux had retained copies of many betting sheets, to record that he had paid for his squares (and when he paid); many of these copies were placed in evidence. Boudreaux identified the initials of Navarro and Autin on the sheets; he also testified that sometimes Navarro and Autin were present when he placed his bets at the toolroom window (which is only open during working time). On cross-examination Boudreaux was asked how long it took to have money collected for bets in the work area; he replied: "It depends on how long he wanted to stand there and talk to you. Five minutes, maybe." (2) Retired employee Adeline Plaisance credibly testified that in the machine shop, during working time:

> I would take and go around and collect if somebody was out of work for a while, and, say, two or three months. They had to be out about three months. And to help them out, I would go around the shop and collect a dollar, $2, whatever anybody wanted to give, and I would give them the money.
>
> Or I collected for flowers; I collected for a guy that got robbed at Christmas time. I passed the collection for that, to help him out. All his gifts was stolen, and he had children. And let's see. Anybody retired, I would collect.
>
> There were numerous things that I would collect for. Anytime they needed a collection passed, I was the one that always passed it.

Plaisance testified that supervisors, as well as employees, contributed to these solicitations that she undertook during working time. Plaisance was never disciplined for conducting these solicitations. (3) Current employee Eric Evans credibly testified (vol. 59) that Shipfitting Department General Foreman Clark Usee sold hog-cracklings (dried skins) during working time. Usee has done this twice a year for 8 years, and Evans bought some as late as November 1994.

Perera's Warning Notice for Union Solicitation—Conclusions

I do not believe Perera's testimony that when he was approached by Hanson on March 15, he was only responding to the question of another employee about what it was that had fallen out of his pocket. I agree with Respondent that Perera was soliciting, or distributing literature, or attempting to distribute literature, for the Union. Nevertheless, solicitations and distributions had been widely permitted by Respondent before and after March 15, especially in the electrical department, as the above credited testimony of supervisors and employees demonstrates. It is therefore clear that Perera was issued the warning notice of March 14 in an exercise of disparate treatment.

Further evidence of discrimination against Perera in the issuance of the March 16 warning notice lies in Gerdes' use of "intentional negligence" as the stated basis for the warning. In no sense of the (vague, self-contradictory) term could Perera's conduct be classified as negligence, "intentional" or otherwise. Perera's conduct could have been appropriately described as solicitation or distribution, and if either Respondent's no-solicitation rule or its no-distribution rule could have been validly invoked, one of them would have been. Obviously, Gerdes knew (or was told) that he could not use those facially appropriate categories of the Avondale Employees' Guide because Respondent had allowed other solicitations and distributions during working time and in work areas. Gerdes still wanted to cite Perera for something. As Gerdes admitted, Perera's conduct could have been categorized under the Avondale Employees' Guide as the general offense of wasting time. Gerdes did not cite Perera for such a general offense because, it is also obvious, he wanted to cite Perera for a major offense under the Avondale Employees' Guide. To do this, Gerdes invoked the

entirely inappropriate rule against "intentional negligence." This groping for a justification[241] for the warning notice is a further indication that it had no valid basis.

I find that the General Counsel has shown to be pretextual the evidence with which Respondent has come forward to meet the prima facie case that the March 16 warning notice was issued to Perera unlawfully. I therefore conclude that the warning notice was issued in violation of Section 8(a)(3).

3. Employees discharged for violence, threats, or insubordination

a. Rene Rubi's discharge for insubordination

Rene Rubi (vol. 7) was employed as a shipfitter until he was discharged on February 9, 1994. The second complaint, at paragraph 141, alleges that by discharging Rubi, Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Rubi because of a single expression of prounion sympathy to his foreman. Respondent answers that its supervisors had no knowledge of any prounion sympathies of Rubi at any relevant time and that Rubi was discharged because he failed to do assigned work and was insubordinate to his foreman. The General Counsel replies that the defense is a pretext because Rubi was not insubordinate and that his alleged conduct was provoked by the foreman; alternatively, the General Counsel replies that Rubi was treated disparately because other employees who engaged in similar conduct were issued lesser, or no, discipline. Ultimately, I find and conclude that the General Counsel has not presented a prima facie case that Rubi was unlawfully discharged, and I shall recommend that the allegation be dismissed.

Rubi worked under Foreman Donald (Dooley) Euvino. Rubi did not wear prounion insignia, and he engaged in no other types of union activities of which Respondent's supervisors could possibly have been aware. Rubi did testify that, for several weeks before his discharge, Euvino asked him several times how much Rubi's wage rate was. On one of these occasions:

> Dooley come and ask me again, "Hey, Rene, I need to see your check."
>
> I tell again, "It is not your business, man. Why you come and ask me for my money, anyway? You no pay me. Anyway, you no ask me no more, man; I vote to the Union."
>
> He left away. That is it.

Rubi's English was minimal, but the General Counsel did not present him with a translator, and I simply can make no sense of the quoted testimony. Assuming that the exchange to which Rubi was referring happened at all, it happened in early February 1994, some 7 months after the June 25 Board election, and no other election was scheduled at the time. Therefore, I cannot accept Rubi's testimony as an indication that he would vote for the Union at any time in the future if Euvino did not leave him alone. If Rubi meant the past tense of "vote," however, his testimony still makes no sense; certainly, he was not telling Euvino that he should not ask him questions because he had voted for the Union some 7 months before.

Euvino is the supervisor who first told Rubi that he was discharged. (General Foreman Leroy Trepagnier investigated and confirmed the discharge.) Euvino (vol. 119) credibly denied that Rubi ever said anything like what Rubi described, including specifically the reference to Rubi's voting for the Union. Moreover, Euvino testified that, before the Board election, Rubi asked him for two "Vote-No" stickers. When Euvino gave him the stickers, Rubi placed both of them on his hardhat. Rubi wore the "Vote-No" stickers on the day of the election, and he was wearing them on the day that he was discharged. None of this testimony by Euvino was rebutted, and I found it credible. (For possible purposes of review I here state that I also found credible Euvino's testimony about the conduct of Rubi on the day of Rubi's discharge.)

As the General Counsel has failed to present a prima facie case, I shall recommend dismissal of the allegation that Respondent discharged Rubi in violation of Section 8(a)(3).

b. Edwin Brown's discharge for disobeying and cursing a guard

Edwin Brown (vol. 5) was a crane operator in the plate shop until he was discharged on June 8, 1993. The first complaint, at paragraph 27, alleges that by discharging Brown, Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Brown because of his known union activities and expressions of sympathy which included his wearing prounion insignia and his expressing prounion sympathies directly to his supervisor. Respondent answers that its supervisors had no knowledge of any union activities or sympathies of Brown at any relevant time and that Brown was discharged solely because he cursed and refused to obey a security guard. The General Counsel replies that Brown was treated disparately on both accounts because other employees were allowed to disregard equivalent instructions of security guards, and other employees were allowed to speak profanely to guards but they received lesser, or no, discipline. Ultimately, I find and conclude that the General Counsel has not presented a prima facie case that Brown was unlawfully discharged because Brown engaged in no union activities and Brown made no expressions of prounion sympathies to Respondent's supervisors.

Brown reported to Foreman Ronny Roux and General Foreman Barry Bartholomew. Brown testified that he regularly took literature from union agents at the gate during the organizational campaign when Roux and Bartholomew were present and observing. Brown further testified that, at one employer campaign meeting, he asked Bartholomew: "[D]id he still think I didn't deserve a raise?" Brown also testified that on May 3, Roux showed to him a letter from Union Representative Phillip Miller to the Navy; in the letter Miller had made remarks critical of Respondent's management. After showing Brown the letter, Roux asked Brown if Brown wanted a person like Miller to represent him. Brown testified that he responded that representation by Miller "couldn't hurt." Brown further testified that on May 21 Roux passed out company handbills to several employees. When Roux got to Brown, Brown asked him "why he keep giving me these handbills." Roux replied that he was doing what he was told. Brown took the handbill, but immediately wadded it up and threw it in a trash can. Roux told him to go on back to work. Brown further testified on direct examination that Roux told him "several times" that he could not be reading union handbills on working time. On cross-examination, however, Brown acknowledged that his pretrial affidavit includes:

[241] Although Gerdes was cross-examined specifically on the point, Respondent on brief makes no suggestion why Perera was issued a warning notice for "intentional negligence" rather than for solicitation or distribution, or for wasting time.

"I always took the handbills with me to my work area, but I do not recall any supervisor seeing this." Brown testified that he wore two "Union-Yes" stickers on his hardhat, but on cross-examination he acknowledged that his affidavit states, "I did not wear any clothing to work with the Union insignia on it." The General Counsel did not ask Brown on redirect examination to explain the inconsistencies with his affidavit.

The unexplained conflicts with Brown's affidavit cause me to believe that he was not a truthful witness, certainly as far as his testimony about his purported union activities goes. I do not believe that he wore prounion insignia at work, nor did he read prounion handbills in the presence of supervisors. Brown did accept prounion handbills in the presence of Bartholomew and Roux, and he did tell Roux that representation by the Union "couldn't hurt," but this is no more than minimal union activity, if that. (Brown wadded up a company handbill, but this was, at most, a rejection of the Company's propaganda, not an expression of union affinity.) Brown's asking Bartholomew if he did not think that he deserved a raise was simply an individual complaint; it was not concerted activity in any sense. Finally, the supervisors who discharged Brown, Bartholomew, and Samuel Capaci (Respondent's assistant director of security), credibly denied knowledge of any prounion sympathies of Brown.

I therefore find and conclude that the General Counsel has not presented a prima facie case that Brown was unlawfully discharged, and I shall recommend dismissal of this allegation of the complaint.[242]

c. Chad Durocher's discharge for insubordination and threatening his supervisor

Chad Durocher (vol. 9) was employed as a layout mechanic in the electrical department until he was discharged on September 23, 1993. The second complaint, at paragraph 122, alleges that Durocher's discharge violated Section 8(a)(3). The General Counsel contends that Respondent discharged Durocher because of his known union activities and expressions of sympathy which included: (1) in the presence of a supervisor, talking to, and taking a union handbill from, a union organizer; and (2) Durocher's making prounion comments to supervisors, once in response to an interrogation and once during an employer campaign meeting. The complaint further alleges that, in violation of Section 8(a)(1), Durocher was threatened with discharge or other discipline if he associated with union organizers, instructed not to talk about the Union during working time, threatened about such talking, interrogated about his prounion sympathies, and solicited to campaign against the Union.[243] Respondent denies that the alleged threats, interrogation, instructions, or solicitation occurred. Respondent denies knowledge of any prounion sympathies that Durocher may have held; Respondent asserts that, in fact, Durocher was openly opposed to the organizational attempt. Respondent further answers that Durocher was discharged solely because he was insubordinate to, and threatened physical violence to, a supervisor. The General Counsel replies that the defense is a pretext because Durocher did not threaten the supervisor, but, on the contrary, the General Counsel contends, the supervisor threatened Durocher. Alternatively, the General Counsel replies that, even if it finds that Durocher, in some sense, was insubordinate to, or threatened, the supervisor, the Board must nevertheless hold that Durocher was treated disparately because other employees who engaged in similar conduct were issued lesser, or no, discipline. Ultimately, I find and conclude that the General Counsel has failed to present a prima facie case that Durocher was unlawfully discharged, and I shall recommend dismissal of that allegation.

As an electrical layout mechanic, Durocher reviewed engineering diagrams and instructed and assisted shipfitters and tack-welders in installing metal brackets (and such) through which cables and wires were to be routed about the ships. Until approximately the week before he was discharged, Durocher reported to Foreman Chester Christiansen; during his last week, Durocher reported to Foreman Jimmy Pretlove.

Durocher testified that he wore a prounion sticker, but only on the inside of his hardhat or on his billfold that he kept in his pocket. Durocher testified that alleged discriminatee Michael Molaison was his helper, but when Molaison testified he was not asked about any expressions of prounion sympathies that Durocher may ever have made. Indeed, after Molaison left the stand (and could not be found for service of subpoena), the parties stipulated that Molaison's pretrial affidavit dated August 17, 1993, states: "In addition, Chad Durocher and I worked together from February through April 1993. . . . Durocher was a known company supporter. He often told me himself that he did not want to see the Union come in to the Company." In the affidavit, Molaison was attempting to show that Durocher was being treated as a favored antiunion employee, continuing at least through the date of Molaison's discharged, June 3. Additionally, on cross-examination Durocher was asked and he testified:

> Q. Isn't it a fact that you often told Mr. Michael Molaison that you did not want to see the Union come into the Company?
>
> A. No, that I can recall.

This evasive claim of lack of memory was incredible, and I find that the true answer would have been "yes." Finally, as I discuss in deciding whether Durocher was discharged in violation of the Act, Respondent's witnesses Christiansen and Poche credibly testified that Durocher regularly spoke against the Union and wore "Vote-No" stickers, and he once asked Poche for other "Vote-No" stickers to distribute.

Ultimately, I conclude that Durocher's antiunion sympathies are determinative in deciding his 8(a)(3) case, but they are not relevant to consideration of the Section 8(a)(1) allegations in support of which Durocher was also called to testify. The rights of antiunion employees can be violated by antiunion employers; also, the 8(a)(1) allegations are made in the public interest, not solely in the interest of the employee to whom the alleged 8(a)(1) conduct was immediately directed.

[242] For possible purposes of review, I here state that I credit the testimony of guard Agnes Williams (vol. 69) over the testimony of Brown in regard to the events of June 8. I further state that I discredit the testimony of former guard Leon Harrison (vol. 33) who testified squarely in conflict with his pretrial affidavit and offered an intelligence-insulting explanation for that conflict.

[243] A threat by Electrical Department Assistant Superintendent Gerdes that was not directed individually to Durocher, but which Durocher overheard, is discussed above as the allegation of paragraph 58 of the second complaint.

Instruction and Threat by Pretlove

Durocher testified (vol. 9) that in April Pretlove conducted a meeting in his office. About eight employees attended. According to Durocher:

> We had a meeting, and he warned us not to talk to anyone besides our immediate work partner and that if we got caught talking to anyone else, that we could be subject to termination, and if we are caught talking union or [to] someone affiliated with the Union, we will be terminated.

Based on this testimony by Durocher, paragraph 16 of the second complaint alleges that Respondent, by Pretlove, "(a) promulgated a rule precluding its employees from talking about the Union; and (b) threatened its employees with discharge if they talked about the Union during working time."

Pretlove (vol. 80) was asked and he testified:

> Q. Do you recall have a conversation with Mr. Durocher in which you told him that he could not talk about the Union on company time?
> A. No.
> Q. Have you ever told Mr. Durocher when he was employed there that he could not talk about the Union on company time?
> A. Not to my knowledge. I don't remember telling him that, no.

Pretlove's "no," coming only after disclaimers of memory, was not convincing. I credit Durocher on the point. I find and conclude that, as alleged, in violation of Section 8(a)(1), Respondent, by Pretlove, in April 1993, (a) promulgated a rule precluding its employees from talking about the Union; and (b) threatened its employees with discharge if they talked about the Union during working time, although Respondent then allowed employees to talk about other nonwork-related topics on working time.

Durocher's Statement to Melancon

Durocher further testified that in late May or early June, he and Electrical Department Foreman Tyrone Melancon[244] had a conversation in which Melancon asked Durocher what he thought about the Union. According to Durocher, he replied that "I thought it was pretty good, that I may vote for the Union and do what is best for my family." Melancon made a noncommittal reply. Melancon's question to Durocher is not alleged as a violation of the Act. The evidence was introduced by the General Counsel as proof of Respondent's knowledge of support for the Union by Durocher as recently as late May or early June 1993. Melancon did not testify, and I found Durocher's testimony on the point to be credible.

Durocher's Statement to Pretlove

Durocher testified that in early June, in Pretlove's office, when about six employees were present:

> I asked him [Pretlove] about raises, and he told me Avondale didn't have any money for raises, and I said, "Well, if they have money to paint 'Vote-No' on the water tower and to fight the campaign as hard as they are, they should have money to give us raises." And the meeting got out of hand, and he just dispersed the meeting.

The General Counsel introduced this testimony as evidence that would charge Respondent with knowledge of Durocher's prounion sympathies that he had held until early June. Pretlove did not deny that Durocher made such a remark in his presence.

Durocher's Interrogation by Christiansen

Durocher further testified that later in June he was told to report to Christiansen's office. When he got there:

> [Christiansen] said, "I am trying to find out who is voting for the Union and who is not; have you decided what you are going to do"
> And I replied, "I am going to do the best for my family."
> And he said, "Get back to work."

Based on this testimony by Durocher, paragraph 45 of the second complaint alleges that Respondent, in violation of Section 8(a)(1), by Christiansen, interrogated its employees about their union membership, activities, and sympathies.

Christiansen (vol. 81) denied interrogating Durocher. Christiansen testified that he attended the TIPS meetings conducted by Respondent's attorneys and followed the TIPS card that he was given. Respondent contends that this attendance makes it unlikely that Christiansen would interrogate any employee. All that Christiansen could remember of the instructions on the TIPS card, and the lawyer's oral instructions, was, however, "we shouldn't be involved in any surveillance or promising any, what you call gratuities or whatever." If Christiansen was told anything about not interrogating employees at the TIPS meeting, he did not remember it by time of trial. Christiansen, moreover, admitted that during the preelection period he was instructed by his superior, General Foreman Mancuso, to find out which employees were for the Union, and he did so. Christiansen was asked and he testified:

> Q. [By Mr. Morgan]: Going back to the question, you did receive instructions, did you not, Mr. Christensen, from superiors to try and find out who in your crew supported the Union and who in your crew didn't support the Union?
> A. Yes, sir.
> Q. And you did that, didn't you?
> A. To the best of my ability, yes, sir.

There was no testimony by Christiansen that his superiors' instructions to find out who was for the Union were accompanied by other instructions to follow what was on the TIPS card. When he was called pursuant to Rule 611(c) by the General Counsel, Christiansen testified (vol. 40) that he determined which employees favored the Union only by noting which employees were wearing prounion insignia. I believe that Christiansen was doing more than just making mental notes of who was wearing prounion insignia (or "Vote-No" stickers, for that matter). Simple observation of prounion insignia required no particular ability, much less Christiansen's "best" ability. I do not believe Christiansen's denials of Durocher's testimony, and I credit Durocher whom I did find credible on this point.

I find and conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Christiansen, in June 1993, interrogated an employee about his union membership, activities, or desires.

[244] This is the correct spelling of the supervisor's name. (See GC Exhs. 152 and 222.) In Vol. 9 of the transcript, Melancon's name is spelled as "Molaison" (the same spelling as the name of alleged discriminatee Molaison who is also mentioned in Durocher's testimony). The transcript is accordingly corrected.

Threat by Christiansen to Durocher

Durocher testified that he regularly accepted union handbills at the gate during the organizational attempt. (Several supervisors testified to doing the same.) On one such occasion, at a point after discriminatee Michael Molaison had been discharged on June 4, he accepted a handbill from Molaison who was then working as a union representative.[245] Durocher testified that Electrical Department General Foreman Mark Poche was watching as he took the handbill from Molaison and talked to Molaison. Later during that day Durocher and employee Andy Bergeron were in Christiansen's office with Christiansen; Durocher stated that he had seen Molaison at the gate and that Molaison had been "doing pretty good." In response to his remark, according to Durocher, Christiansen told him that, "standing by the gate was going to get me in trouble." Based on this testimony by Durocher, paragraph 12 of the second complaint alleges that Respondent, in violation of Section 8(a)(1), by Christiansen, "threatened its employees with unspecified reprisals because they aided or supported the Union." Bergeron did not testify.

Poche (vol. 77) did not deny seeing Durocher speaking to Molaison outside the gate at some time after Molaison's discharge. Poche did credibly testify that during the 4 weeks before the Board election, Durocher regularly wore "Vote-No" stickers on his hardhat, and during that period Durocher asked him for more of such stickers, presumably to distribute. This testimony by Poche is relevant to the issues arising from Durocher's September discharge; but it does not detract from the evidence that, in June, Supervisor Poche observed Durocher taking union handbills from Molaison and talking to Molaison.

Christiansen did not deny Durocher's testimony that Christiansen told him that he could get into trouble by standing around the gate (when handbills were being distributed), and I credit Durocher's testimony on the point. Durocher had just told Christiansen that he had been visiting Molaison who had been passing out the handbills in front of Poche, and there is no other explanation for Christiansen's warning to Durocher. It is clear enough that Christiansen was warning, or threatening, Durocher that even being present during the protected concerted activity of distributing union handbills could get him "in trouble," and this was a threat of unspecified reprisals if Durocher did it again. I find and conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Christiansen, in June 1993, threatened an employee with unspecified reprisals because of the employee's expression of interest in union activities.

Christiansen's Solicitation of Durocher for Antiunion Activity

Durocher further testified that during the morning of June 25, the day of the Board election, he and employee Andy Bergeron were outside Christiansen's office when Christiansen spoke to him. According to Durocher:

> He said, "If you guys want to redeem yourselves, I suggest you go hold up a 'Vote-No' sign at the gate."
> And I asked, "What is in it for me."
> He replied, "An extra half-hour off for lunch."
> I said, "Okay."
> He said, "The signs are in the office; they have a truck at the bottom of the ship to pick you up by the elevator at lunchtime."

Durocher testified that, at noon, he and Bergeron were taken in a company truck to the main gate where they picketed with "Vote-No" signs (while others held up signs favoring the election of the Union). At 12:30 p.m., Durocher and Bergeron were returned in the company truck to the area of Christiansen's office. Durocher and Bergeron stayed in Christiansen's office, without working, until 1 p.m. Durocher testified that he was paid for 8 hours that day. Based on this testimony by Durocher, paragraph 52 of the second complaint alleges that Respondent, in violation of Section 8(a)(1), by Christiansen "solicited its employees to campaign against the Union."

Christiansen denied asking Durocher to go to the main gate at lunchtime, and he denied all other aspects of Durocher's testimony on this point. Christiansen testified that on the day of the election:

> They [employees] was all going out to the gate for the election during lunch, between 12:00 and 12:30. . . . The union, nonunion, [employees] whoever wanted to go was going out there, and we—you know, they asked—we had—asked anybody if they wanted to go out there, that they can go, if they was interested in what was going on, as long as they was back before 12:30.

Christiansen testified that it was employee Steven Caillouet who told Durocher that, if he wished to redeem himself, he should go to the main gate and picket with the "Vote-No" sign. Caillouet did not testify. Christiansen testified that Durocher left his office with a "Vote-No" sign and returned to work in time to eat his lunch and be back on the job by 12:30 p.m.

Poche testified that during the hour before work on June 25, he saw Durocher (and alleged discriminatee Kevin Lockett) demonstrating at the main gate; both employees were carrying "Vote-No" posters. This testimony was not rebutted, and I found it credible.

I believe Christiansen's testimony that employee Caillouet, and not he, told Durocher and Bergeron that they could "redeem" themselves by demonstrating against the Union at noon on the day of the Board election. Nevertheless, I believe Durocher's testimony that Christiansen adopted Caillouet's solicitation and encouraged Durocher and Bergeron to demonstrate against the Union at lunchtime on election day by telling the employees that they would be excused for one-half hour from working if they did so. I further credit Durocher's testimony that he was, in fact, excused from work for one-half hour on June 25 because he had demonstrated against the Union. Christiansen stumbled around it, but in his above-quoted testimony he essentially admitted that supervisors asked employees to demonstrate at the gate at noon. Christiansen certainly did not ask any employee to demonstrate for the Union; he was, as Durocher testified, asking them to demonstrate against the Union, and Christiansen was offering one-half hour's credit for working if they engaged in this antiunion activity.

I find and conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Christiansen, on June 25, 1993, solicited employees to demonstrate against the Union.

[245] Durocher placed this event in April; however, he was clear that the event occurred after Molaison was discharged, so it had to be after June 3.

Discharge of Durocher

Durocher was an antiunion employee. He was interrogated, but he gave only noncommittal answers. The most he ever said was that he "may" vote for the Union, but Christiansen credibly testified that once Durocher told him that he thought the Union was not the best thing for him and his family. He spoke up at one employer campaign meeting, but his remark (about how much the Company was spending on antiunion signs), viewed with his history of wearing "Vote-No" stickers, was nothing more than a taunt of the supervisors conducting the employer campaign meeting. As Molaison testified in his affidavit, "Durocher was a known company supporter."

Finally, on June 25, Durocher asked Christiansen, "what is in it for me," when Christiansen asked him to demonstrate against the Union at lunchtime. Durocher asked this question because he wanted something, not because he was afraid of something (as he incredibly testified at one point). The one-half hour paid break at noon on June 25 was a sufficient trade for Durocher because, as I find, he was an antiunion employee on June 25. And there is no evidence that he changed his sympathies thereafter. (And, moreover, there is no evidence that Respondent knew of any such change of sympathies.) I conclude that the General Counsel has not presented a prima facie case that Durocher was discharged in order to discourage union activities in violation of Section 8(a)(3). I shall therefore recommend dismissal of the allegation on that basis.

Durocher's Case—Alternative Findings

For possible purposes of review, I further enter alternative findings about Durocher's misconduct and Respondent's discharge of Durocher for that reason: Durocher acknowledged that on September 23 he was repeatedly told by Pretlove to leave the office and go help other employees; Durocher refused to move for no good reason. When Pretlove persisted, Durocher answered him with a vile and disgusting reply which Durocher admits. Pretlove, I find, advanced on Durocher and, as he did so, Durocher clinched his fists. Pretlove told Durocher that he would be pleased if Durocher would take a swing at him; Pretlove admitted that he told Durocher, "Look, you have got a choice: you either fight or go to work." Durocher left the office.

Durocher testified that he had previously witnessed vulgar exchanges between supervisors and employees, but he credibly described nothing that remotely approaches what he admits he did; and this finder-of-fact concludes that the conduct Durocher admits was an obvious attempt to humiliate and anger Pretlove. (As well as Durocher's testimony, the General Counsel adduced other testimony of offensive language; again, however, there was nothing remotely approaching what Durocher told Pretlove.)

After Durocher left the office, Foreman A. S. Russell, who had been present (but who did not testify), told Pretlove that he had already called Terry. Pretlove replied that he thought the matter could be handled with a warning notice. Pretlove drafted a major offense-warning notice for Durocher stating: "Insubordination—willful disobedience of authorized instructions issued by supervision. When employee was given direct instructions to report to his work area, he gave supervisor verbal abuse and threatened to fight." Terry ordered Russell and Pretlove to bring Durocher to his office, which they did, after Pretlove gave Durocher the above-quoted warning notice. According to Durocher, when he got to Terry's office:

> [Terry] spoke with me and asked me what happened, and I told him the same thing that just happened here. . . .And [I told Terry that] I was sorry for what I had done. And that Pretlove never really gave me a chance to apologize or get a word in. He just jumped in my face.
>
> [A]nd he said, "Well, okay," and he sent me outside, back in the waiting room.
>
> And Russell and Pretlove came back into Bob Terry's office and just spoke a little while longer. And they called me back in, and I went in there, and he [Terry] said, "Chad, I am sorry; I can't have any of [these] disruptions within my department."

Durocher was discharged at that point.

Pretlove acknowledged that he told Terry that he did not think that Durocher should be discharged. (This factor fortifies my conclusion that Pretlove first challenged Durocher to fight; otherwise, the supervisor assuredly would have recommended discharge out of self-respect, if nothing else.) Pretlove credibly testified that Durocher argued to Terry that he should not be discharged because he had campaigned against the Union. As Pretlove put it:

> He said he didn't think it was fair to discharge him, because he was pro-Avondale and he had helped Avondale in the Union campaign by holding up "Vote-No"—"Vote against the Union [signs]." He said he had held up signs on Avondale's behalf.

Terry responded to the entreaties of both Pretlove and Durocher that Durocher would nevertheless have to be discharged because he could not have employees "challenging" the foremen as Durocher had done. (Again, these are alternative findings to my holding that the General Counsel did not present a prima facie case on behalf of Durocher.)

d. Peter Legaux's discharge for throwing a can of urine

Peter Legaux (vols. 7, 8) was employed as a sheet metal mechanic until he was discharged on July 2, 1993. The second complaint, at paragraph 97, alleges that by discharging Legaux Respondent violated Section 8(a)(3). The General Counsel contends that Legaux was discharged because Respondent suspected him of prounion sympathies which included his wearing prounion insignia and his telling other employees that he was disappointed because he had missed a home visit by a union representative. The complaint further alleges that, in violation of Section 8(a)(1), a supervisor warned Legaux that his union activities were under surveillance and the same supervisor threatened a group of employees with plant closure. Respondent denies that the threat or the surveillance-warning occurred. Respondent further answers that its supervisors had no knowledge or suspicion of any union activities or sympathies of Legaux at any relevant time and that Legaux was discharged solely because he threw a can of his urine over a wall into an area in which two other employees were standing. Legaux admits this conduct. As Legaux testified: "Just my luck, two people was passing by behind the wall, and later on, about 10:00 o'clock, one of the guys said the can had missed him, but it could have hit him, you know." This incident was reported to General Foreman Arthur Schloegel who promptly ordered the discharge of Legaux. As detailed below, there is evidence that Respondent's supervisors suspected Legaux of prounion sympathies, and there is a prima facie case of unlawful discrimination against Legaux. There is, however, no credible evidence of

Respondent's permitting any conduct remotely approaching that of Legaux's.[246] Respondent has therefore shown that it would have discharged Legaux even in the absence of his known prounion sympathies. I shall therefore recommend dismissal of the allegation that Legaux's discharge violated the Act.

I do not believe certain testimony by Legaux that he wore prounion insignia at work. Current employee Junius Duplantis (vol. 29) worked with Legaux; when the General Counsel asked Duplantis how he knew that Legaux was prounion, Duplantis responded: "From talking to him from time to time." Duplantis was a truthful employee, as I have found above, and if Legaux had worn prounion insignia, Duplantis would have mentioned it.[247] Moreover, the supervisor who caught Legaux throwing the urine credibly testified that Legaux was not wearing prounion insignia on his last day at work. There is, however, evidence that Legaux's foreman, Joe DeNicola, suspected that Legaux was sympathetic to the Union. Duplantis credibly testified that, about 3 weeks before the June 25 Board election, he was present when employee David Sanderson told DeNicola that Legaux had told Sanderson that some union representatives had come by Legaux's house when Legaux was not there and Legaux was disappointed that he had missed meeting with them. Legaux testified that during that same week: "Mr. DeNicola told me that he heard that my Union buddies passed by my house and I was very upset that I didn't get a chance to talk to them. I didn't reply to him." Based on this testimony by Duplantis and Legaux, paragraph 29 of the second complaint alleges that DeNicola unlawfully created the impression of surveillance.[248] DeNicola denied this testimony, but I found Legaux credible.

In the above cases in which I have found to be unlawful acts of the creations of the impression of surveillance, I have found other coercive remarks were made in addition to the remarks that would tend to foster such impressions. Such additional findings are not, however, required. In *Electro-Voice, Inc*., 320 NLRB 1094 (1996), the Board stated:

> In determining whether an employer has created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. See, e.g., *7-Eleven Food Store*, 257 NLRB 108, 116 (1981). Employees should be free to participate in union organizing campaigns without fear that members of management are peering over their shoulders, and in what particular ways. *Flexsteel Industries*, 311 NLRB 257 (1993). An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. See *Emerson Electric Co*., 287 NLRB 1065 (1988).

When DeNicola told Legaux that he knew that a union representative had been to Legaux's house, and that he even knew that Legaux had been upset because he had missed the union representative, DeNicola was making remarks reasonably calculated to convey the impression that Respondent was "monitoring the degree of an employee's union involvement." Such comments would reasonably lead any employee to believe that his protected concerted activities were under surveillance, and they would therefore tend to discourage such activities. Accordingly, I find and conclude that, in violation of Section 8(a)(1), Respondent, by DeNicola, about June 1, 1993, created the impression that its employees' union activities were under its surveillance.

Legaux also testified about an incident that occurred during the week of June 14. A group of employees had gathered in DeNicola's office to sign in for the day; at some point they began talking about the organizational attempt. According to Legaux:

> He told us, "Let me tell you all guys what is going to happen if the Union gets in this yard, that Avondale is going to shut the gate; they will no longer have any place to work, and all you all who do have a place to work, all you all that are signing union cards will have to go on strike and will not receive any unemployment and will not receive your jobs back again, that this union cannot work at Avondale Shipyard."

Again, DeNicola denied the testimony, but I found it credible. This testimony by Legaux, however, is alleged as a second instance of a plant closure threat by DeNicola during the week of July 14. I have already found this violation in my disposition of paragraph 43 of the second complaint. (See sec. IV(A)(4)(a), above.) As I have already found that Respondent violated Section 8(a)(1) by the conduct alleged in the specified paragraph of the complaint, no further conclusions need be entered.

e. James Cox's discharge for damaging company property

James (Danny) Cox (vols. 6, 158) was employed by Respondent as an electrician until he was discharged on June 4, 1993. The first complaint, at paragraph 27, alleges that by discharging Cox Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Cox because of (1) his known union activities and expressions of sympathy which included his wearing prounion insignia and speaking for the Union at employer campaign meetings, and (2) his concerted activity of circulating a petition that complained about a condition that some employees perceived to be unsafe. The General Counsel further alleges that, in violation of Section 8(a)(1), Cox was threatened with discharge and plant closure. Respondent denies that the threats occurred. Respondent admits knowledge of Cox's prounion sympathies and his concerted activities, but it denies that his concerted activity of circulating the petition was protected because that activity was conducted on working time. Respondent further denies that either Cox's concerted or union activities were, in any way, a factor in its decision to discharge Cox. Respondent further answers that Cox was discharged solely because he damaged, or at least defaced, Respondent's property by painting words (a prounion slogan) on a machine. The General Counsel replies that the defense is a

[246] Schloegel testified that he ordered Legaux's discharge because "[h]e threw urine on two employees." Contrary to the General Counsel's argument on reply brief, Schloegel never testified that he discharged Legaux *only* for urinating in a can, as opposed to urinating in the can and then throwing it where it "could have hit him" (to use Legaux's words).

[247] The General Counsel did not attempt to refresh Duplantis' memory in this regard, except by a leading question that was withdrawn when an objection was sustained. The General Counsel did not try again.

[248] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Legaux, as well as the charge in Case 15–CA–12171–1.

pretext because the machine was not damaged; alternatively, the General Counsel replies that any defacement would easily have been removed; as a second alternative, the General Counsel replies that Cox's conduct was, at most, a minor offense, which, even under Respondent's written rules, warranted only a warning for a first offense. Ultimately, I find and conclude that Cox was unlawfully threatened, and that his circulation of a petition was protected activity, even though it was on working time. Nevertheless, I further find that Respondent has shown that it would have discharged Cox even absent his union or protected concerted activities, and I shall recommend dismissal of that allegation.

From the inception of the organizational attempt through the date of his discharge, Cox was quite active on behalf of the Union, and knowledge of that activity is not denied. As well as wearing union stickers and buttons, Cox spoke up at several employer campaign meetings and challenged the truthfulness of several assertions of supervisors as those supervisor spoke against the organizational attempt. Cox testified that he once saw a list entitled "Union Supporters," listed by badge numbers (but not names) in a "community" desk at the workplace. Cox's badge number was one of those listed. As previously mentioned, Electrical Department Superintendent Robert Terry admitted (vol. 42) that during the preelection period he maintained a list of "Union supporters," and he admitted that Cox's name (or badge number) was on that list. Finally, Terry, who discharged Cox, testified (vol. 90) that he knew that Cox was a union supporter because: "He was openly supporting the Union by his stickers on his hat, his buttons, his T-shirts, his paraphernalia."

Cox's Petition and Threats to Cox—the General Counsel's Evidence

On Friday, May 14, and Monday, May 17, Cox worked under the supervision of Foreman Daniel Reeves. On May 14, Cox circulated a written petition to management complaining about certain conditions on a ship that was under construction. Cox collected 118 signatures,[249] 8 of which were those of supervisors; to wit: General Foreman Mark Poche and Foremen Chester Christiansen, Louis Lester, Tyrone Melancon, Bobby Robichaux, Dell Thibodaux, Randy Owen, and Daniel Reeves. On May 17, Cox called Terry and asked Terry to support him in his efforts. Terry told Cox to bring the petition to his office. Cox testified that, on the way to Terry's office, he left another copy of the petition at the safety department office. According to Cox, when he got to Terry's office, and the two of them were alone:

> Bob told me he was concerned that this was a union matter, that it was union motivated. I tried to convince him that this was a safety matter period, that I had no hidden agenda, that this was in no way connected with the organizing effort. I gave him a copy of the petition. He told me he would speak to his vice president about this matter.

On cross-examination Cox acknowledged that "at some point he [Terry] raised the question as to when the signatures had been gathered or acquired or whatever." Cox was not asked what Terry said (or asked) in this regard. Cox was not asked if he had solicited the signatures during working time on May 14, either on cross-examination or direct examination.

Cox further testified that about 1:30 in the afternoon of May 17, he and the supervisors who had signed the petition "were called" to Terry's office. (That is, Cox used the passive voice and did not testify how he was called, or who called him, or who told him to go to Terry's office at the same time as the supervisors that had signed the petition.) Cox testified that he was told to wait outside while the supervisors, including Reeves, went in.

Reeves (vol. 46), who was discharged by Respondent on May 18, testified for the General Counsel.[250] Reeves testified that during the May 17 meeting between Terry and the supervisors who signed Cox's petition (the supervisors' meeting), Terry was angry and upset; Reeves further testified:

> At that time, Mr. Terry addressed us and told us that we had signed a petition that Danny Cox had circulated and [he] asked if we didn't know that Danny Cox was a union organizer. And he [Terry] said he [Cox] showed Bob Terry his [Cox's] signed union card, and that his [Cox's] petition had something to do with the Union. And we had to watch him very closely.
>
> . . . .
>
> He told us that we all dropped a little bit in his eyes, that we just had to watch Danny Cox.
>
> . . . .
>
> He said that he would have fired Danny Cox right now but he couldn't because all of us as foremen had signed that petition. And if he fired him, he would have to do something to us too.
>
> . . . .
>
> Well, he told all the other foremen to leave and told me to stay and he called Danny Cox in.

As will be seen, supervisors called by Respondent testified that Terry was quite calm and reserved during this meeting. Before they so testified, however, the General Counsel called Christiansen as an adverse witness (vol. 40). The General Counsel asked Christiansen about the May 17 meeting between Terry and the supervisors who had signed Cox's petition. Christiansen admitted that Terry was "very upset" during the meeting.

Reeves was further asked what happened immediately after the supervisors' meeting, and he testified:

> Q. Who was present besides you and Mr. Cox and Mr. Terry?
>
> A. That was it. Just three of us.
>
> Q. Who said what at this time?
>
> A. At that time, Bob Terry told Danny Cox—he said that he was this close to firing him, that he was walking on thin ice. One more citation and he would be gone.
>
> JUDGE EVANS: All right. The witness held his right forefinger and thumb about an inch apart when he said, "This close." All right. Continue. What else was said?

[249] As he was examining the copy of the petition that was placed in evidence at one point, Terry testified that there were 87 signatures; as he did so, Terry failed to count a second column of the signatures.

[250] On cross-examination Reeves acknowledged that, when he was discharged, he was told that the reason was "soliciting employees during working time by making loans to them."

> Q. [By Mr. Morgan]: Do you recall anything else being said, Mr.—
>
> A. No. He told us to go back to work and Danny Cox left. Told me that I had to watch him very closely. If he did anything else, that any time he did anything he wasn't supposed to, to bring him back in the office.

Cox testified that when he was called into Terry's office after the supervisors' meeting, Jerry Gerdes, assistant to Terry, was present, as well as Reeves and Terry. According to Cox:

> He [Terry] told me that what I had done was wrong, that Avondale deals with their employees one on one. He was hollering at me, he raised his hand and he held his fingers ever so slightly apart [the witness demonstrated by holding his right thumb and forefinger very close together, as I described on the record] and he said, "You are a cunt hair away from being terminated. . . . If you get one more signature, you will be back in my office."
>
> He then turned and looked at Dan Reeves who was sitting directly beside me, addressed him and said, "If he gets one more signature, I want you to bring him back to my office." . . . The meeting was adjourned at that time.

Based on this testimony by Cox and Reeves, paragraph 14 of the first complaint alleges that Respondent, by Terry, unlawfully threatened its employees with discharge, "if they continued to engage in protected concerted activities or formed, joined or assisted the Union."

Cox testified that later on May 17, as he was signing out for the day, Reeves spoke to him, and Reeves, "told me that I better be careful, I have been marked." Reeves, himself, testified, "I just told Danny that he better watch his step, that they are out to get him. Management was out to get him." Based on this testimony by Cox and Reeves, paragraph 15 of the first complaint alleges that Respondent, by Reeves, unlawfully threatened its employees with unspecified reprisals.

Reeves acknowledged on cross-examination that Cox had tendered the petition to him on working time; on redirect examination he testified that he could not recall if Terry, during the meeting with the supervisors who had signed the petition, mentioned the fact that Cox had circulated the petition on working time; and Reeves denied that, when he, Cox and Terry were together, Terry said anything about Cox's circulating the petition on working time.

Cox testified that on May 18, Foreman Dell Thibodaux spoke to him and:

> Dell told me that Dan Reeves had been terminated . . . . to set an example for the other foremen not to allow union activity to go on, and that he [Terry] had felt he [Reeves] was untrustworthy. . . . [And Thibodaux told me that] Bob Terry would have fired me the day before but that would have meant . . . citing [issuing a warning notice to] all the salaried personnel who had signed the petition and he was unwilling to do that.

(Supervisors, as well as employees, may be issued warning notices by Respondent.) No separate allegation of the complaint is based on this testimony; the General Counsel introduced the testimony as evidence of animus to be considered in deciding the discharge allegations for Cox.

Cox further testified that, at some later point in May, he had a conversation with Foreman Leon Taylor; according to Cox:

> I was asked by Leon if I really thought that the Union could help Avondale. I went to some lengths explaining how I felt that they could help them improve work conditions, the economic situation as far as acquisition of work, to better organize their work, and to have a better quality of craftsmen through training and more motivated workers with all those things and they could also pay more. It was a conversation that lasted ten minutes or 15 minutes.
>
> His response to that was: "They can't help us if the yard is shut down."
>
> I asked him what he meant.
>
> He told me he had been in a supervisory meeting in the Rock House [Respondent's administration building] in which Mr. Bossier [Company president] had told him and the group of supervisors there that if the Union got in they were going to lock the gates and shut the yard down.
>
> . . . .
>
> My response to that was that was just ridiculous, that if I had a company that was paying me $600,000 a year plus benefits that there is no way I would close it down for anything, and for that kind of money they would have to run me off.
>
> And he said he was aware that Avondale hadn't been doing that well financially as of late and our stocks hadn't been great and that he was making financial plans in the event that the Union did get in.

Based on this testimony by Cox, paragraph 17 of the first complaint alleges that Respondent, by Taylor, threatened its employees with plant closure.[251]

Cox's Petition and Threats to Cox—Respondent's Evidence

General Foreman Poche (vol. 77) testified that Cox approached him with the May 14 petition between 8 and 8:15 a.m. while Poche was in his office. Poche testified that, before he signed the form, he called one Lou Cognevich in Respondent's safety department. According to Poche:

> Well, I explained to Lou that there were several people that had concerns with this, and he said, "Put her on a complaint form."
>
> And I asked, "Do we put a complaint form in on each one, or can they just enter one complaint form and everybody sign the same one?"
>
> He assured me that was fine.

Poche testified that upon hearing this from Cognevich, he signed Cox's petition; Poche had been the 11 person to do so.

Terry, when he was called by the General Counsel as an adverse witness (vol. 42), and when he was called by Respondent in its case (vols. 90-94), testified that when Cox called him during the morning of May 17, Cox told him that many employees and several supervisors had signed a safety petition and Cox asked Terry for his support on Cox's petition. Terry responded by asking Cox when he had circulated the petition. Cox acknowledged that he had circulated it during working time. Terry told Cox that he should not be doing such things when he was supposed to be doing his work. Terry further testi-

[251] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sect. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Cox, the charge in Case 15–CA–12171–1.

fied that Respondent has established procedures for presenting safety complaints, and Cox should follow those procedures.[252] He asked Cox to stop circulating the petition and bring it to him.

Terry further testified that, when Cox got to his office, he repeated that Cox should have followed the usual procedures for filing safety complaints. Terry testified:

> And I went on to tell him, "You know, there is three things I want you to do for me, Danny: I want you to stop passing the petition around. I want you to allow me to handle this—okay—because I will take it forward, and I want you to go back and do your job assignment."
>
> And at that point, Mr. Cox said, "Okay," and he gave me the petition. I think I asked him if it was the original. He said no, but that was all he had, and I said, "Okay. I will deal with it, but I will take it forward; I will handle it, Danny. And he said, 'Okay.'"

Terry told Cox to go back to work. Terry denied that the Union was mentioned in this exchange; he testified that he did not believe that it could have been a union-sponsored petition because eight supervisors had signed it.

Of the eight supervisors who had signed Cox's May 14 petition (Poche, Christiansen, Lester, Melancon, Robichaux, Thibodeaux, Owen, and Reeves), six attended the supervisors' meeting that Terry conducted later in the morning of May 17; these were: Poche, Christiansen, Robichaux, Thibodeaux, Owen, and Reeves[253] Three of those six supervisors testified for Respondent about the meeting: Poche (vol. 77), Thibodeaux (vols. 130-131), and Owen (vol. 136).[254] In addition to Poche, Thibodeaux, and Owen, Gerdes (vols. 122-123) and Terry testified for Respondent about the May 17 meeting. All five of these witnesses denied that Terry was upset; all denied that the Union was mentioned; all denied that any prounion sympathy or activity by Cox was mentioned; all denied that Terry told the supervisors that Cox had showed him his union card; all denied that Terry said that he would have discharged Cox but for the fact that eight supervisors had signed the petition; and all denied that Terry told the supervisors to watch Cox more closely. All of these supervisors testified that Terry emphasized that his concerns were that Respondent had certain procedures for filing safety complaints that should have been followed and that Cox had circulated the petition on working time. All denied that, at the close of the meeting, Terry asked Reeves to stay and they denied that they saw Cox in the area of Terry's office after the meeting. All testified that Terry went around the table asking each supervisor how he could have signed the petition. As Gerdes described it:

> And he [Terry] held the petition up, and he says, "Gentlemen, I am very concerned about what is going on in this petition and Danny Cox and this petition. First of all, I just can't believe supervisors would sign something like this. I cannot believe the amount of money and time that was lost—the cost to the Company with a man circulating this petition throughout the ship and through different sectors of the yard. I can't believe you all would do this."
>
> And then he started around the table, and first he looked at Mr. Reeves. And he said, "Did you sign this?"
>
> And Dan says, "Yes."
>
> And he says, "Why?" Dan didn't say anything.
>
> And then he looked at Randy Owen. . . . He said, Randy, "Why would you permit something like this to happen? Were you aware that you—he has—did you tell him he had channels to go through? Were you aware he was going around the shipyard or throughout the ship getting this petition signed during working time? Furthermore, you signed it yourself."
>
> And Randy just kind of sat there, and he put his head down and flexed his hands up like this (indicating), and he says, "No." And he didn't say any more.
>
> So then Bob proceeded to go around the table, and he went to Mr. Robichaux and Mr. Poche and Mr. Thibodaux. I was sitting to his left.
>
> And then his closing comment was, "Gentlemen, if this ever gets out, this would be terribly embarrassing to the Electrical Department."

Of course, as stated above, Reeves was Cox's supervisor on May 14, not Owen. Terry testified that he had been under the impression that Owen was Cox's supervisor. On cross-examination Terry was asked and he testified:

> Q. Did you ever learn that, in fact, that Mr. Owens was not Mr. Dan Cox's immediate supervisor at that time?
>
> A. No, I did not. If he weren't, he sat there and took a lot of heat from me without commenting.

The significance of all of this is that Respondent contends that, because Terry did not know that Reeves was Cox's supervisor, it is unlikely that Terry would have met with Reeves, and Cox, immediately after the supervisors' meeting to instruct Reeves and threaten Cox, as Reeves and Cox testified. Terry and Gerdes denied that any meeting between Terry, Reeves and Cox, occurred immediately after the supervisors' meeting.

Terry and Gerdes testified that they met with Cox later in the afternoon of May 17, but Reeves was not present. Terry testified that he had thought that Cox had agreed that Cox would allow him to handle the safety matter, but he had been called by someone in the safety department and told that Cox had left the petition there.[255] Terry testified that he called Cox to his office and that he and Gerdes met with Cox; Terry denied that anyone else, specifically Reeves, was present. Terry told Cox that he thought that they had an agreement that he would handle the safety matter and Cox had gone back on his word, and he was "disappointed" in Cox. Cox merely replied that he had done what he thought he had to do. Terry denied threatening Cox with any discipline, although he testified that he had thought that Cox had been in violation of Respondent's no-solicitation rule by circulating the petition on working time. Terry denied telling Cox that Avondale meets with its employees one-on-one, and he specifically denied telling Cox that he was a "cunt hair" away from being discharged, or that he held up his fingers

[252] These procedures involve an employee's filing a complaint directly with the safety department or going through supervision.

[253] Lester testified (vol. 135) that he was not present at the May 17 meeting; Melancon did not testify, but no witness placed him at the meeting.

[254] Robichaux was not called by Respondent; Christiansen was not asked about the meeting when he testified for Respondent (vol. 81), although he did testify about the meeting when he was called by the General Counsel, as discussed supra. Reeves, as previously discussed, was a witness for the General Counsel.

[255] Of course, Cox testified that he had left the original of the petition at the safety department before he had gone to Terry's office that morning.

to indicate that Cox was close to being discharged. Gerdes testified fully consistent with Terry.

On cross-examination Terry acknowledged that safety was a matter that the Union had taken up in its frequent handbilling of the plant during the organizational campaign that was then being conducted. He further admitted that he held "a consideration" that the Union would publicize the fact that eight supervisors had signed the petition. Terry further admitted on cross-examination that employees are allowed to file and process safety complaints on working time. Terry further acknowledged that the employees have 10 or 15 minutes of informal breaks during each half-day of work, but he denied that Cox told him that he was using breaktime to solicit the signatures.

On direct examination Owen was asked why he did not state to Terry that he had not been Cox's supervisor on May 14 when the petition was circulated; Owen replied: "Well, in our department, we just don't go around, just pointing fingers at each other. We just take the blunt of it and just let it go."

Thibodeaux denied much of Cox's testimony about their exchange on May 18. Thibodeaux testified on direct examination:

> Basically I said, "Danny, this safety complaint about the stairs, could have and should have been handled in a better way."
>
> And I believe Danny's response was, "It was the only way I felt I could get any response."
>
> And my response to that was, "Danny, this is how—this is truly what I feel; I feel that the way you handled it, that you would have been terminated for just not—for leaving your job and taking a lot of—to get as many signatures as you had, you had to leave the job for a large amount of time. And if it wouldn't have been for the simple fact that supervisors signed it, I feel that you probably would have been terminated for being off the job that long."
>
> And he just shook his head, says, "Well, I guess that is the only reason I didn't get fired."
>
> And I said, "I don't know, but that is how I feel."
>
> . . . .
>
> Danny [Cox] said, "I think they fired Dan [Reeves] because of me."
>
> And I said, "No; Dan was fired for loan sharking."
>
> And that is pretty much the extent of that.

Thibodeaux flatly denied that he told Cox that Reeves had been discharged to set some sort of an example to other foremen because Terry considered Reeves untrustworthy.

On cross-examination, Thibodeaux was asked and he testified:

> Q. When you had the conversation with Cox one or two days after the Bob Terry meeting, what did you tell Mr. Cox?
>
> A. Basically that I felt that Bob was—that he would have been terminated for the simple fact that he was on company time, or should I say, work time, collecting these signatures, these 40-whatever-it-is signatures on company time, when one signature was just as sufficient as 50 or whatever there were.
>
> And that is the reason I felt that—I felt—nothing was ever told to me; this is how I felt—that he would have been terminated for that, but the only reason he was not terminated for the simple fact that not Bob would have had to fire; he would have had possibly to take some type of disciplinary action against his foremen.
>
> Q. And when did you first develop that opinion?
>
> A. At that meeting.
>
> Q. At the meeting. That is the meeting with Mr. Bob Terry.
>
> A. Yes.

Thibodeaux had been the 44 individual to sign Cox's petition.

Taylor (vol. 142) testified that he never discussed the Union with Cox, and Taylor flatly denied telling Cox that Bossier had told supervisors at the administration building that Respondent would close if the employees selected the Union as their collective-bargaining representative. He further denied ever hearing Bossier say such a thing. On cross-examination, Taylor acknowledged that he did attend a meeting conducted by Bossier at the administration building, and in that meeting Bossier had said that Respondent was not in good financial condition and that layoffs may be conducted if more contracts were not secured.

Cox's Petition and Threats to Cox-Credibility Resolutions and Conclusions

Cox's circulation of the petition was protected concerted activity. Cox was called in rebuttal, but he did not deny Terry's testimony that Cox admitted that he had secured the signatures on the May 14 petition on working time. Even Reeves testified that he was approached by Cox during working time. I find that Cox secured all, or substantially all, of the signatures on the petition during his working time and the working time of other employees. On the other hand, I also find that General Foreman Poche gave Cox permission to solicit the signatures during working time. As Poche testified, Cox approached him to sign the petition between 8 and 8:15 a.m., indisputably Cox's working time. (Poche did not ask Cox if he was on a break when Cox did the nonwork of presenting the petition to Poche; moreover, Terry testified that employees are allowed informal breaks, but much later in the morning, usually after 9 a.m.) Poche did not tell Cox that he should not be circulating the petition then; Poche checked with the safety department, signed it, and sent Cox on his way with Poche's implicit blessing. Also, Poche was the 11th signatory, a beacon to the bulk of the 186 employees (and supervisors) who signed the petition that the effort had management's blessing. Cox's circulation of the petition, therefore, was authorized by one of Respondent's second-level supervisors; concerted activities that are expressly permitted by an employer are necessarily protected by the Act. This was the case for Cox's activities of May 17, as I find and conclude.

Cox was not unlawfully threatened by Terry. Respondent's five witnesses to the May 17 supervisors' meeting testified that Terry was calm, not upset. Christiansen and Reeves testified that Terry was upset. Respondent can argue the bias of Reeves, but not its supervisor Christiansen. Terry was, at least, upset. Thibodeaux testified that in the meeting, he got the impression that Terry would have discharged Cox but for the fact that eight supervisors had signed his petition. I find that Thibodeaux got that impression because that is precisely what Terry said. That is, I credit Reeves on this point; and I further credit Reeves' testimony that during the meeting Terry said that he suspected that the petition had something to do with the Union. And I credit Cox's testimony that, when he first showed the petition to Terry, Terry told him that he thought that the petition was a

"Union matter." As noted, Terry agreed that he was concerned, inter alia, that the supervisors' signing the petition would be used as propaganda by the Union. I find that Terry viewed the petition-circulating efforts of Cox to be union activity, as well as protected concerted activity. Terry also expressed some concern that the petition-circulating activity of Cox had been done on working time, but that was not his only concern.

On the other hand, I do not believe the testimonies of Reeves and Cox about the alleged threat to Cox immediately after the supervisors' meeting. Cox placed Gerdes there; Reeves stated flatly that there was no one there but Terry, Cox and himself. The event, if it had happened, had to be of a most dramatic impact. If the rest of the account by Reeves and Cox had been truthful, the discrepancy over Gerdes' presence could not exist. Moreover, Reeves was not called in rebuttal to deny that during the supervisors' meeting, Owen was singled out for the "heat" (as Terry testified) or the "blunt" (as Owen testified) of Terry's wrath. (And wrath, I find, is what it was.) Owen would not have been subjected to Terry's wrath if Terry had thought someone else was responsible for Cox's activities; Terry would not have wasted the effort. (Or, if he had thought that Reeves was something of a dual-supervisor with Owen, he would have vented his spleen on Reeves, as well as Owen, and Reeves would have so testified.) In addition to the conflict over the presence of Gerdes, Cox, and Reeves conflict on what Reeves was told to do by Terry; Cox testified that Terry told Reeves to bring Cox back to his office if he got one more signature on the petition; Reeves testified that Terry told him, in Cox's presence, that he was to bring Cox back to Terry's office "any time he did anything he wasn't supposed to." Certainly, if this broader threat had been uttered, Cox would have testified to it. Finally, Cox testified that Terry used a specific, unforgettable, vulgarism to describe just how close Cox was to being discharged. Reeves, however, testified that Terry described the distance between Cox and discharge as being that of the thickness of "thin ice." This conflict further detracts from the credibility of both Cox and Reeves about Terry's threat to discharge Cox.

Although I have found Terry to have been a false witness at other points,[256] Gerdes was credible in his account of the end of the supervisors' meeting and his account of meeting with Terry and Cox (and not Reeves) later in the afternoon of May 17. I credit the testimonies of Terry and Gerdes that they met with Cox, without Reeves, later in the afternoon of May 17, but they did not meet with Cox immediately after the supervisors' meeting. Cox testified that he was called to Terry's office at the same time as the supervisors who had signed his petition; Reeves was Cox's supervisor, and he did not testify that he told Cox to come along with him, nor did he testify that he told Cox to go to Terry's office separately. This leaves the question of how Cox was "called" to go to the office so that he could be waiting there immediately after the supervisors' meeting. I am convinced that Reeves was not present with Cox and Terry immediately after the supervisors' meeting, and the apparent artifice of making Reeves a witness to the alleged threat permeates all other aspects of Cox's testimony on this point. I discredit Cox (and Reeves), and I shall recommend that this allegation of the complaint be dismissed.

[256] I refer especially to the case of discriminatee Molaison where Terry testified that he took a confession of misconduct from Molaison on a day that Terry was not at the plant.

Cox was unlawfully threatened by Reeves. In the supervisors' meeting, Reeves undoubtedly got the same impression that Thibodeaux got—Cox would have been discharged if eight supervisors had not signed the petition. I have no doubt that Reeves told Cox that "Management was out to get him," as Reeves testified. The only reason for the statement was Cox's protected concerted activity, and union activity, of circulating the safety petition. I conclude that, in violation of Section 8(a)(1), Respondent, by Reeves, on May 17, 1993, threatened its employees with unspecified reprisals because of their union or protected concerted activities.

Thibodeaux told Cox that he could have been discharged for his protected activities. Thibodeaux was incredible in his testimony that he told Cox on May 18 that Cox had pressed the safety complaint in the wrong way, even though Thibodeaux, himself, had signed the petition when Cox presented it to him. Moreover, Thibodeaux testified that, in the supervisors' meeting of May 17, he got the impression that Cox would have been discharged but for the fact of the signatures of the eight supervisors on Cox's petition. Cox was quite credible in his testimony that Thibodeaux told him exactly that. Again, the only activity which prompted such a statement was the union activity and protected concerted activity of Cox in circulating the safety petition. Again, this statement by Thibodeaux was not alleged as a separate violation of Section 8(a)(1), but it is a clear demonstration of Respondent's animus toward Cox for his protected concerted activities.

Cox was unlawfully threatened by Taylor. Taylor admitted that he had been to a meeting in which Bossier stated that Respondent was not in a good financial position and that layoffs may result if more contracts were not secured. Whether Bossier also told the supervisors at that meeting that the yard would close down if the Union were selected as the employees' collective-bargaining representative is not an issue. Cox was credible in his testimony that Taylor told him that this is what Bossier had said. This was a threat of plant closure by a supervisor to an employee. I conclude that, in violation of Section 8(a)(1), Respondent, by Taylor, in late June 1993, threatened its employees with plant closure if they selected the Union as their collective-bargaining representative.

Cox's Discharge for Damaging Respondent's Property

Wire, or cable, is purchased by Respondent in large spools; smaller spools are made from the larger spools on a wire-spool machine. Only one such machine was mentioned in this case; it was made of aluminum, it stayed outdoors in all weather, and it had many marks and scratches that had been accumulated through the years. The part of a wire-spool machine that holds the larger spools has four aluminum flanges. Each flange is about eight by 10 inches. A "Markal" is a pen-like device that dispenses paint in a bead about 3/16 of an inch wide. Markals are used about the plant for such things as marking steel-fabrication jobs with the badge numbers of employees who worked on those jobs.

As he admits, on June 3, Cox took a Markal and wrote on the four flanges of the wire-spool machine, in letters about 6-inches high, the four words, "Vote-Yes"-"Vote-Yes," undisputedly a prounion slogan during the preelection period. Further according to Cox:

> The following day, the 4th, at 10:00-something in the morning, [Foreman] Jerry Rhoto called the small group that worked in the cable cutting area over to the machine

> and pointed to the "Vote Yes" and asked who did that, and I said I did.
>
> And he said, "I can't believe that, defacing company property."
>
> I said, "Well, you could see it that way."
>
> He said, "I can't believe you go that stupid that fast," and turned and walked away back into his office.
>
> . . . .
>
> About ten or 15 minutes went by and I attempted to scrape the marker off of the flange with my pen knife and Jerry Rhoto came out and told me to stop. About 15 to 20 minutes later, I guess 30 or some-odd minutes, 40 minutes after the initial conflict, [Department Superintendent] Terry arrived . . . with two security guards—he was on his motorcycle, they were in their pickup truck—and he told me to come into the office.

At the office Terry gave Cox a warning notice and told him that he was discharged. The warning notice recited as the Reason for Warning: "Immediate Discharge #3—Willful damage to Company property." As Cox admitted on cross-examination, Terry told him, "Danny, you are being terminated for willful damage to Company property."

Respondent offered as a witness employee Terron Neville who testified (vol. 152) that, before Rhoto went into his office, Rhoto told Cox not to touch the wire-spool machine because he wanted Terry to see it. Cox denied this in rebuttal. I credit Cox. Neville also testified that in Bossier's preelection period speeches to the entire yard, as discussed above, Bossier did not mention the Union. Neville was not a credible witness. Moreover, Respondent did not present Rhoto for this testimony, a fact that further impels me to draw an adverse inference and credit Cox where his testimony conflicts with Neville's.

The General Counsel has presented a prima facie case of discrimination in the case of Cox's discharge. Knowledge of Cox's union and protected concerted activities is admitted. It is clear enough from Terry's statement to the supervisors in the meeting of May 17, and Thibodeaux's threat to Cox on May 18, and Taylor's threat to Cox later in May, as well as the animus that Respondent harbors toward all employees who engage in union activities, that Respondent would welcome a chance to discharge Cox. However, as stated in *Klate Holt Co*., 161 NLRB 1606, 1612 (1966):

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful. [Citations omitted.]

The Avondale Employees' Guide lists intentional damage to company property as an immediate discharge offense. When an object has extraneous paint put on it, it is damaged. The object is further damaged when it is scraped with a knife. The fact that the object has other unaesthetic marks on it, and the fact that damage could be repaired, do not detract from the fact that it was, indeed, damaged. Cox's act was intentional, as he admits. Therefore, Cox's conduct falls within the category of conduct for which Respondent had announced, in the Avondale Employees' Guide, that it would discharge an employee immediately. (Even if such express announcement had not been made, discharge for intentional damage, like theft, is a universal condition of employment.)

On brief, the General Counsel cites several warning notices that Respondent issued during the 1990-1994 period for damaging property. The General Counsel contends, by the proof of these warning notices, he has shown that a significant number of employees who did intentional damage to company property were *only* issued warning notices. This argument makes the assumptions that, from the face of the warning notices, the Board can tell that: (1) the employee conduct was intentional, and (2) the employees were not discharged. Only one warning notice that the General Counsel introduced, however, shows that the act was intentional; this was the warning notice to paint department employee 13791. From the face of that document, it can be told that the misconduct was intentional; the warning notice recites in the space for reason for the warning: "Destroying Company property. Employee purposely broke a part to an airless gun causing it to malfunction." The warning notice to employee 13791 also shows that the employee was not discharged because, on it, supervision checked a box for a general offense under the Avondale Employees' Guide.[257] This single instance, however, is not a significant number of employees treated differently from Cox, and it does not prove disparate treatment of Cox.

I place the remaining warning notices introduced by the General Counsel into seven categories that are not probative evidence of disparate treatment toward Cox: (1) Chad Durocher, the alleged discriminatee discussed above, was issued a warning notice dated January 11, 1991. On the warning notice the box for general offense-8 ("Defacing the Company property") is checked, and the reason for warning space is completed: "Defacing company property by cutting air hose from an employee of another craft." The warning notice is signed by Electrical Department Foremen A. S. Russell and Percy Waugespak. Russell did not testify; Waugespak identified the warning notice on cross-examination (vol. 71), but he disclaimed memory of the underlying event. The General Counsel did not question Durocher about the circumstances underlying the warning notice to him, and there is no evidence that conduct which prompted the warning notice was intentional, as Cox's conduct was intentional. A warning notice issued to employee 943 is identical to that issued to Durocher, and it also does not indicate that the employee's conduct was intentional. (2) The warning notice issued to employee 5413 is for "Intentional negligence—Destroying Avondale Property." The employee's conduct is not described in any way. The oxymoron "Intentional negligence" is used, but the inference that the conduct of the employee was merely "negligent" is equally as strong as the inference that the conduct was "intentional." Moreover, the warning notice is issued for a major offense under the Avondale Employees' Guide, but the General Counsel did not show that the employee was not discharged,[258] even though, ultimately, Respondent produced all personnel files of all produc-

[257] Again, the Avondale Employees' Guide states that the punishment for a general offense is only a warning notice.

[258] Again, the Avondale Employees' Guide states that the punishment for a major offense is a warning notice "or discharge." Some supervisors admitted that discharges for first major offenses were rare, but the possibility is hardly precluded.

tion and maintenance employees (going back to 1938). The same is true for the warning notices issued to employees 11817, 12988, 10642, 2836, and 540 (although, in the case of employee number 540, there is a "Final Warning" notation on the warning notice that does show that the employee was not discharged). (3) The warning notice issued to employee number 869 shows that the employee damaged material in the process of doing work; Cox, of course, was not doing work when he damaged the wire-spool machine. Moreover, the employee was cited for a Major offense under the Avondale Employees' Guide, but the General Counsel did not show that the employee was not discharged. The same is true (or could well have been true) for the warning notices issued to employees numbers 1200, 11420, 1776,1375, 2563, and 9807. (4) The warning notice issued to employee 4536 shows that he disclaimed all responsibility for the damage, which, of course, Cox did not. (5) The warning notice issued to employee 11153 shows that the damage done was the result of "horse playing," not intentional conduct such as that of Cox. (6) The warning notice issued to employee 576 was for simple wastefulness. The same is true for the warning notice issued to employee 1992; moreover, that warning notice was for a major offense under the Avondale Employees' Guide, and the General Counsel did not show that the employee was not discharged. (7) The final category of warning notices that the General Counsel cites on brief is one composed of those that were not issued for damage to company property.

I therefore find and conclude that disparate treatment toward Cox has not been shown. I further find that Respondent has proved that it would have discharged Cox for his damage to Respondent's property even in the absence of his known protected activities. I shall therefore recommend that this allegation of the complaint be dismissed.

f. Patrick Noah's discharge for insubordination

Patrick Noah (vol. 15) was employed as a painter-sandblaster until he was discharged June 10, 1993. The second complaint, at paragraph 86, alleges that by discharging Noah Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Noah because of his known union activities or expressions of sympathy which included his wearing prounion insignia, his telling a supervisor that he intended to vote for the Union in the June 25 Board election, and his speaking favorably about the organizational attempt at an employer campaign meeting. Respondent denies that any of its supervisors had knowledge of any prounion sympathies that Noah may have held prior to his discharge. Respondent further states on brief that Noah was discharged for insubordination which consisted of his being out of his work area immediately after being told to return there by General Foreman Glenn Clement. Clement, however, testified that Noah voluntarily quit when he confronted Noah about being out of his work area. Ultimately, I find and conclude that Noah was discharged in violation of Section 8(a)(3).

Noah was hired by Respondent in November 1992. Noah first worked on the crew of Foreman Luther Bishop. Noah testified that about April 15, Bishop spoke negatively about the Union to members of the crew. Noah testified: "I, in turn, told Bishop that I was for the Union, I had made up my mind which way I was going to vote and he was just wasting his time talking to me." On brief, Respondent argues that Noah could not have made such a statement to any supervisor because, as of April 15, the Board election had not been scheduled. This is an unpersuasive argument. Employees quickly become familiar with the procedures of Board elections during a campaign; they do not wait until there is a formal announcement by the Regional Office before knowing that they will get a chance to vote on the issue of representation.[259] Although Bishop (vol. 117) generally denied that he knew of Noah's prounion sympathies, and he denied that Noah ever said "anything in support of a union," he did not deny that Noah told him that his mind was made up, that he was voting for the Union, and that Bishop was wasting his time talking to Noah about it. I cannot credit Bishop's unspecific testimony that he heard Noah say nothing favorable about the Union in the face of Noah's specific testimony that he made these specific statements. (As I have noted elsewhere, where Respondent was evidently more confident of denials, counsel even read the transcript of the statements in question and solicited denials.) I credit Noah.

Noah further testified that he spoke up in favor of the Union at one employer campaign meeting that was conducted by Clement. Respondent denies that Noah made the statement that he claims to have made; ultimately, I find that Noah made the statement, but not on the date that he advanced at trial. In his trial testimony, Noah first cited April 15 as the date of Clement's meeting; this was clearly wrong, and Noah changed his testimony to state that Clement's meeting was on May 27. This date also could not have been correct because Noah testified that he was on Bishop's crew at the time, but, as Respondent's MCRs showed, Noah had been moved from Bishop's crew to the crew of Foreman James Knoblock on May 10. I do not credit Noah's (changed) testimony that the meeting in question occurred on May 27. In his 1993 affidavit, Noah testified that the meeting occurred on May 6. I credit the affidavit,[260] and I find that the employer campaign meeting to which Noah referred occurred on May 6.

Noah testified about the May 6 meeting:

> In that meeting, they were telling us what a bad financial shape Avondale was in. They referred to it as being in a slump. I asked Clements how they planned to get us out of that slump, and he said the only way they knew to do that was to continue not to give any raises and to restrict overtime.
>
> Then I asked him, "If Avondale doesn't have any money, then why are they paying hourly employees to print these posters and signs that they were hanging all over the yard? Why are they paying the hourly employees to do this if they don't have any money?"
>
> And he [Clement] told me that he didn't want to hear any of that and the discussion of that subject was closed.

Many of the signs that Respondent had caused to be produced and posted about the yard had said, inter alia, "Vote No," and I shall refer to the signs to which Noah referred as ""Vote-No" signs."

Brian Ellis (vol. 47), who had been discharged by Respondent at time of trial, testified that he was present at three employer campaign meetings that were conducted by Bourg and Clement. Noah, according to Ellis, spoke at all three. Ellis testi-

[259] For example, after an employer campaign meeting, alleged discriminatee Charles Giles wrote his supervisor on March 16, 2 weeks after the organizational attempt began: "I personally will not be voting for the Union."

[260] *Alvin J. Bart & Co*., 236 NLRB 242 (1978).

fied that, at one such meeting, Noah asked why the employees were not receiving wage increases, and "they" replied that Respondent had no money for raises. At another such employer campaign meeting, according to Ellis, Noah asked Bourg why, if Respondent had no money for raises, it was "spending so much money on signs to keep the Union out. . . . And Patrick told him that it must cost a lot of man-hours to fix the signs the way they were doing the signs." In this meeting, Ellis testified, Bourg told the employees "that they were trying to keep the Union out to save our jobs." (Noah testified to no meeting in which Bourg made such a statement.) Ellis further testified that at the third employer campaign meeting, after Bourg had said that there would be no raises, Noah said, "if we voted the Union in, we could get someone else to negotiate for us, rather than have Al Bossier keep deciding whether or not we get raises."

Noah, himself, did not testify that he made this reference to Bossier and negotiations; if he had made such a statement in an employer campaign meeting, Noah assuredly would have testified to the fact. I discredit Ellis' testimony that Noah told the supervisors at an employer campaign meeting that electing the Union would allow it to negotiate better wages for the employees. This was clearly false testimony by Ellis, and it causes me to suspect other testimony by Ellis. I am particularly suspicious of Ellis' testimony regarding Noah's question about the "Vote-No" signs. Ellis gave two affidavits to the Board, one on March 16, 1994, and one on October 4, 1994, the latter being just shortly before he testified. As was brought out on cross-examination, Ellis did not mention any reference to Noah's alleged question about the "Vote-No" signs in the first affidavit. When he was passed for redirect examination, the General Counsel did not ask Ellis why such a statement had not appeared in his first affidavit. Finally, Noah testified that it was Clement who responded to his question about the money being spent on "Vote-No" signs, and Noah testified that Clement did so in an abrupt manner (by stating that the subject was "closed"); Ellis, however, testified to no such response by Clement. In fact, Ellis testified that Noah's question about the money that was being spent on "Vote-No" signs was addressed to Bourg, not Clement.

These conflicts between Noah, Ellis, and their affidavits cause me to be entirely suspicious that Noah even asked the question about the money that was being spent by Respondent on the "Vote-No" signs. Nevertheless, neither Bourg, nor Clement nor, Bishop denied that Noah asked such a question at an employer campaign meeting that was conducted for Bishop's crew. I credit Noah, and I find that, on May 6, he asked Clement (or Bourg, or both) why Respondent had money for the production of "Vote-No" signs, but not wage increases.

Noah further testified that, about 3 weeks before his termination, he began wearing a "Union-Yes" sticker "front and center" of his hardhat, and he maintained the sticker on his hardhat through the date of his discharge, June 10. Noah gave two affidavits during the course of the investigation of the charge filed on his behalf, one affidavit on July 19, 1993, and the other on May 6, 1994. Noah's 1993 affidavit was signed only a few days after his discharge and only a few weeks after he claims to have placed the sticker on his hardhat; yet, the 1993 affidavit does not mention the "Union-Yes" sticker. When Noah was passed for redirect examination, he was not asked to explain how mention of the "Union-Yes" sticker could have been omitted from his 1993 affidavit. An additional factor to consider on this issue is that the General Counsel also called Ellis to support Noah's testimony about his prounion activity. Ellis, who regularly worked with Noah, was not asked to corroborate Noah's testimony about the "Union-Yes" sticker. Also, when called as Respondent's witness (vol. 131), Noah admitted to a confrontation with a guard during the week before he was discharged. That guard, Barry Horn (vol. 125), credibly testified that during the confrontation he took special note of Noah's hardhat, and it did not have prounion insignia on it. Finally, Noah's supervisors credibly testified that they did not see Noah wearing any prounion insignia. Based on these factors, and the factor that Noah, himself, did not present a favorable impression, I discredit Noah's testimony that he wore prounion insignia while working.

Noah's Discharge—General Counsel's Evidence

On May 25, Noah was placed on probation by a New Orleans traffic court. A term of that probation was that he report to a probation officer, by telephone: "Every Thursday between 11 & 11:30 a.m." May 27 was the first Thursday that Noah was required to call his probation officer. Noah testified that Clement conducted an employer campaign meeting that day, and, at the end of it:

> And I asked Clements if I could use the phone, and he said that he would—they would do anything in their power to help us and, you know, they were there for us. And he then got me an outside line so I could make my call.
>
> . . . .
>
> I told him I had to call the courts every Thursday between 11:00 and 11:30, that that was the time set by the court, you know.
>
> . . . .
>
> At that point, he said it was no problem.
>
> . . . .
>
> Clements got me an outside line. He dialed the main paint office, and she [apparently a clerical employee] hooked us up with an outside line, and I made the call.

It is to be noted that Noah testified that the meeting after which he explained to Clement his need to use the telephone was the same meeting at which he asked about the money that was being spent on "Vote-No" signs, and Noah testified that that meeting was on May 27. As I have found, however, Noah spoke up at a May 6 meeting. (And, as I find below, there was no May 27 employer campaign meeting.)

Ellis testified that he was present when, after one of the employer campaign meetings in Clement's office, Noah explained to Clement the need to call his probation officer every Thursday between 11 and 11:30 a.m.; Clement agreed and got Noah an outside line. (Contrary to Noah, Ellis did not testify that the meeting at which Noah asked to use the telephone was the same meeting at which Noah spoke up and asked about the money being spent on the "Vote-No" signs. This is another factor contributing to my finding that the meetings were not the same, as discussed infra.)

Noah testified that on May 25, the day he was placed on probation, he told his foreman that he had to call his probation officer every Thursday between 11 and 11:30 a.m. The supervisor, Noah testified, said that making the call would be "no problem." Noah identified the supervisor as Bishop; however, it

is clear that on May 25 Noah's supervisor was Knoblock. Knoblock, in fact, admitted that Noah told him about the probation "about three weeks" before Noah was discharged. Knoblock also admitted that Noah told him that he was required to call his probation officer weekly. This comports with Noah's testimony about the date and the substance of what was said between him and his supervisor, and it appears that Noah was simply mistaken about which supervisor he told about the probation.

Lester Reed (vol. 46), who was Noah's probation officer, testified that Noah called him as required on Thursdays, May 27, June 3 and 10 (the last being the date of Noah's discharge). Noah did not testify about how he arranged to make a telephone call to his probation officer on Thursday, June 3, at the required time between 11 and 11:30 a.m.

Noah testified that, on June 10, about 11:05 a.m., he began looking for Knoblock in the work area, to get a pass to go outside the work areas to use the telephone. (A pass would be necessary if an employee was going to use a telephone other than a supervisor's telephone.) Noah testified that he was unable to find Knoblock in the working areas. He went to Clement's office where:

> I told him I had to make my phone call, [and I asked him] had he seen Knoblock. He said, "No; What are you doing out of your work area?"
>
> I said, "Well, I have to make my phone call." . . .
>
> And he says, Well, you definitely need a pass before you make the call.
>
> I got a phone book from Clements. [I] looked the number up and wrote it down.

Noah did not testify that he asked Clement if he could use Clement's telephone. (That is, as discussed infra, Noah testified that on May 27 Clement expressed eagerness to assist him in making the calls to his probation officer, but on June 10 he did not even ask Clement if he could use Clement's telephone.)

Noah testified that, after he left Clement's office on June 10, he spent several more minutes looking for Knoblock. Someone told him that Knoblock was in Rodrigue's office. Noah called that office on an interyard telephone; Knoblock came to the telephone; Knoblock told Noah that he could come to Rodrigue's office (which was also on the ground) and use the telephone. Noah went to Rodrigue's office and made his call to the probation officer in the presence of Knoblock. After the call he and Knoblock discussed the job. As he and Knoblock continued to talk, Noah asked the time, and, "I recall him saying it was 11:58. And that was the end of the conversation with Knoblock." Further according to Noah, he then started walking toward the toolroom because that was where his lunch for the day was stored and he had to get supplies that he would need after lunch, anyway. Noah testified:

> So I am walking to the toolroom, and then I run into Clements again. He rides up on this mo-ped as I am standing in front of the toolroom. And he says, "What are you doing out of your work area?"
>
> I says, "Well, I just found James [Knoblock], and I just made my phone call." And as I was saying that, the 12:00 siren blew, and I said, "And now I am going to lunch."
>
> He seemed real mad to me. . . . [H]is voice was getting louder. He was like not understanding while [why] I am still out of my work area because he says, . . . "What are you doing out of your work area?" And he is shaking his finger in my face, [and Clement further said]: "You came by my office; It was about 11:15, and here it is lunchtime, and you are still not back in your job area."
>
> . . . .
>
> I told him, "I don't have any choice about this; I have to make this phone call within the time limit set by the court; it is not my choice."
>
> And he told me that I needed to take care of my own personal business on my time. And again I told him, "I don't have any choice about this; I have to call them."
>
> At this point, his voice is getting louder and louder and he is walking towards me. I am backing up. He has me backed against a shelf inside the toolroom, and he says, "I know how to handle this. Give me your badge. You are fired."
>
> I then lost my temper. I got my badge out of my wallet and gave it to him. And I told him he could stick it in his ass, and when he got done with it, he could give it to his boss [apparently, Vice President Carroll Danos], and he could do the same thing with it.

Noah denied cursing Clement (and Danos) until Clement told him that he was discharged.

Noah did not testify that Clement gave him a reason for his discharge. The General Counsel introduced into evidence a form that Respondent completed and submitted to the Louisiana Department of Labor on June 14. The form, entitled "Separation Notice Alleging Disqualification," is used by employers when they wish to serve notice that they will challenge unemployment claims. The form that Respondent completed is dated June 14. On the form, under "Reason For Leaving," there are 10 boxes that can be checked, as options. The first box is for "Voluntary Leaving (Quit)," and the second box is for "Discharge (Fired)." Respondent checked the latter. In a space for "Explanation," Respondent wrote: "Discharged—Walked off the job without permission."

During the investigation of the charge filed on behalf of Noah, counsel for Respondent also stated in a position letter, dated December 3, that Noah was terminated, "for walking off the job without permission." Counsel further stated in the letter that Noah cursed Clement and then: "Mr. Clement told Charging Party [Noah] to turn in his badge, and he was terminated." Finally, counsel states: "In conclusion, the decision to terminate [Noah] was made by Mr. Clement solely on the basis of [Noah's] violating ASI policy by leaving his work area."

On the basis of Respondent's communications to the Louisiana Department of Labor and to the Region, the General Counsel argues that any contention that Noah was discharged for any reason other than walking off the job is shifting defense and necessarily pretextual. The General Counsel further argues that any contention that Noah was discharged for being out of his work area is a pretext because that offense is only a general offense under the Avondale Employees' Guide. (As is stated there, general offense-4 is: "Wasting time, loitering or leaving the working place without permission.") the General Counsel further argues that employees are not discharged for such offenses, at least until their third such offense within a 12-month period. (See the above discussions of the cases of alleged discriminatees who were discharged for multiple offenses.) That is, the General Counsel argues that, if Noah was discharged for his first, or even his second, offense of "leaving the working place without permission," he was treated disparately. There

are in evidence over 50 general offense-4 warning notices that were issued to employees for being out of their work areas. (Many of these were from the paint department.) It is undisputed that Noah had received no other warning notices for being out of his work area (or for anything else) at the time of his discharge.

Noah's Discharge—Respondent's Evidence

Knoblock (vol. 98) testified that while Noah was on his crew, beginning May 10 and continuing through his discharge, Noah never asked why Respondent was paying hourly employees to make signs urging the employees to vote against the Union. This testimony, which I found credible, fortifies my conclusion that Noah asked such a question only on May 6, before he was moved to Knoblock's crew.

Knoblock further denied that, at any employer campaign meeting that he attended, Noah asked Clement if he could use the telephone or that he told Clement that he had to call the courts between 11 and 11:30 a.m. Knoblock identified the MCRs that Noah signed during the week of May 27. On Monday, May 24, Noah and all other members of Knoblock's crew signed out from 12:30 until 1 p.m. to attend an employer campaign meeting.[261] The MCR for May 27 shows no sign-outs for an employer campaign meeting, and Knoblock denied that there was an employer campaign meeting that week, other than May 24. (When he was on cross-examination, Noah was asked if he signed out for the meeting that he claimed was held on May 27; Noah testified that he could not remember.)

Knoblock further testified on direct examination that about three weeks before Noah "got fired," Noah told him that he needed to make a telephone call to his probation officer. Knoblock testified that on that occasion, he took Noah to a telephone and got him permission to use it. Knoblock further testified on direct examination that Noah did not tell him that he needed to make the call more than once, or at any certain time, and he further testified that he did not recall if Noah ever asked him again to use the telephone. On cross-examination, however, Knoblock testified that it was "once or twice" that Noah told him that he had to call his probation officer. Knoblock further acknowledged that in a pretrial affidavit that he gave to Respondent, he states: "Sometime at the end of May or the beginning of June 1993, Patrick Noah told me that he had been placed on probation and had to call in to his probation officer once a week." Further on cross-examination, Knoblock acknowledged that, in fact, Noah told him that he was required to call his probation officer "once a week." Finally on cross-examination, Knoblock denied that Noah approached him in Rodrigue's office and asked for permission to use the telephone on the day of Noah's discharge. Knoblock testified, "If he had came and find me, he wouldn't have got fired."

Paint Department Superintendent Bourg (vol. 81) testified that on June 8, he found Noah out of his work area before lunch and gave him an oral warning. Bourg further testified that on June 9, he again found Noah out of his work area before lunch, and he told Noah that he would be receiving a written warning notice for that conduct. (When he was on direct examination, Noah denied ever having received an oral warning about being out of his work area. I discredit that testimony by Noah, infra.)

[261] Respondent had a separate job code for the MCRs to designate when employees signed out for employer campaign meetings of one-half hour or more.

Clement (vol. 86) testified consistently with Bourg about their communications about Noah on June 8 and 9. Clement testified that on June 9 he called the paint department office and had a warning notice drafted and routed in the interplant mail system to Knoblock for delivery to Noah. It is undisputed, however, that the warning notice was not delivered to Noah before his termination on June 10.

Clement further testified that about 11:10 a.m. on June 10, Noah came to his office and "[h]e told me he had gotten in trouble, and he needed to use my telephone to call a judge." Clement testified that he told Noah that "it wasn't Avondale's policy to let employees use the telephone for personal calls," but he would in this case. Clement testified that he stepped out of his office and let Noah use the telephone in private "because I thought it was a personal matter." Clement waited outside the door while Noah used the telephone. Clement further testified that, when Noah came out of his office, he told Noah to go on back to work.

Clement further testified that, between 11:30 and 11:45 a.m. on June 10, when he was riding his motor bike in the area of a ship that was up on a supporting platform, he saw Noah standing under the ship. When Noah saw Clement, Noah "ducked" under the ship and started walking toward a second ship that was on a supporting platform near the first ship. Clement could tell where Noah was going, so he motored around to the other side of the second ship and stopped near a toolroom. Shortly, Noah came out from under the second ship. Clement "waived" Noah over to him. On direct examination, Clement was asked and he testified:

> Q. What did you say and what did he say?
>
> A. I told him that I had verbally warned him. We had written him up for leaving early, and here it is the third day I catch him—personally catch him again doing the same thing that he was written up for before.
>
> And I told him I didn't think it was fair for him to be getting off the ship, you know, to go to lunch early and beat the crowd while everybody else had to stay up there and wait for it. I recommended that he go back to work again, go back up on the ship.
>
> Q. Did he say anything to you at that time?
>
> A. He cursed at me. He—can I say what he said?
>
> Q. If you remember exactly what he said, what did he say?
>
> A. He says, "Look." He says, "Man, fuck you and Carroll Danos. I don't need this job," at which time he displayed his badge and had it out like this.
>
> JUDGE EVANS: All right. The witness extended his left forearm and turned his wrist down sharply, so that his thumb was up in the air—or just beyond, let's say, a 90-degree angle from his body line. And you are saying he had his badge between his thumb and his forefinger?
>
> THE WITNESS: Yes, sir.
>
> Q. [By Ms. Canny]: And what, if anything, did you do or say at that point?
>
> A. I took his badge from him.
>
> Q. Do you know whether or not—well, what did you understand Mr. Noah was doing?
>
> A. I thought he quit the job.
>
> . . . .
>
> Q. [By Ms. Canny]: Did you do anything else at that point?

A. I called security to come take him out of the yard.
JUDGE EVANS: Did he say anything else to you?
THE WITNESS: Not after he cursed me.

Clement testified that he waited in the area of the toolroom "until the security guard picked [Noah] up."[262]

During Bourg's testimony, Respondent had offered an ASI-22 (discharge) form that was created after Noah's discharge. Also during Bourg's testimony, Respondent offered a memorandum that was created by Clement after Noah's discharge. For the reasons that I discussed below, I rejected the ASI-22 form. Clement's memorandum was offered again, separately, during his direct examination. As I stated on the record, I rejected the offer because, as the trier of fact, I was not going to use it as a substitute for, or even as corroboration of, sworn testimony that was subject to cross-examination. That is, I found Clement's postdischarge memorandum irrelevant for the purpose that it was offered. Although it was rejected for the purpose offered by Respondent, the General Counsel and the Charging Party used Clement's memorandum during cross-examination. Clement was first examined about his testimony that he had allowed Noah to use the telephone on June 10. Clement was asked and he testified:

Q. Sir, I want to place before you Respondent's Exhibit 431, rejected exhibit. And, sir, isn't it correct that the following sentences appeared: "I questioned this employee and told him he had to return to his work area, at which time he informed me he had to make a personal phone call. He was told—he was then told ASI doesn't pay him to make personal phone calls—personal calls (except in emergencies, which this was not). I told him again to return [to] his work area."
Q. Is it correct that that appears in your statement?
A. Yes, it does.
Q. Nowhere in this statement, sir, does it say that you then allowed Mr. Noah to make a phone call, does it?
A. No, it doesn't.

In the cross-examination about his testimony that Noah had quit, Clement was again asked about the memorandum. Clement acknowledged that the memorandum concludes: "I then told him to turn in his badge, that he was fired." Clement was then asked about a pretrial affidavit that he had given to Respondent's counsel:

Q. Sir, isn't it correct that the affidavit you gave Ms. Canny says, "So I told him"—referring to Mr. Noah—"to hand in his badge, that he was fired." Isn't it correct your affidavit says that?
A. Yes, sir, it does.
Q. Isn't it correct, sir, that on June 10, 1995 [sic], you told Mr. Noah that he was fired?
A. That is what my affidavit says.
Q. No, sir. Yes-or-no question: Isn't it correct—
A. Yes.
Q. —that on June 10, 1993, you told Mr. Noah that he was fired?
A. Yes.
Q. Now, that is not the same thing you testified to earlier today, now, is it?
A. My memory is refreshed—
Q. I am sorry. Yes or no: That is not the same thing you testified to earlier today, is it?
A. No.

Clement then testified that he did not remember telling Noah that he was fired, and, even though he admitted that he told Noah "that he was fired," he continued to insist that Noah had quit. Clement was again shown the ASI-22 form that was completed after Noah was discharged. (As noted, I had rejected that document when it was offered through Bourg.) Clement was asked and he testified:

Q. And you recognize this as being one for Mr. Noah?
A. Yes.
Q. And do you see a reason—a date of June 10, 1993, on there?
A. 6/10/93, yes, sir.
Q. And do you see a reason on there for his leaving employment, reason for change?
A. Termination.
Q. Does that refresh your recollection that Mr. Noah was fired on June 10, 1993?
A. Terminated.
Q. Terminated. Do you see a difference between an employee being terminated and an employee being discharged?
A. His employment is terminated either way.
Q. Mr. Noah quit his employment. Is that correct, sir?
A. That is my understanding, yes, sir.
Q. Well, you were the general foreman who was responsible for the termination papers. Isn't that correct?
MS. CANNY: Objection.
JUDGE EVANS: Did you have some responsibility regarding the termination papers?
THE WITNESS: No, sir, I didn't. . . .
Q. [By Mr. Lurye]: When you say it is your understanding that he quit, sir, that is not based on anything any other foreman reported to you. Isn't that correct?
A. It is not based on anything any other foreman has told me.
Q. That [understanding] is based solely on the occurrence that you have described here in the courtroom between you and Patrick Noah on June 10 in the toolroom—is that correct?—at about 11:45 a.m.?
A. Yes. No. It is based on what he told me.

Obviously because he had insisted that Noah had quit, Clement was not asked on direct examination, or redirect examination, why he had discharged Noah. (Clement's rejected memorandum also does not say why he discharged Noah; specifically, the memorandum does not state that Clement discharged Noah for insubordination.)

Noah's Discharge—Credibility Resolutions and Conclusions

I have discredited Noah's testimony that he wore prounion insignia at any time while working for Respondent. I have credited the testimony of Noah and Ellis that at an employer campaign meeting Noah asked why Respondent was spending money on the "Vote-No" signs. I do not, however, find that this single question constituted an expression of prounion sympathies. As I found in the case of alleged discriminatee Chad Du-

[262] Knoblock had testified that on June 10 the sand-blasters, such as Noah, were working without a lunchbreak. The implication is, therefore, that Noah should not have been leaving for lunch at all on the day he was discharged. At no point, however, did Clement testify that he knew that Noah was not entitled to a noon lunchbreak.

rocher, the question was more of a taunt of Respondent than an expression of support for the Union. Nevertheless, I have credited Noah's testimony that, on April 15, he told Foreman Bishop that his mind was made up, that he was voting for the Union, and that Bishop was wasting his time talking to Noah about it. Knowledge of this unequivocal expression of prounion sympathies is imputed to Bishop's supervisor, Clement, and it was Clement who discharged Noah. That is, knowledge of Noah's prounion sympathies is established. Respondent's animus toward employees who held such sympathies having been established, I conclude that the General Counsel has presented a prima facie case of unlawful discrimination in the case of Noah's discharge, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Noah even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I do not believe, and do not credit, Clement's testimony that Noah, in something of a fit of exasperation, cursed Clement and Danos, and then declared that he was quitting and voluntarily handed Clement his badge. I believe, and find, that Clement discharged Noah by demanding his badge because of: (1) Noah's credible testimony, (2) Clement's postdischarge memorandum in which he states that Noah "was fired" (although the memorandum does not state the reason for which Noah "was fired"), (3) Clement's pretrial affidavit that states that Noah "was fired," (4) Respondent's filing with the Louisiana Department of Labor, which filing skips the box for "Voluntary Leaving (Quit)" and checks the box for "Discharge (Fired)." Respondent also added that Noah was fired because he "walked off the job without permission"), and (5) Respondent's December 3 letter to the Region that states that Noah "was terminated" (for "leaving his work area"). I further find that Noah did not curse Clement (and Danos) before he was fired.

Although Clement did not testify that he discharged Noah for insubordination, Respondent states on brief :

> Mr. Noah was fired for "[I]nsubordination. Willful disobedience of authorized instructions issued by supervision," [which is a quotation of] Immediate Discharge Offense number 1 in the Employee Guide. Specifically, Mr. Noah had intentionally disobeyed the instructions of Mr. Clement to return to his work when Mr. Clement saw him at the field office, and instead was still out of his work area half an hour or 45 minutes after Mr. Clement given him the instruction to return to the ship, in willful disobedience of Mr. Clement's instruction, and he was terminated.[263]

Clement did not testify to this, and he is the supervisor who discharged Noah. If Clement had thought that Noah was guilty of insubordination that rose to the level of that which is proscribed by immediate discharge offense-1 of the Avondale Employees' Guide (by cursing, or by refusing to follow orders, or by any other insubordinate conduct), and he discharged Noah for that reason, Clement assuredly would have so testified. Again, Clement did not. Instead, Clement falsely testified that Noah quit.

By testifying that Noah had quit, of course, Clement insulated himself from any cross-examination about what he *might* have thought Noah's insubordinate conduct was. Also, if Clement had testified about what he thought that insubordinate conduct was, the General Counsel would have been required to prove that Clement's testimony was not true or that Noah was treated disparately. Rather than offer testimony that was subject to cross-examination and rebuttal, however, Respondent offered only a postdischarge document to prove that Noah was discharged for insubordination. Through Bourg, as noted above, Respondent offered as a "business record" an ASI-22 form to prove that Clement had, indeed, discharged Noah for insubordination. A discharge is not a routine event for any employer,[264] and it is hardly a "regularly conducted activity" within Federal Rules of Evidence 803(6). Rather than being a record of a routine business event or transaction, ASI-22 forms are created in contemplation of litigation, specifically, litigation before the Louisiana Department of Labor, as Respondent's personnel manager, Bruce Nunez, testified (vol. 117). Moreover, any such record must be created by "a person with knowledge," according to 803(6). Clement was the supervisor who made the decision to discharge Noah (and it was Clement who called for security department personnel to take him away), but, as Clement admitted, he had no part in creating the "business record" that Respondent offered. The ASI-22 form that Respondent offered to show that Noah was discharged for insubordination is completed in the distinctive handwriting of paint department office clerical employee Joy Plaisance. Plaisance entered, and initialed, Bourg's signature. The form does contain the hearsay entry by Plaisance that Noah had been discharged for "insubordination," but Respondent offered no testimony about who may have given Plaisance her information and ordered her to make the "insubordination" notation on the form. Also, Respondent offered no testimony about when the form was created. Bourg testified that he saw the form shortly after it was prepared, but Bourg did not testify when that was. Also, contrary to Respondent's assertion on brief, Bourg did not testify that he somehow approved the discharge of Noah, and he certainly did not testify that, in approving the discharge of Noah, he somehow relied on the assertions of the ASI-22 form (or Clement's postdischarge memorandum). Specifically, Bourg did not testify that the issue of Noah's discharge had been submitted to him for review before Clement had called the security department and had Noah escorted from the premises.[265] Nor was there an offer of any such testimony. That is, taken at best, and indulging in every assumption upon which Respondent relies, the ASI-22 form reflects what Bourg thought Clement *could have* discharged Noah for; it is not, however, a statement that, in fact, Noah had been discharged for insubordination.

Such postdischarge forms as the ASI-22 form offered by Respondent in Noah's case cannot take the place of sworn testimony that is subject to cross-examination, which is the purpose for which Respondent offered the document. If such documents could be substituted for sworn testimony that is subject to cross-examination, NLRB discrimination cases would turn into drafting contests. Determinations according to law, of course, are not made on the basis of such drafts; they are made on the

[263] A footnote, which makes other, unrelated, factual assertions is omitted.

[264] As evidence that it rarely discharges employees, Respondent offered the testimony of an expert on statistics on day-138. I struck the testimony as it was offered for another, and irrelevant, purpose.

[265] As shown in the case of discriminatee Marshall, paint department general foremen sometimes make the final decisions on discharges. That also appears to have been the case in Noah's discharge.

basis of sworn testimony that is subject to cross-examination. At best, the ASI-22 form that Respondent offered in Noah's case would serve to corroborate sworn testimony that Noah was discharged for insubordination; here, again, such testimony is lacking because Clement did not testify that he discharged Noah for insubordination. Moreover, it is again to be noted that Respondent's position letter of December 3, as quoted above, does not state that Noah was discharged for insubordination. It states, in two different places, that Noah was discharged for being out of his work area. If the defense of insubordination had existed before December 3, counsel for Respondent would have mentioned it in his statement of position of that date. Counsel's letter to the Region quotes Clement's postdischarge memorandum, and, obviously, that memorandum had been made available to counsel. Presumably, if the ASI-22 form that Respondent offered into evidence had existed before December 3, it also would have been made available to counsel and he would have mentioned the defense of insubordination in his letter. For all of the foregoing reasons, I adhere to my ruling, and the ASI-22 form that Respondent offered as its defense that Noah was discharged for insubordination remains rejected.

I firmly believe that, like the defense that Noah quit, the defense that Noah was discharged for insubordination is a post hoc creation designed as a substitute for the defense that Respondent asserted in counsel's letter of December 3 and in the submission to the Louisiana Department of Labor; *to wit*: "leaving his work area." Respondent apparently felt constrained to find a substitute for the "leaving his work area" defense because it knew that that defense would not withstand scrutiny. It would not withstand scrutiny because the disciplinary offense of being out of the work area is, at most, a general offense under the Avondale Employees' Guide. (In fact, it is general offense-4.) As discussed above in the cases of the alleged discriminatees who were discharged for multiple offenses, three such offenses, after an oral warning,[266] are required before an employee can be considered for discharge under the Avondale Employees' Guide.[267] Here, Noah had committed, at most, only two such offenses after Bourg's oral warning of June 8. The first such offense was on June 9. The second, as I find below, occurred on June 10. Under Respondent's progressive disciplinary system, Noah was entitled to a warning notice for each of those offenses. According to Clement on direct examination, even after a third similar offense in 12 months employees are not necessarily discharged; Clement was asked and he testified:

> Q. Do you have any practice for yourself and your line foremen concerning three citations to an employee in 12 months' time?
>
> A. Three citations to an employee in a 12-month time warrants termination.
>
> Q. Do you know whether or not employees with three citations in a 12-month time period who work under your supervision are always terminated?
>
> A. No, they are not.
>
> Q. Why not?
>
> A. Well, it is hard to find out. Unless you call to find out how many citations they actually do have, it is a matter of getting up and going and looking in their files to find out if they have three. I mean, we have—if we see someone loitering or anything like that, we will—you know, we will verbally warn him. If we catch him again, we will call in for a citation. . . .
>
> Q. [By Ms. Canny]: When, if ever, do you or your line foremen call to check an employee's department file or personnel file when a citation is written?
>
> A. If it is a chronic case and it is, you know, back-to-back incidences where the guy got caught doing the same thing, we will call and say, How many citations does this guy have? This is not the first time I catch him doing this. And at that time, then, we will be notified whether he has three on file.

Here, again, Noah had received no warning notices before June 10. One had been drafted, and it may be assumed that it was "on file," according to Clement's understanding. There were not, however, two warning notices "on file." And, as Clement admitted, even if an employee receives three warning notices (or commits three offenses) within 12 months, he is not necessarily discharged.

The defenses that Respondent has submitted for Noah's discharge have shifted from the defense of his "leaving his work area," to the defense of his having quit his employment, to the defense of his having committed insubordination. Respondent's shifting from defense, to defense, to defense shows that all of the defenses are pretextual, and Respondent's shifting of defenses creates the strong inference that Noah was unlawfully discharged. The General Counsel's prima facie case that Noah was unlawfully discharged is accordingly fortified by this inference. There is no evidence that Noah was discharged for insubordination or leaving his work area, and the evidence that Noah quit has been discredited. It must therefore be concluded that Respondent has not met its burden under *Wright Line* to show that it *would have* discharged Noah even in the absence of his professed intention to vote for the Union in the Board election that was to occur 15 days' later. The conclusion that Noah was unlawfully discharged is therefore compelled. For possible purposes of review, however, I make additional findings about circumstances of Noah's discharge.

As previously noted, Knoblock testified, "If he [Noah] had came and find me, he wouldn't have got fired." I find that on June 10 Noah did come to Knoblock in Rodrigue's office, and he used the telephone there. I further find that, before he went to Rodrigue's office, Noah went to Clement's office, but he did not then use Clement's telephone, and Clement did not then tell him to go immediately to work. My reasons for these findings are as follows:

Noah was placed on probation on Tuesday, May 25. There were three Thursdays between that date and Noah's discharge. These Thursdays were May 27, June 3 and 10. The records of Probation Officer Reed show that Noah made calls to his office on all of those dates. Witnesses for neither side testified on the topic, but a finding on how the June 3 call came to be made is necessary. It is apparent to this trier of fact that both Noah and Clement selected some words that were said on June 3, and they inserted those words into their respective versions of what happened on June 10.

[266] Respondent contends that oral warnings are usually issued before warning notices for general offenses under the Avondale Employees' Guide are issued.

[267] The Avondale Employees' Guide states that discharge may come on a second general offense, but supervisors consistently testified that employees are discharged on a second general offense only on rare occasions. Clement did not testify that Noah's disciplinary offense of June 10 was such an occasion. (Again, Clement did not testify that Noah was discharged, at all.)

Clement did not testify that Noah's June 10 request to use the telephone to call his probation officer was the first such request that Noah made to him. If it had been, Clement assuredly would have so testified. Also, Clement did not deny that Noah made such a request after an employer campaign meeting. (Respondent carefully sought such a denial from Knoblock, but Clement was not asked.) From Clement's failure to deny the testimony of Noah and Ellis in this regard, I find that Noah did ask Clement to use the telephone after some employer campaign meeting. It was not after the employer campaign meeting of May 24 that Noah made his request because Noah was not on probation until the next day. It was not after an employer campaign meeting on May 27 that Noah made the request because there was no employer campaign meeting conducted on that date. It appears, therefore, that Noah made his first request to Clement on Thursday, June 3. There is no affirmative evidence that there was an employer campaign meeting on that date, but that must have been the case. I do so find. Alternatively, I find that, even if there was no employer campaign meeting on June 3, Noah asked Clement for permission to use his telephone on that date.

I further find that when, on June 3, Noah asked Clement to use the telephone, Clement allowed Noah to use it, but he then told Noah that he should not ask to use his (Clement's) telephone in the future for personal calls. This is what Clement testified happened on June 10, but, if he had allowed Noah to use the telephone on June 10, Clement would have mentioned the fact in his postdischarge memorandum; he did not. My finding that this occurred on June 3 is the only way to reconcile Clement's memorandum, or what is left out of the memorandum, and the self-conflicting testimony of Noah. Noah's self-conflicting testimony is: (1) Noah testified that the first time he asked Clement to use a telephone to call his probation officer, Clement effusively told him that " he would—they would do anything in their power to help us and, you know, they were there for us," and Clement then told a clerical to get an outside line for Noah. (2) Noah, nevertheless, testified that the next time that he needed to make a call he went to Clement's office but did not ask to use the telephone; he only asked to look up the number of his probation officer. If Noah had previously (and effusively) been told by Clement that he could use the telephone for such purposes, Noah would have at least asked to use the telephone when he went to Clement's office on June 10. Instead, according to Noah, he only asked where he could find Knoblock and he asked to look at a telephone book.

Finally, to go back in time, Knoblock testified that, 3 weeks before Noah was discharged, Noah asked to use his telephone (or, possibly Rodrigue's telephone) to call his probation officer; and Knoblock testified that he allowed Noah to do so. This testimony was not rebutted, and I find that it is true. This would have been the call that Noah made on May 27. I so find.

In summary, I find that the circumstances of the three telephone calls that Noah made to his probation officer were: (1) On May 27, Knoblock permitted Noah to use his telephone. (2) On June 3, Noah asked Clement to use his telephone; Clement then allowed Noah to do so, but Clement told Noah not to ask to use his telephone again; rather, Clement told Noah thereafter to get a pass and go to a telephone outside the work areas to make personal calls. (3) On June 10, Noah did not ask Clement if he could use Clement's telephone, but Noah did tell Clement that he was looking for Knoblock to get a pass, and he asked Clement for the telephone book to look up the number of his probation officer. Clement did not then tell Noah to go immediately back to work; Clement told Noah to find Knoblock, make his call, then get immediately back to work.

After he got the telephone number from Clement, Noah continued looking for Knoblock. He did find Knoblock in Rodrigue's office, and he then (and there) made the call to his probation officer.[268] Noah admits that he did not go directly back to his work area. He testified that he went toward the toolroom area to seek out supplies and gather his lunch. I do not believe this self-serving testimony. I believe that Noah was maneuvering toward the gate, to get a "jump" on the lunchtime rush. I believe that Clement saw Noah out of his work area and reasonably believed that Noah was, again,[269] committing an offense under the Avondale Employees' Guide. Clement, feeling that he had sufficient pretext to discharge Noah, promptly did so. It was then, and not before, however, that Noah cursed Clement and Danos.

In conclusion, the General Counsel has presented a prima facie case that Noah was unlawfully discharged. Respondent, however, has not shown that Noah was discharged for insubordination (or for leaving his work area). Respondent has therefore failed to show that it would have discharged Noah even in the absence of his expressed intention to vote for the Union in the soon-forthcoming Board election. I therefore conclude that Respondent discharged Noah in violation of Section 8(a)(3).

g. Charles Bennett's discharge for insubordination

Charles Bennett (vols. 24–26) was employed as a painter and sandblaster until he was discharged on July 20, 1993. The second complaint, at paragraph 104, alleges that by discharging Bennett Respondent violated Section 8(a)(3). The General Counsel contends Respondent discharged Bennett because of his known union activities and expressions of sympathy which included his wearing prounion insignia and telling a supervisor that he had voted for the Union in the June 25 Board election. The complaint further alleges that Bennett was threatened in various ways in violation of Section 8(a)(1). Respondent denies that the threats occurred. Respondent further answers that Bennett was discharged solely because he was insubordinate to a foreman and that he threatened the foreman. The General Counsel replies that the defense for Bennett's discharge is pretextual because Bennett did not engage in the conduct attributed to him; alternatively, the General Counsel replies that Bennett was treated disparately because other employees who engaged in similar, or worse, conduct were issued lesser discipline. Ultimately, I find and conclude that Respondent has failed to show that Bennett engaged in the conduct attributed to him, and I conclude that Bennett was discharged in violation of Section 8(a)(3).

Bennett testified that he engaged in no union activities before the June 25 Board election, but, shortly thereafter, he placed a "Union-Yes" sticker on his hardhat where it remained through the date of his discharge. Bennett further testified that he took handbills from the union organizers at Respondent's gate. Bennett testified that on one occasion, about 2 weeks before the Board election, after he had accepted a union handbill and stuck

[268] I discredit Knoblock's testimony to the contrary.

[269] I credit the testimonies of Bourg, Clement and Knoblock that Bourg caught Noah out of his work area before lunch on June 8 and 9, that on June 9 Bourg told Noah that he would receive a warning notice, and that Bourg ordered Clement to issue the warning notice. Noah, however, was terminated before the warning notice could be delivered.

it in his pocket where it was showing, Paint Department Foreman Eldon Pierre spoke to him and, according to Bennett, "He said that those could get you in trouble." Pierre, however, credibly denied this testimony.

Bennett testified that in March, in an employer campaign meeting that was conducted in a toolroom on board a ship: "[General Foreman] Tommy Bourgeois said that if the Union is voted in, that it will raise the wages so high that other companies would not bring their work to Avondale; therefore, we [would] have no work, and we would be forced to close." Current employee James Lanham (vol. 27) testified that he also was at a March employer campaign meeting during which Bourgeois spoke. Lanham testified that Bennett was one of the employees present, and that the meeting was conducted in the paint office of the ship that they were working on. Lanham testified that during the meeting: "He [Bourgeois] said if the Union was voted in, we would have to close down because we couldn't compete with other shipyards." Former employee Donald McGee (vol. 58) testified to essentially similar statements by Bourgeois. Based on this testimony by McGee, Bennett, and Lanham, paragraph 9 of the second complaint alleges that Respondent, by Bourgeois, unlawfully threatened its employees with plant closure.[270] Bourgeois testified, but he did not deny this testimony by Bennett, Lanham, and McGee, and I found the testimony credible. I conclude that, in violation of Section 8(a)(1), Respondent, by Bourgeois, in early March, 1993, threatened its employees with plant closure if they selected the Union as their collective-bargaining representative.

Bennett further testified that about 3 or 4 weeks before the Board election, Paint Department Superintendent Charles Bourg Sr. spoke to employees at an employer campaign meeting and: "[Bourg] was saying that if the Union come in, that they would raise the wages up so high that other—the companies wouldn't bring their work to the shipyard to have it done; they would go somewhere else. . . . They said that they would be forced to close, because they wouldn't have no work." Lanham testified that he attended an employer campaign meeting at which Bourg Sr. spoke to a group of employees that included Bennett. According to Lanham, Bourg told the employees: "That if the Union was voted in, that we would have to close our gates." McGee testified that at a meeting: "Charlie Bourg also said that the Union was only interested in collecting union dues from us and that the Union could not guarantee us any promotions or any raises. Charlie Bourg then stated that Avondale would close down if the Union was voted in because they would not be able to compete with other shipyards." Based on this testimony by McGee, Bennett and Lanham, paragraph 10 of the second complaint alleges that Respondent, by Bourg, unlawfully threatened its employees with plant closure.[271] Bourg denied this testimony; however, I found the employees credible. On brief, Respondent argues that the employees cannot be credited because they conflict about who conducted the meetings and where. Bourg admitted that he attended or conducted various employer campaign meetings during this period, and Respondent's arguments do not preclude the possibility that the statements were made at different meetings. Also, as found above, Bourgeois, Bourg's general foreman, did not deny that he made essentially the same threat. It is more likely than not that those undenied threats by Bourgeois[272] were the reflection of what he had heard from his superintendent, Bourg.[273] I conclude that, in violation of Section 8(a)(1), Respondent, by Bourg, in March 1993, threatened its employees with plant closure if they selected the Union as their collective-bargaining representative.

Bennett further testified that on June 25, the day of the Board election, when he was in a work area, he passed Pierre and employee Donald Kennedy. According to Bennett, Pierre asked him how he would pay his bills on a picket line and told him that, even if the Union were selected as the collective-bargaining representative, the supervisors would make it hard on the employees by making "some changes." Based on this testimony by Bennett, paragraph 53 of the second complaint alleges that Respondent, by Pierre, unlawfully threatened its employees with unspecified reprisals.[274] This testimony was quite suspect; before the Board election Bennett made no display of any prounion sympathies that he might have held, and there is no apparent reason why Pierre might have singled out Bennett for such a virulent threat. I further found Pierre credible in his denial of the threat, and I shall recommend dismissal of this allegation of the complaint.

Bennett further testified that during the evening of June 25 he waited outside Respondent's administration building for the election returns. He first stood behind the building with a group of employees and supervisors who opposed the organizational attempt. Across a public road stood several union representatives and many prounion employees. At some point during the evening, according to Bennett, Marybeth Arnold, Respondent's timekeeping supervisor, came out of the building and gave the group "an early count.' After he heard Arnold, according to Bennett:

> I walked over and told the union representative [about the preliminary count], and they [the Company supporters] had Doug Cortez, [and an] electrician foreman, and a couple of other foremans come up to me and started yelling, "You traitor, you traitor; you are either with us or you are with them."
>
> And I left and started going to my truck. And the electrician foreman hollered out, "Watch out—Watch out; he is going in his pocket."
>
> And Doug Cortez said, "That is what I want him to do, so I have a reason to hit him."
>
> I just got in my truck and left.

Bennett testified that, as he left, Cortez (whose first name is actually Dirk), "was coming behind me." Bennett further testified, "They chased me out to the parking lot the night of the election," but this is a conclusion inconsistent with his testimony that he "just" got into his truck and left. Bennett did not know the name of the person whom he identified as the electri-

[270] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Bennett, as well as the charge in Case 15–CA–12171–1.

[271] Id.

[272] As noted in the case of discriminatee Marshall, Bourgeois also made undenied threats that employees who wore prounion insignia would be discharged for doing so. Also, as noted in the case of discriminatee Varnado, Bourgeois also made an undenied, violative, threat that, if the Union were selected to be the collective-bargaining representative, Respondent would lay off employees when work was slack.

[273] The animus that Bourg personally held for the Union is reflected in a surreptitious recording that Bennett made, as discussed infra.

[274] See fn. 270, supra.

cal department foreman. Based on this testimony by Bennett, paragraph 54 of the second complaint alleges that Respondent, "by Doug Cortez and several other unidentified foremen, threatened its employees with physical violence because they aided or supported the Union."[275]

Bennett testified that on his next workday, June 28, Paint Department Foreman Terry Knight referred to the "Cortez" incident, and Knight told him: "You are a very lucky man, because [toolroom employee——————] Danos kept . . . them entertained where you could get away." Based on this testimony by Bennett, paragraph 56 of the second complaint alleges that Respondent, by Knight, "threatened its employees by telling them that other supervisors were going to physically assault an employee because he aided or supported the Union."[276]

The allegations of paragraphs 54 and 56 depend on the General Counsel's establishing that, on June 25, Cortez was a supervisor within Section 2(11) of the Act. This is something that the General Counsel failed to do. Therefore, while I found Bennett's testimony credible over certain denials by Cortez and Knight, I shall recommend dismissal of these allegations of the complaint.

Although it is not alleged as a separate violation, Bennett further testified that when Knight spoke to him on June 28, Knight asked him if it was true that he had voted for the Union. Bennett testified that he replied to Knight that he had. Knight denied this testimony; however, I found Bennett credible.

Discharge of Bennett—the General Counsel's Evidence

About June 14, Bennett and Lanham were transferred from an outside painting job on the first shift to working in the shot house on a shift from 3 until 11 p.m., with no scheduled meal break. (Such shifts were sometimes referred to as "straight eights"; although there were no scheduled meal periods, employees working such shifts were allowed to pause briefly, at appropriate times, to eat food that they might carry with them and canned soda from vending machines.) Bennett did not object to the transfer to the second shift, but he bitterly protested the assignment to the shot house, one of the more difficult places to work at the plant.[277] On July 20, Bennett and Lanham reported to the shot house, but some time after they did, they were approached by Foremen Matthew Martin and Dennis (Alabama) McDonald. Martin and McDonald told Bennett and Lanham to check in their shot house equipment and report to the platen area where they would be sandblasting units that day. Bennett and Lanham went to the shot house toolroom to check in their equipment. When they got to the toolroom, Bourg and several other persons, including Foreman Glenn Clement and General Foreman Gilbert Arseneaux, were there. It is undisputed that, while Bennett and Lanham were in the shot house toolroom, Bourg made a comment that was referred to in a relevant postdischarge exchange between Bennett and Bourg, and I shall recount the testimony at this point. According to Bennett, in the toolroom: "And Charlie Bourg said that, 'Those are two important men.' Then a few minutes later, he said, 'They are very important.' Then the toolroom lady, Mary, told him [Bourg] to shut up." Bennett and Lanham then left the toolroom and went to the platen area where they received assignments from McDonald and Martin.

After units are sandblasted, they are to be "blown-down" with an air-hose, and thereafter they are to be fine-cleaned of the dust that settles. (How fine cleaning was done was not described; it is probably a repeat air-hose operation.) Bennett testified that when he got to the platen area (where units are still on platens), McDonald assigned him to blow down, and fine clean, a unit that was the size of a small room. It was very hot inside the unit. As Bennett knew, after the cleaning was finished, the tank was to be painted. While Bennet was doing the cleaning job, a storm began to gather. If the unit got wet before painting, it would have to be reblasted. Bennett testified that he blew down and fine cleaned the unit. Bennett was asked and he testified:

> Q. So after you fine-cleaned the unit, then what happened?
>
> A. They told me—Alabama [McDonald] told me to get my line and set it up there in the middle with the rest of the workers. And Martin drove up, and he said, "I want Charles to blast right here."
>
> And Bama [McDonald] said, "I already had Lee [Bennett] lined up there."
>
> He [Martin] said, "I don't give a fuck who you had lined up there. I want Charles to blast here."
>
> And so I pulled my stuff over there and got it set up to blast right there. Then they were filling the sandblast pot, so I couldn't blast until they got through with it. So I went and got my lunch box and put it in under the shelter and got me a cold drink and a sandwich.
>
> And Alabama come up to me, hollering, "Put that fucking sandwich up; put that mother-fucking sandwich up now." And I put my sandwich up, and then—the sandwich was already up, and then Martin come up there hollering the same thing.
>
> I told Martin that if I seen anybody else eating or drinking, I would consider that harassment. He told me to "go over by the toolroom," that I was "going home."

(As the term is used at the yard, to send an employee "home" is to suspend him.) Bennett testified that, in fact, other employees who were assigned to sandblast were also sitting around waiting for the sand pot to be refilled.

As Martin told him to do, Bennett did go to the toolroom; Martin followed, and they had an exchange of words. Bennett sometimes carries on his person a microtape recorder. He surreptitiously recorded four conversations that he had with his supervisors on July 20 and 21. The first recorded conversation occurred when, on July 20, Bennett and Martin arrived at the toolroom; and that conversation was between Bennett and Martin, only. The second recorded conversation occurred a few minutes later on a walkway on the levee, at a point near the gate from which Bennett left work that day; that conversation was among Bennett, Martin, and the paint department's second shift general foreman, Carl Mott Sr. The third conversation that Bennett recorded occurred on July 21, before 3:30 p.m., in the office of Paint Department Superintendent Bourg; Bourg and Bennett were the only participants in that conversation. The fourth conversation that Bennett recorded occurred on July 21, some time after 3:30 p.m., also in Bourg's office; the participants were Bennett, Bourg, and Martin. Transcripts of the four conversations were offered by the General Counsel; after the tapes were played and certain modifications of the transcripts were made, the tapes and their transcripts were received in

[275] Id.

[276] Id.

[277] Neither the transfer to the second shift nor the assignment to the shot house is alleged as a violation.

evidence.[278] I shall quote extensively from these three transcripts.

(The transcripts are especially difficult to read because the speakers often interrupt each other and because of other problems. To facilitate understanding, I have entered the bracketed indications to note the speakers' apparent intent. Ellipses in the original transcriptions, which show interruptions and pauses, are replaced by dashes here (to distinguish them from the ellipses that I enter). The transcriptions often use "your" for "you're"; I have entered corrections accordingly. I have also entered certain punctuation that is necessary for understanding of the exchanges. Also, Respondent employed an expert whose audio-enhancing equipment proved some parts of the first and second conversations in addition to what was proved during the General Counsel's case; where I quote the transcripts of Bennett's recordings, the contributions of the expert's analysis of the tapes are italicized.)

The first recorded conversation begins when Bennett and Martin have reached the toolroom area on June 20; Bennett first speaks and asks "What's this about?" Martin tells Bennett, "What do you think it is about? . . . What did I tell you? I caught you, didn't I?" Bennett argues that he had been working in a hot place, and, that by drinking a soda, he was doing no more than what other employees do regularly. Then, according to the transcript:

> MARTIN: I do not care about other people. If you are going to work for me, you are going to do as I tell you to!![279]
>
> BENNETT: So you are harassing me, huh?
>
> MARTIN: You can call it what you want. I am doing my job and you are going to do yours.
>
> BENNETT: You are sending me home for drink a cold drink after I—
>
> MARTIN [interrupting]: That's exactly right!
>
> BENNETT [continuing]: after I had been in that unit for about two hours.
>
> MARTIN: *Hey*, no. You ain't been in there no two hours. And I'm going to tell you something else-you ain't even been in there an hour. And I'm going to tell you something else—I'm not arguing with you. . . .
>
> BENNETT: All I wanted to do was drink my cold drink and go on *back to work*.
>
> Martin: No. No, you *copped* an attitude. That's what you did.
>
> BENNETT: No, I didn't.
>
> MARTIN: [unintelligible] What did . . . What did you do then?
>
> BENNETT: Huh?
>
> MARTIN: What did you do?
>
> BENNETT: You fix . . .
>
> MARTIN: What did you do then?
>
> BENNETT : You're fixing to send me home for drinking a cold drink.
>
> MARTIN: You're gone.

Many times thereafter, Martin tries to get Bennett to admit that he had done, or said, something when Martin had approached Bennett on the unit and told Bennett to get back to work. Bennett always evades answering Martin. In the dialogue that was recorded at the toolroom, Martin never says what it is that Bennett is supposed to have said or done when the two men were at the unit.

Further in the transcription of the exchange between Bennett and Martin at the toolroom, Martin asks Bennett if he had seen anyone else in the area who was eating at the time that Bennett was eating. Bennett does not answer this question, but he asks Martin if he had not seen others drinking sodas on his shift; Martin states that he has not. Martin then says: "Clear on out and get your *pass out through the gate*." Bennett asks that Mott be called. Martin refuses; Bennett tells Martin that he will go to Mott; Martin replies that he is Bennett's "boss," and, further:

> MARTIN: Well, you're gone. You can go talk to Al Bossier if you want. You work for me. You don't work for nobody else. You work for me and what I say [is] going to go.

Bennett again accuses Martin of harassing him and Martin and Bennett repeat themselves a few times. Then:

> MARTIN: You know something else, Charles? You will get a citation tomorrow.
>
> BENNETT: For what?
>
> MARTIN: For not doing your work.
>
> BENNETT: For drinking a cold drink?
>
> MARTIN: No, for not doing your work.

One last time, Martin asks Bennett to admit what he had said or done the first time that he was approached by Martin at the job; Bennett replies: "I didn't tell you nothing. I was putting the sandwich up." Bennett again argued that others were standing around when Martin had approached him on the jobsite. The exchange continues:

> MARTIN: You ain't got nothing to do with what other people do.
>
> BENNETT: I was in there working by myself. I was hot. I was, sure, I was a little hungry. I came out. . . . I came out; I was drinking one sandwich and a cold drink.
>
> MARTIN: Simple as that; not doing your work.
>
> BENNETT: Well, I did my work. I came out. . . . Yeah, that unit's clean; go check it. I was in that hot, hot, hot, unit. . . . No air in there. I blew it down. I was fine-cleaning it. . . . All I wanted was one cold drink and a sandwich, and I was going to blast. And I wasn't eating it slow. I was eating it very fast.[280]

The transcript of the exchanges between Martin and Bennett at the toolroom stops at that point, apparently because Bennett turned off the tape recorder.

At the hearing Bennett testified that, after the exchange with Martin at the toolroom, he went back to the unit, gathered his tools, and proceeded toward the gate. On a walkway to the gate, he met Martin and Mott. (In its case, Respondent introduced evidence of how Mott and Martin had gotten together so that Bennett could have met them at this point; Respondent also introduced credible evidence of things that were said between Mott and Bennett that are not on the transcript of the second conversation that Bennett recorded.) The transcript of the second conversation picks up at some point during the time that

[278] The first and second conversations were recorded on the same tape, and they appear on the same transcript.

[279] Exclamation marks are in the original transcript.

[280] The ellipses that I insert in this paragraph exclude Martin's saying (with disbelief apparent), "Yeah, Yeah."

Mott, Martin, and Bennett were at the gate.[281] The first part of the second conversation that Bennett recorded is:

> MARTIN: What do you want to do with him, Mott? Fire him?
> MOTT: Do you have enough to fire him?[282]
> MARTIN: Yeah.
> MOTT: You sending him home?
> MARTIN: Right, for not doing his work.
> BENNETT: For not doing my work?
> MARTIN: That's right.
> BENNETT: I was only stopped, not even—
> MOTT: Are you terminating him? Are you firing him?
> MARTIN: He should be fired.
> MOTT: I'm asking you.
> MARTIN: Yeah.
> BENNETT: You firing me?
> MARTIN: That's right. [Then Martin says to Mott:] He don't want to do what I tell him to do. It's up to you. [Then, apparently to Bennett] I told *you* to get back to work. *No, you want to keep* arguing with me.
> BENNETT: You're going to fire me for drinking a cold drink.
> MARTIN: Yeah, I'm going to fire you. That's right.
> MOTT: *I agree with him*.
> BENNETT: You agree with him and your name's Mott?
> MOTT: Yeah.

On cross-examination, Bennett acknowledged that before he exited the gate (but, apparently after he had turned off the recorder) he asked Martin for a statement of the reason for his discharge. Bennett further acknowledged that Martin gave him a gate pass. (A gate pass is used to show gate guards that the employee has permission to leave before quitting time.) The gate pass that Martin gave to Bennett lists the time as 5 p.m. on July 20. In a space on the form for "Details," Martin had written: "Terminated-Insubordination."

On July 21, well before the second shift had started, Bennet went back to the plant to plead for his job with Bourg. In the transcript of this third conversation that Bennett recorded,[283] Bourg speaks first and says:

> BOURG: You gonna have to come back this evening. I ain't going to discuss the matter with you until I have the foreman that fired you. . . . I can tell you what the man said. The man said he asked you to go back to work and you said "No, I ain't going back to work right now; I'm on break right now. I'm eating my sandwich and [drinking] my drink." Quote unquote. Did you not just say that?
> BENNETT: I did not say that.

Bennett did return during the afternoon of July 21. He went to Bourg's office where he met Bourg, Mott, McDonald, and Martin; also present were General Foremen Tommy Bourgeois and Gilbert Arceneaux, Foreman Glenn Clement, and two security guards. Then occurred the fourth conversation that Bennett surreptitiously recorded. (The transcript of this meeting contains Bourg's reading of a memorandum that Mott had previously submitted to Bourg; although Mott was present during this meeting, according to Bennett, the transcript reflects that Mott then said nothing.) In the transcript, Bourg begins by telling Bennett that it is "your show." Bennett begins by stating that he was terminated for eating a sandwich and drinking a soda. Bourg denies this and begins to read a memorandum that he had received from Mott:

> BOURG: No. No. What you was terminated for, I was told, I read . . . what Mr. Mott left me. [Bourg then begins reading a memorandum that he had received from Mott.]
> "Mr. Charles Bennett, [badge number] 11479, terminated at 5 p.m.
> "At three p.m. he was given orders to blow down unit 450, a small tank. At 4:45 he proceeded to his lunch box, got a soft drink and sandwich and started eating them.
> "Martin walked over and asked him what he was doing.
> "He said he was taking a break.
> "Martin told him it was not lunchtime and he needed the unit completed so he would not lose it due to the rain. He then told Charles to put up his drink and sandwich and complete his job.
> "Charles said 'I'll show you a thing or two.'
> "Martin then said, 'You won't show me anything; you're fired. Your time will stop at 5 p.m.'
> "Mr. Charles Bennett was terminated for loafing on the job and insubordination in a threatening way."

Bourg's reading to Bennett of Mott's memorandum ended at this point. Further according to the transcript, after he finishes the reading of the memorandum from Mott, Bourg tells Bennett, "Now, its your show again." Bennett calls Martin, McDonald, and Mott liars, then:

> BOURG: In other words, you didn't put your finger in Martin's face?
> MARTIN: Ain't that right Charles? When I come over there and you was sitting up on that unit, what did you say?
> BENNETT: I did not tell you what's wrote on that paper.
> MARTIN: That's just what you said. That's just what you said.

Bourg states that Bennett had had his say, then he tells Martin to give his account, which was:

> MARTIN: When I walked over there, told him about eating. He [Bennett] walked back [and I said to Bennett], "Charles, put up your lunch and go back to work."
> [Bennett said to me], "What you mean? I can't eat a sandwich?" That's what he told me. I said, "Charles, put up your sandwich and your soft drink and go back to work." [Then Bennett said to me]: "What y'all trying to do? I'll show you."
> BENNETT: I did not.
> MARTIN: You didn't do that?
> BENNETT: That's right.
> MARTIN: Well, Charles, you are a liar. . . . I'll tell you what. They got that woman. She was over there. She said, "Martin, did you see how he was pointing his finger?"

[281] On the transcript that was received as G.C. Exh. 147(b), this point, otherwise unmarked, is at p. 8, just before the last line.

[282] In a transcript prepared by Respondent's expert, this sentence is marked "unintelligible." It was not unintelligible. This is what was said, as was demonstrated when the parties and I reviewed the tape and the transcript that was offered by the General Counsel. Respondent made no objection to the transcript that was offered by the General Counsel that included this sentence.

[283] Respondent's expert was not questioned about this recording or its transcription that was offered by the General Counsel.

They was, she was over there by the tracks. They had Hill, Lloyd, Greenwood, and the woman; that [totals] four people. I don't know if they heard direct word, but she did.

BOURG: Charles, you know that's threatening.

BENNETT: What I say happened.

Bourg again asks for Bennett's account and:

BENNETT: What I'm saying is I did my work. The rain was coming. I could see the rain at the bridge. I moved my lunch box. Took four or five bites of a sandwich on the way [while I was] moving my lunch box. Drinked half a cold drink.

BOURG: You're getting off the subject because you're not being fired for eating or drinking any soft drink. I want to let you know that. You're being fired for insubordination . . .

BENNETT [interrupting]: I didn't tell him nothing.

BOURG [continuing]: and threatening and putting your finger in that man's face.

BENNETT: I didn't put my finger in his face.

BOURG: But he got this man right here and, plus, he's got other witnesses out in the yard that [are] saying to the fact that you did put your finger in his face.

After repeating themselves, Bennett reminds Bourg of the incident at the shot house toolroom:

BENNETT: You remember the little comment you made to him [apparently, Clement] and Gilbert [Arseneaux] when we walked up. You seen our hats and you said, "That's two very important men." And Mary told you to shut up, that you shouldn't have said that. . . . I wasn't the only one that heard that.

BOURG: I'm telling you right now, don't bring up nothing about "union." You be quiet right now because I let you talk; now let me talk. Let me tell you, don't you, don't bring up "union" in front of me. You're not being fired for any union. I could care less on what you feel; that's your right. That's your right as an American, but don't tell me and sit right here and say because you had a union sticker on your hat that you [are] being fired [for that]. Now, you go and tell [that to] those other rotten son[s] of bitches that you're talking to, okay, but don't come in my office and threaten me . . . . [Y]ou stinking fuck with the wrong one. 'Cause I['ll] have your ass in court. You hear what I'm telling you? I['ll] have your ass personally in court. And you can go back and tell God this, 'cause I don't give a shit. But you're not being fired for union activity, 'cause we don't fire people in this shipyard [for that] . . . You're being fired for insubordination and talking and intimidating your supervisor. . . .

BENNETT: What I'm telling you [is that] I didn't point my finger in his face.

After some repetition of these themes, the recorded discussion diverges into whether Bennett also had been working for another employer; Bennett denied that. Then:

BOURG: You don't work for nobody [else]. You're not being fired [for any other reason], so don't go back and tell anybody outside this yard or anybody else that you're being fired for eating a sandwich or drinking. I told you; you're being fired for insubordination and threatening a supervisor by putting your finger in his face. You said, "I'll get you." He [Martin] has a witness right there [apparently referring to foreman McDonald who was then present], and also he's got other hourly employees [as witnesses]. You're not going to do [any more of] your part right now. I'm saying my part. I gotta back them [Martin and McDonald] up 'cause I got another foreman [who] said he was right there; he seen it.

And the reason I got security [guards] here is to let you know that you [are] not being fired for eating a sandwich. You're being fired for insubordination and threatening a foreman. We don't fire people for eating a sandwich. We don't fire people for drinking. We don't fire people for going to the bathroom. We fire people for not following orders, and it, do what you want—Because I got your signature [on an acknowledgment] that you have one of these guide books [the Avondale Employees' Guide], and, if you read this book again, it says you cannot intimidate or be insubordinate to a salaried supervisor or [to the] orders of an employer.

BENNETT: [Repeats his denial of any misconduct.]

MARTIN: Yeah, sure.

At this point, Bennett's recording of the fourth conversation ended.

Further for the General Counsel, current employee Lanham testified that he was present in the work area during the confrontation between Bennett and Martin on July 20. Lanham testified that he saw Bennett eating a sandwich and drinking a soda. At the same time, Lanham testified, he could see employee Raymond Hill, about 60 feet away from Bennett, eating a sandwich at the same time. Hill, however, was part of a crew which, at the time "didn't have nothing to do," as Bennett acknowledged when he testified. Lanham further testified that he saw Martin and McDonald approach Bennett and he heard Martin tell Bennett to put up his food and drink, and Bennett immediately complied; Lanham further testified that he did not see Bennett make any gestures toward Martin. In his pretrial affidavit, however, Lanham states simply, "I do not recall the conversation between Bennett and Martin." Lanham was given ample opportunity to explain this inconsistency, but he was unable to do so. I do not credit any of Lanham's testimony about the exchange between Martin and Bennett. I do not believe that he was present during the confrontation, although he may have come upon the aftermath, and he may have then received a report from Bennett, which report was the apparent source of his testimony.

Bennett's Discharge—Respondent's Evidence

On day-26 of the trial, during the cross-examination of Bennett, Respondent showed Bennett an MCR for July 14. When Bennett was passed for redirect examination, the General Counsel requested production of the MCRs that Bennett signed between July 14 and 20, the day he was discharged. The documents had been subpoenaed,[284] but Respondent refused to produce them, even though she acknowledged that they were in the

[284] Subpoena B-87852 had demanded production of MCRs for the employees who had worked in shot house from July 14 through 20. (Bennett was assigned to the shot house on those dates, although he was also reassigned to the platen area at some point during July 20.) On day-11 of trial, I denied a petition to revoke the subpoena, and it was still outstanding at the time that the demands for the documents were made on day-26.

courtroom. (In the course of the discussion of the issue, I cited *Industrial Towel & Uniform Service Co*., 172 NLRB 2254 (1968). In that case, an individual who had not been subpoenaed was in the courtroom, but, when called by the General Counsel, the respondent's counsel refused to allow the witness to take the stand. The Board condemned the counsel's conduct, making it clear that a subpoena is not necessary for persons who were present in the courtroom when called to testify. The same would necessarily apply for documents that were acknowledged to have been in the courtroom, as I informed Respondent's counsel, even if the documents had not been subpoenaed. Counsel nevertheless persisted in her refusal to produce the documents.)

On day-98 of the trial, 11 months after I ordered production of the MCRs, Respondent, still without having produced the subpoenaed documents, called Foreman McDonald as a witness. When Respondent's counsel asked McDonald to testify about the confrontation at the unit that involved him, Martin and Bennett, the General Counsel, citing *Bannon Mills*,[285] objected. I again asked Respondent's counsel why the documents had not been produced; she replied, "[I]f we produce those documents, we would not preserve the issue for review or appeal."

Bannon Mills precludes a litigant from using records wrongfully withheld, "and secondary evidence regarding matters provable by such records." McDonald's testimony would have been in the nature of secondary evidence offered to prove what could well have been in the July 20 MCR that was wrongfully withheld from the General Counsel during presentation of his case. More particularly, Bennett testified that he was first assigned to blow down one unit and then sandblast another; he testified that he did not get started on the unit to be sandblasted because the sand pot was then empty, and that is why, according to Bennett, he took time to eat and drink. If the MCR listed assignments for work on two different units (which would have had different job account numbers), it would tend to lend credence to Bennett's testimony, whether or not Bennett actually got started on a second unit. (The relevance of this factor is even argued on Respondent's brief; Respondent contends that Bennett was lying about the empty sand pot's being a factor in what he did because, Respondent contends, Bennett was only assigned to blow down a unit, a job for which the sand pot was not needed.) Moreover, as the transcript of Bennett's tapes reflects, Bennett and Martin disagreed over how much time Bennett had spent blowing down the unit. The MCR could well have been helpful in determining who was truthful.[286] Also, because Respondent continued to contumaciously withhold the July 20 MCR when it presented McDonald, the possibilities of effective cross-examination of McDonald were severely diminished. Finally, each MCR has a space for a supervisor's "Comment" about the shift. The MCR that Bennett signed on July 20 could have contained a "Comment," or other entry, that squarely conflicted with what McDonald was about to testify. An entry could even have had words that disclosed an unlawful motivation in Bennett's discharge.[287] I therefore sustained the General Counsel's objection to the presentation of McDonald's testimony about what could have been documented in the wrongfully withheld MCR of July 20.

I did, however, allow Respondent to make a question-and-answer offer of proof through McDonald. This offer included:

> Q. What did Martin say?
>
> A. He told him, "Charlie, it is about to rain. You need to put your sandwich away and go back to work."
>
> Q. And what did Charles say?
>
> A. He told Martin—he took his finger and pointed it in Martin's face and say, "I will show you a thing or two."
>
> Q. Did Charles or Martin say anything else before Charles did that?
>
> A. No. Only Martin just told him—asked him to go back to work.
>
> Q. How far apart were Charles and Martin at the time that Charles put his finger in Martin's face?
>
> A. Arm length, you know. . . .
>
> Q. After Charles said, "I will show you a thing or two," and shook[288] his finger in Martin's face, what did Martin say or do?
>
> A. Martin told him, "You showed me nothing. You showed me nothing. Pick up your equipment and go to the toolroom."
>
> Q. Did he say anything else?
>
> A. He told him he was fired.
>
> Q. What did Martin do at that point?
>
> A. Got on his bike and went to the toolroom.

This testimony, even in an offer of proof, shows that McDonald was not a truthful witness. As the above-quoted transcript of Bennett's recording shows, when Martin and Bennett reached the toolroom, Martin confirmed only that he was sending Bennett "home," and that he was getting a warning notice "for not doing your work." Martin did not say anything to indicate that he had already told Bennett that he had been discharged. To the contrary, Martin told Bennett at the toolroom, "I am doing my job and you are *going* to do yours," necessarily implying that Bennett had not then been discharged. That is, Martin would not have said these things at the toolroom if, as McDonald testified in the offer of proof, Martin had already fired Bennett when the two were back at the job site. Also, after Martin and Bennett left the toolroom and met Mott at the gate, Mott felt required to ask Martin whether he was discharging Bennett. ("I'm asking you," Mott stated to Martin.) Only at that point does Martin state to Bennett, "Yeah, I'm *going* to fire you." Mott's question and Martin's use of the future tense show, at least, that Martin had not fired Bennett at the jobsite (or even at the toolroom). All of which is to say that McDonald testified falsely when he testified in the offer of proof that he heard Martin tell Bennett that he was fired.[289] Accordingly, for possible purposes of review, I here state that I would not credit McDon-

[285] 146 NLRB 611 (1964).

[286] Ultimately, this issue was rendered moot because of a later admission by Mott, as discussed infra, that Bennett was not punished for taking a break. At the time of my rulings to which Respondent objects, however, Mott had not testified.

[287] This is hardly a far-fetched assumption. At one point, in answering another subpoena, Respondent produced all 1993 MCRs of the paint department except Bennett's MCRs for the July 14-20 period. This factor, and Respondent's demonstrated virulent animus toward the statutory rights of its employees, leads immediately to the inference that Respondent, in disobeying my directive, was hiding something that was quite damaging. I so infer.

[288] It is to be noted that McDonald had not said that Bennett had shaken his finger.

[289] McDonald's testimony appears to be the product of reading Mott's memorandum, as quoted supra, but not the product of honest recollection.

ald's testimony that he saw that Bennett "pointed"[290] his finger in Martin's face, and I would not credit McDonald's testimony that he heard Bennett say to Martin, "I will show you a thing or two," even if McDonald's testimony were received as evidence rather than taken merely as an offer of proof.

Respondent did not call Martin to testify. Respondent states on brief that it did not call Martin because of the rulings that I made when it called McDonald to testify. Be that as it may, the record now does not contain Martin's testimony, and it does not even contain an offer of proof of Martin's testimony. In Mott's memorandum to Bourg, as quoted above, Mott says that there were three other witnesses to the incident, but Respondent also did not call those individuals to testify, even to make offers of proof.

As noted above, Respondent introduced credible evidence that some things were said among Mott, Bennett, and Martin before Bennett started the recording of the second conversation. Mott (vol. 103) testified that during the afternoon of July 20 Martin came to him at the shot house. (This would have been after the end of the first conversation that Bennett recorded, at the same time that Bennett left the toolroom and went back to the worksite to retrieve his tools before being suspended for the day.) At the shot house, according to Mott, Martin reported that, after working only about an hour, Bennett had sat down on the job to eat and drink, although a storm was approaching; Mott testified that: "Martin told me that the man jumped up into his face and told him, 'I am going to show you a thing or two.'" Mott further testified that, on hearing this from Martin, he told Martin that he would come to the area and see Bennett. When Mott got to the area, in a walkway leading to the gate, he found Martin and Bennett. Mott further testified:

> And Charles Bennett proceeded to tell me, "Well, this man is firing me for eating a sandwich and drinking a drink." I said, "No, I want to know what happened between you and Martin. Why were you sitting down drinking a soft drink and eating a sandwich when you hadn't completed your work?"
>
> And [Bennett] told me, "Well, I was tired and ready to take a break."
>
> Martin said, "I asked him to go back to work. When I asked him to go back to work, he got mad and told me that, I am going to show you a thing or two, and jumped up into my face."
>
> And Bennett proceeded to say, "No, he is just firing me because I was sitting down, drinking a drink and eating a sandwich."
>
> I said, "Charles, you don't work an hour and decide to take a break."
>
> And I told Martin, I said, "Did anybody else see Charles Bennett?"
>
> [Martin] said, "Yes, I have a couple of people over there that seen this."
>
> Charles Bennett again proceeded to say something, and I said, "Charles, hold it. I tell you, I want to ask you something right now. Did you jump up into this man's face?"
>
> [Bennett said,] "Well, he had me mad."

[290] Again, Respondent's counsel, not McDonald, used the word "shook."

The transcript of the second conversation that Bennett recorded picks up at this point, as quoted above.

Bennett's Discharge—Credibility Resolutions and Conclusions

I find that Bennett wore prounion insignia from July through the date of his discharge. I find that all supervisors who had come in contact with Bennett as he worked during that time had knowledge of his prounion sympathies by virtue of that open and obvious display; this, of course, would include Mott and Martin, and also Bourg who fulminated against Bennett and the Union when (during the fourth recorded conversation) Bennett referred to his hardhat. It is to be noted that, before Bourg began his diatribe, Bennett had said nothing about the prounion insignia that had been on his hardhat. Also, on June 28 Bennett told Foreman Knight that he had voted for the Union in the June 25 Board election. From all of this I conclude that, at the time of his discharge, Respondent's supervisors had knowledge of Bennett's prounion sympathies. The element of animus, especially toward those employees who wore prounion insignia, is established throughout this decision. Therefore, the General Counsel has presented a prima facie case that Bennett's discharge was unlawfully motivated, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Bennett even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Mott testified that it was he who made the decision to discharge Bennett. Mott was asked why he discharged Bennett, and he replied, "[f]or jumping up into a foreman's face in a threatening way." On cross-examination Mott was asked and he testified:

> Q. [By Mr. Bensinger]: Was Bennett fired for taking a break?
>
> A. No.
>
> Q. Was that in any way, as far as you know, a factor in Bennett being fired?
>
> A. No, it was not a factor.

From these answers, from the recorded denials by Martin that he was disciplining Bennett because he had started a break, and from undenied testimony by Bennett that Martin and McDonald had allowed short breaks, I conclude that Bennett cannot be considered to have been loafing when he was first approached by McDonald and Martin. The fact that a storm was approaching is also rendered irrelevant by Mott's admission.

(For possible purposes of review, however, I state the following: From the tapes and the credible parts of his testimony, and the conflicts between his testimony and the tapes, I believe that Bennett had completed the blowing down portion of his first assignment, but he had not started the fine cleaning. He was waiting for the dust to settle before he did the fine cleaning, and, while doing so, he took out a sandwich and soda. Martin wanted Bennett to finish the fine cleaning, and then start sandblasting, but Bennett failed to put up the sandwich and soda immediately upon being told. Bennett delayed until both Martin and McDonald (in vile terms) told him to get back to the fine cleaning. Other employees were then sitting around, waiting for the sand pot to be filled. If he had finished the fine cleaning, Bennett would have been sitting around also; he could not have started the sandblasting work that Martin wanted to do after the fine cleaning.)

Respondent states on brief that Bennett was discharged "for insubordination and threatening Foreman Martin on July 20." According to the tape recording that Bennet made when he, Martin and Mott were together at the gate on July 20, Martin told Bennett that he was being discharged because, "you want to keep arguing with me." This was an accusation of insubordination, but it was not an accusation of threatening a supervisor. The defense that Bennett was discharged for threatening Martin, therefore, is clearly an afterthought; moreover, there is no evidence that Bennett did threaten Martin.

Mott was credible in his testimony that there was some conversation among himself, Bennett and Martin before the transcript of the second recorded conversation begins. The recorded part of that conversation starts where Martin asks Mott, "What do you want to do with him, Mott? Fire him?" There necessarily had to have been some exchange before that point. Mott was further credible in his testimony that during that unrecorded portion of the exchange, he asked Bennett, "Did you jump up into this man's face?," and Bennett replied, "Well, he had me mad." (Bennett denied ever being close to Martin, but on cross-examination Bennett admitted that his pretrial affidavit states that Martin was in his face during the exchange at the jobsite.)

I find that Bennett put his face close to Martin's face during the exchange at the jobsite. Bennett told Martin something, but on the transcript Bennett never admits what he had said, if anything, and there is no admissible, credible, nonhearsay,[291] evidence of what it was that Bennett said to Martin at the job site (before they went to the toolroom). Assuming that finger shaking could be considered to be threatening, there is also no evidence that Bennett shook his finger in Martin's face, as Respondent contends. Even in the transcribed meeting of July 20, Martin does not accuse Bennett of such; the most that Martin said in that regard was that other people, including one woman, had seen Bennett "pointing his finger" at Martin (from a distance that was not established in Respondent's case). Finger pointing may be considered rude in some quarters, but, with nothing more, it can hardly be said to constitute a threat. Also, there is no admissible, credible, nonhearsay evidence that Bennett told Martin "I'll show you a thing or two"; however, assuming that he did so, there is no reasonable basis for concluding that such a statement was a threat. Certainly, Martin does not state at any point in the transcripts that Bennett did any threatening thing or that he felt threatened by any statement that Bennett had made. Also, as the recording of the conversation among Bennett, Mott and Martin shows, Bennett was not told that he was being discharged for threatening Martin. At most, Martin told Bennett that he was being discharged for arguing with him. Mott testified that he told Bennett that he was being discharged because he was insubordinate "in a threatening way," but such a statement to Bennett does not appear in the transcript of the second conversation that Bennett recorded. That transcript picks up while Bennett's discharge is still being debated by Mott and Martin, and, if Mott had told Bennett that he was being discharged for threatening Martin, it would have been recorded. It appears that, like McDonald, Mott was testifying from memory of his memorandum that Bourg read on July 21, not his honest recollection of what had actually happened. In summary, Bennett was told that he was discharged for arguing with Martin, but he was not told that he had threatened Martin.

Further in regard to the defense that Bennett somehow threatened Martin, it is again to be noted that Respondent did not call Martin to testify. In *International Automated Machines*, 285 NLRB 1122 (1987), the Board noted the "familiar rule" that:

> [W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. (2 Wigmore, Evidence, § 286 (2d ed. 1940); McCormick, *Evidence*, § 272 (3d ed. 1984). See *Greg Construction Co*., 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974).)

Because Respondent did not call Martin to testify, even to make an offer of proof, I infer that, had he testified, Martin would have at least admitted that Bennett did not threaten him, nor did he feel threatened by Bennett on July 20. Finally, there was no evidence, or offer of evidence, that Bennett told Martin "I'll get you," which is what Bourg accused Bennett of during the fourth recorded conversation. For all of these reasons, therefore, I find that the assertion that Bennett did something that was threatening to Martin is a mere afterthought, and Bennett did not threaten Martin; nor did Bennett say or do anything that would reasonably have been considered to be a threat to Martin.

Respondent also did not prove that Bennett was insubordinate. On the tape of the discharge, Martin accuses Bennett of being insubordinate by accusing him of arguing over the order to stop his break and get back to work. This accusation, however, is not evidence. There is no evidence, or offer of evidence, that Bennett told Martin that he would not, despite Martin's order, discontinue his break. Also, although I do not believe that Bennett put up his sandwich and soda as soon as he was first told to do so, there is no evidence of any more than a momentary delay while Bennett complained of being unfairly treated. Finally, even if McDonald were credited, the most that was shown was that Bennett was rude and insolent, but there is nothing that can be fairly characterized as insubordination, especially when one considers the stream of curses from Martin and McDonald to which Bennett had just been subjected.

I now consider the General Counsel's alternative contention that, even if he engaged in some degree of insubordination, Bennett was treated disparately because other employees were shown to have been insubordinate, but they were only issued warning notices. The General Counsel introduced several warning notices that demonstrate that this contention is valid. I here list several warning notices that the General Counsel placed into evidence. Before beginning this listing, I must note that immediate discharge offense-1 under the Avondale Employees' Guide is "Insubordination. Willful disobedience of authorized instructions issued by supervision." Several of the following warning notices quote this language, but the supervisors do not mention "Immediate Discharge Offense-1." This is because, obviously, the employees are being warned, not discharged, for being insubordinate.[292] Apparently feeling constrained to check something, the supervisors checked the boxes for "Other" Major offense under the Avondale Employees' Guide, or they

[291] Accusations on the tapes, of course, are hearsay. They become admissible as evidence of conduct only if the accused person agrees that the accusation is valid.

[292] Of course, on Respondent's warning notice forms, there are no boxes to be checked for immediate discharge offenses, obviously because it would be illogical to warn employees against conduct for which they are being discharged.

checked the clearly inapplicable box for major offense-1 ("Unexcused absences of three (3) or more consecutive working days"); and, in two cases, general offense-4 (wasting time) or "Other" general offense is checked by the supervisor for insubordination. In all such cases, of course, the gravamen of the offenses is insubordination. I include in this listing only those warning notices issued to employees who, it appears from the evidence, were not also discharged.[293] I determine that the employees were not discharged because each of these warning notices shows on its face that the employee was not also discharged for his offense of insubordination (by being only a warning notice for a general offense under the Avondale Employees' Guide, or being a "final warning" or other remark) or the existence in the exhibits of other evidence that the employee was not discharged (such as subsequent warning notices).

The insubordination warning notices to paint department employees other than Bennett include: (1) On December 14, 1990, paint department employee 5384 was issued a warning notice signed by Bourg for: "Failure to comply with instructions given by supervisor." (2) The same employee was issued four more warning notices between December 14, 1990, and October 1, 1991, at which time he was issued a warning notice signed by Bourg for: "Willful disobedience of authorized instructions by supervisor. Employee was told to do a certain job. Employee argued with the foreman but eventually did the work. This type of action will not be tolerated by this dept. You are hereby warned. Final Warning."[294] (3-5) On February 1, 1991, paint department employees 1697, 10056, and 471 were each issued a "Final Warning" because they: "Refused to do the job assigned you by a supervisor. Signed out and went home." (Employee 471, however, received two more warning notices during the following year and she still was not discharged, a fact reflected by yet another warning notice.) (6) On June 19, 1991, paint department employee 2914 was issued a major offense-2 (intentional negligence) warning notice for "Failure to follow instructions by supervisor." (Bourg, the department superintendent, signed this warning notice. Presumably he would not have bothered to issue, and retain, a warning notice if the employee was also being discharged.) (7) On August 22, 1991, paint department employee 1001 was issued a warning notice by Bourg and Mott for: "Willful disobedience of instructions issued by supervisor. Employee refused to work under the foreman she was assigned to. She reported to another foreman of her choice for work and informed this foreman that her former foreman had sent her to him. She lied to the foreman." (8) On the very next day, August 23, 1991, employee 1001 was issued another warning notice by Bourg and Mott for. "Willful disobedience of instructions issued by supervisor. Employee refused to work under the foreman she was assigned to. You are not to report to any other foreman unless notified by your supervisor. If you continue to do this, you will be terminated. Final Warning." (Employee number 1001 was issued several subsequent warning notices for violations that included reporting late or leaving early, and she was still not discharged.) (9) On September 10, 1991, paint department employee 4747 was issued a warning notice, signed by Bourg, that states as the reason for the warning: "Willful disobedience of authorized instructions issued by supervision." (Bourg, the department superintendent, signed this warning notice. Presumably he would not have bothered to issue, and retain, a warning notice if the employee was also being discharged.) (10) On February 18, 1992, paint department employee 1019 was issued a "Final Warning" for: "Insubordination. Willful disobedience of authorized instructions issued by supervisor. Employee refused to pick up trash between 3:00 and 3:30 p.m. Violation of any other Company rules or regulations will result in your termination." (11) On March 11, 1992, paint department employee Arthur Bradford was issued a general offense-12 (safety) warning notice because: "Employee refused to put a fire out after his foreman [Pierre] told him to." (Aside from being only a general offense warning notice, Bourg also signed and retained it, thus indicating that the employee was not discharged.) (12) On June 23, 1992, paint department employee 732 was issued a major offense-2 warning notice that stated: "Failure to follow supervisor's instructions given. Employee is given a work assignment and constantly complains and argues about the assignment[s] with foreman before doing work assigned." On the same day, this employee was issued a general offense-4 warning notice for wasting time. During the preceding 7 months, this employee had also received two warning notices, one for a safety violation and one for sleeping, which is immediate discharge offense-2 under the Avondale Employees' Guide.[295] (13) On December 4, 1992, paint department employee 3082 was issued a general offense-4 (wasting time) warning notice for being absent from his work place for 28 minutes, then: "When questioned about whereabouts, employee used profanity toward the foreman (W416) [Alvin Tate] and refused to answer for his whereabouts. Violation of any other Company rules or regulations will result in your termination. Final Warning." (14) On January 27, 1993, paint department employee 774 was issued a general offense warning notice (marked "Other") by Mott, which notice was signed (and retained) by Bourg for: "Failure to follow instructions issued by foreman. Employee refused to get off a bucket while [he was supposed to be] working." (15) On May 12, 1993, paint department employee 2318 was issued a warning notice signed by Bourg stating: "You are hereby notified that you have willfully disobeyed [an] authorized instruction issued by your supervisor. Should you continue to do this, immediate disciplinary action will be taken. Final Warning." These warning notices for insubordination, continuing chronologically until just weeks before Bennett, at most, momentarily argued with Martin, show that employees who did much worse, and who had prior bad work histories (including the commission of immediate discharge offenses under the Avondale Employees' Guide), were not discharged for their insubordination; rather, again, they were only issued warning notices. Respondent offered no surrebuttal why Bennett was discharged and these other paint department employees were not.

Also the General Counsel introduced warning notices that were issued in the 1990–1994 period for insubordination by Respondent's other departments, and it appears from the evidence that these employees were not also discharged for the offenses cited: (16) On January 28, 1991, shipfitting department employee John L. Smith was issued a warning notice that

[293] The General Counsel offered several more insubordination warning notices, but I cannot tell from the face of them, or from other documentation, that the employees were not also discharged for the offense listed.

[294] Bennett had no prior warning notices at the time of his discharge.

[295] This warning notice is also mentioned in the case of alleged discriminatee Jose Aguilar, infra.

tracked immediate discharge offense-1 of the Avondale Employees' Guide and was worded: "Insubordination, willful disobedience of authorized instructions issued by supervision. Final warning." (17) On January 28, 1991, shipfitting department employee 4310 was issued a warning notice that was worded identically. (18) On May 16, 1991, shipfitting department employee Calvin Willis was issued a warning notice for "Deliberate failure to comply with instructions given by a supervisor in the performance of his duties. Note: Any further offense against Avondale policies and procedures will be grounds for termination." (On the warning notice, the supervisor circled the box for major offense-12, interference with plant guard or other official in the performance of "his" duties.) (19) On July 9, 1991, outside machinist Therron Comeaux was issued a warning notice stating: "Insubordination, not following instruction to job assignment as issued by supervisor. Final Notice." (20) On June 12, 1992, machine shop employee Alexandra Barrera was issued a major offense-2 (failure to complete job) warning notice for outright refusals to perform an assignment; the notice concludes, "and I told her she will get a citation for coercing." (21) On November 3, 1992, Ships Operations Department General Foreman Robert Olmstead wrote an extensive memorandum to Jeffery Boudreaux, the superintendent of the department. In the memorandum Olmstead details a litany of insubordinate conduct by employee Andy Anderson. The memorandum recites that Anderson had refused to do certain jobs and lied to supervisors about his assignments from other supervisors. Attached to the memorandum were memoranda from other supervisors to whom Anderson had been insubordinate. Olmstead's memorandum concludes that: "Andy violated one general (4) [General offense-4 under the Avondale Employees' Guide], two majors (2 &12), and the Immediate Discharge Offense (1) all because of an attitude. Andy Anderson, Clock No. 4638, gives me no choice but to discharge him." Olmstead signed the memorandum, but, below that, is printed, presumably by Boudreaux: "Andy was not discharged; he was given an official warning notice." Anderson was, indeed, issued a warning notice, with the boxes checked for general offense-4 (wasting time) and major offense-2 (failure to complete job assigned), and major offense-12. The warning notice concludes; "Further repeat of this offense will result in his immediate discharge." (22) On January 15, 1993, operators department employee Joey Ockman was issued a warning notice that was worded: "Insubordination, willful disobedience of authorized instructions issued by supervision. Final warning." (And Ockman subsequently received a warning notice for counterfeiting a company pass.) (2) On June 7, 1993, shipfitting department employee Carolyn Ratcliff was issued a warning notice for: "Insubordination. Employee arguing with supervisor over job assignment and what is required of employee to do. Continue to do so will result in your discharge." (23) On April 18, 1994, electrical department employee Bennie Jackson was issued a warning notice that was also worded: "Insubordination, willful disobedience of authorized instructions issued by supervision. Final warning." (24) On April 18, 1994, electrical department employee Bennie Jackson was issued a warning notice that was identically worded. Like the cases of the paint department insubordination warning notices, Respondent offers no evidence, or explanation, why these employees of other department's, some of whom had prior records of warning notices, including final warnings, were issued warning notices for insubordinate conduct but Bennett was discharged.

In summary, Mott testified that Bennett was discharged for threatening Martin, but there is no evidence that Bennett threatened Martin. Also, Respondent contends that Bennett was insubordinate to Martin at the jobsite (not in the toolroom or thereafter, it is to be remembered), but there is no evidence that Bennett was insubordinate. To the extent that Bennett could possibly be found to have been insubordinate, the General Counsel has shown that a significant number of other employees engaged in worse conduct, but they were only given warning notices; they were not discharged, as was Bennett. I therefore find that Respondent has failed to show that Bennett engaged in the misconduct it alleges to have been the basis for the discharge, and Respondent has failed to demonstrate that Bennett would have been discharged even absent his union activities. The General Counsel's prima facie case of unlawful discrimination against Bennett has therefore not been rebutted. Accordingly, I find and conclude that, by the July 20, 1993, discharge of Bennett, Respondent has violated Section 8(a)(3).

h. *Joseph Simpson's discharge for insubordination*

Joseph Simpson (vol. 18) was employed as a fiberglass mechanic in the shipfitting department until he was discharged on March 9, 1994.[296] The second complaint, at paragraph 143, alleges that Simpson's discharge violated Section 8(a)(3). The General Counsel contends that Respondent discharged Simpson because of his known union activities and expressions of sympathy which included his wearing prounion insignia, his refusing a supervisor's request to campaign against the Union, and his once displaying before a supervisor a handbill that he had received from the Union. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Simpson may have held at any relevant time. It further answers that Simpson was discharged on March 9 solely because he had failed to complete a job assignment on March 8 and, when his supervisor presented him a warning notice for that conduct on March 9, Simpson was insubordinate. The General Counsel replies that Simpson completed the March 8 assignment as expeditiously as possible under the circumstances and he was not insubordinate toward the supervisor when the warning notice was presented. Ultimately, I find and conclude that Simpson was loafing on March 8, but that loafing was not the reason for the discharge, and the reasons offered for the discharge are false and pretextual; I therefore conclude that Simpson was discharged in violation of Section 8(a)(3).

Simpson worked as a first-class painter until June 7, 1993, when he was assigned to the shipfitting department. In the shipfitting department, Simpson worked under Anthony Bishop, a foreman, and one Arthur Slocum, a supervisor under Section 2(11) of the Act.[297] Simpson testified that he began wearing a "Union-Yes" sticker on his hardhat, and began accepting union handbills, about 2 weeks before the June 25, 1993, Board election. Simpson testified that in the 2-week period before the election, Bishop spoke to him three times about his "Union-Yes" sticker or the Union. (The General Counsel offered Simpson's testimony about these three occasions solely as evidence of supervisory knowledge of Simpson's prounion sympathies,

[296] All dates mentioned in Simpson's case are in 1994, unless otherwise indicated.

[297] Respondent's witnesses described Slocum as a leadman; however, in its answer to the second complaint, Respondent admits that Slocum was classified as a foreman and that he was a supervisor within the meaning of Sec. 2(11) of the Act. Slocum did not testify.

not as evidence of 8(a)(1) violations.) On the first such occasion, according to Simpson:

> Me and Mr. Bishop was walking on the dock, and he passed me, and he said, "You ought to take that off your hat, take that thing off your hat." . . .
>
> I didn't say anything. I kept on walking and so did he.

Simpson testified that on another occasion in that period, Bishop saw him reading a union handbill (apparently on working time). Bishop told Simpson that he could get into trouble for reading "that Union flyer." On the third such occasion, according to Simpson:

> [Bishop] said, "You know about unions, Joe; you was in the Union. You know the Union can't do nothing for you over here at Avondale. You all will end up like those people at Bayou Steel [a struck, and closed, plant in the area] with no job. And he asked me, "Why don't you tell the fellows that the Union can't do nothing for them."
>
> I told him, " I couldn't do that. I let everybody make their own mind up about their family. I know what is best for my family."

Bishop denied this testimony, but I found all of it credible.

The General Counsel relies on other testimony by Simpson as support for a 8(a)(1) allegation. Simpson testified that, in February,[298] some employees posted a union handbill in an office area that Bishop used. When Bishop entered the office, according to Simpson: "[Bishop] wanted to know who had put that up there on the wall, that Union flier. . . . No one said anything. . . . Mr. Bishop then tore it down." Based on this testimony by Simpson, paragraph 78 of the second complaint alleges that Respondent, in violation of Section 8(a)(1), by Bishop, interrogated its employees.[299] Simpson's testimony was credible as far as it went, but Simpson was not asked what words Bishop used to express what he "wanted," and I can perceive no coercive impact that may have been wrought by Bishop's "wanting" to know who posted the handbill. That is, Simpson's conclusionary testimony cannot support the finding of a violation. I shall therefore recommend dismissal of this allegation of the complaint.

"Over-spray" is the misting effect that some painting at the plant has; some employees had complained that over-spray had fallen on their automobiles and damaged the finishes. Simpson further testified that on March 3, as the employees gathered in a shipfitting department office, he and other employees were discussing a union handbill that mentioned over-spray and a scheduled union meeting. Simpson testified that Bishop entered the room just as he was saying to the group that: "I know I will be going to this meeting, because they be talking about over-spray, and I had over-spray on my car." Simpson further testified that within the next few minutes Slocum gave him the day's assignment. Simpson openly wrote the assignment on the handbill which he placed on a table directly before Slocum. The original of the handbill was placed in evidence. As noted, Slocum did not testify. On direct examination Bishop (vol. 84) was shown the handbill and asked if he remembered seeing Simpson with it; Bishop testified that he could not. This was less than a denial of Simpson's testimony. I found Simpson's testimony about the events of March 3 to be credible.

Simpson's Discharge—the General Counsel's Evidence

At the time of his discharge, Simpson was a fiberglass mechanic on a fiberglass-hull ship, a mine-sweeper. The ship was under construction in the water (as opposed to being propped up on land). Because the hull and main infrastructure of the mine-hunter are fiberglass, things cannot be bolted or welded to it as they can on metal-hull boats. Therefore, when supports are needed for appliances (or other necessities), the hull is built up, or embossed, with other fiberglass. To construct these embossments, fiberglass is layered in cloth-like sheets onto the hull. The procedure for obtaining and laying fiberglass is this: After a fiberglass mechanic receives his assignments from a foreman, he grinds and sands the areas where the sheets of fiberglass are to be placed. (Sometimes, the mechanic has a helper to complete this part of the job.) The mechanic measures the areas to receive embossments, leaves the ship, and goes to a fiberglass cutting room that is in a building on the dock. At the cutting room, the mechanic requests the number and sizes of fiberglass sheets that he will need. After the sheets are cut to order, the mechanic takes them to an adjacent part of the building where liquid resin is dispensed to him, the amount being determined by the weight of the fiberglass. The resin is coated between the fiberglass sheets to promote bonding. After receiving the fiberglass and resin, the mechanic returns to the prepared area and lays the sheets. There are usually two workers in the cutting room and two in the resin room. At the beginnings of shifts, cutters first cut only a percentage of the sheets that a mechanic requests. This procedure allows several fiberglass mechanics to get started early in the shift on the different jobs on the ship. Then, as the mechanics finish laying their initial allotments, they return to the cutting room for the remainder of the sheets that they had requested. (The alternative to this procedure would be to have some mechanics waiting, possibly for hours, while other mechanics get all the fiberglass that they need for a shift.) Because of the dust and fumes that are created by the fiberglass installation processes, fiberglass work is done principally on the second shift, from 3:30 to 12 o'clock, and Simpson did work on that shift. The established meal period on the second shift is from 8:30 until 9 p.m.

Simpson testified that on March 8 Slocum gave him and a helper two jobs.[300] The first job was to lay five pieces of fiberglass at one point on the boat. The second was to start on a project that had a total of 140 pieces. Simpson testified that he expected to finish all 5 pieces of the first job, and about 70 pieces of the second job, on that shift. Simpson measured the jobs and went to the cutting room and ordered all 145 pieces of fiberglass, asking that the 5 pieces for the first job be cut first. Simpson testified that he received the five pieces for the first job about 6 p.m., and he completed the first job, including some cleanup work, about 6:30 p.m. Simpson testified that Slocum was in his work area when he finished the first job; he told

[298] Actually, Simpson testified that he was referring to February 1993; however, there was no open organizational effort in February 1993, and Simpson was not in the shipfitting department until June 1993; therefore, Simpson was necessarily referring to 1994.

[299] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Simpson, as well as the charge in Case 15–CA–12171–1.

[300] On brief, the General Counsel contends that the helper was Clarence Stokes. Although Simpson testified that Stokes was present, he did not testify that Stokes was his helper. Bishop credibly testified that the helper was J. C. Murphy. Neither Stokes nor Murphy testified.

Slocum that he would go back to the cutting room to get more fiberglass at 7 p.m., and Slocum agreed. (No explanation for the 30-minute delay was offered.) When he got to the cutting room, none of the fiberglass for the second job was ready; also, the cutting room employees had just finished a bolt of the fiberglass cloth, and a new bolt had to be loaded. Simpson helped the "two fellows" load the bolt. (Simpson did not testify about how long it took to load the bolt.) Simpson left the cutting room and went to the resin room because "I was informing the fellow as to the material that I was going to be getting, so he would have a general idea as to, you know, some weight of what I would be getting for resin." Simpson further testified that he returned to the cutting room "about" 8 p.m., and the first 70 pieces for the second job were then ready for him. When he got back to the resin room with the cut fiberglass, there were others in line before him, and he had to wait his turn. While waiting his turn in the resin room, Simpson met Slocum who had come there. According to Simpson, he explained that he had gotten his fiberglass, and he was still waiting for resin, but then it was approaching meal time. Slocum agreed that Simpson should take his meal before he went back to the ship. (Whether Simpson then went to eat, or continued to wait for resin until the 8:30 p.m. lunchtime, was not asked.) After finishing lunch at 9 p.m., Simpson returned to the resin room; he still did not get his resin immediately because "I came back to the resin room and they had the people that was before me about four or five fellows, and they was getting these materials weighed up and getting their resin, and they only had one person in there at that time. There would normally be two."

Simpson testified that he returned to the ship about 9:10 p.m.. Shortly after he arrived, Bishop arrived and asked if the five pieces of the first job was all that Simpson had gotten done since the start of the shift; Simpson replied that it was. Bishop accused Simpson of loafing. Simpson replied that he could not lay sheets of fiberglass that he did not have, and "[t]hat is all I had to lay." Bishop responded that he should fire Simpson; Simpson again stated to Bishop that the five pieces of the first job was all that he had to lay until that point and that "I didn't have time to argue with him." Simpson then turned and went to work. Simpson laid the 70 sheets that he had secured for the second job by 11:30 p.m. Then he went to the dock, in the area of the resin room, to clean certain implements before the end of the shift.

At the dock, Simpson was approached by Bishop who presented Simpson with a warning notice that was signed by Bishop (as "Supv. or Department Head") and Slocum (as "Witness"). The box for major offense-2 of the Avondale Employees' Guide is circled; the reason for warning space is completed: "Employee intentionally neglected to complete job assigned by foreman." Simpson read the warning notice and handed it back to Bishop stating that he would not sign it. After that, according to Simpson:

> He [Bishop] said, "Well, you are going to get a copy anyway."
>
> And I said, "How? Are you going to shove it into my pocket?"
>
> He said, "Yes."
>
> I said, "I don't think so. That is why they need a union around here, so you all can't do what you all want."
>
> He walked away, and I went back to the resin room and finished my cleanup and what I was supposed to do before the shift was over.

Simpson testified that Bishop did not tell him during that evening of March 8 that he was discharged. When he arrived the next day, however, he was met by Bishop and one Oliver Gills (who was not otherwise identified). Bishop told Simpson that he was terminated; Simpson did not testify that he asked for the reason. Simpson left the plant after picking up his personally owned tools.

Simpson's Discharge—Respondent's Evidence

Bishop (vol. 84) testified that there was only one job assigned to Simpson on March 8; it consisted of laying about 100 pieces of fiberglass; he and Slocum gave the assignment to Simpson and the helper at 3:30 p.m., the start of the shift. Bishop testified that he expected Simpson to have completed about one-third of the work by the end of the shift. About 5:30 or 6 p.m., Bishop went by Simpson's work site and saw that five pieces of fiberglass had been laid, and all other areas had been prepared for the laying of fiberglass, but neither Simpson nor the helper was there. Bishop testified that he assumed that they had gone to get more materials. About 9 p.m. Bishop returned to the worksite where he saw that no additional work had been done since his first inspection about 6 p.m. Bishop asked Simpson why he had not gotten more work done, and Simpson "told me that he had been waiting on glass to be cut." Bishop went to the cutting room and spoke to the attendants, Gary Lenfest and John Walsh. Lenfest told Bishop that Simpson's order had been completed by 6 p.m.; Bishop checked the paperwork that the cutting room creates (and retains for about 1 week), and the paperwork also reflected that the order had been completed at 6 p.m. Bishop returned to Simpson. According to Bishop:

> I told Mr. Simpson that I had checked [with] the cutting room attendants, and they had told me that he had received all of his glass at 6:00 . . . And I told him that he is not performing to the best of his ability, that he is not doing anything, and that I wasn't going to tolerate it.
>
> . . . .
>
> He said that he didn't care how much work he had done. . . . [and] that I could do whatever I wanted to do.
>
> . . . .
>
> [A]nd I told him that it was my full intent to write him a warning slip for his lack of production for that day. . . .
>
> And I went to the office, and I wrote his warning slip.

Bishop further testified that he returned to Simpson with the above-quoted warning notice. According to Bishop Simpson refused to accept the warning notice and:

> Then he also said that he was going to go to the Navy and tell them what we were doing out there. And I don't know what he meant by that.
>
> But then I asked him if he was threatening me or the Company. And he said, "No, I am just telling you what I am going to do."

On direct examination Bishop testified to nothing further that Simpson said when the warning notice was presented. Bishop denied that Simpson said anything about the Union during the exchange.

Bishop testified that after Simpson made his reply about going to the Navy, he then thought Simpson should be discharged,

but he did not then know the main-yard procedures for terminating an employee. (Bishop had transferred to the main yard from another yard about a year before, and there is no evidence that he had been involved in any main-yard discharge before Simpson's.) He wanted to call Shipfitting Department Superintendent Richard (Red) Wallace, but it was then nearing midnight. From his home the next morning, Bishop made telephone contact with Wallace who was then at the plant. Bishop was asked and he testified:

> Q. And what did you say in that conversation, that you recall?
>
> A. I told him what the situation was, that I had a problem with Mr. Joe [Simpson], that he was insubordinate towards me, and that he was exhibiting lack of production.
>
> Q. And what, if anything, do you recall Red Wallace saying?
>
> A. Yes. Red Wallace told me that when Mr. Joe came in that afternoon that—when I got to work, that when Mr. Joe came in that afternoon, to ask for his badge and tell him that he no longer works for Avondale, that he has been terminated.
>
> Q. Was there anything else that was said in this conversation that you recall?
>
> A. No.
>
> Q. Do you recall whether or not you told Red Wallace that Joe Simpson said he was going to go to the Navy in that conversation? . . .
>
> A. Yes. I did tell him that. I sure did. I do recall that.
>
> Q. Was there anything else you recall saying to Red Wallace in that conversation?
>
> A. No.
>
> Q. Do you recall whether or not you told Red Wallace that Joe Simpson had said he didn't have to work for someone who looked like you? . . .
>
> JUDGE EVANS [To the witness, after objections and a ruling:] I need to know what you said out loud.
>
> THE WITNESS: I told him that I had a problem with [Simpson] and that—yes, that he did—he made some comments about the Navy, you know, going to the Navy, and that he didn't have to—he wasn't worried about how much work he had had done and that he wasn't worried about anybody that looked like me. . . .
>
> [T]hen he [Wallace] said, "Well, as far as I am concerned, he is terminated. . . . When . . . he comes in this afternoon, ask him for his badge and tell him he no longer works for Avondale, that he has been terminated."

(Bishop's memory had been exhausted, and the leading was done in proper form, but it was, nevertheless, leading, as I discuss, infra.) Bishop further testified that, when he arrived at work before the shift started on March 9, he asked Wallace if he was sure that he wanted Simpson discharged; Wallace replied that he was. When Simpson arrived at work about 3:30 p.m. on March 9, Bishop approached Simpson, asked for his badge and told Simpson that he was discharged. According to Bishop, Simpson stated again that he would go to the Navy; Simpson then added that he could get Bishop discharged if he did go to the Navy.

On cross-examination, Bishop testified that he and Wallace made the decision to discharge Simpson together, but Wallace had the "final say-so." When asked what the reason for the discharge was, Bishop answered "insubordination." When asked what that consisted of, Bishop testified:

> [T]he fact that he told me he didn't care how much work he got done, he wasn't worried about anybody that looked like me, and plus the fact that he told me he was going to go to the Navy and tell the Navy what we been doing out there.

(That is, on cross-examination Bishop testified that the things that he had told Wallace in their conversation during the morning of March 9 were true.) Bishop testified that he did not know what Simpson meant by saying that he was not worried about anybody who looked like him, but, "I felt like he was objecting to my authority." Finally on cross-examination, Bishop acknowledged that the helper did not receive a warning notice on March 8, for lack of production or anything else.

Bishop and Simpson are members of different races. As I stated at the hearing, I conclude that, if an employee of one race states to a foreman of a different race words to the effect, "I don't have to listen to anybody who looks like you," the employee is making a statement that the foreman need not be listened to because of his race. Clearly, such a statement, if made, could be grounds for valid discharge. When he testified, Simpson denied telling Bishop that he did not care what work that he got done; he denied telling Bishop that he was not worried about what anybody that looked like Bishop did; and he denied telling Bishop that he would go to the Navy and cause problems.

Respondent called cutting room employee Lenfest (vol. 84) who testified that, between 5 and 6 p.m. on March 8, Bishop came to the cutting room and asked when Simpson had picked up his fiberglass. According to Lenfest: "I told him [Bishop]—his [Simpson's] glass was still there, so he hadn't come got it. I believe I gave him a few pieces to start with, but the majority of his glass was ready for him." Lenfest testified that it was not unusual for Bishop to come to the cutting room and ask when employees had received the fiberglass that they had ordered.

Wallace (vol. 79) testified that, in the telephone conversation with Bishop on the morning of March 9, Bishop told him of Simpson's conduct. Wallace testified that Bishop told him that Simpson had said that he would work no harder, that he would go to the Navy, and that "the black man didn't have to run any more, and he didn't have to take orders from Tony or from anybody who looked like Tony." Wallace further testified that Bishop told him that he had already discharged Simpson, and Bishop asked Wallace if he had done the right thing; Wallace testified that he told Bishop that he had. To process Simpson's discharge, Wallace completed the ASI-22 (discharge) form. In the space for "Explanation For Action," Wallace wrote: "Intentional negligence, insubordination and loafing during working hours. Employee made threatening statements towards the Company."

Simpson's Discharge—Credibility Resolutions and Conclusions

Simpson was credible in his testimony about wearing prounion insignia, and he was credible in his testimony of what Bishop said about it. Further, as I have noted, Simpson was credible in his testimony about refusing Bishop's request that he campaign against the Union. Finally, Simpson was credible in his testimony about announcing that he would attend a union meeting and displaying a union handbill in front of Bishop and

admitted Supervisor Slocum just a few days before his discharge. I find that Respondent's supervisors had knowledge of Simpson's prounion sympathies at the time of his warning and discharge. The element of animus, especially toward those employees who wore prounion insignia, is established throughout this decision. Therefore, the General Counsel has presented a prima facie case that Simpson's discharge was unlawfully motivated, and the defenses for the discharge must be addressed.

I do not believe Simpson's testimony that on March 8 he received no fiberglass until 6 p.m., or 2-1/2 hours after the shift started. Respondent has a system (initial partial distribution of the fiberglass to all of the mechanics) designed to prevent exactly that sort of delay. Moreover, Lenfest was credible in his testimony that Simpson received an initial portion of his fiberglass early in the shift, and the rest of his order for the day was ready by 6 p.m., but Simpson simply did not pick it up. I do not believe Simpson's accounts of delays at the cutting room and the resin room; but, even in his account, there are unexplained periods of delay.

Bishop testified that when he told Simpson that his 2-hour failure to get anything done could not be attributed to delays by the cutting room personnel, Simpson replied that he did not care what amount of work that he got done. This testimony was given by Bishop without leading, and I credit it. (Moreover, Respondent introduced unrebutted, and credible, evidence that Simpson had previously made a statement to a meeting of all of the fiberglass employees and supervisors that he would not work any harder than he wanted.) Bishop further testified that, when he presented Simpson with the above-quoted warning notice, Simpson told Bishop that he was going to go to the Navy and inform the Navy of unspecified misconduct by Respondent. This much of Bishop's testimony was also elicited in nonleading fashion, and I credit it. I further believe, and credit, Bishop's denial that Simpson mentioned the Union during the exchange in which the March 8 warning notice was presented.

Although he came around to it on cross-examination, Bishop did not testify on direct examination that, when he presented the warning notice to Simpson, Simpson said that he did not have to worry about anybody who looked like Bishop. Had this racial remark (as I shall call it) been made by Simpson, it would have been impressive, if not shocking, to Bishop, so much so that Bishop would not have omitted it from his direct examination. Bishop did testify on direct examination that he told Wallace, in their telephone conversation of March 9, that Simpson had made the racial remark, but Bishop did so only after word-for-word leading by counsel. Again, if Simpson had made such a remark, Bishop would have so testified on direct examination, and Bishop would have testified that he told Wallace about it without the leading that he required on direct examination. I credit Simpson's denial that he told Bishop that he did not have to worry about supervisors who looked like Bishop.

I further do not believe that Bishop told Wallace that Simpson made the racial remark; if he had, again, Bishop would not have needed leading to so testify. I further discredit Wallace's testimony that Bishop told him of the alleged racial remark. Bishop and Wallace squarely conflicted in their testimonies about who made the decision to discharge Simpson: Bishop testified on direct examination that he called Wallace and reported only what had happened, without making a recommendation. (On cross-examination, Bishop first testified that he made no recommendation to Wallace about what to do with Simpson; then he testified that he made a recommendation to discharge Simpson.) Bishop testified that Wallace responded to his report: "[A]sk him for his badge and tell him he no longer works for Avondale, that he has been terminated." Bishop further testified that, when he reported to work on the afternoon of March 9, he checked with Wallace to make sure that Wallace still wanted Simpson to be discharged, and Wallace replied that he did. Wallace, however, testified that Bishop told him, on the evening of March 8, that he had already discharged Simpson. The conflict, and Wallace's embellishment that Bishop reported that Simpson told him that "the black man didn't have to run any more," lead me to believe that neither supervisor was telling the complete truth about what was said when Bishop reported the alleged misconduct of Simpson, and my conclusion that Simpson did not make the racial remark is thusly fortified.

In summary, I find that there were two exchanges between Simpson and Bishop on March 8 after Bishop had checked with the cutting room; in the first, when Bishop confronted Simpson with what Lenfest had said, Simpson replied that he did not care how much work he had gotten done; in the second, when Bishop returned with the warning notice, Simpson stated that he was going to the Navy, but he did not state that he did not have to worry about persons who looked like Bishop. Finally, I find that in their exchange of March 9, when Bishop told Simpson that he was terminated, Simpson repeated that he would go to the Navy, and at that time Simpson added that he could have Bishop discharged.

On the warning notice that Bishop presented to Simpson, after Simpson told him that he did not care how much work he had gotten done, Bishop circled major offense-2 of the Avondale Employees' Guide which is: "Intentional negligence, inefficiency or failure to complete job assigned." In the space for reason for warning, Bishop wrote on the notice: "Employee intentionally neglected to complete job assigned by foreman." the General Counsel argues that Bishop testified on cross-examination that he had not even expected Simpson to complete the job on March 8; he expected Simpson only to lay about one-third of approximately 100 sheets during the shift. From this factor the General Counsel argues that the warning notice was invalid, if not discriminatory, itself. The General Counsel argues that Simpson was, at worst, guilty of general offense-4, wasting time. I reject this argument. Simpson's telling Bishop that he did not care how much work that he got done was an expression of intention not to do more work than the employee wanted to do. It would not be unreasonable for Bishop to invoke the offense which included an "intentional" offense, even if the "neglected to complete job" notation did not precisely fit the circumstances because Bishop had not expected Simpson to complete the entire job during the shift. Bishop had expected Simpson to get at least something done between 6:30 and 8:30 p.m.; Simpson got nothing done; and Bishop confirmed (with Lenfest) that Simpson's expressed reason for not getting anything done was false. Therefore, Bishop could reasonably conclude, and I find that he did conclude, that Simpson had been intentionally loafing, an offense best encompassed by the language of major offense-2 of the Avondale Employees' Guide.

Bishop admitted that the helper received no warning notice on March 8; Bishop further admitted that he had never seen the helper wear prounion insignia. From these admissions, the General Counsel argues that Simpson must necessarily have been discriminated against because, if Simpson had been loaf-

ing, the helper must have been loafing also. This argument assumes that the helper received no assignments other than helping Simpson, something that the General Counsel did not prove. For all of these reasons, therefore, I would not find a violation of Section 8(a)(3) in the issuance of the March 8 warning notice, even if the allegation had been made.

The discharge of Simpson, however, raises different considerations. The testimonies of Bishop and Wallace conflict, and are incredible, on many accounts. Taken at best, however, Bishop and Wallace testified that Simpson was discharged because of (1) his loafing, (2) his statement that he did not care how fast he worked, (3) his threat to go to the Navy when he was presented with the warning notice, and (4) his racial remark when he was presented with the warning notice. These reasons being couched in the conjunctive, all must have been proved for Respondent to have presented a *Wright Line* defense.[301]

Simpson's statement that he did not care how fast he worked was made before he was issued the warning notice, and it was part of the reason for the warning notice, and the statement was necessarily punished by that warning notice. Therefore, although Simpson made the statement, it, as well as his loafing, was punished in the warning notice, and the conjunctive defense fails on that account. Moreover, Simpson's statement that he would go to the Navy was simply not an offense, as Production Vice President Michael Simpson admitted on cross-examination (vol. 139). This is another failure of the conjunctive defense. Finally, the fourth leg of the conjunctive defense has already fallen by my finding, above, that the reason is false; Simpson did not make the racial statement that Respondent attributes to him.

The injection of this false element into the litany of reasons for the discharge shows its pretextual nature. More evidence of pretext is shown by Wallace's testimony that Simpson was discharged, in part, because Simpson had told Bishop that Simpson could cause Bishop to be discharged when he went to the Navy. Of course, Bishop testified that this last remark was made only after he had told Simpson that he was discharged, and it could not have been a part of the reason for Simpson's discharge. That is, Simpson actually did loaf, he said that he did not care about how much work he got done, and he said that he would tell the Navy about things that Respondent was doing. But, if in their own minds, those three reasons were sufficient cause for Simpson's discharge, Bishop and Wallace would have listed only those three reasons. Instead, Bishop (after leading) injected the pretext of the racial remark, and embellished upon it, demonstrating that all of the reasons that Respondent offered for Simpson's discharge were pretextual.

As Respondent has failed to show that Simpson was discharged for nonpretextual reasons, Respondent has failed to demonstrate that Simpson would have been discharged even absent his known prounion sympathies. The General Counsel's prima facie case of unlawful discrimination against Simpson has, therefore, not been rebutted. Accordingly, I find and conclude that, by the March 9, 1994 discharge of Simpson, Respondent violated Section 8(a)(3).

[301] Further demonstration of the conjunctive nature of the reasons advanced for Simpson's discharge is found in the language that Wallace used on the ASI-22 form, "Intentional negligence, insubordination *and* loafing during working hours. Employee made threatening statements towards the Company." (Emphasis added.)

i. Johann Burton's discharge for threatening his supervisor

Johann Burton (vol. 28) was employed as a welder's helper in the shipfitting department until he was discharged on August 23, 1993. The second complaint, at paragraph 117, alleges that by discharging Burton Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Burton because of his known union activities and expressions of sympathy which included his wearing prounion insignia and making statements sympathetic to the Union at employer campaign meetings. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Burton may have held at any relevant time and that Burton was discharged solely because he threatened a supervisor with physical harm. The General Counsel replies that the defense for the discharge is pretextual because Burton did not engage in the conduct attributed to him; alternatively, the General Counsel replies that, even if he did engage in some degree of the conduct attributed to him, Burton was treated disparately because other employees engaged in similar conduct but they received lesser, or no, discipline. Ultimately, I find and conclude that Respondent discharged Burton in violation of Section 8(a)(3).

Until 4 days before his discharge, Andrew Thomas was Burton's foreman. At the time of his discharge, Nickels Pierce was Burton's foreman, Lee Goodson was his general foreman, and Leroy (Trip) Trepagnier was the department's assistant superintendent. Burton testified that he started wearing a "Union-Yes" sticker on his hardhat in April (although his pretrial affidavit states that he did not begin wearing the sticker until May), and he wore the sticker every day until 1 week after the June 25 Board election. Burton testified that he was one of three employees on his crew of eight or nine employees who wore prounion stickers; the remainder wore "Vote-No" stickers.

Burton testified that sometime in May Goodson and Trepagnier conducted an employer campaign meeting in Thomas' office. During the meeting, Trepagnier argued that Respondent's health insurance plan was relatively inexpensive. Burton indicated to Trepagnier that he had a question. Burton testified:

> And then he called me by name. And then he asked me what do I think about the insurance policy. And I said, "I don't think that the Company insurance is much cheaper; I think the Union insurance is much cheaper because for $26.50—Mr. Miller explained to me we could get hospitalization, dental care and medication. That sounded like a better deal to me."
>
> And then Trip said, "How could you explain that?"
>
> I said, "I don't know; I can't knock it until I try it first."
>
> And then he started talking about once he had back surgery and some kind of injury on his body.

Phillip Miller was one of the principal organizers for the Union before, and after, the Board election.

Burton testified that another employer campaign meeting was conducted in May, this time in the blacksmith's (metal forming and shaping) shop. In attendance for Respondent were department Superintendent Torres, Trepagnier, Pierce, and several other foremen. Burton testified that he spoke up at this meeting; he first referred to Carl Alexander, the shipfitter to whom Burton was then assigned as helper. Burton testified that he said:

> Carl has been with the Company for 15 years, and Carl only makes $10 an hour, whereas Joe Green has been with the Company for three years and is just only making $9.18. And so then Trip told me Joe had advanced himself. And I said, "I don't see how the Company cannot allow [Carl] to advance himself because it doesn't make sense."

Further according to Burton, during that same meeting employee Scott Miller spoke against the organizational attempt; in his statement, Scott Miller spoke well of Al Bossier, company president. Burton testified that he replied to the arguments made by Miller: "I don't see how come Scott Miller is speaking highly of Mr. Bossier because he had been screwing the Company for a long time."

When called by Respondent (vol. 126), Trepagnier testified that in an employer campaign meeting in which insurance was discussed in his presence, Burton stated to him (and the group) that Respondent should provide "free" (i.e., noncontributory) insurance to the employees. On direct examination, Trepagnier was asked to deny that Burton said anything "that you understood to be an expression of support for the Union." Trepagnier did make the conclusionary denial, and he further denied hearing Burton say anything to the effect of "You can't knock the Union till you try it." Neither of these denials, however, was a credible denial of Burton's categorical testimony that he spoke favorably of cheaper union insurance and he cited as his authority Union Representative Phillip Miller. I credit Burton's testimony about what he said to Trepagnier at the insurance meeting.

I further credit Burton's testimony about what he said at the second May employer campaign meeting. Burton placed Department Superintendent Torres, Pierce, and Trepagnier at the meeting. Torres did not testify. Pierce testified that he attended no employer campaign meetings in which Burton was present, and Trepagnier testified that the insurance meeting was the only employer campaign meeting at which both he and Burton were present. Neither Pierce nor Trepagnier were asked, however, to deny being present at any meeting at which Burton stated that Company President Bossier was "screwing" the Company. Respondent solicited specific denials of virtually all other such testimony by the General Counsel's witnesses. Torres' nonappearance, and Respondent's failure to solicit from Trepagnier and Pierce specific denials of this dramatic testimony by Burton, lead me to credit Burton's testimony of what he said to the group at the second employer campaign meeting in May. Burton's comments at the second May employer campaign meeting were made as he sought to rebut the pro-Bossier, and antiunion, arguments presented by employee Scott Miller. Torres, whom I have found to have been present, reported directly to Company Vice President Emil Foret Sr. Burton's outspoken (albeit crude) reference about Bossier, in the context of his speaking for the Union's cause, presumably went to the highest level of Respondent's management.

Burton's Discharge—the General Counsel's Evidence

According to Burton, on August 17 he and Alexander were reassigned from Thomas' crew to Pierce's crew. On August 23, just before the 7 a.m. whistle blew, Pierce told Burton that he would not be working with Alexander that day; instead, he would be doing grinding work with shipfitter Frank Narcisse. Instead of first going to Alexander's work area to retrieve the gear that he had left there the day before, and then going to Narcisse's area as instructed, Burton went first to Narcisse's area, about 150 feet from Alexander's area. When asked why he first went to Narcisse's area, Burton replied, "I go by Frank and ask Frank what type of work I had to do." Further according to Burton:

> And then I went to talk to Frank, and Frank told me to go grind on the burr on the rudder. And then I go back by Carl so I can get my hardhat, my glasses and my shears. And then Pierce come over to me [in Alexander's area] and tell me [that he] had assigned me to work with Frank. And then he told me I am goofing off and I should be by Frank. . . .
>
> I told him to cool down [his] verse because I have children of my own. And then he told me I am being a smart ass.
>
> I told him, I am not being a smart ass. And then he told me that me and him should go talk to [General Foreman] Leroy Goodson. And then we go walking to the office. That was when he told Goodson I threatened him with a knife. And then Goodson said he is going to page Trip [Assistant Superintendent Trepagnier] and let Trip settle this.
>
> And then he paged Trip. . . . And Trip got there, and Pierce told Trip I threatened him with a knife. . . . And then Trip told me I could be fired for threatening a supervisor with a knife. And then Trip said, "You are fired." So that is what happened.

Burton testified that Pierce said nothing about a knife until he and Pierce reached Goodson's office. Burton carries a knife in a scabbard, like some other employees, but he denied pulling the knife out during his exchanges with Pierce, and he denied threatening Pierce at any time that morning. Burton testified that employee Alexander was present during his exchanges with Pierce in the work area, but neither side called Alexander to testify.

Burton's Discharge—Respondent's Evidence

Pierce (vol. 98) testified that he made the assignment to Burton at 6:55 a.m., before starting time. Further according to Pierce, about 7:20 a.m., as he made rounds of the job, he approached Narcisse's working area; he asked Narcisse where Burton was and Narcisse replied that he had not seen Burton. Pierce went the 150 feet to Alexander's area and found Alexander and Burton talking. According to Pierce:

> I asked him why he hadn't moved his stuff to the new job site I had assigned him to.
>
> He told me, if I didn't leave him alone, he was going to fuck me up.
>
> I was startled, stunned for a while, and I asked him what he meant by that.
>
> And he says, "You heard what I said; I will fuck you up."
>
> I asked him to follow me to Lee Goodson's office.

Pierce did not testify that Burton had threatened him with a knife. When Pierce and Burton got to Goodson's office, further according to Pierce, Pierce told Goodson what Burton had said to him (which included no mention of a knife). Pierce testified that Goodson asked Burton if what Pierce had just related was true; Burton replied that it was. Goodson replied that he would call Trepagnier, which Goodson did.

Pierce further testified that after Trepagnier arrived in Goodson's office:

> He [Goodson] told him [Trepagnier] exactly what I had said, that he [Burton] said he was going to fuck me up.
>
> He [Trepagnier] looked at Johann and asked him, "Is that true? Did you threaten him? Did you say that?" And he said, "Yes."
>
> He [Trepagnier] told him [Burton] that they had given him a lot of warnings, that he had had trouble with other foremans before, and that he had given him chances, and that he reached his limits with him, that he couldn't tolerate any more. . . . He told him he couldn't use him anymore, that he had put up with enough of him, that he had had problems with him with other foremans, that he had moved him around from one area to the other, and that he had been lenient to him because he was friends with his mother. His mother is a clerk—was the office superintendent's clerk. . . .
>
> And he told him that he should have let him go, a long time ago, but he was moving him around and trying to help him out, and that he just couldn't tolerate him threatening anybody, especially a supervisor.

At that point, Pierce testified, the security department was called and Burton was escorted from the premises. Finally, Pierce was asked and he testified:

> Q. Why did you bring Mr. Burton to see Leroy Goodson? Why didn't you wait to see whether he did anything? . . .
>
> THE WITNESS: Well, because of the look in his face, he was just a blank stare, and then he looked like he was serious.
>
> Q. [By Ms. Canny]: How big was Mr. Burton compared to you?
>
> A. Oh, he is a small-bodied person. He is about half my size. And I didn't expect him to take a swing at me.
>
> A. What did you expect? . . .
>
> THE WITNESS: Well, I haven't seen any postal workers getting killed by a fist fight. So I wasn't going to stand around and let him make his move, whatever it was going to be.

Pierce denied knowing that, before he was discharged, Burton favored the Union.

On cross-examination Pierce testified that he felt that Burton had threatened him with physical harm by gun or knife, but he denied that he told either Goodson or Trepagnier that Burton had threatened him with a knife. Further on cross-examination, Pierce repeated that, as Trepagnier discharged Burton, Trepagnier reminded Burton that he had given Burton chances before, and that he had been required to move him from foreman-to-foreman, and that he had warned Burton before to "straighten up."

Goodson (vol. 98) also testified that when Pierce brought Burton to him, Pierce told Goodson that Burton had said to Pierce at the worksite, "I'll fuck you up." Goodson further testified that Burton admitted that he had told Pierce, "I'll fuck you up." Goodson testified that then:

> I asked him, "What do you mean by that?"
>
> He said, "You know what I mean by that." That is all he said.

Goodson testified that he then called Trepagnier. When Trepagnier arrived at Goodson's office, Goodson testified, he related to Trepagnier what Pierce had related to him. Trepagnier, according to Goodson, then asked Burton what he had said to Pierce; and Goodson testified: "He [Burton] said if he [Pierce] didn't get out of his face, he was going to fuck him up." Goodson testified that Trepagnier then told Burton that he was discharged for threatening Pierce. Goodson flatly denied that Trepagnier, in firing Burton, referred to Burton's prior work record. This, of course, was in direct conflict with Pierce's testimony to that effect.

Trepagnier (vols. 121, 126) testified consistently with Pierce and Goodson except that, like Goodson, and contrary to Pierce, he did not testify that he told Burton that he had given Burton other chances, had been required to move him from foreman-to-foreman, and had been indulgent to him because his mother worked at the plant.

Burton's Discharge—Credibility Resolutions and Conclusions

I have credited Burton's testimony that he wore prounion insignia for at least 2 months before the June 25 Board election. I have further credited Burton's testimony that during the preelection period he spoke up at employer campaign meetings and told his supervisors (including Pierce and Trepagnier who discharged Burton) that Union Representative Miller had made valid points about the Union's health insurance plan, that the Union should be tried by the employees, that some employees were being unfairly paid, and that the Union was needed because Bossier had been treating the employees unfairly "for a long time." These activities are proof of Burton's prounion sympathies. Animus toward such activities has been proved, especially animus toward the wearing of prounion insignia. I find, therefore, that a prima facie case of unlawful discrimination against Burton has been presented by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Burton even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Pierce testified that Trepagnier told Burton that he was being discharged, in part, because Burton had a history of not working. This testimony was not true; if it had been, Goodson and Trepagnier would have corroborated it. This testimony by Pierce is an indisputable sign that he was not a truthful witness.

Burton had a knife, and Pierce admitted that he was afraid that Burton would use a knife (or a gun) against him. Pierce denied that he knew that Burton had a knife, but Burton was credible that he carried one in a scabbard, something that would have been obvious. Neither Goodson nor Trepagnier was asked if Pierce had reported that Burton threatened him with a knife. Pierce was not asked about this most critical element when Respondent had Pierce on direct examination, and Respondent's lawyers were not ones to neglect critical elements. When on cross-examination, Pierce denied that he told Goodson and Trepagnier that Burton had threatened him with a knife, but this denial was not credible. (Many witnesses will lie when pressed to do so; I believe Pierce was one such witness.) I find that, as Burton testified, Pierce told Goodson and Trepagnier that Burton had threatened him with a knife.

I believe that Burton had been loafing on the morning of August 23, as Pierce described. I further believe that Burton became angry when he was confronted by Pierce, and he told Pierce to back off or, "I'll fuck you up." Burton did not, how-

ever, threaten Pierce with a knife. Pierce, however, seized upon the "I'll fuck you up" remark to tell Goodson and Trepagnier that Burton had threatened him with a knife, as Burton testified. That is, I find, Pierce told Goodson and Trepagnier that: (1) Burton told him "I'll fuck you up," and Pierce also told Goodson and Trepagnier, and (2) Burton had threatened him with a knife. Pierce's first statement to Goodson and Trepagnier was true; the second was consciously false. At best, Trepagnier then discharged Burton because Pierce had falsely reported to him that Burton had threatened him with a knife. At worst, Trepagnier knew that the report was false, but used the report as a pretext for discharging Burton. Which was the case, I need not decide. Also, I need not speculate whether, at the time, Trepagnier would have thought that he had enough of a "story" to advance as a pretext if Pierce had only told him the truth.

Burton had spoken up for the Union during employer campaign meetings in the presence of Pierce and his other supervisors, and he had worn prounion insignia, something against which, as I have found infra, Respondent's supervisors threatened its employees many times. I find that Pierce made his false report to Goodson and Trepagnier to supply a pretext for the discharge of the prounion employee Burton. Knowing or unknowingly, Trepagnier acted on that false report and used it as a putative basis for the discharge.

I therefore find that Respondent has not shown that it would have discharged Burton even absent his protected activities, and I conclude that, by discharging Burton on August 23, 1993, Respondent violated Section 8(a)(3).[302]

j. Lennie Valentine

As discussed above in the case of alleged discriminatee Dwight Ballard, sheet metal department employee Lennie Valentine was discharged by Respondent in April 1993. (Again, that discharge is not a subject of the complaints that are now before the Board.) After the 1993 discharge, as I found in Ballard's case, Foreman Jesse Caston told current employee Eric Evans and alleged discriminatee Keith Collins that Valentine had been discharged because of his prounion activities. Also as I have previously found, Foreman Joe DeNicola told his crew (including current employee Junius Duplantis) that Valentine and Ballard had no chance at reinstatement from their 1993 discharges because of their prounion sympathies. Valentine and Ballard were nevertheless reinstated on January 31, 1994, but both were suspended 2 days' later; those suspensions violated Section 8(a)(3), as I have further concluded in Ballard's case.

Respondent's treatment of Valentine after he was reinstated are the subjects of three additional 8(a)(3) allegations of the complaints: (1) the second complaint, at paragraph 145, alleges that on April 12, 1994,[303] Valentine was issued a warning notice; (2) the fourth complaint, at paragraph 39, alleges that on July 14 Valentine was issued a second warning notice; and (3) the fourth complaint, at paragraph 42, alleges that on August 20 Valentine was again discharged. The General Counsel contends that Respondent took these actions against Valentine because of his known union activities and expressions of sympathy which included his wearing of union insignia after his reinstatement and a lingering hostility toward Valentine because of Respondent's being required to reinstate him as a result of the 1993 unfair labor practice charges that were filed on his behalf. Respondent answers that: (1) the April 12 warning notice was issued solely because Valentine had obtained three pass-outs[304] within 30 days; (2) the July 14 warning notice was issued because Valentine wore a beard in violation of its safety rules; and (3) Valentine was not discharged for a second time. The General Counsel replies that: (1) Respondent caused Valentine to take one of the pass-outs that was counted against him, and warning notices for three pass-outs, alone, had not theretofore been issued; (2) Valentine was treated disparately because other men who reported to work with beards were allowed time off to shave rather than being issued warning notices; and (3) Valentine was, in fact, discharged. Ultimately, I find and conclude that (1) the pass-out warning notice to Valentine was just one of six that were concurrently issued to employees, and there is no evidence that any of the warning notices were issued because of Valentine's protected activities or the protected activities of any other employees; (2) Valentine's supervisor admitted that he could have sent Valentine to shave, rather than issue him a warning notice, and Respondent has not shown why Valentine was not afforded that alternative, and, therefore, the issuance of this warning notice violated Section 8(a)(3); and (3) Valentine was not discharged for a second time.

Valentine (vols. 19, 20) testified that when he reported to work on January 31, and most days thereafter, he wore a union T-shirt. During his 1994 employment he wore "about nine" "Union-Yes" stickers on his hardhat. Valentine further testified that he regularly wore a union button on his coveralls. When he dropped the top of his coveralls for heat-dissipation, he usually displayed a union T-shirt that he wore underneath. Valentine testified that when he reported to Kitzman on February 1, wearing the union T-shirt, Kitzman told him, ". . . that he had no problem with me about what I was fired for and whatever the Union is telling me, you know, he would appreciate it—I am just there to do his work." Further, Valentine testified that Kitzman, once "asked me about why I had all those stickers on my hat." Valentine replied that it was because he was "a union man." I found this testimony by Valentine to have been credible.

(1) Valentine's warning notice for taking excessive pass-outs

April 3 was Easter; April 1 was Good Friday, a paid holiday according to the Avondale Employees' Guide. On Thursday, March 31 (called "Holy Thursday" by several of the witnesses), according to Valentine (vol. 19):

> [Employee Ronald] Matherne and myself were working on the job and Al Kitzman, the foreman, came to us and said, "If you all would go home early today, I will be able to go home too, also; so why don't you all get a pass-out today and we all can go home together."

Valentine took the pass-out and went home. Valentine further testified that during the morning of April 12 Kitzman presented

[302] On brief, page "Shipfitting-20," Respondent states that I prevented it from calling witnesses and I prevented all examinations about productions pursuant to a subpoena duces tecum for a union agent's notes that might affect credibility resolutions in Burton's case. This is not true. What I prevented, on day-138, was examination of one witness about the thoroughness of a search and a production that had been made more than a year before the requested examination. I felt that laches applied.

[303] All dates mentioned in Valentine's case are in 1994, unless otherwise indicated.

[304] "Pass-outs" are grants of permission to leave a shift early; I use the term that the lawyers and witnesses used, rather than "passes-out."

him with a warning notice that was signed by Kitzman and General Foreman Schloegel. The box for "Other" general offense is checked. In the space for the date of the offense, the warning notice lists March 2, 11, and 31. The reason for warning is stated as: "Excessive PASS-OUTS within a 30-day period. Employee left work early on the above-listed three days." Valentine told Kitzman that he did not know that receiving pass-outs could result in a warning; Kitzman replied that there was such a rule, even though it is not stated in the Avondale Employees' Guide (or written anywhere else). Valentine further testified that he asked Kitzman who had ordered him to issue the warning notice, but Kitzman refused to tell him. Valentine asked to see Schloegel. Later in the day, Schloegel and Kitzman met with Valentine. According to Valentine, he also told Schloegel that he did not know that there was a rule against receiving excessive pass-outs; Schloegel admitted that there was no such written rule but, "a foreman can write you up for any reason or any cause that he wants to." Valentine complained that Kitzman had said someone else had told him to issue the warning notice, and Kitzman then said, "Well, Lennie, the reason why I give the warning was because I was having a lot of pass-outs before you came back and I am trying to break it down." Valentine further testified that he then argued that other employees had received more pass-outs than he without penalty, and Kitzman then replied that he had issued the warning notices of April 12, "[b]ecause like Arthur said, it is up to my discretion to give them when I want to give them."

Valentine further testified that on April 13, when he and Kitzman were alone, Kitzman said, "I want to apologize for the date of the 31st, Holy Thursday, on your write-up because I know that I asked you to go home that day, but if you would go down to the Union people and tell them that I am going to deny it to the fullest." The warning notice remained in Valentine's personnel file.

Steven Marque (vol. 47), a current sheet metal department employee, testified that on the morning of Holy Thursday 1994, Kitzman approached him and employee Charles Kennedy as they were working and:

> Al came on the boat to tell us that everybody on the crew was leaving at 12:00. He said—he asked us if we wanted to leave early, and if we did, he could leave early, too. And I told him I was going to stay all day. I said, "If Charles stays, I am going to stay; if Charles goes home, I will leave."
>
> Charles said he wanted to work the whole day; he needed the money. I said, "Well, I am going to stay and work with Charles."
>
> And Al said, "Okay." And he walked off, and that was it.

All of the other members of Kitzman's crew, including Valentine, left work at noon. Marque testified that about 2 weeks' later, Kitzman conducted a safety meeting and:

> I told him that it wasn't fair that he wrote up all the guys that got a pass-out within the 30-day period using the same date, the Thursday before Good Friday, to write them up and use that date as one of the three days that they got a pass-out, when he was advocating for everyone to leave early that day. . . .
>
> He [Kitzman] apologized to everybody that got wrote up for using that Thursday before Good Friday, and [if] that is the day that . . . caused them to get written up, he was sorry, [and] he apologized, but [Kitzman further said that] there was nothing he could do about it because the write-ups already went in the office.

Marque testified that before this incident he had never been told that there was a rule regarding excessive pass-outs, and employees often took more than three in a month without penalty.

Lennie Gueho and Michael James Boudreaux are two current employees of the sheet metal department, but they work in the inside sheet metal shop under General Foreman Michael Torres, not outside General Foreman Schloegel. Fifteen-year employee Gueho (vol. 42) testified that to get his paycheck cashed the same day that he receives it, "I usually get a pass-out 99 percent of the time on a Friday." Gueho has never received a warning notice for this custom. Nine-year employee Boudreaux (vol. 46) testified that almost every Friday afternoon, at 2:30 p.m., Gueho and Mike Michell, Dan Brackovich and Randy Tate, other sheet metal shop employees, walk by his work station on their ways out the door. All four employees are still employed by Respondent.

Valentine's Warning for Excessive Pass-Outs—Respondent's Evidence

Sheet Metal Department Superintendent Allen Poleto testified (vol. 105) that he has established no rules concerning pass-outs and his office keeps no records of pass-outs; those matters, Poleto testified, are left to his general foremen, Schloegel (outside) and Torres (inside). Schloegel (vol. 109) testified that since 1992 his office has maintained monthly records of who receives three pass-outs within 30-day periods. Schloegel's secretary distributes these records to his foremen as they are compiled. Schloegel testified:

> I told them [his foremen] it [whether to issue a warning notice] is up to them. And when it gets to be a disease in their area. In other words, if people are missing time, taking pass-outs, they [the foremen under him] are not meeting their schedules. If they find they are having problems, well then, they will issue a warning.

Further on direct examination, Schloegel testified that he approved the warning notice to Valentine because he thought that Valentine had been given repeated oral warnings against taking excessive pass-outs. Schloegel, however, did not deny Valentine's testimony about the exchange that they had after Valentine received the warning notice for excessive pass-outs (which testimony included Valentine's statements that he was unaware of any such rule).

Kitzman (vol. 107) testified that on March 31 he went to each member of his crew and, "I told all of the employees out there that if they wanted to take a pass-out, that they could and it would not be held against them." Kitzman denied, however, that he asked any employee to take a pass-out so that he [Kitzman] could go home also. Kitzman further testified on direct examination that he had been given the discretion to issue warning notices for excessive pass-outs when an employee's pass-out record created "problems." Kitzman was asked and he testified:

> Q. Now, what, from your supervisor perspective, would alert you to problems with respect to pass-outs for your crew?
>
> A. A couple different things: One, if an employee showed a pattern consistently every month, taking three or four pass-outs, obviously that is a problem.

> Or two, if it bleeds over to the other workers, the other workers seeing this guy is taking a pass-out every week and not getting in trouble, so they start to take pass-outs, and before you know it, three-quarters of the crew is taking pass-outs and production is dropping. . . .
>
> Q. Now, if you do see a particular problem with respect to pass-outs in your department where a large number of employees are taking pass-outs in a given month, what do you do?
>
> A. I look at the pass-out list. Everyone that has got three or more for that particular month, I issue a citation to.

Kitzman acknowledged, however, that never before April 12 had he issued a warning notice to any employee for excessive pass-outs. Further on direct examination, Kitzman testified that in early April:

> I received the monthly pass-out update [for March], and when I received this pass-out list, there was an extraordinary amount of pass-outs on there. I mean, I had five or six guys with three or more pass-outs. I mean, it was ridiculous. I had at least 20 pass-outs for the month of March, I believe it was.
>
> And I called my clerk and told her to issue a citation for everyone that had three or more pass-outs in that month.

Kitzman identified five other warning notices that he caused to be issued on April 12. Two other employees in addition to Valentine received warning notices for having taken three pass-outs, Eugene Edward (for pass-outs on March 18, 25, and 31) and Merlin Williams (for pass-outs on March 8, 18, and 31). Three other employees received warning notices for having taken four pass-outs during the 30-day period: Jacob Canova (March 4, 11, 24, and 31), Ronald Matherne (March 8, 18, 23, and 31), and Robert St. Pe (March 4, 24, 25, and 31).

Kitzman agreed that, when he protested the warning notice, Valentine pointed out that the Avondale Employees' Guide contains no rule about excessive pass-outs. Kitzman denied that anyone had told him to issue the warning notices, and he denied telling Valentine that someone had told him to issue them. Kitzman testified that he was present when Valentine spoke to Schloegel about the warning notice, and he then told Valentine again that no one else had ordered the issuance of the warning notice. Kitzman testified that after the warning notices were issued, he realized that he had included March 31 on the warning notices. When he did realize it, according to Kitzman, he held a safety meeting and:

> After the safety meeting, I gave a general apology to everyone on my crew who received a citation for the month of March.
>
> I told them anyone that received a citation for the month of March with the date 3/31 on it, it was a mistake. I mean, I had completely forgotten about the day and that when I had got the pass-out list, that the 3/31 date never struck me. I didn't understand what was going on.
>
> I apologized to them, and I told them, "If you had a citation for three pass-outs in the month of March, it would not be held against you by me, but if there was four or more pass-outs, the citation was still valid."

Kitzman denied having any discussion individually with Valentine about the matter. Kitzman further denied telling Valentine, or anyone else, that he would deny any of his comments if he (or they) went to the Union. Kitzman admitted knowledge of Valentine's prounion sympathies, but he denied that any other of the five employees who received warning notices wore prunion insignia, and he denied knowing if they had any prounion sympathies.

On cross-examination, Kitzman denied that he had ever received instructions from Poleto or Schloegel concerning pass-outs. Kitzman testified that he could not remember ever having issued a warning notice for excessive pass-outs. Kitzman was asked and he testified:

> Q. Do you have a personal policy concerning pass-outs?
>
> A. Yes.
>
> Q. Could you tell us what that is?
>
> A. If I—after I receive this pass-out list on a monthly basis for the month prior, if I deem it to have a problem on the previous month, I will issue citations. And when I say a problem, I am talking about if I have one individual with five or six pass-outs—four or five or six pass-outs, or I have a whole crew taking pass-outs.
>
> If I have 23 of them for the prior month, evidently I have a problem, and I will issue citations.
>
> . . . .
>
> Q. Is your pass-out policy ever written down anyplace?
>
> A. No.
>
> Q. Did you ever tell your pass-out policy to any employees?
>
> A. It is not a policy. I mean, it is something that I do.

When asked if he told his employees what he did, even if it is not a policy, Kitzman testified that he did. When asked how he communicated what he did to the employees, Kitzman testified:

> I tell him as—whenever I have a problem with the pass-out list. If I get a list and I have an employee or I have four or five employees that have two pass-outs—I will go to that employee and say, "Look, you know, you have got two pass-outs for this month. Let's not keep doing it, you know." Evidently we are going to have a problem with it.
>
> I haven't grabbed the group together as a whole and told them, no, but [I do so, or I did so] on an individual basis when I seemed to have a problem.

Kitzman was then asked and he testified:

> Q. And so prior to April 1994, the most you would do is just give a verbal warning?
>
> A. Yes.
>
> Q. Lennie Valentine didn't have a pass-out problem in February of 1994, did he?
>
> A. No.
>
> Q. And the only reason, as I understand it, you gave Lennie Valentine a citation in April of '94 was because he had three pass-outs within the calendar month of March?
>
> A. No, that is not the only reason. I had a problem in the month of March. I had an extraordinary amount of pass-outs for my whole crew. When I saw this list, I called my clerk and told my clerk to issue a citation for everyone in the month of March that had three or more pass-outs.

Kitzman did not testify that he ever gave Valentine an oral warning to the effect that he was accumulating too many pass-

outs during March. Kitzman acknowledged that he had not had the warning notices of Edward, Williams and Valentine withdrawn, or even asked Schloegel if they could be withdrawn. Kitzman was asked and he testified:

> Q. Is there a reason that you didn't do that?
>
> A. It was a mistake on my part, and I just never told Mr. Schloegel about it. I should have done it, but I never did.

Further on cross-examination, Kitzman testified that, although he had approved all pass-outs for his crew during March, and he had coded each pass-out on each day's MCR, he had not noticed, during March, that the members of his crew had taken an unusually large number of pass-outs as the month went along. Kitzman further acknowledged that, during March, he had not noticed any drop in production by his crew.

Respondent introduced other warning notices on the topic to prove that there was such a rule at the time that Valentine and the five other employees received the April 12 warning notices. Schloegel identified two warning notices for excessive pass-outs that were issued by his foremen in 1992. One, dated April 26, 1992, was issued by Nathan Dubios to employee Kay Holliday for having five pass-outs within 30 days. The other warning notice identified by Schloegel is dated May 1, 1992; it was issued by Joe DeNicola to employee Elijah Epps for having four pass-outs within 30 days. "Other" general offense is checked for those warning notices, as was Valentine's.

DeNicola (vol. 119) identified two 1992 warning notices that he issued to two employees, Clarence Swington and Henry Area. Like Epps' warning notice, each was for having taken four pass-outs within 30 days. When asked on cross-examination if he would issue a warning notice for only three pass-outs within 30 days, DeNicola responded, "I wouldn't give a warning, not me." Respondent also introduced five other 1992 warning notices that had been issued to employees[305] by DeNicola; each includes references to from three to five pass-outs within 30-day periods, but they also include references to other attendance problems that the employees were simultaneously having (such as absences and tardiness).

Valentine's Warning for Excessive Passouts—Credibility Resolutions and Conclusions

In view of all of the animus expressed toward such prounion employees as Valentine, and in view of all of the animus expressed toward Valentine because of his union activities, it must be concluded that a prima facie case of unlawful discrimination against Valentine has been presented for all of the discipline that was imposed on Valentine,[306] and Respondent's defenses must be examined.

Valentine and Kitzman conflict on, among other things, whether Kitzman told Valentine, on April 12, when Kitzman presented the warning notice to Valentine, "I want to let you know this is not me that is doing this here; I am told to give you this written warning," or words to that effect, as Valentine testified. The question that immediately arises is: Why would Valentine falsely create this testimony? Valentine could not have anticipated that Respondent would contend, as it does, that the degree of discretion that it invests in first-level supervisors prevents Board analysis of its conduct under any theory of disparate treatment. Moreover, Schloegel did not deny that on April 12 Valentine approached him and told him that Kitzman had said that the warning notice "came from somewhere else," as Valentine also testified. Finally, although Kitzman admitted that issuing the warning notices, at least to Valentine, Edwards, and Williams, was a "mistake," he did nothing to have the mistake corrected; this fact further compels the conclusion that Kitzman issued the warning notices because he had been told to do so by a superior. I credit Valentine's testimony about his April 12 exchanges with Kitzman and Schloegel. I further find, based on that testimony, that Kitzman was, in fact, ordered to issue the April 12 warning notices; Kitzman would not have told Valentine that he had been ordered to issue the warning notices if it were not true. The order undoubtedly came from Schloegel or Poleto, but I need not speculate which. (Schloegel was evasive when asked if he had instructed Kitzman to issue the warning notices, and this factor would further leads me to believe that either Schloegel originated the order or he communicated the order from Poleto.)

I further credit Valentine's testimony that on April 13 Kitzman apologized for including March 31 on his warning notice, and that Kitzman further then said he would deny the apology if Valentine complained about the matter to the Union. Again, Kitzman was being forced to issue the warning notices, and this testimony by Valentine was perfectly consistent with that fact. I further credit current employee Marque's testimony that Kitzman solicited him and Kennedy to take a pass-out on March 31. I further credit Marque's testimony that it was 2 weeks later that Kitzman apologized to the group for having included March 31 in the warning notices, and that Kitzman did so only after Marque challenged him on the point. Kitzman was entirely vague and evasive about when, and how, it was that he realized that he had included March 31 on the warning notices; I believe Kitzman had hoped that no one would challenge him on the point, and he waited until that challenge came to apologize.

(Even assuming that the April 12 warning notices were all Kitzman's idea, the remainder of his testimony about why he issued the warning notices does not withstand scrutiny. Schloegel testified that he provides his foremen, such as Kitzman, with information about the number of pass-outs that their employees take in a month; he leaves it to the foremen to issue warning notices over the pass-outs taken*, if those pass-outs affect production*. Kitzman, however, admitted that he had not noticed any drop in production during the month of March.)

Kitzman testified on direct examination that he issued warning notices either (1) "if an employee showed a pattern consistently every month, taking three or four pass-outs," or (2) "if it bleeds over to the other workers, the other workers seeing this guy is taking a pass-out every week and not getting in trouble, so they start to take pass-outs, and before you know it, three-quarters of the crew is taking pass-outs and production is dropping," or (3) "if I have one individual with five or six pass-outs—four or five or six pass-outs, or I have a whole crew taking pass-outs," or (4) "[i]f I have 23 of them for the prior month, evidently I have a problem, and I will issue citations." Valentine, however, (1) had not been on Kitzman's crew in February, so he had not taken any passes "every month"; (2) his conduct could not have "bled" over into other workers and caused a lack of production because there was no lack of pro-

[305] These were employees Robert St. Pe, Douglas Menier, Michael Keaton, Richard Combel, and Shane Forrester.

[306] As I ultimately find infra, Valentine was not discharged a second time; therefore, there is no prima facie case of that allegedly unlawful discipline.

duction during the month according to Kitzman's observation, and Valentine was not taking a pass-out "every week"; (3) Valentine he did not take four (or five or six) pass-outs in the month of March, and even his third was taken upon the solicitation by Kitzman; and (4) although Valentine was on a crew that took more than 23 pass-outs in March, according to the record for that month,[307] the group only took 20 pass-outs if one excludes the pass-outs of March 31, as Kitzman admitted should have been done.

Schloegel testified that he had signed the warning notices because of the "[v]erbal warnings" that the six employees had received, and Kitzman testified that, before he gave warning notices, he gave oral warnings. Valentine, it is undisputed, got no oral warning that his taking pass-outs, that month or any other, could result in a warning notice.

Respondent introduced other pre-April 12 warning notices to employees for excessive pass-outs; not one of them had been issued on the basis of only three pass-outs within 30 days. All of the prior warning notices for excessive pass-outs were for four or more pass-outs, or they were for three pass-outs combined with other attendance problems such as absences or tardiness. At one point, Kitzman, himself, admitted that he issued warning notices only to employees who had "four or five or six" pass-outs in a month. (Even then, according to his testimony Kitzman would orally counsel and warn an employee before the number got that high.)

In summary, Schloegel's and Kitzman's issuances of the six warning notices of April 12 were unfounded on a number of accounts. To some, therefore, Respondent's actions of April 12 may seem unreasonable, arbitrary or "unfair." Respondent, however, is not on trial for acting unreasonably, arbitrarily or "unfairly" in the abstract. It is on trial only for committing unfair labor practices under the Act; for matters of discipline, unfair labor practices under the Act are proved only where it is shown that an employer discriminated against employees because of the protected activities of some or all of them. None of the other five employees who were concurrently issued warning notices were shown to have been prounion, and, on brief, the General Counsel points to no proof that would indicate that Schloegel and Kitzman issued the warning notices to all six sheet metal department employees because of the protected activities of Valentine. There is no such proof. At best, the General Counsel is requesting an inference that the group was discriminated against because Valentine was in it. It is, however, at least equally inferable that Schloegel and Kitzman acted "unfairly" toward a group of employees, one of whom turned out to be Valentine. I shall therefore recommend dismissal of these allegations of the complaint.[308]

(2) Valentine's warning notice for having a beard

Respondent has a written safety policy that employees who may be required to wear a respirator while working must be clean-shaven. Exceptions within the policy (the "no-beard policy") are made for employees with skin conditions that preclude close shaving. If an employee has a statement from a dermatologist that his skin condition precludes close shaving, and the employee presents the statement to the medical department for review, the medical department will issue to the employee a permit that will allow him to wear a beard of up to one-quarter inch in length. The medical department also issues to any such employee a sticker for the back of his hardhat. The stickers are fluorescent pink, 2-inch, triangles; and each sticker has a large black "1/4" printed in its center. It is undisputed that Valentine's job sometimes required use of a respirator and that he was subject to the no-beard policy.

Valentine (vols. 53, 54) testified that, as he was working with hot glue on June 23, he burned his face on the right side and on the front of his chin. Valentine reported the burn to Kitzman who sent him to the medical department where he was treated and released. A week later, Valentine tried shaving, but the action pulled the scabs off. Thereafter, he began shaving his face only where there were no scabs.

As amended at the hearing, the fourth complaint, at paragraph 6, alleges that one Phil Casper is a supervisor within Section 2(11) of the Act or an agent of Respondent within Section 2(13). Respondent denies that Casper is either. Casper did not testify. Peter Territo (vol. 78), Respondent's safety director, testified that in 1994 Casper worked as a nonsupervisory safety inspector. On brief, the General Counsel points to no evidence that conflicts with Territo's testimony. I find and conclude that in 1994 Casper was not a supervisor or agent within the meaning of the Act.

On July 14 Valentine worked a shift from 4 a.m. until 12:30 p.m.[309] About 7:30 a.m. Valentine, alleged discriminatee Kenneth Patterson, and employee Bruce Litell were walking in a road in the yard. Casper, who was driving by in a company truck, stopped, got out, and spoke to Valentine. Valentine testified that, at the time, he was wearing a union T-shirt and "about 20" union stickers on his hardhat; neither Patterson nor Litell was wearing any prounion insignia. Patterson, further according to Valentine, had a full beard that was "[a] quarter of an inch or longer." Patterson did not have a "1/4" sticker on his hardhat.[310] Valentine testified that, when Casper approached the three employees, Casper asked Valentine if he had a sticker to wear a beard. Valentine replied to Casper that he did not know that he needed a sticker to wear a beard. Casper replied that all employees are told about the beard rules during orientation; Valentine responded that, when he was reinstated in February, he did not go through orientation. Casper wrote down Valentine's badge number and left.[311] Further according to Valentine, Casper had said nothing to Patterson. Valentine denied that he knew that Respondent had a policy that required permits, and displays of stickers, before beards (of up to one-quarter inch in length) could be worn. On cross-examination, Valentine acknowledged that "half" of his face had not been shaved for approximately 2 weeks at the time that he was confronted by Casper.

[307] See the GC Exh. 750(87).

[308] The second complaint, at par. 144, further makes the general allegation that Respondent violated Sec. 8(a)(3) by more stringently enforcing its rule concerning pass-outs. Again, as there is no evidence that any of the warning notices were issued because of the protected activities of any of the employees, I also recommend dismissal of that allegation.

[309] In his direct examination, Valentine confused the dates of the events in question and testified that they occurred on July 13 and 14. I have drafted the narrative to reflect the correct dates of July 14 and 15.

[310] Valentine testified that his own beard was not a quarter-inch long at its longest point, but this does not matter because it is undisputed that the no-beard policy does not permit any beard if the employee has no permit from the medical department.

[311] Valentine and Patterson testified that Valentine tried to explain about his burn, but both were impeached on that point by their pretrial affidavits or cross-examinations.

Patterson (vol. 54) testified that he had received a permit to wear a quarter-inch beard, and he did have a full beard, one-quarter inch long, on July 14. Patterson testified that his beard was "fuller and longer" than Valentine's beard. Although he had previously been issued a beard-sticker for his hardhat, on July 14 he was not wearing his own hardhat; he had left his hardhat at home and had borrowed another. There was no "1/4" sticker on the borrowed hardhat. Patterson agreed with Valentine that Casper did not ask him if he had a beard permit.[312] On cross-examination, Patterson acknowledged that there were parts of Valentine's beard-growth that could have been shaved because there were no burns (or burn-marks) there. Litell did not testify.

On July 15, according to Valentine, Kitzman presented him with a warning notice. The warning notice was signed by Kitzman and Schloegel. The box for general offense-12 is checked; the date and time of offense space is completed: "Thursday—7/14/94." The reason for warning space is completed: "Violation of Company safety and health rules and regulations. Employee was in violation of Avondale's beard policy. See attached beard policy." (No attachment to the warning notice was offered in evidence; however, a copy of the no-beard policy was introduced at another point during the trial.) Valentine testified that when Kitzman presented him with the warning notice:

> And [Kitzman] said, "I have a citation for you to sign, but I want to let you know that I had nothing to do with this." And I took the citation.
>
> And I started reading the citation, and I said, "From my understanding, I heard that for your first offense, you get sent home, if you have too much hair on your face, or you get sent to the first-aid, to shave."
>
> And he said once again, "I had nothing to do with this."

The General Counsel contends that, in fact, employees were permitted to go home, or go to the medical department, to shave when found in violation of the no-beard policy, rather than given a warning notice, at least on the first offense.

Valentine's Warning Notice for Having a Beard—Respondent's Evidence

On direct examination, Kitzman (vol. 107) testified that on July 14 General Foreman Schloegel handed him a copy of a memorandum from Martin Summers, the assistant manager of the safety department. The memorandum is partially boilerplate. Filled-in is Valentine's badge number and a statement that the employee had been found in violation of the no-beard policy. Boilerplate under these entries state: "Please send the Safety Department a copy of the citation within one week of receipt of this notice." Phil Casper's name is then entered as a person to contact for further information. Kitzman testified that, after receiving Summer's memorandum from Schloegel, he went to Valentine and saw that Valentine had "[m]aybe a day's growth, maybe two at the most." Then, according to Kitzman, he drafted the above-quoted warning notice and gave it to Valentine. Kitzman testified that he gave the warning notice to Valentine on July 14 and, as he did so, Valentine responded, "I knew it was coming. I saw the safety man earlier." Kitzman denied that Valentine told him that he thought employees were given an opportunity to go to the medical department and shave, or go home to shave, before being issued a warning notice. (Therefore, Kitzman and Valentine conflict not only on what was said when the warning notice was issued, they conflict about what day it was issued. Kitzman left blank the space on the warning notice for "Date and Time of Issuance of Notice.") Kitzman was not asked anything on direct examination (or cross-examination) about Valentine's burn or his previously having shaved around it.

On cross-examination Kitzman (vol. 115) testified that his understanding was that an employee who failed to shave for 24 hours was in violation of the safety rules and subject to a warning notice. Kitzman acknowledged that, when Schloegel gave him Summers' memorandum, Schloegel did not tell him that he was required to issue Valentine a warning notice. Finally, on cross-examination, Kitzman was asked if he "simply could have told Mr. Valentine to go home and shave and had him leave work early," and Kitzman testified that he could have.

On redirect examination Kitzman again testified that he could have sent Valentine home to shave, "rather than issue a citation," but he further testified that he did not do so because he "went out" and saw that Valentine was, in fact, in violation of the no-beard policy. Kitzman further testified that he thought that he would be subject to discipline, himself, if he did not issue the warning notice to Valentine because the memorandum from Summers indicated (in the boilerplate quoted above) that the safety department expected to see a warning notice within the week. Supervisors can, in fact, be issued warning notices for failures to enforce Respondent's safety policies. The frequency with which this happens, however, was not litigated.

Respondent's safety department director, Territo, testified on direct examination that warning notices are "generally" issued when the safety department inspectors do generate such memoranda. Territo was then asked and he testified:

> Q. [By Ms. Canny]: When a notice such as this goes from your department to a [production department] supervisor, does the supervisor have any discretion as to whether or not to issue a citation?
>
> A. Yes.
>
> Q. What can the supervisor do?
>
> A. He usually meets with Marty [Summers] or—to find out if this if valid. There may be some certain situations where he could not have issued a warning notice. . . . [G]enerally, they do issue the warning notices from this [type of] memo.
>
> . . . .
>
> Q. And is the superintendent required to issue a citation to the [badge] number [specified on the form]?
>
> A. Generally.

Territo was further asked and he testified:

> Q. [By Ms. Canny]: For employees in 1993 or '94 who did not have a pink, 1/4-inch sticker, but who did have facial air, what action, if any, could the Company take towards them?
>
> A. They sent them home to shave. They made them punch out and go shave, and then they could come back, or they gave them warning notices. . . .

Respondent's counsel later returned to the topic and asked:

[312] Actually, neither Patterson nor Valentine knew Casper's last name, but subsequently discussed documents show that it was Casper, and I have drafted the narrative accordingly.

Q. And what are the rules with respect to [being] sent home or [being] written up?

A. If they didn't have that—if they didn't have a doctor's note, that sticker on their hat, if they had a beard, then they got disciplined for that, yes.

Q. And who determined . . . what that discipline would be?

A. The supervisor.

On cross-examination, Territo acknowledged that, despite the above-quoted reference to "the citation" on the form that Summers sent to Poleto, there are circumstances in which warning notices are not issued by the supervisors.

Valentine's Warning Notice for Having a Beard—Conclusions

Territo testified, without objection, that a 1992 statement of the no-beard policy was issued to all employees. I do not believe Valentine's testimony that, before July 14, he did not know of the no-beard policy (whether he was re-told of the policy when he was reinstated in February, or not). Aside from simply being incredible on the point, I note that if Valentine had not been aware of the policy before he was confronted by Casper, Valentine assuredly would have told Kitzman when Kitzman presented the warning notice to him, just as he had denied the existence of the pass-out rule. According to his own testimony, Valentine did no such thing. (Also I note that Patterson did not corroborate Valentine's testimony that Valentine told Casper that he did not know that he needed a beard permit.)

There is no dispute that Patterson was with Valentine when safety department employee Casper stopped Valentine on July 14; it is further not disputed that Patterson was then wearing a beard but not wearing a hardhat with a "1/4" sticker on it, and Casper said nothing to Patterson. If the General Counsel had proved that Casper was a supervisor, these facts would be significant; however, the General Counsel did not prove that Casper was a statutory supervisor; therefore, even if Casper singled out Valentine because Valentine was wearing so many prounion insignia, that fact, alone, is irrelevant.[313] The issues that therefore remain are whether (1) before July 14 Valentine had been excused from the operation of the policy by his departmental supervisors, or, (2) if not, was Valentine treated disparately by the punishment of the warning notice.

I find that, as he testified, Valentine had, for at least 2 weeks before July 14, only shaved around his burn; by July 14, Valentine had a patchy, but substantial, beard. The beard was substantial enough for Casper to stop his vehicle and confront Valentine,[314] and it was more than 1 or 2 days' growth as Kitzman testified. I further discredit Kitzman's testimony where it conflicts with Valentine's testimony that Kitzman presented the warning notice to him on July 15 and, as he did so, Kitzman told Valentine, "I had nothing to do with this."

It is undisputed that Valentine had suffered a facial burn about 2 weeks before July 14. (Valentine testified that he was treated for the burns at the medical department, and he could have been easily impeached by that department's records if that testimony had not been true.) Kitzman had allowed Valentine to grow his substantial beard, obviously, because he knew that shaving would be difficult after Valentine had sustained that burn. Kitzman had certainly allowed Valentine to go without being clean shaven through the start of the shift on July 14; Valentine had then been required to sign in on Kitzman's MCR, and Kitzman had undoubtedly seen Valentine, with his substantial beard, then. Even if, somehow, Kitzman had not seen Valentine during the morning of July 14, he had seen Valentine in the few days before because substantial beards do not grow overnight. When he saw Valentine during the several days before July 14, he necessarily then saw that Valentine's face had gone beyond the point of being clean shaven. As Kitzman allowed Valentine to continue to grow such a beard, he condoned Valentine's violation of the no-beard policy. This condonation lasted until Kitzman was told by one of his superiors to issue the warning notice to Valentine, as Kitzman admitted to Valentine on July 15 when he presented the warning notice.

The facts further show that, even if condonation had not been proved, Valentine would not have been issued a warning notice absent his extensive history of union activities. On cross-examination, Kitzman admitted that he could have sent Valentine to shave, rather than issue him a warning notice. Kitzman was given every opportunity to qualify that admission while he was on cross-examination, but he did not. On redirect examination, however, Kitzman attempted the explanation that he did not allow Valentine to go and shave because, after he got the memorandum from the safety department, he went to Valentine and then saw that Valentine did, indeed, need a shave. This testimony on redirect examination was testimony that warning notices are always issued if the production department supervisors agree with the inspectors that the no-beard policy has been violated, but it is testimony that was not true, as made clear by Territo's testimony.

It is clear from the testimony of Territo that warning notices are not always issued when memoranda are sent from the safety department to the production departments; Territo testified three times that only "generally" are warning notices issued when the safety department notifies the production departments of safety violations. (And Territo acknowledged that the safety department does no followups to see if such warning notices are issued by the production departments.) When asked specifically what supervisors could do when an employee is in violation of the no-beard policy, Territo first replied: "They sent them home to shave. They made them punch out and go shave, and then they could come back." Only after that clear testimony, did Territo add the alternative, "or they gave them warning notices."

In summary, based on the fact that Kitzman had, previous to July 14, allowed Valentine to report to work wearing a substantial beard (because of Valentine's job-related injury), I find that Respondent had condoned the conduct for which it punished Valentine. I would therefore find a violation of Section 8(a)(3) on that account, alone. Further, I find that Respondent has shown in its defense only that it *could have* issued the warning notice of July 14 to Valentine, but it has not met its *Wright Line* burden and shown that it *would have* issued the warning notice even absent the protected activities of Valentine. As well as the condonation factor, I base this finding on: (1) Territo's admission that warning notices are only "generally" issued when

[313] The considerations, of course, would be different if the General Counsel had shown that the sheet metal department supervisors knew that Casper had singled out Valentine because of the many prounion insignia that he wore.

[314] Casper did not stop because he saw two employees with beards; Patterson was not wearing his "1/4" sticker, but he was probably known to the safety department personnel as one who possessed a beard permit.

memoranda are sent from the safety department to production departments; (2) Territo's admission that supervisors sometimes send employees to shave, rather than issue them warning notices, when violations of the no-beard policy are found; (3) Territo's admission that "the supervisor" can decide what, if any, discipline is to be imposed for violations of the no-beard policy (and there is no rigid policy requiring the issuance of a warning notice, despite the boilerplate on the memoranda from the safety department to the production departments); and (4) Kitzman's specific admission that he could have sent Valentine to shave rather than issue him a warning notice. I therefore find and conclude that Respondent, by issuing the July 14 warning notice to Valentine, violated Section 8(a)(3).

(3) Valentine's discharge for threatening a supervisor

On August 3, near the end of the workday, Kitzman approached Valentine and remarked that Valentine had a hole in his work boot, another safety violation. Valentine asked Kitzman if he could continue working if he could borrow another employee's boot; Kitzman said that Valentine could. Valentine borrowed a boot and then approached Kitzman. According to Valentine, Kitzman told him that he did not care about the boot, but CDC General Foreman Roy Toledano was "pushing" the matter. Valentine testified that when he left Kitzman he met sheet metal department employee Patterson; in the immediate area was a third employee who was wearing a black hardhat (indicating that he was an employee of the CDC department). Valentine explained to Patterson what he had been doing over the prior several minutes; in the process, he referred to Toledano as an "ass." Later in the day, Kitzman and Toledano approached Valentine. According to Valentine:

> Kitzman asked Roy, "Is this the man that threatened you."
>
> And he [Toledano] said, "Yes."
>
> And I told him, "Well, how can I threaten you; I never did talk to you."
>
> And he replied that, "I know you didn't talk to me, but one of my workers heard it and told another co-worker of mine that came back and told me that you said you was going to kick my ass."
>
> I told him [Toledano] that was a lie.

Kitzman told Valentine to go back to work. Later in the day, Valentine went to Kitzman's office to get another assignment; Kitzman and Schloegel were there. Kitzman told Valentine that he was being discharged for threatening Toledono. Valentine again denied that he had done so, but Kitzman replied that Toledono had said that the CDC department wanted Valentine discharged. Valentine asked Schloegel if it were true that he was discharged, and Schloegel replied, "Yes, you are terminated. And Roy will have his witness in court." Kitzman escorted Valentine off the premises. As they were leaving the work area, Patterson approached and announced that he had been present and would serve as a witness for Valentine in future litigation. All of this testimony by Valentine was credible.

The next day, Valentine testified, Schloegel telephoned Valentine. Schloegel told Valentine to report back to work, and he would be paid full backpay, "because they couldn't find evidence that I threatened Roy." Valentine was reinstated the following day, with backpay.

No witness testified that he heard Valentine threaten Toledono. Schloegel (vol. 109) testified that CDC Superintendent Leroy Cortez demanded that he discharge Valentine, and he complied by telling Valentine that he was, indeed, discharged. Schloegel and Kitzman, however, then contacted their superintendent, Poleto. Schloegel and Kitzman told Poleto that they did not believe that Valentine had threatened anyone. Poleto contacted Ernest Griffin, Respondent's vice president in charge of the human resources department, and explained what had happened. Poleto told Griffin that Valentine should not have been discharged, even though Cortez, another superintendent, had ordered it. Griffin agreed and told Poleto to call Valentine back to work and Valentine would be given back pay for all the time that he had missed. No discharge papers (such the ASI-22 form) were processed for Valentine.

If animus toward Valentine's protected activities was part of the reason that the CDC supervisors demanded his discharge, it was effectively extinguished by the actions of the supervisors of the sheet metal department. I agree with Respondent that Valentine was not discharged; in effect, he was given a day off, with pay. I shall therefore recommend dismissal of this allegation of the complaint.

4. Employees discharged for sleeping

a. Jose Aguilar

Jose Aguilar (vols. 12, 159), a pipe and systems tester, was issued a warning notice on October 5, and he was discharged on October 8, 1993. The second complaint, at paragraphs 125 and 127, respectively, alleges that Aguilar's warning notice and discharge violated Section 8(a)(3). The General Counsel contends that Respondent warned and discharged Aguilar because of his known union activities and expressions of sympathy which included his displaying prounion insignia on his hardhat and on the bumper of the vehicle that he regularly drove to work. The complaint further alleges that, in violation of Section 8(a)(1): Aguilar was warned that his union activities were being kept under surveillance, Aguilar was threatened with unspecified reprisals because of his union activities, and Aguilar was threatened by being told that he had been discharged because of his union activities. Respondent denies that the alleged threats and warning occurred. Further, Respondent answers that its supervisors had no knowledge of any union activities or sympathies of Aguilar at any time before he was issued the warning notice, although Respondent admits that its supervisors had such knowledge before Aguilar was discharged. Respondent further answers that Aguilar was issued the warning notice solely because he did not possess personal hand tools that all pipe-testers are required to possess, and Respondent further answers that Aguilar was discharged because he was found sleeping during working time. The General Counsel replies that the defense for the warning notice is a pretext because Aguilar had not been required to possess the tools before he engaged in union activities. The General Counsel further replies that Respondent's defense for the discharge is a pretext because Aguilar was not sleeping at the time in question. Alternatively, the General Counsel contends that, even if the Board finds that Aguilar had been sleeping, it must nevertheless hold that Aguilar was treated disparately because other employees were found sleeping on duty but they were issued lesser, or no, discipline. Ultimately, I find and conclude that Aguilar's warning notice was not issued because of his union activities, that Aguilar did

sleep on duty, that Aguilar was treated disparately for that offense, and that his discharge violated Section 8(a)(3).

Aguilar was usually employed by Respondent's ships' test and trials (operators) department as a tester of systems on ships just before they were delivered. Jeffrey Boudreaux was the superintendent of the operators department at the time Aguilar was assigned there. At the time of the events in question, Aguilar was assigned to the pipe department to work for various foremen who reported to General Foreman John Whittington.

Aguilar testified that about 2 weeks before the June 25 Board election, he placed a union bumper sticker on his pickup truck that he regularly drove to work; the bumper sticker stayed there through the date of his discharge. Also, for 2 days during the week before the Board election, Aguilar wore a "Union-Yes" sticker on his hardhat; Aguilar removed it immediately after the election. In the "Employee Comment" space of the warning notice that Aguilar received on October 5, Aguilar wrote "I refuse to sign this because this is a form of harassment in retaliation for being a union supporter." Also, as admitted by Whittington, the supervisor who ultimately discharged Aguilar, immediately after he received the warning notice, Aguilar placed another union sticker on his hardhat; it stayed there through the date of his discharge.

Aguilar testified that about 2 days before the Board election, Pipe Department Foreman Lawrence Mullins spoke to him in a work area and:

> Well, he told me that I had been named in a—that I had been identified in a pipefitters foreman meeting as a—okay, a union supporter.
>
> . . . .
>
> He told me to "Be careful, Jose, be careful." He also named the person who ID'd me, and that was Billy Goat, Jr.

("Billy Goat, Jr." is employee Karl Knecht. Karl Knecht is the son of Pipe Department Foreman Harold (Billy Goat) Knecht.) Based on this testimony by Aguilar, paragraph 48 of the second complaint alleges that Respondent, by Mullins, "threatened its employees with unspecified reprisals because they aided or supported the Union."

Karl Knecht (vol. 121) testified for Respondent that he had a confrontation with Aguilar at which time Aguilar was wearing a prounion sticker on the inside of his hardhat. During that confrontation, Knecht told Aguilar that if he was so proud of a "Union-Yes" sticker, he should wear it on the outside of his hardhat. Aguilar responded angrily and told Knecht that, if he got discharged because of the sticker, he would assault Knecht. Knecht testified that he told his father, Foreman Harold Knecht, about the incident, but he further testified that he told no foreman that he saw Aguilar's prounion sticker. I do not believe that Knecht told his father about the incident, but that he did so without mentioning the prounion sticker. I find that employee Karl Knecht told Foreman Harold Knecht about Aguilar's prounion sticker. I further believe that the "word" was spread at some foremen's meeting. I further believe, and find over Mullins' denial (vol. 121), that Mullins told Aguilar that he had been identified as a union supporter in a foremen's meeting and that he should "be careful," as Aguilar testified. I accordingly conclude that, in violation of Section 8(a)(1), Respondent, by Mullins, on June 22, 1993, threatened its employees with unspecified reprisals because of their prounion sympathies.

Aguilar further testified that on Friday, September 3, as he was leaving the plant in his vehicle that had a prounion sticker on the rear bumper:

> I had gotten off at about 3:30, and I was on my way home from work, and I had noticed one of the pipefitter foremans, [actually, Operators Department General Foreman] Bob Olmstead, pull up behind me.
>
> And we had recognized each other; we had waved at each other. And when I had left, when the light turned green, I had noticed him standing up in his van looking at the rear of my truck. So I was at fear that someone may have hit me in the parking lot, so I pulled over and I looked at my truck. I didn't see any damages, so I went ahead and I went home.

Then, further according to Aguilar, on September 7:

> Tuesday—I remember because the Monday was Labor Day—Tuesday, Bob Olmstead called me to the side—it was just him and I—and he asked me if—he asked me whose truck I was driving Friday afternoon when we had seen each other. And I told him it was mine, and that was the end of the conversation.

Olmstead (vol. 120) testified for Respondent, but he did not deny Aguilar's testimony about his September 3 and 7 conduct, and I found it credible. Aguilar testified that later on September 7:

> After I had finished spoken to Bob Olmstead, about a half hour later Jeff Boudreaux came to where I was collecting test memos in back of the operator's office.
>
> He called me to the side . . . it was just him and I there—he told me, "Off the record, Jose, I know that you are a union supporter. Oh, I have nothing against it, but I know that you are," which totally caught me off guard and I could only ask him where he got his information.
>
> He told me he couldn't say. I then again tried to name a couple names, and he told me again that he couldn't say.

Based on this testimony, paragraph 73 of the second complaint alleges that Respondent, by Boudreaux, "created the impression among its employees that their union activities are under surveillance by the Respondent." Boudreaux denied this testimony; however, I found Aguilar credible on the point. A supervisor's calling an employee away from other employees and then telling him that his prounion sympathies were known, but refusing to tell the employee, when asked, how that knowledge was gained, is an action designed to convey to that employee that the information was gained by stealth, and unlawful means, not observation of open and obvious activity (such as Aguilar's bumper sticker). The act of telling the employee that the communication was "off the record" would further tend to coerce the employee by threatening him. I find and conclude that, in violation of Section 8(a)(1), Respondent, by Boudreaux, on September 7, 1993, created the impression of surveillance in an employee.

(1) Aguilar's warning notice for not having tools

On October 1, Aguilar was assigned a "flush watch" on a 3 to 11 p.m. shift. The flush watch, as Aguilar described it: "is where we clean the internals of the piping with a hot oil and pressure and a high temperature. And we run a pump and a filter to pick up any sediment or trash that is—that could be lodged in a pipe." At 3:30 p.m. General Foreman Whittington

told Aguilar to repair a steam hose leak that was on the dock, about 50 yards away from the point on the ship that Aguilar was performing the flush-watch duties. Aguilar told Whittington that he did not have the tools necessary to repair the steam-hose leak. Further according to Aguilar:

> At the same time, [admitted Supervisor] Blaine Johannson, this other pipefitter foreman, told me to go borrow some tools from a ship operator by the name of Leon Roberts. So I told him that I would get together with Leon Roberts and I will get right on it.
>
> I later went and spoke to Leon Roberts, and I asked him if I can borrow some tools from him. He said that he would come down with me to take a look at the job and see what kind of tools I would need, so we went down at the foot of the gangway where the job was at.
>
> We took a look at it. It had 2-1/2 inch couplings on it, and Mr. Leon said that he didn't have the tools to perform that job, that all he had was 14-inch pipe wrenches, which wouldn't fit, that don't fit. So we tried them anyway, but we was unable to get it off.
>
> So I went on to try and borrow some more tools—to try and find the right tools for the job. I called—I went to the fire watch's office; I called the other ships, because I know that they have operators on other ships, with the hope of trying to locate an 18-inch pipe wrench that will fit this union [a junction between two hoses].
>
> I didn't have any luck, so I called John Whittington [at home] at approximately 6:00 and I told him that I didn't have any luck locating any tools . . . to perform the job.

Johannson was not called by Respondent to testify; Roberts had deceased by time of trial.

After Aguilar's telephone call to his house, Whittington came to the premises. Whittington also searched for a larger wrench; when he failed to find one, Whittington took a steel mall, and, according to Aguilar:

> He [Whittington] beat the coupling until he broke it loose. He beat it with the mall and he broke it loose, and then he put the pipe wrench on it and spun it off. He—I changed out the hose and he put it back on with the 14-inch pipe wrench, and then he beat it again to tighten it up. And then he started to boast about, it didn't take him long to do the job.
>
> And I explained to him that I brought . . . all of my tools home for fear of them getting . . . stolen, and that is why I didn't have the tools to perform the job, because they had gotten stolen a couple times before. . . . [Whittington said] that we would talk further about this in the morning.

Aguilar testified that during the next workday Whittington presented him with a warning notice for negligence because of what had happened. Aguilar protested that he could not be considered negligent because he had called Whittington at home for help. Whittington agreed, took the notice back, and Whittington then sent Aguilar back to work. On October 5, further according to Aguilar, Whittington presented Aguilar with another notice. Whittington had marked the box for major offense-2 of the Avondale Employees' Guide, and Whittington stated in the space for the reason for the warning: "Employee didn't have proper tools to complete job assignment. Job assignment was not done."

Aguilar testified that he argued first that he should not have been given another assignment while on flush watch. Further:

> And as far as having the tools—from what it says here, as far as having the proper tools to complete the job assignment, I didn't have the—okay, that particular tool, which I attempted to borrow the tools from the person that they told me to go borrow the tools from.

Aguilar did not sign the warning notice; as previously noted, in the "Employee Comment" section Aguilar did state that he thought he was being harassed because he was a "Union supporter."

Whittington testified that he gave Aguilar the order to change the steam hose because there was no one else present during the second shift to do it, and this testimony was not rebutted. Whittington denied knowing, at the time that he made the steam-hose assignment to Aguilar, that Aguilar favored the Union. Whittington further testified that when he initially gave the order to Aguilar to fix the steam hose, Foreman Blaine Johannson and employee Leon Roberts were present. According to Whittington, Roberts held up two wrenches, at least one of which could have uncoupled the hose, and offered them to Aguilar. Whittington testified that Aguilar agreed to take the wrenches from Roberts and use them on the steam-hose assignment.

Whittington's testimony about what happened when he returned to the plant after Aguilar's telephone call to his home does not differ significantly from Aguilar's. Whittington testified that during the next day, after conferring with Olmstead (who was usually the general foreman directly over Aguilar when Aguilar worked in the operators department) he composed a warning notice for negligence and not completing the job. When Aguilar protested, he changed the warning notice to not having the proper tools and failure to complete a job.

Conclusions on Aguilar's Warning Notice for not Having Tools

For a day or two before the June 25 Board election, Aguilar wore a "Union-Yes" sticker. Also during that period, Mullins told Aguilar that he had been "identified" as a union supporter in a foremen's meeting (obviously after the younger Knecht told Foreman Knecht of what he knew). Mullins further threatened Aguilar by telling him to: "Be careful, Jose, be careful." On September 3, Olmstead, it is undenied, took special note of the rear end of Aguilar's truck where Aguilar had placed a prounion bumper sticker. The next workday, September 7, Olmstead confirmed with Aguilar that the employee had been driving his own truck. Later that day Boudreaux approached Aguilar and told him that, through means that he would not disclose, he had found out that Aguilar was a prounion employee. Mullins' and Boudreaux's acts have been found above to have constituted 8(a)(1) violations by Respondent. The acts of the two general foremen and the foreman demonstrate to me, and I find, that Aguilar's prounion sympathies were well known to Respondent's supervisors at the time that the October 5 warning notice was issued; I discredit Whittington's testimony that he did not know of those sympathies. Animus toward those who favored the Union, especially those who displayed prounion insignia such as Aguilar's bumper sticker, having been established, it must therefore be held that a prima facie case of unlawful motivation in the issuance of the October 5 warning notice to Aguilar has been established by the General

Counsel, and the Board must examine the evidence that Respondent has presented in defense.

Respondent did not call admitted Supervisor Johannson, and I credit Aguilar's testimony that Roberts did not, in fact, have a wrench that could disconnect the hose for purposes of repair. Nevertheless, Aguilar admitted that he did not have the wrench necessary to do the job of changing the ruptured hose. He testified that, even before Whittington had mentioned the possibility of discipline over the issue, he told Whittington that he did not have the 18-inch wrench because he had left all of his tools at home out of fear that they would be stolen. This was the plainest of admissions that Aguilar was required, and knew that he was required, to possess the tool with which the job could have been completed. The General Counsel, nevertheless, contends that: (1) Aguilar should not have been ordered to change the hose because he was on a flush watch and busy with that duty, (2) Whittington's testimony shows that Aguilar should have been able to borrow tools, and (3) Whittington should not have banged on the coupling with a mall. The General Counsel did not, however, allege that the original assignment was an act of harassment (as the General Counsel does in other cases), and I shall not substitute my opinion for Respondent's about who should have been assigned the work. Moreover, although Whittington would have allowed Aguilar to borrow tools, this does not detract from the fact that Aguilar was charged with the duty of having his own tools, as Aguilar admitted. It is true that, as the General Counsel points out on brief, Whittington admitted that he did not always discipline employees who failed to have all of their required tools; however, there is no evidence that Whittington failed to discipline employees whose failures to have their tools resulted in such problems as that presented by Aguilar's failure to have his tools on October 1. Finally, banging on the coupling does not sound like a traditional (or even safe) technique, but the job needed to be done, and Whittington's methods are not the proper subject of the Board's inquires. I find and conclude that Respondent has demonstrated that it would have issued Aguilar the warning notice of October 5 even in the absence of his known protected activities. Accordingly, I conclude that Respondent did not violate Section 8(a)(3) by Whittington's issuance of that warning notice. I shall therefore recommend that this allegation of the complaint be dismissed.

(2) Aguilar's discharge for sleeping in a control room

On October 7, Aguilar was assigned to work an 11 p.m. to 7 a.m. shift. Aguilar testified that he worked in the MMR-1, the main machinery room of the ship, until other workers cut off the electricity about 3:30 a.m. The only light remaining was from an emergency system and was comparatively dim. Aguilar went to the AMR-1, an auxiliary machinery room. There, he found employee Mike Barr and an employee of a vendor who stated that they had cut the power while installing a new control panel, and they told Aguilar that they would be through in 15 minutes. Aguilar went to a nearby AMR-1 control room (technically: an "engine room operating station") that was about 8-feet by 8-feet, and it had no door. Aguilar sat down and waited for the power to be turned back on. According to Aguilar:

> And about approximately 4:00, I guess, [electricians] Rico Martinez and Steve Roppolo walked in and sat down at the door, and about two minutes later, John Whittington came into the room, [and Whittington] asked Steve and Rico what they were doing, and they told him that they just had sat down.
>
> And then he looked in back of the room and he saw me sitting back there, and he asked Rico how long have I been sitting back there. And they told him . . . that I had been back there for about two minutes since the time that they had sat down, that they didn't know how long I had been sitting back there, that they had just sat down themselves.
>
> So then he [Whittington] took off, and about a minute later he came back and he touched me on my leg and I asked him what he wanted, and he asked me if I was [not] supposed to be in MMR-I, and I told him that Mike Barr is with the vendor and they have the power secured, and that I am going to wait for [them] to restore the power so I can go turn on the A/C [air conditioning] system and the ventilation system back on. Since the A/C system is forward of the AMR-I, I sat there and I waited for them.
>
> . . . .
>
> Then he [Whittington] turned around and he left, and a couple minutes later the power was back on, so I went to the forward A/C plant and I started it up, and while I was waiting for it to go on line, John Whittington and a boss man, which I don't know his name, this other pipe foreman, approached me and told me: "Your time stopped at 5:00. Pack your bags and go home."
>
> So I asked him what is he talking about, and he said, "Sleeping on the watch. I have two witnesses." I told him, I wasn't sleeping on the watch. And, right, he said he had two witnesses. He told me: "Pack your bags and go home. You are fired."

Aguilar testified that he then left the premises and:

> About 6:30 I called up Jeff Boudreaux, the operator superintendent, and I asked him if he was going to stand by John Whittington firing me because he thought I was sleeping.
>
> And I told him that I had witnesses, that I was working with Mike Barr and the vendor, and he told me, "Jose, you made the wrong decision."
>
> I said, "What? What do you mean?"
>
> He said, "Jose, you are fired."

Based on Aguilar's testimony of his exchange with Boudreaux, paragraph 75 of the second complaint alleges that Respondent, by Boudreaux, "informed an employee that an employee had been discharged because he aided or supported the Union." Additionally, the General Counsel contends that Boudreaux's remark was an admission that Aguilar was actually discharged because he had made the "decision" to support the Union. Boudreaux denied Aguilar's testimony on this point, but I found Aguilar credible. I do not, however, find a threat, or an admission, by Respondent in Aguilar's testimony. Aguilar told Boudreaux that Whittington had at least thought he was sleeping; it is equally inferable that Boudreaux was backing his fellow supervisor and telling Aguilar that he made the "wrong decision" to sleep on duty. I shall, therefore, recommend dismissal of this allegation of the complaint.

Aguilar's Discharge—Respondent's Evidence

Whittington testified that he came to the ship between 3:30 and 4 p.m. on October 7 to make a routine inspection of the flush watch. At the time he arrived, the power had been re-

stored to the ship. The air-conditioning and flushing systems were on stand-by, waiting to be re-started. A sea-water cooling pump for the air-conditioning system had stayed on line when the power went off, so it had started automatically when the power was restored. Aguilar was not where he should have been, in the MMR-1. Whittington looked for Aguilar for 20 minutes and then found him in the AMR-1 control room. (Whittington testified that the control room was only 2 minutes away from the MMR-1, but it took him 20 minutes to find Aguilar because he had had no reason to look for Aguilar in the area of the AMR-1.) According to Whittington, Aguilar was lying prone, with a cap pulled over his eyes. Whittington called Aguilar's name twice, but Aguilar did not respond. Whittington shook Aguilar and then:

> I said, "Were you asleep?"
>
> He replied: "Yes; what do you want?"
>
> I said, "I need you to go get everything back up and running, we need the AC plants running."
>
> He said—you know he was kind of groggy so it wasn't real quick, and he said, "Well, I need to get the sea water pumps going."
>
> I said, "No, you don't, they are already running, they have been running, you haven't been watching them; go get the AC plants going."
>
> So he went to the forward AC machinery room. That is the last time I spoke to him. I went and got [Pipe Department Foreman] Chris Trotter, explained to Chris Trotter what had happened, [and I asked] would he witness the termination. He said, "Yes," he would. Chris Trotter went with me to the forward AC room.
>
> I told Mr. Aguilar: "Jose, you are being terminated for sleeping on the job; I need your badge." He gave me his badge and left.

Respondent called electricians Martinez and Roppolo (both at vol. 70). Both testified that when they went to the control room to take a lunchbreak, the power and lights were on (although they earlier had been off), and Aguilar was sitting in a chair, leaning against a large toolbox, his face covered by a baseball cap, apparently asleep. Both testified that Whittington called Aguilar by name, twice. When Aguilar did not respond, Whittington shook Aguilar, at which point Aguilar got up without saying anything. Then Aguilar and Whittington left the room. Roppolo and Martinez also testified that Aguilar later returned and told them that he had been fired and asked them to be his witnesses that he had been awake before Whittington had entered the control room.

In rebuttal, Aguilar denied that he admitted to Whittington that he had been sleeping, and Aguilar denied that he ever saw Martinez and Roppolo after he left the control room.

Aguilar's Sleeping—Credibility Resolutions

I believe, and find, that Aguilar was sleeping when he was found by Whittington. Although there are minor discrepancies and difficulties among the descriptions, I credit Whittington, Martinez and Roppolo that Aguilar was lying, or slouched in a chair close to the point of lying, in a position indicative of nothing but sleep. The disinterested testimonies of Martinez and Roppolo that Aguilar was apparently sleeping were credible. (Clearly Roppolo was not hostile to Aguilar; Roppolo testified that the baseball cap that Aguilar had over his face, while sleeping, was a union-emblem cap, although Aguilar denied that he was wearing a cap with prounion insignia.) That testimony, along with essentially consistent, and credible, testimony by Whittington, proves to me that Aguilar was sleeping, with his eyes covered by a baseball cap, when Whittington entered the room. An admission of sleeping is even implicit in Aguilar's testimony; Aguilar testified that Whittington spoke to Roppolo and Martinez and asked how long Aguilar had been there, but Aguilar did not speak up and say anything (such as: "Why are you asking them that?"). Additionally, I do not believe that Aguilar would not have allowed to go unchallenged Whittington's (or anyone else's) touching him on the leg, as Aguilar described, unless he had been asleep when Whittington approached him.

I find that Aguilar sat in the control room to wait for the power restoration. Then he fell asleep and he slept through the power restoration, through the entry of Roppolo and Martinez into the control room, through Whittington's entry into the control room, through Whittington's looking directly at him without saying anything to him (and, of course, Aguilar's not saying anything to Whittington), through Whittington's asking Roppolo and Martinez if that was Aguilar whose eyes were covered by the bill of his cap, through the answer of Roppolo and Martinez that it was Aguilar, and through Whittington's twice calling Aguilar's name. Aguilar reached some level of consciousness when Whittington was asking Roppolo and Martinez how long Aguilar had been in his sleeping position. Nevertheless, perhaps because of the degree of his somnolent state, Aguilar was unable to respond to Whittington himself. Whittington then touched Aguilar and fully awakened him. Although it was in a voice that was apparently too low for Roppolo and Martinez to hear, Aguilar then admitted to Whittington that he had been asleep, as I further find. I further credit Whittington's testimony and find that, the moment Aguilar admitted to sleeping, he decided to discharge Aguilar. Finally, I find that, after he was discharged, Aguilar returned to the work area of Roppolo and Martinez and asked them to be false witnesses for the proposition that, just before Whittington entered the control room, he had been awake.

I do not, however, credit Whittington's testimony to the extent that it seeks to imply that Aguilar was out of his work area when he went to the control room because Aguilar should have remained in MMR-1. Only the sea water cooling pump was working after the power had been restored; it had gone on automatically, and there was no discernable "need" to monitor it before the air-conditioning system (which it serviced) was operating. That is, Whittington did not testify that the sea water cooling pump, as opposed to the flushing system, had to be monitored constantly. To the extent his testimony may be said to imply such, I discredit it. Both Aguilar and Whittington testified that Aguilar's first duty after the power was restored was to re-start the air conditioning system. Both testified that the air-conditioning system was forward of the control room, and MMR-1 was aft. Respondent has not shown that Aguilar's decision to wait in the control room (which was only 2 minutes away from MMR-1, according to Whittington) until the power was restored was unreasonable, or somehow a dereliction of his duty. That is, Respondent has not shown that there was anything wrong with Aguilar's going to the AMR-1 when the power went out, and it has not shown that Aguilar neglected his duties by waiting there, in the control room, for the power to be restored, rather than returning to MMR-1 to watch the sea-water cooling pump (which was not cooling anything because

the air-conditioning system was off). Aguilar's falling asleep as he waited, of course, raises different issues.

Employees' Sleeping—General Counsel's Evidence of Disparate Treatment

The Avondale Employees' Guide lists as immediate discharge offense-2: "Sleeping or deliberate loafing during hours of work," As Respondent's progressive disciplinary system is structured, "immediate" means that no prior warning is necessary before discharge will be effectuated. The General Counsel, however, introduced a great deal of evidence that Respondent's supervisors did not consider sleeping to be grounds for discharge, despite the plain language of the Avondale Employees' Guide.

On January 17, 1992, pipe department employee Gerald Pennex fell asleep while conducting a pipe test, an equivalent of the flush watch to which Aguilar was assigned on the night of October 7–8. Buddy Roberts, the superintendent of the ship that Pennex was working on, composed an ASI-22 (discharge) form for Pennex stating that Pennex had violated the Avondale Employees' Guide's immediate discharge offense-2. Roberts added that Supervisor "R. Weber" also witnessed Pennex's sleeping. The form was processed to Production Vice President Michael Simpson, apparently without having gone through then Pipe Department Superintendent Ken Genter. On the ASI-22 form, Simpson wrote: "IVO [in view of] 10 yr. work record, I choose to have Pennex suspended for three days without pay. Further violation will result in immediate dismissal." On cross-examination Simpson (vol. 139) was asked and he testified:

> Q. Mr. Simpson, why didn't you agree with the discharge of Mr. Pennex?
>
> A. His superintendent came to me and described to me a long work record that was very good and some extenuating circumstances for the man going to sleep and requested that he not be discharged.
>
> Q. Besides having a good work record, what were the extenuating circumstances?
>
> A. Well, I just described to you the position he was in, the job he was doing, the climate in the area which he was, and the fact that he obviously didn't do it on purpose, because he was in plain view of everybody. And his superintendent [Genter] told me that he was on cold medication. . . . He was sitting up—the overhead of the prison barge is about 20 feet high. And he was way up in the overhead, sitting on pipes while he observed the test of some piping system. . . . It was winter, and everybody was dressed very warmly. And it was cold in the compartment below, but it was warm up in the piping. And he was sitting up there overdressed, with a wonderfully boring job, and on cold medication, a good, long record of no prior problems, and a special request from the superintendent to give him special consideration, which I did.

At the time of his discharge, Aguilar had been employed by Respondent for 5-1/2 years, beginning December 11, 1987. He received three warning notices during that period. The October 1 warning notice has been discussed above. In addition, Respondent offered another 1993 warning notice that Aguilar received on March 31, 1993, for a violation of general offense-4 (for "leaving work place"). Respondent also offered a 1991 warning notice for a violation of major offense-11, an unauthorized exit from the property. (I rejected Respondent's offer of the latter warning notices because no relevance had been shown at the time, but I consider them here.) Respondent offered no other warning notices that were issued to Aguilar during his tenure. In addition to receiving only three warning notices during a 5-year tenure, Aguilar received four commendations that were received in evidence: (1) On December 1, 1988, his supervisor recommended him for an upgrade in classification as a "valuable and seasoned employee . . . gives full effort . . . Learns quickly . . . . Needs minimal amounts of job supervision . .. always available for emergency work on short notice . . . productivity has greatly increased as have his job skills." (2) On March 14, 1990, a ships' superintendent composed a memorandum to the human resources department that states that Aguilar and three other employees had taken quick action to contain a fire while the fire department was being called. The memorandum concludes: "There is not doubt [that] the damage could have been more extensive had it not been for the actions of these employees." (3) On March 16, 1990, Aguilar's supervisor recommended him for a wage increase stating:

> Mr. Jose Aguilar continues as one of my most aggressive and productive memo-testers. He has learned a number of new systems, taken them on as a challenge, groomed them for defects, interface well with supporting crafts, corrected minor defects, and demonstrated systems to the Navy. To date, Jose has closed more memos [assignments] than any other operator. Jose has been developing into a high caliber operator/tester and merits a raise. He and a co-worker have only last week located a fire, sounded the alarm, [and] fought and extinguished a Class A fire.

(4) On April 13, 1992, Aguilar's then-supervisor also wrote a four-paragraph "To whom it may concern" letter stating that Aguilar had worked under him since May 9, 1988, and that:

> During this period, he has been delegated numerous job assignments requiring manual dexterity and a firm mental grasp of how various systems operate.
>
> Mr. Aguilar has consistently demonstrated his skills and his ability to get the job done on time and within cost. He has an excellent record of job reliability, working everyday, and, when required, working over on short notice, including weekends, to complete his job assignment.
>
> During Mr. Aguilar's assignment to me, he has proven himself to be an exemplary employee and is an excellent and conscientious mechanic, with the capability to work well with his co-workers.

Other than Simpson's bare statement that Pennex had caused "no prior problems," Respondent did not offer evidence of the ("good") work record of Pennex upon which Simpson relied in reversing the ships' superintendent's decision to discharge Pennex.

According to documentation introduced by the General Counsel on rebuttal, on December 4, 1992, Simpson reversed another departmental decision to discharge an employee for sleeping, and, according to that documentation, Simpson had been the one who caught the employee asleep. Employee Lionel Griffin was hired in the paint department on March 8, 1988. On December 3, 1992, the paint department processed an ASI-22 (discharge) form for Griffin stating: "Employee was caught sleeping on the job (Truett) by Mike Simpson. [signed] Frank Munger." After this entry, however, Simpson wrote: "In

view of length of service, excellent previous work record, and his recommendation of his superintendent, Mr. Griffin is to be suspended 3 days w/o pay instead of discharged. [Initialed and signed by Simpson.]" Simpson was not called in surrebuttal to offer any additional explanation of why Griffin's discharge was converted to a 3-day suspension.

Further in rebuttal, the General Counsel introduced other documentation that demonstrated that other employees were found sleeping in the 1990–1994 period, but they were not discharged. Some of the documentation recites that there were no witnesses to an employee's sleeping other than the foreman who caught the employee. On brief, Respondent contends that two witnesses to the sleeping are necessary before an employee is discharged for sleeping, and that all such documentation is irrelevant. Simpson (who was the penultimate supervisor of all 4100 production and maintenance employees and who headed Respondent's campaign against the organizational attempt), however, denied that Respondent had a requirement that there be two witnesses to an employee's sleeping before such employee is discharged. Also, many of the warning notices that state "no [other] witnesses" were issued in the paint department. Upon this factor, Respondent contends that it has been proved that, at least in the paint department, two witnesses to sleeping are required before a discharge will be implemented. In this regard, Paint Department Superintendent Bourg was asked on direct examination and he testified:

> Q. Do you have any rules or policies in your department as to how employees who are caught sleeping on the job are to be handled?
>
> A. Yes. You know, we like to have a witness if we catch anyone sleeping on the job, you know, because it is best to have a second party to witness an employee that has been caught sleeping.
>
> And, again, each individual case is judged by whether that employee might have been known by the foreman knowing that he had a problem, that he maybe spent the night in the hospital with someone, whatever. And there's times that where an employee caught someone sleeping, and he said, "Hey, look, before I am forced to terminate your services, I think it is best for you to go home and get some sleep." That has happened a few times.

Contrary to Respondent's assertions, Bourg did not thereby testify that, even in the paint department, two witnesses are required before an employee will be discharged for sleeping; Bourg testified only that it is "best" to have two witnesses. (Even then, as the above quotation shows, and as subsequent cross-examination showed, Bourg testified that he would consider the circumstances of each case; he did not testify that the paint department treated sleeping as an immediately discharge able offense.) Stan Oliver, Respondent's fire chief, was the only department head who testified that his department requires two witnesses before an employee is discharged for sleeping. Accordingly, I find that all of the following warning notices, and all of the following other documentation, are relevant in deciding if Aguilar was treated disparately.[315] Some of these warning notices recite that the employee is guilty of "sleeping or deliberate loafing." Although such notations leave open the possibility that the cause of the warning notice was not sleeping, these warning notices show that, although both offenses are included in the wording of immediate discharge offense-2 of the Avondale Employees' Guide, it is obvious that neither was considered to be an immediately discharge able offense by the supervisor and the department in which he worked.[316]

(1-2) The first two documented cases of employees not being discharged for sleeping are those of Pennex and Griffin, as detailed above. Additionally: (3) On December 3, 1990, electrical department employee B. Rousell was issued a general offense-4 warning notice for: "Lounging on a rack in the CPO berthing during working hours." (A "rack," in Navy parlance, is a bed.) Previously, on October 29, 1990, this employee had been issued a detailed warning notice for refusal to follow instructions and "displaying an attitude less than acceptable." (4) In 1991, employee 11983 was issued five warning notices, the last for sleeping, and he was still not discharged. The employee's first three warning notices of 1991 were for wasting time; the last of those three states: "You are hereby notified that this type of action will not be tolerated by this dept. Beware, action may be taken against you. 3rd notice. Final Warning." Thirty-three days later the employee received another notice for wasting time, and that fourth warning notice concludes: "This action will not be tolerated by this dept. Last and Final Warning." Two weeks later the employee was issued his fifth warning notice that stated: "Sleeping on the job site. (No witnesses.) Your foreman observed you sleeping on the job site. This action will not be tolerated by the dept. This is your only warning given. If it happens again, you will be terminated." (5) On February 20, 1991, paint department employee Ronald Newman was issued a warning notice that stated: "You are being warned about sleeping on the job. Seen sleeping by Kelly, the electrical foreman."[317] Five months later, Newman was issued another warning notice for wasting time. (6) On March 7, 1991, electrical department employee Steven Johnson was issued a warning notice for wasting time and insubordination; the warning notice stated: "Employee was also wasting time (lying down on scaffold board) which resulted in lack of production. Final warning." (7) On April 9, 1991, paint department employee 10048 was issued a warning notice for: "Substandard workmanship. Was caught sleeping on the job by pusher [leadman] (Watson). You are hereby warned that this conduct will not be tolerated. This is a final warning." (8) On May 18, 1991, paint department employee Cedric Tate was issued a warning notice that stated: "Employee was found by foreman and an hourly man sleeping on the job. Employee was given a verbal warning. Foreman clocked out employee and sent him home. Sleeping or deliberate loafing during work hours will result in termination of employment if continued. No salar[ied] foreman in sight. This is your last and Final Warning." (9) On June 10, 1991, pipe department employee 2968 was issued a general offense-4

[315] For possible purposes of review, I will quote any notations by supervisors that there was only one witness to an employee's sleeping; on review, however, it should be noted that none of the warning notices state that the lack of a second witness was the only reason that the employee was not being discharged. Moreover, the clear majority of the warning notices for sleeping, including paint department warning notices, do not mention any lack of corroborating witnesses.

[316] The proof that the following-listed employees were not discharged is shown by a warning notice's being "final" or the existence of other documents such as subsequently issued warning notices. Where stated, and legible, I give the employees' names; otherwise, I use employee badge numbers. Exclamation marks, as well as other marks of emphasis, are original.

[317] James Kelly is an electrical department general foreman.

warning notice for: "Wasting time, loitering. Employee was sleeping on job! Next offense will result in termination."[318] (10) On June 20, 1991, shipfitting department employee 677 was issued a warning notice that stated: "This is your first and last warning for sleeping on the job. Continue to do so will result in your termination." (11) On August 7, 1991, paint department employee 10650 was issued a warning notice that stated: "Sleeping or deliberate loafing during hours of work. Foreman found employee sleeping on the job site. No witnesses. Employee admits to sleeping on job. This will not be tolerated by this dept. If it happens again, you will be terminated. You are hereby warned and given written notice." Two months before, this employee had received a major offense warning notice for substandard workmanship. Two days after the warning notice for sleeping, this employee was issued a general offense warning notice for wasting time. (12) On September 16, 1991, CDC employee 12970 was issued a warning notice for: "Sleeping or deliberate loafing during hours of work. You are hereby warned that any future citations from this day on will result in termination of employment per Leroy Cortez CDC supervisor. Final Warning." During the 6 months before this warning notice was issued the employee received two other warning notices for "Intentional negligence-Destroying Avondale Property," and absenteeism. (13) On December 12, 1991, electrical department employee Dwane Harris was issued a warning notice that stated: "Mr. Harris was found by his supervisor laying on top of pipes in a dark area of the engine room, close to his work area, with a piece of fire cloth draped in front of him." (14) On January 10, 1992, paint department employee David Doncet was issued a warning notice that stated: "Employee was observed sleeping on top of some scaffold boards in the midbody. You are hereby warned that if you are caught sleeping on the job again you will be terminated." (15) Also on January 10, 1992, paint department employee 11507 was issued a warning notice that was identical in text to Doncet's. During the preceding 8 months this employee had received four warning notices, two for absenteeism, one for "intentional negligence," and one for "carelessness or improper use of Company equipment." (16) Also on January 10, 1992, paint department employee 732 was issued a warning notice for sleeping that was identical in text to those that were issued to Doncet and employee 11507. During the preceding month, employee 732 was issued a warning notice for a safety violation; 5 months' later, the employee had been issued warning notices for arguing with a supervisor[319] and wasting time. (17) On February 10, 1992, paint department employee 5504 was issued a warning notice for "tardiness," but the text of the warning notice is: "Employee was sleeping during his lunch period. Employee overslept and reported to his work area late. You are hereby warned that if you receive a citation for any reason you will be terminated after signing this final citation. (Note employee has 3 citations in folder at present.) Final Warning." Two of the warning notices to which the warning notice for sleeping referred were issued in the preceding month. This employee was also issued another "Final Warning" for absenteeism 2 months' later. (18) On June 15, 1992, shipfitting department employee Paul Griffin was issued a warning notice that stated: "Went to First Aid and went to sleep while waiting to be called in by nurse. Final Warning. Reoccurrence can result in your termination." (19) On October 12, 1992, pipe department employee R. G. Davis was terminated for sleeping. The ASI-22 (discharge) form recites: "(Employee was given a verbal [oral] warning by [salaried supervisor number] W-060 for sleeping and loafing on the job prior to dismissal.)"[320] (20) On June 7, 1993, paint department employee 172 was issued a warning notice that stated: "You are hereby notified that you were wasting time, loitering and sleeping on the job. You are also [guilty of] intentional negligence, inefficiency or substandard workmanship. Should you continue to do this, immediate disciplinary action will be taken. Final Warning!" This employee had previously received three prior warning notices for wasting time. (21) On June 10, 1993, paint department employee 10391 was issued a warning notice that stated: "Intentional negligence, inefficiency or substandard workmanship. Also employee was sleeping on the job. Final Warning!" (22) On September 10, 1993, Operators Department General Foreman Robert Olmstead wrote a memorandum to the file of employee Roy Norwood stating that Norwood: "was found sleeping in the forward 400 Hz. room. After being awakened, he claimed that he was waiting for a breaker replacement in the ISF switchboard. . . . Roy Norwood was given a verbal warning by me, Robert E. Olmstead, Jr., not to be caught sleeping again or it would cost him his job."[321] (23) On February 28, 1994, paint department employee 3137 was issued a warning notice that stated: "You are hereby notified that you were caught sleeping resulting in wasting time and loitering. This is a final warning." (24) On February 28, 1994, paint department employee Daryl Louviere was issued an identical warning notice. Three months before, Louviere had received another warning notice for loafing. (25) On April 4, 1994, paint department employee 2013 was issued a warning notice that stated that: "You are hereby notified that you were caught sleeping or deliberate[ly] loafing during hours of work. Should you continue to do this, immediate disciplinary action will be taken." (26) On April 15, 1994, electrical department employee Frank Palmer was issued a general offense-4 warning notice for: "Wasting time, loitering. Dozing off during transit school." Palmer was subsequently issued warning notices for absenteeism and tardiness. (27) On May 19, 1994, paint department employee 9552 was issued a warning notice that stated: "You are hereby notified that you were caught sleeping on the Bobcat [sweeper] on the Dry Dock. Should you continue to do this, immediate disciplinary action will be taken." This employee had previously, on April 13, 1991, been issued a warning notice for an outright refusal to do a job.[322] (28) On June 17, 1994, sheet metal department employee Merlin Williams was issued a warning notice that stated: "Employee was observed by foreman Al Kitzman sleeping on the job for about 4 to 5 minutes. FINAL WARNING." Between December 1992 and June 1993, Wil-

[318] Again, Aguilar was assigned to the pipe department at the time of his discharge.

[319] The full text of this warning notice is stated in the case of alleged discriminatee Charles Bennett, infra.

[320] That is, on at least one occasion, this employee received no more than an oral warning for sleeping. As discussed below, the General Counsel introduced evidence that other instances of sleeping went without even the comparatively mild punishment of a warning notice.

[321] That is, this memorandum is a record of an oral warning, the only punishment meted out for the employee's sleeping.

[322] As noted in the case of alleged discriminatee Charles Bennett, such misconduct is within the literal, if not always enforced, language of immediate discharge offense-1 of the Avondale Employees' Guide.

liams had received three warning notices for absenteeism and tardiness.[323]

The General Counsel also introduced certain parol evidence that sleeping is not considered an immediately discharge able offense by Respondent. Specifically in regard to the pipe department where Aguilar last worked for Respondent, Whittington's fellow General Foreman William Fedrick was asked and he testified:

> Q. BY MR. BENSINGER: You are aware that sleeping is an immediate discharge offense under the employee handbook?
>
> A. Under the handbook, yes.
>
> Q. And if you caught an employee sleeping on the job, you would fire him?
>
> A. I would use my own discretion.
>
> Q. How is it—well, tell us what that means.
>
> A. At times, a man could be there waiting on his helper to come back with the piece of pipe or a fitting. He may be doing some, and may have had a bad night. He may close his eyes. You could call that sleeping. And I will bump the guy and say, "Hey, you need to go back to work."

Such testimony, similar to that of Bourg's above, shows that a discharge for sleeping is a matter of "discretion," not an ineluctable ground for immediate discharge. A specific illustration of this exercise of discretion was further brought out in Fedrick's testimony. Fedrick acknowledged that, during the 18-month period before the Union's organizational attempt began in March 1993, pipe department employee Tyrone Brousseau had been caught sleeping "[f]our or five times," but not discharged. Fedrick was asked why he did not discharge Brousseau, and Fedrick testified:

> Because he was a good employee. . . [and Brousseau] was having little problems at home at the time, and we talked about his problems. And every once in a while, he would be sitting on the bucket trying to do a little work, and he would doze off, and I would [tell Brousseau]—"Hey, you got to get back to work now."
>
> And that happened on several occasions. And I told him he would have to kind of straighten himself up and get his life back together.

Fedrick also acknowledged that, at least on one occasion, he approved when his foreman, Renaldo Rodriguez, reported that he had found Brousseau sleeping but did not discharge Brousseau. Finally, Fedrick acknowledged that, over the years, there have been "two or three" other employees whom he has found sleeping but did not discharge.

Alleged discriminatee Kevin Lockett (vol. 13) testified that in 1993 Electrical Department General Foreman Mark Poche twice excused his sleeping; one time he had been sleeping for two hours, and another time for 6 hours. Lockett's foreman, Dell Thibodeaux, wrote him warning notices both times, but both times, according to Lockett, Poche tore up the warning notices. Thibodeaux and Poche denied this testimony, but the following admissions of Poche, and the credibility of Lockett on the point, cause me to credit Lockett. On direct examination, Poche (vol. 77) was asked, and he testified:

> Q. [By Mr. Cupp]: During the time that Mr. Lockett worked for you, did you ever find him sleeping?
>
> A. Yes, sir. Physically find him sleeping, no, not physically caught him sleeping.
>
> Q. Did Mr. Lockett ever tell you that he was sleeping?
>
> A. Yes, he did.
>
> Q. What was the circumstances involved with that?
>
> A. He was missing from the ship approximately two hours, which we looked for him, couldn't find him. . . . We searched the whole ship. He wasn't aboard the ship. Approximately maybe two hours after we realized that he was gone, we couldn't find him. He came walking back toward the ship. . . . I asked him where he had been. He said he was sleeping. . . . I asked him if he has a reason why he went to sleep. He said he didn't feel well, and he was taking medication.
>
> Q. Why didn't you terminate Mr. Lockett for sleeping?
>
> A. He was honest in what he told me, that he was—where he was. He did have the medication he was taking, so therefore we kept him on. There was a discussion I recall that I had.
>
> Q. Do you know whether any disciplinary action was taken against Mr. Lockett?
>
> A. In that case, no, sir.
>
> Q. I want to go back to Mr. Lockett. Did you ever issue warning notices to Mr. Lockett?
>
> A. I don't recall if I did or not.

On cross-examination, Poche was also asked about the treatment (which treatment occurred at a time when Lockett was wearing "Vote-No" (antiunion) stickers and speaking against the Union). Poche was asked, and he testified:

> Q. Are you aware of Mr. Lockett disappearing for more than two hours on more than one occasion?
>
> A. I think that there were two occasions that he disappeared.
>
> Q. Is it Avondale's policy, sir, that if an employee candidly admits to you that he was sleeping on the job, he will not be fired?
>
> THE WITNESS: Is that an Avondale policy? No, sir.
>
> Q. [By Mr. Lurye]: Is that your policy?
>
> A. No, sir. It is my discretion to call.
>
> Q. You exercised your discretion?
>
> A. Yes, sir.
>
> Q. At the time that you exercised your discretion and did not fire Mr. Lockett when he admitted to you that he was sleeping on the job, did Mr. Lockett get written up for having disappeared for those two hours?
>
> A. No, sir, he did not.

Therefore, whether there were two incidents of Lockett's sleeping or one, or whether Lockett was issued no warning notices or two (or whether warning notices were torn up, or not), according to Poche it is within a supervisor's discretion to fire a sleeping employee, and supervisors further have discretion not to discipline a sleeping employee in any manner.

Also, Paint Department Foreman James Knoblock (vol. 98) was asked on cross-examination and he testified:

> Q. And although you discourage it, you have had occasions from time to time when you found men or women sleeping in the tanks when they should have been working.
>
> A. Yes.

[323] The General Counsel offered other warning notices that were issued for sleeping, but there is no indication that the subject employees were not also discharged.

Q. And you would agree that, at least in some of those cases, what you did was woke up the person and told them to go back to work or sent them home and told them to come back to work the next day.

A. I would have sent them home.

Q. Sent them home?

A. Sent them home or terminated them.

Q. But in some of those cases you have sent them home and then told them to come to work the next day.

A. Right.

Q. And you have sent people home for sleeping and then told them to come back to work the next day how many times over all of the years?

A. Probably once or twice.

Q. And possibly more?

A. It could be.

Q. It is hard to remember?

A. Yes.

In view of all of this testimony, it is apparent that the supervisors (from the chief vice president, down to superintendents, down to foremen) feel they have the discretion to send an employee home (i.e., suspend him), or do nothing, if an employee is found sleeping. The superintendent quoted above was Paint Department Superintendent Bourg, but one other superintendent has been shown to feel that he has such discretion. David Koppleman, superintendent of Respondent's commercial repair department, denied that he possessed such discretion, but, as I find in the discussion of William Sheard's case, below, Koppleman does not discharge sleeping employees if he finds that they are "good" employees; this is a discretionary standard if there ever was one. Finally, according to the testimony of Craft Coordinator Dirk Cortez (vol. 88), in 1994, he and his superior, Ship Superintendent Buddy Roberts, found employee Clayton Plaissance in a "dark" area, in a sitting position, in circumstances which clearly indicated an act of the employee's sleeping; but nothing was done to discipline Plaissance. Superintendents like Roberts, Bourg and Koppleman, it is to be remembered, report directly to vice presidents; their assumptions and exercises of discretion are necessarily exercises of corporate policy, not aberrant behavior of a first-level foreman, or even a general foreman.

Aguilar's Discharge—Conclusions

As Whittington admitted, Aguilar began regularly wearing prounion insignia on his hardhat immediately after he received a warning notice on October 5. Even before that, however, Aguilar's prounion bumper sticker had been observed by Olmstead. Also Boudreaux gave Aguilar a stealthy, and violative, warning that his prounion attitude was known. Aguilar had been told that he had been identified as a prounion employee by Mullins and told, violative ly, "be careful, Jose, be careful." It is therefore clear that the General Counsel has presented a prima facie case that Aguilar's discharge was unlawful, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Aguilar even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

The testimony of Fedrick makes it clear that discharges for sleeping, specifically in the pipe department,[324] are matters for exercise of supervisory discretion. Fedrick made it clear that the degree of discretion vested in pipe department supervisors is so great that employees are sometimes not even issued warning notices for their sleeping. Without more, Fedrick's testimony shows that Aguilar *could have* been discharged for sleeping, but it refutes any contention that he necessarily *would have* been discharged, even absent his known prounion sympathies.

I have rejected Whittington's testimony that Aguilar had a responsibility to return to MMR-1 and watch the sea-water cooling operation, rather than sitting in the control room, while he was waiting for the power to be restored on October 8. That is, Aguilar was in his work area, but he had nothing to do because of an unusual circumstance (the power shutdown), and he simply dozed. Aguilar's lapse was certainly no worse than that of pipe department employee Brousseau who fell asleep "four or five times" on a bucket. Brousseau, however, was not disciplined; instead, he was given repeated chances to "get his life back together," as Fedrick acknowledged.

When Pennex was found sleeping on a flush-watch, he also was in an position indistinguishable from that of Aguilar. (Actually, Pennex had less of an excuse than Aguilar; there was no interruption of his ability to work such as the power shutdown that occurred in Aguilar's case.) Vice President Simpson, however, intervened and converted Pennex's discharge to a suspension. Simpson testified that he intervened on behalf of Pennex because Pennex was a "good" employee[325] who was taking medication, and "he obviously didn't do it on purpose, because he was in plain view of everybody." The first thing to be noted about this testimony is that Simpson also converted the discharge of Griffin to a suspension, but Respondent offered no surrebuttal that Griffin's offense had any such mitigating factors. But, to return to the comparative treatment of Pennex, it is to be noted that Aguilar, as well as doing essentially the same flush-watch job as Pennex, was "in plain view of everybody," to use Simpson's words, because the 8-feet by 8-feet control room had no door, and other employees (such as Martinez and Roppolo) used it as a break area. Also, if any other employees received the written, effusive accolades that Aguilar had received, as quoted above, this record does not reflect the fact. Aguilar had received two warning notices during 1993, for not having his tools and leaving the work place, but the cases listed above show that other employees had as bad, or worse, records when they were caught sleeping, and they were not discharged; these are the above-listed comparative cases 4, 12, 15, 17, 20, 27, and 28. That is, Aguilar was also a "good" employee. Simpson did testify that another factor in his not discharging Pennex was that Genter had reported to him that Pennex had been taking cold medication that made Pennex drowsy. Simpson, however, did not state on Pennex's ASI-22 form that Pennex's taking of medication was a factor in his not imposing a discharge, and this self-serving testimony is highly suspect; moreover, Respondent would hardly contend that employees who take cold medication somehow have more of a license to sleep than

[324] As noted elsewhere, Respondent contends that, because its supervisors are vested with a great deal of autonomy, historical disparate treatment cases cannot apply to it. Respondent would therefore contend that Fedrick's testimony can stand only for what Fedrick, himself, did. Fedrick, however, did not operate in a vacuum; he presumably followed the policies of Respondent. Moreover, the discretionary nature of the enforcement of Respondent's no-sleeping policy was made clear by Simpson's treatment of Pennex and Griffin.

[325] Fedrick, as well, testified that, if employees are caught sleeping, pipe department supervisors would take into consideration whether they had otherwise been "good" employees.

other employees. Finally, in none of the above-listed cases in which other employees were punished only with warning notices, or suspensions, was there any indication that discharges were not imposed because the employees were taking medication. I cannot, therefore, accept as a controlling distinction, or any distinction, that Pennex was a "good" employee, or that Pennex was not hiding, or the fact that it was reported to Simpson that Pennex had been taking a cold medication.

In summary, the significant number of documented cases listed above, the treatment of Pennex and Griffin by Respondent's production vice president, Simpson, the indulgence that Poche showed the admittedly sleeping (but then antiunion) Lockett, and the admissions of Bourg, Fedrick and Knoblock all show that Respondent simply does not consider sleeping to be an immediately discharge able offense, no matter what the Avondale Employees' Guide says. At best, then, Respondent has shown that it *could have* discharged Aguilar for sleeping, but it has not shown under *Wright Line* that it *would have* discharged Aguilar for sleeping even in the absence of his known protected activities. I accordingly conclude that Respondent discharged Aguilar in violation of Section 8(a)(3).

Respondent cites several cases on brief for consideration by the Board in assessing the cases of Aguilar and the other alleged discriminatees who were accused of sleeping. The only case that Respondent cites that involves multiple instances of alleged disparate treatment is *Mississippi Chemical Corp.*, 280 NLRB 413 (1986). In that case the Board found that a union adherent was treated disparately and it concluded that he was unlawfully discharged, just as I find that Aguilar was unlawfully discharged herein. In *Mississippi Chemical*, the Board relied on evidence of disparate treatment that was far less in volume than, but identical in nature to, the evidence of disparate treatment that I rely upon here. In *Mac Tools, Inc.*, 271 NLRB 254 (1984), a violation of Section 8(a)(3) was not found where the alleged discriminatee had hid to catch some sleep and *the only* comparative case that the General Counsel proved was one in which an employee had dozed off. *Mac Tools*, of course, is distinguishable because Aguilar did not, I find, hide to catch some sleep, and *Mac Tools* is also distinguishable on the basis of the large numbers of other employees whom the General Counsel has proved in this case to have been allowed to sleep without being discharged. In *Caterpillar Tractor Co.*, 257 NLRB 392 (1981), a discharge of a union adherent was held nonviolative where he fell asleep in a place visible to the public and *the only* comparative case that the General Counsel proved occurred outside the view of the public. The Board held that the case of the nondischarged employee was not probative evidence of disparate treatment because the respondent showed that it was "uncompromising" in its public image. Again, by number and by nature of the comparative offenses involved, *Caterpillar* is easily distinguishable from the cases of Aguilar and all other alleged discriminatees who are herein found to have been sleeping. (In the remainder of the cases cited by Respondent, disparate treatment is either not mentioned as an issue, or it is found affirmatively not to exist.)

b. Andre Duhon's discharge for sleeping in a ship's hold

Andre Duhon (vol. 52) was a mechanic's helper in the machinery department until he was discharged on June 8, 1994. The fourth complaint, at paragraph 38, alleges that by discharging Duhon Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Duhon because of his known union activities and expressions of sympathy which consisted of his wearing prounion insignia and distributing union T-shirts in the presence of a supervisor. The General Counsel further contends that specific animus against Duhon's union activities has been demonstrated by a supervisor's statement to Duhon that he would be denied a transfer because of his union activities. Respondent did not call the supervisor to deny this statement, and Respondent does not deny that its supervisors knew of the prounion sympathies of Duhon at the time of his discharge. Respondent answers, however, that Duhon was discharged solely because he was found sleeping during working time, an express ground for immediate discharge under the Avondale Employees' Guide. The General Counsel replies that the sleeping defense is a pretext because Duhon was not sleeping at the time in question. Alternatively, the General Counsel contends that, even if the Board finds that Duhon had been sleeping, it must nevertheless hold that Duhon was treated disparately, because other employees were found sleeping on duty but they received lesser, or no, discipline. Ultimately, I find and conclude that Duhon was sleeping on working time and that he had intended to do so; Duhon did not innocently doze off as did almost all of the employees whom the General Counsel presents as comparative cases. I therefore conclude that Duhon's discharge for sleeping did not violate Section 8(a)(3).

Duhon worked under the direct supervision of Foreman Dale Daunie and, sometimes, Foreman John Porrazzo. Duhon testified that beginning about 2 months before the June 25, 1993, Board election he began wearing an International Association of Machinists sticker on his hardhat as he worked. About 2 weeks before the election he also began wearing two "Union-Yes" stickers on his hardhat. All of the stickers remained on his hardhat through the date of his discharge. Duhon further testified that he wore one union button on the strap of his hardhat, and that he had another union button on a cap that he wore when walking to and from the areas in which he was required to wear a hardhat. Duhon wore a union T-shirt to work, "[j]ust about every day," and he wore the T-shirt on May 6, 1994, when he, along with other union adherents, attended Respondent's annual shareholders' meeting. Finally, Duhon credibly testified that on May 6, before work, in an outside machine shop office, in the presence of Daunie, he gave another employee a union T-shirt to wear to the shareholder's meeting.

Duhon testified that shortly after the Board election he was transferred from second shift to first shift. While working on the first shift, Duhon saw second-shift foreman, and admitted supervisor, Jesus Ramell. Duhon asked if he could be transferred back to the second shift. According to Duhon:

> [Ramell] said he would bring me back to the night shift because I was a pretty good worker, but I talked too much "union shit." If I would stop talking union, he would bring me back to the night shift.

Ramell did not testify, and I found Duhon credible in this testimony.

Duhon testified that on June 8, 1994, Daunie assigned him to work with mechanic Usi Lyons. Their job was to go to a hold on the very bottom of a ship under construction and work on a valve's connections to a "reach-rod" (by which the valve could be controlled from a deck above the hold). The hold in which Lyons and Duhon were to work was about 6 to 8 feet deep and 6 feet square. Access to the hold was through a manhole that

was about 30 inches in diameter. A ladder descended into the hold. Just above the bottom "V" of the ship was a "catwalk," or a metal grate that covered pipes that ran along the bottom. The catwalk was elevated enough for one to sit on. Also present in the hold were two painters whom no witness could identify by name or specific job. (The painters were there, possibly, to wrap pipes that ran through the hold; but the circumstances of Duhon's discharge, as I describe them below, also indicate the real possibility that the painters were in that remote area of the ship to get some sleep without detection by management.)

Duhon testified that at one point during the morning, Lyons was at the valve, and he and the painters were sitting on the catwalk. Duhon was handing tools to Lyons as Lyons needed them. According to Duhon:

> The little painter, he jumped up and he hit me on the leg and told me that my boss was upstairs.
>
> I told him, "So?" . . .
>
> I looked up and I didn't see no one. . . .
>
> We [Lyons and I] finished up the [one stage of the work], then we went up out of the hold.

(Duhon was not asked why the painter would have jumped up; I find that it was because the painter had been asleep, as Lyons later testified.) Duhon was asked why he and Lyons had come out of the hold when they did. Duhon answered: "Because we were going to go finish up the brackets for the actuator. Make up the brackets." (Just what is involved in making up brackets for actuators is not important here.)

Duhon testified that, when he and Lyons emerged through the manhole, they saw Gerald Dumas, a pipe-tester, who said that Porrazzo was looking for Duhon. Lyons and Duhon went to the office were they met Porrazzo and Daunie. Further according to Duhon:

> I asked John was he looking for me. He said no. I asked him, "Well, why was you looking down in the hold on me?"
>
> He said because I was sleeping.
>
> I told him, "No, I wasn't."
>
> He said, "Want to bet? I have a witness."
>
> I said, "I don't care who you have." And then I asked him, "Who is your witness?"
>
> He said, "Dale [Daunie]."
>
> And Dale just looked up and said, "Yes. You were sleeping."
>
> I didn't say anything. We just went on out of the office.

Further according to Duhon, some time later in the morning, Porrazzo returned to the work area and told Duhon to come with him back to the office. Duhon and Porrazzo were joined in the office by Daunie and Jake Kaul, superintendent of the machinery department. According to Duhon:

> Jake Kaul did all the speaking. John and Dale didn't say anything. He said, "I agree that sleeping was a major offense." He could show it to me in the book [the Avondale Employees' Guide]. And he said that it constitutes an automatic termination and, therefore, my services are no longer needed at Avondale.
>
> I told him I wasn't going to argue with you all.

Duhon testified that as he walked back to the work area to collect his personally owned tools and:

> John [Porrazzo] came up behind me and he said, "Hey, buddy. I don't want to fire anybody, but [Ships' Superintendent] Buddy Roberts came and got me and showed me that you were sleeping in the hold." And [Porazzo said that] before he could do anything, the word had got all the way up to [Vice President] Ken Genter, and so he had to do what he had to do . . . [because] Buddy wanted something done about it. . . .
>
> I told John that I wasn't worried about it because I had told Dale a couple of weeks ago, before this incident, that I was going to quit anyway soon as I found another job.

Duhon then left the premises.

On cross-examination, Duhon was asked, and he testified:

> Q. Now, on that day you testified that the painter reached over and shook your leg . . . [a]nd he told you that your supervisor, Mr. Porrazzo, was looking down the hold. . . . Do you know why he reached over and shook you rather than just told you that?
>
> THE WITNESS: No, sir. Because he—well, I don't know because I know I was handing [Lyons] wrenches, and that is when he [the painter] hit me, when he jumped up.

Lyons, a current employee, testified (vol. 54) that it was one of the painters, not Duhon, who fell asleep. Lyons testified that Duhon was seated on the catwalk; he was to Duhon's left; and Duhon was handing him tools, or taking back tools, every 2 to 4 minutes. A painter (Robert) sat on the catwalk to Duhon's right. Lyons and Robert were engaged in conversation when Robert dozed off. Lyons was asked, and he testified:

> Q. [By Mr. Bensinger]: And after the painter dozed off, what, if anything, did you observe then?
>
> A. Well, at that time when he dozed off, I kept right on working and I looked. He [the painter] kind of lifted his head up and looked up over at what is known as the manhole, the hatch, and he saw someone standing above there. . . . Then at that time he hit Mr. Duhon which was next to me. He [the painter] turned to his left and kind of shoved him [Duhon] on the shoulder and made the statement that our [Duhon's and my] boss was up there. . . . Then Mr. Duhon looked up and he didn't see who it was because they had—they kind of walked away from the hole, and I told him, "Let's go see what they wanted."
>
> Q. Now, when you said "they walked," why did you use the word "they"?
>
> A. Well, I used the term they because we have two bosses and I didn't know which one that the painter was talking about over the hole, so I figured that "they" would have covered one or the other.

Lyons testified that when he and Duhon climbed out of the hold, pipe-tester Dumas told them that Porrazzo wanted to see "us," so: "Andre and I went to the office to see what they [sic] had wanted." (Lyons did not testify that Dumas had told him that a supervisor, in addition to Porrazzo, had been inquiring about him or Duhon.) Lyons and Duhon found Porrazzo and Daunie in the office. Lyons was further asked and he testified:

> Q. And what, if anything, was said?
>
> A. We asked them the question what did they want, and John Porrazzo answered and said that we don't want nothing but we caught you sleeping—speaking to Andre.
>
> Q. And what, if any, response did Duhon make?

A. Duhon told him, "I was not sleeping, Boss. . . . I was looking down, but I was not sleeping."

(Of course, this testimony conflicts with Duhon's testimony that "I didn't say anything.") On cross-examination Lyons acknowledged that, when he, Duhon, Porrazzo, and Daunie were in the office, he did not say anything.

Current employee Dumas (vol. 58) testified that, on the day of Duhon's discharge, he first saw Porrazzo, and then he saw Lyons and told Lyons that Porrazzo was looking for Duhon (not Duhon and Lyons, as Lyons testified). Dumas testified that he could not recall if anyone (such as Duhon) was with Lyons when he told Lyons that Porrazzo was looking for Duhon. Dumas placed his exchanges with Porrazzo and Lyons at just before or after noon. All other witnesses place the incident at just after 9:30 a.m.

Duhon's Discharge—Respondent's Evidence

Porrazzo (vols. 51, 87) and Daunie (vols. 51, 85) testified that they were supervising the same employees on June 8 because Porrazzo was preparing to take over Daunie's crew a few days thereafter when Daunie was scheduled for surgery. Porrazzo testified that, when he made rounds of the jobs under his and Daunie's supervision that day, he looked into the hold to which Duhon and Lyons were assigned.[326] Porrazzo testified that he saw Duhon sitting on the catwalk, leaning back against a bulkhead, head up and rolling side-to-side, then forward and to one side. Porrazzo could see the leg and shoulder, but not the face, of another employee (the painter) who was sitting beside Duhon, and Porrazzo could not identify that employee; Porrazzo did not see Lyons at the time. Porrazzo left the deck and went to the office. There he told Daunie to come and see that Duhon was sleeping. The foremen returned and looked into the hold. Porrazzo testified that when the foremen arrive back at the hold, Duhon was: "Rolling his head around, eyes were closed, same as when I left."

Porrazzo testified that, after he and Daunie observed Duhon like that for several minutes, the painter "hit" Duhon on the leg. Then Duhon jumped up and Porrazzo motioned for Duhon to climb the ladder out of the hold. When Duhon reached the deck, Porrazzo told him to come to the office because Porrazzo was going to give him a warning notice for sleeping and that he would also be discharged. Porrazzo testified that Duhon then denied that he had been sleeping. Porrazzo testified that he did speak to Duhon after Kaul had discharged Duhon, but he testified that the extent of his comment involving Ship's superintendent, Buddy Roberts, was: "Andre, you know, if Mr. Buddy Roberts would have caught you sleeping, he would have fired you right there on the spot."

Daunie testified that when he got to the manhole with Porrazzo he looked down and saw the back of Duhon's head which appeared to be resting on his chest; he could not see Duhon's eyes. Daunie started down the ladder, and, when he did so, the other employee awakened Duhon by touching Duhon on the shoulder; then Daunie went back up the ladder, and he and Porrazzo left the deck without saying anything to Duhon.

Machinery Department Superintendent Kaul testified (vols. 68, 69) that during the morning of June 8, Porrazzo called him and asked Kaul to come to the office on the dock because there was a problem. When he got there, Porrazzo and Daunie told him that they had found Duhon sleeping. Kaul told Porrazzo and Daunie that he thought that sleeping was an immediate discharge offense under the Avondale Employees' Guide, but he would check. (Kaul testified that he never before had the experience of an employee sleeping on the job.) Kaul left the dock office and returned to his office; he confirmed his belief by checking a copy of an Avondale Employees' Guide, but he also went to the human resources department and spoke to Manager of Employment Julie Bolden who also confirmed that sleeping was an immediately discharge able offense. Kaul returned to the dock office where he found Duhon, Porrazzo, and Daunie. Kaul told Duhon that he was discharged for sleeping on the job. Kaul further testified that Duhon did not deny to him that he had been sleeping, and this testimony is not disputed.

Duhon's Discharge—Credibility Resolutions and Conclusions

Respondent does not deny that Duhon wore prounion insignia and was known to be a union adherent at the time of his discharge. Also, an expression of specific knowledge and animus was proved by Ramell's undenied statement to Duhon that, as Duhon testified, "he would bring me back to the night shift because I was a pretty good worker, but I talked too much 'union shit.' If I would stop talking union, he would bring me back to the night shift." I therefore conclude that the General Counsel has presented a prima facie case that Duhon was discharged unlawfully, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Duhon even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I find that Duhon was sleeping when Porrazzo, then Daunie, found him.

Over Porrazzo's denial (and an explanation for that denial that made no sense), I credit Duhon's testimony that, after he was discharged, Porrazzo told him that Roberts had first found him sleeping and the matter had gone all the way to Vice President Genter. Nevertheless, Porrazzo also told Duhon that Roberts had "showed me that you were sleeping in the hold." Duhon, however, did not testify that he told Porrazzo that Roberts could not have showed him that he was "sleeping in the hold" because he was not sleeping in the hold. Instead, as Duhon testified, he replied to Porrazzo that he was not worried because he was going to quit anyway. If there had been any truth in Duhon's testimony that he had not been sleeping, he would not have given that reply to Porrazzo.[327] Also, if Duhon had been innocent of sleeping, he would have so stated to Kaul as Kaul began quoting the Avondale Employees' Guide to him; instead, as Duhon admitted, he simply stated that he was not going to argue. I do not, however, rest my finding that Duhon had been sleeping only on these tacit admissions by Duhon.

Porrazzo made two trips to the manhole on June 8. The first time, he was alone (or possibly Roberts was with him, as Porrazzo's postdischarge statement to Duhon would indicate); the second time, Daunie was with him. Lyons testified that, after the painter shook Duhon and Duhon got up from the catwalk, "*they* kind of walked away from the hole." Lyons could not

[326] Porrazzo first misidentified Lyons as Joe Howard (an alleged discriminatee who, like Lyons and Duhon, wore prounion insignia). I find the initial misidentification to be meaningless.

[327] Just as easily, for example, Duhon could have replied to Porrazzo, "What do you mean? Roberts could not have showed you where I was sleeping because I was not sleeping."

intelligibly explain why he referred to "they"; it is obvious that Duhon emerged from the hole first and saw Porrazzo and Daunie walking away, and he reported that observation to Lyons. Duhon and Lyons could not agree on why they thereafter left the hold; Duhon testified it was to get parts for the actuators; Lyons testified it was to see what "they" wanted. Lyons and Duhon knew perfectly well that the supervisors had seen Duhon sleeping. Supervisors make regular tours of the work in progress; there is no reason why Duhon and Lyons would have gone up to the deck to see what "they" wanted, unless Duhon and Lyons thought they had something to explain. (Certainly, when Duhon and Lyons got to the office at the dock, there was no reason for Duhon to have demanded of Porrazzo an explanation of "Well, why was you looking down in the hold on me?") Duhon testified that he and Lyons went to the dock office because, when they came out of the hold, Dumas had told them that Porrazzo was looking for Duhon. Lyons, however, testified that they went to the dock office because Dumas had told them that Porrazzo was looking for "us." Dumas was called to corroborate one, or somehow both, of these testimonies. Dumas testified that he told Lyons (only) that Porrazzo was looking for Duhon. Dumas was incredible; as well as conflicting with both Lyons and Duhon about who he spoke to (Lyons, as opposed to Lyons and Duhon), Dumas conflicted with all witnesses about the time of the event (noon, as opposed to 9:30 a.m.). Moreover, Dumas rendered himself plainly incredible when he testified that he told Lyons that Porrazzo was looking for Duhon, but he could not remember if Duhon was with Lyons at the time.

Also, I found to be completely incredible Lyons' testimony that Duhon told Porrazzo and Daunie in the dock office, "I was not sleeping, Boss. . . . I was looking down, but I was not sleeping." If Duhon had advanced such an argument, he presumably would have so testified. The most that Lyons' testimony on this point is good for is an admission that Duhon had his head slumped on his chest, as Daunie described.

The General Counsel argues that, because of certain seeming inconsistencies in his testimony, Daunie could not have seen Duhon sleeping. The General Counsel's arguments ignore the fact that both Duhon and Lyons testified that Porrazzo and Daunie told them immediately that both of them had seen Duhon sleeping. (As Lyons put it, " We asked them the question what did they want, and John Porrazzo answered and said that we don't want nothing but we caught you sleeping—speaking to Andre." (Again, Lyons lapsed into the plural, revealing that the supervisors jointly accused Duhon of sleeping.) I recognize that Porrazzo embellished by saying that he could see Duhon's eyes on both visits to the manhole, and, on his second trip to the manhole (with Daunie), he told Duhon that he was getting a warning notice, neither of which happened. (If either had happened, Porrazzo would have been corroborated by Daunie.) Nevertheless, the testimonies of Duhon and Lyons, aside from their conclusionary denials that Duhon was sleeping, are consistent with the actions of employees, at least one of whom was sleeping. (For reasons that I state below in discussing the General Counsel's alternative theory of a violation in Duhon's case, I believe that Lyons, as well as the painter(s) and Duhon, was also sleeping when Porrazzo, then Porrazzo and Daunie, came to the manhole.)

Duhon could not explain why the painter would have touched him, rather than just saying something in those close quarters, when Porrazzo and Daunie appeared at the manhole. Just as Whittington shook alleged discriminatee Jose Aguilar to wake him up, the painter shook Duhon to wake him up; there is no other reason for the painter to have touched Duhon, no matter whether it was on the leg or the shoulder (and it could possibly have been both). I find that Duhon was sleeping during both supervisory visits to the hold. Therefore, I reject the General Counsel's principal theory that the reason assigned for Duhon's discharge was a pretext because Duhon was not sleeping on the job.

As an alternative theory of a violation, the General Counsel argues that Duhon did no more than doze off as he was working, and the General Counsel contends that the evidence developed in the case of alleged discriminatee Aguilar demonstrates that Duhon was discharged disparately, and unlawfully. I disagree. Porrazzo and Daunie did testify that Duhon was where he had been assigned to work when they discovered him. Duhon's case, however, is still not in the posture of the cases of employees whom Respondent did not discharge when they had dozed off while they had nothing else to do. Unlike Aguilar, who had nothing to do because of the unusual event of the power shutdown, Duhon had work to do; he just was not doing it.

Duhon was sitting, but he also was supposed to be handing tools to Lyons and doing other things to assist Lyons. Four men were in that very small, remote, hold, and none could have gone to sleep without the complicity of all of the others. Duhon took advantage of the situation to get some sleep. Lyons testified that the painter had gone to sleep; and Lyons thereby acknowledged that he did not wake the painter up. Lyons necessarily had allowed Duhon also to go to sleep, unless, of course, Lyons had gone to sleep first. That is, when the supervisors appeared at the manhole, either Lyons did not wake Duhon from sleep because Lyons was asleep,[328] or Duhon could not wake Lyons from sleep because Duhon was asleep, himself. In either event, the supervisors could not see Lyons, or the sleeping painter(s), but they could see Duhon who was directly beneath the manhole. When they saw him, the supervisors knew that Duhon was supposed to have been doing work, handing tools to Lyons; Duhon could not have just dozed off while waiting until his services were needed. The supervisors could logically have concluded, and I find they did logically conclude, that Duhon was doing what he intended to do, sleep. I find that Duhon was discharged for precisely that reason.

Almost none of the comparative sleeping employees who are listed and discussed in Aguilar's case involved employees who might have intended to fall asleep. That is, the General Counsel has not shown by documentary or parol evidence that a significant number of employees have gone with lesser punishment when they were found in circumstances that would indicate that they had intended to sleep on working time. Therefore, I find and conclude that Respondent has proved that it would have discharged Duhon, even absent his union activities, and I shall recommend dismissal of this allegation of the complaint.

c. William Smith's discharge for sleeping on fire-watch duty

William Smith (vols. 13, 158) was a fire watchman in the maintenance department until he was discharged on February 4,

[328] If Lyons was also sleeping, it would certainly explain why he, as well as Duhon, went to the dock office. (It was not because, as Lyons falsely testified, Dumas told him that Porrazzo had been looking for "us.") Lyons' sleeping would also explain why he said nothing while Porrazzo and Daunie were accusing Duhon of sleeping.

1994. The second complaint, at paragraph 139, alleges that by discharging Smith Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Smith because of his known union activities and expressions of sympathy which included his wearing prounion insignia, his speaking on behalf of the Union directly to supervisors (one of whom was Respondent's vice president for production, Michael Simpson), and his testifying on behalf of the Union at the hearing on objections and challenges relating to the June 25 Board election. Respondent does not deny that its supervisors had knowledge of Smith's prounion sympathies at the time of his discharge. Respondent answers, however, that Smith was discharged solely because he was found sleeping during working time, a ground for immediate discharge under both the Avondale Employees' Guide and the rules of its fire department (as the fire-watch and fire-fighting functions of the maintenance department were called). The General Counsel replies that the sleeping defense is a pretext because Smith was not sleeping at the time in question. Alternatively, the General Counsel replies that, even if the Board finds that he had been sleeping, it must nevertheless hold that Smith was treated disparately because other employees were found sleeping on duty and they received lesser, or no, discipline. Ultimately, I find that Smith was sleeping during working time, but Smith was treated disparately because, as its supervisors knew, just the night before Smith slept on the job, an antiunion fire watchman fell asleep, in circumstances identical to those of Smith's, but that other fire watchman was not discharged; I therefore conclude that Smith was discharged in violation of Section 8(a)(3).

Smith testified that his immediate supervisor was Jimmy Christian. The complaint does not allege that Christian is a supervisor within Section 2(11) of the Act. Christian, who was called by the General Counsel, testified (vols. 48, 49) that he was classified as "a night shift supervisor, acting supervisor, or inspector, however they may want to refer to it of [sic] the night shift in the fire department. . . . I have two operators, and I have seven men that works on the ships." Those men on the ships are fire watchmen such as Smith. Christian reports directly to Respondent's chief fire inspector, admitted supervisor James Junot. Junot reports to Fire Chief Stayton (Stan) Oliver; Oliver reports to Maintenance Department Superintendent Brian Marcel.

Smith testified that beginning in May 1993, and continuing through his termination, he wore a union pin and "Union-Yes" stickers on his hardhat. Sometime in May, Oliver and Marcel conducted an employer campaign meeting that Smith attended. According to Smith, at the end of the meeting Marcel asked the employees in attendance if any had questions. Smith testified: "I raised my hand . . . [and] I asked Brian at this particular meeting how come they always are saying that the Union will cause you to strike when they could do so much more for the Company. And of course, that was never answered." Neither Marcel nor Oliver denied this testimony, and I found it credible. Smith further testified that about June 1 he went to Simpson's office to complain about some perceived mistreatment by Oliver. When he completed that complaint, according to Smith, Simpson asked him how he felt about the Union; Smith testified that he told Simpson, in a short speech, that he favored the Union. Simpson (vol. 139) denied this occurrence, and I found Simpson credible in his denial. On December 9, 1993, Smith testified as a witness for the Union at the Board hearing on objections and challenges concerning the Board election. Finally, Christian testified that he had heard talk around the yard that, if the Union were to succeed in the organizational effort, Smith would make a good steward.

Smith's Discharge

To facilitate review of the somewhat complex chronology leading to Smith's discharge, I here summarize the sequence of events as I ultimately find them below: On the night of February 2–3, 1994, Electrical Department General Foreman Mark Poche found fire watchman Willie Rachel, an antiunion employee, sleeping on duty on LSD-50. Poche reported this to Fire Chief Oliver during the day on February 3. Oliver then ordered Senior Fire Inspector Junot to make an inspection round of the ships during the night of February 3–4 to check for other sleeping watchmen. Junot conducted such a round about 5 a.m. on February 4; Christian accompanied Junot. When Junot and Christian got to LSD-50, Poche joined them. Then Poche, Junot and Christian found Smith sleeping at the very place that Poche had found Rachel sleeping on the night of February 2–3. Smith was discharged; Rachel received no discipline. The bases for these findings are as follows:

It is undisputed that Willie Rachel is an antiunion employee, and Oliver knew it; as Christian was asked, and he testified:

> Q. Did you ever hear Willie Rachel say anything about the Union to Stan Oliver?
>
> A. On several occasions, I have heard Willie come in and make one particular remark. I definitely remember he stated, "Any first class employee that voted for the Union was a damn fool." Now, I remember that specifically.

Oliver did not deny that Rachel made such statements in his presence. It is further undisputed that Rachel worked as the fire watchman on LSD-50, a ship under construction on the land, the night before Smith was caught sleeping on that ship.[329]

Smith was assigned to serve as a fire watchman on LSD-50 on a shift that began at 11 p.m., February 3. Smith had never before worked on LSD-50. As well as walking about the ship, checking for fire and fire hazards, ships' fire watchmen have certain paperwork duties. Each ship under construction has a casualty control center where such paperwork duties are performed. Usually, the casualty control centers are rooms on a ship, or they are box-car-type containers that have been hoisted to a deck. The fire regulations of the Company permit closing the doors to the casualty control centers, but the regulations expressly prohibit locking the doors from the inside. In the usual cases, the doors to the casualty control centers can be secured from the inside without locking such doors against anyone who wants to enter from the outside. The casualty control center on LSD-50 was not of the usual construction; it was an alcove that was formed by three bulkheads (walls) with a plywood facing for the fourth side. The door to the casualty control center, which was located within the plywood facing, opened to the outside; it could be secured from the inside only by use of a wooden bar that pivoted on a bolt that ran through the door. There was a handle on the outside of the door, but that handle was not connected to the wooden bar on the inside of the door, and there was nothing by which the bolt-head on the outside, and the wooden bar on the inside, could be turned. Therefore, when the bar was in place, the door could not be

[329] Different witnesses assigned different numbers or types to the ship in question; which witness was correct is not important; Rachel and Smith worked the same ship on successive nights.

opened from the outside without use of a wrench or channel-locks (large pliers) to rotate the bolt and bar. The door to the casualty control center on LSD-50 had a Plexiglas window that was about a foot square.

Smith testified, without contradiction, that the night of February 2–3 was windy and very cold. To keep the door to the casualty control center from being blown open, Smith put the wooden bar in place; this action, as described above, made it impossible for others to enter the room without use of a wrench or channel-locks.[330] According to Smith, about 5:15 a.m., when he had finished his paperwork in the casualty control center:

> I packed myself up. I was through with my tasks with the exception of going to Safety to drop off the copies that I was supposed to drop off there. I packed my stuff up to get prepared to do this for 6:00 and I was listening to my jazz—I am a jazz fan; I listen to jazz all night long—and at that time I had taken an opportunity to say my normal morning prayer. . . .
>
> About 5:25, Mark Poche, Jim Junot and Jimmy Christian came in. . . . I was sitting in the corner in the position, hands folded, just looking down, but my eyes were not closed when they came in. . . . My body was still in that same position at the time they came in, but I wasn't sleeping.
>
> . . . .
>
> [A]nd I looked up and I said, "Hey, what's up, guys?" Mark Poche then asked me if I enjoyed my sleep, and I told him I wasn't sleeping. And then he called me a liar, and I told him, "You are another liar." He then said that they had been outside for 25 minutes trying to get in because I had the door locked, and I told him that he was—the door wasn't locked—no, I told him, I said there was no way I could have been asleep for no 25 minutes because, during that time, I talked to [fellow employees] Carl and Lou [on the telephone]. And I said, "Besides, I don't work for you; what are you doing coming in here trying to catch me sleeping?"
>
> At that point Junot, the senior fire inspector, said, "Get your stuff together and we are going to go to the fire house."

I would find from Smith's testimony, alone, that he was sleeping when Junot, Poche, and Christian entered the casualty control center; moreover, the conclusion that Smith was sleeping is fully supported by credible testimony by Christian, Poche, and Junot, as described below.

Christian testified that Junot had arrived about 5 a.m. on February 4 and told Christian that he was there to conduct a round of checking for sleeping watchmen, and Junot told Christian to accompany him. When Junot and Christian got to the casualty control center of LSD-50, they could look through the Plexiglas window and see the lower-half of Smith's body as Smith sat in a chair with his hands folded in his lap. (They had only this limited view because the chair in which Smith was sitting was backed against the wall in which the doorway was cut, and there was a beam between the door and Smith.) Smith sat perfectly still for so long that Christian and Junot thought that Smith was asleep. Christian and Junot wished to get into the casualty control center without awakening Smith and observe his eyes so that there would be no question that he was sleeping as well as sitting perfectly still. Junot told Christian to go and find any supervisor who could help them to open the door to the casualty control center.

Christian found Poche and began telling Poche about Junot's, and his, suspicions about the night watchman's being asleep. According to the credible testimony of Christian, which Poche did not deny, Poche became angry because, as he told Christian, he (Poche) had caught the watchman sleeping the night before, as well. Christian testified:

> He [Poche] said, "That damn son-of-a-bitch is sleeping again. I am going to fire his ass. I came up here yesterday morning. I got off the elevator, and I almost fell because the deck was icy. I thought the man should be out here, informing workers that was getting off the elevator to be very careful; they could fall and get hurt."
>
> And he said, "That sorry son-of-a-bitch was in there sleeping. I shook him and shook him, and I couldn't hardly wake him up. I finally woke the man up. I told him, 'Get your damn ass out there and instruct people to be careful; you shouldn't be here in the first place.' And he [the watchman who had been sleeping the night before] went on out [to do what Poche had told him to do]."
>
> I said [to Poche], "Well, wait a minute; wait a minute. The person we are checking on today is William Smith. The man you are speaking of, Willie Rachel, that was his last day on [duty on LSD-50]. The man [Rachel] is not here tonight. It is a different man.
>
> Well, as I recall, I told him [Poche], "Willie [Rachel] is not on [duty]; this is William Smith['s and] our [crew's] first night back [on duty, after alternating days off]. He [Smith] works for me."
>
> He [Poche] said, "Oh, I am sorry." He said, "What is the problem?"

Poche (vol. 77) testified that he did confront Rachel in the casualty control center on the night of February 2–3, but Rachel was awake (when Rachel "finally" opened the door). I find, however, that Poche did, in fact, find Rachel sleeping in the casualty control center of LSD-50 on the night of February 2–3; Poche would not have made such an admission to Christian unless it was true.)

Christian finished explaining "the problem" to Poche (i.e., that he and Junot could not open the door to casualty control where Smith was sleeping). Poche and Christian agreed to go separately to the casualty control center. On his way, Poche picked up a pair of channel-locks with which he could open the door. Poche then went to the casualty control center and met Christian and Junot. Poche turned the bolt-head (which, as described, moved the wooden bar on the inside of the casualty control center) and pulled open the door. Poche entered the room first; Poche was followed by Junot, then Christian. Christian did not dispute that Smith protested that he had not been sleeping, but he did credibly add:

> I saw Mr. Smith. He was sitting in an upright position with his head kind of back, and he was fluttering his eyes and attempting to try to focus. . . . Then when I got there, I didn't say anything. I stood there, and Mr. Smith stood up.

[330] No witness testified that Smith's method of securing the door contributed to his discharge. Also, as noted, Respondent's design of the casualty control center permitted no other way to secure the door against the elements; and this is the way that Rachel secured the door the night before Smith was discharged, according to Respondent's witness Poche.

> And he said, "I was not sleeping. I was only resting my eyes. And if you don't believe me, call Lou at Safety."

Poche testified that Smith admitted that he had "dozed off"; Junot, who had entered the room behind Poche, testified that Smith stated that he could not have been sleeping "very long" because he had just telephoned another employee. I credit Christian and Smith over both Poche and Junot about what Smith said when he was awakened. It is clear to me that Smith did not then admit sleeping, and he included the reference to the telephone call to another employee ("Lou at Safety") as an argument that he had not been sleeping at all, not that he was sleeping only a short time. Moreover, Junot omitted the "dozed off" admission by Smith from his testimony; even though he entered the room after Poche, Junot would have heard any such admission because Poche testified that he stood before the sleeping Smith and waited a few seconds before speaking to Smith and waking him up; this would have given Junot ample time to have gotten into position to hear Smith's admission if it had then been made.

Junot and Christian took Smith to Respondent's fire station (or "fire house"). When Oliver arrived for the day, Junot went into Oliver's office while Smith and Christian waited outside. According to the credible testimonies of Smith and Christian, while Smith and Christian were waiting for Oliver and Junot to come out of Oliver's office, Christian told Smith about the references that Poche had made about finding Rachel asleep during the night of February 2–3.

Oliver and Junot came out of Oliver's office; then Oliver, Junot and Christian escorted Smith to the office of Maintenance Department Superintendent Marcel (which office was in another building). When the group was received into Marcel's office, according to Smith:

> Brian Marcel asked me if I had been sleeping, and before I could answer, Jim Junot interjected and said, "We tried to get in but the door was locked."
>
> And I told Brian that the door was not locked; there was only [a] handle on the door and that was on the inside; whoever put that door on . . . there didn't put a handle on the outside, and [if there were such a handle], they [the supervisors] would have just been able to turn the latch and come on in.
>
> And I said, "Besides, this is the first time in five years I have ever had a complaint about sleeping; where is my warning?"
>
> And at that time Brian said, "Well, let me talk to these guys here for a minute." And he told me to go back over to the fire house.

(As noted, there was a handle on the outside of the door; Smith's use of the word "handle" apparently was meant to include some type of handle by which the bolt (which held the wooden bar) could be turned, as well as a handle by which the door could be pulled open.)

Marcell and Oliver (both in vol. 70) testified that, when Marcell asked Smith if he had been sleeping, Smith admitted that he was, but Smith argued that he had done so only for a short time. Smith admitted that, in his interview with Marcell and Oliver, he did not deny that he had been sleeping. Smith testified, however, that he did not deny that he was sleeping because the interruption by Junot prevented him from doing so. If he truly had not been sleeping, Smith, who is quite articulate,[331] would not have been so easily squelched when pleading for his job; Smith certainly found an opportunity during the exchanges to plead that he should only be issued a written warning notice and not a discharge. I credit Marcel and Oliver. I find that, in Marcel's office, Smith admitted that he had been sleeping.

Christian and Oliver took Smith back to the fire station. Oliver went back into his office. Smith waited in a break area, and Christian came in to that area. Smith testified that Christian then stated that he had not seen Smith sleeping and that he did not know why the other supervisors were accusing Smith of sleeping. In fact, as Christian testified, Christian did not see Smith sleeping; Christian was the third person to go into the casualty control center (behind Poche and Junot), and he first saw Smith's eyes opened, albeit not yet focused. I do not believe, however, that Christian told Smith that he did not know why Smith was being accused of sleeping.

Further according to Smith:

> About between 7:15 and 7:30 Stan Oliver came out of his office and informed me that Brian Marcel had called him and told him that I was terminated.
>
> I said, "Stan, you caught Willie Rachel dead asleep yesterday; what are you going to do about him?"
>
> Stan Oliver said, "Willie Rachel will probably get a warning."
>
> And I said, "Willie gets a warning and I get terminated? What are you going to do about me, what are you going to do for me?"
>
> He said, "I don't have [anything to do] with you at all; Brian Marcel handles anything dealing with you."

At that point, Smith was discharged. Oliver denied telling Smith that Rachel was going to get a warning notice, which denial I believe. Oliver did not deny telling Smith that Marcel made the decision to terminate Smith, and I believe that testimony by Smith.

Christian credibly testified that he told Junot about the Poche-Rachel incident at some point before Smith was discharged. At trial, however, Oliver and Marcel denied any knowledge of the Poche-Rachel incident, and they testified that they made the decision to discharge Smith without consulting with Junot. Because Oliver and Marcel did not consult with Junot, Respondent argues, those decision makers could not have known about the Poche-Rachel incident before Smith was discharged.

I find that Oliver and Marcel knew of the Poche-Rachel incident before Smith was discharged for the following reasons: Poche admitted that on February 3 he called Oliver to say that he had experienced trouble getting into the casualty control center during the night of February 2–3, but Poche denied that he then told Oliver that he had found Rachel sleeping there. Poche's denial was incredible; he angrily told Christian that he had to shake Rachel to wake him up, and it is unbelievable that he withheld that information from Oliver (whom Poche had taken the trouble to call, and who had more authority than Christian to do something about a sleeping fire watchman as well as the authority to do something about the casualty control door that could not be opened from the outside, contrary to the Respondent's internal fire-prevention regulations). Junot testi-

[331] For example, Smith's testimony about his purported short speech to Simpson flowed quite freely.

fied that he only performed night-checks of the fire watchmen when ordered to do so by Oliver but he did not remember when Oliver ordered the inspection round of February 3–4. Oliver testified that he did not remember "specifically" if he ordered the inspection round because of a report that he had received about some sleeping employee. It was, and is, obvious to me that Poche, Junot, and Oliver were inconsistent, vague and forgetful because they wanted to avoid admitting that Poche's discovery of Rachel's sleeping had occurred, as it did, and that Oliver knew about it even before Smith was found sleeping. I find that on February 3 Poche told Oliver about finding Rachel sleeping on the night of February 2–3. Also, I do not believe that Junot failed to tell Oliver and Marcel about the Poche-Rachel incident before Smith was discharged; Junot was in on every part of the investigation of Smith's conduct, in Oliver's and Marcel's offices as well as on the ship, even if he was not one of the actual decisionmakers. In summary, Marcel and Oliver knew about the Poche-Rachel incident before they made the decision to discharge Smith.

As Christian credibly testified, Rachel was openly antiunion. As noted, the General Counsel relies, in part, on the treatment of Rachel as evidence of disparate treatment toward Smith.

Oliver testified that all employees who are proved to be sleeping are terminated, but the fire department requires two witnesses before it makes a determination that an employee has been sleeping. As noted in the case of discriminatee Aguilar, however, Respondent's production vice president, Michael Simpson, testified, without qualification, that Respondent does not require two witnesses before an employee is discharged for sleeping. Moreover, the Poche-Rachel incident proves that the two-witness policy is not rigid, at least when it comes to antiunion employees. There is no direct evidence that a second person was with Poche when he found Rachel sleeping on the night of February 2–3; and, in fact, Poche denied that there was any person with him when he approached the casualty control center that night. There must have been such a person with Poche, however, or Oliver and Junot would not have been so evasive about what they knew of the Poche-Rachel incident, and Poche would not have lied by swearing, as he did, that he had not found Rachel asleep. If Poche, by himself, had found Rachel sleeping, Poche, Oliver, Junot, and Marcel would have said something like: "Yes, Rachel was found by Poche, but Poche had no other witness," if there were a real two-witness policy. Poche, Oliver, Junot, and Marcel, however, did not testify that Rachel went unpunished because there was only one witness to Rachel's sleeping; instead, they falsely claimed that Rachel was not found asleep, or, if he was, they had no knowledge of it.

Smith's Discharge—Conclusions

Respondent does not deny that Smith wore prounion insignia, spoke up for the Union at an employer campaign meeting that was conducted by Oliver and Marcell, and testified for the Union in the representation case. Respondent's animus toward those employees who favored the Union, and especially toward those who wore prounion insignia, is established throughout this decision. Accordingly, I conclude that the General Counsel has presented a prima facie case that Smith was discharged unlawfully, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Smith even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

As noted, the Avondale Employees' Guide lists sleeping during working time as the second of its immediate discharge offenses; that is, Respondent's written rule is that sleeping is an offense outside the progressive disciplinary system, and employees will be discharged on the first offense. As discussed in the case of discriminatee Aguilar, however, I have found that the General Counsel has showed that a significant number of employees were not discharged for sleeping. Almost all of those employees who were not discharged for sleeping dozed off while they were waiting for their labors to be utilized by supervision. The General Counsel argues on brief that Smith had nothing to do at the time that he was sleeping and that he simply dozed off, just as most all of the comparative employees did. Unlike the comparative employees discussed in Aguilar's case, however, Smith did have something to do; at the time that he was caught sleeping, Smith should have been looking around for possible fires. That is what fire watchmen are for. Not every business has fire watchmen; Respondent would presumably not have many fire watchmen if fire were not a great, possibly lethal, peril. Because of the very nature of Smith's job, I would not, therefore, consider as evidence of disparate treatment Respondent's treatment of any employees other than fire watchmen.

But there is a fire watchman's case to which Smith's circumstances are rightly to be compared. On the very night before Smith's discharge, fire watchman Willie Rachel was found sleeping by Poche. Although the supervisors who discharged Smith knew about Rachel's sleeping, they did nothing about it. The only distinguishing factor between Rachel and Smith is the prounion sympathies of Smith and the antiunion sympathies of Rachel. This differing treatment of employees is the essence of unlawful discrimination. I find and conclude that, by discharging Smith Respondent violated Section 8(a)(3).

d. Joseph Bush's discharge for sleeping on fire-watch duty

Joseph Bush (vol. 18) was a fire equipment operator in the maintenance department until he was discharged on October 6, 1993. The second complaint, at paragraph 126, alleges that by discharging Bush Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Bush because of his known union activities that consisted of his wearing prounion insignia and reading a union handbill in the presence of a supervisor. The complaint further alleges that, in violation of Section 8(a)(1), Bush was threatened because he was wearing prounion insignia. Respondent denies that the threat occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Bush may have held. Respondent further answers that Bush was discharged solely because he was found sleeping during working time, a ground for immediate discharge under the Avondale Employees' Guide and under separate rules that govern the fire watchmen. The General Counsel replies that the sleeping defense is a pretext because Bush was not sleeping at the time in question. Ultimately, I find that Bush was not threatened in violation of Section 8(a)(1) and that there is no evidence that Respondent knew of any prounion sympathies that Bush may have held before his discharge. I therefore conclude that the General Counsel has not established a prima facie case that Bush was discharged unlawfully, and I recommend dismissal of the allegation of the complaint.

As a fire equipment operator, Bush drove a firetruck and a pickup truck. In the pickup truck, he went about the yard checking on equipment such as fire extinguishers. One of his duties also was to monitor certain fire-indicator panels that are located in the firemen's breakroom.

Bush testified that he wore a union badge as he worked for Respondent, but Bush was squarely, and credibly, contradicted by his coworker Curtis Young. Young was called by Respondent, but on cross-examination he testified that, although Bush and some of the other fire equipment operators favored the Union, he knew this only through conversations; Young flatly denied that any operators, which would include Bush, wore prounion insignia.

John Zahn was a leadman in the maintenance department until he was promoted to foreman on November 1. Although he was classified as a leadman before November 1, Respondent formally admitted that he was a supervisor within Section 2(11) of the Act at all relevant times. (Zahn is also the individual who, without conferring with any other admitted supervisor, suspended Bush for the remainder of the day when, as I find, he discovered Bush sleeping on October 6.) Respondent did not move to amend its answer, and I conclude that Zahn was a supervisor at all relevant times.

Bush testified that about 2 weeks before the June 25 Board election Zahn asked him how he intended to vote, and Bush told Zahn that he intended to vote for the Union. The General Counsel introduced this testimony as specific evidence of knowledge because it was Zahn who later found Bush sleeping; there is no 8(a)(1) interrogation allegation relating to this exchange. Zahn denied this testimony, and I found Zahn credible on the point.

Bush further testified that on September 27, when he was in a work area, he was approached by Zahn. According to Bush:

> John Zahn came up to me on his motor bike, and I was wearing my Metal Trades Council badge, and he said, "You are still wearing that badge."
>
> I said, "Yes, I am still wearing my badge, and I will be wearing it until the pin falls off."
>
> And he told me, "You don't got to worry about the pin falling off, because you won't be around here to wear it much longer."
>
> And I said, "I will be wearing it as long as I come here and do my job and come to work; every day I will be wearing it."

Based on this testimony, paragraph 72 of the second complaint alleges that Respondent, by Zahn, "threatened its employees with discharge because they aided or supported the Union." Zahn denied that this exchange occurred. As noted, maintenance department operator Young credibly denied that Bush even wore prounion insignia. As well, Zahn credibly denied the threat. I shall recommend dismissal of this allegation of the complaint.

Bush also testified that, at some time before his discharge, Fire Chief Stayton (Stan) Oliver once saw him reading a union handbill. Bush demonstrated by holding his hands before him as if he was grasping a piece of paper. In the case of discriminatee Simpson, the General Counsel called upon Simpson to demonstrate how he placed a union handbill on a table in view of Supervisor Robert Slocum and wrote an assignment on it. In Bush's case, however, the General Counsel offered no evidence of how Oliver could have known what was on the paper that Bush was holding. (Bush did not testify that the paper had a distinctive color or that printing was on both sides of the paper that he held.) Oliver denied seeing Bush reading a union handbill, and I credit that testimony.

I have discredited Bush's testimony that he told Zahn 2 weeks before the June 25 Board election that he intended to vote for the Union. Moreover, Oliver testified that Bush told him that he did not favor the Union, and that testimony was not rebutted. I therefore find and conclude that the General Counsel has not presented a prima facie case that Bush was unlawfully discharged, and I shall recommend dismissal of this allegation of the complaint.

For possible purposes of review, however, I shall enter the following findings regarding the circumstances of Bush's discharge:

Alternative Findings on the Dscharge of Bush

Bush testified that on October 5 he worked a shift from 2:45 until 11:05 p.m. About 4 p.m., after he had finished a round of checking equipment in the yard, he went to the breakroom to eat a sandwich and monitor the fire-alarm system. He was sitting at a table, with his right elbow on the table and his chin resting in his right palm, when Zahn entered the breakroom. Bush testified:

> I heard Zahn come in the door. He was opening the door, slamming it; I know his voice. He come in loud. He was hollering. He can't help the door. It is just a squeaky, squeaky door, you know. I just didn't jump up when he came in there. This was just—
>
> I was in a really depressed mood at the time, and I was just sitting there, watching the panel and just thinking about my father. My father was real ill, and my immediate supervisor knew that.

Bush denied that he was sleeping when Zahn came into the break room. On direct examination, however, Bush was asked and he testified:

> Q. How were your eyes? Were they closed or open?
> A. I can't recall if my eyes were open or closed.

Zahn told Bush to leave the premises because Bush had been sleeping. Bush denied to Zahn that he had been sleeping, but he did as he was told.

On October 6, when Bush reported to work, Oliver escorted him to the office of Maintenance Department Superintendent Brian Marcell. Marcell told Bush that he was discharged because he had been sleeping on October 5. Marcell pointed out to Bush that he had obtained written statements from two witnesses, Zahn and "another man" (evidently Young, as discussed below). Bush then left the premises.

Employee Young testified that, on October 5, shortly after the shift started, he and Bush ate lunch together, in the firemen's breakroom. Bush leaned back in his chair and fell asleep. After Bush was sleeping for about 10 minutes, Zahn came into the room. Young started to wake Bush, but Zahn gestured to Young and stopped him from doing so. Zahn, according to Young, sat at the table at which Bush was sleeping; Zahn observed Bush for 10 minutes more, at which point Bush awakened. Zahn then told Bush to collect his things and leave the premises. Zahn testified consistently with Young, except that he described Bush's posture while sleeping as leaning forward with his head on the table. This difference is curious, but it is

not determining especially in view of Bush's testimony which plainly reveals that he was sleeping.

I credit Zahn and Young. I find that Bush (who could not remember if his eyes were opened or closed) was sleeping, and Bush had been sleeping for about 10 minutes when Zahn found him on October 5. I further find that Bush continued sleeping for about 10 minutes more after he knew that Zahn had entered the room.[332]

e. Eugene Sheard's discharge for sleeping on a scaffold

Eugene Sheard (vol. 50) was employed as a shipfitter until he was discharged on November 10, 1993. The fourth complaint, at paragraph 23, alleges that by discharging Sheard Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Sheard because of his known union activities and expressions of sympathy which consisted of his wearing prounion insignia. Respondent answers that it had no knowledge of any prounion sympathies that Sheard may have held at the time of his discharge, and Respondent answers that Sheard was discharged solely because he was found sleeping on working time, a ground for immediate discharge under the Avondale Employees' Guide. The General Counsel replies that the sleeping defense is a pretext because Sheard was not sleeping at the time in question. Alternatively, the General Counsel contends that, even if the Board finds that he had been sleeping, it must nevertheless hold that Sheard was treated disparately because other employees were found sleeping on duty and they received lesser, or no, discipline. Ultimately, I find that Sheard did sleep on duty. Respondent, however, failed to call to testify the supervisor who made the decision to discharge Sheard, and it failed to offer any reason why it did not call that supervisor to testify; Respondent therefore did not meet its burden under *Wright Line* to demonstrate that it would have discharged Sheard even absent his protected activities. I therefore conclude that Respondent discharged Sheard in violation of Section 8(a)(3). I further find that Sheard did not engage in certain postdischarge misconduct as alleged by Respondent.

For most of 1993 Sheard worked in the shipfitting department under the supervision of Foreman Emil (Joey) Foret Jr. Sheard testified that he placed "Union-Yes" stickers on his hardhat at some point before the June 25 Board election, and those stickers remained on his hardhat through his discharge. Sheard testified that he was the only member of Foret's crew who wore prounion insignia. Foret was not called to testify, and I credit this undenied testimony.

On November 1, Sheard was "loaned" to the drydock and commercial repair department (drydock department). In the drydock department, Brian Ponville was his immediate supervisor.[333] Ponville reported to Superintendent David Koppleman. At some time between November 1 and 9, Shipfitting Department Foreman Gerald Ford was also loaned to the drydock department; Ford then became Ponville's acting immediate superior (and a second-level supervisor above Sheard).

On November 9,[334] Sheard was assigned to a crew that was doing cleaning work in a hold of a ship that was under contract for repair at Respondent's drydock. Sheard credibly testified that he was the only member of the drydock department crew who was wearing prounion insignia. Sheard testified that after lunch he was not told specifically what to do, so he took it upon himself to climb up a ladder to a 12-inch-wide board that was suspended 40 feet above the deck of the hold. I find that Sheard's 40-feet estimate to be an exaggeration; the exaggeration was possibly innocent because the deck of the hold (designed for the storage of fluids) was slanting, so distances involved in a fall would be hard to calculate; nevertheless, it is clear that any fall from the scaffolding would have involved injury. Sheard testified that, as he was seated on the scaffold, he began sweeping rust and filings that had accumulated on horizontal beams on the side of the ship. Sheard testified:

> The employee below me asked to borrow my broom. . . . I lent him my broom, and I was sitting there waiting on my broom when [until?] he get through. . . . And my foreman [Ponville] came in the hold, and I heard him yell [that] he don't need me no more. Told me to go home.

Sheard did then leave the premises. Sheard did not testify that he made any response to Ponville when Ponville told him to leave. Sheard testified that Ponville had entered the hold on a ladder that descended through a hatchway on the main deck into the hold. Sheard testified that he was sitting on the board, with his back to Ponville, when Ponville started yelling at him; his eyes, which Ponville could not have seen, were not closed. Sheard denied that he was lying prone on the board; and he denied that he had been sleeping when Ponville began yelling at him.

The next day, November 10, when he reported to work, Sheard was told by Ford that he had been discharged for sleeping. Sheard argued that he had not been sleeping. Ford told Sheard that, if he wanted to talk about the matter, he should go see Superintendent Koppleman. When Sheard found Koppleman, he argued that he had not been sleeping the day before and, "I would be crazy to be way up there sleeping on a board." Koppleman, according to Sheard, told Sheard to go back to the shipfitting department (from which Sheard had been "loaned") and ask his foreman in that department if he wanted Sheard back; if so, Sheard would not be discharged and he could return to the shipfitting department.

When he got to the shipfitting department and found Foret, Sheard related what Koppleman had said. Foret made a telephone call to someone; then, according to Sheard:

> He said, "Well, everything is okay."
> And I thanked him for getting my job back.
> And he told me to, "[Go] right on down there to Dry Dock, pick up your tools, and come on back down here on the LSD."

As neither Ford nor Foret testified, Sheard's testimony about what they told him is not denied.

Sheard went back to the drydock department to get his tools. When he returned to the shipfitting department, he met that department's superintendent, Huey Seals. Further according to

[332] Again, these findings are entered only for possible purposes of review because I conclude that no prima facie case was presented for Bush.

[333] Ponville is an admitted supervisor within Sec. 2(11); however, he is the only nonsalaried foreman who was mentioned in this case, and he was sometimes referred to by witnesses, including Ponville himself, as a leadman.

[334] Sheard placed the first accusations of his sleeping, and his being suspended, on November 8, at 3 p.m., but Respondent's documentation and credible testimony proved that he was suspended on November 9, before 1:45 p.m.

Sheard, Seals told him: "The situation still stands that you have been terminated." Sheard gathered his tools and left the premises.

Sheard's Discharge—Respondent's Evidence

Eric Bardes (vol. 83) is an employee who works as an estimator and craft-coordinator in the drydock department. Bardes testified that he accompanied Ponville on an inspection "walk" of the ship during the afternoon of November 9. They reached a portion of the ship's hold that was divided into quadrants; Bardes and Ponville first entered a quadrant in which employees, other than Sheard, were doing cleaning work. Bardes and Ponville left that quadrant and entered another. There were no employees working in the second quadrant. Bardes and Ponville began climbing the ladder to the hatchway that led out of the hold. Bardes testified:

> And we climbed down one side of the tank, crossed over to the other [quadrant], and as we were leaving the tanks, there was a man laying down on the scaffold boards. . . . Bryan Ponville also saw the man. Bryan hollered at him, something like, "Hey," or words to that effect. . . . Bryan grabbed the man's feet to shake him.

"The man," of course, was Sheard. Ponville (vol. 73) testified consistently with Bardes about the circumstances of finding Sheard on the scaffold. Ponville and Bardes credibly testified that the scaffold was made of two 12-inch boards, not one as Sheard testified. Also there were two safety cables protecting anyone on the 24-inch scaffold from falling.

Bardes and Ponville testified that Sheard appeared to be sleeping. They were credible, and I find that Sheard was sleeping when he was found by Bardes and Ponville. Bardes and Ponville were also credible that there were no other employees in the quadrant in which Sheard was found. That is, there was no other employee to whom Sheard could have lent his handbroom (while Sheard waited on the scaffold, as Sheard testified). Moreover, Sheard acknowledges in his pretrial affidavit that he did not even ask Ponville why he was being sent home; this demonstrates to me that Sheard knew that he had been found engaging in some misconduct. It is obvious to me that on November 9 Sheard had removed himself from the area where other employees had been working and he hid himself in a place where he was unlikely to be detected as he slept. I so find.

(This factor of Sheard's intentionally hiding to catch some sleep would distinguish almost all of the comparative cases that the General Counsel advances as evidence of disparate treatment. The General Counsel has not shown that a significant number of employees were allowed to continue employment after intentionally hiding themselves in order to sleep on the job. As I conclude infra, however, Sheard's case does not get to the issue of disparate treatment because Respondent did not present credible evidence in defense against the allegation that Sheard was discharged in violation of Section 8(a)(3).)

Ponville testified that he first told Ford that he had found Sheard sleeping; then he called Koppleman. Koppleman told Ponville that he would handle the matter. A few hours later, Ponville approached Koppleman and asked what was going to happen. According to Ponville: "And he said that he was going to contact [Sheard's] former supervisor [in the Shipfitting Department] and find out what kind of work record he had before he took any action." Later in the day, according to Ponville:

> Getting ready to go home, [Koppleman] told me that [Sheard] was fired because he had a bad record in the yard. In other words, he had a dirty record in the yard and that he [Koppleman] had gotten with his former supervisor and the decision was made that, with the record he had, that they shouldn't give him any more chances. . . . [Koppleman] told me not to put [Sheard] to work the next morning.

This testimony by Ponville was credible. Ponville further testified that he was with Ford on November 10 when Ford told Sheard that he was discharged. Ponville testified that it was he who told Sheard to see Koppleman "if he had any questions." (Whether it was Ford, as Sheard testified, or it was Ponville, as Ponville testified, who told Sheard to go to Koppleman ultimately does not matter; it could well have been both.) Ponville testified that later in the morning of November 10 (after Sheard had seen Koppleman, Foret, and Seals, as I find infra) he and Ford saw Sheard:

> He [Sheard] saw us [Ponville and Ford] headed up on the levee and he flagged me down and he had tears in his eyes and he told me he was sorry for sleeping on the job but he needed his job. I told him it was out of my hands, there was nothing I could do and he shouldn't be sleeping on the job.

I also find this testimony credible, and it fortifies my conclusion that Sheard was, in fact, sleeping when he was found by Ponville and Bardes on November 9.

Neither Foret nor Seals was called by Respondent, but Respondent did call Koppleman. In direct conflict with the testimony of Ponville, Koppleman (vol. 73), testified that, on November 9, when Ponville first reported to him that he and Bardes had found Sheard sleeping, he immediately told Ponville that Sheard was discharged. Later that day (on November 9, not November 10 as Sheard testified), Sheard came to his office and asked him if he could not be sent back to the shipfitting department instead of being discharged. Koppleman testified that he told Sheard that he would "consult" with Seals, but, even if Seals would take Sheard back in the shipfitting department, Sheard could never come back to the drydock department because he had been found sleeping there. At that point, further according to Koppleman, Sheard left the premises. Koppleman testified that he did not speak to Sheard again; that is, Koppleman denied Sheard's testimony that he and Sheard spoke on November 10. Koppleman further testified that on November 9, after Sheard left his office, he called Seals. According to Koppleman:

> I said, "Huey, we caught Mr. Sheard sleeping. I am going to terminate him. Now, if you have some other reasons, that he is a good hand or something like that, if there was anything that would warrant to keep him, say something now because if you take him back, I don't want him no more."
>
> And Huey Seals told me, "The policy is terminate him."

Koppleman further testified that on that afternoon of November 9, he prepared the ASI-22 (discharge) form to process Sheard's discharge. The ASI-22 form states in the space for "Explanation for action," in two lines as quoted here:

Sleeping on job, witnessed by Clock #1654, Brian Ponville.

Employee on loan from Dept. #02 to Dept #24. Has 3 citations.

[Department 02 is the shipfitting department; department 24 is the drydock department.] In spaces on the ASI-22 form, "Date Prepared" is completed "11-9-93," "Effective date" was initially completed: "11-9-93." Copies of the document that both the General Counsel and Respondent offered show, however, that the "9" is stricken out, and "10" is inserted. Koppleman acknowledged on cross-examination that he did not have Sheard's personal file on November 9, and did not even know of Sheard's prior disciplinary record, when he completed the ASI-22 form. Koppleman testified that the words in the space for "Explanation for Action," as quoted above, were added on November 10, but the remainder of the form had been completed on November 9 immediately after his discussion with Seals.[335] Koppleman's signature on the form is dated "11-10-93." Further on cross-examination, Koppleman acknowledged that he told Seals in that discussion that, even if he would take Sheard back in the shipfitting department, Koppleman would issue Sheard a "write-up," or warning notice.

Sheard's Discharge-Conclusions

Sheard wore prounion insignia as he worked in both the shipfitting department and the drydock department; and he was the only employee on either crew who wore prounion insignia. I discredit the testimonies of Ponville and Koppleman that they did not notice, and did not have knowledge of, that union activity by Sheard. More importantly, neither Foret nor Seals testified; Foret was the supervisor for whom Sheard regularly worked, and Seals, as I find, was the supervisor who made the final decision to discharge Sheard. I find that the supervisors who knew Sheard at the time of the discharge knew that he held prounion sympathies. Respondent's animus toward employees who favored the organizational attempt, including specifically its animus toward those employees who wore prounion insignia, has been established. I therefore conclude that the General Counsel has presented a prima facie case that Sheard was discharged unlawfully , and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Sheard even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, Respondent states that: "Mr. Sheard was terminated for sleeping on the job in front of two witnesses, an immediate discharge offense in [the] Avondale Employees' Guide." As discussed above in Aguilar's case, the two-witness requirement does not actually exist; specifically, Production Vice President Michael Simpson (who headed Respondent's campaign against the organizational effort) testified that it did not exist. Also, as the treatment of Sheard further shows, not even Departmental Superintendent Koppleman believed that sleeping was an immediately discharge able offense, no matter what the Avondale Employees' Guide states. My conclusion in this regard may be rested entirely on evidence that was introduced by Respondent, *to wit*: (1) Koppleman told Ponville that he would check Sheard's prior disciplinary record before making any decision about Sheard, as Ponville testified; (2) Koppleman actually checked Sheard's disciplinary record and told Ponville on November 9 that Sheard had a "dirty" record, as Ponville further testified; and (3) Koppleman told Sheard that he could continue his employment if the shipfitting department supervisors would take him back, as Koppleman admits. Koppleman would have done none of these things if he had actually thought that sleeping was an immediately discharge able offense. Additionally, Koppleman testified that, had Seals agreed, he would only have issued a warning notice to Sheard for his sleeping and sent him back to the shipfitting department with orders that he not return to the drydock department. In giving this testimony, of course, Koppleman was admitting that, not only was sleeping not an immediately discharge able offense, it could be punished with only a warning notice and a transfer. (Because, as I find, Koppleman did not discharge Sheard, immediately or otherwise, the conclusions of this paragraph actually apply more to the case of discriminatee Aguilar than to Sheard; that is, Aguilar was immediately discharged when he was found sleeping, but, as I concluded in his case, Aguilar's discharge was an act of disparate treatment.)

Koppleman may have begun the ASI-22 (discharge) form for Sheard on November 9, but, as the date of his signature indicates, and as Koppleman acknowledged on cross-examination, the form was not completed until November 10. At minimum, it is clear that Koppleman did not send the form to his superiors, and complete the discharge process, until November 10. I find, consistent with Sheard's testimony, that it was on November 10 (not on November 9, as Koppleman testified), that he went to Koppleman to appeal for his job. After Koppleman heard Sheard's appeal, as Sheard further testified, Koppleman told him that he could continue his employment if the supervisors in the shipfitting department would take him back. That is, although Koppleman had told Ponville on November 9 that, because Sheard had been caught sleeping and because he had a "dirty" record of warning notices, he would discharge Sheard, Koppleman reversed his decision on November 10 after Sheard made his appeal. Koppleman's second decision, as he admitted, was to issue Sheard a warning notice but withhold processing of the ASI-22 form if the supervisors in the shipfitting department would take Sheard back. As Sheard's undisputed testimony proves, Foret agreed, on behalf of the shipfitting department, to take Sheard back, but Seals, Foret's superior, repudiated that agreement and told Sheard that he was discharged.

When Seals decided to repudiate the agreement between Koppleman and Foret, he made the effective decision to discharge Sheard. That is, the final decision to discharge was made by Seals. Indeed, in a June 10, 1994 letter to the Region, Respondent admitted that Seals made the final decision to discharge Sheard. That letter states: "Mr. Seals reviewed [Sheard's] record and since he had been caught sleeping, and had received four warning notices in less that 12 months, Mr. Seals terminated [Sheard]." This is nothing short of admission that it was Seals who discharged Sheard. Also, the evidence that Respondent introduced at trial also clearly indicates that Seals made the final decision to discharge Sheard. Simply stated, Koppleman gave Seals the last word; if Seals had been willing to take Sheard back in the shipfitting department, he presumably would have still been employed there (albeit with one more warning notice that would have been issued by Kop-

[335] It is apparent that the two lines in the space for "Explanation for Action" were added on a second insertion of the form into a typewriter; the lines slant upwards, to the right, in perfect parallel. As I find, however, the entries were made on November 10, but only after Seals decided, on that date, to discharge Sheard.

pleman). Finally on this point, undisputed evidence that the General Counsel introduced at trial also proves that Seals made the decision to discharge Sheard. Respondent did not call Foret; therefore, Sheard's testimony is undisputed that: (1) he went to Foret on November 10; (2) he told Foret that Koppleman said that, if the shipfitting department would take him back, Koppleman would not discharge him; (3) Foret then made a telephone call; (4) Foret then told Sheard that the matter had been taken care of and he could continue working in the shipfitting department; (5) Foret further told Sheard to return to the drydock department and gather his tools. On brief, Respondent does not mention Sheard's undenied testimony about his exchanges with Foret. Sheard's undisputed testimony that disclosed Foret's November 10 agreement with Koppleman, of course, is completely inconsistent with Koppleman's testimony that Seals told him on November 9 that Sheard could not be returned to the shipfitting department solely because Sheard had been sleeping on the job. If Respondent could have briefed me with a reason for discounting Sheard's undenied testimony, it undoubtedly would have.

Foret would not have made the statement to Sheard that, in effect, he and Koppleman had reached an agreement whereby Sheard could keep his job if that statement had not been true. That is, the undisputed evidence is that, when Sheard left the shipfitting department to get his tools at the drydock department, he had not been discharged. I find that Koppleman did not even speak to Seals on November 9; Koppleman got his information about Sheard's "dirty" work record on November 9, as he then told Ponville, but that information apparently came from a clerical in the shipfitting department, not Seals. It is clear from the circumstances, and I find, that it was Koppleman to whom Foret spoke on the telephone before telling Sheard that he could continue his employment with Respondent in the shipfitting department, and Sheard therefore was not *then* discharged.

The decision to discharge Sheard was not made until after he left the shipfitting department to get those tools. It is apparent to me, and I find that, while Sheard was collecting his tools in the drydock department, Seals first found out about the agreement between Foret and Koppleman, and he then decided to repudiate it. Upon Sheard's return to the shipfitting department, Seals told Sheard of his decision that, despite the agreement between Koppleman and Foret, he had decided that Sheard was to be discharged.[336]

Under *Wright Line*, the issue is whether Respondent has demonstrated that it would have discharged Sheard even in the absence of his known protected activities. The Board, of course, requires evidence upon which to make its findings and conclusions under *Wright Line*. Because Seals was not called to testify there is no record evidence of the basis for Seals' decision. Moreover, except to the extent that it contains admissions against Respondent, counsel's letter of June 10, 1994, is not evidence, Specifically, counsel's letter is not evidence that the supervisor who decided to discharge Sheard (*to wit*: Seals) did so because of Sheard's prior disciplinary record as well as his sleeping. Indeed, Respondent's letter is not even evidence that Sheard's sleeping had anything to do with his discharge. Also, Koppleman's report in the postdischarge ASI-22 form is hearsay as to what considerations were taken into account by the decisionmaker, Seals.

If Respondent had called him as a witness, Seals may have testified that he based his decision solely on Sheard's sleeping, but it is equally possible that he shared Paint Department Superintendent Bourg's opinion that sleeping employees may well just be spoken to, rather than discharged, as discussed above in the case of discriminatee Aguilar. It is also possible that Seals would have testified that he decided to discharge Sheard only because of the number of warning notices that Sheard had received; the notation "Has 3 citations" on the ASI-22 form would indicate as much. (Of course, if Seals had testified that he decided that Sheard should be discharged because of the number of his prior warning notices, his testimony would have raised the issues of how many warning notices, within what period of time, compel a discharge, as discussed in the cases of discriminatees Barbara Marshall, Hernandez, Varnado, and George, supra.) It is also entirely possible, however, that Seals' testimony would have revealed that he decided to discharge Sheard because of the fact that Sheard was the only employee who wore prounion insignia when he worked on Foret's crew. The great degree of animus that Respondent holds makes this last possibility more than clear. All of which is to say that, because that decisionmaker was Seals, only Seals could have offered testimony of why Sheard was discharged. Respondent, however, did not call Seals to testify, and it offered no reason for failing to do so.

By failing to call Seals, of course, Respondent shielded the decisionmaker from the requirements of the oath and cross-examination. Instead, Respondent asks the Board to make its decision on the basis of (1) Koppleman's false (and hearsay) testimony that Seals told him on November 9 that Sheard should be discharged only because he had been sleeping, and (2) the postdischarge memorandum that Koppleman completed only after Seals made the decision to discharge Sheard. Again, I draw the strongest adverse inference against Respondent for its failure to call Seals to testify.

In summary, Koppleman told Foret that Respondent had a reason for which it *could* discharge Sheard. Foret decided not to discharge Sheard, and Foret put Sheard back to work (by telling him to go and collect his tools). Seals, however, for a reason that was not disclosed by testimony, decided to overrule Foret, and Seals discharged Sheard. Because Respondent did not call Seals to testify, it has not shown that Seals *would have* discharged Sheard even absent his protected activities. Because it has not offered any credible evidence that Seals *would have* discharged Sheard even absent his known protected activities, of course, it has not met its burden under *Wright Line*. I therefore conclude that Sheard was discharged in violation of Section 8(a)(3).

Respondent further contends that, after his discharge, Sheard confronted Seals and threatened him with death. Respondent argues that, because of this post-discharge misconduct, Sheard is barred from any potential remedy. Again, Seals did not testify, and Respondent offered no excuse for not calling him. Again, I draw an adverse inference against Respondent; if Seals had actually been threatened to his face, as Respondent alleges, Respondent would have called Seals to so testify. Moreover, Sheard denied the threat, and his denial was just as credible as the (conclusion-filled) testimony of the one witness that Respondent did offer in support of its allegation, General Foreman

[336] In making these findings, as well as Respondent's admission by letter to the Region, I heavily rely on the fact that Respondent called neither Foret nor Seals to testify, and I draw the strongest adverse inferences against Respondent for its failures to do so. See *International Automated Machines*, 285 NLRB 1122 (1987), as quoted above.

Neil Adams (vol. 83). I therefore find that Respondent's allegation of postdischarge misconduct by Sheard has not been proved, and I conclude that Sheard is entitled to full remedy under law.

5. Employees warned or discharged for loafing

a. Keith Collins' discharge for loafing in restroom

Keith Collins (vols. 5, 47) was employed as a welder until he was discharged on June 1, 1993.[337] The first complaint, at paragraph 27, alleges that by discharging Collins Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Collins because of his known union activities and expressions of sympathy which included his making prounion remarks, both in employer campaign meetings and individually, to his supervisors. The General Counsel further contends that a supervisor twice admitted to other employees that Collins was discharged because of his union activities. Finally, the General Counsel alleges that, in violation of Section 8(a)(1), Collins was twice threatened with unspecified reprisals because of his union activities and that Collins was once threatened that other employees had been discharged because of their union activities.[338] Respondent denies that the threats and admissions were made. Respondent further answers that its supervisors did not know of Collins' prounion sympathies and that Collins was discharged solely because, on June 1, he was found to be spending an excessive amount of time in the restroom. The General Counsel denies that Collins spent an excessive amount of time in the restroom; alternatively, the General Counsel replies that Collins was treated disparately because (1) Collins was not given the benefit of Respondent's progressive disciplinary system that is contained in the Avondale Employees' Guide, and (2) other employees engaged in similar conduct but they were issued lesser discipline or no discipline at all. Ultimately, I find and conclude that, although he spent an excessive amount of time in the restroom, Collins was treated disparately and that he was discharged in violation of Section 8(a)(3).

Collins' immediate supervisor was Foreman Bobby Ramirez who, in turn, usually reported to welding department General Foreman Hubert (Butch) Cole and Superintendent Norris Pertuit. Collins testified that in early March 1993, about the time the organizational effort started, Cole and Welding Department Foremen Donald Brown and Sterling Dolese conducted an employer campaign meeting. At the meeting Brown spoke against the organizational attempt. Collins further testified that he spoke up and:

> I told him about the injustice that was going on out there on the yard and about the nepotism and how I haven't had a raise in five years. And I have seen other people, like Ramirez and his foreman, Ricky, they had got raises.
>
> And I explained to him, "That is why I think we need a union, because the Company [doesn't] seem to be trying to change to ease our problems."
>
> And they told me, "No, that is the worst thing that could happen to this yard."

Neither Cole nor Brown was presented by Respondent as a witness; Dolese testified, but he did not deny that Collins made these prounion statements. I credit Collins' testimony.

Collins further testified that in late March, immediately after another employer campaign meeting, he was approached at his work station by Ramirez, and:

> I was welding, and he [Ramirez] say, "Keith, do you have any questions about the meeting?" . . .
>
> And then I asked him, "Bobby Ramirez, when are you going to give me a raise? When are you all going to see about giving me a raise?"
>
> And he say, "When the Company gets back on its feet, we are going to see about getting you a raise."
>
> And then I asked him, "Do Avondale have any contracts?"
>
> And he says, "I think they have a couple of contracts."
>
> And then I asked him, "What are they waiting [for], to see what happened with the election before they announce it?"
>
> And he say, "I think so, but if you tell anyone that I told you this, I am going to lie and say I didn't tell you this."
>
> And then he asked me did I have any more questions, and I said, "No." And just before he left, he told me, "You are doing a good job. Keep up the good work."

Based on this testimony by Collins, paragraph 13 of the first complaint alleges that Respondent, by Ramirez, "threatened its employees with unspecified reprisals if they continued to assist the Union." As discussed infra, Ramirez denied telling Collins that Respondent's granting of wage increases depended on the results of the Board election.

In late March, Collins was transferred (or "loaned," depending on Respondent's terminology which is important in other cases, but not Collins') to the pipe department to work as a helper to employees who worked under different foremen; those foremen reported to Pipe Department General Foreman William Fedrick. On June 1, Collins was transferred back to the welding department under Ramirez and Cole. On that date, according to Collins, Cole was absent and Welding Department General Foreman Ernest Foret Sr. substituted for Cole. At some point before 11 a.m., Foret conducted an employer campaign meeting; present were all welding department foremen and employees. According to Collins:

> Bobby [Ramirez] came to me early and told me we was going to have a meeting —a union meeting in the office. So I went to the office. I sit across from Mr. Foret—I sit right across from him, and Ramirez sit on the side of me. And Foret asked me what my badge number was.
>
> And I told him, "My badge number is 420."
>
> And he told me that . . . "[Fedrick] came over here and told me that you was missing a lot of time."
>
> And I would say, "No, I only missed one day since I was in the Pipe Department. The two months I was in the Pipe Department, I missed one day."
>
> And he say, "I told [Fedrick] he should have fired you."

Based on this testimony by Collins, paragraph 18 of the first complaint alleges that Respondent, in violation of Section

[337] Collins testified that he was discharged on June 2; however, his personnel card and Respondent's report to the Louisiana Department of Labor show that his last day worked was June 1.

[338] The other employees were Dwight Ballard and Lennie Valentine. In Ballard's case, supra, I find that the supervisor, Jesse Caston, did make this threat in violation of Sec. 8(a)(1).

8(a)(1), by Foret, "threatened its employees with unspecified reprisals if they continued to assist the Union." As discussed infra, Foret admitted similar comments to Collins, but he placed them in a different time, place and context. Ramirez testified, but not about any exchange that he might have witnessed between Collins and Foret.

Collins' Discharge—General Counsel's Evidence

Collins testified that the June 1 meeting that was conducted by Foret ended about 11 a.m. At 11:15 a.m., Collins left his work area to go to the restroom. It took 4 or 5 minutes to get to the restroom. Collins left the restroom at 11:35 a.m.; therefore, by his account of the time needed to get back to his work area, it would have been 11:40 a.m. when Collins did so. Therefore, by his estimate, Collins was absent from his job to go to the restroom for 25 minutes.

Collins testified that when he returned to the welding work area, he was greeted by Ramirez:

> Then he told me, "Keith, where have you been? I been looking for you. This yard could have been burning down. I was timing you. You was in the restroom for 30 minutes."
>
> And I told him, "No, I was watching my watch. I was in the restroom for 15 minutes." . . .
>
> And he said, "No, I was timing you. You was in the restroom for 30 minutes." . . . And then he say, "Your clock number is not on your work."
>
> And I say, "Yes, it is on my work."

Welders are required to chalk their clock (or "badge" or "employee") numbers on welds that they have completed. Collins and Ramirez went to the weld in question, and Collins' badge number was on it. Further according to Collins:

> [A]nd he say, "All I know, you was in the restroom for 30 minutes."
>
> I said, "No, I wasn't in the restroom for 30 minutes."
>
> Well, then he told me that some pipe fitters say that I was over there in the pipe fitting department—I was lazy, and I didn't want to work. And he say, "Well, give me your badge."
>
> I say, "Give you my badge for what? Bobby, I know you all setting me up."
>
> And he says, "There is more to it than that. The pipe fitters say you didn't want to work; all you wanted to do was talk about the Union."
>
> So he told me, "If you don't give me your badge, I am going to call the security guard."
>
> And I told him, "I been out here for nine years. You are going to terminate me for allegedly something like this?"
>
> And he say, "All I know is the pipe fitters said you was lazy and you didn't want to work."

(Collins had, in fact, been employed by Respondent for 9 years.) At that point, Collins was discharged. After Collins and Ramirez went to the toolroom to account for all of the company-owned tools that Collins had checked out, Collins went to Superintendent Pertuit's office. Collins protested his discharge; Pertuit responded that Collins had been given warning notices for poor production in 1986 and 1987, and concluded, "I can't do anything for you." Pertuit testified for Respondent (vols. 104, 141), but he was not asked anything about Collins on direct examination, and this testimony by Collins stands undenied. The ASI-22 (discharge) form that Pertuit created, and sent to the human resources department after Collins was discharged, states that the reason for Collins' discharge was: "Leaving job without supervisor's permission." General offense-4, as stated in the Avondale Employees' Guide is: "Wasting time, loitering or leaving the working place without permission."

Collins' personnel card indicates that before his discharge Collins was issued two warning notices in 1988, three in 1989, one in 1990, one in 1991, and one in 1993. The 1993 warning notice is dated March 25; it is signed by Cole and Ramirez; it cites general offense-1; and it states as the reason for warning: "Excessive absenteeism. Also, failure to notify superintendent's office of reason for absence."

Ernest Roland (vol. 40) is a current employee who drives a van pool to and from work. Roland testified that on June 1, the day that Collins was discharged, Shipfitting Department Assistant Superintendent John Ernst, Ramirez, and several nonsupervisors rode home with him in the van. According to Roland, Ernst spoke to Ramirez and:

> [Ernst] said, "Well, I heard you fired another one of them guys today."
>
> I was driving my van and I come to a stop sign and I stopped, and I turned and I looked at Bobby, and he looked at a little notebook that he had in his pocket and he said, "Yes, I fired another one of them guys today involved with the Union." . . . He said [it was] Keith Collins. . . . Then he laughed.
>
> He [Ramirez] said, "Big Foot [Ernest Foret Sr.] ain't got the balls to fire them." . . . He said, "Big Foot told me to fire him; he is involved with that Union."
>
> [Ernst] just laughed.

(Ramirez and Ernst denied that this exchange occurred, and these denials will be discussed infra.) the General Counsel further introduced certain testimony by current employee Lawrence Arabie (vol. 32) as evidence of an admission by Ramirez that Collins was discharged for union activities. Arabie's testimony was credible as far as it went; however, it did not contain such admission, and I do not consider it further.

Collins' discharge—Respondent's evidence

Ramirez on direct examination: Ramirez testified (vol. 111) that Collins asked him several times for a raise; the last time Collins asked, he told Collins that raises would be coming when the Company was in "better shape." Ramirez denied, however, that he ever told Collins that whether Collins received a wage increase depended on whether the Union was selected as the employees' collective-bargaining representative, and Ramirez denied saying that he would lie and deny that he had made such a remark. Ramirez further denied any knowledge of any prounion sympathies that Collins may have held.

Ramirez testified that he supervised Collins at irregular intervals during the 2 years before Collins was loaned to the pipe department; during those 2 years, he observed Collins' walking away from his work and otherwise "goofing off." Ramirez further testified that other Welding Department employees would complain to him that Collins would leave the hardest parts of jobs for them to do. Ramirez testified that on those occasions he would: "pull him off on the side and tell him, 'Hey, Keith, these guys don't want to work around you. You need to straighten up.'" Ramirez acknowledged, however, that he never issued Collins a warning notice for his conduct during

the prior years that Collins had worked under him; Ramirez also did not testify that he orally warned Collins of discharge or other possible discipline during those years.

Ramirez further testified that during the April-May period that Collins was loaned to the pipe department, he saw Collins walking toward the restroom "[a]bout four or five times a day." Ramirez testified that when Collins arrived back in the welding department, at 7:30 a.m. on June 1, he assigned Collins to do some welding work, "[a]nd told him to put his number on his work." About an hour later he observed that Collins had completed some welding but he had not placed his badge number on it. Ramirez testified "I got on him like I usually do. I told him, 'You have got to put your number on your work. I am not playing with you. You have got to put it on there.'" Ramirez testified that Collins replied, "Okay." Ramirez did not testify that, at any other point before he discharged Collins, Collins failed to place his employee number on a completed weld.

Ramirez testified that later in the morning, when he was near the platen upon which Collins was working, Shipfitting Department Foreman Terry Cortez called him over to an adjacent platen. Cortez told Ramirez that he had a rush weld job to do. Cortez was very anxious that the welding be done immediately and forcefully demanded that Ramirez assign someone to the job immediately. As they were talking, Ramirez noticed that Collins had stopped welding on the job that Ramirez had previously assigned to Collins and that Collins had begun walking in the direction of a restroom that was about 200 feet away. Ramirez testified that he observed Collins walk for 2 minutes to the restroom door. He noted by his watch that Collins entered the restroom at 11:10 a.m. He and Cortez continued talking; at 11:15 a.m., as Cortez was getting more anxious that the job be started, Ramirez testified that he told Cortez, "Well, let's wait a little before I make a decision about getting another guy here. He ain't going to be that long. Calm down."

Ramirez was asked and he testified:

> Q. What happened then?
>
> A. Ten minutes went by; ten more minutes went by. I said, "Man, this guy is killing me, man. So, you know, let's just hang loose. Let's just wait now."
>
> Q. Why did you decide—did you decide to wait there?
>
> A. I decided to wait . . . because of his back history, I figured that is what he was doing, pulling another one of these stunts of his.
>
> Q. Why didn't you go in the bathroom to get him?
>
> A. I am not doing that. . . . These are grown men I am working out there. They need to be a little bit more responsible. I am not going after these guys in the bathroom. That is their job, not mine. I got a job to do.
>
> Q. What happened next?
>
> A. It was quarter to 12:00 when he came out. It took him another two minutes to get over there.
>
> Q. Where were you? Did you see him come out [of] the bathroom?
>
> A. Yes, I was watching him.
>
> Q. How do you know it was a quarter to 12:00 when Mr. Collins walked out?
>
> A. I was looking at my watch.
>
> Q. What happened then?
>
> A. He went back up there, and I am standing there. By that time, [Cortez] started walking off. When he [Collins] bypassed me, he just went by me and went back to work—getting ready to go back to work.
>
> Q. What did you do, if anything?
>
> A. I went over there and I said, "Give me your badge. I no longer need your services."
>
> Q. Did you discharge him at that point?
>
> A. Right.

Ramirez did not deny that, as Collins testified, when Collins came back from the restroom, he and Collins inspected the weld that Collins had finished before he went to the restroom, and Collins' badge number was on it. (To the extent that Ramirez' testimony could be construed to contain any such a denial, I discredit it.)

After telling him that he was discharged, Ramirez walked Collins to the toolroom. There, according to Ramirez, Collins complained that he was being discharged because of his union activities. Ramirez testified that he replied: "That is not the reason why I am firing you, Keith. The reason why I am firing you is because of your past record and what you are doing when you spend all that time in that bathroom. We can't keep putting up with this all the time."

Ramirez further testified that after he and Collins parted company at the toolroom, he met a pipefitting employee who told him that Collins had been lazy while he worked in the pipe department. Still later, when he saw Collins near a gate, before Collins left the premises, Ramirez told Collins that he had received a report that Collins had been lazy while working in the pipe department. This testimony, apparently, was offered to deny that Ramirez had said such a thing when he discharged Collins at the platen. Ramirez did not, however, deny that he also told this to Collins when he discharged Collins at the work site, as Collins testified. (To the extent that Ramirez' testimony could be construed to contain any such a denial, I discredit it.)

Ramirez further denied that, at the end of the day, in the van that takes him home, he told Ernst: (1) that he had fired an employee that was involved with the Union, or (2) that he then told Ernst that Foret did not have the "balls" to fire Collins, or (3) that he then told Ernst that Foret had told him to fire Collins because he was involved with the Union. After these denials, Ramirez was asked and he testified:

> Q. Before Collins was sent back to work with you, Mr. Ramirez, did you have any discussions with Big Foot Foret regarding Collins?
>
> A. Before he was sent back to me?
>
> Q. Yes.
>
> A. No.

Ramirez was not asked if he had any discussions with Foret after Collins was sent back to him from the pipe department (i.e., during the morning of June 1, between 7:30 a.m., when Collins arrived from the pipe department, and 11:45 a.m., when he discharged Collins).

Finally, it is to be noted about Ramirez' direct examination, that he was asked and he testified:

> Q. Why did you do that [discharge Collins], Mr. Ramirez?
>
> A. I felt—may I say that to explain myself—I felt that Keith Collins owes me an explanation why he was in the bathroom that long. If he was sick, I would have sent him to first aid and never said a word. But he bypassed me, [in effect, Collins was saying] "just to heck with you; I do what I want." And I already had the heat on me.

And I made the decision. With his past, I wasn't going to put up with it no more.

Q. When you said you already had the heat on you, what do you mean by that?

A. That I got to get these bulkheads finished, and he is playing around on the job. He don't care about his job. I got a job to do.

Later in his direct examination, Ramirez was asked (again):

Q. What were the specific reasons that you fired Collins?

MR. LURYE [for the Union]: Objection.

JUDGE EVANS: Overruled.

THE WITNESS: To start off with, I felt that he should have gave me an explanation why he was in that bathroom that long, to begin with. If he would have told me, like I said, he was sick, spending that long in the bathroom, I would have said, "Okay. Go to the first aid and go ahead and go home." No big deal.

But when he—as far as I am concerned, he disrespected my ability as a foreman and whatever and just went on back to work and [in effect] said, "Heck, I will spend 35 minutes in there; he ain't going to tell me nothing, or I don't care." I said, "Okay."

I said, not only that, his background for the two years that I worked him is not real good. I mean, I don't spend 35 minutes in the bathroom. That is what I am saying. And that is the reason why I fired him.

(It is to be noted that Ramirez was first asked on direct examination why he discharged Collins, and then later on direct examination he was asked the "specific reasons" for the discharge. This was really a repetition of a question on direct examination, and the Union's objection was, in that sense, valid. In the direct examinations of many other supervisors that it called at trial, Respondent's counsel asked first for "the" reasons for discharges, and then he asked for "the specific reasons" for discharges. I consider this procedure to have been a technique of attempted testimony enhancement, and I usually do not consider the answers to the repetitive "specific reason" questions. The exception is where those answers contain express or tacit admissions. For example, in the just-quoted testimony, Ramirez does not mention as a part of the reason for the discharge Collins' failures to mark his welds; this is a tacit admission that weld marking was not part of the reason for the discharge, even though Ramirez later added this reason on cross-examination, and Respondent contends that Collins was discharged, in part, for failure to mark his welds with his badge number.)

As noted, Ramirez testified that after he discharged Collins on the platen, he took Collins to the toolroom. Ramirez was further asked and he testified:

Q.[By Mr. Cupp]: Did you say anything to Collins at that point about a pipefitter foreman?

A. Not at that time, no.

Q. At that time, Mr. Ramirez, did you tell Collins that another pipefitter foreman had said all Collins wanted to do was talk about the Union?

A. I didn't say "another pipefitter foreman."

Q. At that time, did you say—did you tell Mr. Collins that someone had told you that all he wanted to do was talk about the Union?

A. No.

Q. How long did the conversation in the toolroom last?

A. A minute, two minutes.

Of course, Collins had not testified that Ramirez' statement about him talking about the Union was made at the toolroom; Collins testified that the remark was made at the platen, just after Ramirez had found his marks on the welding that Collins had done before he had gone to the restroom. Also, Collins had not testified that Ramirez had told him that it was a pipe department foreman who had said that all he had wanted to do was "talk about the Union"; Collins testified that Ramirez had said that "[t]he pipefitters" had made the statement. To the extent that Ramirez' testimony may be said to suggest a relevant denial of this specific testimony by Collins, I discredit it.

Ramirez on cross-examination: Although he had denied on direct examination that, after an employer campaign meeting, he told Collins that raises were being delayed until after the Board election, Ramirez on cross-examination acknowledged that his pretrial affidavit states, in part: "I recall talking to Collins after one of the meetings I conducted to state Avondale's position regarding the Union. I recall saying to Collins that I would do what I could to keep the Union out."

Further on cross-examination Ramirez was asked and he testified:

Q. [By Mr. Bensinger]: Now, if an employee engages in misconduct that is working for you, do you usually give the employee a chance to explain why he engaged in that misconduct?

A. Sure. Yes, sir.

Q. And do you usually first question the employee to ask him why he engaged in misconduct or what happened?

A. I would clear it with him, yes. Yes, sir.

Q. And then do you hear him out, and then you discuss it with him?

A. Discuss it with him, yes.

Ramirez further acknowledged on cross-examination that, before he gives a warning notice, he "normally" gives an employee one oral warning; and sometimes he gives an employee more than one oral warning before he issues a warning notice. Further on cross-examination Ramirez testified that "[a]s far as the Company is concerned," warning notices are not valid after 12 months, but: "If he [any employee] wasn't working for me, I don't go look back at his record. I don't hold that against him. If he does a good job, I just go from there."

Ramirez was further asked and he testified:

Q. Sir, you realize that the reason the Company has written citations is to put employees on notice that their performance has to improve.

A. Yes, sir.

Q. And that is the same reason that you give employees verbal [oral] warnings.

A. Right.

Q. And in the past, when—over the two years that you worked Mr. Collins, in the past when you gave him verbal warnings, his conduct improved.

A. It improved within—it was up and down. When I was getting ready to give him a citation, he got good. He got better and was doing everything right. Then he went right back like he was. It seemed like he was—had it planned out like that.

I mean, I didn't want to fire the guy. He was trying to do better, then he went back.

JUDGE EVANS: Next question.

Q. [By Mr. Bensinger]: Not in regards to Mr. Collins, but with the other men and women you supervised over 20-some years, you have had the experience that if an employee is slacking off, if you gave the employee a written citation, that sort of snapped him back in line.

A. Sometimes; sometimes not.

Q. And you knew when you fired Collins that possibly if you gave him a written citation, that might have caused him to improve his performance.

MR. CUPP: Objection.

JUDGE EVANS: Did you realize that?

Overruled.

THE WITNESS: I just got tired of putting up with the way he was conducting himself on the job. When he bypassed me, I felt he owed me an explanation.

JUDGE EVANS: Excuse me. The question was did you realize when you had waited so long for Collins to come back that you could give him a written warning notice for doing this, taking so long?

THE WITNESS: I probably could have, but it was a judgment call on my part. I felt he no longer deserved any more chances from me.

Ramirez acknowledged that it could have been as much as a year before June 1 that Collins had last worked for him.

Although Ramirez claimed on direct examination that, while Collins was on loan to the pipe department, he saw Collins going toward the restroom "about four or five times a day," on cross-examination he further acknowledged that pipe department helpers on ships (as Collins was then) often walk in the same direction as the restrooms on the ground while being sent on errands by the mechanics that they are helping. When asked to acknowledge that he did not know why Collins was on the ground when he was assigned to the pipe department, Ramirez responded: "All I know is I would see him pretty often."

As noted, on cross-examination Ramirez added that one of the reasons that he discharged Collins was his sometimes-failure to mark his badge number on his work. Finally, on cross-examination Ramirez testified that he had no idea why the ASI-22 form for Collins cited: "Leaving job without supervisor's permission." Ramirez testified that Collins had not needed his permission to go to the restroom when he did, and "I don't question people when they stay in there for ten, fifteen minutes." Ramirez further acknowledged that he knew that, under the Avondale Employees' Guide, "leaving the working place without permission" is general offense-4, for which a warning notice is the first step in the progressive disciplinary system.

Cortez (vol. 99) corroborated Ramirez' testimony that he stood with Ramirez while Collins went to the restroom. Cortez testified that he and Ramirez could see the restroom door from where they stood, about 200 feet away. Cortez testified that he and Ramirez waited for Collins, "I would say approximately 30, 35 minutes." When Collins approached them, Cortez left. Cortez did not, however, corroborate Ramirez' testimony that he was particularly anxious that the job be started immediately.

As noted, Pertuit was asked nothing on direct examination about Collins. On cross-examination Pertuit acknowledged that he completed the ASI-22 form that is quoted above and sent it through to the personnel department to complete the discharge of Collins. Pertuit testified that before doing so, Ramirez reported to him that: "One thing he [Ramirez] said he terminated Collins for [was] staying away off the job, and he has a witness. .. . [H]e just said he [Collins] left the job for a long time in the bathroom." On redirect examination, Pertuit was not asked why he entered "leaving the job without supervisor's permission" as the reason for Collins' discharge on the ASI-22.

Fedrick testified (vol. 104) that, while Collins was on loan to the pipe department, he was told by different leadmen that Collins was lazy; after one of those reports, he contacted Foret and:

> I told [Foret] that he needed—that I had a welder that they loaned to me, and I needed to let him go back to the Welding Department because he wasn't suitable for the type of work that he was doing, he may be better off as a welder than he was a pipe fitter helper. [I] gave [Foret] the clock number, and the welder's name—I told him his name was Keith. And at that time he told me, "Okay, send him back to the Welding Department" the following morning.

On cross-examination Fedrick was asked and he testified:

> Q. As I understand it, you told Mr. Ernest Foret Sr. at that time that Keith Collins had been working for you as a pipe fitter helper, but you didn't think he was suitable as a pipe fitter helper and would better work out as a welder's helper. Is that correct?
>
> A. No, it is not. I told him he would be better off as a welder, not a welder's helper. . . .
>
> Q. And that was because of Mr. Collins' skills as a welder. Correct?
>
> A. Correct.
>
> Q. Did Mr. Ernest Foret say anything to you at that time?
>
> A. Just that he told me that he could probably use a few extra welders, and work was starting to pick up, and go ahead and send him back to the Welding Department the following day.

At no point did Fedrick testify that he told Foret that he was sending Collins back to the welding department because of the reports of Collins' work habits that he had received from his leadmen.

On direct examination Foret (vol. 100) testified that, on the day before Collins returned to the welding department, May 31, he was approached by Fedrick. Foret was asked and he testified:

> Q. What was discussed in that meeting?
>
> A. That [Fedrick] said that the man missed time and he wasn't doing his work.
>
> Q. And what if anything did you say?
>
> A. I told him, "Well, if he is not doing his work, why didn't you write him up and fire the man?"
>
> Q. What if anything did Fedrick say?
>
> A. Says, "He belongs to you all. [He was] just loaned to us. He said, I am going to send [Collins] back to you all."
>
> Q. Do you recall if there was anything else said in that conversation?
>
> A. No. That is it.

Foret's testimony that Fedrick told him that he was sending Collins back to the welding department because Collins was not doing his work and "missed time" was not corroborated by Fedrick. Fedrick did testify that he received reports from his leadmen that Collins was lazy, but he did not testify that he reported that to Foret. Fedrick did not testify that Collins had "missed time" while he was in the pipe department, and, of course, he did not testify that he told Foret that Collins had an absenteeism problem while he was on loan to the pipe department.

Foret further testified on direct examination that, sometime later on May 31, he met Collins and told him that:

> I told him he was coming back to the Welding Department to Butch Cole. . . . And I told him looks like he was having problems with the Pipe Department. . . . I told Mr. Collins that if you are working for me, if you missed that much time that Mr. Fedrick says, I says, I would have to end up firing you.

This last answer was apparently offered in reply to Collins' testimony that Foret told him, on June 1, that Fedrick should have discharged him for absenteeism.

Foret further testified that he did not recall substituting for Cole at any time and he did not recall that Collins ever attended any employer campaign meeting that he conducted. Foret denied knowing that Collins was a union adherent, and he denied that he told Ramirez to discharge Collins because of his union activities. On cross-examination Foret acknowledged that Fedrick did not tell him how much time Collins had missed when working in the pipe department. To the extent that Fedrick and Foret differ, as described above, I credit Fedrick.

Collins' Discharge—Final Credibility Resolutions

Collins was credible in his testimony that, after an employer campaign meeting, Ramirez told him that forthcoming wage increases depended on the results of the Board election. This statement was pleaded as a threat of unspecified reprisals. It was not "unspecified"; it was quite specific. Ramirez admitted, however, that after an employer campaign meeting he told Collins, without qualification, that he would do "what I could" to keep the Union out. That was a threat of unspecified reprisals. It may have occurred at the same time that the threat to withhold wage increases was made, or it may have been made at a different time. It does not matter; the two categories of threats are certainly not mutually exclusive. The threat of unspecified reprisals that Ramirez admitted in his affidavit, which I credit,[339] necessarily occurred in March, after the organizational attempt began and before Collins was loaned to the pipe department. I conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Ramirez, in March 1993, threatened its employees with unspecified reprisals because of their union activities. I further credit Collins' testimony that, in the same conversation, Ramirez told Collins that he would lie if he were asked about what he had said. (The proof of Ramirez' willingness to lie under oath is discussed below.)

As quoted, Collins testified that, on June 1, after he had returned to the welding department, Foret told him that he should have been fired by Fedrick for absenteeism when Collins worked in the pipe department. Foret testified that on May 31 he told Collins that he should have been fired for "problems" *including* absenteeism. Foret did not deny, however, that, at an employer campaign meeting he told Collins that he should have been fired by Fedrick for absenteeism. Foret only claimed lack of memory about employer campaign meetings that he may have conducted while substituting for Cole. Moreover, Collins testified that Ramirez was sitting next to him at the June 1 employer campaign meeting at which the alleged threat occurred; Ramirez did not deny Collins' testimony. I credit Collins who had a credible demeanor when testifying on the point. (To the extent that Foret Sr's. testimony about his May 31 remarks to Collins can be construed as a denial of the June 1 remarks that Collins attributes to him, I discredit it.) There was no express reference made to the Union or to the union activities of Collins (or any other employee) in Foret's statement to Collins on June 1 at the employer campaign meeting; however, as I find infra, Ramirez told Collins that he, and presumably Foret, had heard that Collins had been talking about the Union while Collins was on loan to the pipe department. Foret told Collins that he should have been discharged by the pipe department for conduct that had not taken place there.[340] This statement necessarily took on a coercive nature when Ramirez told Collins that he had been accused of talking about the Union while he was in the pipe department. I therefore conclude that, in violation of Section 8(a)(1), Respondent, by Ernest Foret Sr., on June 1, 1993, threatened its employees with discharge or unspecified reprisals if they continued to assist the Union.

Collins testified that, when Ramirez discharged him in the work area on the platen and Collins then complained that he had been working well for 9 years, Ramirez responded that while Collins had been assigned to the pipe department, "[t]he pipefitters say you didn't want to work; all you wanted to do was talk about the Union." On direct examination, in an attempted denial of this testimony, Ramirez evasively testified that "I didn't say 'another pipefitter foreman,'" but he did not deny that he had said that "pipefitters" had said that all that Collins wanted to do was talk about the Union. Further Ramirez was carefully led to deny that he had made such a statement at the toolroom; he did not deny that he told Collins on the platen that pipefitters had complained that all he wanted to do was talk about the Union. I credit Collins.

Current employee Roland testified that on June 1, after Collins had been discharged, Ramirez told Ernst (and the other riders in the van) that he had discharged Collins because Foret had told him to do so, and Roland testified that Ramirez then further told the members of the van pool that Foret had told him that the reason for the discharge was that Collins was "involved with that Union." Ramirez and Ernst denied that this event occurred, but I found that Roland had a more credible demeanor, and he was a current employee who had nothing apparent to gain, and much to lose, by his testimony. Moreover, Ramirez' willingness to lie is demonstrated by his previously telling Collins that he would do exactly that, as Collins credibly testified. One might argue with this conclusion's being made on the basis of a credibility resolution, but the record contains even a better demonstration of Ramirez' willingness to lie under oath. As discussed below in the case of alleged discriminatee Mark Cancienne, Ramirez told employee Lawrence Arabie that

[339] See *Alvin J. Bart & Co*., 236 NLRB 242 (1978).

[340] Collins had not had an absenteeism problem in the pipe department and, until he was led away from it, Fedrick testified that he sent Collins back to welding only because his talents would be better utilized there

Cancienne had been transferred to his supervision to be discharged for his union activities. When he was called as a witness by the General Counsel (vol. 59), Ramirez denied that he had made this admission; then Ramirez admitted the remark when a surreptitious recording of the admission was played for him. That is, I believe that Ramirez' willingness to lie under oath about his admission about Cancienne's transfer proves his willingness to lie about his admission about Collins' discharge. I credit Roland.

Collins' Discharge—Conclusions

Collins credibly testified that at an employer campaign meeting in early March, which meeting was conducted by Cole (Collins' general foreman), Brown and Dolese, Collins complained about lack of a wage increase and nepotism and stated: "That is why I think we need a union, because the Company [doesn't] seem to be trying to change to ease our problems." As he discharged Collins, and Collins complained that the stated basis for the discharge was invalid, Ramirez replied, "There is more to it than that. The pipefitters say you didn't want to work; all you wanted to do was talk about the Union." This is the clearest evidence that, at the time of his discharge, Respondent suspected Collins of prounion sympathies and union activities. There is abundant evidence of antiunion animus in this case; of course, no stronger evidence of knowledge of, and specific animus toward, an employees' prounion sympathies can exist than Ramirez' statement to Ernst (and to Roland and to other riders in the van pool) that he had fired Collins because Foret had told him to do so because Collins was "involved with that Union." I conclude that a prima facie case of violative discrimination against Collins exists in the record, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Collins even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I find that on June 1 Collins was absent from his job (going to, being in, and returning from, the restroom) for 30 minutes, a time that Ramirez, and Respondent, reasonably considered to have been excessive. This finding, however, hardly ends the inquiry.

Respondent advanced no denial of Collins' testimony that on June 1, the day that Collins returned to the welding department from the pipe department, Cole was absent and Foret substituted for him. (To the extent that certain testimony by Foret could be construed to constitute such a denial, I discredit it.) On that day Foret conducted an employer campaign meeting in which he told Collins that Pipe Department General Foreman Fedrick had complained that Collins had missed "a lot of time." Fedrick, however, did not testify that he made any complaints to Foret about Collins; and, in fact, Collins received no discipline from the pipe department supervisors for his attendance during the period that he was on loan there. It is clear enough that Foret was searching for a pretext to discharge Collins when Collins returned to the pipe department on June 1, and, as I have concluded above, Foret then threatened Collins with discharge in violation of Section 8(a)(1).

As the substitute for Cole on June 1, Foret became the immediate superior of Ramirez. On that day, I find, Foret told Ramirez to discharge Collins because Collins was "involved with that Union." I arrive at this finding on the basis of current employee Roland's credible testimony of Ramirez' admission to Ernst and the other members of the van pool, which admission would not have been made if it had not been true. Ramirez discharged Collins immediately upon his return from the restroom; therefore the instruction from Foret must have come before Collins left for the restroom. There was plenty of time for Foret to have given this instruction during the morning of June 1; he could have given it between the start of the shift and the beginning of the employer campaign meeting that Foret conducted, and he could have given it between the point in time at which the meeting was concluded and the point in time at which Collins left for the restroom. (Ramirez' careful denial that Foret spoke to him about Collins "[b]efore he was sent back to me" is meaningless, except for its demonstration of Ramirez' willingness to evade telling the truth (and Respondent's willingness to structure its direct examination of Ramirez accordingly). Also meaningless is testimony by Foret that he did not recall speaking to Ramirez about Collins before Collins was discharged.)

Nevertheless, even though Foret had previously instructed Ramirez to discharge Collins because of his union activities, if Collins thereafter engaged in conduct which otherwise would have precipitated his discharge even absent his union activities, his discharge for that conduct would not violate the Act.[341] Therefore, the issue under *Wright Line* remains: has Respondent shown that it would have discharged Collins even absent his known or suspected union activities?

"Deliberate loafing" is an immediate discharge offense under the Avondale Employees' Guide, but, on brief, Respondent does not argue that Collins was discharged for an immediate discharge offense; instead, Respondent argues that Collins was discharged for staying in the restroom for 35 minutes and "Collins' supervisors considered Collins' consistent pattern of walking off the jobs during working hours." Also, Ramirez testified that he told Collins that he was being discharged because of his "past record," and Ramirez further testified that he discharged Collins because of his "history." Therefore, it is clear that Ramirez did not consider Collins' conduct on June 1, standing alone, to be immediate grounds for discharge.

On the ASI-22 (discharge) form that Pertuit completed and sent to the human resources department, Pertuit wrote as the explanation for Collins' discharge: "Leaving job without supervisor's permission." Ramirez admitted, however, that Collins had not needed advance permission to go to the restroom on June 1, and the entry of this reason is entirely suspicious. Assuming, however, that there is some relation between Collins' conduct and what Pertuit wrote on the ASI-22 form, it is to be noted that the only comparable description of an offense under the Avondale Employees' Guide is general offense-4; to wit: "Wasting time, loitering or leaving the working place without permission." Therefore, it is clear that, at the time of the discharge, Respondent considered Collins' conduct to have been the equivalent of some general offense under the Avondale Employees' Guide, probably general offense-4. Respondent's established progressive disciplinary system necessarily applied to such general offenses.

Ramirez' two-fold explanation for his failure to follow the progressive disciplinary system (or "judgment call," as Ramirez phrased it) was that : "[1] I just got tired of putting up with the way he was conducting himself on the job. [and (2)] When he bypassed me, I felt he owed me an explanation." In regard to

[341] See *A & T Mfg. Co*., 276 NLRB 1183 (1985), as it discusses *Wright Line* and cites *Klate Holt Co*., 161 NLRB 1606, 1612 (1966).

Ramirez' first reason for not affording to Collins the benefit of Respondent's formal progressive disciplinary system, it is to be noted that Collins had not been under Ramirez' supervision for as much as a year on the morning of June 1; and on June 1 Collins worked for less than a half-day (given the facts that Collins did not arrive at the welding department until some point after 7:30 a.m., and that some of the morning was consumed by the employer campaign meeting that Foret conducted, and that Collins was discharged by 11:45 p.m.). The only misconduct during that morning that preceded Collins' trip to the restroom, according to Ramirez' testimony, was Collins' one-time failure to mark his employee number on some completed welds. According to Collins' credited testimony, however, Collins had marked his welds before going to the restroom, and this was demonstrated to Ramirez when Collins returned to the work area from the restroom. Therefore, even assuming that Collins had failed to mark welds earlier in the morning, he corrected his conduct after being orally reminded to do so before he left for the restroom. That is, the only misconduct with which Ramirez had been "putting up" had been corrected. To the extent Ramirez was referring to conduct in which Collins had engaged as much as a year prior to June 1, it is to be noted that Ramirez admitted that, even when warning notices are issued, they are not held against an employee for more than a year; here, the only warning notice that Collins had received during the prior 12 months was a March 25 warning notice for absenteeism (something that was apparently corrected by that warning notice). To the extent that Ramirez might have been referring to the way that Collins had been conducting himself while working in the pipe department, it is to be noted that: (1) Collins was not disciplined for anything when he was on loan to the pipe department, and (2) Fedrick did not tell Foret that Collins had been guilty of any infraction in the pipe department. (I have discredited Foret's uncorroborated testimony to the contrary.)

In regard to Ramirez' second reason for not affording Collins the benefit of Respondent's progressive disciplinary system, it is to be noted that, even according to Ramirez' testimony, there was no way that Collins could have known that Ramirez knew how long Collins had been gone to the restroom, and there was no way that Collins would have known that he was being waited for to begin a job that needed to be started immediately. (Ramirez admitted that he saw Collins walking away, toward the restroom, but he did not call to Collins and apprize him of any factor that would indicate any urgency; e.g., "Hurry up and get back here; we need you to start on Cortez' urgent job.") Therefore, when he returned from the restroom, Collins would not have known that he needed to volunteer an explanation for the length of his absence. (It is further to be noted that Cortez did not corroborate Ramirez' testimony that the job was, in fact, urgent.)

Ramirez admitted that when warning notices are issued, the employees "sometimes" correct their ways. (Specifically, Ramirez admitted that during the 2 years before his discharge, Collins "got good" if Ramirez was "getting ready to give him a citation.") Improved performance is the purpose of the formal progressive disciplinary system that is contained in the Avondale Employees' Guide. Respondent has offered no credible reason why the benefit of its progressive disciplinary system was not afforded to Collins. In a context of animus such as that which is found in this case, the failure to afford a known union adherent the benefit of a progressive disciplinary system raises a strong inference of unlawful motivation.[342] Collins was a known union adherent,[343] and I do draw that inference.

The General Counsel has further demonstrated that other employees were allowed to be absent from a job for as much as 30 minutes without any discipline beyond a warning notice. According to warning notices that the General Counsel placed in evidence during his rebuttal: (1) On July 29, 1992, paint department employee Paulette Washington was issued a general offense-4 warning notice for being away from the job for 3-1/2 hours. (2) On the same date, and apparently on the same occasion, paint department employee 11061[344] was issued a general offense-4 warning notice for the same conduct. (3) On January 16, 1992, paint department employee 4227 was issued a general offense-4 warning notice for doing no work for 4 hours. (4) On July 12, 1991, electrical department employee Joe Hirstus was issued a warning notice, with recommendation for discharge for being away from his work area for 4-1/2 hours; Hirstus was not discharged even though, within 30 days thereafter, he was issued another warning notice for leaving the work place without permission. (5) On February 24, 1992, paint department employee 10210 was issued a general offense-4 warning notice for being out of his work area for "over two hours." (6) On March 25, 1992, electrical department employee Robert Bennett was issued a general offense-4 warning notice for being out of his area for 1 hour and 25 minutes. (7) On May 11, 1990, pipe department employee W. J. Bradley was issued a general offense-4 warning notice for being out of his work area for 45 minutes. (8) On April 2, 1991, sheet metal department employee Raymond Hill was issued a general offense-4 warning notice for being away from his work area for "over (1) one hour." (9) On April 26, 1990, pipe department employee Felicia Nicholas was issued a general offense-4 warning notice for being away from her work area for 45 minutes. (10) On February 17, 1994, shipfitting department employee Ronnie Davis was issued a general offense-4 warning notice for being out of his work area for 2 hours. (11) On October 19, 1990, electrical department employee Howard Williams was issued a general offense-4 warning notice for not making his way to his job assignment for 1 hour. (12) On May 29, 1992, employee 9827 was issued a general offense-4 warning notice for being out of his work area "for over 50 minutes." (13) On July 19, 1993, CDC employee 4757 was issued a general offense-4 warning notice for being in restroom "for over 30 minutes." (14) On September 25, 1990, paint department employee 712 was issued a general offense-4 warning notice for being away from his work area "for 1 hour, 17 minutes." (15) On July 31, 1991, operators department employee Fulton Saul was issued a general offense-4 warning notice for being out of his work place for 1 hour. (16) On January 2, 1991, shipfitting department employee James Jackson was issued a general offense-4 warning notice for being absent from his work area for 40 minutes. (17) On February 21, 1992, shipfitting department employee Robert Witherell was issued a general offense-4 warning notice for being "off of job site for 25 to 30 minutes;" within the 12 months before the issuance of that warning notice, Witherell

[342] See *Yukon Mfg. Co*., 310 NLRB 324 (1993).

[343] Again, Collins spoke out for the Union at an employer campaign meeting, and, when Collins returned from the pipe department, Ramirez accused him of talking about the Union rather than working.

[344] Most of the paint department warning notices, and many of the warning notices from other departments, bear no employee name, only employee badge numbers.

had been issued another general offense-4 warning notice for wasting time (marked "Final Warning") and he had been issued another general offense-4 warning notice for "wasting time, leaving work place without permission, stopping another employee from working" (the amounts of time wasted are not indicated on the warning notices that preceded Witherell's February 22, 1992 warning notice; after those three warning notices Witherell was issued two major offense-2 warning notices, both marked "Final Warning" (in all, Witherell was issued four "Final" warning notices between January 28, 1991, and October 7, 1992). (18) On May 22, 1992, electrical department employee M. Pierce (employee 1133) was issued a general offense-4 warning notice for leaving his work area for 35 minutes. (19) On July 1, 1992, employee 1366 was issued a general offense-4 warning notice for taking "35 minutes going to restroom" and [before or after that he] "was not working, just standing around." (20) On September 7, 1990, electrical department employee Ozell Daniels was issued a general offense-4 warning notice for being out of his work area for 45 minutes; Daniels had also been issued another general offense-4 warning notice within the preceding 30 days. (21) On April 30, 1992, paint department employee 9337 was issued a general offense-4 warning notice for being out of his work area "for over 1 hour and 15 minutes; whereabouts were unknown to foreman." (22) On July 31, 1991, operators department employee Donald Richardson was issued a general offense-4 warning notice for being out of his work area for "one hour." (23) On May 3, 1994, electrical department employee Wayne Toupe was issued a general offense-4 warning notice for being away from his work area for 40 minutes to use the telephone, and "[h]e did not notify supervisor or his helper that he was leaving," according to the warning notice. (24) On November 25, 1991, outside machinist Tommy Barnes was issued a warning notice (with no offense-number designated) because he left the work area for "35 minutes without supervisor's authorization." (25) On December 23, 1992, electrical department employee Gregory Hines was issued a general offense-4 warning notice for being away from his work area "from 12:45 to 2:15." (26) On March 16, 1993, electrical department employee A. Hughes was issued a general offense-4 warning notice for being away from his work area for one-half hour before his lunch period and 7 minutes after the lunch period; on July 1, 1993, Hughes was issued another general offense-4 warning notice, but it does not say how long he was away from his work area. (27) On May 22, 1990, electrical department employee Robert Gaudin was issued a general offense-4 warning notice because, as the warning notice states: "Mr. Gaudin signed the MCR at 6:00 a.m. and disappeared for the rest of the day. We didn't find him until he came to sign out at 2:00 p.m." (28) On July 12, 1990, outside machinist Frank Clark was issued a general offense-4 warning notice for being away from his work area for 55 minutes. (29) On January 31, 1992, operators department employee Dale Bauer was issued a major offense-2 warning notice (marked "Final") for "hiding and loitering" for an unspecified time. (30) On May 2, 1990, electrical department employee Bruce Pablo was issued a general offense-11 warning notice for "Unauthorized exit from Company premises" from 2:30 to 3:30 p.m. (quitting time). (31) On February 13, 1992, shipfitting department employee Randy Howey was issued a general offense-4 warning notice because he "left work area for 30 min.," according to the warning notice. (32) On March 24, 1993, insulation department employee 1857 was issued a general offense-4 warning notice because "[w]ithout permission, left his job for 30 minutes." (33) On October 21, 1991, paint department employee 9927 was issued a general offense-4 warning notice because "[e]mployee left the job site for over 30 minutes without permission," according to the warning notice. (34) On July 7, 1992, paint department employee 5614 was issued a general offense-4 warning notice because he "left work area without permission for over 45 minutes." (35) On March 30, 1992, paint department employee Helen Hudson was issued a general offense-4 warning notice because she "went to the restroom and was [away from] the work area for over 40 minutes," according to the warning notice. (36) On September 25, 1990, paint department employee L. M. Firven was issued a general offense-4 warning notice because he "left the job site for 1 hour without permission." (37) On June 3, 1991, pipe department employee 435 was issued a general offense-4 warning notice for "Leaving working place without permission" for 1 hour and 10 minutes. (38) On January 22, 1992, paint department employee 2006 was issued a general offense-4 warning notice for being absent from his work area without permission for 45 minutes. (39) On July 29, 1992, paint department employee 3852 was issued a general offense-4 warning notice because he "left the work place assigned at [7:30 a.m.] and was not seen again until [11:00 a.m.]," according to the warning notice. (40) On April 8, 1992, paint department employee 4858 was issued a general offense-4 warning notice for being out of his work area "for over an hour," the notice is marked "Final Warning." (41) On May 30, 1991, paint department employee 1809 was issued a general offense-4 warning notice because he "was walking around vessel for at least 45 minutes before returning to work area from restroom break," according to the warning notice; this employee had been issued warning notices on the preceding March 19 and April 2 for absenteeism and tardiness, and the latter of those two warning notices was marked "Final Warning," the employee was issued two warning notices subsequent to his May 30, 1991, warning notice, one on June 19, 1991, for absenteeism, and one on July 1, 1991, for lack of production. (42) On June 24, 1991, paint department employee 10543 was issued a general offense-4 warning notice for wasting time, "1:00 p.m. to 2:20" and "2:45 to 3:20," according to the warning notice; this employee had been issued four other warning notices for various reasons during the preceding 3 months. (43) On August 1, 1991, paint department employee 12148 was issued a general offense-4 warning notice because he was "out of work area for over an hour. He was found in another work area interfering with production of other employees," within the following 4 months, the employee was issued four other warning notices for various offenses. (44) On February 14, 1992, paint department employee 5748 was issued a general offense-4 warning notice for "walking around for approx. 1 hour before starting to work," according to the notice; within 2 weeks the employee was issued two other warning notices for various offenses. (45) On April 24, 1991, paint department employee 9146 was issued a general offense-4 warning notice for being "missing in work area for 30 minutes or more-Whereabouts unknown," according to the warning notice; this employee had been issued 10 other warning notices in the 7 months prior to April 24, 1991; one of the six prior warning notices was for general offense-5, quitting work early, and five of the six prior warning notices were for general offense-4 violations (although the amounts of time wasted are not specified on those five other warning notices). (46) On August 9, 1991,

shipfitting department employee 10400 was issued a general offense-4 warning notice for taking 1 hour and 25 minutes to begin a job assignment; this employee had been issued another wasting-time warning notice within the preceding 6 months, and another during the month following; i.e.,this employee was issued three wasting-time warning notices within 12 months. (47) On September 25, 1990, paint department employee Abbey Howard was issued a general offense-4 warning notice for being away from the job for 1 hour and 25 minutes.

Several of the alleged discriminatees in this case were also issued warning notices, rather than discharged, for wasting more time that 30 minutes: (48) On October 1, 1993, discriminatee, and paint department employee, Marshall was issued a general offense-4 warning notice, rather than discharged, for being in the restroom for 45 minutes. (49) On October 27, 1993, the day of her discharge, Marshall was absent from her work place for 40 minutes; her supervisors testified that, but for her prior warning notices, Marshall would have only been issued another general offense-4 warning notice. (50) On April 15, 1994, alleged discriminatee, and electrical department employee, John Joseph was issued a warning notice, rather than discharged, because "Employee disappeared for the last 35 minutes of work shift," according to the warning notice. (51) On March 11, 1993, alleged discriminatee, and pipe department employee, Eddie Johnson was issued a warning notice, rather than discharged, for being away from his job from "12:30 . . . until 1:32," according to the warning notice. (52) On July 23, 1993, alleged discriminatee, and electrical department employee, Kevin Lockett was issued a general offense-4 warning notice, rather than discharged, when his supervisor could not find him "for over two hours."[345]

Ramirez testified that 15 minutes to use the restroom was permissible; therefore, although Collins was away from his job (with permission) for 30 minutes, his period of unexcused absence was only 15 minutes. The above listing, however, demonstrates that a significant number of employees were absent from their jobs, without permission or other excuse, for 30 minutes or more (not 15 minutes, like Collins); many of those other employees (as opposed to Collins) had prior (or subsequent) documented histories of similar conduct and warnings (including "Final" warnings); and none of those other employees were discharged for their 30-minute (plus) absences. All of which is to say that, by Ramirez' "judgment call" that Collins was to be discharged rather than issued a warning notice, Collins was treated disparately. This disparate treatment raises another inference of unlawful motivation in the discharge of Collins.

Therefore, there are three separate inferences that Collins was discharged unlawfully: (1) the inference that is raised by the denial of the benefit of the progressive disciplinary system to Collins; (2) the inference that is raised by the disparate treatment of Collins; and (3) the inference that is raised by Ramirez' admission to the van pool members that Collins was discharged because he was "involved with that Union." I do draw all three of these inferences.

I further find that all three of the separate inferences of unlawful motivation are fortified by other factors in the record that the reason assigned for Collins' discharge is a pretext; to wit: (1) Upon his return to the welding department Collins was told by Foret that he should have been discharged for absenteeism in the pipe department; absenteeism was not a problem for Collins when he was in the pipe department, and, certainly, Fedrick did not testify that it had been. (And Fedrick, of course, did not testify that he told Foret that Collins had an absenteeism problem while on loan to the pipe department.) Clearly, when he told Collins that Fedrick should have discharged him for absenteeism, Foret was foisting about for a pretext for discharging Collins. (2) Further evidence of pretext is found in Collins' credible testimony that, as he was discharging Collins, Ramirez groped for other reasons to add to the restroom offense; in doing so, Ramirez came up with no better than the uncorroborated[346] claims of Collins' misconduct in the pipe department and a false assertion that Collins had failed to mark his completed welds. (3) Ramirez admitted that before he disciplines employees he gives them a chance to explain their conduct; as well as offering only incredible reasons for not affording to Collins the benefit of Respondent's progressive disciplinary system, Ramirez offered no reason why he did not allow Collins to explain his conduct. (4) Pertuit and Nunez attempted justifications of the discharge by references to Collins' warning notices that dated back to 1988; they attempted such justification, even though Respondent's policy is that warning notices that are more than 12 months old are not to be used against employees. Ramirez acknowledged the existence of this policy on cross-examination, and, as noted in the introductory section of this decision, Foret testified: "In other words, every month to the year, the old ones are torn away and are no good. After a year, the citations are no good." (And, as further noted in the introductory section, Respondent's lawyers made the same concession.) (5) Ramirez testified that part of the reason that he decided to discharge Collins was that, during the time that Collins was assigned to the pipe department, he saw Collins walking toward the restroom "four or five times a day." On cross-examination, however, Ramirez admitted that Collins could have been going for parts or supplies, as pipe department helpers are required to do. Also, during the time that Collins was assigned to the pipe department, he received no warning notices for being away from the job unnecessarily. It is clear that Ramirez' assertion of this reason for the discharge was just another attempt to construct a pretext for the discharge. (6) Ramirez testified that he does not consider warning notices that employees receive from other supervisors, even if those warning notices are received within 12 months of an infraction that is committed while the employees are working under him. Ramirez, inconsistently testified, however, that he held Collins' alleged loafing in the pipe department against Collins, even though the pipe department did not issue Collins a warning notice for loafing (or anything else). (7) Although he was twice given an opportunity on direct examination to state his reasons for discharging Collins, Ramirez left out Collins' alleged failures to mark welds; Ramirez' assertion of that reason on cross-examination is further evidence of its pretextual nature. (8) Further evidence of pretext is found in the fact that Pertuit recited on the ASI-22 (discharge) form as the reason for Collins' discharge: "Leaving job without supervisor's permission." Ramirez testified that Collins had not needed his permission to go

[345] Respondent contends that the treatment of alleged discriminatees cannot be compared because all of them are alleged by the General Counsel to have been prounion. Even if this were a valid criticism, Respondent denies knowledge of the prounion sympathies of all of the alleged discriminatees mentioned in this paragraph.

[346] The testimony of Fedrick was received for the report only; it was hearsay as to Collins' actual performance in the pipe department.

to the restroom, and he had no idea why the quoted language was included on the ASI-22 form. Also Pertuit testified that Ramirez had only told him that Collins' staying in the restroom too long was the reason for the discharge. What the reference to "leaving job without supervisor's permission" demonstrates is that Pertuit really did not care what he put down on the form; any reason was apparently good enough.

Accordingly, I find that Respondent has failed to show that it would have discharged Collins even absent his known or suspected union activities. I therefore conclude that Collins was discharged in violation of Section 8(a)(3).

b. Leroy Clark's discharge for reading a newspaper during a break

Leroy Clark (vol. 10) was employed as an electrician until he was discharged on January 10, 1994.[347] The second complaint, at paragraph 134, alleges that by discharging Clark Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Clark because of his known union activities and expressions of sympathy which included his making prounion comments at an employer campaign meeting and his expressing union sympathies directly to a supervisor. Respondent denies knowledge of any prounion sympathies that Clark may have held. Respondent further answers that Clark was discharged solely because he was found reading a newspaper when he should have been working, and that this happened shortly after Clark had received a warning notice for similar conduct. The General Counsel concedes that Clark was found reading a newspaper by a supervisor, but the General Counsel replies that the newspaper-reading defense is a pretext. The General Counsel contends that, although Respondent has no established breaks other than lunch, employees such as Clark were permitted "informal" breaks, that Clark was taking such a break when he was found reading a newspaper, and that he was not supposed to have been working at the time. The General Counsel contends that employees, previously and subsequently, were allowed to read newspapers with impunity, at least on breaks. The General Counsel further contends that Clark was disparately treated because other employees who were found reading newspapers during working time were only issued general offense-4 warning notices under the Avondale Employees' Guide. Ultimately, I find and conclude that Clark was treated disparately, that the reasons asserted for Clark's discharge were a pretext, and that Clark was discharged in violation of Section 8(a)(3).

Clark testified that from early in the campaign he wore union stickers, but only inside of his hardhat. He also placed union stickers in, but not on the outside of, his lunchbox. Clark also testified that 2 weeks prior to the June 25 Board election Electrical Department Superintendent Robert Terry addressed a group of electricians with whom Clark had been working. According to Clark, he spoke up at the meeting, and:

> My comment was that the time and money that was being spent on those meetings were good, but I also stated that the time and money could have been spent before this particular period and avoided what they call now a union problem.

Terry denied that any employee ever said any such thing to him, but I found Clark credible.

[347] All dates mentioned in Clark's case are between March 1, 1993, and January 10, 1994, unless otherwise indicated.

Clark further testified that about 2 days after Terry's meeting, his then-foreman, P. J. Sprunk, approached him individually. According to Clark:

> Well, first thing he said to me was: "You are not for this union business, are you?"
>
> [M]y statement to him was that I was displeased with the fact that I made 7.44 an hour as a third-class electrician and I was doing first-class work from the time that I was hired, and I gave him some examples, how you had people in the cleaning department that actually made more money than myself. And my final statement was, "You know I am going to vote for this union."

Clark further testified that during the week before the Board election, when he was with two other employees, he was approached by Sprunk and offered a Vote No sticker. Clark declined the offer. No interrogation allegation is based on either of these alleged communications to Clark by Sprunk. Sprunk did not testify, and this testimony by Clark is undenied, and I credit it.

Clark's Discharge—Background

From October through January, Clark's foreman was Joe Locantro. Before January, Locantro reported to General Foreman Mark Poche, but Locantro reported to General Foreman James Kelly in January, the month of Clark's discharge. Kelly and Poche, of course, reported to Terry. Terry, Kelly, and Poche testified, as previously mentioned, but Locantro did not.

"Containers" are essentially boxcars with their undercarriages removed. Containers are used around the yard for storage and offices for foremen. As Terry acknowledged, although there are no formal break periods, employees are permitted up to 15 minutes in the morning, around 9 a.m., for a break. Clark testified that in October, Locantro conducted a meeting of the employees on his crew. Locantro discussed assignments and breaks. According to Clark: "Specifically what he said concerning breaks was he did not mind us taking our breaks between 9:00 and 9:30 , having a little sandwich or a little drink, as long as we don't make a meal out of it." Clark testified that when working on Locantro's crew, about 9 a.m., the employees would take breaks lasting "[t]en, fifteen minutes at most." The employees on Locantro's crew, Clark testified, took their morning breaks in a container assigned to Locantro; they would eat sandwiches and drink sodas. As Locantro did not testify, this testimony by Clark stands undenied; I found the testimony credible.

On December 14, Locantro issued a warning notice to Clark. Quoting major offense-2 of the Avondale Employees' Guide, Locantro wrote as the reason for warning:

> Intentional negligence, inefficiency or failure to complete job assigned. Assigned man to grind 4" welds off foundations that should have taken 3 hours. Man took 8 hours and only accomplished half.

Poche signed as the witness to this warning notice. The issuance of this warning notice is not alleged as an unfair labor practice by the General Counsel, but Respondent depends on it as background for Clark's ultimate discharge. Clark testified that when Locantro and Poche presented the warning notice to him for signature, the three men got into a heated argument. Later, further according to Clark, Kelly told him, "not to worry, that that particular write-up had been thrown out." Kelly denied this testimony, but I credit Clark. As noted above, copies of all

warning notices are furnished to the human resources department for recording on the employees' personnel cards. Clark's personnel card does not reflect that the December 14 warning notice was processed to the human resources department. Although counsel for the General Counsel clearly stated the relevance of the personnel card at the time that he offered it, Respondent suggests no reason why it does not reflect that such a warning notice was processed. I believe Clark's testimony; I find that Kelly told Clark that the warning notice would be thrown out, but, rather than throwing it out, Kelly (or Poche or Locantro) retained a copy, and the original of the December 14 warning notice was never processed beyond Kelly until some time after Clark's discharge.

Clark's Discharge—the General Counsel's Evidence

Clark testified that on January 10 Locantro was absent. Clark and fellow employees Ray Rorak, Donald Moore, and an employee whom Clark knew only as "Renaldo," were assigned to uncrate several transformers and prepare them for hoisting onto a ship. At 9 a.m., according to Clark, "We all went on break." All four employees walked toward Locantro's container. Locantro's container is divided, according to Clark, into a "clerical side" and a "storage side"; the two sides are separated by a partition. The other three employees went to the clerical side; Clark went to the storage side. Clark was asked and he testified:

> Q. And what, if anything, did you do once in the storage side of the container?
>
> A. Well, on my side, I saw a newspaper, started glancing at it.
>
> Q. And about how long did you do that?
>
> A. About three minutes.
>
> Q. And what if anything happened then?
>
> A. About 9:03, I guess—I don't know—Mark Poche walked by . . .; he looked in; he said, "Hey, you know, you can get fired for that." And I said, "I don't want to lose my job."
>
> Q. And after you said that, what, if anything, did you do then?
>
> A. Well, he just kept going, and so I walked around, went into the container, saw the other three guys taking their break, one of them eating a sandwich, the other one got his feet on the table, other one sitting at a desk. I told them what had happened. I said, "Mark just threatened me with my job; we need to get back to work."
>
> Q. And after you said that to the other men, what happened?
>
> A. They followed suit. They all came back out; we went back to work. I think Ray [Rorak] stayed behind, did paperwork.

Poche's testimony about this incident will be discussed below; neither Rorak nor the other employees testified.

About 40 minutes later, Poche and Kelly met Clark. The two general foremen told Clark to collect his tools and come with them to Terry's office. Clark asked why, but Poche and Kelly would not tell him. When the three men got to Terry's office, further according to Clark:

> The conversation that took place once I entered Bob Terry's office, he asked me a question. He says, "Is it true what Mark Poche saw?"
>
> And I said yes, and as I was trying to explain, he cut me off, and said, "You are fired, you know." . . .
>
> I told Mr. Terry that I had been working for Avondale for 17 months and had never had a write-up, and I wanted to know why I was being fired and why I could not have been written up like everyone else. I . . . said, "What about them other three guys," okay.
>
> And he says, "Well, you could have been picking up trash, you know." That was his comment. . . .
>
> I asked Bob Terry again—you know, I wanted to talk. He said he had heard enough. "You are fired."
>
> So I ended up back in the other room. Yes. They put me back in the anteroom. And James Kelly came and he had a warning notice. And he wanted me to sign it. . . .
>
> I signed the warning notice, with comments.

The warning notice that Kelly then presented to Clark was signed by Poche and Kelly. Partially quoting immediate discharge offense-2 of the Avondale Employees' Guide, the warning notice states as the reason for the warning:

> Deliberate loafing during hours of work. Mr. Clark was observed sitting in the material storage container reading the sports section of the newspaper. It is unknown the length of time Mr. Clark had been in the storage container.

Clark was then escorted from the premises.

Clark's Discharge—Respondent's Evidence

Poche (vol. 77) testified that on January 10, as he was walking by a building, not a container, he saw Clark reading a newspaper. Poche testified that he had been on his way to talk to an employee who was in an office in the building, one or two doors down from where Clark was sitting. He walked beyond a doorway and "I caught something out of the corner of my eye." This was Clark, sitting on a bucket and reading the sports section of a newspaper. Poche testified that he went beyond Clark's doorway to the next, stayed for about a minute, then returned to the doorway where he had seen Clark. Poche was asked and he testified:

> Q. When you came back, what conversation took place between you and Mr. Clark?
>
> A. I asked him what he was doing. He said, "I am taking a break reading the paper." . . .
>
> I told him there are no breaks during company hours to read the paper. I asked him, what was he supposed to be doing. He said he was supposed to be wrapping equipment. . . .
>
> [I told Clark:] "Then do what you have to do and put the paper down."
>
> [Clark] put the paper down and walked outside again, began wrapping the equipment that he was supposed to be wrapping in the first place.

Poche testified that he went next door and asked three employees there what Clark was "supposed" to be doing and they also said that Clark (as opposed to themselves) was "supposed" to be wrapping materials. Poche further testified that, when he addressed them, the other three employees were reviewing drawings to see where the equipment was going to be placed on the ship.

Poche, as I have found so often in this decision, was not a credible witness. Here, Poche first admitted that he saw Clark out of the corner of his eye as he walked by; then he tried to describe a position that Clark had assumed in order to make himself undetectable, unless one looked very carefully. Poche

further tried to draw a picture of other employees diligently working while Clark read a newspaper; as he did so, Poche changed his testimony in various ways and self-conflicted about what other employees he had talked to, and when, and what those other employees were doing, and where. (Poche described a building where Clark and other employees were found, but his own warning notice indicates that Clark was found in "the material storage container.") In the process, Poche (again) rendered himself incredible. I do not believe that Clark admitted that he was supposed to be wrapping materials or doing anything else other than taking a break. I do not believe that Poche went to three other employees and asked them what Clark was supposed to be doing. Finally, I do not believe that the three other employees appeared to Poche to have been working at the time that he approached them. I believe, and find as Clark testified, that all four employees had agreed to take a break, and they were doing so. The only difference was that Clark took part of the breaktime to read a newspaper that he had found. Then, after Poche addressed Clark, Clark went to the three other employees and told them what Poche had said and that they had better get back to work. Rorak stayed behind to do paperwork, and Clark and the two other employees went back to wrapping transformers. (Transformer wrapping was something that Clark could not have been doing by himself, according to Clark's credible testimony.)

Further according to Poche, after he left the building in which the employees had told him that Clark was supposed to have been wrapping transformers, he called Kelly and "I asked Mr. Kelly to come to my office, that I had a problem to discuss with him, and the problem was people under him."[348] While he waited for Kelly, Poche, "wrote a citation out for Mr. Clark wasting time, loafing, reading a newspaper during working hours." After Kelly arrived at Poche's office, he signed the warning notice as a witness; then Kelly and Poche collected Clark and took him to Terry's office. There he and Kelly left Clark outside while they to went into Terry's inner office. According to Poche, "I gave Mr. [Terry] a citation. He asked me, "What was the guy doing." I said, "He was reading a newspaper." He said, "Okay, bring him in." (This testimony conflicts with that of Terry's, as discussed below. Also to be noted is the fact that Poche testified that he drafted "a" citation and he gave Terry "a" citation. Poche did not testify that he drafted the warning notice that Clark was issued after his discharge, as quoted above.) Further on direct examination, Poche was asked and he testified:

> Q. What happened next?
>
> A. Mr. Clark was asked to come in. He came in to Mr. Terry's office, and Mr. Terry asked him if he knew why he was in there.
>
> Q. And what did Mr. Clark respond?
>
> A. He said, "Yes."
>
> Q. What happened next?
>
> A. Mr. Terry asked him, "Is it true what I am reading on this citation, that you were reading a newspaper?"
>
> He said, "Yes, I sat down; I was looking at the newspaper."
>
> Q. What happened next?
>
> A. Mr. Terry told him he was terminated.
>
> Q. Did Mr. Clark respond?
>
> A. I don't recall if he did or not.
>
> Q. At any point, did you recommend termination of Mr. Clark?
>
> A. No, sir.
>
> Q. Did Mr. Kelly recommend termination of Mr. Clark?
>
> A. I don't think so. No, sir.
>
> Q. When was the first time that you heard that Mr. Clark was being terminated?
>
> A. When he was in the presence of Mr. Terry.
>
> Q. Did Mr. Terry tell you that he was going to terminate Clark before he actually informed Mr. Clark?
>
> A. Not that I recall. No, sir.

(As discussed below, this testimony conflicts with that of Terry who testified that there was discussion of Clark's disciplinary record before and during the discharge interview.)

On cross-examination Poche testified that he called Terry before he and Kelly took Clark to Terry's office, but he could not remember what he told Terry about the situation. When asked why he called Terry, Poche replied: "It is an immediate discharge violation. It is deliberately wasting time, negligence on his part." Later on cross-examination Poche denied that he made the decision to take Clark to Terry; Poche testified that it was Kelly's determination to take Clark to Terry. As Poche later put it: "I requested his [Kelly's] presence to come down and speak to me." When we talked, he said, "We are going to bring him down and speak to Mr. Terry."

Kelly (vol. 136), however, did not testify that he met with Poche before going to Terry's office; specifically, Kelly did not corroborate Poche's testimony that he decided to bring Clark to Terry. Kelly further excluded from his testimony that he was somehow involved with the drafting of a warning notice before he got to Terry's office. Finally, Kelly did not admit, as both Poche and Clark testified, that he met with Poche and Clark before the three of them went to Terry's office. Instead, on direct examination, Kelly was asked and he testified:

> Q. As best as you can recall, what is the first—what is the—what do you remember at all about that particular incident?
>
> JUDGE EVANS: Well, what was your first notice that something had happened?
>
> THE WITNESS: I was called to the main electrical office, and I don't know if I was called by radio or if I was beeped. And when I got to the main electrical office, they asked me to come in to Bob Terry's office. Mr. Leroy Clark was in Bob Terry's office, and when I entered the room, Bob asked me to close the door, so I closed the door, and—
>
> Q. [By Mr. Hymowitz]: Who else was there, if anybody else was there, other than Mr. Clark?
>
> A. I think Mr. Poche was in there also, Mark Poche.
>
> Q. All right. And what happened at that point, after you closed the door?
>
> A. Bob asked Mr. Clark, was he reading a newspaper. Mr. Clark told him, yes, he was reading a newspaper, and Bob told him he was going to terminate him, and that was it.

Kelly testified that after Terry discharged Clark, Clark "went and sat across the hall," as Clark also testified. Kelly, however,

[348] Apparent from Poche's phraseology is the fact that, although Clark had been under Poche supervision when the December 14 warning notice was issued, Clark was not under Poche's supervision on January 10.

denied that he then took the above-quoted warning notice to Clark. Kelly acknowledged his signature on the January 10 warning notice as quoted above, and he testified that he believed Terry gave it to Clark while Clark was in Terry's office, but he denied remembering when he signed it as a witness. Kelly professed to remember nothing else about the incident.

Terry (vol. 91) testified that on January 10 Poche called him and told him that he had found Clark reading a newspaper; Terry testified that he told Poche to bring Clark to him. Terry further testified that, while he was waiting for Poche and Clark, he called for, and reviewed, Clark's personnel file. Terry testified that he found in Clark's file the above-quoted December 14 major offense warning notice for "intentional negligence, inefficiency or failure to complete job assigned." Terry testified that he first spoke to Poche; according to Terry:

> He [Poche] told me that he had observed Mr. Clark sitting in a material container, which is on the ground adjacent to the particular ship that Mr. Clark was assigned to work, sitting on a bucket reading the sports page.
>
> I said, "Well, I reviewed his file, Mark, and Mr. Clark has got a major offense in there already for intentional negligence, inefficiency, and failure to complete his job assignment. I am considering terminating Mr. Clark." . . . I asked Mr. Poche to call Mr. Clark into the office so that I could speak to him and hear him out as to what his version was of what happened.

(Poche did not corroborate Terry's testimony that Terry mentioned Clark's prior warning notice to Poche before Clark was called into his office.) When Clark was called into his office, further according to Terry:

> Well, you know, I had his file out in front of me. I said, "Leroy, you have already [been] written a citation. It is very current; for intentional negligence, you know. This to me should mean that your supervisor is putting you on notice that you have to improve your work habits. And you are going to go sit down in the material cage and read the sports section during your work time?"
>
> He says, "But I didn't read it long."
>
> I said, "That is not the issue. As far as I am concerned, this is loafing. This is sleeping or deliberate loafing, which is an immediate discharge offense." And I told Mr. Clark that I was going to discharge him.

(Neither Poche nor Clark nor Kelly testified that Terry referred to Clark's prior warning notice in the discharge interview.) Further on direct examination, Terry was asked and he testified:

> Q. Why did you decide to terminate Mr. Clark? . . .
>
> THE WITNESS: This [January 10] deliberate loafing is an immediate discharge offense. That, in combination with the [December 14] inefficiency, intentional negligence, and failure to complete job assignment—here, you have a major offense, and the current offense is immediate discharge offense. The combination of the two—my conclusion was this employee should be terminated.

Terry testified that he could not remember what Poche told him other than that he had found Clark sitting on a bucket, reading a newspaper, and Poche denied remembering telling Terry anything more; therefore, there is no direct evidence that Terry knew that Clark had been taking a normal mid-morning break. I find, however, that Terry knew that Clark was claiming that he had been on a break when he was found by Poche. Poche admitted that Clark had told him that he was on a break; Poche presumably passed this information on to Terry, and Terry did not deny knowing that Clark was making that claim. I was therefore constrained to ask:

> JUDGE EVANS: Sir, if Mr. Leroy Clark had been eating as well as reading the newspaper when he was sitting on that bucket, would he have been disciplined in any way?
>
> THE WITNESS: Your Honor, if it was within a reasonable—you know, like midmorning or mid-afternoon time frame and the man was taking a break and he was actually eating or drinking a soft drink and not reading the newspaper, he would not have been disciplined.
>
> If he had been tried to have been disciplined, I would not have accepted it.

Therefore it is clear that, in Terry's eyes, Clark's misconduct lay entirely in the fact that he was reading on a break.

On cross-examination, Terry was asked and he testified (vol. 93):

> Q. It is correct, sir, that when employees take their informal break, they are permitted to speak to each other. Isn't that correct?
>
> A. Yes.
>
> Q. Is there any attempt made by the electrical department to control the conduct of employees during their informal break?
>
> A. No.
>
> Q. For all intents and purposes, sir, isn't it correct that the informal breaks are considered to be the employee's time for those ten or 15 minutes? . . .
>
> THE WITNESS: Yes.
>
> Q.[By Mr. Lurye]: Isn't it correct, then, sir, that during those ten or 15 minutes, the employees can talk about union activities?
>
> A. Yes.
>
> Q. And isn't it correct, then, that during those ten or 15 minutes, the employees could sign petitions concerning union activity?
>
> A. I would think so.
>
> Q. And isn't it correct that during those ten or 15 minutes, employees could sign petitions concerning safety problems?
>
> A. Yes.

Then, on redirect examination, Terry was asked and he testified:

> Q. [By Mr. Hymowitz]: You testified, I believe, that it was not uncommon to see employees have soft drinks or sandwiches around 9:00 a.m. in work areas or designated eating areas. . . . Are employees permitted to sit around and read a newspaper while taking a break time at 9:00 a.m.?
>
> MR. LURYE: Objection.
>
> JUDGE EVANS: Overruled.
>
> THE WITNESS: No, they are not.

The question was, of course, blatantly leading, but the damage had been done.

Documentary Evidence about Newspaper Reading

During the General Counsel's case-in-chief Respondent objected to global production of all electrical department warning

notices. I agreed that such production was more properly a subject for rebuttal, and the General Counsel subsequently issued another subpoena duces tecum for rebuttal purposes. The General Counsel offered several warning notices that Respondent then produced. About all electrical department warning notices, Terry testified (vol. 59): "They are not filed or processed in any way until I review them."

In the 12-month period beginning December 28, 1990, Locantro issued to electrical department employee Norman Ducre four warning notices as follows: (1) On December 28, 1990, Locantro issued to Ducre a general offense-4 warning notice for leaving the work area 2 minutes before lunchtime. (2) On September 17, 1991, Locantro issued to Ducre a warning notice that had "Other" major offense marked; Locantro stated as the reason for the warning: "Deliberate loafing during work hours. Man was caught reading newspaper." (3) October 17, 1991, Locantro issued to Ducre a major offense-2 warning notice that stated as the reason for the warning: "Intentional negligence . . . Man was assigned job of [work described]. Took man 7:00 to 10:30 to do job." (4) On November 19, 1991, Locantro issued to Ducre a general offense-4 warning notice that stated as the reason for warning: "Wasting time . . . . After giving man warning once before about using phone without pass, he continued to do it. Written Final Notice."[349] As Terry processed this last warning notice as a "Written Final Notice," Ducre was presumably not discharged after it; Respondent introduced no evidence in conflict with that presumption on surrebuttal.

On October 6, 1993, or just three months before he discharged Clark, Terry, himself, signed a general offense-4 warning notice that was issued to electrical department employee JoAnn Beaty. As the reason for the warning, Terry stated: "Wasting time, Paging through newspaper during working hours."

The General Counsel introduced other documentary evidence that supervisors of other departments considered newspaper reading something less than an immediate discharge offense under the Avondale Employees' Guide: (1) On August 24, 1990, operations department employee Calvin King was issued a general offense-4 warning notice for "reading a pocket novel, paperback book during working hours. Reported to Bob Olmstead by Lester Lehoste." (Employees cited for a general offense under the Avondale Employees' Guide are presumably not discharged as if their offense had been an immediate discharge offense. In King's case it is further clear that he was not discharged for his August 24, 1990 offense because King received a subsequent warning notice.) (2) On September 25, 1990, paint department employee John Thomas was issued a general offense-4 warning notice that stated: "Employee was not in his assigned workplace and was reading [a] newspaper during working hours. The next warning of this type will result in IMMEDIATE discharge." (3) On March 13, 1991, paint department employee Calvin Watkins was issued a general offense-4 warning notice for being "caught reading a newspaper during working hours." (Watkins received another warning notice 40 days' later, and he unquestionably was not discharged for this offense.) (4) On April 1, 1991, operations department employee Ephram Auila was issued a general offense-4 warning notice for reading a newspaper during a pipe-flushing watch. That warning notice notes a previous warning notice for loafing. On October 3, 1991, Auila was given another general offense-4 warning notice for reading a newspaper. (5) On April 11, 1994, paint department employee Adrian Rauma was given a general offense-4 warning notice for "reading newspaper in a tank." (6) On April 28, 1992, paint department employee Terry Brown was issued a general offense-4 warning notice that stated "Employee was . . . reading a newspaper when he was supposed to be working." Previous to this warning notice Brown had received two other warning notices: (a) on February 1, 1991, Brown received a major offense warning notice stating "Refused to do the job assigned you by a supervisor; signed out and went home. FINAL WARNING." (2) After that "final" warning, on October 1, 1991, Brown received another general offense-4 warning notice for leaving early for lunch.

Testimony about Newspaper Reading

Current employee Francis McGill (vol. 53), a layout mechanic in the electrical department, testified that Foremen A. S. Russell and Vincent (Wolf) Michel[350] share an office where electrical layout mechanics, such as McGill, often take breaks. The very week before he testified, according to McGill, Michel and Russell were in the office when employees on break read and discussed what was in a newspaper. McGill gave several examples of such incidents in the year preceding his testimony (involving reading and discussions of newspaper articles about professional football players, point spreads, drug trafficking, and musicians). Neither Michel nor Russell testified, and this testimony by McGill stands undenied. Respondent called electrical department employee Keith Riley who testified that Michel once told him that he could not read newspapers on breaks; Riley, however, also testified that he was told that he could not even sit down on breaks, something no supervisor or other employee testified to.[351] Riley rendered himself incredible on this point.

Former employee Gene Wagner (vol. 50) testified that once, between 1990 and 1992, when he was working on a prison barge, Operators Department General Foreman Robert Olmstead saw him reading a newspaper during working time. Olmstead told Wagner to put the newspaper up, but he did not issue any discipline to Wagner. Olmstead testified (vol.120), but he was not asked about Wagner's testimony. (On cross-examination, Olmstead admitted knowing Wagner and that Wagner had worked for him on the prison barge.)

Current paint department employee Jim Lanham (vol. 27) testified that on breaks he and other employees regularly read newspapers in the presence of Foremen Matthew Martin and Dennis McDonald. Lanham further testified that he has seen Martin and McDonald read magazines and newspapers during the shift. Lanham further testified that Martin and McDonald regularly allow him to have a head-phone radio to listen to Monday night professional football games. As mentioned in the case of discriminatee Bennett, Martin did not testify. McDonald (vol. 98) denied this testimony by Lanham, but I found it to be credible.

[349] It is to be noted that Ducre, who received four warning notices in a 12-month period, is not included in App. B, but I do include him in App. C (as explained in the case of discriminatee Marshall, supra).

[350] McGill knew Michel only as "Wolf." Terry testified (vol. 59) that "Wolf" is Electrical Layout Supervisor Vincent Michel. Michel is a stipulated supervisor (whose name is misspelled as "Mitchell" at various points in the transcript).

[351] Certainly, Terry did not testify that employees must not sit down during breaks.

Current inside-shop pipe department employee Harold DiMaggio (vol. 47) testified about Foremen Keith Hodges and Johnny Dufrene, who read newspapers along with clerk Donna Jones, Charlie ———, an expediter, and Miguel ———, a fitter, and himself. According to DiMaggio: "Well, everybody in the shop at one time or another reads the paper during the day." Further according to DiMaggio, he brings a newspaper to work every day and reads it about 35 or 40 minutes during breaks and working time. Hodges and Dufrene have been present when much of this reading was going on, according to DiMaggio. Dufrene always brings a newspaper and reads it; if, for some reason DiMaggio does not have his paper, DiMaggio goes to Dufrene and borrows his. DiMaggio and Dufrene sometimes go out gambling together; the week before DiMaggio testified, Dufrene brought him a newspaper showing that a local casino was offering "free blackjack tournaments." Another shop employee has a custom of bringing advertisements for cruises, depicting nudes, and DiMaggio has sometimes seen Dufrene and Hodges review those. Neither Dufrene nor Hodges testified, and I found this testimony by DiMaggio to be credible.

Current sheet metal department employee Michael James Boudreaux (vol. 46) testified[352] that he often reads newspapers during the period between 3:20 and 3:30 p.m. (presumably after he finishes cleaning his work area). Boudreaux testified that his foreman, Clifford Autin, and the Departmental Superintendent Poleto each see him reading the newspaper "[t]wo or three times a week." Autin did not testify. Poleto testified (vols. 105, 134), and he acknowledged knowing Boudreaux, but he did not deny this testimony. I found this testimony by Boudreaux to be credible.

Clark's Discharge—Conclusions

Clark wore prounion insignia, but only in a discrete fashion (on the inside of his hardhat and on the inside of his lunchbox) and his supervisors cannot be charged with knowledge of his prounion sympathies by that conduct. I also do not find an expression of prounion sympathies in Clark's statement to Terry that the employer campaign meetings were good, but Respondent could have avoided its "union problem" by spending the time and money earlier. (Clark further credibly testified that some supervisors saw him receiving handbills at the gates during the preelection period, but such testimony was not probative evidence of expressions of prounion sympathies.) On the other hand, in June, when his then-foreman, Sprunk, asked if Clark were "for this union business," Clark unequivocally told Sprunk that he was, and Clark told Sprunk that he intended to vote for the Union in the June 25 Board election. In view of the hostility that Respondent's supervisors expressed toward the apparent union victory in the election, and especially the hostility expressed by various electrical department supervisors,[353] this expression of prounion sympathies can hardly be considered "minimal." Also, Terry maintained a list of "Union supporters."[354] Terry testified that he destroyed the list shortly after the election, but I have only his (often discredited) word for that, and I do not believe it. It was presumably for some reason that Sprunk asked Clark if he was for the "Union business." It is safe to infer, as I do, that the answer was passed along to Sprunk's superintendent, Terry. It is further safe to infer, as I do, that Terry recorded the results of the questioning, either mentally or on his list of "Union supporters." I find that Terry had knowledge of Clark's prounion sympathies at the time that he discharged Clark, and, in view of all of the unlawful animus that his been proved, it must be concluded that the General Counsel has presented a prima facie case of unlawful discrimination in the discharge of Clark,[355] and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Clark even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

As quoted above, when asked why he decided to discharge Clark, Terry first responded: "This [Clark's January 10 newspaper-reading] deliberate loafing is an immediate discharge offense." Then Terry testified that he discharged Clark because of "the combination" of Clark's newspaper reading and his prior single major offense warning notice for "[i]ntentional negligence, inefficiency or failure to complete job assigned." These are two separate defenses, detracting from the credibility of both, but they must be separately addressed. The first issue presented, therefore, is whether newspaper reading was considered an immediate discharge offense under the Avondale Employees' Guide before the circumstances of Clark's case.

I have credited Clark's testimony that he and his three coworkers were on a usual morning break when Poche found him reading a newspaper while sitting in one side of the container. As Poche testified, Clark told Poche that he was on such a break. Poche testified that he rejected Clark's representation that he was on a usual break because the three other employees told him that Clark was supposed to be out in the yard wrapping transformers. I have discredited Poche's testimony that the employees told him this; Poche's testimony was clearly contrived to make blameworthy something that would otherwise have gone unpunished.

Assuming, however, that Poche had honestly thought that he had spotted a disciplinary infraction, it is clear enough that Poche thought it was something less that an immediate discharge offense under the Avondale Employees' Guide. Poche testified that, in his office, he wrote out a "wasting time" warning notice for Clark; "wasting time" is an express subject of

[352] On brief, Respondent contends that Boudreaux's testimony should be stricken because he testified that he gave an affidavit that was not produced by the General Counsel pursuant to the Board's Rule 102.118. When he was passed for cross-examination, the General Counsel presented Respondent with several affidavits that Boudreaux had given. Counsel further represented there were no other affidavits by Boudreaux in his files, that the field examiner to whom Boudreaux claims to have given the additional affidavit had deceased, and that it cannot definitely be determined that such an affidavit ever existed. I accept the General Counsel's representations. It appears that Boudreaux was simply mistaken. I deny Respondent's motion.

[353] To be noted especially is the June 28 instruction by de facto Electrical Department Assistant Superintendent Gerdes to the general foremen to tighten up on various disciplinary rules because of the apparent union victory. See the testimony of Durocher and the conclusions about the allegations of the second complaint, par. 58, supra.

[354] This is the term that Terry used when he was first called by the General Counsel (vol. 42), although Terry denied using the term later in his testimony; see the discussion in the case of discriminatee Molaison, supra.

[355] I would also infer the existence of Terry's knowledge of Clark's prounion sympathies by the contrived nature of the defense and the disparate treatment to which Clark was subjected, as found infra. See *Montgomery Ward & Co*., 316 NLRB 1248 (1995), and cases cited therein.

general offense-4. Moreover, Poche testified twice that he drafted "a" warning notice that he gave to Terry. Poche did not testify that he gave Terry an immediate discharge offense warning notice; moreover, Poche was not shown the immediate discharge offense warning notice that Kelly gave to Clark after the discharge. The only possible reason for this is that the warning notice that Clark ultimately received was not the warning notice that Poche originally drafted. Also, Poche testified that he had no idea that Clark was to be discharged until Terry announced the decision in his office; if Poche had thought that newspaper reading was an immediate discharge offense, and if he had originally drafted an immediate discharge offense warning notice, he would have had at least some idea that Clark might be discharged before Terry announced it. It is apparent to me that whatever warning notice that Poche had drafted was destroyed and, when Clark was asked to step out of Terry's office, a new warning notice was drafted at Terry's instruction. Terry ordered the warning notice to be drafted as an immediate discharge offense warning notice,[356] although Poche had drafted the original as something less. All of which is to say that, if reading a newspaper (on a break or otherwise) had been an immediate discharge offense under the Avondale Employees' Guide, Poche had not known about it until after Terry had discharged Clark. If general foremen such as Poche and Kelly[357] did not know that newspaper reading was an immediate discharge offense, even on breaks, employees such as Clark could hardly have been expected to know it. The truth is that newspaper reading (on breaks or otherwise) did not become an immediate discharge offense until Clark's discharge.

Terry did testify that employees are not allowed to read newspapers on breaks, but he did so only after being led directly to that denial on redirect examination and only after he had admitted on cross-examination that: (1) the employees are free to speak to each other as they wish, including talking about union activities, on their informal breaks; (2) the electrical department makes no attempt to control the employees' conduct during their breaks; (3) the time on informal breaks is considered the employees' own time; and (4) employees are even free to sign petitions (which they presumably first read) on breaks. In addition to these admissions by Terry, it is to be noted that newspapers are not contraband at the plant. (They are sold in vending machines outside some of the gates, and production and maintenance employees are not prohibited from purchasing them on the way into work.) If Respondent permits production and maintenance employees to possess newspapers inside the gates, it must necessarily expect them to read those newspapers, at least on breaks.

Finally, as well as the above-quoted parol testimony of occasions when newspaper reading is not punished at all,[358] the above-quoted general offense and major offense warning notices to employees for reading newspapers on working time shows that newspaper reading on breaktime was certainly not an immediate discharge offense under the Avondale Employees' Guide; the most significant of these, of course, are the two electrical department warning notices, one approved by Terry as a major offense violation, and one, signed by Terry, himself, as a general offense-4 warning notice to employee Beaty. (And the warning notice to Beaty occurred only 3 months before Clark's discharge.) All of which is to say that Terry's denial that employees are not free to read newspapers on breaks, and his assertion that employees are subject to being immediately discharged for reading newspapers on breaks, were simply not credible.

Next to be addressed is the "combination" prong of the defense for Clark's discharge. The first thing to be noted about it is that Clark's December 14 warning notice for "intentional negligence, inefficiency or failure to complete job" was not mentioned in the warning notice that was drafted immediately after Clark was discharged (and while he was still waiting outside Terry's office to be escorted from the premises). Many of the warning notices (and especially many of the "Final" warning notices) that were received in this case expressly mention prior discipline if there was any. If Clark's prior warning notice was relied upon as a basis for the discharge it would assuredly have been mentioned in his final (postdischarge) warning notice. There is further evidence that Clark's December 14 warning notice played no part in the discharge. Clark, Poche and Kelly all testified that Terry told Clark that he was discharged immediately upon Clark's admission that he had been reading a newspaper. Terry is the only witness who testified that Clark's prior record was mentioned in any way during the discharge interview. Poche had signed the December 14 warning notice; presumably, if it was mentioned during his discussions with Terry before the discharge interview, or if it was mentioned in the discharge interview, Poche would have so testified. Terry's testimony was clearly false.[359] It is obvious to me that, as Clark credibly testified, Kelly had told him that the December 14 warning notice would not be processed; it was not in Clark's personnel file during the discharge interview; some time after the discharge interview, I believe, Terry was furnished a copy that either Poche or Locantro had retained. Then Terry, as an afterthought, injected the previously discarded December 14 warning notice into his scenario of the discharge interview because he knew that the defense that newspaper reading was an immediate discharge offense would not withstand scrutiny.

Assuming that there was some element of truth in Terry's references to Clark's prior disciplinary record, Terry was not called in surrebuttal to testify why Clark's record warranted discharge but electrical department employee Ducre, with a worse disciplinary record,[360] was not discharged. Finally, the multiplicity of employees who were not discharged by supervisors of other departments, as shown by the parol and documen-

[356] The box for "other" major offense is checked on the warning notice, but the language entered as the reason for the warning is that of immediate discharge offense-2 of the Avondale Employees' Guide.

[357] Poche testified that Kelly signed the warning notice that was drafted in his office. Kelly did not corroborate Poche; however, Kelly also testified untruthfully that Terry gave Clark the immediate discharge offense warning notice, something to which neither Terry, nor Poche nor Clark testified.

[358] See, especially, the testimony of electrical department employee McGill who testified to newspaper reading that was conducted with impunity during the week before he testified.

[359] As noted above in the case of discriminatee Molaison, Terry committed perjury in his account of that discharge interview; briefly, Terry testified that he discharged Molaison only after Molaison admitted his misconduct, but Gerdes had discharged Molaison and Terry was not even at the plant. In my opinion, Terry had no compunction about lying about what happened at discharge interviews.

[360] As noted above, Ducre had two general offense warning notices in addition to two major offense warning notices. Respondent does not contend that Ducre's circumstances were meaningfully different because his newspaper reading major offense warning notice preceded his inefficient-work warning notice.

tary evidence, demonstrates that newspaper reading, even in combination with other disciplinary infractions, was not a discharge able offense, even when that newspaper reading was done on working time.

In summary, Respondent has come forward with only pretexts[361] and afterthoughts to meet its *Wright Line* burden. I therefore find that Respondent has not shown that it would have discharged Clark even in the absence of his known protected activities. I therefore conclude that Clark was discharged in violation of Section 8(a)(3).

c. Harold Adams' warning notice for loafing while doing welding work

Harold Adams (vols. 28, 29), who is employed as a first-class welder in the welding department, was issued a warning notice on August 30, 1993. The second complaint, at paragraph 120, alleges that by the issuance of that warning notice Respondent violated Section 8(a)(3). The General Counsel contends that Respondent issued the warning notice to Adams because of his known union activities and expressions of sympathy which included his wearing prounion insignia, his making comments favorable to the organizational effort at an employer campaign meeting, and his declining to wear a "Vote-No" sticker that a supervisor had offered to him. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Adams may have held at any relevant time. Respondent further answers that the warning notice was issued solely because Adams was loafing on a welding job and did not complete that job within the time that he should have. The General Counsel replies that the defense is a pretext because: (1) Adams was not loafing, (2) Respondent knew that the job would take more time than was afforded to Adams, (3) Adams was charged with using more time than he actually did, and (4) Adams was prevented, by various circumstance of which Respondent was aware, from completing the job in the time that was afforded to him. Ultimately, I agree with the General Counsel and conclude that the warning notice was issued to Adams in violation of Section 8(a)(3).

From about July 1 until about July 15, Adams worked under Welding Department Foreman Joe Alvarez and General Foreman Ernest Foret Sr. Foret Sr. is something of an assistant superintendent to Superintendent Norris Pertuit; the office of Foret Sr. is across the hall from Pertuit's office, and Foret Sr. substitutes for Pertuit when Pertuit is absent. In late July, Adams was assigned to work under Foreman Ernest Foret Jr. who, like Alvarez, reported to Foret Sr.

Adams testified that, about 3 weeks before the June 25 Board election, Pertuit conducted an employer campaign meeting that was attended by several employees and supervisors. At the end of his presentation, when Pertuit asked for questions or comments, according to Adams:

> I told him that everything that we had been hearing about the Union was negative. I asked him whether or not he could tell me something that the Union did for the people that was good. . . .
>
> He gave me a dirty look.

Adams also testified that Pertuit conducted a second employer campaign meeting during the week before the election. At the end of that second meeting, Pertuit and Foreman Otis Lege (the supervisor of Adams before Alvarez) tendered "Vote-No" stickers to employees as they left.[362] Adams testified that some employees took the stickers and some did not. Adams testified that he declined a "Vote-No" sticker offered to him by Pertuit, and Pertuit "just looked at me."

On direct examination, Pertuit acknowledged that Adams was at one employer campaign meeting that he conducted. When asked if at that one meeting Adams told him that he was "for the Union," Pertuit responded negatively. It is problematical whether Pertuit considered Adams' question (whether there were not something positive to say about the Union) to have been a statement that he was "for the Union." Pertuit was not asked if Adams had asked if there were not something good to be said about the Union. I find that Adams asked the question of Pertuit and that the question constituted a prounion remark. Pertuit did not deny offering "Vote-No" stickers to Adams and other employees after another employer campaign meeting that he conducted, and he did not deny that Adams refused to take one. Lege did not testify. I credit Adams' testimony in this respect. Adams further testified that on the day of the June 25 Board election he placed two "Union-Yes" stickers on his hardhat, one on his shirt, and one on his lunch kit (which he carried with him at all times on the job). Adams testified that he maintained the "Union-Yes" stickers on his hardhat until they wore off about 4 months after the Board election (or well after the date of the warning notice that is in issue). Adams testified that the "Union-Yes" sticker wore off his lunch kit in about a month, but he replaced it.

Adams' Warning Notice—the General Counsel's Evidence

In late August Adams was working in the assembly area on LSD-51, which was on the ground in the assembly area. Adams testified that toward the end of the day on August 26, Foret Jr. gave him a welding assignment to be completed by another welder on the second shift. On August 27, from 7 to 7:30 a.m., Adams testified, he attended a safety meeting. After the safety meeting, he and Foret Jr. went to inspect what the second-shift personnel had done during the evening before. They found that the second-shift welder had done the welding improperly. Foret Jr. told Adams to correct the mistakes that the other shift's employees had made. At the same time, Foret Jr. told Adams that, after he finished fixing the mistakes made by the second-shift welder, Adams was to do a "gouging" job. (This job need not be described, except to note that it did require a type of welding rod that is different from other types of welding rods.) In telling him of the gouging job, Foret Jr. pointed over a rail of LSD-50 to indicate the gouging job that was "over the side" from where he and Adams were standing. After getting these instructions, Adams went off the ship to a storage room to get welding rods that he would need for the repair and gouging jobs. (Welding rods are stored in ground storage rooms, as opposed to ships' storage rooms, and welders can get only so-many rods at a time.) As he was leaving the storage room, Adams met General Foreman Foret Sr. Further according to Adams:

[361] Terry's statement that Clark's newspaper reading was an immediate discharge offense under Avondale Employees' Guide, although during the 3 preceding months he signed a general offense-4 warning notice for employee Beaty's newspaper reading, is further evidence of pretext. See *Yukon Mfg. Co.*, 310 NLRB 324, 340 (1993), where the Board affirmed a conclusion that: "The aggrandizement of the offense is, itself, indicative of pretext."

[362] This conduct by Pertuit and Lege is not alleged as a violation of Sec. 8(a)(1).

> Foret, Sr., told me that every time he sees me, I am looking over the side of the boat. . . . He told me that he didn't want me to do that job [that Foret, Jr., had given him], that he was going to send a real man over there to do that job.

Adams testified that if Foret Sr. had seen him looking over the side of the ship that day, he also must have seen his son. After telling Adams that he was always looking over the side, Foret Sr. gave Adams another job, which is described below as the "T-beam job." Adams returned to Foret Jr. and told him that Foret Sr. had given him the T-beam job. Adams then went back to the rod-storage room to get the rods needed for the T-beam job (and, presumably, to turn back in the gouging rods that he had previously secured). Adams then went to do the T-beam job that Foret Sr. had assigned to him, rather than the gouging job that Foret Jr. had assigned to him.

The T-beam job.[363] In the fabrication area, as discussed in the introductory section of this decision, the compartments of ships are constructed as "units," after being completed to a certain point, the units are moved to the assembly area. Shell plates (as opposed to interior bulkhead plates) make up the vertical outsides of the units. "T-beams" are T-shaped reinforcing beams that are welded, at the bases of the T's, horizontally along the shell plates, for support. The initial welding of T-beams to shell plates is done in the fabrication area. After a unit is placed on a ship, and its shell plates are spliced to the shell plates of a previously placed unit, the T-beams of the two abutting plates are welded together so that the T-beams run continuously from shell plate to shell plate. Abutting shell plates may have several T-beams running along them, depending on how large the shell plates are. The T-beams on an 8-foot wide shell plate are 8-feet long, but the last 18 inches, or so, of each T-beam's ends are not welded to the shell plate in the fabrication area; this is done later in the assembly area after abutting shell plates of different units are welded together. Where two shell plates abut and are spliced is an "erection joint." (For example, two shell plates that are 7-feet high and 10-feet wide may be spliced along their common 7-foot seam; that seam is the erection joint.) T-beams of two spliced shell plates are welded together where they meet at the erection joints. (By not welding the T-beams all the way to the edges of the shell plates while the shell plates are still in the fabrication area, welders in the assembly area can create stronger joints; this is because the welding core under the ends of the T-beams, and immediately over the erection joints, become one mass.) The job that Adams testified that he was assigned by Foret Sr. was to weld the undersides of four shell plate T-beams out to the edges of abutting shell plates, and then to weld together the T-beams of different plates where they abutted at the erection joints. In addition to the vertical shell plates (on which there were four T-beams to final-weld, according to Adams) there were also 12 to 14 overhead T-beams that were to be final-welded to a "deck" shell plate (so-called because, although it was overhead to Adams, that shell plate formed the "deck" of the level above). Just who gave Adams the T-beam assignment, and how many T-beams there were for him to weld, are matters that are in dispute.

Tack welding is the welding of metal parts together to hold them in place until final welding can be performed. Final welding is either fillet or butt welding. Fillet welding is the most common type of welding; essentially, it is the welding of two objects together by filling in space that may exist between them with substance (core) that is produced by the use of welding rods. Butt welding is the welding of two plates (or T-beams or any two other objects) that abut. Mirror welding is final welding with the use of a mirror to see into spaces that are not otherwise visible to the welder; to reach these areas, welding rods must be bent so that only an inch, or so, can be used at a time; necessarily, mirror welding is a more tedious and time-consuming type of operation. Pick-up welding is the cutting away of detritus that a welder creates as he does final (or tack) welding, or detritus that may have been left by other welding operations. Rework is rewelding final welds that have been cut open for refitting. Adams testified that the side (vertical) shell plate T-beams required mirror welding for some aspects, and he testified that both the side and overhead T-beams required some butt welding, fillet welding, rework and pick-up welding.

Adams testified that on August 27 he was delayed in starting any work by several events: (1) the safety meeting that lasted one-half hour, (2) the review of the second-shift's work with Foret Jr. (3) Foret Jr's. showing him the gouging job, (4) his going to the welding-rod storage room to get rods for the repair and gouging jobs, (5) his confrontation with Foret Sr. and the receipt of the T-beam job assignment, (6) his returning to the rod room to exchange for the rods he would need for the T-beam job, (7) his return to Foret Jr. to explain why he would not be doing the gouging job, and (8) the time required to set up his welding machine for the T-beam job. Adams testified that because of these events, it was "a couple of minutes after 8:00" before he began the T-beam job.

Adams testified that he met several problems on the T-beam job: one problem was that rework was required; to wit: on one of the side shell plates, the T-beams' face-plates (cross-bars of the T's) had previously been refitted; they had been cut off and tack welded back into place, and it was his job to final weld them. Also, Adams could see all of the undersides of those side T-beams, but he could not see the upper sides. For the portions of those T-beams that he could not see, even by climbing on something, he had to use mirror-welding techniques. Adams further testified that his work on the side T-beams was made slower by the fact that, starting about 9 a.m., after he had finished only two of the side T-beams, another employee began working on the side shell plates just a few feet directly below Adams. That other employee was "Roberto" (last name unknown to Adams) whom Foret Jr. had sent to do the gouging job that Adams had originally been assigned. Adams testified that he was required to stop working on the remaining side T-beams and then work only on the overhead T-beams to avoid being directly above Roberto while Roberto was gouging; otherwise, Adams testified, Roberto would have be showered with burning sparks that he was creating on the T-beam job. Additionally, Adams testified, there was pick-up welding to do on the job: some of the refitted T-beams had been painted, and that paint had to be burned off, and some of the T-beams had detritus left from previous operations which had to be cut off, and, as he had been instructed by Foret Jr. to do, he also did pick-up welding for the detritus that he created as he went. Finally, being a typical August day in the New Orleans area, it was hot, and Adams testified that he had to stop many times to get water, as employees are generally allowed to do.

Adams acknowledged that he did not complete the job by the end of the day. By 3 p.m., Adams testified, he had completed

[363] The description of this work is taken from the testimonies of both Adams and Foret Jr.

the two side T-beams that he had finished when Roberto arrived at 9 a.m. and "about 10" of the overhead T-beams; Adams estimated that he had therefore completed "[a]bout two-thirds of the job." (The job was finished by second-shift personnel.)

Issuance of the warning notice. Further according to Adams, about 3 p.m., he was welding when he was approached by Foret Sr. According to Adams:

> Foret began to ask me about what I had done. . . . [W]hen I tried to explain to him what I did, he started whooping and hollering at me.
>
> He said, "This is all you have done; What class are you?"
>
> When I told him what class I was, he said, "You are first class, and this is all you have done? You are making too much money."

On the next workday, Monday, August 30, Foret Jr., presented Adams with a warning notice. It was signed by Foret Sr., and Foret Jr., had signed as a witness. The box for major offense-2 is checked; the "Time of Offense" is stated to be: "8-27-93—7:00 a.m.—2:30 p.m." The reason for the warning is stated to be: "Failure to do job assigned." According to Adams, he told Foret Jr., that he would not sign the warning notice, and Foret Jr., responded that "he couldn't believe that his father sent that in."

On cross-examination, Adams testified that he stopped for water "possibly" five times while doing the T-beam job. He further admitted that Roberto's presence did not slow him down on welding the overhead T-beams (although Roberto's presence had caused him to move from the side T-beams to the overhead T-beams before he had completed the side T-beams).

Adams' Warning Notice-Respondent's Evidence

Foret Sr. (vol. 100) testified that he gave Adams no assignments on August 27. Foret Sr. testified that on August 27, about 9:30 or 10 a.m., he was standing on the 01-level of *LSD-50*, a ship that was on the ground, adjacent to the ship that Adams was working on, *LSD-51*. Foret Sr., looked over to the 01-level of *LSD-51*, and he saw Adams where Adams was "supposed to be welding T-beams." (Foret Sr. testified that he could see Adams because Adams was working in an "open compartment"; that is, one side of the unit was open to view from one side.) Foret Sr. testified that he saw that Adams "[w]asn't working." Rather, he saw that Adams was stopping passers-by and talking to them at "[t]wo to five-minute intervals, off and on." On direct examination Foret Sr. was not asked how long he observed Adams from *LSD-50*; on cross-examination, Foret Sr. testified that it was: "About five minutes."

Foret Sr., took "about 15 minutes or less" to walk from one *LSD* to the other and approach Adams. Foret Sr. testified: "I told him that I don't pay him to shoot the bull with these fellows, especially right there where he welding at." He further told Adams "to get to work." Foret Sr. testified that he could not remember if Adams made any response.

Foret Sr. testified that "offhand" he could not recall how much work Adams had done to the point at which he approached Adams, but he knew that Adams had not "performed a sufficient amount of work for a welder." Foret Sr. testified that, when he left Adams, he went to Adams' foreman, Foret Jr. and told him to make sure that Adams welded the right number of T-beams according to the job's work order, and that he performed enough welding "footage" for the day.

Welding footage charts are guides that indicate how many feet-per-hour of welding that a welder should accomplish. According to Foret Jr. the footage charts are for fillet welding in open areas. Pick-up welding, mirror welding, and rework welding are not rated by the footage charts; those types of welding are sometimes rated by "breakdown sheets" attached to work orders. Foret Sr. testified that the work order that included the T-beam job had breakdown sheets attached; he acknowledged that the work order for the T-beam job still exists, but it was not produced (with or without the breakdown sheet) by Respondent.

Foret Sr. further testified that he went with Foret Jr. back to Adams' work area at 2 p.m. There he saw that Adams had "three hours' worth of work done . . . [f]or that day." Then, Foret Sr. testified, he instructed Foret Jr. to issue to Adams a warning notice.: "Because Mr. Adams was not performing his duties for that day."[364]

On cross-examination Foret Sr. was asked and he testified:

> Q. And you would agree with me that you never went and looked at the work order and the attachment from Mr. Adams' job?
>
> A. No, sir. I didn't have to, through experience.

Foret Sr. further acknowledged that T-beams sometimes get reworked, but he testified that he could not remember if any of the T-beams upon which Adams was working required any rework; he denied that any of the T-beams that Adams worked on had been painted.

Foret Jr. (vol. 113) testified that he gave Adams the T-beam job on August 27 and that he gave Adams no other jobs on that date. As did Foret Sr., Foret Jr. testified that there were only two side T-beams and only six or seven overhead T-beams. (In his testimony, Foret Jr. referred to the T-beams as "angles.") Foret Jr. further testified that by 7:15, he had assigned Adams the job and showed him where to start; at that point Adams was ready to go to the rod-storage room, something that would take no more than 5 or 10 minutes. About 8:30, he passed by Adams and saw him working, with "no problems," on the side T-beams; Adams had not started the overhead T-beams at that point. He noted that Adams was working with a mirror on the side T-beams. Foret Jr. told Adams that it was not necessary to use a mirror. Foret Jr. testified that nothing else was discussed with Adams at that point. At 11 a.m. Foret Jr. returned to Adams' work area and found that Adams had finished the two side T-beams and was beginning to work on the overhead T-beams. (In his testimony Foret Jr. mentioned no contact with Foret Sr. that may have occurred after Foret Sr's. claimed confrontation with Adams about 10 a.m.)

Foret Jr. further testified that about 1:30 p.m., Foret Sr. approached him and:

> He came to me and asked me where [Adams] was working at, if I had given him that job in the morning. And I told him, "Yes." And he told me then—he wanted to know if I had moved him anywhere, because it didn't seem like he was moving or getting any further, and which I explained to him about the stuff with the mirror and everything.

[364] As detailed infra, Foret Jr. testified on direct examination that he made the decision to issue the warning notice to Adams; Foret Jr. however, admitted on cross-examination that that testimony was false.

> And he said it still should have been further than what he was. "Had I been up there lately?" And I told him I had been late morning up there.
>
> He said he observed him, you know, throughout the morning and that it didn't seem like he was moving. That was basically about it.

Foret Jr. and Foret Sr. agreed to meet at 2 p.m.at Adams' work area to see just how much Adams had gotten done that day. Foret Jr. did not testify that his father told him in this 1:30 p.m.exchange (or in any other exchange) that he had seen Adams standing around talking to others and wasting time in the manner that Foret Sr. described in his testimony.

(While Foret Sr. described a morning exchange with Foret Jr. in which Foret Sr. told Foret Jr. to watch Adams' footage that day, it is apparent that this 1:30 p.m. exchange was the first of the day between Foret Sr. and Foret Jr. If there had been anything like the morning exchange that Foret Sr. described, Foret Jr. would not have testified that, in the afternoon, Foret Sr. inquired about when Adams got the T-beam job assignment.)

Further according to Foret Jr., he and Foret Sr. did meet at 2:15 p.m. at Adams' work area, but Adams was not there. At some point when the Forets were standing there, Adams walked up, but neither Foret said anything to Adams. The Forets returned to Foret Jr's. office where they looked at work orders to see how much welding footage Adams should have accomplished in the time that he had consumed. On direct examination, Foret Jr. testified that he then decided to issue the July 30 warning notice to Adams. Foret Jr. testified that he then called the welding department clerk (who did not testify, but who is mentioned in many other of the cases involved herein) and ordered that a warning notice be typed out and sent to him. That was late Friday, August 27. On Monday, August 30, Foret Jr. received the typed warning notice from the clerk, and he then signed it and presented it to Adams. Foret Jr. testified that Adams said that he did not deserve the warning notice, and that he told Adams that he could say that in the employee's comment section of the warning notice. Foret Jr. testified that he could remember nothing else that was then said between Adams and himself. Foret Jr. was not asked if, when he presented the warning notice to Adams, he told Adams that he "couldn't believe that his father sent that in," as Adams testified.

When asked why he decided to issue the warning notice on the basis of work that Adams had done by 2 p.m., Foret Jr. testified:

> Because his footage wasn't there. I mean, he didn't have enough at the time, and which six hours—he should have had plenty more done. And at the end of the day, I returned back to his job site to make sure he did any—see how much more he had done, which he basically hadn't moved. He was about the same area. . . . I had to end up putting the night shift on there to do the job.

Foret Jr. further testified that no one had worked on the T-beam job before, and there was no pick-up welding for Adams to do. (He was not asked if there was rework to be done on the T-beams.) Finally on direct examination, Foret Jr. denied that Adams complained that another employee was in his way and was slowing him down. Foret Jr. was not asked if there was, in fact, another employee there whose presence would have slowed down Adams, such as Roberto.

Early in his cross-examination, Foret Jr. reasserted that he had made the decision to issue the July 30 warning notice to Adams. Later in his cross-examination, however, Foret Jr. admitted that Foret Sr. instructed him to issue the warning notice and that his earlier testimony was "incorrect."

Foret Jr. then admitted that Foret Sr. ordered him to have the warning notice issued for "failure to complete job assigned," which is major offense-2 of the Avondale Employees' Guide. Foret Jr. acknowledged, however, that Adams' conduct could also have been written up as a general offense under the Avondale Employees' Guide; general offense-4, is "wasting time." Foret Jr. was not asked on redirect examination why the more serious category of offense was cited on the warning notice.

Foret Jr. further was asked and he testified:

> Q. And, now, as best you can, in the order it happened, if you are able to, I want you to tell us what you and Foret, Sr., did in that office either in terms of looking at materials or talking during that ten minutes [shortly after 2:00 p.m.] . . . either speaking or looking at things or a combination of—
>
> A. Oh, we went over a footage chart in angles, to see how many angles we should have welded that day, and determined that he wasn't—he didn't have enough in that time—in the time he had started since 7:00.

Also on cross-examination Foret Jr. was asked and he testified:

> Q. So you sort of knew that morning when you [gave] him the job at 7:00 a.m. that someone else might have to finish up on night shift or that someone might have to do it on Monday, some of it—
>
> A. Yes. Might have to complete the job—right.
>
> Q. And if you are able, could you tell us, after the—that shift was done, that eight-hour shift, how many more hours of work you thought there would be?
>
> A. Maybe five, six more hours of work.
>
> Q. So eight hours on that Friday during day shift, and then five or six more hours either that evening or the next Monday morning.
>
> A. Yes.
>
> Q. So if he worked that day and then five or six hours the next day—the next workday, that would be most of two days, wouldn't it?
>
> A. Close. It wouldn't be two, but it would be—
>
> Q. But it would be most of two days.
>
> A. Yes.

On this point, Foret Jr. was asked questions on redirect examination, and he testified:

> Q. And do you remember in response to Mr. Bensinger's question you said it would have taken five or six hours to complete the job that Mr. Adams was working on? Do you recall you saying that?
>
> A. Yes.
>
> Q. What did you mean by that?
>
> A. That it would have took five or six hours to complete where he had left off that day.
>
> Q. If Mr. Adams had completed a full day's work, how long would that have taken to complete that job?
>
> . . . .
>
> THE WITNESS: About another hour or two.

Whether it was 1 or 2 hours, or 5 or 6 hours, it is clear from this testimony that Respondent's supervisors knew that the T-beam job was more than an 8-hour job.

Because he (and Foret Sr.) testified that Adams was issued the warning notice because he did not achieve enough "footage," Foret Jr. was asked the obvious question, and he testified:

> Q. BY MR. BENSINGER: And what distance did you figure that he should have welded that day?
>
> A. He should have done all the angle splices within that time.
>
> Q. But how many inches, feet, or yards was that?
>
> A. I don't know offhand.

Of course, Foret Jr. was not testifying "offhand." Like all of Respondent's witnesses, he was well prepared. Finally on cross-examination, Foret Jr. agreed that welders should do the pick-up welding as they went along.

Adams' Warning Notice—Credibility Resolutions and Conclusions

At the time of the issuance of the warning notice in issue, Adams' supervisors were Foret Sr. and Foret Jr. both of whom denied seeing the "Union-Yes" stickers on Adams' hardhat; however, I found Adams' testimony on the point credible. I find that Adams' supervisors had knowledge of Adams' prounion sympathies by August 30 by virtue of Adams's open and obvious display of the "Union-Yes" stickers, by his speaking up for the Union at one employer campaign meeting,[365] and by his refusing to accept a "Vote-No" sticker after another employer campaign meeting. Respondent's animus toward those employees who favored the Union, and specifically toward those employees who wore prounion insignia, has been demonstrated throughout this decision, I conclude that the General Counsel had presented a prima facie case of unlawful discrimination against Adams, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Adams even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Foret Sr. and Foret Jr. credibly testified that there were only two splices of T-beams to be made on the side shell and six or seven splices on the overhead shell. Ultimately, however, the numbers of the T-beams to be completed makes no difference. In assessing the amount of time charged against Adams by Respondent, the first thing to be noted is what is not in issue: both supervisors testified that they counted the time from 7 a.m. because that is when Foret Jr. assigned the T-beam job to Adams. Also, the warning notice, itself, states that the time charged against Adams was "7:00–2:30 p.m."

Adams testified, without contradiction, that on August 7 he attended a 30-minute safety meeting at the start of the shift. Periods consumed in safety meetings are recorded on MCRs; at trial, literally hundreds of MCRs were produced by Respondent (often to rebut testimony about when meetings of various types, including safety meetings, occurred). The MCR that would have disputed this testimony by Adams (Foret Jr's. MCR for the day), however, was not produced by Respondent, and no reason for not producing it was offered. I credit Adams' testimony on this point. I also credit Adams about the other matters that delayed his start on the T-beam job until after 8 a.m., including his first being assigned the gouging job by Foret Jr. and then his being assigned the T-beam job by Foret Sr. In order to defeat Adams' testimony that Foret Sr. gave him the T-beam job assignment, Foret Sr. testified that he watched Adams working only once that morning, and then only from another ship, and then only for 5 minutes. Foret Jr. however, testified that Foret Sr. told him that he had been watching Adams "throughout the morning." Also, Adams testified that during the morning Foreman Alvarez told him that Foret Sr. had been in the area, watching Adams, "three or four times." Alvarez was not called by Respondent to deny this testimony by Adams, and I found Adams' testimony on this point credible. Alvarez would not have said that Foret Sr. had been in the area three or four times if Foret Sr. had not been. Finally, Foret Jr. did not deny that Adams told him that he was not going to do the gouging job, because Foret Sr. wanted a "real man" to do the gouging job, and that Foret Sr. had assigned him to do the T-beam job instead. I find that Foret Jr. did not give the T-beam job assignment to Adams at 7 a.m., the point at which Respondent began counting time against Adams; Foret Jr. did not give the T-beam job assignment to Adams at all; Foret Sr. gave the assignment to Adams, and he did so well enough after the close of the safety meeting at 7:30 a.m. that Adams did not get started on the job until after 8 a.m., as the Forets well knew.

After he did get started, the only problem that Foret Jr. found with Adams' work effort was that he used the mirror where he did not need to. There is no suggestion that even that conduct would have warranted a general offense warning notice, much less a major offense warning notice, which is what Adams was issued. Foret Sr. testified that he saw Adams talking to passers-by (for about 5 minutes); however, if Foret Sr. had actually seen Adams taking an unusual amount of time to speak to passers-by, he would have mentioned the fact to Foret Jr. Foret Jr's. testimony includes no such report, and I find that Foret Sr's. testimony on the point was untrue.

Foret Jr. was insistent that he and Foret Sr. reviewed the footage (or the breakdown sheets), and they reviewed them for about 15 minutes, before the decision was made to issue the warning notice; Foret Sr. was just as insistent that they did not review the footage charts. Foret Sr. testified that his judgment that Adams had not done enough work that day was made from "experience." I credit Foret Sr. who would not have testified that the decision was made to issue the warning notice without looking at the footage charts if that were not true. Foret Sr. made the decision to issue the warning notice to Adams without consulting the footage charts because the footage charts did not apply to Adams' assignment because of the various factors credibly cited by Adams; to wit: the rework, the pick-up welding, and the mirror welding. (Those factors were within the observation and control of the Forets, but the most that they said about them was that they did not know if such factors existed, or they did not remember, or they made conclusionary denials, and Respondent did not produce the still-existing work orders that may have proved the points. That is, unlike the self-serving testimonies of many other of the General Counsel's witnesses in this case, Adams' testimony on these factors could have been effectively rebutted, but it was not.) Further, the Forets did not take into account the fact that, for some part of the job, Roberto was in Adams' way. Foret Jr. testified only that: "I don't recall having any welders in the area where he [Adams] was." This is far short of a credible denial by Foret Jr. in the face of Adams' insistence that Roberto's gouging assignment did have the effect of slowing his progress (at least on

[365] Departmental Superintendent Pertuit conducted the employer campaign meeting; I infer that Pertuit shared the information that he learned with his assistant, Foret Sr., who ordered the issuance of the July 30 warning notice.

the side T-beams), and that Foret Jr. is the one who gave Roberto the gouging assignment.

But even if the footage charts did apply, neither Foret knew how much footage Adams had achieved during the day. Foret Jr. acknowledged that in the fabrication area the T-beams are left unwelded at the ends for different lengths, but neither Foret testified that he measured, in any way, what Adams had done in the time allotted to him. That is, Adams was held strictly accountable according to the footage charts to produce "X" amount of footage in "Y" time, but "X" was a complete unknown, and "Y" was calculated without regard to the one-hour delay at the beginning of the day that Respondent's supervisors caused.

Although Foret Jr. would not admit all that was involved in Adams' description of the work, he did acknowledge on cross-examination that, when he first assigned Adams the T-beam job (at 7 a.m., according to his account) he knew that "Maybe five, six more hours of work" would have to be performed by another shift before the job was completed. Foret Jr. reduced this estimate on redirect examination to 2 hours' work above an 8-hour shift for the job, but the fact remains: Respondent's supervisors knew that there was more than eight hours' work to the T-beam job for any welder. (This factor also belies Foret Jr's. testimony that part of the reason that the decision to issue the warning notice was because "I had to end up putting the night shift on there to do the job," as if he had not known from the start that Adams could not do the job by shift's end.)

Foret Jr. acknowledged that the warning notice could have been for a general offense, such as general offense-4, "wasting time," as well as major offense-2, "failure to complete job assigned." According to his testimony, the only fault that Foret Jr. found with Adams' work was that he had used mirror welding when he did not need to. I have discredited this testimony, but assuming it is true, Foret Jr. was not asked why the more severe warning notice was issued. As the Board stated in *Yukon Mfg. Co*., 310 NLRB 324, 340 (1993): "The aggrandizement of the offense is, itself, indicative of pretext."

Finally, it is uncontradicted that, when Foret Jr. presented Adams with the warning notice, he told Adams that he "couldn't believe that his father sent that in." Foret Jr"s. detailed testimony of how he decided to issue the warning notice, and how he ordered the clerk to prepare it, and how he received it from the clerk was false, as Foret Jr. admitted on cross-examination. Foret Jr's. false testimony was an apparent attempt to meet Adams' testimony; Foret Jr. wanted the Board to believe that he could not have said that his father had ordered the warning notice if he had ordered the warning notice. Foret Jr's. false testimony, coupled with Foret Jr's. failure to deny making the statement, and Adams' credible demeanor, cause me to credit Adams; Foret Jr. told Adams that he could not believe that his father had ordered the warning notice in issue. This statement by Foret Jr. was an admission that the warning notice was invalid. Based on this admission, and my findings that Adams was issued the warning notice even though Respondent's supervisors knew that he could not have finished the job in the time allotted, I find that Respondent has not shown that Adams would have been issued the August 30, 1993 warning notice even absent his expressions of prounion sympathies. I therefore conclude that by issuance of that notice Respondent violated Section 8(a)(3).

d. Joe Howard's warning notice for being out of his work area

Joe Howard (vol. 14), who is employed as a first-class machinist in the machinery department, was issued a warning notice on October 12, 1993. The second complaint, at paragraph 129, alleges that by the issuance of the warning notice Respondent violated Section 8(a)(3). The General Counsel contends that Respondent issued the warning notice to Howard because of his known union activities and expressions of sympathy which included his wearing of prounion insignia. Respondent does not deny that Howard wore prounion insignia, but it answers that Howard's warning notice was issued solely because Howard was out of his work area on October 11. The General Counsel replies that the defense is a pretext because Howard was not out of his work area at the time in question. Ultimately, I find that Howard was not out of his work area and that the warning notice was issued pretextually, and I conclude that the warning notice was issued in violation of Section 8(a)(3).

Before July, 1993, Howard was a machinist in the outside machine shop; his foreman there was Wirley Parks; Parks reported to General Foreman Phillip Prince. In July, Howard was assigned to the "pipe-operators"; the pipe-operators were mostly crews of pipe testers and ships' operators, but there were at least two machinists assigned to those crews, as well. As a pipe-operator, Howard was assigned to work under Pipe Department Foreman John Bigeaux and General Foreman John Whittington.

Howard testified that beginning in May or June, and continuing through time of trial, he wore a "Union-Yes" sticker on the back of his hardhat. As noted, Howard's supervisors did not deny this testimony, and I found it credible.

Howard's Warning Notice—The General Counsel's Evidence

On October 11, Howard was assigned as a leadman on a pipe-flushing job on a ship that was next to a dock. Howard testified that, as his crew worked he found that they had been supplied inappropriate gaskets and bolts and that they needed a compound called "Never Seize." He left the ship and went to a toolroom on the dock to obtain what the crew needed. As he left the toolroom, according to Howard:

> On returning to the ship a co-worker of mine stopped and asked me about obtaining some tools that I had prior to me being transferred.
>
> I did not notice Mr. Whittington behind me, but he was, and he stopped and spoke to another gentleman. At that particular time he inquired of me what I was doing, and I told him that I was getting material and heading back to the ship. He replied by saying: "Well, let's get on it."
>
> And I replied by asking him what did he say.
>
> At that particular time the gentleman who I was speaking to by the name of Clayton Plaisance replied by saying: "He said you better get your ass on the ship."
>
> And my reply to Clayton was I didn't play that type game, you know, using vulgarity or anything.
>
> And at that particular time Mr. Whittington angrily told me: "I am tired of this mess; come on, let's go, you are going back to your department."

Whittington escorted Howard to the office of Machine Shop General Foreman Prince, where Whittington told Prince that both he and Howard wanted Howard to be transferred back to

the machine shop. On cross-examination Howard flatly denied that he requested to be transferred back to the outside machine shop.

The next day, after Howard had resumed his duties as a machinist, Foreman Parks presented Howard with a warning notice that was signed by Whittington. The box for general offense-4 under the Avondale Employees' Guide ("Wasting time, loitering or leaving the working place without permission") is checked; as the reason for the warning Whittington had written: "Employee was out of his work area. This an on-going problem with this employee. This is a final warning."

Howard testified that, before October 11, "on a daily basis" Whittington would stop him and ask: "Where I was going, what I was doing, things of that nature," but he flatly denied that Whittington had, in any way, indicated that his being out of his work area was something of a "problem" or that Whittington ever told him that he was out of his work area in violation of some disciplinary rule.

Plaisance (vol. 44), a current employee who was also an outside machinist who also had been transferred to the pipe-operators, testified consistently with Howard about the confrontation between Howard and Whittington. Plaisance also testified that at the time of the Whittington-Howard exchange, he was not wearing any prounion insignia, but Howard was wearing "Union-Yes" stickers on his hardhat.

Plaisance further testified that, later during October 11, he was called to the office of Outside Machine Shop Foreman Parks where:

> And I said, "Well, what is up?"
>
> And he said that [he called me] for that incident that—on the dock with Joe that you was there—he said that they was trying to fire [Howard].
>
> And . . . And I said, "Why?"
>
> And he said, "Well, they said something like he was either cursing or raising his voice at the foreman."
>
> And I told him, "No. [Howard] didn't do that. The only curse word that was said, I said it."
>
> And [Parks] asked me . . . if [Howard] had said anything that the foreman [Whittington] should have brought him to the—higher foreman [Machine Shop General Foreman Prince], and I told him no.
>
> But [Parks] asked me again to see if Joe [Howard] had cursed, and I said, "No. The only curse word that was said, I said it; And when [Howard had] answered [in Whittington's presence that] he 'don't play them games,' [Howard] had told it to me because [Howard] was looking at me."
>
> And I also told him that: "Joe don't curse because he is a preacher; and he don't play around like me and you would or anything like that; it is just his way."
>
> And [Parks] asked me again if Joe had cursed or raised his voice, and I told him no.
>
> [Parks] asked me in my own way if I thought that Joe did anything or said anything that he should have been fired for.
>
> I said, "At the time that we was together from the time that they left, no, he did not do anything that he should have been fired for."

Further according to Plaisance, still later in the day, Machine Shop General Foreman Prince came to his work area. Prince asked Plaisance the same questions that Parks had asked. Plaisance gave the same answers, and Prince left.

Howard's Warning Notice—Respondent's Evidence

Whittington (vols. 74, 76) testified that during the few weeks before issuance of the October 11 warning notice he had seen Howard out of his work area about 20 times. On each occasion he told Howard to get back to his work area. Whittington further testified that both Pipe Department Superintendent Fradella and Pipe Department General Foreman Carl Abadie had spoken to him about Howard several times prior to October 11; each time Fradella and Abadie told Whittington that they had observed Howard on the dock, hanging around a cooler, rather than at his work place on the ship. Fradella testified, but not about Howard; Abadie did not testify.

Whittington testified that on October 11, at a time when Howard's assigned work area was on a ship, he saw Howard talking to other employees on the dock, near the machinists' office, for "maybe a minute, two minutes." Whittington testified that the point at which Howard was talking to the other employees was "[a] good long ways away" from his work area on the ship, but he did not deny that Howard was near, or could have been coming from, the toolroom described by Plaisance, the one near the machine shop office. Whittington denied that Howard was carrying with him any tools or supplies that he could have used for a job. Further according to Whittington:

> They were just standing there talking. . . . I went over to the group and asked, "What are you doing? You are supposed to be on the boat working."
>
> [Howard] told me, "Hey, I . . . don't play this kind of mess, this is ridiculous."
>
> The machinists left, but before the machinists left, Mr. Howard told me, "Hey, I am tired of this. I want to go talk to Prince about transferring back to machinists."

Whittington told Howard that he could transfer back to the outside machine shop, and he immediately escorted Howard to Prince's office. Whittington testified that in the office, with Howard present:

> I told [Prince] what had happened outside, that the way [Howard] talked to me was not proper, it wasn't fair, [and] I felt like that he would probably be better off back in his craft.
>
> He said, "Yes, we will take him back, I need another man back, I will take him back, but when he comes back he is coming back with a citation for what he did."
>
> . . . .
>
> Prince told [Howard], "John [Whittington] is not the only one that has had problems with you. . . . I have personally seen you off the boat down here in the [unintelligible] cage before lunch so you can get in the [food-service] shack.
>
> Howard said that he wasn't cut out [for working] where he was at, he was a machinist and that is what he was hired in to do.
>
> Prince said, "Well, we are going to put you back as a machinist."

Whittington testified that he drafted the warning notice; he gave it to Prince for issuance by the outside machine shop supervisors.

At the conclusion of his direct examination on the point, Whittington testified that he ordered the warning notice issued to Howard: "Because he was continuously out of his work area,

he had been very warned, and his almost insubordination when I approached him the last time." Whittington was not asked why he made the warning notice to Howard a "final warning."

On cross-examination Whittington was asked and he testified:

> Q. [By Mr. Bensinger]: Do you agree that it was Mr. Prince's decision to give Mr. Howard the warning that you testified about today?
>
> A. No, sir.
>
> Q. Well, whose decision was that?
>
> A. He agreed—I told him I would like to write him [up] and he agreed.

Prince did not testify. Parks (vol. 137) testified that on October 11 Prince approached him and told him to write Howard a warning notice over the incident that had happened between Howard and Whittington. Parks testified that he refused to write the notice because he thought Whittington should. After he had told Prince this, Parks testified, he then called Plaisance to his office and asked for his account of the event. He denied that he told Plaisance that anyone was trying to fire Howard. When asked why he asked Plaisance what had happened, Parks replied: "Because I wanted to find out from Clayton just exactly what took place." Parks testified that he was concerned because he knew by then that Howard was coming back to work on his crew in the outside machine shop. Parks testified that on October 12, he received through the inter-plant mail the warning notice that is in issue. On the same day he presented it to Howard.

Howard's Warning Notice—Credibility Resolutions and Conclusions

Howard was not a vocal union supporter, and he was not subjected, in violation of Section 8(a)(1), to threats or interrogations, as were many of the alleged discriminatees as found herein (and as were many other nonalleged discriminatees as found herein). Howard did, however, wear a "Union-Yes" sticker on his hardhat, activity against which many employees were warned in violation of Section 8(a)(1). Respondent's animus toward those employees who wore prounion insignia having been well established, I therefore find and conclude that the General Counsel has presented a prima facie case that the October 12 warning notice was issued to Howard in violation of Section 8(a)(3), and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Howard even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Howard acknowledged that before October 11 Whittington had, many times, asked him where he was going or where he was working, but Howard denied that Whittington had ever warned him about being out of his work area. Except in conclusionary terms, Whittington, himself, did not testify to any such warnings. (The most that Whittington testified to was that he had told Howard that he needed to be back on the boat, but he did not testify that he warned Howard of any possible discipline.) Whittington's estimates of how often he had previously seen Howard out of his work area varied, incredibly, from 3 to 20. If his testimony about seeing Howard out of his work area more than 20 times had any element of truth in it, there assuredly would have been some sort of warning of some discipline. Moreover, neither Fradella nor Abadie was called to corroborate Whittington's testimony that Howard was frequently out of his work area. It is apparent that, when Whittington had previously seen Howard out of what Whittington had suspected was Howard's work area, Whittington had accepted whatever explanations that Howard had given him. (Or, at least, Whittington did not challenge Howard's explanations before October 11.) Finally, I credit Howard's denial that, before October 11, Whittington had previously warned him that discipline might be taken against him because he was out of his work area.

As Prince did not testify, Plaisance's testimony that Prince came to him and asked him if Howard had not cursed Whittington or otherwise acted insubordinately was not denied. I credit that testimony. I also believe Plaisance's testimony that Parks asked him the same things, Parks' denial not withstanding. I do not believe that Parks told Prince that he would not write a warning notice that Whittington should write, and then called Plaisance into his office to find out what had actually happened. Further, I believe, and credit, Plaisance's testimony that Parks admitted to him that the supervisors were trying to find a reason to discharge Howard. Even without such testimony it is obvious that by questioning Plaisance, and suggesting to Plaisance that Howard had been insubordinate, the supervisors were seeking support for a theory on the basis of which Howard could be issued greater punishment than a warning notice. That theory was insubordination, and insubordination is an "Immediate Discharge" offense under the literal terms of the Avondale Employees' Guide. When the attempt to make Plaisance a witness to "insubordination" failed, Respondent's supervisors were left with one theory of a disciplinary violation; to wit: Howard was out of his work area. Now, that putative theory of discipline must be examined.

Although he was near the machinists' office, as Whittington described, Howard was also near the outside machine shop's toolroom, as Plaisance described. There is no suggestion that there was a closer toolroom that Howard should have used (say, for example, a pipe department toolroom). Howard was near a toolroom where he could have gotten supplies, and if he was going to, or coming from, the toolroom to get supplies (or tools), he was in a work area.

Howard testified that he was exchanging gaskets and bolts and securing "Never Seize" at the outside machine shop toolroom. He further testified that, when he was confronted by Whittington, "he inquired of me what I was doing, and I told him that I was getting material and heading back to the ship." Whittington testified that he did not see Howard "with anything," but he did not deny that Howard claimed to be coming from the toolroom where he had gotten supplies. I find that Howard did tell Whittington that he had been to the toolroom and had gotten supplies. If that statement had not been true, it would have been an easy matter for Whittington to challenge Howard. (For example, Whittington could have asked: "What supplies?") I find that, when Whittington confronted Howard on October 11, Howard had with him supplies from the toolroom and that Whittington saw those supplies. That is, Howard was not out of his work area when he was confronted by Whittington.

I do not believe the testimony by Howard and Plaisance that Howard made the "playing games" statement in rebuke of Plaisance when Plaisance used the word "ass." The testimony made no sense; mild or severe, cursing is not "playing games." I believe Whittington in this respect: I find that Howard told Whittington that he thought Whittington was playing games with

him, and Howard wanted to go back to the outside machine shop.

Nevertheless, the warning notice was issued on a pretext. There are three independent reasons for this conclusion: (1) Whittington considered Howard's retort as "almost insubordination," as he testified. But it was not insubordination. So Whittington tried to get corroboration for another theory of insubordination, by causing Prince and Parks to contact Plaisance, as I have found above. When that did not work, Whittington fell back on a theory of Howard's being "out of his work area" even though, as I have found, it was not true. (2) On the point of who ordered the warning notice, Whittington's testimony on cross-examination squarely conflicted with his testimony on direct examination; on direct examination, Whittington testified that, without his mentioning a warning notice first, Prince declared that "I will take him back, but when he comes back he is coming back with a citation for what he did." On cross-examination, Whittington stated the obvious; it was his decision to issue the warning notice. Apparently Whittington had forgotten the answer he had given on direct examination; the obvious reason he could not remember his answer on direct examination is that it was not true. The conflict, I find, comes from the fact that a warning notice was not mentioned at all in Prince's office when Howard was there. But some time after Whittington left Prince's office, Prince and Parks were sent out to seek justification for a warning notice to Howard by contacting (and attempting to put words into the mouth of) Plaisance. That is, the warning notice was an afterthought by Whittington, another indicia of pretext. (3) A final indicia of pretextual basis for the discipline is the fact that Whittington made the warning notice a "Final" warning notice when there had been no prior warning notices for misconduct of any sort by Howard. There are many final warning notices discussed in this case; in all others, where the offense is a general offense under the Avondale Employees' Guide, the final warning notices were preceded by other warning notices. Again, as the Board stated in *Yukon Mfg. Co*., 310 NLRB 324, 340 (1993): "The aggrandizement of the offense is, itself, indicative of pretext." Finally, it is to be noted that Clayton Plaisance, who was "out of his work area" every bit as much as Howard was on October 11, received no warning notice; Plaisance, however, was not wearing any prounion insignia at the time.

In view of my finding that the reason offered for the issuance of the warning notice to Howard was false, it must be concluded that Respondent has failed to show that it would have issued the October 12, 1993 warning notice to Howard even in the absence of his known protected activities. I therefore conclude that Respondent violated Section 8(a)(3) by issuance of that warning notice.

e. Eddie Johnson's discharge for wandering around the yard

Eddie Johnson (vols. 57, 58) was employed as a pipefitter's helper until he was discharged on June 1, 1994. The fourth complaint, at paragraph 34, alleges that by discharging Johnson Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Johnson because of his known union activities and expressions of sympathy which included his talking about the Union within the hearing of his immediate supervisor, wearing prounion insignia, telling his supervisors that he was going to testify on behalf of the Union at the representation case hearing, and his actually so testifying. The General Counsel further alleges that, in violation of Section 8(a)(1), Johnson was threatened three times with discharge or other discipline. Respondent denies that the threats occurred. Respondent further answers that the supervisors involved in the discharge of Johnson did not know of any prounion sympathies that he may have had and that Johnson was discharged solely because he was found to have been deliberately loafing, an immediate discharge offense under the Avondale Employees' Guide. The General Counsel replies that the loafing defense is a pretext because Johnson was not loafing at the time in question. Alternatively, the General Counsel contends that Johnson was treated disparately because, to any extent that he may have been loafing, other employees were permitted to loaf longer without being discharged. Ultimately, I find and conclude that Johnson was unlawfully discharged.

Johnson was first hired by Respondent in 1990; he was employed as a pipefitter until he quit in May 1993. He was rehired as a pipetester's helper on August 26, 1993, at a substantially lower pay rate. From his re-hiring until March or April 1994, Johnson worked mostly under Pipe Department Foreman Timmy Benoit. From the time that he left Benoit's crew until his discharge, Johnson worked on the crew of Foreman John Lindsay. Benoit and Lindsay reported directly to Pipe Department General Foreman John Whittington. At the time of Johnson's discharge, he worked on *LSD-51*; the pipefitting (as opposed to pipetesting) general foreman for *LSD-51* was William Fedrick; Fedrick also described himself as the pipe department's "general foreman over the ship," and he had some authority superior to that of Whittington. Fedrick discharged Johnson.

Johnson testified that, beginning in September, he regularly wore "Union-Yes" stickers on his hardhat, a union button, and a union T-shirt. Johnson testified that on his crews, no other employees wore prounion insignia. Johnson did testify in the representation case hearing and it is undenied that in September 1993, he told Benoit and Whittington that he was going to do so; neither supervisor commented. On cross-examination Lindsay admitted (vol. 96) that, when Johnson worked on his crew of approximately 12 employees, Johnson spoke to other employees in favor of the Union, and Lindsay admitted that Johnson was the only employee on his crew who wore prounion insignia. Fedrick and Foreman James Walker were the supervisors who were directly involved in Johnson's discharge, and they denied seeing Johnson's prounion insignia or knowing of his prounion sympathies. I found Johnson, and Lindsay, credible in the testimony about Johnson's prounion insignia, and I conclude that, at the time of Johnson's discharge, all of Respondent's production supervisors who worked around Johnson knew of his prounion insignia and sympathies.

Johnson testified that during September, shortly after he told Benoit that he was going to testify in the representation case, Benoit spoke to him when they were alone. According to Johnson:

> Well, Timmy told me: "Eddie, personally, you know, I don't care if the Union come in because if the Union come in, you guys will probably get more money . . . because I am at the bottom of the pay scale for foremans.
>
> But if I was you, I would be careful who I talk to about the Union. There was a guy named Joe Melton who used to work here for me. Just the way you are talking the Union, that is the way he was talking.
>
> Black Abadie [Pipe Department General Foreman Carl (Black) Abadie] transferred him [Melton] to Westwego,

> but two weeks later they fired him. Black and John [Whittington] would do the same thing to you. If I was you, I would be real careful, because I have heard that anybody that is affiliated with Union people, they want to fire them.
>
> Now, we had this conversation, but, we didn't have this conversation, because anybody that asks me I will deny it.
>
> I said, "Well, Timmy, I don't care what these people think. Avondale is still surrounded by America, and this is America."

Based on this testimony by Johnson, paragraph 8 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Benoit, "threatened to transfer or discharge employees if they continued to aide or support the Union."[366] (As discussed below, Joseph Melton is an alleged discriminatee who, on July 30, 1993, was transferred from Benoit's supervision to the Westwego yard; then, on August 23, 1993, he was discharged from the Westwego yard. The General Counsel contends that this testimony constitutes an admission in Melton's case, as well as an independent violation of Section 8(a)(1).) As discussed below, Benoit denied this testimony by Johnson.

Johnson further testified that in March 1994, when he, Leadman Ollie Pinckney, and employee——— Riggs were talking to Lindsay:

> Well, they were giving out raises in the yard, so I come to Mr. Lindsay about a raise. He said, "Personally I don't like your attitude. You are always talking to these Union people and you are union. Why don't you ask them for a raise?"
>
> That is when Ollie stepped in [and] said, "The man's personal beliefs don't have anything to do with his work."
>
> That is when Lindsay said, "Well, I didn't hire him. He knew what the money was when he took the job." Then he walked away.

Based on this testimony by Johnson, paragraph 10 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Lindsay, "informed its employees that a wage increase had not been granted due to an employee s aiding or assisting the Union."[367]

Johnson further testified that in April, he and Riggs were working together when General Foreman Whittington approached. According to Johnson:

> Well, John [Whittington] rode up on a bike, and I said, "John , I asked John Lindsay about a raise. He [Lindsay] said there is nothing he can do."
>
> [I asked Whittington:] "Can you get me a raise? As you all know, you are underpaying me."
>
> So John Whittington said, "I can get you a raise if your attitude wasn't so bad."
>
> I said, "John, you can give me a raise now, or you can wait until the Union comes. Once the Union comes, you are going to have to give me a raise."
>
> So he looked at me and he said, "That Union is going to get you and a whole lot of other people ran away from Avondale." And he turned around, got on his bike and rode off.

Based on this testimony by Johnson, paragraph 11 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Whittington: "(a) advised an employee that he had been denied a wage increase because he had aided or assisted the Union; and (b) threatened an employee with discharge because he had aided or assisted the Union."[368] As discussed below, Whittington testified for Respondent, but he did not deny this testimony by Johnson, and I found Johnson's testimony credible.

Johnson's Discharge—The General Counsel's Evidence

On March 11, Fedrick and Foreman Lawrence Mullins issued a warning notice to Johnson. The issuance of this warning notice is not alleged to be a violation of the Act, but it is relevant background. On the warning notice, the supervisors checked neither general offense nor major offense number under the Avondale Employees' Guide. "Time of offense" is stated as 12:30 p.m., when employees are supposed to have returned to their work stations from lunch. The reason for the warning notice is stated as: "Return to the work place late after lunch. Left to see timekeeper at lunch. Did not return to the work place until 1:32. Did not notify foreman."

On June 1, Johnson was working on a ship that was on the ground. Johnson worked with Leadman Pinckney who figures prominently in this narrative, but who did not testify. Johnson testified that Pinckney told him to leave the ship and go into the yard to get: (1) some stainless steel flanges from a supply cage that is controlled by Foreman Mullins ("Mullins' cage"); (2) some flanges and gaskets, and 16 bolts with nuts, from a pipe-storage cage (pipe cage); (3) a grinder from Johnson's tool box which was in a gang box,[369] and (4) some cutting blades that were available in Fedrick's office that was on the ground. Johnson testified that after he got these instructions from Pinckney, he walked down a stairway to the dock and began to go; about the yard as Pinckney had instructed him to do.[370] Where Johnson went, and how long he took to go to each place, are issues in this case.

Johnson testified that on his way to Mullins' cage he met employee Vernon Forest, a paint department employee who was operating a "Bobcat" street-sweeper. Johnson testified that he and Forest spoke for "[f]orty-five seconds to a minute, maybe." Then Johnson walked on to Mullins' cage where, after 2 or 3 minutes, he found some of the flanges that he was sent for. Then he went to the pipe cage where, after searching, he found other flanges, the gaskets, and the nuts and bolts. Then he went to his toolbox where he got the grinder and some wrenches. He then went to Fedrick's office for the blades, but he found the office locked. Then he started back toward the ship, but, at the time, he realized that the job that Pinckney's crew was working on could not have been performed without the blades. As he was walking, Johnson turned into a restroom where he stayed "about ten minutes." He then continued toward the ship; as he got almost to the ship, which was at wetdock-2, he saw a bicycle that was not being used. Johnson put the tools

[366] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Johnson, as well as the charge in Case 15–CA–12171–1.

[367] Id.

[368] Id.

[369] Again, a gang box is a larger box that can hold several tool boxes and can be, itself, locked.

[370] The transcript, vol. 57: p. 11,748, L. 25, is corrected to change "crawl" to "walk."

and supplies in the basket of the bike, and pedaled to wetdock-3, about a "quarter of a mile" away. Johnson testified that he went to wetdock-3 because he knew that he could get the needed blades at the pipetesters' cage there. Johnson testified that when he first got to wetdock-3 he saw Lindsay and told him that he was there to get blades. After he got to the pipetesters' cage, he was required to wait for "four or five minutes" for the attendant to get to him and give him the blades. On his way back from wetdock-3, Johnson further testified, he saw Lindsay again; Lindsay asked him if he had gotten what he needed, and Johnson replied affirmatively. (Lindsay did not deny this testimony by Johnson.) Johnson testified that, when he got to the ship:

> Well, I had four plastic bags with different things in them. And I was holding the bag, just walking up the stairs. And I stopped a couple of times at different levels, and when I got to the top, [leadman] Nat, Nathaniel McGowen . . . said, "Blue Eyes [Fedrick] wants to see you. I think he is going to fire you."

Just how many bags Johnson was carrying when he got back to the ship is an issue in this case. Here, it is to be noted, Johnson testified both that there was "the" one bag, and that there were "four plastic bags." Johnson later testified that he was carrying 25 pounds of bags when he climbed the stairs where he was met by McGowen.

Johnson went to the ship-board office of Foreman Walker, as McGowen had told him to do. When he got to Walker's office he was met by Walker and Fedrick. According to Johnson:

> [Fedrick] said, "I watched you go to three cages. You stopped and talked to a guy on a Bobcat for ten minutes. Then you came back, got on the bike; you went to Wetdock-3."
>
> I said, "Everything you said I did, that is what I did, except talk to somebody for ten minutes. The conversation with that guy only took about a minute, if that much."
>
> He said, "Well, I am terminating you for deliberately loafing on the job. Let's go down to my office."

Johnson was, at that point, discharged.

Johnson, Walker and Fedrick went to Fedrick's office on the ground. There, Fedrick wrote out a warning notice to Johnson, marking the box for "Other" Major offense. As the reason for the warning Fedrick wrote: "Immediate Discharge offense #2. Deliberate loafing during hours of work." Fedrick and Walker signed the warning notice. During the process of drafting the warning notice, Johnson testified, Fedrick stepped out of the room. While he was gone, Walker told him: "I didn't have nothing to do with this. I don't even know what it is about, he said, but Blue Eyes is my general foreman. I have to sign it." As discussed below, Walker denied this testimony by Johnson.

After Johnson left the premises, Fedrick signed the ASI-22 (discharge) form necessary to process Johnson's discharge. On it, as "Explanation for Action" there are typed (1) a recitation of the Avondale Employees' Guide's wording of immediate discharge offense-2, and (2) a listing of times and places that Johnson went about the yard. This document, the General Counsel's Exhibit 352, was adequate to prove the fact of discharge, but I do not consider the listing of times and places as evidence on the factual issue presently before me: where did Johnson go and when did he go there? The listing of times and places is, of course, hearsay to that issue, and it is not hearsay evidence that comes within the business-records exception because it is a "business record" of no more than what Fedrick told the human resources department that Johnson had done. For nonhearsay on the issue presently before me, evidence such as the testimony of one or more witnesses was needed. Respondent's evidence on the issues of where Johnson went, and when, will be discussed below.

In Johnson's case, the General Counsel also called current employee Forest who testified (vol. 60) that the exchange between Johnson and him lasted, "not even a good minute or so."

Johnson's Discharge—Respondent's Evidence

Benoit (vol. 80) testified that he had been instructed to act in conformance with the TIPS card and the Foreman's Guide, and he flatly denied ever stating to Johnson that Melton had been transferred to Westwego and then discharged because he had been talking about the Union. As will be discussed in more detail in Melton's case, Benoit testified that transfers such as Melton's were the normal part of business, but he admitted on cross-examination that he had had no notice of Melton's impending transfer to Westwego. Benoit also denied that he told Johnson that what had happened to Melton would happen to him if he continued his union activities.

Lindsay (vol. 96) testified that Johnson asked him several times about getting a wage increase. On those occasions he would explain a two-tier wage system that Respondent instituted in early 1994; he also told Johnson that he should have gotten the matter of his wage rate settled before he accepted rehiring. Lindsay testified that he told Johnson that he should go see the pipe department superintendent about his wages, but he flatly denied telling Johnson that he did not like his attitude, that he was "Union," and that he should go see the Union if he wanted a raise.

Fedrick's Testimony on Johnson's Discharge that is Stricken

Well before Johnson was called to testify, the General Counsel subpoenaed from Respondent all notes and memoranda that had been made by supervisors concerning Johnson's discharge. Some matters were then produced but, as it turned out, not all.

Respondent first called Fedrick to testify on day-71 of the trial; in direct examination, Fedrick was asked nothing about Johnson's discharge, but, during cross-examination on day-72, pursuant to Rule 611(b), he was interrogated by the General Counsel about the Johnson discharge. During that examination, Fedrick testified that he had watched from the deck of the ship as Johnson walked, and bicycle-rode, about the yard for "over an hour." Fedrick was asked and he testified:

> Q. Other than watching Mr. Johnson, did you do anything else while you watched Mr. Johnson?
>
> A. Like what?
>
> Q. Well, I am really asking you, did you do paperwork? Did you make telephone calls?
>
> A. No.
>
> Q. Did you do anything?
>
> A. No.
>
> Q. You just watched Mr. Johnson?
>
> A. Correct.

As it soon came to light, however, Fedrick had, indeed, been doing something while he watched Johnson.

On day-77 of the trial, Respondent announced that Respondent had "newly discovered" documentary evidence to produce in response to the demands of the General Counsel's subpoena.

After that production, Respondent recalled Fedrick who testified that, as he watched Johnson walk about the yard on June 1, he made notes of the places and times on a pad that he carried with him. Without the notes before him, Fedrick recited a point-to-point itinerary that Johnson had taken about the yard. Fedrick disclaimed memory, however, of the times that Johnson reached various points in the yard. Then Respondent had marked its Exhibit 365. When counsel showed the exhibit to Fedrick, the General Counsel objected to further direct examination on the document because it had not been produced pursuant to the General Counsel's subpoena duces tecum. The General Counsel cited *Bannon Mills*, 146 NLRB 611 (1964), which prohibits a party from introducing in its own case subpoenaed documents that have not been produced to the requesting party. Counsel for Respondent represented that she had not known of the existence of the notes until the day before, and that the notes had been inadvertently missed during its initial search to respond to the subpoena. Counsel interrogated Fedrick about how the document had been found: Fedrick testified that during the preceding day, as he was being prepared to testify, counsel had asked him to search for "the original documents." Fedrick testified that he contacted a secretary who found Respondent's Exhibit 365 in Johnson's departmental personnel file. Respondent's counsel then argued that the direct examination should continue because she had proved that the notes were newly discovered evidence within some exception to *Bannon Mills* and because there was no prejudice to the General Counsel by the production, even if the production was considered to be late. I stated that, before the direct examination of Fedrick on the exhibit continued any further, I would like to have the citations of any authorities Respondent might have on the issue of newly discovered evidence and the issue of prejudice under the *Bannon Mills* line of cases. Respondent's counsel responded that she would "withdraw" the exhibit and proceed to other parts of Fedrick's direct examination, which she did. (Actually, the document had not been offered at that point.) Of course, because it had been withdrawn, there was no voir dire or cross-examination of Fedrick on the document. The General Counsel moved to strike Fedrick's testimony related to the notes that had not been produced, but I denied the motion because I was leaving it open to Respondent to show that the document was admissible (by authority, by evidence of the good faith but unfruitful search, or by both).

Several *Bannon Mills* issues surfaced during the course of this trial. On day-94, I issued a written statement of my reasoning for several of my rulings; that statement is in the record as Administrative Law Judge's Exhibit 4.[371] Even though Respondent's Exhibit 365 had, at that point, been withdrawn, I stated in Administrative Law Judge's Exhibit 4 that I considered the *Bannon Mills* objections to the exhibit to have been valid.

On day-104, Respondent again presented Fedrick, and it then offered (for the first time) Respondent's Exhibit 365. As Respondent attempted to lay a foundation for the offer, Fedrick testified that he made most, but not all, of the notations on Respondent's Exhibit 365. There is a comment at the end of the exhibit which Fedrick testified that he did not make. Fedrick testified that he believed that he knew who wrote the additional notations on the exhibit, but he was not thereafter asked who that was, and he was not asked other questions that would complete the identification of the entire document. Nevertheless, Respondent then offered the entire document; i.e., Respondent did not except from its offer the comment on the exhibit that had not been identified by Fedrick. The General Counsel again objected on the basis of the *Bannon Mills* principles, and he further objected to the fact that no foundation had been laid for the comment that was not made by Fedrick. I sustained the *Bannon Mills* objection, citing Administrative Law Judge's Exhibit 4, and I said that I need not pass on the issue of foundation for the comment made by someone other than Fedrick. The document, at that point, was placed in the rejected exhibits file. As the document had been rejected on the basis of *Bannon Mills*, there was no need for, and there was no opportunity for, the General Counsel to conduct voir dire on the document, and there was, of course, no cross-examination of Fedrick on the document's content.

On day-147, I announced to the parties that I considered my statements in Administrative Law Judge's Exhibit 4, as they applied to Respondent's Exhibit 365, to have been erroneous because the substance of the withheld notes had been furnished to the General Counsel in the form of the entries in the "Explanation for Action" section of the General Counsel's Exhibit 352 (the ASI-22 form for Johnson, as noted above). Therefore, I stated, there was no possible prejudice to the General Counsel in the failure to produce, in specie, the document from which the wording of the General Counsel's Exhibit 352 had obviously been taken. By Respondent's providing the General Counsel's Exhibit 352 well before Johnson testified, I stated, the General Counsel had known what the specifics of the defense on Johnson were, whether or not the General Counsel had been furnished the source-document for the General Counsel's Exhibit 352. On day-150, after argument, I restated my reasoning, and I struck all references to Johnson's case in Administrative Law Judge's Exhibit 4. I further stated that I was leaving it to Respondent to reoffer Respondent's Exhibit 365 at some subsequent point, if it chose to do so.

On day-153, Respondent reoffered Respondent's Exhibit 365, but it did so without presenting Fedrick as a witness. The General Counsel objected and argued that, because I had previously sustained their *Bannon Mills* objections during the direct examination of Fedrick on day-104: (1) he had not been given any opportunity to conduct voir dire examinations of Fedrick on issues of identification other than those issues that were raised under *Bannon Mills* (such as, who made the comment on Respondent's Exhibit 365 that Fedrick did not make, when was it made, whether there had been a second page to the document, and like lines of inquiry); and (2) he had not had any opportunity to cross-examine Fedrick on his testimony about the notations that he claimed that he made. The General Counsel argued that receipt of the document without affording him the opportunities for voir dire and cross-examination would be erroneous and extremely prejudicial. I agreed with the General Counsel, and I again rejected the document, not because of the *Bannon Mills* principles, but because of the fact that the witness was not being presented for purposes of vior dire and cross-examination. At the same time, however, I told Respondent that the document could be re-offered when it simultaneously presented Fedrick as a witness. On day-154, again without presenting Fedrick as a witness for purposes of voir dire and cross-examination, Respondent reoffered its Exhibit 365. Counsel stated:

[371] The document was originally received as ALJ-3, but it was later remarked as ALJ-4.

> MS. CANNY: With respect to Respondent's Exhibit 365 that was initially offered by us yesterday, the hand-written notes of Mr. Fedrick, we have determined we are not going to re-call Mr. Fedrick. We believe that an opportunity was provided when he initially appeared here to question him concerning this, that he has sufficiently identified this document on the two separate occasions, and we would move that it be received.

(It is to be noted that counsel did not dispute that the General Counsel had not had an opportunity to cross-examine Fedrick on the subject matter of the document. Moreover, it is more than obvious that the real reason that Respondent's counsel did not recall Fedrick when she offered the exhibit was that, had she done so, the General Counsel would have been able to confront Fedrick with his then-palpable lie of day-71 that he had done no "paperwork" as he stood at the railing and watched Johnson go about the yard.) the General Counsel again objected on the grounds that he had not had an opportunity to conduct voir dire on the exhibit and that he had not been given any opportunity to cross-examine Fedrick on the substance of the document.

I agreed with the General Counsel that identification of the document had not been completed and that the General Counsel had never been afforded an opportunity to cross-examine Fedrick on the substance of the document. Identification of Respondent's Exhibit 365 had not been completed because: (a) Fedrick never testified who made the final comment on the exhibit, and (b) the General Counsel was never afforded opportunity to conduct voir dire examination of Fedrick on that comment or the notations that Fedrick claimed that he had made. Opportunity to cross-examine Fedrick on his testimony about Respondent's Exhibit 365 was never afforded to the General Counsel because the document had been (1) not produced, or (2) withdrawn, or (3) rejected before Fedrick had been passed for cross-examination. Therefore, the document remained, and does remain, rejected. The final rejection at trial was based on Fedrick's not being presented as a witness when Respondent's Exhibit 365 was re-offered, but I have reconsidered my *Bannon Mills* ruling, as well.

Because Respondent failed to recall Fedrick and thereby prevented his being subjected to voir dire and cross-examination when it reoffered the exhibit, it has not been proved that Respondent's Exhibit 365 contains the notes that Fedrick created on June 1. But assuming that what was offered as Respondent's Exhibit 365 was genuine, further reflection on the matter causes me to believe that, had the exhibit been offered on day-77, I should have then rejected it on the basis of *Bannon Mills*. Because it could have been found by exertion of a reasonable amount of effort, Respondent's Exhibit 365 was not newly discovered evidence within any possible exception to *Bannon Mills*. Moreover, the General Counsel did suffer substantial prejudice by its not being produced when subpoenaed. One element of the prejudice to the General Counsel lies in the fact that, when he testified on day-72, Fedrick had testified falsely that he had done nothing else as he stood at the railing and watched Johnson walk about the yard. As was revealed 5-trial days later, Fedrick had done something; he had made notes. Perhaps he thought that the notes had been lost when he testified on day-72, but, even if he did, Fedrick's testimony that he had done nothing as Johnson walked about the yard was consciously false and, in my opinion, perjury. In making the notes on June 1, Fedrick was making an attempt at cover-building, and he could not possibly have forgotten that he had memorialized that attempt. Obviously, an affirmative answer was called for when Fedrick was asked if he had done (1) "anything else," or (2) "paperwork," or (3) "anything," as he watched Johnson walk about the yard. Instead, Fedrick answered: "like what?," and "no" and "no." If Fedrick had answered any of these questions truthfully, the General Counsel would have then demanded production of the subpoenaed notes before there was any further 611(b) examination. Therefore, the General Counsel did suffer substantial prejudice because the possible effectiveness of his 611(b) examination of Fedrick on day-72 had been dissipated by Fedrick's consciously false testimony, as well as the failure to produce the document when called for by subpoena duces tecum in the first place.

As well as excluding records that had been subpoenaed but withheld, *Bannon Mills* prevents the withholding party from introducing "secondary evidence regarding matters provable by such records." Such is Fedrick's testimony about the points to which he saw Johnson walk. The withheld document shows the places that Johnson went, as well as the times. As noted above, the General Counsel moved to strike all testimony by Fedrick regarding the subject of the withheld notes which describe where and when Fedrick saw Johnson go from point to point in the wetdock-3 area. The motion should have been granted when made, and I do so now. I shall not consider Fedrick's testimony about the places he claims to have seen Johnson go. (Again, Fedrick testified that he did not independently recall the times that Johnson went from point to point.) Therefore, only to be considered is Fedrick's testimony about what happened before Johnson left the ship and what happened after he returned.

Fedrick's Other Testimony about Johnson's Discharge

During his 611(b) testimony on day-72, Fedrick testified that, as well as Johnson's conduct on June 1, he discharged Johnson because of his conduct "prior to that, leading to this day." Also during the day-72 examination, Fedrick acknowledged that the job of a pipefitter's helper is to go and get things like flanges, gaskets, bolts and blades. He further acknowledged that he keeps cutting blades in his office on the ground and that office is padlocked when he is not there.

When called by Respondent on day-77, Fedrick testified that during 1994, before Johnson's discharge, he twice spoke to Johnson about loafing and "walking around," and he told Johnson that he needed to work harder, but he did not testify that he gave Johnson an oral warning of discipline. Fedrick further testified that he issued Johnson's March 11 warning notice, as quoted above, because during the lunch period on that date Johnson had gone to Respondent's administration building to get a paycheck problem resolved and that Johnson had stayed at the administration building beyond the 12:30 deadline for returning to work without having signed out on his foreman's MCR. (Fedrick knew that Johnson had been to the administration building because Fedrick saw him there when Fedrick was there on other business.)

Fedrick testified that, on June 1, while he was observing Johnson from the main deck of the ship, he asked Pipe Department Foreman James Walker and Leadman "Nat" to join him and observe Johnson also. While they were watching, Leadman Ollie Pinckney came on deck; Pinckney told Fedrick that he was looking for Johnson, and Pinckney stated that Johnson "has been gone a while." Fedrick told Pinckney to go back below and he would handle the problem. When Johnson returned to

the ship, Fedrick sent Walker to bring Johnson over, and then Fedrick told Johnson that he was discharged. Fedrick's account of what was said on the ship, and what happened thereafter in Fedrick's presence, does not differ significantly from Johnson's account. (The leadman "Nat" was not called to testify; Walker's testimony is discussed below.)

During the cross-examination of day-77, Fedrick testified that Johnson had only one small plastic bag with him when he returned to the ship. During that examination, Fedrick repeated that, when Johnson returned to the ship: "James [Waker] went to the top of the stairs and brought him over there to me, and that is when I told him that he was gone for a considerable amount of time off the job and that we were going to terminate him for loafing."

Walker's Testimony about Johnson's Discharge

Walker (vol. 79) testified that Fedrick did ask him to stand with him by the railing and watch Johnson. Walker first saw Johnson talking to the Bobcat operator. Then Walker saw Johnson talk to someone on a motorcycle, then go to a supply cage, then go to a restroom, then go to a bicycle; Johnson got on the bicycle and pedaled out of view. "Sometime later," Walker further testified, Johnson returned with "a small plastic bag with some material in it." Walker denied seeing Johnson go to Fedrick's office on the ground, denied seeing him talk to Foreman Lindsay, and denied seeing him approach his gang box. Walker testified that it was "over an hour and ten minutes" from the time he began watching Johnson until the time that Johnson returned to the ship.

Walker further testified that while he and Johnson waited for Fedrick in Fedrick's ground office, Johnson asked why he was being discharged. Walker told Johnson that he would have to ask Fedrick. Walker flatly denied telling Johnson that he had had nothing to do with the discharge and that he would sign the warning notice only because Fedrick was his general foreman.

On cross-examination, Walker was asked and he testified:

> Q. How long did you observe Eddie Johnson talking to the man on the Bobcat?
> A. He was there probably 10 minutes. . . .
> Q. How long was Eddie Johnson in the bathroom?
> A. Fifteen to 20 minutes.

Walker testified that the small plastic bag that Johnson was carrying when he returned to the ship was transparent, and he could see no blades or gaskets in the bag, only flanges, nuts, and bolts.

Johnson's Testimony about Threats—Credibility Resolutions and Conclusions

On cross-examination, Lindsay admitted that Johnson was vocal in his support of the Union to other employees, that Johnson wore prounion insignia, and that Johnson was the only employee on his crew to wear prounion insignia. Lindsay further acknowledged that Johnson mentioned the Union when asking for a raise, sometimes saying that he would get one when the Union came in. Lindsay made several other admissions that will be discussed infra. Johnson testified that Lindsay threatened him with a denial of a wage increase, but Lindsay made several important admissions (on other topics) during his testimony, and I found Lindsay, overall, to have been a credible witness. I found Lindsay credible in his denial of Johnson's testimony on this point. I shall recommend dismissal of this allegation of the complaint.

Johnson' testimony about a threat by Benoit, however, requires a different result. Johnson acknowledged that the June 8, 1994 affidavit that he gave to the Regional Office investigators in support of the charge filed over his discharge states that he could not then remember the name of the employee to whom Benoit had referred when Benoit told him that another employee had been transferred to the main yard and then discharged because of that employee's union activities. Johnson, however, testified that at the time of the exchange with Benoit, he had never heard of Melton and he could not remember Melton's name when he gave his affidavit. Johnson testified that Melton's name later came to his memory without prompting from anyone else. I believe this testimony by Johnson. Johnson was also credible in his testimony that Benoit told him that Melton had been transferred to Westwego because he had spoken up for the Union, as Johnson was then doing, and that the same thing could happen to Johnson if he continued to do so. Benoit, however, was not credible in his testimony on the point. Although he was fairly poised when he testified about Melton's transfer from the main yard to Westwego (and other topics), Benoit became much the less so when he was testifying about his exchange with Johnson about that transfer. I got the distinct impression that Benoit was not telling the truth on this point. Moreover, Benoit demonstrated a willingness to lie under oath in his later account of the transfer of Melton to Westwego. (As discussed in Melton's case infra, Benoit testified that Melton was transferred because of lack of work at the main yard, a defense that not only went uncorroborated, it was contradicted by Production Vice President Simpson, and it was not even mentioned by Respondent on brief.) I credit Johnson over Benoit. Telling an employee that another employee had been transferred because of his union activities, and then discharged, and that "I have heard that anybody that is affiliated with union people, they want to fire them," is certainly a threat that would tend to restrain the employee in the exercise of his Section 7 rights. I conclude that Respondent, in violation of Section 8(a)(1), by Benoit, in September 1993, threatened its employees with transfer or discharge if they continued to support the Union.

Whittington's undenied threat to Johnson that the Union "is going to get you and a whole lot of other people ran away from Avondale," is, of course an unadulterated threat of discharge, and I find and conclude that Respondent, in violation of Section 8(a)(1), by Whittington, in April 1994, threatened its employees with discharge if they supported the Union.

Whittington did not, however, tell Johnson that he "had been denied a wage increase" because of his union activities, as further alleged. Whittington told Johnson that he could get Johnson a raise if he did not have such a "bad attitude," but he did not say that a wage increase had already been denied Johnson. While the term "bad attitude" is often used as a shibboleth for "union-adherent," the Union had not been mentioned in the exchange by that point, and it was first mentioned by Johnson. Johnson had just received the warning notice of March 11, and it may be equally inferred that Whittington was referring to that. I shall recommend dismissal of that allegation of the complaint.

Johnson's Discharge—Credibility Resolutions and Conclusions

Without objection by the General Counsel on the basis of *Bannon Mills*, or anything else, Walker testified on direct ex-

amination that he watched Johnson go from point to point in the yard for "over an hour and ten minutes." Johnson did not wear a watch, and he did not make any testimonial appraisal of how long he was absent from the ship. This testimony by Walker therefore stands undenied, and I credit it. I also credit the statements that Walker made on cross-examination that Johnson and the Bobcat driver, Forest, stopped and talked for 10 minutes. I have taken into consideration the fact that Forest is a current employee, but he was simply unimpressive as a witness on this issue, and I had no confidence in his testimony on this point. Over Johnson's testimony, I also credit Walker's testimony that he saw Johnson disappear into the restroom for 15 to 20 minutes. I further credit Walker's denial that he told Johnson that he did not know what the matter was all about during the brief period that he and Johnson waited for Fedrick to return with a warning notice. I further do not believe Johnson's testimony that Pinckney told him to go to Fedrick's office on the ground to get blades, or anything else. Walker credibly denied seeing Johnson go to Fedrick's office; also, the office was always locked when Fedrick was not there, something that Pinckney would know; Pinckney would not have sent Johnson to Fedrick's office without checking, or having Johnson check, to see if Fedrick were not on the ship, the place he usually worked.

Even if Pinckney did tell Johnson to get blades, even by Johnson's own account he did not tell him to go the substantial distance to wetdock-3 to get them. I further credit Walker and Fedrick that Johnson had only one bag with him when he returned to the ship, and that Johnson then had no blades with him. I believe, and find, that Johnson saw a free bicycle when he left the restroom, and he used it to go to wetdock-3 for no purpose related to his assignments by Pinckney. It is undenied that Johnson saw Lindsay at, and as he returned from, the wetdock-3 area, but Lindsay would not have known whether Pinckney had sent Johnson there, and he would have had no reason to question Johnson about his representation; leadman send helpers throughout the yard to get things without clearing such assignments with their foremen. There is not a credible estimate of how long it took Johnson to go to wetdock-3 and return, but, from the various descriptions of distances in the record, I find that it was at least 20 minutes.

Johnson was twice-threatened because of his union activities. The second threat, by Whittington, was categorical; to "run off" is common shop parlance for "discharge." And that threat occurred shortly before Johnson's discharge. Therefore, the General Counsel has clearly presented an prima facie case that Johnson was discharged in violation of Section 8(a)(3), and Respondent's defense for that discharge must be examined.

Fedrick testified that, although Johnson was guilty of an immediate discharge offense under the Avondale Employees' Guide, he nevertheless would have only issued Johnson another warning notice but form his prior misconduct as memorialized in the warning notice of March 11. In this posture, Johnson's case is no different from those of the 883 employees listed in the case of discriminatee Marshall who, during the 1990–1994 period, received three (not just two) warning notices in 12-month periods without being discharged. Clearly, then, Respondent has not presented a defense that shows that it would have discharged Johnson even absent his known protected activities. I therefore find and conclude that by discharging Johnson Respondent violated Section 8(a)(3) of the Act.

6. Employees warned or discharged for quitting work early

a. Donald Mason

Donald Mason (vols. 22, 51), who is employed by Respondent as an electrician, was issued one warning notice on December 9, 1993, and he was issued another warning notice on May 19, 1994.[372] The second complaint, at paragraph 131, and the fourth complaint, at paragraph 31, allege, respectively, that by the issuance of the warning notices Respondent violated Section 8(a)(3). The General Counsel contends that Respondent issued the warning notices because of Mason's known union activities and expressions of sympathy which included his wearing of prounion insignia. Respondent answers that the supervisor who caused both warning notices to be issued to Mason did not know of any prounion sympathies held by Mason when the December warning notice was issued, although that supervisor did suspect Mason of prounion sympathies when he issued the May warning notice. Respondent further answers that Mason was issued the warning notices solely because, on December 8, he left his work area before 3:30 p.m., and, on May 13, Mason left his work area before 12 noon (lunchtime). The General Counsel replies that the defenses for the warning notices are pretexts because Mason did not leave his work area early on either date. Alternatively, the General Counsel contends that other employees were allowed to engage in such conduct with impunity and that Mason was treated disparately. Ultimately, I find and conclude that Mason was treated disparately on both occasions and that Respondent violated Section 8(a)(3) by the issuance of both warning notices.

Mason is an internal-communications technician in the electrical department. Mason testified that, beginning with the initiation of the organizational attempt in March, and continuing through the dates of his testimony, he wore "Union-Yes" stickers on his hardhat. General Foreman Mark Poche (vol. 77) admitted that he saw Mason wearing prounion insignia on his hardhat "from March to June 1993." Also, from the start of the campaign until the June 25 Board election, Mason regularly wore a large union button on his shirts. Further according to Mason, he also regularly used a pocket protector that had "IBEW" printed on it. He also maintained a union sticker on his lunchbox which, during the day, was stored in areas where anyone else could see it. Alleged discriminatee Sidney Jasmine (vol. 23) testified that he saw Mason wearing "Union-Yes" stickers on his hardhat during the preelection period, and Jasmine further testified that he saw Mason wearing the stickers daily until the week before Jasmine testified.

(1) Mason's warning notice for quitting work before shift end

Background

As noted, general offense-4 of the Avondale Employees' Guide is: "Wasting time, loitering or leaving the working place without permission." General offense-5 is: "Quitting work, washing up, or going to the timeclock area before the specified time." As has been further noted, Respondent sounds a whistle 10 minutes before the end of each shift. The Avondale Employees' Guide does not say what the employees are to do during those 10-minute periods, and no memoranda to employees have been issued on the topic. There was placed in evidence by Respondent, however, a memorandum dated March 16, 1990,

[372] All dates mentioned in Mason's case are between April 1993 and May 1994, unless otherwise indicated.

from Production Vice President Simpson to "All superintendents, general foremen and foremen." The stated topic is "Work hours and supervision." The memorandum states:

> Normal working hours are from 7:00 a.m. to 3:30 p.m., with a 1/2 hour lunch break from 12:00 noon to 12:30 p.m. Workers are allowed to discontinue work at 3:20 p.m. to facilitate pickup of tools, cleanup of the work area, securing of materials, etc. No one should be allowed to leave their work area at the end of the work shift until it is in a safe and orderly condition. Loitering away from the job is a violation of company work rules.

Several supervisors testified that this memorandum was often reissued, and that it was often read, and reread, to the employees. There was no evidence to the contrary. There is, therefore, no issue that there exists an announced work rule that employees must clean, and stay in, their work areas during the last 10 minutes of a shift.[373] Indeed, both the General Counsel and Respondent placed in evidence copies of many general offense-4 and -5 warning notices that were issued because the employees had not followed this "quitting-work-early rule," as I shall call it. Nevertheless, although the General Counsel concedes that there has been some enforcement of the quitting-work-early rule, he contends that it was enforced disparately against Mason on December 9.[374]

Before December 9, Mason had received one warning notice for violation of the quitting-work-early rule. Mason was issued a warning notice on April 23 by Electrical Department Foremen Dell Thibodeaux and Louis Lester. The date and time of offense is listed as "3:22 p.m., 4/22/93." The box for General offense-4 is checked, and the reason for warning space is completed: "Mr. Mason [was] wasting time [by] not cleaning at cleanup time." General Foreman Jerry Gerdes testified, without contradiction, that he caused this warning notice to be issued to Mason because he had found Mason sitting on a bucket at 3:22 p.m., rather than cleaning his work area.

Mason's Warning Notice for Quitting Work Before Shift End—the General Counsel's Evidence

On December 8, Mason was assigned to work on an *LSD*. The decks on the *LSD* are, going down, the main deck, the second deck, the third deck, the fourth deck, and the fifth deck (i.e., there is no "first deck" below the main deck). On December 8, Mason was assigned to work in the MMR-2, the second main machinery room, of an *LSD*. The MMR-2 is amidships; it spans the fourth and fifth decks below the main deck. While there were other employees in the area, the only other electrician in the area was Van Nguyen who was helping Mason. Nguyen did not testify.

Mason testified that on December 8, he did not hear the 3:20 p.m. whistle that announces cleanup time, but he did hear a public address system announcement that it was time for employees to clean up their work areas. Mason testified also that he did not hear a 3:30 p.m. whistle, but, by his watch, he noted when it became 3:30 p.m. At that point, and not before, Mason testified, he and Nguyen quit work. They climbed stairways until they got to the second deck, the deck immediately below the main deck (where there was a gangway to the dock). According to Mason: "When I got to the second deck, he [Nguyen] was coming behind me. But after I reached the second deck, he started down the corridor, going forward; I don't know where he was after that." Further according to Mason, when he reached the stairwell of the stairs going up from the second deck to the main deck:

> there were some guys ahead of me waiting to go up the stairs. And I got closer to it, and [General Foreman] Jerry Gerdes came downstairs. Mr. Gerdes asked me for my clock number. . . .
>
> Well, I asked him what was the deal. . . .
>
> He said it wasn't 3:30 yet. . . .
>
> I told him that my watch had 3:30 or a little after 3:30—3:32 or something like that. . . . I showed him my watch. . . . I gave him my clock number. . . .
>
> He said, "That is two, buddy." And he walked away.

Mason testified that, at the time of the confrontation with Gerdes, he was wearing his hardhat (with the "Union-Yes" stickers on it). Mason testified that while he was in the stairwell, there were about five other employees around, three of whom were electricians. Mason could name none of the electricians, but he did name employee Terry Perkins as one of the two nonelectricians who were also standing near him. Mason did not know what craft Perkins was in; Perkins was not called to testify. Mason testified that he heard Gerdes say nothing to the five other employees.

On December 9, Mason was issued another warning notice; this one was signed by Foreman John Crutchfield and General Foreman Jimmy Mancuso, a subordinate of Gerdes. Crutchfield had checked the box for general offense-5 of the Avondale Employees' Guide. The date and time of offense is listed as "12/8/93—Time: 3:28." The reason for warning space is completed: "Quitting work before the specified time. . . . Final Warning."

On cross-examination Mason was asked and he testified:

> Q. Now, there is a 3:20 whistle that blows at Avondale. Correct?
>
> A. Correct.
>
> Q. And the 3:20 whistle means you stop your working and you clean up your area. Is that correct?
>
> A. Correct.
>
> Q. Then there is a 3:30 whistle that blows at Avondale, and that gives you the right to leave your work area and proceed to leave the ship. Is that correct?
>
> A. That is correct.
>
> Q. And you are supposed to remain in your work area between 3:20 and 3:30. Isn't that true?
>
> A. That is correct.

That is, Mason acknowledged that, as discussed above, there was a rule that required him to stay in his work area until 3:30 p.m. Mason also acknowledged that, in two pretrial statements, he did not mention that, when he was confronted by Gerdes at the bottom of the stairs, other electrical department employees were in the area. Finally, on cross-examination Mason was asked if he knew whether his watch was right on December 8, and he answered that he did not.

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[373] An exception exists for employees who need to use the restrooms to relieve themselves, as Terry testified in the case of discriminatee Molaison, supra. This exception is not involved in Mason's case.

[374] The General Counsel further contends that there was disparate enforcement of the quitting-work-early rule in the case of the joint discharges of alleged discriminatees Marty Bourgeois, Dwayne Braud, and Glynn Zeringue, considered next in this decision.

Mason's Warning Notice for Quitting Work Before Shift End—Respondent's Evidence

Gerdes (vols. 122, 123) testified that it was at 3:28 p.m. on December 9 when he found Mason standing with three or four other employees, none of whom were electrical department employees, at the bottom of a stairway. (Gerdes testified that Mason and the other employees were on the main deck, just below the ladder going to the 01 deck, where there was another exit from the ship, but the difference is not important.) Gerdes testified that he was confident of the time because he regularly synchronizes his watch with the plant whistles. Gerdes further testified that for Mason to have been at the stairway at 3:28 p.m., he was necessarily required to leave his work area shortly after 3:20 p.m. Gerdes agreed that he told Mason "that's two," or words to that effect, and then he called Jimmy Mancuso, general foreman over Crutchfield, and ordered that Crutchfield issue a warning notice to Mason because of his conduct. Gerdes testified that he ordered that the warning notice be made "final" because he knew that Mason had previously been issued a warning notice for the same conduct (referring to the April 23, 1993 warning notice, discussed above). Gerdes testified that he did not see any prounion insignia then being worn by Mason, and he had not known of any prounion sympathies that Mason may have then held.

On cross-examination, however, Gerdes was asked about the December 9 warning notice, and he testified:

> Q. And do you recall in and around that time period, Mr. Mason used to have a union sticker on his hardhat?
>
> A. In December? I can't remember that time period; if it was before or after that that he put the union sticker on his hat. It [was] somewhere in that vicinity. I am not exactly sure; before or after December 9, '93. I don't remember.

Further on cross-examination Gerdes denied remembering whether Mason was wearing his hardhat when, on December 9, he found Mason waiting to climb the stairway. Gerdes also testified that he did not issue warning notices to the other employees whom he saw standing with Mason on December 9 because: "Those employees do not work for me." Gerdes acknowledged, however, that he knew that the Avondale Employees' Guide states that "all supervisors" may issue warning notices to all employees. Gerdes further admitted that, ordinarily, if he saw employees of other crafts heading for a gangway between 3:20 and 3:30 p.m., he would at least "challenge" them; Gerdes acknowledged, however, that he did not challenge the employees he saw standing around with Mason on December 9. Finally, Gerdes testified that he was reluctant to challenge employees of other crafts between 3:20 and 3:30 p.m. because they may be working odd shifts (e.g., from 2 to 10:30 p.m.).

Mason's Warning Notice for Quitting Work Before Shift End—Conclusions

Mason and Jasmine testified that Mason wore prounion insignia on his hardhat from early in the organizational attempt, and thereafter. Moreover, General Foreman Poche admitted that he saw Mason wearing prounion insignia during the preelection period. Mason testified specifically that, when he was confronted by Gerdes on December 9, he was wearing his hardhat that bore two "Union-Yes" stickers on it.[375] Gerdes first denied knowing of any prounion sympathies that Mason may have held, but later on cross-examination he testified that he could not remember whether Mason had started wearing prounion insignia before December. Gerdes rendered himself incredible in this retreat. I credit Mason that, on December 9 (and before), he was wearing prounion insignia, and I discredit Gerdes' testimony to the extent that he denied seeing it on or before December 9. I therefore find that relevant knowledge of Mason's prounion sympathies is established. The element of animus, especially animus toward those employees who would wear prounion insignia, is established throughout this decision. I therefore conclude that the General Counsel has established a prima facie case that the issuance of the December 9 warning notice to Mason was unlawful, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Mason even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

As Mason admitted, he was supposed to stay in his work area until 3:30 p.m. I do not believe his testimony that he did so. (Nor do I believe the implication of his testimony that he thought that he had stayed in his work area until 3:30 p.m but he could not be sure because he was not sure that his watch was accurate.) The fact that other employees, from other crafts, were standing around the stairwell, rather than going on up it, shows that it was not 3:30 p.m. when Mason got to the second deck; first-shift employees do not stand around after 3:30 p.m.; they leave as soon as possible. I believe that, on December 9, Mason got to a point as close to the timeclock as he thought he could get without being seen by a supervisor. That point was at the base of a stairway, at the top of which he would be observable by any supervisor. Mason waited at the base of the stairway, waiting to rush up as soon as the 3:30 p.m. whistle blew. Gerdes saw Mason there and knew that, because of the remoteness of Mason's assignment that day, Mason must have been away from his work area for several minutes.

Mason, however, was not alone. There were several other employees who were similarly standing around the base of the stairway, out of their work areas, waiting to get a jump on the 3:30 p.m. whistle. I credit Gerdes, over Mason, that none but Mason was an electrical department employee. Nevertheless, Gerdes did nothing about those other employees. Gerdes attempted to excuse himself from disciplining those workers by saying that they were not electrical department employees. All employees, however, are categorically told by the Avondale Employees' Guide that they may expect discipline from any of Respondent's supervisors for violation of any of its disciplinary rules, such as its quitting-work-early rule. Gerdes next tried to explain his doing nothing about the other loafing employees on the basis that they may have been on an odd shift. Of course, if those employees were "working" on an odd shift, they would not have been standing around the bottom of a stairway, with Mason or anyone else. Finally, Gerdes acknowledged that if, during the last 10 minutes of a shift, he saw employees of other crafts approaching an exit to a timeclock, he would at least

[375] Respondent contends that, at all times, employees are required to wear hardhats in such production areas, as discussed in the case of alleged discriminatee Leroy King, infra.

challenge them,[376] but he admitted that he did not challenge these employees who were doing the undeniable equivalent.

In summary, Respondent has not shown why, among the group of employees that had quit work early on December 9, Mason was singled out for discipline. Respondent has therefore not proved that it would have issued the warning notice to Mason even in the absence of his known prounion sympathies. I therefore find and conclude that by issuance of the December 9, 1993 warning notice to Mason Respondent violated Section 8(a)(3).

(2) Mason's warning notice for quitting work before lunctime

Beginning in January, on Tuesdays and Fridays, Mason began wearing at work a prounion T-shirt, as well as his "Union-Yes" sticker on his hardhat. Mason further testified that beginning about April 6, the date of the shareholders meeting mentioned at various points in this decision, he began wearing a union cap to work; he would place his hardhat over the cap when working, but, when entering or leaving the yard, he wore only the union cap on his head. On April 6, about 9:30 a.m., Mason signed out on the MCR of his supervisor, Crutchfield, and went to the shareholders' meeting. When he signed out with Crutchfield, Mason was wearing a union T-shirt and a union cap.

Mason testified that during the morning of Friday, May 13, he told Crutchfield that he wished to leave work at noon. Crutchfield agreed. "About 11:50 or 11:55," according to Mason, he went to Crutchfield's office on the ship to sign out on Crutchfield's MCR. Crutchfield was not in his office, but the MCR was. Mason signed it. At the time, according to Mason, employee Romalis Martin was also at Crutchfield's office to sign out at noon; Martin signed out also. The MCR was received in evidence; it does indicate 12 noon sign-out times for Mason and Martin. According to Mason, he and Martin left the ship "At about 11:58, 11:59 a.m. I am not sure." Martin and Mason proceeded "40 or 45 yards, maybe" to a timeclock and punched out.

Received in evidence were two pages of Respondent's transaction register for May 13. These pages reflect that Mason and Martin punched out on the same electronic timeclock, number 22K,[377] within the same half-minute, "11:99." According to a table for Respondent's decimal-equivalent timekeeping system, ".98" is 59 minutes after the hour; there is no designation on the table for ":99," but a clock-time of ":99" is apparently within the last 30 seconds of an hour; therefore, Martin and Mason punched out within one-half minute before noon. Mason testified that Martin punched out after he did.

When Martin and Mason finished clocking out, they walked to the levee, up the levee (which is only five or six strides), to the walkway on the top of the levee, and proceeded toward a gate. As they walked on the levee walkway, Mason and Martin were approached by Gerdes who was on a motorbike, heading the opposite direction. Gerdes went past them; Gerdes stopped and turned around; Gerdes drove back to be in front of the men; Gerdes stopped and looked at the men, but he said nothing. Mason and Martin continued walking.

On May 19, Crutchfield approached Mason and handed him another warning notice. The warning notice is signed by Crutchfield and Mancuso. The box for "Other" general offense is checked; the date and time of offense is stated: "5/13/94—12:00 noon." In the reason for warning space is written, "Quitting work early and clocking out before the specified time. Final Warning." According to Mason, when Crutchfield gave him the warning notice Crutchfield told Mason that Gerdes had ordered it "because he saw me leaving at 10 minutes to 12:00."

Current employee Romalis Martin (vol. 54) testified that he started working on Crutchfield's crew "about spring of '94," and he started wearing a "Union-Yes" sticker on his hardhat about 3 weeks thereafter. Martin was asked what happened to the sticker, and he testified:

> Well, I came to work one morning and my sticker was missing off my hat. . . . I asked had anybody taken it off because some of my co-workers, they were taking stickers off as a joke and stuff, but my foreman [Crutchfield] told me that he took it off because some superintendents were asking who were wearing stickers and who weren't.

Crutchfield was not called by Respondent, and this testimony stands undenied.[378]

Martin further testified that he also received permission from Crutchfield to leave the plant at noon on May 13. Martin did not have an automobile at the plant, and he testified that, during the morning, Mason agreed to give him a ride when they left at noon. Martin testified consistently with Mason about signing Crutchfield's MCR, punching out, going to the levee, and seeing Gerdes.[379] Martin testified that he received no discipline for his having quit work early on May 13. Martin further testified that, on May 13, he was wearing no prounion insignia, Crutchfield having removed his "Union-Yes" sticker from his hardhat, as discussed above. Martin testified that, from the time that he came to Crutchfield's crew, Mason always wore prounion stickers on his hardhat, and that Mason often wore union T-shirts.

Mason's Warning Notice for Quitting Work Before Lunchtime—Respondent's Evidence

Gerdes testified that on May 19 he was riding his motorbike on the levee walkway when, about 30 seconds before the noon whistle blew, he saw Mason walking between the timeclock and the base of the levee. Gerdes testified that he knew that Mason was assigned to the ballast control room (deep within the ship) that day, and he knew that Mason necessarily would have left that area by 11:53 a.m. to get to where Gerdes first saw Mason. Gerdes further testified that Mason was alone when he saw Mason; he denied that Martin, or any other employee, was with Mason. When he got to his office, Gerdes had someone check, and he found that Mason had punched out at "11:99." He ordered Mancuso to have the above-quoted warning notice issued. Mancuso relayed the order to Crutchfield who, after some delay, issued the warning notice to Mason.

[376] In the case of alleged discriminatee Edward Armstrong, a pipefitter, Gerdes testified extensively about his duty to see that nonelectricians are working when they should be, as discussed infra.

[377] Respondent's timekeeping supervisor, Mary Arnold (vol. 18), testified that there were about 100 such terminals in the yard. Arnold further testified that the second columns of the transactions registers, such as that in evidence, show for each employee's workday, "which terminal he went to, to punch in or out, the actual location of his punch in or out."

[378] Neither Crutchfield's removal of Martin's "Union-Yes" sticker, nor his statement to Martin, is separately alleged as a violation.

[379] The alleged discrepancies cited by Respondent on brief are not significant.

Gerdes freely admitted that, at the time of the incident, he "strongly" suspected that Mason was prounion because of the unfair labor practice charge that had been filed over Mason's December 9 warning notice.

Mason's Warning Notice for Quitting Work Before Lunchtime—Conclusions

Respondent does not deny that, by the time of the May 19 warning notice, Gerdes knew of Mason's prounion sympathies. In addition to the animus toward all employees, such as Mason, who wore prounion insignia, animus toward those employees subordinate to Gerdes, as late as spring of 1994, is established. Martin testified, without contradiction, that during the spring of 1994 Crutchfield told him that he had taken Martin's "Union-Yes" sticker from his hardhat "because some superintendents were asking who were wearing stickers and who weren't." Crutchfield would not have told this to Martin had it not been true. Crutchfield would not have removed Martin's "Union-Yes" sticker had he thought that the superintendents' inquiries were only academic. Crutchfield, obviously, removed the sticker because he thought that one of the inquiring superintendents would discharge, or otherwise discriminate against, Martin because he was wearing it. Terry, again, was Crutchfield's superintendent; Gerdes had once been classified as an assistant superintendent, and, as has been noted, Gerdes was Terry's de facto assistant superintendent. A prima facie case of unlawful discrimination has therefore been established by the General Counsel, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Mason even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I believe, and credit, Gerdes' testimony that Mason would have been required to leave his work area about 7 minutes before noon to be at the point where Gerdes first saw him on, or approaching, the levee. (Even Mason admits to leaving his work area by 11:55 a.m., and possibly as early as 11:50 a.m.) Mason acknowledged that, if he were going to lunch, rather than leaving for the day, he should have stayed in his work area until noon. I agree, however, that Martin's and Mason's situation was not the same as employees who were going to lunch. Employees are not required to sign the MCRs to go to lunch. When they leave work before the regular quitting time, however, employees are required to find their supervisors and sign out on their supervisors' MCRs.[380] This is what Mason was doing. There is no question that employees are permitted to sign out for the day while they are still on working time. Signing out, after all, is work.

Nevertheless, Mason punched out before noon, and approached the levee while he was still on paid, working time, as Gerdes saw. There is no evidence that employees are permitted to punch out before 3:30 p.m. when they are working a full day, and there is no evidence that employees are permitted to punch out before noon when they are working only until noon. If this is all there were to the case, Mason would have validly been subject to discipline.

Mason and Martin, however, credibly testified that they were walking side-by-side when Gerdes would have seen Mason leaving the timeclock and walking toward the levee. Moreover, there is documentary evidence, the transaction register, that shows that Mason and Martin punched out during the same minute from the same timeclock. I do not believe that Martin thereafter left the plant on any path other than the most direct path toward the gate, just as Mason did. I discredit Gerdes' testimony to the contrary.

Mason, who was wearing prounion insignia, and who was "strongly" suspected of being prounion by Gerdes, was issued a warning notice; Martin, who was not wearing prounion insignia, was not disciplined. This is discrimination in its purest form. I find and conclude that Respondent has not shown that Mason would have been issued the warning notice of May 19, 1994, even in the absence of his wearing of prounion insignia. Therefore, by issuance of that warning notice Respondent violated Section 8(a)(3) of the Act.

b. Discharges of D. Braud, M. Bourgeois, and G. Zeringue for card playing

Dwayne Braud (vol. 10), Marty Bourgeois (vol. 27), and Glynn Zeringue (vols. 6, 7), all of whom had been employed as mechanics in the inside shop of the sheet metal department, were discharged on August 19, 1993. The second complaint, at paragraph 115, alleges that by discharging Braud, Bourgeois, and Zeringue Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Braud, Bourgeois, and Zeringue because of their known union activities and expressions of sympathy which included: (1) Bourgeois' speaking up for the Union at an employer campaign meeting; (2) Braud's responding affirmatively to two interrogations and Braud's maintenance of prounion insignia on his toolbox; and (3) Zeringue's wearing prounion insignia on his hardhat. The complaint further alleges that, in violation of Section 8(a)(1), a supervisor interrogated Braud and Zeringue about their union activities and sympathies. Respondent denies that the interrogations occurred. Respondent further answers that its supervisors had no knowledge of any union activities or sympathies of Braud, Bourgeois, or Zeringue at any relevant time. Respondent further answers that "deliberate loafing" is an immediate discharge offense under the Avondale Employees' Guide and that Braud, Bourgeois, and Zeringue were discharged for deliberate loafing by playing cards during the cleanup period between 3:20 and 3:30 p.m. on August 18. Although admitting the card playing, the General Counsel replies that the card playing defense is a pretext because the same, or equivalent, conduct had been engaged in by the same, and other, employees in the sheet metal department, and elsewhere, but no other employees were previously disciplined for such conduct. Alternatively, the General Counsel replies that, even if the card playing could be considered deliberate loafing, Braud, Bourgeois, and Zeringue were treated disparately because other employees, at other times, were no more than given warning notices for other types of loafing that could be classified as "deliberate." Ultimately, I find and conclude that no prima facie case was presented for Zeringue, and I further find and conclude that Respondent has shown that it would have discharged Bourgeois and Braud (and Zeringue) even absent their protected activities. I therefore recommend dismissal of these 8(a)(3) allegations.

In the sheet metal Shop, Braud, Bourgeois, and Zeringue worked under the supervision of Foreman Hector Navarro, General Foreman Michael Torres, and Sheetmetal Department Superintendent Allen Poleto. Other foremen (and stipulated supervisors) in the sheet metal shop at the time of the dis-

[380] Conversely, when employees work a full day, supervisors find them to secure their signatures on the MCRs, as fully discussed in the case of alleged discriminatee John Joseph, supra.

charges were Willie Dufrene, Sal Gaspar, Clifford Autin, and Eli Duhe.

Union Activity of Bourgeois, Braud, and Zeringue

Bourgeois, who had been employed by Respondent for 3 years at the time of his discharge, testified that during an April employer campaign meeting that was conducted by Navarro:

> Hector had a card that Avondale wanted us to bring to the Union and get them to sign it guaranteeing we wouldn't go on strike to get a pay raise. . . .
>
> Well, I was arguing with Hector. I told him I didn't think anybody would sign such a card guaranteeing that they wouldn't go on strike. . . .
>
> [As the employees departed the meeting] Hector was standing by the door of the engraving room handing out the cards to the employees as they left. And [as] I approached him, he pulled back the card and said he wasn't even going to give me one.

Braud, who had been employed for 13 years at the time of his discharge, testified that during the 2 or 3 weeks before the June 25 election, through the date of his discharge, he maintained union stickers on his toolbox which was openly displayed at his workbench. Also, according to Braud, in early June, when Navarro was in his work area:

> Well, I had called him [Navarro] back by my bench to ask about some blueprints on the job I was working on. And then in the process, we were talking about that. After that was over with, general conversation, then he mentioned, asked me how I felt about the Union, and I said, "Right now if the vote was being taken today, I was leaning toward the Union; I would have to vote yes."
>
> And then he said, "Well, why would you vote yes?"
>
> I said, "Well, we haven't had a raise in six years."
>
> And he said, "Well, if the management don't have the money to give you raises, they can't give you raises," and [Navarro said] that what the Union can do is only go on strike.
>
> I said, "Well, if that is what it takes for us to get raises, that is what it is going to have to take." And then he just turned around and walked off.

Braud further testified that later in the month of June, but apparently before the June 25 Board election, he was in Navarro's office to use the telephone. According to Braud, Navarro "asked if my views had changed on the Union." Braud testified: "And I told him no. I said, I would still vote for it." Braud testified that Navarro did not reply.

Based on this testimony by Braud, and other testimony by Zeringue as discussed below, paragraph 35(a) of the second complaint alleges that Respondent, by Navarro, unlawfully interrogated its employees.

Braud further testified that in "about early June, mid-June," when he and General Foreman Torres were alone in a working area:

> We were talking in general talk, and then we got on the subject of the Union, and he [Torres] asked me how I felt about the Union, what was my views on it.
>
> And I told him, "Right now if the vote was being taken I would vote for the Union." And I said that this place needed some change around here.
>
> And he told me that, "Well, the Union is really not the answer."
>
> I said, "Well, management don't have any answers for us, so why not let the Union give it a try, and work it out that way."

No allegation in the complaint was made on the basis of Braud's testimony about what Torres asked him; at trial the General Counsel stated that the testimony was presented solely for proving knowledge of Braud's prounion sympathies.

Zeringue, who had been employed by Respondent for 28 years at the time of his discharge, was shown a "Union-Yes" sticker by counsel for the General Counsel, and then he was asked:

Q. [By Mr. Morgan]: Mr. Zeringue, I show you something marked the General Counsel's Exhibit 3 and ask you if you can identify it.

A. It is a union sticker.

Q. Did you ever put it—place one of those stickers anywhere?

A. On my hardhat.

Q. Did you wear your hardhat at Avondale?

A. Right.

This is the entirety of the testimony about Zeringue's alleged union activities or expressions of prounion sympathies.

Zeringue further testified that 2 weeks before the June 25 Board election, when he and Navarro were in the work area:

> He [Navarro] asked me how I felt about the Union, and I told him I would rather not comment about it.
>
> And he said, after that, that he wouldn't vote for the Union because if the Union got in and they couldn't get new contracts; if they couldn't get new contracts, they wouldn't have money to give people raises.
>
> And I didn't have no comment to that, and he just walked off.

In addition to the above-described alleged interrogations of Braud by Navarro, the General Counsel contends that Zeringue's testimony is evidence of another violative interrogation by Navarro as alleged in paragraph 35(a) of the second complaint.

The Discharges of Bourgeois, Braud, and Zeringue—the General Counsel's Evidence

As mentioned so often in this decision, each day at 3:20 p.m. whistles blow at the plant signaling employees that it is time to begin the process of cleaning their work areas. The factual question presented in the case of Bourgeois, Braud, and Zeringue is: When employees finish cleaning their work areas, and they stay in those areas, what are they allowed to do?

Bourgeois testified that for about "three or four months" before August 18, he maintained a deck of playing cards at his work station. Bourgeois testified that regularly, about 3:25 p.m., after all of the tools had been picked up and all necessary cleaning of the work area had been done, four employees would gather at his workbench and play hands of cards until the 3:30 p.m. whistle blew. The usual participants in the games were Bourgeois, Joe Morehouse, Scott Nance, and Barry Cooper. (None of these other three employees testified.) On August 18, Nance and Cooper were absent from work, and Zeringue and Braud took their places. According to Bourgeois, as he, Braud, Zeringue, and Morehouse were playing cards:

> We played for a little bit, and then Mike Torres walked down the center aisle and seen us playing cards, and he started screaming at us. He screamed, "I can't believe you motherfuckers are playing cards. Put them up." And he started hollering for Hector [Navarro] then.
>
> . . . .
>
> I stood around by my toolbox waiting for the 3:30 whistle to blow.
>
> As I was leaving to go to the timeclock, Hector Navarro stopped me and he said I had to go with him to his office because he was going to write me up.
>
> I told him I didn't have time. I had to go catch my ride. I would do it tomorrow.

Bourgeois was asked what the other shop employees were doing when they were initially approached by Torres, and Bourgeois testified: "Some of them were sitting around. Some of them were standing around, and some of them were reading newspapers or magazines, and nobody was working at that time of the day."

Braud testified about the events of August 18:

> About 3:27, 3:28, right after we got about one or two hands of cards, and Mike Torres walked up. And he looked at us. I happened to look up and see him standing there, and then he said, "I can't believe you stupid ass holes are actually doing this." And then he started calling for [Foremen] Willie Dufrene, Sal Gaspar, and Hector Navarro. And then he turned around—excuse my language. He said, "I can't believe you stupid mother-fuckers are actually doing this."
>
> And then when he said that, it stunned me. I just put my cards down on the table and just stood there in dismay.
>
> . . .
>
> By that time, my cards were already down on the table, and we done stopped playing cards. . . .

Braud was asked what the other shop employees were doing when they were initially approached by Torres, and Braud testified: "They were watching us playing cards and some of them—one of the guys was sitting in a chair, reading a magazine, and a couple of the other guys that were off on the other side of the alleyway was just standing around talking."

Zeringue testified consistently with Bourgeois and Braud. Although Zeringue's testimony did not include any attempt to repeat Torres' curse words, Torres, himself, admits to using some curse words, and "yelling," as described below.

On August 19, at the start of the shift, the four cardplayers were called to the office of Superintendent Poleto. As the three alleged discriminatees and Torres agree, Torres told them that they were discharged for "playing cards" the day before. The complaint does not allege that the discharge of Morehouse violated Section 8(a)(3). There is no evidence or contention that Morehouse held any prounion sympathies, and there is no evidence that a charge was ever filed on his behalf.

Braud, Bourgeois, and Zeringue testified that the card games that occurred between 3:20 and 3:30 p.m. were conducted without any attempt to hide the activity and that Bourgeois' workbench was within 25 unobstructed feet of Navarro's office; they testified that Navarro would often stand in his doorway while the card playing was going on before him. They also testified that Bourgeois' workbench was at the intersection of major and minor aisle ways, and that Torres often walked through the area, easily in position to see the card games.

No employee testified that Torres or Navarro did or said anything to acknowledge that the card games were being conducted. Braud, however, testified that Foremen Dufrene and Gaspar had "three or four times" stood and watched the games. Zeringue testified that, at some point, Dufrene, "watched the game in the afternoon." Bourgeois testified that once Dufrene "walked up and seen us" playing cards; Bourgeois further testified that once,"probably about a month before" the discharges, Gaspar walked within sight of the afternoon game.

Adeline Plaisance is a retiree who worked under the supervision of Navarro at the time of the events in question. (I have previously credited her testimony (vol. 51) that in April or May 1994 she was threatened with unspecified reprisals for wearing prounion insignia by Sheet Metal Shop Foreman Autin .) Plaisance testified that, before August 18, between 3:20 and 3:30 p.m. "Well, we were supposed to pick up our tools, and after we got through with that, we could go to the bathroom or do whatever we wanted to do, read the paper, sit down, stand up, talk to the others."

Plaisance denied that the employees did any work after they finished cleaning their work areas. Plaisance further testified that she witnessed Bourgeois' end-of-shift card game being regularly conducted for 2 months before the August 18 discharges. Plaisance also testified that Foreman Dufrene would stand by the cardplayers "[j]ust watching them." Plaisance further testified that, at the end of the workdays, Navarro regularly stood by his office door in clear view of the card playing. Plaisance admitted that she could not tell what Navarro was looking at, "but he looked and watched us all the time," and she did see Navarro looking in the direction of the cardplayers at times. Plaisance testified that she was present on the day of the discharges; she testified that, between 3:20 and 3:30 p.m. that day, employees in the work areas adjacent to Bourgeois' bench, were "[j]ust standing around, waiting for the whistle to blow, talking to each other. Some of them were reading newspapers or whatever."

Plaisance further testified that each day, as 3:30 p.m. approached, employees who worked in the back of the sheet metal shop would come to her work area and wait for the final whistle to blow; then they would rush to the timeclock which was in the middle of the shop. Also according to Plaisance, each day employees who worked in the front of the shop would gather around the timeclock in order to be among the first to punch out.

Steven Marque (vol. 47), who had been employed by Respondent in the sheet metal department for 15 years at time of trial, testified that he was present when Bourgeois, Braud, and Zeringue were playing cards on August 18. At the time, according to Marque, he was 6 to 8 feet away from the cardplayers and: "I was sitting down in my home-made chair," not working. Marque testified that one or two employees "might have been cleaning the area at the time." Marque further testified that he had seen the game being conducted daily between 3:20 and 3:30 p.m., at Bourgeois' work station, "[f]or years." (Of course, Bourgeois, himself, testified that the game had been conducted only for 3 or 4 months, and Plaisance testified that she had seen it for only 2 months.) Also, Marque testified that he had seen Dufrene "on several occasions" watch the games at Bourgeois' workbench.

Michael James Boudreaux (vol. 46), a 9-year mechanic who works in the sheet metal shop,[381] testified that until Zeringue, Bourgeois, Braud, and Morehouse were discharged on August 19, Sheet Metal Shop Foreman Gaspar kept a running card game going in the back of the sheet metal shop; Gaspar's game was set up 5 minutes before the noon whistle, and it usually concluded 5 minutes after the 12:30 p.m. whistle blew. Employees under Foremen Gaspar and Duhe participated in the games. Boudreaux further testified that on the morning of August 19, shortly after Bourgeois, Braud, and Zeringue were discharged, Autin and other supervisors[382] in the sheet metal shop held meetings with employees and announced that the employees were to stay busy until 3:30 p.m.. The employees followed the instruction for about a week, but, as Boudreaux further testified: "It lasted about a week and then everybody went back to doing what they did before. . . . Everybody was standing around doing nothing again, reading the paper, standing by the clock, timeclock, waiting for the 3:30 whistle to blow." Respondent did not call Autin to testify, and this testimony is undenied.

Specifically in regard to practices in the sheet metal shop between 3:20 and 3:30 p.m. before August 18, Boudreaux further testified that, before the discharges of Morehouse, Bourgeois, Braud, and Zeringue, when the 3:20 p.m. whistle blew, employees would be "[g]oing to the restroom, cleaning up, sitting down reading the papers, newspapers" and employees could go to the restroom "[a]nytime they wanted." Boudreaux testified that two or three times a week, between 3:20 and 3:30 p.m., Autin and Sheet Metal Department Superintendent Poleto saw him reading newspapers, but he received no discipline for the practice.[383] Poleto testified, but he did not deny this testimony by Boudreaux; as Autin did not testify, Boudreaux's testimony is undenied.

Current employee Lenny Gueho (vol. 42) testified that the inside sheet metal shop's day-ending routine is: "Well, when the horn blows at 3:20 you clean up your area if it needs to be cleaned up or pick up your tools, turn in your tools to the tool room, wash up, and stuff." Gueho testified that this usually takes about 5 minutes; after that the employees go to the restroom if they wish, or they stand around in the work area and do nothing more than talk. Gueho testified that the inside sheet metal shop employees are occasionally told to stay busy, and they were told such on August 19; Gueho further testified, however, that the order was essentially ignored thereafter by the employees. Gueho was not asked if he had ever seen Zeringue, Braud, and Boudreaux play cards before they were discharged. On cross-examination, he acknowledged that he had never played cards between 3:20 and 3:30 p.m.

The Discharges of Bourgeois, Braud, and Zeringue—Respondent's Evidence

Navarro (vol. 129) denied interrogating any employees, and he denied that Braud told him that he was going to vote for the Union in the June 25 Board election. Navarro further denied seeing prounion insignia that may have been worn by Zeringue or prounion insignia that may have been on Braud's toolbox. Navarro denied knowledge of any prounion sympathies by Bourgeois, Braud, or Zeringue, and he denied discussing a "union guarantee card" with Bourgeois.

Navarro testified that before August 18 he had seen employees play cards at their work stations, but only during lunch or before or after work. Navarro testified that at regular safety meetings he tells employees that they must be working between 3:20 and 3:30 p.m. Navarro testified that he did not witness any employees playing cards on August 18; Torres came to his office late in the day and told him of the event, as Torres describes below.

On cross-examination, Navarro was asked and he testified:

> Q. And during that period between 3:20 and 3:30, after they have cleaned their area and picked up their tools, sometimes they sit and wait for the whistle. Correct?
>
> A. Some do, some don't.
>
> Q. And sometimes during that period, 3:20 to 3:30, employees go to the bathroom?
>
> A. Right. To wash their hands and come back to . . . their work area.
>
> . . . .
>
> Q. And sometimes between 3:20 and 3:30, employees gather together and talk?
>
> A. Some do, some don't.
>
> . . . .
>
> Q. Between 3:20 and 3:30 p.m., sir, on every time that you have been outside of your office during that period of time that you have observed at least one or more employees not working during that period of time?
>
> A. Yes. I have observed some.

Navarro started a vacation on August 19 and was not present for the discharges. Navarro testified that, when he returned from vacation, Torres told him that the four employees had been discharged because "[t]hey caught them over there playing cards."

Torres (vol. 118) denied knowledge of any prounion sympathies of Bourgeois, Braud, or Zeringue at the time of the discharges. Torres specifically denied having any conversations with Braud about the Union. Torres testified that on August 18, just after the 3:20 p.m. whistle blew, as he was walking in a main aisle of the sheet metal shop, he noticed "a large group" gathered around a work bench. As he approached the bench, according to Torres:

> There were three guys on the outside standing up; I think a few of them had tools in their hands. . . . As I continued walking on towards the crowd, I got closer and the three guys dispersed, leaving four people [Morehouse, Bourgeois, Braud, and Zeringue] exposed sitting down playing cards.

Torres knew two of the three employees who had been watching the card game and who "dispersed"; these two were Dominick Saladino and Rolondo Cabailero. Torres testified that someone told him later that the third employee who had been watching the card playing was Michael Cain, but Torres had not recognized Cain at the time. (Torres further testified that an eighth employee was in the immediate area of the bench, but he was doing required cleaning.)

[381] In the disposition of the case of alleged discriminatee Leroy Clark, supra, I disposed of Respondent's motion to strike all of Boudreaux's testimony.

[382] This would not include Navarro who began a vacation on August 19.

[383] At one point, Boudreaux referred to his reading time as "Between 12:20 and 12:30"; however, Boudreaux corrected himself and, also from the context, it was clear that he meant between 3:20 and 3:30 p.m.

Torres acknowledged that when he approached the cardplayers, he "blew up" and said, "I can't believe you fucking assholes. . . . You could lose your job on account of this, you know that?" Torres testified that he was "mad."[384] He went to find Gaspar and Navarro, and when he did so, according to Torres, "I said, 'Write up all these people for loafing.'" Navarro asked if the warning notices could not wait until the following morning because "it is late; everybody is getting ready to leave." Torres agreed.

Torres testified that he had never before seen shop employees playing cards between 3:20 and 3:30 p.m. Torres further testified that he had, himself, been manually working in the shop (building a machine) during the preceding 2 weeks; regularly during that period he had walked through the same aisle between 3:20 and 3:30 p.m., and he specifically denied ever having seen anyone playing cards in the area of the benches.

Torres testified that early on the morning of August 19, "I was still burning up, I couldn't believe these guys, first-class mechanics doing what they was doing." He decided to discharge the four cardplayers, rather than issue them warning notices. He prepared ASI-22 (discharge) forms for the employees; in the space for explanation for action, Torres wrote "Playing Cards." Torres then called the four employees into Poleto's office. According to Torres:

> They all sat down. I said, "You all know what you are here for." And they all said yes. And I said, "You broke a company policy, and I am terminating you for this." And they all looked at me, and then I said, "You have to sign this; as far as you are concerned, at this time you are unemployed at Avondale. It [each ASI-22 (discharge) form] is for loafing on the job, and of course, you know what you were doing, you were playing cards. And they all got up, and I am pretty sure all four of them signed the sheets.

(This is the only case of record in which alleged discriminatees were asked to sign their own ASI-22 forms.)

Further on direct examination Torres was asked and he testified:

> Q. MR. TORRES, why did you decide or make the decision to terminate the four individuals? . . .
>
> THE WITNESS: Usually when I am walking down the aisle, if someone is not doing what they are supposed to do, they scatter, you know, they have respect. When I walked down the aisle that particular day, three people took off, these four guys just challenged me, it looked like. They just sat there like [they were saying] "So what?" I couldn't believe it, I just couldn't believe it.
>
> Q. BY MR. CUPP: What are employees supposed to be doing between 3:20 and 3:30 in the Sheet Metal Shop?
>
> A. Tidying up, cleaning up, returning tools, closing their toolbox, they usually put their shoes on, take their work clothes off, their work shirts, prepare to leave.

Torres testified that he ordered warning notices to be issued to Saladino and Cabailaro. Listing 3:26 p.m. on August 18 as the time of the offenses, general offense-4 is checked and quoted: "Wasting time, loitering or leaving the working place without permission." Torres testified that he did not issue a warning notice to Cain (the third onlooker) because: "It was just a word of mouth I got from another employee that he was the third person [who had been watching the card game]."

On cross-examination Torres identified some notes that he had made shortly after the discharges. Torres was asked and he testified:

> Q. You say in your note in the last paragraph that you were coming down the aisle and noticed seven men loafing on work time. Is that correct?
>
> A. Yes, sir.
>
> Q. Why didn't you treat all seven of the men that were loafing in the same fashion?
>
> A. Because three of them just dispersed.
>
> Q. Other than that, is there any other reason that you didn't treat them all in the same fashion?
>
> A. No other reason.

Torres testified, however, that he would have discharged the four cardplayers, even if they had begun to disperse when they saw him, "because this was serious." As noted, on direct examination Torres testified that, when he first found the cardplayers, he went to Navarro and Gaspar and told them: "Write up all these people for loafing." Also, Navarro asked to wait until the next day to issue the warning notices, and Torres agreed. On cross-examination, however, Torres testified that he never considered writing warning notices to the four cardplayers because: "These guys just was trying to take advantage of me, you know, no respect whatsoever." As also noted, Torres testified on direct examination that he decided to discharge the four cardplayers because they did not "scatter" and show "respect" when he approached. On cross-examination, however, Torres acknowledged that the cardplayers did not see him until he "yelled." (Torres changed this testimony after a late objection from Respondent's counsel, but I do not credit that change.)

Torres acknowledged that when employees are through cleaning their work areas between 3:20 and 3:30 p.m., they are free to go and wash their hands, and some employees could have been in the restroom when the card playing was going on. Torres further acknowledged that Navarro or Gaspar could have seen the card playing of August 18 if they had stepped out of their offices. Torres admitted that he was "focused" on the cardplayers and the employees standing around them; he did not notice what other employees in the area were doing. That is, Torres did not dispute the testimony of the General Counsel's witnesses that other employees were standing (or sitting) around, doing nothing, when he approached the cardplayers.

Discharges of Bourgeois, Braud, and Zeringue—Conclusions

Navarro denied the testimony by Braud and Zeringue that Navarro interrogated them; however, I found Braud and Zeringue credible, and I do credit their testimony. I find and conclude that Respondent, in violation of Section 8(a)(1), by Navarro, in June 1993, interrogated its employees about their union membership, activities, or desires.

I credit the testimony of Bourgeois that he spoke up in favor of the Union in an employer campaign meeting that was conducted by Navarro. What Bourgeois said to Navarro could not, in the abstract, be considered a forceful prounion statement, but it was enough for Navarro to recognize Bourgeois as being one who did not want, or would not accept, Respondent's campaign material (the guarantee card). I have further credited the testimony of Braud that he twice told Navarro, in response to

[384] The Tr., vol. 118, p. 28,839, L. 9, is corrected to change "made" to "mad."

unlawful interrogations, that he intended to vote for the Union at the Board election. I further credit Braud's testimony that he openly displayed a prounion sticker on his toolbox while he was working, and I further credit his testimony that he told Torres that he would vote for the Union because "this place needed some change around here." I therefore find that Respondent's supervisors had knowledge of the prounion sympathies of both Braud and Bourgeois at the time of their discharges. The element of animus, especially toward those employees who displayed prounion insignia, is established throughout this decision. Therefore, the General Counsel has presented prima facie cases that the discharges of Braud and Bourgeois were unlawfully motivated, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Braud and Bourgeois even in the absence of their known protected activities. Respondent's defenses must therefore be examined.

Zeringue, however, appears not to have been a prounion employee. The entirety of Zeringue's testimony about wearing prounion insignia was that he could identify the "Union-Yes" sticker, that he (at some undisclosed time for an undisclosed period) placed one on his hardhat, and that he wore his hardhat at work (as all production employees are required to do). Nowhere in this testimony is there evidence that Zeringue placed the "Union-Yes" sticker on the hardhat before he was discharged. Assuming that Zeringue put the sticker on his hardhat before his discharge, there is no testimony about how long he maintained it there; for all that the record shows, Zeringue could have had a change of heart, and he could have taken the sticker off his hardhat immediately after he had put it on. Other alleged discriminatees who testified that they wore prounion insignia on their hardhats further testified that they maintained the stickers there until they were discharged, or at least for a significant amount of time; this was simply not so with Zeringue. Moreover, neither Braud nor Bourgeois testified that they saw Zeringue wear prounion insignia in the shop (or anywhere else). Finally, sheet metal shop employees Gueho, Marque, Boudreaux, and Plaisance testified (as described above), but they were not asked if they ever saw Zeringue wearing prounion insignia. In sum, there is no probative evidence that Zeringue wore prounion insignia while he was employed by Respondent, and if Zeringue's testimony had been true, the General Counsel could easily have presented corroborating evidence. I draw an adverse inference against the General Counsel for failing to present corroboration for Zeringue's (ambiguous) testimony about his display of prounion insignia.[385] I do not credit Zeringue's testimony to the extent that it was intended to convey the impression that he wore prounion insignia while working.[386] Zeringue responded evasively to Navarro's interrogation; therefore, if Zeringue ever held any prounion sympathies, there is no evidence that any of Respondent's supervisors knew of it. Therefore, the General Counsel has not presented a prima facie case that Zeringue was discharged because of his prounion sympathies, and I would recommend dismissal of the allegations relating to Zeringue's discharge on that basis, alone. (As discussed below, the General Counsel does not contend that nonunion employee Zeringue was discharged as part of a plan of Respondent's supervisors to discharge prounion employees Braud and Bourgeois.)

There is much evidence that Braud, Bourgeois, Zeringue, and Morehouse were treated disparately. Boudreaux testified that, before the discharges, Foreman Gaspar kept a running card game going in the back of the shop, and Gaspar conducted the game a few minutes before and after the lunchbreaks; i.e., on working time. Employees of both Gaspar and Duhe participated in the games, according to Boudreaux. Neither Gaspar nor Duhe was called by Respondent to deny this testimony which I found credible. There is no meaningful distinction between this conduct and the conduct for which Bourgeois and Braud were discharged. There is even undenied, credible, testimony by Plaisance and Marque that Supervisor Dufrene sometimes watched the running card game that Bourgeois conducted. The only possible reason that Gaspar, Duhe, and Dufrene were not called to testify by Respondent is that the testimonies of Boudreaux, Marque, and Plaisance were true, as I so find. Employees in addition to the alleged discriminatees credibly testified that the employees do nothing after they have cleaned up for the day. Plaisance credibly testified that the practice was: "[W]e could go to the bathroom or do whatever we wanted to do, read the paper, sit down, stand up, talk to the others." Over Torres, I further credit Plaisance's testimony that employees in the back of the shop would leave their areas in order to get into positions to more quickly punch out when the 3:30 p.m. whistle blew. Boudreaux testified that, before the discharges, he would regularly stand around doing nothing except read a newspaper, between 3:20 and 3:30 p.m.; Boudreaux further testified that he was regularly seen doing this by Autin (whom Respondent did not call to testify) and Poleto (who testified, but he did not deny this). I credit this undenied testimony. Boudreaux further was credible in his testimony that, after Autin told the employees to work until 3:30 p.m., the employees did so for a while, then things went back to: "Everybody was standing around doing nothing again, reading the paper, standing by the clock, timeclock, waiting for the 3:30 whistle to blow." Further, Gueho was credible in his testimony that employees sat around doing nothing between 3:20 and 3:30 p.m., before and after the discharges. Finally, Marque credibly testified that when Torres approached the cardplayers, he was sitting in his homemade chair only 6 to 8 feet away, doing nothing, and he was not disciplined. Although Navarro first said that it was "very seldom" that he sees employees not working between 3:20 and 3:30 p.m., he admitted that some employees "sit and wait for the whistle," and some "gather together and talk." Navarro finally admitted that every time that he comes out of his office between 3:20 and 3:30 p.m., he sees some employees not working. In summary, the preponderance of the evidence is that the sheet metal shop employees were permitted to do whatever they wanted to do between 3:20 and 3:30 p.m., including reading

[385] In other cases, the General Counsel had witnesses corroborate testimony by the alleged discriminatees about their expressions of prounion sympathies. For example, former employee Donald McGee (vol. 58) did not know the name of alleged discriminatee Octave Rouege, but the General Counsel took the effort to have McGee describe Rouege and testify to Rouege's wearing of prounion insignia. When I asked the General Counsel to explain the relevance of his questions to McGee, he replied, "I guess also—so there is no adverse inference." (Unlike Zeringue, Rouege had given unambiguous testimony about his wearing prounion insignia.)

[386] For possible purposes of review, I here state that I credit the testimony of Torres and Navarro that they did not see prounion insignia that Zeringue may have worn.

newspapers[387] or simply doing nothing, as long as their work areas had been cleaned. Respondent makes no contention that the cardplayers had failed to clean their work areas on August 18.

There is even specific credible evidence that before Torres saw Braud, Bourgeois, Zeringue, and Morehouse employees were allowed to play cards during working time, at least at certain periods of the day. I credit the testimonies of Marque, Plaisance, Bourgeois, Braud, and Zeringue that Bourgeois' running card game had been conducted at least for months (although Marque made a flippant exaggeration that it had been conducted "for years"). No witness of the General Counsel testified that either Torres or Navarro did anything to indicate that they had seen the card game, and there is no probative evidence that Torres had ever seen a card game before August 18. There is, however, abundant evidence that Navarro often stood before his office at the end of the day, and Torres admitted that had Navarro been standing before his office on August 18, he would have seen the card game. I find that Navarro knew of the running card game that had been conducted for at least 2 months before the discharges. Obviously, Navarro did nothing about it. The four cardplayers, therefore, were not engaging in conduct that had theretofore been prohibited; in fact, it had been tacitly permitted by their supervisor, Navarro.

Further on the issue of disparate treatment: Respondent contends that Bourgeois, Braud, and Zeringue were discharged for deliberately loafing. Of course, the conduct of the three onlookers was equally deliberate, but two of them (Saladino and Cabailaro) were excused with no more than a warning for "wasting time," a general offense under the Avondale Employees' Guide, and one of them (Cain) was not punished at all. (That Cain was not recognized immediately by Torres is no distinction; Torres had ways of finding out his employees' names, and, in Cain's case, he did.) The only putative distinction that Torres could advance between the cardplayers and the onlookers was that the latter "dispersed" when he approached. To explain why that made a difference, Torres claimed that the cardplayers were paying him "no respect." Of course, because the employees had previously been permitted to play in that card game between 3:20 and 3:30 p.m., and other employees were permitted to play in Gaspar's card game, during working time, the alleged discriminatees had no reason to believe that they needed to rise and show such "respect" to Torres. Even if the employees had known that they needed to show such respect to Torres by rising when they saw him approach, Torres admitted that they had not seen him before he began "yelling."

Finally on the issue of disparate treatment: the General Counsel further adduced evidence that similar time-wasting activities were punished with no more than general offense warning notices. For example, a significant number of employees who disappeared from their jobs, or simply did not do cleaning work between 3:20 and 3:30 p.m., were given general offense warning notices, and sometimes "final" warning notices, but they were not discharged.[388]

In summary, it is clear that Braud, Bourgeois, Zeringue, and Morehouse were treated disparately. Nevertheless, they were all treated alike, and the General Counsel does not contend that the nonunion employees, Morehouse and Zeringue, were discharged as part of some plan of Respondent to rid itself of prounion employees Braud and Bourgeois. Indeed, the General Counsel essentially ignores the discharge of Morehouse, except to note, as have I, that no charge was filed on his behalf. Morehouse could have been an alleged discriminatee, even though no charge was filed on Morehouse's behalf.[389] I find that the General Counsel's failure to allege, or prove, that nonunion employees Morehouse and Zeringue were discharged in order to rid Respondent of prounion employees Braud and Bourgeois is fatal to the contention that Braud and Bourgeois were discharged unlawfully. Certainly, the General Counsel concedes that the discharge of Morehouse was lawful by not alleging that Morehouse was unlawfully discharged when the General Counsel could have made that contention, even in the absence of a charge being filed on Morehouse's behalf. Moreover, even if there were some theory under which the General Counsel's allegations for Braud and Bourgeois remained viable after the General Counsel declined to issue a complaint on behalf of Morehouse, the facts are against the General Counsel.

Although there is much evidence of disparate treatment in the discharges of Braud and Bourgeois, evidence of disparate treatment does not create a conclusive inference of unlawful motivation. In this decision I have, several times, found such inference to be appropriately drawn when there is a prima facie case and no credible evidence of countervailing considerations has been presented by Respondent. In this case, however, there is the significant, even determining, countervailing consideration that two nonunion employees were treated at the same time with the same treatment for the same conduct as were the two prounion employees. This immediate, even-handed treatment of prounion and nonunion employees defeats the General Counsel's propounded inference that the prounion employees were punished unlawfully. That is, even given the evidence of disparate treatment that exists in this case, Respondent has shown that it would have discharged Braud and Bourgeois even absent their protected activities, just as it discharged nonunion employees Zeringue and Morehouse.

Therefore, as well as recommending the dismissal of the allegation that Zeringue was discharged unlawfully, I shall recommend dismissal of the allegations that Braud and Bourgeois were discharged in violation of Section 8(a)(3).

7. Employees terminated as assumed to have quit

a. Charles Giles

Charles Giles (vols. 3, 158) was a preventive maintenance coordinator in the ships' tests and trials department until he was discharged on August 3, 1993. Before he was discharged, Giles was transferred from an office that was in a building to a room that was on a ship. The first complaint, at paragraphs 26 and 27 respectively, alleges that by transferring and discharging Giles Respondent violated Section 8(a)(3). The complaint alleges that Giles' transfer was to a more onerous position, and the General Counsel contends that Respondent transferred and discharged Giles because of his known union activities and expressions of sympathy which included his taking a leading role in the conduct of a June 19 union meeting and his serving as an observer

[387] Note that alleged discriminatee Leroy Clark was discharged in the electrical department for the stated reason that he had been reading a newspaper on a break.

[388] One such example is found in the immediately preceding case of alleged discriminatee Donald Mason who was issued a general offense-4 warning notice for sitting on a bucket, rather than cleaning, between 3:20 and 3:30 p.m.

[389] See, for example, *Control Services*, 315 NLRB 431 (1994).

at the June 25 Board election. The complaint further alleges that, in violation of Section 8(a)(1), Giles was interrogated, his grievances were solicited, and he was given the impression that his union activities had been under surveillance. Respondent denies that the alleged interrogation, impression of surveillance, or solicitation of grievances occurred. Respondent further answers that Giles' work station was changed because (1) all preventive maintenance coordinators were moved to ships, (2) a superintendent of another department had indicated that he wanted to use Giles' office space, and (3) Giles was moved on June 21 because he was found on that date engaging in talking about the Bible, and not working, during working time. Respondent further answers that Giles was terminated solely because he had not appeared for work, and he had failed to contact Respondent, over an extended period of time. The General Counsel replies that all of Respondent's defenses are pretexts. Ultimately, I find and conclude that Giles was unlawfully assigned a more onerous job position (transferred), but that he was not unlawfully discharged.

The employees in Respondent's ships' tests and trials department are generally classified as operators, and the department was usually referred to by the witnesses as the "operators department." The operators department coordinates various functions that involve different departments. Giles was hired by Respondent in January 1987. Giles had had congenital polio, and he always walked with something of a limp, but he was hired without limitations. During his entire tenure of employment, Giles reported directly to Operators Department Superintendent Jeffrey Boudreaux; Boudreaux reported to Vice President Ken Genter. For the first 2 years of his employment, Giles was a test coordinator. A test coordinator maintains documents relating to tests of equipment that had been placed on a ship. During his last 3 years of employment Giles was a preventive maintenance coordinator. Boudreaux described the job of a preventive maintenance coordinator as:

> Preventative maintenance is maintenance performed on equipment before it is running to prevent it from tearing up or being destroyed. The Navy requires us to have machinery history documenting that we did observe and do maintenance on the equipment while it was down or while it was running. It comes at different time cycles; different equipment had different things.
>
> Giles' job was to take this schedule, go aboard the ship, give it to those people who were supposed to do the maintenance, make sure all of the equipment was done at that time, take the paperwork after they sign it and initial it and stamped and said they did it—and you assume that they did or saw that they did—take the paperwork back to Preventative Maintenance [Department] supervisor, Mr. [Michael] Bobbitt.[390] And it was entered into a history. And upon completion of a ship all of these records were then given to the Navy to be entered into their machinery history for the ship.

Giles worked in Boudreaux's outer office in a building at wet dock-3 until June 1992 when he was assigned an office in a building at wet dock-1. wet dock-1 was about a mile from wet dock-3. As a tester, then as a preventive maintenance coordinator, Giles regularly went from his office to, and through, the ships. For longer excursions, he rode a bicycle about the plant areas.

Alleged Interrogation of Giles by Carr—the General Counsel's Case

Al Carr was a general foreman over instrumentation during the preelection period. Giles testified that on March 15, Carr conducted an employer campaign meeting in Carr's office. Giles flatly denied that he could remember anything that had been said in Carr's meeting.[391] Giles testified that after the meeting he returned to his office where he received a telephone call from Carr. According to Giles:

> Well, Mr. Al Carr simply requested me to write a statement about my position as far as the Union was concerned. And I questioned him. But he said, "No, all I wanted was a statement."
>
> . . . .
>
> I said, "You want a written statement to that effect?" He said, Yes. . . . And I said, "Fine."

Based on this testimony by Giles, paragraph 8(a) of the first complaint alleges that Respondent, by Carr, interrogated its employees.

Giles testified that after Carr's call, he called Boudreaux's clerk, Beverly Chaisson. According to Giles:

> I . . . asked of her did she know anything about writing a letter—a statement to the effect of my position and our position with the Union. And she in turn said, "Well, they want is just a—you know, just how-you-feel-about-the-Union statement."

Giles identified a letter that he then composed and dated March 16, to wit:

> To whom it may concern:
> From Charles Giles, Jr., Operators Dept.
> Re: Per your request concerning meeting about union.
>
> I really appreciate the information received from our supervisors on 3/15/93. The information was clear and concise. I personally will not be voting for a union.

Giles triple-underlined "will not" and signed the letter. He then sent the letter to Carr.

Alleged Interrogation of Giles by Carr—Respondent's Evidence

As noted above, Giles flatly denied that he could remember what Carr had talked about during the employer campaign meeting of March 15. In his direct examination, however, Boudreaux (vol. 108) testified that Carr had told him that he had talked to the employees and: "asked if they had any problems or any questions they would like answered, please write it on a piece of paper and give it up to him." Based on Boudreaux's testimony of what Carr had told him, the General Counsel moved to amend the first complaint to include, as paragraph 8(b), an allegation that Carr had solicited employees' grievances in violation of Section 8(a)(1).

[390] There is an entire preventive maintenance department; Giles worked in coordination with that department, but he was not an employee of it.

[391] Respondent presented testimony about what Carr said during the meeting, and, on the basis of that testimony, the General Counsel moved to amend the complaint to allege a solicitation of grievances, as discussed below.

Carr (vol. 143) testified that the March 15 employer campaign meeting was attended by about eight employees. In that meeting, Carr testified, he told the employees that he had no use for any union. Further according to Carr:

> This was only a two or three, maybe five, minute meeting at the most. I then asked them as an afterthought—that was basically the [end of the] meeting, but as an afterthought—because the whole crowd was kind of down, [I] couldn't get any feedback; they didn't want to talk—as an afterthought I says, "Listen, if there is anything that you all can submit that would help to improve morale in here, if you will submit it, I will submit it." I said, "Now, I don't want to hear anything about pay raises; I don't want to hear anything about money; and I won't make any promises." I said, "I will submit it." That was basically the end of the meeting.

When asked on cross-examination if he told the employees what he meant by "morale," Carr responded: "I did not say what I meant about morale. They knew it." Carr was further asked and he testified:

> Q. I am talking about in 1993, March of 1993, you said that the employees understood what you meant by the term "morale issues." What is it that was meant by that term?
>
> A. Things that we were doing at that time within our department. We have crawfish boils once a year. . . . We have fishing tournaments. We have golf tournaments. Company morale things; get the people together.
>
> Q. Those things were already going on in the yard?
>
> A. Yes. I was looking [for?] anything else that we could do in that area.

After Carr gave this testimony the General Counsel offered a letter dated February 28, 1994, to the Region from Respondent's counsel. In that letter, in which counsel responded to the charges that had been filed on behalf of Giles, counsel states:

> At a meeting with employees which was held sometime in March, Mr. Carr asked the employees to write down any questions that they had that they would like upper management to address. Specifically, Mr. Carr asked if they had any problems they were unhappy about or any company policies they were dissatisfied with, such as employee benefits, health insurance, and the like, that they would like the Company to respond to. This was not an interrogation of employees concerning their union sympathies; it was simply an effort by the Company to determine the employment-related concerns of the workforce.[392]

As discussed below, the General Counsel contends that this letter is an admission by Respondent that Carr did, in fact, solicit grievances.

Carr further testified that, after the March 15 employer campaign meeting, Giles approached him and told Carr that he would have something for Carr. Also at this time, further according to Carr, Giles showed him some kind of AFL–CIO card and Giles told Carr that, "he understood where I was coming from because he had been a member of a union before, and he had no use for them either."

Carr further testified that, later in the afternoon, when he had received nothing from Giles, as Giles had promised, he called Giles and: "I said, Mr. Giles, you said you had something that you wanted to give to me." Carr testified that Giles replied, "Yes, I will get it for you." Carr testified that the next day, he received in the interoffice mail Giles' letter of March 16, as quoted above. When he received the letter, he called Giles and told Giles that this was not what he had asked for. Giles replied that it was something that he wanted to "share" with Carr. Carr flatly denied that he ever asked Giles for a written statement about how he felt about the Union.

Chaisson (vol. 120) testified that Giles did call her and say that the operators had had a meeting about the Union. Further according to Chaisson, Giles told her that "Al Carr wanted a statement from him, and he asked me what I thought he should do. And I told him to do what he wanted . . . just make it short and sweet, you know. Just go to the point. Whatever he wanted to do, you know." Chaisson was further asked on direct examination and she testified:

> Q. [By Mr. Hymowitz]: Do you recall anything else from that conversation that you said?
>
> A. No. I don't.
>
> Q. Did you ever tell Mr. Giles during that conversation that what they want is just a statement about how you feel about the Union? . . . Did you ever tell him anything like that?
>
> A. No. No. I don't remember.

Alleged Interrogation of Giles by Carr—Conclusions

If Giles was singled out for a written declaration of how he felt about the Union, he was the only employee in this extensive case who was. I did not believe Giles' testimony as he gave it, and I do not believe it now. I certainly do not believe Giles' testimony that he could remember nothing about what Carr had said during the March 15 employer campaign meeting. Giles gave that false testimony, I believe, to disguise the fact that he had gotten the original idea for a letter to Carr during the March 15 meeting, not afterwards. I credit Carr. I believe, and find, that Carr did ask for submissions of suggestions of what might improve morale (and the legal ramifications of that request will be discussed below). After the meeting Giles told Carr that he, as well as Carr, had no use for unions; Giles also told Carr that he would, indeed, have a submission pursuant to Carr's request. Giles then called Chaisson, Boudreaux's clerk. Giles testified that he called Chaisson to find out what Carr wanted; Giles had testified, however, that Carr had "simply requested me to write a statement about my position as far as the Union was concerned." If Carr had made a simple request for a statement of how Giles felt about the Union, there was nothing left for Chaisson to explain to Giles. I believe that, when he got back to his office, Giles, on his own, decided to ingratiate himself by telling Carr what he wanted to hear most. Giles could not think of the best way to express it, so he called Chaisson and asked her for ideas. Notwithstanding her denial (followed by her disclaimer of memory), Chaisson agreed with Giles that an antiunion statement would be a good thing to submit, and told Giles to just keep it brief. The content of Giles' letter (with its palpable sycophancy) was not requested by Carr. That is, Carr did not interrogate Giles. I shall therefore recommend that this allegation of the complaint be dismissed.

Because Giles (falsely) disclaimed memory of what Carr said in the March 15 employer campaign meeting, the only

[392] This exhibit was properly marked as G.C. Exh. 630, although the marking was incorrectly stated to be "634" at the time that the exhibit was offered.

testimony on the point is Carr's. Carr told the employees that, if any employee submitted to him a suggestion to improve morale, "I will submit it." As counsel's letter admitted, Carr was telling the employees that he would submit their suggestions to Respondent's "upper management." The issue before the Board, therefore, is whether Carr's March 15 statement to the operators was a solicitation of grievances that, expressly or implicitly, contained a promise of remedy.

Carr testified that he did not tell the employees what he meant by "morale," but he admitted that he meant such obvious economic benefits as annual crawfish boils, fishing, and golf tournaments. Carr further admitted that the employees knew that he meant such things. Carr did not testify how he knew that the employees knew what he meant; perhaps it was because of other things that he had said at other times. At any rate, Carr would not have admitted that the employees knew that he was referring to such economic benefits as the annual crawfish boils, fishing, and golf tournaments if it was not true. Carr further admitted that he asked the employees what improvements they wanted only after they failed to react to his presentation against the organizational attempt that had begun just 2 weeks before. That is, Carr admitted that, when the employees made clear that they were not interested in whatever arguments he was making, he asked them to tell him what he could do or say that would impress them. Or, as Respondent stated in its Counsel's letter of February 28, 1994, "it was simply an effort by the Company to determine the employment-related concerns of the workforce." This was a solicitation of grievances, and nothing less.

Carr also told the employees that he would seek remedy for their complaints of insufficient economic benefits, or grievances. Carr did not make an express promise that requested benefits would be granted, but he told the employees that he would submit their requests to higher management. Carr's holding out of the prospect of remedy was an implicit promise of remedy.[393] The coercive impact, moreover, was made clear by the sequence that Carr described. Again, Carr testified that he asked what would satisfy the employees, and promised to pass their requests on to higher management, only after they failed to respond to his presentation that the employees should not accept the Union as their collective-bargaining representative. The coercive impact could not have been missed by any reasonable employee. I so find.

I therefore conclude that, in violation of Section 8(a)(1), Respondent, by Carr, on March 15, 1993, solicited the grievances of its employees and promised to remedy those grievances.

(1) Giles' assignment of more onerous working conditions

Background

As noted above in the introductory section of this decision, the Avondale Employees' Guide states:

> It is the employee's responsibility to notify his supervisor or department head's office of the reason for his absence or tardiness on a daily basis. Failure to do so will result in either a written warning or discharge.

The assigned reason for Giles' discharge is that Giles was absent from June 29—28, and he failed to call in to his superintendent's office as required by the Avondale Employees' Guide. Giles was transferred before he was discharged, and Giles claims that he suffered an accident in Respondent's parking lot at some point before he was transferred. The General Counsel contends that factors involved in the accident affect the determinations about both his allegedly more onerous work assignment and his discharge.

Respondent's medical department (which is also sometimes called the first aid department) utilizes a form entitled "Progress Report." The progress report form consists of two columns; one column is for dates, and the other is for running medicalhistories of employees. According to a progress report that Respondent introduced in evidence,[394] on March 30, at 7:45 p.m., Giles called Respondent's medical department and reported that he had, on that date, fallen in Respondent's parking lot after work and hurt his right knee. Giles was advised to come to the medical department on the next morning. (Giles, and the other witnesses, disclaimed memory of the date of this alleged accident. As well as Respondent's progress report, a memorandum from Giles' personal physician, as discussed below, recites that March 30 was the date of Giles' parking lot accident.)

On April 1, Giles did go to Respondent's medical department, as further shown by the progress report. Giles was given a nonnarcotic pain killer and an antiinflammatory drug; the medical department also issued to Giles a gate pass so that he could leave the premises. While Giles was in the medical department on April 1, he signed and dated a space on the progress report that states:

> I have been advised that I must call my superintendent's office each day that I do not report to work.

Giles testified that, further on April 1, he called Boudreaux and reported the March 30 accident. According to Giles, Boudreaux responded: "I have already heard about it; don't worry about it; take as much time as you need." Giles testified that he missed "three or four" days of work because of the March 30 accident, but he called in to Boudreaux's office only on April 1. Giles further testified that no supervisor admonished him in any way for not calling in during those days of absence.

Giles' testimony that, after the parking lot accident, he went "three or four" days without calling in was false. Giles could have missed only one workday without calling in; that day was Friday, April 2. The progress report recites that Giles was seen in the medical department again on Monday, April 5, and he was "[r]eturn[ed] to work with no limits." Also on April 5, the medical department issued to Giles a release that Giles was to give to his superintendent. The release states that Giles was then able to return to "regular duties" (as opposed to "limited duties," another alternative that could have been checked on the form). And, ultimately, Giles also admitted that he actually returned to work on April 5. Therefore, Giles missed only 2 days of work because of the March 30 accident, April 1 and 2, and he acknowledged having called in on April 1. (Moreover, as I find below, Boudreaux credibly testified that Giles did call in on April 2 as well as April 1.)

[393] *Gull, Inc.,* 279 NLRB 931 (1986). Carr's fleeting reference to his not making promises is to be distinguished from the facts of *Uarco, Inc.,* 216 NLRB 1 (1974), where the employer defeated the inference of an implicit promise to remedy solicited grievances by repeatedly emphasizing no promises were being made.

[394] See R. Exh. 705 which is a complete copy of the G.C. Exh. 15 (which has the entry for March 30 redacted).

Assignment of More Onerous Work to Giles—the General Counsel's Evidence

Giles testified that from the parking lot accident of March 30 until about June 7, he came to work on crutches. Boudreaux acknowledged that when Giles returned to work on April 5, he made arrangements so that documents that Giles needed in his work would be brought to him at his office at wet dock-1, and, until June 21, Giles was not required to go on to ships to get the papers.

Giles is an ordained minister. Giles testified that on Saturday, June 19, he gave the invocation and a 15-minute speech at a union meeting that was attended by 400 employees. In the speech, Giles urged the employees to select the Union as their collective-bargaining representative.

Giles testified that, when he went to work on Monday, June 21, he was still walking with a "severe limp" as a result of the parking lot accident of March 30.[395] Giles testified that at 10 a.m. on June 21, he, Preventive Maintenance Department Foreman Michael Bobbitt,[396] and a safety department employee (whose name Giles did not know) were sitting in Giles' office at wet dock-1 when Boudreaux walked in. According to Giles, Boudreaux stated to him, in front of Bobbitt and the safety department employee: "Henceforth, you will be working on a ship; I want you out of this office today." Giles testified that Boudreaux indicated the room on the ship to which he was then to go, "exactly . . . by number." Giles testified that Boudreaux then turned and left his office; after that, Bobbitt and the safety department employee left his office. Giles testified that later he called Boudreaux and asked for a meeting. Boudreaux came to Giles' office again, and, according to Giles:

> When he walked in the office, this is what he said to me: "Giles, I thought you said that you were not for the Union; I understand you spoke at the meeting Saturday."
>
> I said, "I did the opening prayer at the meeting." . . .
>
> He said, "I understand you did more than that; I understand you made statements against the Company."

Based on this testimony by Giles, paragraphs 22(a) and (b) of the first complaint allege that Respondent, by Boudreaux, interrogated employees and created the impression of surveillance of their union activities. Giles testified that, in addition to his March 16 letter to Carr, he had previously told his supervisors (orally) that he did not favor the Union's organizational attempt.

Giles testified that, after Boudreaux left his office (for the second time) on June 21, he went to the room on the ship at wet dock-3 that Boudreaux had designated. To get to the room, Giles had to climb many stairs to get to the main deck of the ship; then he had to descend many other stairs to get to the specified room on a lower deck of the ship. Giles testified that: "I was somewhat restricted in being able to go up and down stairs at that particular time" because of the injury to his right knee that he had received in the parking lot on March 30 and because of a leg brace that he wore that day. (Giles did not testify that climbing the stairs caused him any pain. Also, because Giles was seated when Boudreaux entered Giles' office on June 21, there is no apparent way that Boudreaux would have known that Giles was wearing a brace that day.)

Giles testified that the ship's room to which he reported on June 21 was empty; there was no desk, chair or telephone; there was no air-conditioning and no other source of ventilation. (Giles testified that his office on wet dock-1 had been air-conditioned.) There were no file cabinets or files upon which he could work, and he did no work on June 21. Giles testified that General Foreman Robert Olmstead once came by the ship's office and looked in on him. On June 22, the second day of his assignment to the ship at wet dock-3, Giles experienced the same working conditions. Again, his files had not been transported to the ship, and he had no work to do.

On cross-examination Giles acknowledged that as a test coordinator, the job he held for the first 2 years of his employment, he was required to go on ships about once or twice per week, and he acknowledged that he was required to climb stairs when he did so. Giles at first testified that, as a preventive maintenance coordinator, he went about the yard visiting various offices, but he denied ever having to climb to a second floor of a building. When reminded of his oath, however, Giles acknowledged that he did go to offices on the second floors of buildings.

As discussed below, Giles did not report to work after June 22; there is, however, no allegation that the transfer to the ship at wet dock-3 constituted a constructive discharge, as well as an assignment of more onerous duties.

Giles' Assignment of More Onerous Work to Giles—Respondent's Evidence

Boudreaux testified that, when Giles was classified as a test coordinator, and he was stationed in Boudreaux's outer office at wet dock-3, Giles would go on ships as many as two or three times a day. Boudreaux testified that a problem that he had with Giles while Giles was working as a test coordinator was that: "on occasions he would do what we call Christian counseling during working times." Boudreaux testified that he defined Christian counseling as "talking religion and Bible to the people." When Giles was doing Christian counseling, according to Boudreaux, neither Giles nor the person to whom Giles was talking was working. Boudreaux testified that each time that he found Giles doing Christian counseling he gave Giles a "verbal warning," and Giles would refrain for a while, but then Giles would do it again. Boudreaux would then give Giles another "verbal warning," and the process would repeat itself. When asked why he never issued a warning notice to Giles because of this conduct, Boudreaux replied: "Verbal [oral] warning seemed to be working for a period of time to keep him on track, and it was—I don't think talking about God or religion was something to give a citation for as long as he continued to do his job after I warned him."

Further according to Boudreaux, when Giles became a preventive maintenance coordinator (and continuing until the parking lot accident of March 30) he was required to go on ships "almost every day." Boudreaux also testified that, after Giles became a preventive maintenance coordinator, he would find Giles "every now and then" engaging in Christian counseling during working time. Boudreaux would issue another "verbal" warning; Giles would stop for a while; and then he would do it again. Still, Boudreaux issued no warning notice to Giles over the Christian counseling. At no point did Boudreaux testify that his oral warnings to Giles contained any threat of future disci-

[395] As previously noted, Giles already had something of a limp from congenital polio.

[396] As Boudreaux testified in Respondent's case, Michael Bobbitt is a foreman and supervisor in the preventive maintenance department.

pline under Respondent's progressive disciplinary system (i.e., warning notices or a discharge).

Boudreaux testified that in June 1992 his outer office was remodeled and there was no room for Giles and his file cabinet. (Boudreaux acknowledged that Giles' jobs entailed a great deal of paperwork.) Boudreaux testified that there was space available in the building at wet dock-1, so he moved Giles there. There was also an operators department supervisor in the building, and there were ships at wet dock-1 that Giles had to work with. Boudreaux testified that, before he moved Giles to a private office at wet dock-1, he "informed him that [he was to conduct] no Christian counseling because it [his office] was kind of like a private cubbyhole." Boudreaux testified that he expected the supervisor (whom he did not name) at wet dock-1 to prevent Giles from future Christian counseling during working time.

Boudreaux testified that about February 1, 1993, the last ship was finished at wet dock-1, "so we had to move the people from there." The supervisor and the mechanics who were headquartered there were moved to jobs at wet dock-3, and the only operators department employee remaining at wet dock-1 was Giles. Boudreaux testified that Giles asked him to be allowed to remain at wet dock-1, and:

> I told him that, yes, this could be arranged. We could leave him there as long as there was no Christian counseling because now there was no supervisor there, and it would [be] very tempting. And I told him no Christian counseling in the office at that time, and I would leave him there as long as I could because Bob Terry, the electrical superintendent, was asking me what I was going to do with that space. He now needed space to expand his operation up there. But I had no place to put Giles, so I told him I would leave him there as long as I could. . . .
>
> [I further told Giles:] Eventually when the ship [at wet dock-3] would be completed, we would then put him aboard the ship with the other coordinators, Mr. Don Robbins and Sterling Landry.

Boudreaux testified that, in fact, Terry frequently asked him to vacate the air-conditioned space at wet dock-1 that included Giles' office because the electrical department needed it for testing of electrical equipment. (Terry testified, but he was not asked to corroborate this testimony by Boudreaux.)

Boudreaux testified that, before completion of the *LSD* contract that Giles was working on at wet dock-1, he had placed other preventive maintenance coordinators on another ship (a *TAO*), and much time was saved by mechanics not having to go on shore to get memoranda. He desired the same efficiencies with the ship then at wet dock-3, and before February he decided that all preventive maintenance coordinators should be located on ships, when office space was available.

Boudreaux testified that Giles called him on the day after his parking lot accident (which telephone call would have been on April 1, as I have found the facts to be). Giles stated that he was going to his own physician because he had not signed up for Respondent's (contributory) insurance program. Giles told him that he would call back when he got his physician's opinion. The next day (or April 2) Giles called again and said that he would be out for approximately a week. Boudreaux testified that he responded that Giles should call him in a week "and let me know what the status of him would be." Boudreaux testified that, although the Avondale Employees' Guide and the instructions from the medical department require absent employees to call in each day, he requires employees to call in only weekly when they let him know that they will be absent for extended periods.

Boudreaux further testified that, although the medical department released Giles for regular duties when he returned (earlier than expected) on April 5, Giles asked him if he could be excused from going to the ship at wet dock-1, and excused from any climbing, "because his leg was still bothering him." Boudreaux testified: "I told him I would leave him there [at wet dock-1] as long as I could till his leg healed, as long as I could hold the office work. But there would be no Christian counseling again in that office." As previously noted, Boudreaux told Giles that, until Giles' leg healed from the March 30 parking lot accident, Boudreaux would arrange it so that others could bring Giles memoranda from the ships when he needed them. Boudreaux further testified that Giles used crutches until about 4 weeks before June 21, then he stopped. During that 4 weeks, Boudreaux saw Giles climbing stairs and riding a bicycle without apparent difficulty.

Boudreaux testified that, before June 21, he had no knowledge of any prounion sympathies that Giles may have held. Boudreaux testified that Carr had showed him the March 16 letter that Giles had written, as quoted above; therefore, he thought Giles opposed the Union. Boudreaux further testified that on Friday, June 18, Giles came to him and:

> He came into my office to see me, and he said, "Let me share this with you. I am voting, preaching in my church, praying in my church, that the Union election goes union-free, that Avondale is union-free at the end of the election."

(This testimony was undenied, and it was credible.) Boudreaux testified that on June 21 he was informed that the ballots of clerk Chaisson and three coordinators, including Giles, would be challenged at the Board election on June 25. He went to wet dock-1 to tell this to Giles and further to tell Giles that he should go and vote anyway. Giles' office had no door. As he approached the doorway, Boudreaux heard Giles, another employee whom Boudreaux could not identify, and Preventive Maintenance Department Foreman Bobbitt talking "about the Bible and religion in general." (On cross-examination, Boudreaux testified that he stood outside the door for about 45 seconds, and he heard Bobbitt and Giles exchanging views on a religious point that he could not recall; the other employee said nothing while Boudreaux was listening.) Boudreaux stepped inside Giles' office and asked Giles to step out into the passageway where he could talk to him privately. There, according to Boudreaux:

> I told Mr. Giles he was Christian counseling again, and he knew he wasn't supposed to do that. And I asked him how his leg was. And he said his leg was fine. And I told him being as he was Christian counseling again we would then have to move him towards the ship, on board the ship in an office space because he couldn't be Christian counseling. He said his leg was fine.
>
> I then told him about the ballot that was supposed to be put into an envelope when he voted on Friday as I was—went up there originally to do. And he understood that. And I told him he would be aboard the ship again with the other coordinators, Don Robbins and Sterling. We would

open up an office aboard the ship, and we would install his office at that time. . . .

Mr. Giles then informed me, he said, I would like to share this with you. I attended a union meeting Saturday. I opened invocation, and I talked for the Union against Avondale.

Boudreaux testified that his feeling was one of "shock" because of what Giles had told him on the previous workday about Giles' prayer that Respondent would remain union free, but he only replied that Giles was within his rights. Boudreaux testified that this was the only conversation that he had with Giles on June 21. Boudreaux flatly denied that he first mentioned the Union, and he denied that he told Giles that he had heard that Giles gave a speech, as well as said a prayer, at the June 19 union meeting.

When asked on direct examination why, on June 21, he decided to reassign Giles from wet dock-1 to the ship at wet dock-3, Boudreaux responded: "One, he said his leg was better; there was no need for him being there; two, he was Christian counseling again; and third, the electricians need the space to do their work." Boudreaux flatly denied that, before Giles told him about it, he knew anything about Giles' activities at the June 19 union meeting.

Boudreaux testified that, at the time that he transferred Giles to the ship at wet dock-3, "There was two or three offices that was released to me," and he intended that Giles would use one of those. Boudreaux testified that usually when ships' offices are released to him (or to the operators department) they are fully equipped with desks, chairs and file cabinets, and they are air-conditioned. Boudreaux did not, however, deny that the room to which Giles was sent lacked all of these accommodations. Boudreaux did not testify that Giles did, or could have done, any work after his transfer to the ship at wet dock-3. Boudreaux testified that two other coordinators were assigned to the ship at wet dock-3 at the same time that Giles was; these were Supervisor Don Robbins and employee Sterling Landry. Finally on direct examination, Boudreaux testified that, a few days after the June 21 incident, he "chastised" Bobbitt for engaging in Christian counseling "because he was a supervisor."

On cross-examination, Boudreaux was asked how arrangements were made so that Giles would have an office on the ship at wet dock-3. Boudreaux testified "I went down to my office and told my general foreman, Bob Olmstead, that Giles was to have an office aboard the ship, to see to it and make sure that the office was available for him. . . . I left it up to him [Olmstead] to find a suitable office. . . . I told him to go put him in an office—find the office open, the office up on the ship." Boudreaux was further asked on cross-examination and he testified:

Q. And prior to June 21, 1993, there had been no preparation to prepare or secure an office for him at wet dock 3. Isn't that true?

A. There was plans all along for an office aboard the ship, sir, when it became ready and his leg was better.

Still further in the cross-examination, however, Boudreaux was asked and he testified:

Q. Sir, you did not have an office for Mr. Giles on board the LSD at the time that you decided to transfer him. Isn't that correct?

A. I had spaces available.

Q. But you didn't have an office, did you, sir?

A. Not assigned to him. No.

Q. You didn't even have an office assigned to you at that point, to your craft. Isn't that correct?

A. That is correct.

This testimony is to be contrasted with Boudreaux's unequivocal testimony on direct examination that "[t]here was two or three offices that was released to me" on the ship, and he intended that Giles would use one of those. Also to be contrasted with Boudreaux's testimony that Giles was transferred to an "office" on the ship is Boudreaux's testimony given in a deposition in a collateral matter. As Boudreaux acknowledged, he was there asked and he testified: "Question: So on June 22 when Mr. Giles, we know, was shown his office, was there actually an office set up? Answer: No, it was being set up. Mr. Giles was going to move in."

Although Boudreaux testified on direct examination that he had expected file cabinets to have been installed in the room to which Giles was transferred, he further acknowledged that in his deposition he was asked and he testified: "Question: Who was expected to move Mr. Giles's desk and cabinet—desk and cabinet up to that [apparently meaning the ship at wet dock-3]? Answer: My people." Also, Boudreaux acknowledged that his deposition contains: "Question: By furniture you mean desk and file cabinets? Answer: Yes. His file cabinet was going to go on the ship with him; we do take that with us."

Finally on this point, Boudreaux was asked on cross-examination, and he testified:

Q.[By Mr. Morgan]: Mr. Giles's desk you said was still up at wet dock 1?

A. Yes, sir.

Q. Do you still have an office at wet dock 1?

A. I reopened a part of what I had before. Yes, sir.

On cross-examination, Boudreaux further acknowledged that Foreman Bobbitt was Giles' "contact" in the preventive maintenance department and "it would not have been out of place" for Bobbitt to have been in Giles' office at wet dock-1 on July 21 when he (Boudreaux) went there. Boudreaux further acknowledged that he has no problem with employees' talking about whatever they want, "as long as they don't stop working." Boudreaux testified that, during the 5 years that Giles worked for him, he caught Giles Christian counseling "at least four times a year," or approximately 20 times before his discharge.

Olmstead (vol. 120) corroborated Boudreaux that Giles did a great deal of walking and climbing of stairs when he was a test coordinator. Olmstead also testified that once, when Giles was a test coordinator, Boudreaux asked him to speak to Giles about his Christian counseling. Olmstead testified that he told Giles to "do it on his own time," but he did not testify that he threatened Giles with discipline over the issue. Olmstead did not testify that he ever saw Giles Christian counseling. In 1990, when Giles was reclassified to preventive maintenance coordinator,[397] Giles continued to do a great deal of walking in his work. Olmstead also testified that in 1990 Boudreaux again asked him to speak to Giles about Christian counseling, and he did so (again without threatening discipline).

[397] Contrary to Boudreaux's testimony, Olmstead agreed with Giles that Giles was a test coordinator for 2 years and a preventive maintenance coordinator for 3.

Olmstead testified that the ship that was being worked on at wet dock-1 when Giles was there was a repair job that finished in February. When the repair job was finished the supervisor and other operators, except Giles, were then moved to offices in buildings at wet dock-3 (i.e., not a ship at wet dock-3). Olmstead testified that Boudreaux then told him that he wanted to move all operators on ships, as he had done successfully in the *TAO* program. Olmstead testified that, again in late 1992, Boudreaux reported again to him that Giles appeared to be doing Christian counseling, and he again went to Giles and told him not to do so (without any warning of discipline). As did Boudreaux, Olmstead credibly testified that on Friday, June 18, Giles visited his office and stated that "he was praying that the Union would not win the election."

Olmstead testified that he saw Boudreaux early on June 21 and:

> He said, "I just came from wet dock 1. Giles is Christian counseling again. I want you to go up there and tell him to get everything packed up, and I am going to go see Metzger about getting the spot on the ship where he can work out of.

(Michael Metzger was the ship's superintendent, or overall coordinator of crafts, for the ship at wet dock-3.) Olmstead testified that he went to Giles and "I told him to go ahead and start packing up all his files and everything so they could be moved down to wet dock 3. . . . I told him that we were going to get him a room on the vessel to go ahead and work out of on wet dock 3; in fact, Jeff [Boudreaux] was working on that right now." Giles, according to Olmstead, just said, "Okay."

Olmstead testified that the office to which Giles was assigned was on the second deck (i.e., the first level below the main deck), not in the bottom of the ship as Giles described. Olmstead flatly denied that the room had no furnishings; he testified that it had several desks, chairs, and file cabinets, all of which were part of the ship's final equipment. Olmstead admitted that there was no air-conditioning for, or telephone in, the ship's office to which Giles was assigned. Olmstead testified that the air-conditioning was scheduled to be operational in "about a week or so" and a telephone was scheduled to be installed in "about a week." Olmstead denied that he saw Giles in a room with no furnishings on June 21 and 22. Olmstead testified that the other coordinators, Landry and Robbins, were moved from wet -dock-3 on to the ship "about a week or so" after Giles was moved there. Landry and Robbins were delayed because, as Olmstead testified, "The room that they were getting into wasn't completely put together yet."

On cross-examination Olmstead testified that Boudreaux told him what space it was on the ship that he had secured for Giles. Olmstead did not know who told Giles which compartment to go to. Olmstead acknowledged that when he went to the room there were no chairs, but that was "no problem." On redirect examination Olmstead was not asked why the lack of a chair was "no problem." Olmstead acknowledged that Giles used a telephone "frequently" in his work. On redirect examination, Olmstead testified that a telephone was available to Giles in the casualty control center, but he also acknowledged that the casualty control center was "two decks up" from the room to which Giles had been assigned.

Chaisson, the clerk in Boudreaux's office, testified that, 8 or 9 months before Giles was moved from wet dock-1 to wet dock-3 on June 21, Boudreaux told her that he intended to move all coordinators to the ships because doing that during the *TAO* program had worked out so well. Chaisson also testified that after Giles' March 30 parking lot fall, Giles went about the plant on crutches; however, "a few weeks" before Giles was moved from wet dock-1 to the ship at wet dock-3, she saw him walking without crutches and saw him going around by bicycle. Chaisson further testified that, about a month before Giles' June 21 assignment to the ship at wet dock-3, she asked how his leg was, and "[Giles] told me he was blessed, and that God healed him." Chaisson also testified (on redirect examination) that, after Giles' parking lot accident on March 30, but before Giles' transfer to the ship at wet dock-3, Boudreaux told her, "[t]hat if he caught him Christian counseling again, he was going to move him to the *LSD*."

Assignment of More Onerous Work to Giles—Conclusions

In deciding whether the General Counsel has presented a prima facie case that Giles' June 21 transfer was unlawful, the first issue to be addressed is whether Respondent's supervision had knowledge of Giles' union activities before the decision to transfer him was made. Boudreaux testified that he had planned to move Giles to wet dock-3 for a considerable, if indefinite, time before June 21. Boudreaux further testified that he decided to move Giles on the very day of June 21 only because he heard Giles Christian counseling while he stood outside Giles' door on that date. Boudreaux further testified that he gained knowledge of Giles' participation in the June 19 union meeting only after he called Giles out of his office and announced his decision. On the basis of this testimony by Boudreaux, and certain corroboration by Olmstead and Chaisson, Respondent argues the General Counsel has not presented a prima facie case that Giles was unlawfully transferred.

For a prima facie case of unlawful discrimination, direct proof of knowledge is not required. If an employer has general knowledge of union activities, knowledge may be inferred from the totality of the circumstances including: (1) the timing of the allegedly discriminatory action, (2) any evidence of disparate treatment, and (3) any contrived nature of the reason of the employer's actions. See *Montgomery Ward & Co.,* 316 NLRB 1248 (1995), and cases cited therein.

In Giles' case, the timing was immediate; the transfer followed Giles' union activities on the first workday following his union activities (which, in turn, had immediately followed Giles' assurances to both Boudreaux and Olmstead that he was praying that the Union would be defeated in the June 25 Board election). Disparate treatment is also clear; before his participation in the June 19 union meeting, Giles was allowed to be on light duty, even though, according to Respondent's evidence, his leg had been healed for 2 weeks or more. Finally, Boudreaux, Olmstead, and Chaisson credibly testified that Boudreaux had some indefinite plan for moving all coordinators to the ships, but the reason stated for moving Giles precisely on June 21 is a pure contrivance. Simply stated, the room to which Giles was assigned was not ready for Giles, or anyone else, to work in. As well as having no air-conditioning, it had no desks or chairs, and Giles' papers had not been moved there. Olmstead admitted that the other coordinators were not moved to the ship until at least a week after Giles because: "The room that they were getting into wasn't completely put together yet." Giles, however, was moved well before an office on the ship was "completely put together" for him. The ship's room to which Giles was assigned did not even have a telephone, even

though Olmstead admitted that, in his job, Giles used a telephone "frequently." The room was at least a week short of getting a telephone (or air-conditioning), but Giles was moved anyway. As well as being further evidence of disparate treatment, the precipitous movement of Giles to a nonfunctional office shows the spurious, contrived, nature of Respondent's actions. I therefore find from the totality of the circumstances that Boudreaux knew of Giles' June 19 union activities before he decided to move Giles to the room on the ship on June 21. Animus toward such protected activities as Giles' is established throughout this decision. Accordingly, I conclude that the General Counsel has established a prima facie case that Giles was unlawfully transferred to the ship at wet dock-3 on June 21, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Giles even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On March 16, Giles sent Carr an unsolicited letter complementing Carr on his "clear and concise" presentation, which Giles "really did appreciate," and declaring that he would not vote for the Union in any forthcoming election. On March 30, Giles had an accident in Respondent's parking lot, and he was placed on light duty; Giles was not thereafter required to go on ships, and papers that he needed were brought to him. About a month before June 21, Giles told Chaisson that his leg was healed, and, during the next several weeks, Boudreaux and Olmstead observed Giles walking normally (for him). Nevertheless, Giles was continued on light duty through Friday, June 18, when he declared to both Boudreaux and Olmstead that he was praying that the Union would not win the June 25 Board election. Then, on June 21, Boudreaux went to Giles' air-conditioned, fully furnished, fully equipped, office and told him that he would have to move to an office aboard a ship. The room to which Giles was assigned, it turned out, was not air-conditioned, and it was simply nonfunctional as an office. Boudreaux testified that, after he told Giles that he was to be moved, Giles told him that he had given a prayer and made a speech at the June 19 union meeting. Giles, however, testified that Boudreaux mentioned Giles' activity at the union meeting before he did. The conflicts between Giles and Boudreaux, however, arise even before that point. Boudreaux testified that he approached Giles' wet dock-1 office with the intention only of informing Giles that his vote would be challenged; when he got to the doorway, he heard Christian counseling going on; then he called Giles outside and told Giles that he was to move to wet dock-3. Giles, however, testified that Boudreaux walked into his office and, in the presence of Supervisor Bobbitt, told Giles to move to wet dock-3, and then abruptly walked out. If Boudreaux's approach to Giles' office had occurred as Boudreaux testified, and if Boudreaux later "chastised" Supervisor Bobbitt as Boudreaux testified, Bobbitt would have been called to so testify. Respondent did not call Bobbitt, and it offers no reason for not doing so. I draw an adverse inference against Respondent for its failure to call Bobbitt, and I credit Giles.[398]

I further believe Giles' testimony about what was said when Boudreaux returned to Giles' office. Boudreaux stated that he had thought that Giles opposed the Union, but he had heard that Giles had spoken at the June 19 union meeting. When Giles attempted to minimize his activity by stating that he had only given a prayer, Boudreaux retorted: "I understand you did more than that; I understand you made statements against the Company." Boudreaux had already announced to Giles that he was being transferred to wet dock-3; Boudreaux's immediately returning with remarks that he had thought Giles was opposed to the Union was an admission that Giles' reassignment was caused by that activity. Additionally, Boudreaux's remarks were admissions that Respondent was making note of the particularities of the "degree of the employee's union involvement." See *Electro-Voice, Inc.,* 320 NLRB 1094 (1996), as quoted above. Therefore, I find and conclude that, in violation of Section 8(a)(1), Respondent, by Boudreaux, on June 21, coercively created an impression of surveillance of an employee's protected activities. Finally, by introducing his coercive remarks with a statement that he had thought that Giles opposed the Union, Boudreaux was sounding out Giles about his then-feelings about the Union. This also, I further find and conclude, was an interrogation of an employee in violation of Section 8(a)(1).

Respondent asserts three reasons for the transfer: (1) Boudreaux had intended to move all coordinators aboard ships, (2) Electrical department Superintendent Terry wanted the space that Giles had been using at wet dock-1, and (3) Boudreaux had intended to move Giles from wet dock-1 the next time he caught Giles Christian counseling. I agree with the General Counsel that the multiplicity of reasons for the transfer, alone, is an indication of pretext. Moreover, the defenses are separately nonavailing:

(1) I reject the defense that Giles' transfer on June 21 was the product of a firm decision that was made before Boudreaux's knowledge of Giles' union activity of June 19. Olmstead and Chaisson testified that Boudreaux had told them that he planned to move all coordinators on board ships at some point; nevertheless, even if such an idea existed, Boudreaux had no predetermined plan to start the relocations precisely on June 21. Nothing had happened at wet dock-1 (or wet dock-3) that would have required the transfer of Giles on June 21; there was no business necessity for the move on that date. That is, the plan existed only as a theory in Boudreaux's head, but Boudreaux did nothing about it until after he learned of Giles' participation in the June 19 union meeting, as I have found. Then Giles was moved to a shipboard room that was strictly nonfunctional as an office.

Moreover, it is clear that the decision to move Giles was made in haste, rather than in a process of deliberate business planning. Boudreaux and Olmstead testified that the room to which Giles was sent was "supposed" to have the amenities of an office, but it simply did not. Specifically in regard to a desk and file cabinet, Boudreaux testified that the ship's room to which Giles was assigned was "supposed" to have them already installed, but Boudreaux acknowledged in his deposition that "my people" were supposed to move the file cabinet and desk that Giles had been using in the office at wet dock-1. At another point Boudreaux acknowledged that his deposition stated: "His file cabinet was going to go on the ship with him; we do take that with us." In direct conflict with this testimony by Boudreaux, Olmstead testified that there were permanent desks and file cabinets for the room when Giles got there. Olmstead admitted that there was no chair, but he testified that absence of

[398] On its reply brief, Respondent contends that, in deciding whether a prima facie case exists, the Board may draw no adverse inferences, no matter what Respondent does, or fails to do. This argument is made without citation of any authority, except for a portion of an administrative law judge's decision that the Board refused to adopt.

a chair was "no problem." How the absence of a chair presented "no problem," however, was left unexplained on redirect examination. Giles, I find, was sent to an unfurnished room, not an office. (Not only was Giles' room on the ship not an office, Boudreaux acknowledged that his craft had not been assigned any office space on the ship by June 21.) Therefore, even granting that Boudreaux had some generalized plan to move coordinators such as Giles on to ships, he certainly had no plan to do so before offices were ready for them.

(2) I reject the defense that Giles' transfer was the product of a need for his wet dock-1 office space by the electrical department. Respondent made no attempt to corroborate Boudreaux's testimony that Terry had desired the office space at wet dock-1 that had been occupied by Giles. Even if Terry had expressed interest in the space, there is no evidence that he was prepared to assume it on June 21; moreover, Boudreaux acknowledged on cross-examination that the operators department still uses the office space at wet dock-1.

(3) I reject the defense that Giles' transfer was the result of his Christian counseling. Boudreaux defined Christian counseling as "talking religion and Bible to the people" on working time. Giles denied that he engaged in "Christian counseling" on working time, but he did not deny "talking religion and Bible to the people." Specifically, Giles was called in rebuttal, but he did not deny that, when Boudreaux approached his office at wet dock-1, he, Bobbitt and the safety department employee had been discussing "Bible and religion in general," as Boudreaux testified. I credit Boudreaux that he heard Giles, the safety department employee, and Bobbitt discussing the Bible. Nevertheless, I do not believe the testimony of Boudreaux (or the corroboration by Chaisson) that Boudreaux had previously decided to move Giles to a ship the next time he caught him Christian counseling; nor do I believe that he did so, even in part, for that reason. Boudreaux testified that in June 1992 he started warning Giles that he would be moved to a ship if he continued Christian counseling. This testimony appeared to be nothing but testimony that was tailored for the occasion. Moreover, Boudreaux testified that Giles continued to do Christian counseling, but he still did not move Giles until after the June 19 union meeting. This factor, alone, convinces me that the warning was not given at all. Also, Giles credibly denied in rebuttal that he was ever warned about talking about anything on the job. Finally, when Boudreaux approached Giles' office, Giles was not talking to himself, and Giles was not just discussing the Bible with another employee. Supervisor Bobbitt was there and, according to Boudreaux, Bobbitt participated in the Bible discussion. Presumably, the supervisor would not have allowed the Bible discussion to be conducted if there was any work that either of the employees could have been doing. Assuming, however, that all three men were consuming working time for the purpose of Bible discussions, the presence of, and the participation of, Supervisor Bobbitt lent the element of condonation to Giles' conduct.

Another reason that I reject the proposition that Giles' Bible talking precipitated his transfer on June 21 is that there are conflicts between Boudreaux and Olmstead that demonstrate that the specific room to which Giles was transferred had been selected even before Boudreaux approached Giles' office on wet dock-1. Boudreaux and Olmstead squarely contradicted each other about who made the arrangements for the room to which Giles was sent. Boudreaux testified that he left the arrangements to Olmstead; Olmstead testified that Boudreaux made the arrangements. (Also, Olmstead testified that he told Giles: "that we were going to get him a room on the vessel to go ahead and work out of on wet dock-3; in fact, Jeff [Boudreaux] was working on that right now.") Giles could not have known that Boudreaux and Olmstead would conflict on this point. It is clear to me, and I find, that, when Boudreaux walked into Giles' office, he told Giles "exactly . . . by number," what room on the ship that Giles was to go to, as Giles testified. Another reason for crediting Giles on this point is Olmstead's inability on cross-examination to explain who had given the specific room assignment to Giles, even though he had testified on direct examination that it was he who told Giles "to start packing up all his files." Finally, Bobbitt was there; if Boudreaux had not told Giles exactly what room to go to, as Giles testified, Respondent would have called Bobbitt to testify. That is, Boudreaux had decided to move Giles on June 21 even before he got to Giles' doorway and heard the Bible talk (or "Christian counseling").

The final issue on Giles' transfer of June 21 is whether, as alleged, it was a transfer to a more onerous position. I agree with Respondent that Giles's leg had healed from any possible damage from the March 30 accident, and he could climb stairs adequately, as he had done before. Nevertheless, other factors compel the conclusion that the conditions to which Giles was subjected at wet dock-3 were more onerous than those under which he worked at wet dock-1. Although Giles physically could have gone about the ship and gotten the papers that he needed, the fact remains that he was not required to do so before June 21. Therefore, the job after June 21 was physically more onerous than it had been before. But more importantly, after the transfer Giles was deprived of the work that he was hired to do, and he was dispatched to sit in a room by himself (if he could somehow secure a chair from somewhere else). Moreover, because of the lack of his files and the lack of the usual office amenities, there was no possibility that Giles could do any work. Boudreaux testified that Giles had been an intelligent, excellent employee. The situation into which Giles was placed would have been a humiliating situation for any employee, especially one who had been such a good employee. I find that the transfer of Giles was a transfer to more onerous conditions.

In summary, the General Counsel has presented a prima facie case that on June 21 Giles was assigned more onerous work because of his union activities, and Respondent has failed to demonstrate that it would have so assigned Giles even in the absence of those known union activities. I therefore conclude that, by transferring Giles to a more onerous job position on June 21, Respondent violated Section 8(a)(3).

(2) Giles' termination as assumed to have quit

Giles testified that on June 23 he called in to Boudreaux and told him that he could not come to work. According to Giles: "I informed him that my leg had—was swollen and that I was experiencing pain—severe pain in it and that I would not be in that day." Boudreaux replied that there would be "No problem." Giles was selected to be an observer for the Union at the June 25 Board election. As an observer, Giles was excused from work on June 24 to attend an instructional session that was conducted by the Regional Office. Giles testified that he called Boudreaux's office on June 24 and spoke to Chaisson. Giles testified that he asked Chaisson to relay a message to Boudreaux that he would not be in that day, and that "my leg

was still swollen and that I was experiencing pain." On Friday, June 25, Giles did serve as an election observer (sitting, as Giles described it, with his right leg elevated).

Giles further testified that on Monday, June 28, he called Boudreaux and: "I informed him that I would not be in, that I was going to make an appointment with a doctor as soon as possible. And he told me okay." Giles did not testify that he told Boudreaux why he was going to miss that day's work, and Giles did not testify that he told Boudreaux that he would be out for any period of time after June 28.

Giles acknowledged that did not call in to Boudreaux's department again through the date of his discharge on August 3. On July 7, according to Giles, Chaisson called him at home and told him that Boudreaux wished to speak to him. Further according to Giles:

> Mr. Boudreaux came on the phone, and he said, "What happened, Giles; I haven't heard from you; Have you quit your job?"
>
> And I responded to him, "No."
>
> He then stated to me, "Well, I have your termination papers on [Vice President] Ken Genter's desk. We want to know what you are going to do. Do you want your job?"
>
> I then informed him that, "I want my job; yes, I want my job, and I plan to come back to work." . . .
>
> He gave me further instructions. He said, "If you are still having problems with your leg, call Medicaland ask for Mr. Sevino, and he will give you further instructions." And that was the end of the conversation.

(Respondent employs no one named Sevino; David Sansoni is Respondent's manager of medical services.) Giles testified that he went to Respondent's first aid department on Friday, July 8, where he told the attendants there that he was scheduled to have surgery on July 20. Giles was given two forms; one was to get the physicians' diagnosis of his condition, and one was to report the result of the scheduled July 20 surgery. (The medical department's progress report that was offered by the General Counsel does not reflect a visit by Giles on July 8; the report's entry for April 1, however, recites that Giles was then given the described forms. I do not believe Giles' testimony that he went to the medical department on July 8.)

On July 12, Giles' personal physician signed a "disability certificate" stating that Giles was unable to work because of the condition of his right knee; the certificate (which was part of a form created by the private physician, not by Respondent) further stated that Giles was scheduled for arthroscopic surgery on July 20. Giles testified that he brought the disability certificate to a clerk in Respondent's medical department on July 13. The medical department's entry on the July 13 progress report is:

> [Patient] came in with enclosed certificate of disability. He also stated that he is not actually working. Patient was given 2 long forms.
>
> 1st to be brought back with the information concerning patient's inability to do his regular work.
>
> 2nd to be brought back after his arthroscopic surgery (7/20/93).
>
> Patient also stated that he is on his way to get a second opinion.

(That is, according to the medical department entries, Giles was given sets of these forms on two dates, April 1 and July 13; I believe that that is what happened; Giles simply did not return the first set.) Giles testified that he took the first company form to his personal physician that day, July 13. Boilerplate on the first company form states: "For intelligent assignment of work on [sic] your release of the above-named employee, the Company Physician requests the following data." Giles' physician dated the form as July 13, and he wrote that (1) the accident occurred on "3/30/93," (2) the diagnoses was "Internal derangement [of] right knee," (3) the "Treatment Period" was "6/29/93 & 7/12/93," (4) laser arthroscopic surgery was scheduled for "7/20/93," and (5) the date of Giles' final release to return to work was "undetermined." On rebuttal, Giles testified that he returned this form to Respondent's medical department on the same day that he received it, July 13. Giles acknowledged that the arthroscopic surgery was never performed. Giles testified that he did not have the surgery because of something that his insurance company (not Respondent, or Respondent's medical department, or his own doctor) told him. Giles did not testify that he ever informed the medical department that the surgery had been canceled. Giles acknowledged that he also did not call the operators department again.

On August 3, Respondent filed with the Louisiana Department of Labor a notice that it would contest any unemployment compensation claim by Giles. The notice concluded that Giles had been discharged as: "Assumed quit—failure to notify supervisor of reason for absences." Giles testified that his receipt of a copy of this notice in the mail was his first notice that he had been discharged, a point that is not in dispute. Giles acknowledged that, after July 13, he "never did" call in his absences to his superintendent's department. Giles was not asked why he did not call in between June 28 and August 3.

On cross-examination. Giles was shown the 1990 edition of the Avondale Employees' Guide. At first, Giles testified falsely by denying ever having seen it. Then Giles was shown a receipt for the booklet that he had signed and dated on September 13, 1990. Giles first testified falsely that: "I have never seen this document with my signature on it, dated 9/13/90. I didn't sign this document dated 9/13/90." Then Giles admitted that the signature on the receipt "appears to be my signature." Then Giles testified that "I don't recall" receiving a 1990 edition of the Avondale Employees' Guide. Giles was then shown the section of the Avondale Employees' Guide that is entitled "Reporting Absences and Tardiness," which, as quoted above, states that employees are required to call their departments daily during absences. Giles then was asked and he testified:

> Q. BY MR. HYMOWITZ: Were you aware of that policy of Avondale, that you were supposed to notify your department head's office—
>
> A. Yes, I was.
>
> Q.—once every day while you were absent. Is that correct? You were aware? Is that true?
>
> A. Yes, I was.

As noted, Giles testified on direct examination that he did call in on June 28. Giles specifically denied that, in the telephone conversation with Boudreaux on July 7, he was told that he should call in. On redirect examination, Giles was not asked why he did not call in when he was absent from June 29 through August 3.

Giles' Discharge—Respondent's Evidence

Boudreaux flatly denied Giles' testimony that Boudreaux called him on June 23 to report his absence of that date.

Boudreaux also flatly denied Giles' testimony that Giles had called him on June 28. Boudreaux testified that, as of July 6, Giles had failed to call in for 6 consecutive workdays; to wit: June 28, 29, and 30 and July 1, 2, and 6 (Monday, July 5 being a holiday in 1993). During that time he had instructed Chaisson to try to reach Giles at his home. Boudreaux testified that Chaisson reported to him that she had done so "numerous" times, but all she got was an answering machine and she left messages for Giles to call her. Chaisson testified that she called Giles twice during this period; she reached only an answering machine; she left a message that Giles was to call her, but she received no return call from Giles.

Further on direct examination, Boudreaux testified that on July 6 he decided to discharge Giles; Boudreaux was asked and he testified:

> Q. And on what basis? Why?
>
> A. He hadn't reported in three consecutive days, and we started counting.
>
> Q. And was there any work rule at Avondale concerning an assumed quit at that time?
>
> A. If you had three days where you didn't call in, you could assume quit after three days and terminate him.

As previously noted, the Avondale Employees' Guide states (before the progressive disciplinary system is set out) that failure to report absences on a daily basis "will result in either a written warning notice or discharge." Also, major offense-1 of the Avondale Employees' Guide, for which either a warning notice or discharge is the stated penalty, is: "Unexcused absences of three (3) consecutive working days."

Boudreaux testified that on July 6, he instructed Chaisson to create an ASI-22 (discharge) form for Giles. In the space for explanation for action, Boudreaux, in consultation with Olmstead, caused Chaisson to type:

> Charles Giles has missed over three consecutive working days without being excused. Due to his lack of communicative response in this matter, it can only be concluded [that] he has quit. His termination will be based on Major offense Number One in the Employee's Guide.
>
> Last day worked: 6–22–93. Last excused abs. 6–28–93.
>
> He has not called First Aid or the Insurance Dept.
>
> Note: (First Aid has not heard from him since [sic] three months.)

Approvals spaces are signed by Olmstead, Boudreaux, and Vice Presidents Genter and Simpson. Genter's signature is undated; the others are dated July 6.

Boudreaux further testified that on July 7 Giles called him (contrary to Giles' testimony that Boudreaux called him). Boudreaux testified that, when Chaisson put the call through to his office, Olmstead was with him and could hear his side of the conversation. According to Boudreaux:

> I talked to Mr. Giles, and I asked him where was he at, what was he trying to do, did he want to quit because I had already made up termination papers for him on an assumed quit.
>
> He told me, no, he didn't want to quit, that he had hurt his leg two weeks before, and he was going to a doctor.
>
> He then told me he didn't—he never told the supervisor or First Aid, he never reported it, but he was using his insurance, his wife's insurance. He didn't have Avondale insurance.
>
> I told him it made no difference, he still had to call First Aid and the Insurance [Department] people, that if he wanted to keep his job he had to call me at least once a week and advise me and keep me up to date on his status.

Boudreaux denied that, during this telephone call, he told Giles to go to the medical department and speak to any individual. Boudreaux testified that, after this telephone call with Giles, he stopped the processing of the ASI-22 form, and it did not reach the human resources department for final termination. When asked why he did so, Boudreaux replied, "Because Mr. Giles—I wanted to give him another chance to keep his job. He was a good employee, and I did not want to lose him."

Chaisson also corroborated Boudreaux's testimony about what he told Giles on July 7. Chaisson testified that Giles called on that date; she put the call through to Boudreaux; when Boudreaux came out of his office immediately after the telephone call, Boudreaux told her that he had told Giles "that he wanted him to call him once a week. And he wanted me to let him know when he called." Further according to Chaisson's testimony, she at that time wrote on the back of the ASI-22 form that had been created: "Was told on *July 7* to call in once a wk. As per Jeff Boudreaux." (The emphasis, as always, is original.)

Boudreaux testified, and it is undisputed, that Giles did not call Boudreaux's office again. Boudreaux testified that he instructed Chaisson to try to telephone Giles' home "[t]wo or three times a week" between July 7 and 27; Chaisson reported that she had gotten no answer and had left a message on the machine. Boudreaux testified that during the July 7—27 period, he called Respondent's insurance department twice; he was told that Giles had been sent a registered letter, but he had not responded. (Giles was shown such a letter on cross-examination, but he denied receiving it.) On the day before he decided to discharge Giles, apparently July 27, Boudreaux called someone in the medical department and was told that Giles had been there and had been given "paperwork" to have completed, but he had not returned it. Boudreaux testified that on July 27 or 28 he called Manager of Employment Julie Bolden, the immediate subordinate of Vice President Griffin in Respondent's human resources department. After conferring with Bolden, Boudreaux decided to discharge Giles because, as Boudreaux testified: "After all we tried to do to get in touch with him, and everything was done, he refused to call or let us know his status, so we just assumed he quit." Boudreaux testified that all Giles had needed to do to keep his job was to call him once a week. Boudreaux testified that Giles was not penalized in any way for his absences through July 7.

On cross-examination by the Charging Party, Boudreaux acknowledged that, if an employee calls in and states a legitimate reason for being absent, he is coded "05" on his department's MCRs. On June 28, Giles was carried on the MCR of Operators Department Foreman David Schlauderhoff. Schlauderhoff coded Giles "05" (excused absence). Although he denied that Giles called him on June 28, Boudreaux acknowledged that foremen, such as Schlauderhoff, sometimes are in the outer office and take absent employees' calls. Boudreaux was also shown again the (rescinded) July 6 ASI-22 form for Giles, and Boudreaux was referred specifically to the notation: "Last excused abs. 06–28–93." Boudreaux acknowledged that notation was on the July 6 ASI-22 form at the time that he signed it.

Boudreaux nevertheless, insisted that Giles had not called in on June 28, but he admitted that he could not explain why Giles was coded "05" on that date. Respondent did not call Schlauderhoff to testify. Boudreaux acknowledged that he did not ask Schlauderhoff (or anyone else) why Giles had been coded "05" on June 28.

Olmstead testified that he was in Boudreaux's office on July 7 when Boudreaux spoke to Giles. Olmstead testified consistently with Boudreaux about what he heard Boudreaux tell Giles.

Giles' Discharge—Credibility Resolutions and Conclusions

Even without the existence of a written, categorical work rule, the position of an employee who simply disappears is not a sympathetic one. Moreover, in this case, Giles (finally) acknowledged that he had received a copy of the Avondale Employees' Guide in 1990, and although he acknowledged that the Avondale Employees' Guide required him to call in on each day of absence, and although he acknowledged his signature of April 1 on a medical department record that told him that he must call his superintendent's office on each day of absence, Giles admitted that he did not call in to Boudreaux's office from at least June 28 through July 28 (when the decision to discharge him was made). The General Counsel did not ask Giles why he failed to call in over that long period.[399] On brief, the General Counsel states:

> For the exact same [sic] reasons the General Counsel states in the arguments regarding [alleged discriminatee] Aubrey May, the testimony elicited from both witnesses of Respondent and the General Counsel establish that once Giles was out of work through the Company's First Aid Department, pursuant to the practice maintained by Avondale, he had no duty to continue to call in either daily or weekly.

The evidence upon which the General Counsel relies in May's case does not support the proposition advanced. In May's case, the General Counsel proved, at most, that four employees who had disabilities that were confirmed by either the medical department, or the individual departments, or both, were excused from calling in for various periods of time that were reasonable under the circumstances of each case. This evidence, however, does not prove that, somehow, Giles was treated disparately. (Indeed, the General Counsel does not contend that Giles was treated disparately.) Moreover, Giles was not "out of work through the Company's first aid department," in the sense that the General Counsel contends. On June 13, Giles presented the first aid department with the fait accompli that he was not coming to work at least until July 20 because he was going to have surgery on that date. Giles did not ask the medical department personnel to examine him,[400] and the medical department personnel, in no way, agreed that Giles was unable to come to work. (At most, the medical department was documenting only a claim of inability to work.)

Assuming, however, that Giles was "out of work through the Company's first aid department," before July 20, after that date he was assuming that status under false pretenses. On July 13, in his last contact with the first aid department, Giles stated (in writing) that he was to have surgery on July 20. Giles did not have the surgery, and he did not inform the medical department, or the operators department, that the surgery had been canceled. Indeed, the surgery was never performed. Giles, however, was content to indefinitely leave the medical department, and the operators department, under the false impression that he had had the surgery and was presumably recuperating from it.[401] Under the General Counsel's theory of the case, Giles could have continued to withhold the information that his surgery had been canceled, and could have refused to come to work, forever. No business could allow an employee to do that. The reasonableness of Respondent's rule is not an issue, but it is obvious why Respondent, in the Avondale Employees' Guide and on the medical department forms, places an affirmative duty on the employees to call in to their superintendents. The departments depend on employees to come to work. No one could seriously argue that they need to be updated regularly on an employee's status to avoid just the sort of situation that was created when Giles canceled his surgery.[402]

Because of this obvious need of any supervisor to know the status of his employees who claim to be unable to work, and because of the corroboration by Olmstead and Chaisson, and because of the better credibility of Boudreaux on the point, I discredit Giles and I find that on July 7 Boudreaux told Giles to call in to the operators department each week that Giles might be out because of his claimed physical condition. Although department superintendents such as Boudreaux may require fewer calls than the daily calls that are required by the Avondale Employees' Guide and the medical department forms, there is no evidence that any superintendent allows employees to go indefinitely without calling in when they are disabled for prolonged periods. I do not believe that Giles' superintendent did. Even if Boudreaux told Giles nothing about calling in, however, Giles did not testify that he had any reason to disregard the imperatives of the Avondale Employees' Guide and the medical department form and simply stop calling in indefinitely. That is, Giles did not testify that he did not call in because he was "out of work through the Company's first aid department" (or because of his claimed intumescence of his knee, or because of any other reason).

Finally, I agree with Respondent on brief that, had it wished to discharge Giles, it would have done so at its first opportunity. Although I would find that Giles did call in on June 28, Giles did not testify that he then told Boudreaux that he would be out for an extended period of time. He certainly did not then tell Boudreaux that he was "out of work through the Company's first aid department." According to his own testimony, Giles only told Boudreaux on June 28: "that I would not be in,

[399] Also, the General Counsel asked Giles if his wife had been in town to receive telephone messages, but the General Counsel did not ask Giles if he was in town after July 13.

[400] Giles' conduct is to be contrasted with that of alleged discriminatee Glenda Dennis who sought, and obtained, treatment from the medical department some 3 months after her parking lot injury, as discussed infra.

[401] This certainly explains the fact that "08" (personal illness) was coded on the MCRs that were created after July 7. Moreover, employees are not excused from call in requirements simply because of how supervisors code MCRs.

[402] On brief, the General Counsel finds fault with Respondent's testimony about the attempts of Boudreaux and Olmstead to secure information by calling the Insurance and medical departments, as well as Giles' home. The problems that the General Counsel points out make Respondent's affirmative call-in requirements appear all the more reasonable.

that I was going to make an appointment with a doctor as soon as possible." Giles did not tell Boudreaux that he would be absent for any period of time other than that required to make an appointment with "a doctor." Giles had not been to the first aid department, and not even the General Counsel argues that, as of June 28, Giles was "out of work through the Company's first aid department." As even Giles admits, he did not call in for the next 6 workdays (June 29 and 30, July 1, 2, 6, and, according to his testimony, July 7). Nevertheless, on July 7, Boudreaux rescinded the first ASI-22 discharge form that he created. Although some of Respondent's testimony regarding the handling of that paperwork is clearly inaccurate, the fact remains that Respondent rescinded the July 6 decision to discharge Giles when it clearly had a legitimate reason to discharge him, even under the General Counsel's theory of the case.

For all of the above reasons, I find that Respondent has demonstrated that it would have discharged Giles, even absent his known prounion sympathies. I shall therefore recommend dismissal of the allegations that Respondent discharged Giles in violation of Section 8(a)(3).

b. Aubrey May's termination as assumed to have quit

Aubrey May (vol. 7) was employed as a welder-fitter in the electrical until he was discharged on May 10, 1993. The first complaint, at paragraph 27, alleges that by discharging May Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged May because of his known union activities and expressions of sympathy which included his wearing prounion insignia and his distributing at least one union handbill in a supervisor's presence; the General Counsel also contends that Respondent's supervisors knew of May's prounion sympathies because he responded affirmatively to a violative interrogation. Respondent denies that the interrogation occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that May might have held at any relevant time. Respondent further answers that May was discharged solely because May simply disappeared from the job without calling in to his superintendent's office, as required by Respondent's established work rules. The General Counsel replies that the defense for May's discharge is a pretext because May was absent only because of an on-the-job injury, as Respondent's supervisors knew. Alternatively, the General Counsel replies that May was treated disparately because other employees who were sick or injured failed to call in, but they were not discharged. Ultimately, I find and conclude that May's discharge was lawful.

May's immediate supervisor was Foreman Glenn Murray. May testified that, sometime during the month of March, Murray saw him pass a union handbill to another employee. May did not describe any sign of recognition that Murray may have displayed, and Murray credibly denied seeing May pass a union handbill to another employee. May testified that he placed a union sticker on the bumper of his car, but there is no evidence that any supervisor saw it. May further testified that he wore a union pin on his shirt for 2 days during March. Murray did not deny seeing May wearing a union pin.

May testified that, before work on March 22, he met in Murray's office with Murray and employees Keith Falgout, Russell Ockman, and Richard Scheckschneider. According to May:

> Richard was talking about he wouldn't know if the Union would be good or not. He was undecided about it. And Russell Ockman, he just told me that he was just totally against the Union.
>
> And so that is when my foreman [Murray] asked me—he come out and he said, "Mississippi [May's nickname], did you sign a union card?"
>
> And I told him, "Yes, and I would sign another one."
>
> Then [Murray] turned around and he asked Keith Falgoust, did he sign a union card, and Keith told him "yes." And then [Murray] started giving out . . . the work assignments.

Falgoust (vol. 8), a current employee, was also called by the General Counsel; he fully corroborated May's testimony about Murray's questions, but Falgoust testified that when he responded to Murray: "I told him it is none of his business." Based on this testimony by May and Falgoust, paragraph 9 of the first complaint alleges that Respondent, by Murray, unlawfully interrogated its employees.

May's Discharge

May testified that on April 14, a Wednesday, he was injured on the job about one-half hour before the quitting time of 3:30 p.m. May testified that he had lifted too much weight; he felt a muscle pull, and then "I felt my back snap." May finished the job he was working on and went to Murray's office where he found Murray and Ockman. May was asked and he testified:

> Q. Did you say what you hurt? Did you say what part of your body you hurt?
>
> A. I just told him I believed I had hurt my back.[403] That is the part I told him.
>
> Q. What was his response?
>
> A. Nothing. . . . He was doing his paperwork. He got up and left.

(Ockman did not testify.) May testified that he was close to Murray, and there was no reason that Murray would not have heard him, but he described no action by Murray that would indicate that Murray had, in fact, heard him. May further testified: "It was time to go home, and I went home."

May did not report for work, or call in to work, on April 15; he testified that on that date, he went to the VA hospital for treatment. On April 16, when May reported for work, Murray was absent. May testified that Ockman was then serving as "acting foreman," but there was no corroboration for May's testimony on that point; moreover, Respondent adequately demonstrated that only other salaried supervisors may substitute when a foreman is absent. At any rate, May gave to Ockman a note on a VA prescription form that is captioned: "To be filled in VA pharmacies Only." In the space where prescriptions are to be written, the note only indicated a future appointment. The note stated: "Excuse Aubrey May from work 4/26/93 to see me." The note is dated "4/15/93." In a space for "Signature and Title of Physician or Dentist," there is entered "B. Combs." Although the signature is not followed by a title, or "M.D.," May testified that Combs was, in fact, a "medical doctor." The note did not say anything about May's being injured, or even being symptomatic of having suffered an injury. Ockman gave the note back to May and told May to give it to

[403] The Tr., vol. 7, p. 1067, L. 25, is corrected to change "tack" to "back."

Murray on the next workday, Monday, April 19. May worked the entire day of April 16 without complaint to any supervisor and without going to the medical department.

May did not go to work, and he did not call in to the electrical department office, from April 19 through April 22; he testified that he stayed at home on those days, in bed, because of his back pain. On Friday, April 23 , May also did not call in to the electrical department office, but he did go to Respondent's medical department. May did not see a company doctor on April 23. May did see a medical department attendant, but the attendant did not examine May. The attendant did listen to May's account about an April 14 work-related injury, and the attendant took May's badge. (As previously noted, taking an employee's badge is a procedure that prevents an employee from working because the badges are also electronic cards by which the employees punch in and punch out.) On a "Report of Accident" form, the attendant wrote: "Advised [May] to call Monday at 12 noon to see if [May's report of an accident has been] verified." It is undisputed that May did not call the medical department on the following Monday, April 26. May also did not go to Respondent's medical department again.

May acknowledged that, when he went to the medical department on April 23, he signed and dated a form that states: "I have been advised that I must call my superintendent's office each day that I do not report to work." May, however, denied that he read the statement before he signed it.

May continued to fail to call in to the electrical department through May 10. On May 13, Respondent filed with the Louisiana Department of Labor a notice that it would contest any unemployment compensation claim by May. The notice stated that May had been terminated as: "Assumed quit—failure to notify supervisor of reason for absences." May testified that receipt of a copy of this notice was his first information that he had been discharged.

May was not asked why he did not call in during his absences.

On cross-examination May acknowledged having received the 1990 edition of the Avondale Employees' Guide, but he denied having read it. When asked if he knew of the Avondale Employees' Guide's requirement that absent employees call in to their superintendents' offices each day, May replied, "Not really. No, sir." May further acknowledged that on October 28, 1992, he signed a form stating: "This is to acknowledge that I have received an Avondale Telephone Number Card with my superintendent's name, foreman's name and telephone number on it. I also understand the call-in procedure for my department." May further acknowledged that on April 23, when he went to the medical department, he did not also call his superintendent's department and notify any persons there of the reason for his absences.

May's Discharge—Respondent's Evidence

Murray testified that he attended an instructional session that was conducted by Respondent. Murray was asked and he testified:

> Q. And what were some of the things that you were told in those meetings?
>
> A. Like not to threaten them, couldn't make no promise, couldn't spy on them, stuff like that.
>
> Q. And did you follow those rules?
>
> A. Yes, I did.

Murray did not, however, testify that he was told at the instructional session not to interrogate employees. Murray did deny that he interrogated May. Further, Murray denied that May told him that he supported the Union. Murray did not, however, deny that he saw May wearing a union button, and he did not deny knowing, somehow, that May favored the Union. Also, although Murray denied interrogating May, he did not deny interrogating Falgoust.

On May 10, Murray composed a warning notice for May. Murray marked the box for "Other" major offense under the Avondale Employees' Guide. In the space for the "Date and Time of the Offense," Murray entered May 5, 6, 7, and 10. In the space for "Reason for Warning," Murray entered "Assume Quit." Murray sent the warning notice to the office of Electrical department Superintendent Terry.

(Murray testified that he "terminated" May. When asked what he meant by that, Murray testified: "All I did was write a citation saying I put so many dates on it and I wrote, 'assumed quit," because he still never came back to work." When called by the General Counsel pursuant to Federal Rules of Evidence 611(c), Murray also testified (vol. 41): "I just write, 'Assumed quit,' and send it to the main Electrical office. And they go over it and then decide what to do." That is, Murray was actually testifying that he recommended the discharge of May when he completed a warning notice and sent it to the electrical department office.)

Murray testified that he did not recommend May for discharge before May 10 because: "He was a good worker and I was trying to give him the benefit of the doubt. You know, maybe he might have came back." Murray, however, flatly denied that anyone told him before May 10 that May had been hurt on the job.

In defense of May's discharge, Murray testified on direct examination that employees are required to call in each day that they are absent. If an employee does not call in, "then you get an unexcused absence," according to Murray. If an employee does "get an unexcused absence" from his supervisor, he is coded "06" on the supervisor's MCR for that day. Despite the plain implication of Murray's testimony that he had treated May's absences as unexcused, and had coded May as "06, "Murray did not do so, as discussed below.

Murray further testified on direct examination that it was several weeks after May was discharged that Falgoust told him that May claimed that he had hurt his back. Again, Murray denied any knowledge of the accident before that point.

On cross-examination, Murray acknowledged that it was actually 15 workdays, or three weeks, that May did not call in before he recommended May's discharge. Murray further acknowledged that, during May's absences, he did not call Terry's office to find out if May had called in, and no one from Terry's office called him about May. Murray was further asked and he testified:

> Q. Did you ask anybody in the crew if they had heard from Aubrey May?
>
> A. No.
>
> Q. Now, you said today that you knew Mr. Keith Falgoust was his good friend. . . . Did you ask Mr. Falgoust where Aubrey May was?
>
> A. No, because he wasn't saying nothing.

Almost immediately, however, Murray again testified that it was weeks after the discharge that Falgoust told him that May had been injured. Then he was asked and he testified:

> Q. And do you remember how the conversation came up, that Aubrey May had hurt his back?
> A. No. I always asked—you know, I was asking where he was at, you know, and nobody knew nothing.
> Q. So you were asking Falgoust where May was?
> A. Yes.
> Q. What he was doing?
> A. Yes. Why—you know.
> Q. Why he hadn't shown up for work.
> A. Right.
> Q. And that is when he [Falgoust] told you that he [May] had hurt his back?
> A. No. He had told me—he didn't tell me nothing for the first couple of times. You know, like the first couple of days [that May was consecutively absent]. And then way after that, he comes there and he said that he hurt his back.

Still later in the cross-examination Murray testified that he returned to work from vacation on Monday, April 19. (Again, April 19 was also the first day that May failed to appear after working a full day on Friday, April 16.) Murray was asked and he testified:

> Q. [From April 19 until] the date that you wrote up the discharge slip for Mr. May, [on May 10], how many times did you ask Mr. Falgoust where Mr. May was?
> A. Maybe once or twice.
> Q. When was the first time that you asked him?
> A. Maybe two days after he didn't show up, like the Wednesday or something like that.
> Q. And what did Falgoust tell you?
> A. He don't know.
> Q. And when was the second time?
> A. Two days after that.
> Q. So twice, then, in that first week.
> A. Yes.
> Q. And what did Falgoust tell you the second time?
> A. He don't know.
> Q. And you never asked Falgoust again. Right?
> A. Yes. I never asked him again.

Further on cross-examination, Murray denied that Ockman was even a leadman. Murray testified that Foreman Calvin Lewis, not Ockman, substituted for him on April 16, the day that May claims to have tendered a doctor's note to Ockman.

Further on cross-examination, Murray testified that employees who were injured on the job are supposed to go to the medical department. Murray further acknowledged that his pretrial affidavit states: "If an employee is going to be out of work for any period of time as a result of an injury, then the First Aid office contacts the main Electrical office and advises them of the absence. In this situation, the employee is not required to call in to his supervisor every day." Murray, however, testified that his affidavit was incorrect and that absent employees are required to call in each day.

Terry (vol. 90) testified that if an absent employee fails to contact the electrical department office for "three or more" days, he is terminated as "assumed quit." If, however, an employee is certified as absent because of a workers' compensation injury, he is not considered then to be an electrical department employee, and he is not required to call in to the electrical department office. Terry testified that employees are not excused from the daily call-in requirement unless the medical department had agreed that they cannot work because of a job-related injury.

Terry further testified that, when he received the May 10 warning notice that Murray composed for May, "I gave it to my main office clerks and told them to validate the date and time of the offenses, and if everything checked out and it was proper, that they were to go ahead and prepare the ASI Form 22 for my signature and the supervisor's signature, which in effect terminated the person as an assumed quit." Terry testified that the response that he received from his clerks was an ASI-22 (discharge) form for May. Terry signed the form on May 10, thus effectuating the discharge of May on that date. Terry denied any knowledge of any prounion sympathies that May might have held before the discharge.

May's Discharge—the General Counsel's Rebuttal Evidence

As noted, Murray testified that he did not know of May's complaint of a back injury until weeks after the discharge. Murray also testified that he considered all of May's absences to have been unexcused because May never called in during the days of his absences. As rebuttal, the General Counsel introduced MCRs that Murray signed during May's absences. On April 15, Murray coded May's absence as "05" (excused) on his MCR. (As noted, May worked the full day on April 16.) For the five workdays from Monday, April 19 through Tuesday, April 27, Murray also coded May's absences as "05." On April 28, Murray coded May's absence as "08" (personal illness); on April 29 Murray entered no code on his MCR for May's absence of that date. On the six workdays from Friday, April 30 through Friday, May 7, Murray also coded May's absences as "08." It was not until May 10, the day that Murray recommended May's discharge, that Murray coded an absence by May as "06" (unexcused). Respondent did not recall Murray to explain the obvious inconsistency with his testimony that he had considered all of May's absences to have been unexcused.

As evidence of disparate treatment of May, the General Counsel relies on the testimony of five witnesses: (1) May, himself, testified that, in 1989 or 1990, he was injured on the job. May testified: "I went straightaway to First Aid, and Dr. Mabey [Respondent's in-house physician] cleaned out the wound, cut it and cleaned it out and everything, put a dressing on it, wrapped it up with a band-aid, and sent me home on crutches." The medical department personnel took his badge/timecard and sent him home; May was absent for 6 weeks, and never called in. When he healed, he came back to work by reporting to the medical department; after seeing that he was well, the medical department personnel returned his badge/timecard, and May went back to work without incident. (2) Current employee Raymond Olivera (vol. 7), a pipefitter, testified that he injured his foot on the job; he went to the medical department where he was examined by Respondent's doctor who pronounced the foot to be broken and placed it in a cast. For 3 months, Olivera reported to the medical department for therapy, and he did not go to work. Only occasionally would he call his foreman. Olivera was not disciplined when he returned for work because he had not called in daily. (3) Alleged discriminatee Chad Durocher (vol. 9) testified that, in 1992, he broke his foot while he was not at work. Durocher did call the electrical department office and reported the incident and that

he would be out for 6 weeks. The clerk told him to go to the medical department. Durocher went to the medical department and presented his "doctor's papers." The medical department personnel took his badge and told him to report back to the medical department when he was released by his personal physician. Durocher did so; the medical department personnel returned his badge and he went back to work. Aside from his initial call, Durocher did not contact the electrical department during his 6 weeks' absence. (4) Respondent's witnesses Harold Blanchard (vol. 73) is a mechanic in the steel control department. Blanchard testified on cross-examination that, at some unspecified date, he had hand surgery. Blanchard testified that he was out for "two or three weeks" without calling in to his department every day. Blanchard was not asked how many days that he did call in. Blanchard further testified that he went to the medical department before and after his surgery and he was not disciplined. (5) Finally as evidence of disparate treatment of May, the General Counsel relies on the testimony by alleged discriminatee Giles that he did not call in when he was absent immediately after an accident on March 30. I have, however, discredited that testimony by Giles, above.

May's Discharge—Credibility Resolutions and Conclusions

May and Falgoust each testified that Murray asked them if they had signed a union authorization card. Murray denied that he interrogated May, but he did not deny interrogating Falgoust. The interrogation of Falgoust alone, was violative. (Murray testified that he attended one instructional session that was held by Respondent, but he did not testify that he was told there not to interrogate employees.) I believe, and find, that Murray interrogated both May and Falgoust by asking them if they signed union authorization cards. I conclude that Respondent, in violation of Section 8(a)(1), by Murray, on March 22, 1993, interrogated its employees about their union membership, activities or desires.

As well as obtaining information from his unlawful interrogation of May, Murray was apprized of May's prounion sympathies by May's wearing a union button, something that Murray did not deny seeing. Also, although he denied that May told him that he was a union supporter, Murray did not deny that he knew, somehow, that May favored the selection of the Union as the employees' collective-bargaining representative. In cases where Respondent was apparently confident of denials, it asked supervisors who were involved in discharges for such denials. (For example, Respondent asked Terry if he knew, or suspected, that May favored the Union.) I find that Murray, the supervisor who recommended May's discharge, knew of May's prounion sympathies. Respondent's animus toward employees who favored the Union has been established throughout this decision. Moreover, Murray individually interrogated May. Therefore, I conclude that the General Counsel has presented a prima facie case that May's discharge was unlawfully motivated, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against May even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

It is first to be noted that there is no probative evidence that May actually hurt his back in any way on April 14. May did testify that he hurt his back on the job on April 14, but his following conduct is inconsistent with that testimony. May testified that after his 1989 or 1990 on-the-job injury, "I went straightaway to First Aid." May was then treated by Respondent's in-house physician; therefore, May assuredly knew on April 14 that help was immediately available in Respondent's medical department. May, however, did not seek treatment at Respondent's medical department on April 14, or anytime thereafter. (May did not testify that, when he went to the medical department on April 23, he asked to be examined or treated.) May's knowing refusal to seek (free) treatment from Respondent's medical department arouses the first suspicion of his claim of job-related injury. Also, May testified that he was hurting enough to stay away from work on April 15, but he did not go to the medical department on April 16; instead he worked a full day without making complaint to any supervisor in the electrical department. (Murray was absent on April 16, but he assuredly had a substitute, and other supervisors were also assuredly there.) Also on April 16, May made no complaint to the medical department, something that obvious logic, and his own history, would have compelled him to do if he had actually been injured. How May could have been hurting so bad on April 15, but could work a full day on April 16 (without complaint to supervision or to the medical department) went unexplained. May further testified that by Monday, April 19, he suffered some sort of delayed reaction that kept him in pain, and kept him from working through at least May 10 (when Murray recommended May's discharge). May did not, however, testify that his pain prevented his going to the medical department, as well as the VA hospital, when the professed delayed reaction started. May's conduct, therefore, was not consistent with his testimony that he was in so much pain that he was prevented from working.

May also produced no documentation to corroborate his testimony that he was injured on April 14. Alleged discriminatee Giles, at least, produced two documents from a doctor stating that something debilitating had happened to Giles. May, however, produced nothing but an April 15 request that he be excused from work on May 26.[404] Back injury claims are notoriously easy to make. I am unwilling to accept May's bare statement that he injured his back on the job without at least some documentary corroboration by an examining physician. In summary, because of May's conduct that was inconsistent with his claim, and because of the lack of medicalcorroboration for his claim, I do not believe, and do not credit, May's self-serving testimony that he suffered a debilitating back injury on the job on April 14.

However, unless Murray knew that May was at least complaining of some physical condition that prevented him from working, there is no explanation for Murray's recording May's absences from April 15 through May 7 as either "05" or "08." May testified that he told Murray that he had hurt himself on April 14, but that Murray gave no glimmer of recognition. I credit Murray's testimony that he did not hear May state that he had been injured, but it is nevertheless apparent that Murray found out about May's complaint by the next day. Again, Murray would not have coded May's April 15 absence as "05" unless he did know of May's claim. Murray testified that he did not know of May's claim until several weeks after May's discharge. Murray squarely contradicted himself on cross-

[404] Also, the document that May produced is, on its face, entirely suspicious. Medical doctors, in the experience of this trier of fact, are diligent in placing "M.D." after their names. The document that May produced is signed "B. Combs." May testified that Combs was a "medical doctor," but I do not believe it.

examination, however, by testifying that he did, and did not, ask others on the job about the whereabouts of May. Murray rendered himself incredible in the process. Moreover, in rebuttal Falgoust (vol. 158) credibly testified that "within a week" after May was first absent, Murray asked Falgoust where May was. Falgoust testified that he told Murray, "I guess he is still out with his back injury." Whether he did hear May on April 14, or whether he heard immediately from Falgoust or someone else, it is clear by the records that he, himself, created that Murray knew immediately that May was complaining of a physical condition that prevented him from working.

The General Counsel contends that if Respondent's employees are "out through First Aid" they have no duty call in, ever. May did not testify that he did not call in because he thought he was a beneficiary of such a policy. (Indeed, May gave no reason for not calling in.) Assuming, however, that there was such a policy, I would not find, absent the clearest evidence, that just stopping by the medical department and reporting some symptoms, and then leaving without examination or treatment, establishes that an employee is "out through First Aid." This is all that May did. Moreover, May did not bother to stop by the medical department until April 23, at which point he had missed 5 consecutive workdays without calling in to the electrical department as he knew he was required to do. (I reject May's self-serving testimony that he did not know of the call-in requirement of the Avondale Employees' Guide.) Moreover, on April 23, May was given a written, categorical, instruction that his stopping by the medical department was not sufficient; he needed to call in to his superintendent's office daily, at least as far as the medical department was concerned. (I reject May's self-serving testimony that he did not read the document that he signed on May 23.) From this instruction by the medical department, if nothing more, May knew that he needed to make some contact with the electrical department. If the electrical department supervisors wished to impose less than a daily call-in requirement, it was up to them, not the medical department, or May.

The General Counsel's proffered evidence of disparate treatment is unconvincing. May might not have called in after his on-the-job injury in 1990, but he then went directly to the medical department, and was examined and treated at that time. The practice was for the medical department to notify the departments when such happened. Conversely, in 1993, the electrical department did not know where May was, or that he was claiming to have suffered an on-the-job injury. Moreover, except for the single case of Durocher, the General Counsel's purported examples of disparate treatment reflect that the employees were, or would have been, examined by the medical department personnel; certainly the examples do not rule out that possibility. Moreover, Durocher would have presented himself to the medical department while wearing a cast, palpable evidence of actual injury. Also, Durocher presented the medica department with his "doctor's papers"; May, however, did no such thing. (At most, May presented his department with an appointment card from "B. Combs," whoever he was.) Finally, the General Counsel relies on certain warning notices as evidence of disparate treatment of May. This documentary evidence (not previously discussed) is unpersuasive. May failed to call in for many more days than all of the employees who were issued the warning notices. That Murray listed only May's last 4 days of absences in his recommendation to Terry hardly provides a shield for May's derelictions.

Murray heard immediately from other employees that May was complaining of a back injury. There is, however, no evidence that Murray had heard that May was claiming that his injury happened on the job. Murray had no duty to check with the medical department under any circumstance, but he clearly had no duty to check with the medical department when neither May, nor anyone else, had told him that May was claiming that his injury had occurred on the job. The reasonableness of Respondent's requirement that employees notify their departments is not an issue. The requirement clearly exists, and there is no probative evidence of disparate treatment. Like the case of alleged discriminatee Giles, however, the circumstances of May's case demonstrate the reasonableness of Respondent's rule. As I have stated, I believe that May's claim was spurious. Of course, I could be wrong about that, but if May had timely called in, the electrical department's personnel undoubtedly would have told May to go to the medical department, just as the department's personnel told alleged discriminatee Durocher to go to the medical department when he called in and claimed (truthfully) that he had suffered an injury. If May had followed that assured instruction to go to the medical department, his claim could have been timely examined and possibly verified, one way or the other.

The General Counsel points to the fact that, until May 10, Murray coded May's absences as "05" or "08" on his MCRs. The General Counsel argues that, because May's individual days of absences were excused, May was thereby excused indefinitely from calling in to his department. In the first place, however, May did not know how his absences were being recorded while he was not reporting for work. May could not have been relying on the MCRs' coding as an excuse for not calling in, and he did not testify that he was. (Again, May did not give any reason for not calling in.) More importantly, the General Counsel's position in this regard is an argument that there is no such thing as an abuse of sick leave. Employees do, in fact, abuse sick leave. Individual days of absence, even a great number of them, may be excused, but there necessarily comes a point that a supervisor must say, "enough is enough." Employers could not operate otherwise. It would not have been unreasonable for Murray, and Terry, to have reached that point on May 10.

Finally, the admission in Murray's affidavit that employees who are "out through First Aid" are not required to call in "every day" is not an admission that employees may fail to call in for more than 3 days even if they had not called in once.[405] May, however, never called in. Specifically, May failed to call in on May 5, 6, 7, and 10 and Murray then made his recommendation to Terry. May had missed many days before May 10 without calling in, but, again, enough is enough.

For all of the above reasons, I find and conclude that Respondent has shown that it would have discharged May even absent his known union activities, and I shall recommend that the allegations based on May's discharge be dismissed.

c. Ronald Johnson's termination as assumed to have quit

Ronald Johnson (vol. 8) was an outside sheet metal mechanic until he was discharged on July 27, 1993. The second complaint, at paragraph 106, alleges that Johnson was discharged in violation of Section 8(a)(3). The General Counsel

[405] Even the injured Durocher called the electrical departmentoffice once.

contends that Respondent discharged Johnson because of his known union activities and expressions of sympathy which included his wearing prounion insignia. The General Counsel further alleges that Johnson was threatened in violation of Section 8(a)(1). Respondent denies that the threat occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Johnson may have held before his discharge. Respondent also answers that, as a sheet metal mechanic, Johnson was required to possess certain personally owned tools; Johnson did not secure even half of the required tools, and, after a July 19 tool check, Johnson was suspended and ordered not to come back until he secured a full complement of the tools; by July 27, Johnson had not returned, and he had not called in to explain his absences; Johnson was therefore terminated as assumedly having quit his employment. The General Counsel replies that the defense asserted is a pretext because, before the Union's organizational attempt began, employees such as Johnson were allowed to borrow tools. Ultimately, I find and conclude that Johnson's discharge was lawful.

Johnson was hired in 1990 as a helper in the sheet metal department. On May 3, after some training classes that are described below, he was promoted to sheet metal mechanic and received a substantial pay increase. Johnson's foreman was Jesse Caston; his general foreman was Arthur Schloegel. Johnson testified that, after he was promoted from helper to mechanic, he began wearing union stickers on his hardhat and his shirt "every day." Johnson testified that Caston spoke against the organizational attempt in meetings that Caston would conduct weekly with his crew of about 16 sheet metal mechanics. According to Johnson:

> Jessie used to tell us mostly about why he opposed the Union, and he used to tell us like, "If the Union get in here that they are just going to close the yard down." And he had mouths to feed and his—he used to say his wife worked part-time at K-Mart, and that the Union just was . . . there to collect dues . . . .
>
> [In the Caston meetings] I used to ask him what made him think that the Union was going to fold, that the yard was going to close down. And he said that it always happened. . . .
>
> [Caston] used . . . to say that, "Avondale don't have enough money to pay nobody; Avondale is broke." . . .
>
> And he said, "If the Union get in here, we are not going to be able to transfer you nowhere, and no other department." Like, if the Union come there, we all got to work in Sheet Metal Department. And he said, "If that happens, we have to lay you off."
>
> [Caston] used to say, "If the Union come here, all they going to do is padlock the gates, and then you will have nowhere to work, because . . . Louisiana is not a union state."
>
> And Bayou Steel had a strike during that time, and he [Caston] used to bring in these pamphlets, usually the papers or the newspaper, and tell us we are going to be just like Bayou Steel; we are going to be out there on the gate striking, and all [that] Avondale [is] going to do is hire new people. . . .
>
> [H]e used to say, "If you are not happy here, why don't you go get a job somewhere else? Why make it hard for other people?"

Johnson further testified that Caston would say such things at "[t]he majority" of weekly meetings that Caston conducted late in the campaign before the June 25 Board election. Based on this testimony by Johnson, paragraph 11 of the second complaint alleges that "about March 18 and 23," Respondent, by Caston, "(a) informed its employees that it would be futile for them to select the Union as their bargaining representative; and (b) threatened its employees with plant closure if they selected the Union as their bargaining representative."

Johnson's Discharge

As mentioned in the case of Dwight Ballard, supra, sheet metal mechanics are issued, from time to time, "tool lists." On direct examination, Johnson was shown a document that he identified by stating: "That is a list of the tools that we had to have to work with."

Johnson and Leonard Mutz, a fellow helper, began some training classes on December 15, 1992. The classes were conducted by Caston. Johnson acknowledged that during the course, Caston told him and Mutz that they were required to purchase their own hand tools. Johnson finished the classes, and passed an examination, on February 19. (Mutz passed the test a few weeks before.) Caston issued to Johnson and Mutz sets of "loaner" tools to use during a 2-month "probation period," as Johnson called it. Johnson and Mutz asked if they could buy their own tools from the Company through a payroll deduction procedure. Caston told them that he "would check" and get back with them. Caston told Johnson and Mutz that the tools would cost $300. On May 25, Caston retrieved the loaner tools from Mutz and Johnson. Johnson then asked Caston again if a payroll-deduction procedure was available for the purchase of tools, and Caston again told Johnson that he would check. Thereafter, according to Johnson, he and Mutz borrowed tools that they did not own from Leadman Clarence Brooks.

Johnson testified that "about two weeks before" the June 25 Board election, Caston told his crew that there would be a tool check on July 19, and all sheet metal mechanics must have all of the tools on the tool list. Caston did not tell them, however, what would happen if they did not have all of their tools. Johnson testified that, during the 3 years that he had been in the sheet metal department, there never before had been a tool check.

Johnson further testified that early on July 19, "Mr. Brooks came and got his tools." Johnson and Mutz, together, were subsequently called to the office of General Foreman Schloegel. Caston was there to assist Schloegel in the tool checks. According to Johnson:

> Well, they started checking our tools, and he already knew I didn't have all my tools. But when they checked mine, Mr. Schloegel, he mentioned to me, "Well, we are going to send you home. . . . When you get all your tools, just call Jessie's office back, and he will put you back to work."

Mutz also did not have all of his tools, and he was also suspended by Schloegel. Johnson further testified that, before he left the premises on July 19, he told Caston that he would not be able to buy the tools because, while on suspension, he would not be earning any money. Caston replied that the matter was "out of his hands," according to Johnson.

Johnson testified that he had purchased all of the tools on the tool list by July 27. On that date, he called Caston's office, as

Schloegel had instructed. Johnson did not reach Caston, but he did talk to Brooks. Brooks told Johnson that he (Johnson) had been discharged just that morning. Johnson tried twice to reach Schloegel by telephone, but he was told that Schloegel was unavailable. On cross-examination, however, Johnson acknowledged that his pretrial affidavit recites that it was "about two and a half weeks after I was sent out" (or suspended) before he called in to report that he had acquired all of the tools. Johnson testified that the affidavit was in error, even though, obviously, the affidavit was taken much closer in time to the events in question.

Johnson's Discharge—Respondent's Evidence

Mutz (vol. 121) testified that during the training course, he and Johnson were given copies of the tool list and told that they must acquire their own tools. After he and Johnson finished the training course, they were given boxes of loaner tools by Caston and told again: "You need to acquire your own tools." Mutz purchased the tools "piece by piece." When he and Johnson returned their loaner tools to Caston, they were again told to acquire all of the tools on the tool list. On the day of the tool check, Mutz was missing a set of wrenches. Schloegel told him: "You don't have your proper tools. . . .[G]o home and get your tools and come back to work." Mutz testified that he left the premises and returned the next workday with the wrenches, and he went back to work without further incident.

Caston (vol. 116) identified a letter to the training course's participants. The letter, dated December 15, 1992, told the employees that, in addition to the course, they would be required to have "2 months of job experience" before they would be upgraded to mechanics. Caston testified that he told the sheet metal department employees that, as well as the ability to read blueprints (which was the principal subject of the course), they must have a full set of tools before they would be upgraded from helpers to mechanics. On February 19, Johnson finished the course and took an examination. After passing the examination, Johnson was issued the set of loaner tools (in a loaned toolbox) by Caston. Caston told Johnson that they could be used by him during the 2 month's "training period," but Johnson then must return them. Caston then "suggested" to Johnson that he start purchasing his own tools.

After the 2-month period ended, and after Johnson and Mutz were upgraded to sheet metal mechanics on May 3, Caston and Schloegel still did not ask them to return the loaner tools. Caston testified, "[W]e figured we were going to let them use the boxes as long as possible." On May 25, Schloegel told Caston to collect the loaner tools from Mutz and Johnson "so they could be turned back in to the sheet metal shop," according to Caston. Caston collected the loaner tools and told Mutz and Johnson to get their own tools. Mutz asked if he could buy the loaner tools; Caston told Mutz that the loaner tools were not for sale, but all the tools could be purchased at the Company's safety store. Johnson did not ask how he could buy the tools, according to Caston. At the time, Johnson did have some other tools with which he could work; Johnson had borrowed those from another employee. Caston allowed Johnson to continue to borrow tools.

Caston testified that during June the sheet metal department supervisors discussed at their meetings that too many employees were borrowing tools. At a supervisors' meeting of June 29 (which was the first Tuesday following the Friday, June 25, Board election) Schloegel announced that there would be a tool check on the following Tuesday, July 6. Caston testified that he prevailed upon Schloegel to delay the tool check for two pay periods to "give them a chance to buy the tools that they need without putting a strain on their budget, their home budgets." Within 2 days, further according to Caston, he held a safety meeting for his crew that including Johnson. He announced a tool check for July 13 and, "I told them that Arthur Schloegel said that . . . with this tool check, anybody not having their tools would be sent home [i.e., suspended] to get their tools." Before July 13 arrived, Caston and the other foremen again prevailed on Schloegel, and the employees were given an additional pay period to secure full complements of tools. The final date for the tool check was set at July 19. In the meantime, further according to Caston, he again told his crew, "an employee not having his tools would be sent home to get tools or until his tools are replaced, until he brought his tools, and it wasn't something they should take lightly."

On Monday, July 19, Schloegel met with each of the four supervisors under him; the supervisors were to bring their employees to him, and the employees were to bring their tools. As well as Mutz and Johnson, employee Earl Barnett was found to be without a full complement of tools. Barnett, as well as Johnson and Mutz, was told that he would have to leave until he acquired all of the tools. Barnett left and returned 4 days' later with all the tools, and he was put back to work. (Barnett had accumulated vacation time, and he was allowed to use that for the 4 days.)

Johnson did not reappear at work, with or without his tools. On Thursday, July 22, Caston attempted to call Johnson at his home, but there was no answer. Caston called Johnson's mother (who was also an employee) and asked her to ask Johnson to call him. Later on July 22, Johnson did call Caston. According to Caston:

> [H]e asked me what was up, and I told him that he was in the process of getting ready to lose his job because of his consecutive absentees [sic]. . . .
>
> He said that he didn't have his tools yet, and he didn't have the money to get them.
>
> So I told him that he is going to have to do something. So I suggested to him that he would come to work Friday morning without the tools, and I was going to have to send him back home because he didn't have the tools, but it wouldn't count as an absentee, to try to break up that consecutiveness [i.e., Johnson's series of consecutive absences] that he was undergoing. . . .
>
> He said he would see what he could do.

Caston testified that he suggested this to Johnson in order to "[t]ry and keep him from being terminated."

Johnson did not report to work on Friday, July 23, as Caston had suggested. On Tuesday, July 27, further according to Caston, Caston conferred with Schloegel, and they agreed that Johnson had voluntarily quit because he had failed to appear for work for 6 consecutive workdays (and Johnson's only call-in was when Caston had called him). Johnson's discharge papers were then prepared. Later the same day, further according to Caston, Johnson called and said that he "heard" that he was being terminated. Caston responded that he and Schloegel had "assumed him quit." Caston further testified that he asked Johnson if he had acquired his tools; Johnson testified that he had not because "he was still having financial problems."

Finally on direct examination, Caston testified that, at employer campaign meetings, he did tell employees that wages were even lower for other jobs that were available in the area. Caston, however, denied that he told the employees that Respondent would be "closed down" or would "padlock the gates," as Johnson had testified. Caston did not deny Johnson's testimony that he told employees that they would not be able to transfer between jobs, and would be laid off, if the Union was selected as their collective-bargaining representative. Caston further did not deny Johnson's testimony that he told his crew that, if the Union was selected, the employees would have to strike, "just like Bayou Steel," and that Respondent would "hire new people" to replace them.

Johnson's Discharge—Credibility Resolutions and Conclusions

Schloegel (vol. 134) and Caston denied that Johnson wore prounion insignia on his hardhat and shirt, but I found Johnson credible on the point. I find that, because of Johnson's open display of prounion insignia, Respondent's supervisors who had worked around him had knowledge of Johnson's prounion sympathies at the time that he was suspended and discharged. Animus toward Respondent's employees who favored the Union, and especially those who wore prounion insignia, is established throughout this decision. Therefore, I conclude that the General Counsel has established a prima facie case that Johnson was unlawfully discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Johnson even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Caston was a far more credible witness than Johnson in respect to the facts surrounding the discharge. Johnson was especially incredible in his testimony that he just happened to secure all of the tools by July 27 and it was on that day that he called in and found out that he had been discharged. As well as being too convenient for belief, Johnson squarely conflicted with his affidavit that stated that it was a full 2-1/2 weeks after his suspension of July 19 that he acquired all of the tools. I believe, and credit, Caston's testimony that on July 27 Johnson admitted that he still did not have all of the tools.

In the training that was conducted by Caston, Johnson was told that, upon becoming a mechanic, he would be required to own the tools on the tool list. (Requirements of personally owned tools is, of course, common in the construction industry.) Johnson accepted the pay increase that came with being promoted to a sheet metal mechanic's position, but Johnson did not purchase the tools that mechanics were required to own. It is evident that Johnson decided to unilaterally establish as a term and condition of his employment as a mechanic the right to borrow tools forever. There is no valid argument that Respondent should have allowed him to do so. Moreover, before the tool check, Caston told Johnson that he would be suspended if he did not have the tools. Johnson, however, did nothing about it except complain that he could not afford them. Mutz, on the other hand, purchased the tools one at a time (except for one set of wrenches). Except self-serving arguments that I do not accept, there is no argument that Johnson could not have done the same thing. (That Caston did not tell Johnson exactly how to purchase tools through payroll deductions is no answer for the General Counsel; if Johnson had wanted to purchase the tools through the safety store, through deductions or otherwise, he could have gone there and gotten the process started.)

The General Counsel argues that Johnson was treated disparately because Johnson was suspended for not having his personally owned tools but many other employees were issued warning notices for the same offense. The General Counsel did not show, however, that those other employees were only issued warning notices; suspensions were entirely possible in all cases that the General Counsel offers as comparisons to the treatment of Johnson. Moreover, there is no indication that the other employees had received categorical warnings such as those that Johnson had received before he was suspended. Even if there were some evidence of disparate treatment for the suspension, however, Johnson was not discharged for not having his tools. Johnson was discharged for not coming to work on 6 successive workdays and presumably quitting his employment.

The General Counsel further argues that Johnson was treated disparately because, before the Board election, he was allowed to use Respondent's loaner tools or borrow tools from other employees. Departmentwide tool checks had not been conducted before the Board election, and the fact that this one was announced during the week following the election does raise a suspicion that the tool check was an act of recrimination against the employees for the support that they had given to the Union in the Board election. Nevertheless, the requirement of personally owned tools previously existed, and the great deal of notice that Respondent gave to all of the sheet metal mechanics to comply with the requirement negates any inference of recrimination. That is, Respondent gave the sheet metal mechanic three pay periods to secure the tools; if recrimination were Respondent's objective, it would not have afforded the sheet metal mechanic such a great opportunity to pass the July 19 tool check.[406] Also, "loaner" tools were just that; they were loaned; Respondent had not given the tools to Johnson, and Johnson knew it. Respondent did allow Johnson to borrow from other employees for a while, but, again, there is no legitimate argument that Respondent should have allowed such borrowing to go on forever. (Any such argument would be an argument that Respondent should simply furnish all hand tools to all mechanics.) Therefore, even accepting all of Johnson's testimony, and further assuming that the suspension was alleged as a separate violation of Section 8(a)(3), I would not find a violation in Respondent's actions in that regard.

Finally, if Johnson could not have afforded the tools, he still could have reported to work on July 23, as Caston suggested to Johnson on July 22. Instead, Johnson continued to refuse to come to work. After he had done that for 6 consecutive workdays, his supervisors decided to terminate him as an employee who had voluntarily quit. The General Counsel does not contend that any other employee was permitted to refuse to report for work for as many as 6 workdays without being discharged. I therefore find that Respondent has shown that it would have discharged Johnson even absent his protected activities, and I conclude that Respondent did not violate Section 8(a)(3) by discharging Johnson.

Finally, Caston credibly denied that he told the employees that Respondent would be "closed down" or would "padlock

[406] This situation is to be contrasted, of course, from those of discriminatees Ballard and Valentine who were initially given a period of time to secure the tools (which period included a payday) by their foremen, but Schloegel then cut that period short.

the gates" if the employees selected the Union as their collective-bargaining representative. I shall therefore recommend dismissal of that allegation of the complaint. Caston, however, did not deny Johnson's testimony that he told employees that, in slack periods, they would not be able to transfer between departments, and would be laid off, if the Union was selected. Caston further did not deny Johnson's testimony that Caston told his crew that, if the Union was selected, the employees would have to strike, "just like Bayou Steel," and that Respondent would "hire new people" to replace them. At minimum, these remarks were threats to the employees that their efforts to achieve collective bargaining would be futile, as further alleged. I therefore conclude that, in violation of Section 8(a)(1), Respondent, by Caston, in the spring of 1993, warned its employees that their efforts to secure collective bargaining would be futile.

8. Employees discharged for various other reasons

a. Ramona Edwards' discharge for theft

Ramona Edwards (vols. 17, 148, 159) was a clerk in the machinery department office until she was discharged on June 28, 1993. The second complaint, at paragraph 87, alleges that by discharging Edwards Respondent violated Section 8(a)(3). The General Counsel contends that Respondent discharged Edwards because of her known union activities and expressions of sympathy which included her making a prounion comment to the superintendent of the machinery department during November 1992 and, after the Union's handbilling began in March 1993, wearing prounion insignia and making favorable comments about the organizational effort at an employer campaign meeting. The General Counsel further alleges that, in violation of Section 8(a)(1), Edwards was threatened several times and interrogated once. Respondent denies that the threats and interrogation occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Edwards may have held before her discharge. Respondent further answers that Edwards was discharged solely because its supervisors knew, or reasonably believed, that Edwards had committed an act of theft. Respondent specifically contends that Edwards orally, and in writing, confessed to the theft. The General Counsel replies that the theft defense is a pretext because Edwards did not commit the theft and that Respondent had no reason to believe that she did. The General Counsel further replies that Edwards made no oral confession of theft; the General Counsel concedes that Edwards signed a written confession of theft, but the General Counsel contends that Edwards could not have read the confession because Edwards is illiterate. Ultimately, I find and conclude that Edwards engaged in no prounion activities but, assuming that a prima facie case has been presented, Respondent has shown that it would have discharged Edwards even absent any prounion sympathies that she might have held. I therefore recommend dismissal of the allegations made on behalf of Edwards.

Edwards' testimony as a witness for the General Counsel's case in chief consumes 184 pages of the transcript; probably half of those pages (I have not actually counted) were consumed in the General Counsel's attempt to establish, and Respondent's attempt to refute, the proposition that Edwards is illiterate, even though she has a high school diploma and even though she had been employed as a clerk. Edwards' testimony as Respondent's adverse witness consumed another 28 pages, all on the same topic. I allowed Respondent to make every conceivable inquiry of Edwards about how she managed to go through life, much less serve as a clerical employee, without the ability to read. I further afforded great latitude to counsel for the General Counsel and counsel for Charging Party in redirect examination. The exercise was necessarily humiliating to Edwards, but she withstood it well. Every avenue of attack was answered by Edwards, many times in anguished explanations. I shall not detail those attacks and responses; it suffices to say that I credit Edwards' explanations. Respondent further called other witnesses to testify that Edwards had done things that would indicate that she could, in fact, read. To the extent that testimony was credible, it was probative of nothing; the remainder of the testimony offered by Respondent was not credible when compared with the testimony of Edwards on the point. I find that, except for the ability to read and write her own name, and the ability to recognize some numbers and individual letters,[407] Edwards could not have possibly read a confession of theft that she signed on June 24. (For the reasons stated below, however, I do find that the confession was read to Edwards, and she knew its import.)

At the time of her discharge, Edwards worked in the office of Jake Kaul, superintendent of the machinery department. Kaul succeeded Ken Genter as the departmental superintendent in April 1993 when Genter became a vice president. As noted in the *Wright Line* discussion that introduced the 8(a)(3) section of this decision, Edwards testified that in November 1992 she told Genter that the employees needed the Union and Genter replied that she could be discharged for saying that. As I stated in that discussion, that testimony was undenied, I found it credible, and I consider it strong evidence of Respondent's animus toward those employees who would exert their Section 7 rights to organize and bargain collectively. The General Counsel argues that the statement is further evidence that Respondent would have at least suspected that Edwards maintained prounion sympathies.

Edwards testified that from about April until the date of her discharge, she wore union pins at work and talked in favor of the Union to other employees. At the time of the events in question, the machine shop had two foremen, Nicola Betanoff and Steve Truxillo. Edwards testified that in late April or early May, when she was in the machinery department office with Truxillo:

> Steve Truxillo walked in the office, and he asked me, "What you doing, girl?"
>
> And I replied, "Nothing." As I answered him, I began to turn and straighten up from behind my desk.
>
> I had a union pin on the right top-hand side of my shoulder, and he grabbed it. I said, "Ouch; you stuck me."
>
> He say, "Don't you know this is grounds for automatic dismissal; don't you know this is grounds for dismissal."
>
> I said, "No, I did not."
>
> He said, "Your union activities are getting to be a bit too much; when are you going to leave off." He took my pin, and he bent it. He threw it on the floor. He smushed it with his heel of his boot and threw it in the trash can.

Based on this testimony by Edwards, paragraph 15 of the second complaint alleges that Respondent, by Truxillo, "threatened

[407] For example, Supervisor Wirley Parks has a simple last name; however, a notation that Edwards once made, with deliberation apparent, is spelled "PRAK." Anyone with a minimal concepts of phonetics would not have spelled the name that way.

its employees with discharge if they continued to wear union insignia."

Edwards further testified that, about the first part of May, Truxillo conducted an employer campaign meeting and:

> Mr. Steve Truxillo sit down, and he said that if . . . the Union would get in, that the workers would lose their jobs . . . the Union would let the workers go out on strike. Avondale would not be able to compete, and then the people would lose their jobs. "If you vote for the Union, you lose. Do I have to spell it out for you? . . ."
>
> I raised my hand. He said, "Okay, Ramona; what do you want to say?"
>
> I said, "Well, Avondale haven't done anything for us; we have given them a try; why not give the Union a try."
>
> And he said, "Well, Ramona, if the Union come in, you will be out of here in a second."
>
> And I told him, "Well, that is just a chance I have to take. . . ."

Based on this testimony by Edwards, paragraph 18 of the second complaint alleges that Respondent, by Truxillo, "threatened its employees with discharge and plant closure if they selected the Union as their bargaining representative." Edwards further testified that, immediately after Truxillo's meeting, she met in an office with Truxillo, Betanoff and employee Chester Constant. According to Edwards:

> Steve [Truxillo] told Nick [Betanoff], "Do you know what this ass hole, excuse my French—referring to me—said in the meeting. She was talking up for the Union."
>
> And Nick Betanoff said, "Ramona, I thought you were my friend. Next time they have a meeting, you do what you do best, sit down and look pretty, with your mouth shut."

The General Counsel argues this remark by Betanoff demonstrates specific animus against the union activities of Edwards.

Edwards further testified that in the latter part of May she was in the machinery department office when employee Chester Constant asked to read a handbill that she had in her possession.[408] Further according to Edwards:

> And at the time [Constant] was reading it, Mr. Betanoff came in. And [Betanoff] asked [Constant], where did he get the literature he was reading. And [Constant] said, "I got it from Ramona."
>
> So [Betanoff] looked at it, and he said, "Ramona, do you believe this stuff."
>
> And I told him, "Half of it; half of it, I don't know. . . ."
>
> [Betanoff] said, "Do you know what happened if the Union came in?"
>
> I said, "No, sir, but you don't either."
>
> And he said, "If the Union came in, you would be out of a job in a minute."
>
> And I said, "Well, that is just the chance I have to take."
>
> And that is when I told him, "Rosie Parks and Martin Luther King, if they hadn't stood for our rights, we wouldn't have any; and . . . regardless to what you state, I am voting for the Union."
>
> And he said, "Ramona, you are dumber than what I thought."
>
> And I said, "Well, if you say so, but I am still voting for the Union."

Based on this testimony by Edwards, paragraph 37 of the second complaint alleges that Respondent, by Betanoff, "threatened its employees with discharge if they selected the Union as their bargaining representative." the General Counsel further contends that the exchange with Betanoff is additional specific evidence that Respondent knew that Edwards intended to vote for the Union in the June 25 Board election.

Edwards further testified that in late May or early June, she was approached by Kaul and:

> [w]ell, he basically asked me, did I post anything or pinned anything over the timeclock. And I said, "No, sir." And he said, "Well, never mind; don't worry about it."

Edwards testified that Kaul left the area and:

> Mr. Steve Truxillo came over to my desk, and he told me, "You know you did it; just admit it; you know you did it."
>
> And I asked him, "Did what?"
>
> And that is when [employee] Dennis Rapp came, and he say, "Yes, we both know you did it too."
>
> And Steve said, "Yes, I know you did it, because I took a union pin from you; that is how we know you did it; just admit that you put that over the timeclock."
>
> And I told them, "I don't know what you are talking about."
>
> And he said, "Yes, we both know that you put that union stuff up there; why don't you just admit it and get it over with."

Based on this testimony by Edwards, paragraph 34 of the second complaint alleges that Respondent, by Kaul, "interrogated its employees about their union membership, activities and sympathies."

Discharge of Edwards

Respondent's machinery department office is located near gate 11, an interior gate that is used for pedestrian traffic only. There is a guard's shack at gate 11. Immediately outside the gate is a parking area. In the parking area, close to the guard's shack, is a building in which cleaning supplies are stored (the porter's shack). Edwards regularly parked just outside the gate, and she did so on June 24, the day before the Board election. Edwards testified that her automobile has controls in the passenger compartment with which the trunk can be unlocked; she further testified that those controls can be reached by someone standing outside the automobile when the driver's side window is open. Edwards further testified that she usually left her automobile's windows open on warm days when it appeared that there would be no rain. For at least part of the day on June 24, she left her automobile windows open. The General Counsel contends that, during that day, someone opened Edwards' trunk and "planted" stolen cleaning items in it. (The items included garbage bags, cleanser, polish, and the like.)

Edwards testified that she moved from one house to another in August. On June 24, in preparation for that move, she took some un-flattened cardboard boxes from one of Respondent's

[408] Edwards testified that she took the handbills at the gate, but that she did not know what they said until she took them home for her family to read to her.

dumpsters and dragged the boxes, some inside others, to gate 11. There a guard, whom she could not name, carefully inspected each box. (Other than discarded items such as the boxes, Respondent's guards are required to check items that employees carry out of the gates against property passes or other paperwork.) According to Edwards:

> And he told me, "You can't get them in there [her automobile] like that."
>
> I said, "Well, do you know a better way"
>
> He said, "Yes, if you will flatten them."
>
> And I said, "Well, I don't know how to do that."
>
> He said, "Well, let me show you." So he came to the car; he took a pocket knife out of his pocket. He slit the boxes, and then he flattened them.
>
> I opened the back seat for him, and he put the boxes on the back seat, and he shut the door, and I told him, I said, "Thank you very much."

Edwards testified that neither she nor the guard opened her trunk.

Edwards testified that, during the afternoon of June 24, she received a telephone call from Respondent's assistant director of security, Sam Capaci. Edwards testified that Capaci "asked me, could I come to my car; he was at Gate 11, because he had received a phone call saying that I had put something in the trunk of my car." Further according to Edwards:

> I went outside to Gate 11, and I met him, and he [Capaci] told me, "Ramona, I have received a phone call, saying that you put something in the trunk of your car."
>
> I said, "No, sir. I put something in the back seat but not in the trunk."
>
> He said, "Well, can you open the car?"
>
> I said, "Well, sure."And I went over to the driver's side, and I popped the lock. When I went over to the driver's side and popped the lock, I went on the back seat, and I pulled the boxes off that I had, and I showed him. I said, "This is all I have."
>
> So after I showed him that, he said, "Well, open the trunk." So I shut the back door; I went back on the front. I popped the lock for the trunk to open, and he pulled out my box with my car stuff, windshield wiper stuff and oil and stuff. . . .
>
> Then they [sic] had another box [that Capaci] pulled that was behind it, and he showed it to me. . . . I saw a clear-looking garbage bag; looked like some cleanser, some kind of paper, and cleaning stuff . . .
>
> I said, "I have never seen that box, and I didn't put it in there."
>
> So he asked me to get in his truck, and he brought the box and put the box in his truck, and we drove around to Gate 5 to his office and went upstairs in his office.

(As mentioned in other cases, Respondent's security department offices are located at a building at gate 5.) Edwards testified that in the security department office she again told Capaci that she had not taken the materials and that she had no idea how they had gotten into her automobile's trunk. Further according to Edwards:

> While we were in his office, he asked me, did I have anyone—did I know of anyone that had a vendetta against me, and I said, "Not that I can think of."
>
> [Capaci] said, "Well, Ramona, I believe that you didn't do this; you are a good worker, and I have been working with you a long time, and we have never had any problems. And I am just trying to help you. Are you sure you don't know of anyone that would do this."
>
> I said, "No, sir."
>
> He called the security guard, and the guy came in the office, and he asked the guy, did I bring anything to my car. The guy said, "Just some boxes," which he had flattened for me and put in the car for me. [Capaci] said, "That is all?"
>
> [The guard] said, "That is all she put. She didn't have anything else; everything she came out with, he had checked prior, before it was in the car, which was the flat boxes." . . .
>
> So [Capaci] asked [the guard], "Are you sure she didn't have anything else?"
>
> He said, "No; just those boxes that I flattened for her and put them on the back seat."
>
> [Capaci] said, "Okay." So [the guard] left out.
>
> Mr. Capaci . . . said, "Ramona, I don't know how this is going to go for you, he said, but I will see what all I can do."
>
> So after that, I said, "Well, can I vote tomorrow."
>
> He said, "Yes, you can vote. Just come in to my office if I am here, and I will give you your badge. And if I am not here, see Maureen or Marc," which is [i.e., which employees are] in Security at Gate 5, "and they will give you your badge in order for you to vote."
>
> I said, "Yes, because it is important for me to vote."
>
> He said, "Yes, it is important for the Union not to get in."
>
> And I told him, "I am sorry, but I am for the Union. I think it is best for them to get in."
>
> And he said, "That is not going to help your job any."
>
> I said, "Well, I still think it is important, because Avondale isn't doing anything for us."
>
> And he said, "Well, I am sorry you feel that way; that is not going to help your job any." And [Capaci said,] "Give me a call tomorrow."

At some point during the time that she was in Capaci's office on June 24, Edwards signed what Respondent contends is a written confession that she stole the items that Capaci found in the trunk of her automobile. On direct examination, Edwards was handed the document in question, General Counsel's Exhibit 103, and she was asked and she testified:

> Q. Do you recall when you were with Mr. Capaci, Mr. Capaci writing anything?
>
> A. Yes, ma'am.
>
> Q. Does this look similar to what Mr. Capaci was writing?
>
> A. I don't know. All I know is when he was writing, I asked him what he was writing, and he told me he was just writing something that was normal formality. And I said, "Because I can't read." And he said, "Well, there is nothing for you to worry about." So I don't know what he was writing. I just know he was writing.
>
> Q. Prior to signing the General Counsel's 103, what did you know about what it said?

A. I didn't know. He told me to sign a paper that he gave me. And when I asked him, what was it, he told me "It is nothing for you to worry about."

I said, "Well, I can't read, so I don't know what it is."

He said, "Well, it is not an admission of guilt. It is just a normal formality for me to help you get your job back. Don't worry about it; just go on and sign it."

And I said, "Okay."

Edwards then placed her signature at the bottom of the exhibit.

Edwards flatly denied that Capaci read the exhibit to her before she signed it. She did not, on the other hand, testify that she asked Capaci what the document said or what the "normal formality" was. The statement is 1-1/2 pages long. It is introduced with some boilerplate that indicates that the statement is made voluntarily. The remainder of the statement is in a question-and-answer format; it concludes with:

Q. Did anything unusual happen while you were at work on 6/24/93?

A. Yes. At about 1:00 p.m. I walked out of the porter shop which is located in the parking lot area outside of Gate 11 with a box of house cleaning supplies & placed the box inside my vehicle which was parked in the engineering parking lot. The box contained plastic bags, two cans of air freshener, two cans of furniture polish, two cans of Comet cleanser, three bottles of toilet bowl cleaner, two bottles of Ajax cleaner, & three cans of carpet cleanser. I know that I stole this property from Avondale and that theft is against company policy and that I could be terminated.

Q. Who gave you the property?

A. The employee who drives the porter truck. His name is Marc Boudreaux, Clock #5522.

Q. Have you stolen any other property from Avondale?

A. No.

Q. Do you have anything to add or to delete from this statement?

A. No. I told the truth.

Edwards admitted signing some document while in Capaci's office, and she acknowledged her signature on the exhibit. Edwards denied, however, that she knew what she was signing, again, because she is illiterate. Edwards further denied receiving the cleaning materials outside Respondent's gate, or anywhere else.

The next day, Edwards appeared at the plant, was cleared through the security department, and went to vote at the Board election. According to the hearing officer's report in the representation case, Edwards' vote was challenged by the Union; the basis of the Union's challenge was that Edwards was an office clerical employee, not a production or maintenance employee.

Although Edwards testified that Capaci told her to "give me a call tomorrow," which would have been June 25, she did not testify that she did so. Edwards may have thought that Capaci meant the next workday, Monday, June 28, but she did not testify that she called Capaci then, either. In fact, Edwards did not testify at what point, if ever, she was told that she had been discharged. (As will be seen, Capaci testified that Edwards called him on June 28; he asked her to come to the premises; she did so; and it was then that he told Edwards that she was discharged for theft.)

An indicator of Edwards' credibility appeared in her testimony about how many trips she made from the machinery department office to her automobile on June 24. On direct examination Edwards testified that, before Capaci called her and asked her to meet him at gate 11, she had made one trip from the machinery department office to her automobile. On cross-examination, however, Edwards testified that she had made two trips to her automobile before the call from Capaci. The direct examination on the point was:

Q. The afternoon that you put the boxes in your car, the afternoon that they alleged that you stole the cleaning stuff, how many times did you go to your car that day?

A. I went when I put the empty boxes—you know, to go put the empty boxes in, and I went when Mr. Capaci called me. So two times.

Q. Did you make any trips other than those two trips?

A. I went when I let the windows down, you know, which was the same time that I put the boxes in.[409]

Q. So you let the windows down, you went out with Mr. Capaci, and you went home that day. Other than those three trips, did you make any other trips to your car that day?

A. No.

The cross-examination of Edwards, however, included:

Q. And you testified that you made—well, again, what were the three trips that you made?

A. One was to let the windows down, to decrease the heat. The second one was when the guard put the boxes in the car for me. The third one was when I met Mr. Capaci.

Q. And which of those three trips did you bring the boxes?

A. The second one.

Q. And that was when you went out to let your windows down. Is that correct?

A. No, sir. I let the windows down first. I made three trips. The first one was to let the windows down. The second one is when I brought the boxes, and the guard put them in the car. The third one was when Mr. Capaci called me and asked me to meet him at the car.

After Edwards essentially repeated the last answer during further cross-examination, she was asked and she testified:

Q. What time of the morning did you go over—or what time did you go and put your windows down on your car?

A. It was after lunch.

Q. Was anybody with you during that time?

A. No, sir.

Q. Did you see the guard at his gate during that time?

A. Yes, sir. He was there.

Q. What time of day did you go put the boxes in your car?

A. Right before 1:00 o'clock.

Q. How much time was there between you going out to roll your windows down and bringing the boxes to your car?

A. About maybe 20, 25 minutes.

Q. And what time, if you can recall, did Mr. Capaci call you?

[409] As previously noted, Edwards testified that on warm days that did not threaten rain, she made midday trips to her auto to open the windows.

A. He called between 1:00 and 1:30, looked like.

That is, Edwards testified twice on direct examination that she made only one trip to her automobile before Capaci's June 24 telephone call; she testified that on that one trip, she both lowered her windows and placed the boxes in her automobile. On cross-examination, however, Edwards testified three times that she made two trips to her automobile before Capaci's telephone call; she testified that she made one trip to lower the windows and she made the other trip to places the boxes in the automobile. Moreover, on cross-examination Edwards gave testimony of the approximate times of each of the two trips that she made to her automobile before Capaci called her.

Edwards' Discharge—Respondent's Evidence

As noted, Edwards placed employee Chester Constant at two of her confrontations with her supervisors; the first was with Truxillo and Betanoff, and the second was with Betanoff but not Truxillo. At the first, Truxillo supposedly spoke to Betanoff and he referred to Edwards as an "ass hole," and Truxillo told Betanoff that Edwards "was talking up for the Union" at the employer campaign meeting that Truxillo had just completed. At the second confrontation, Constant supposedly told Betanoff that he had gotten a union handbill from Edwards and Betanoff told Edwards: "If the Union came in, you would be out of a job in a minute." Respondent called Constant as its witness. Constant (vol. 148) testified that he saw Edwards "[a]bout every day" during the first 6 months of 1993, and he never saw her wearing a union pin. Constant further testified that during that period he never heard Edwards speak favorably about the Union; she never told Constant that she was a union supporter; and Constant never heard her tell anyone else that she was a union supporter. Constant further denied that he was present when Truxillo told Betanoff that Edwards had been speaking for the Union and that Edwards was an "ass hole," or that Betanoff ever told Edwards that she would be out of a job in a minute if the Union was selected by the employees. Constant further denied that he was present when Betanoff told Edwards to keep quiet at the employer campaign meetings and just "look pretty." Finally, Constant denied that he ever got any handbills from Edwards.

Truxillo (vol. 70) testified that he conducted employer campaign meetings only for the approximately 15 shop employees who regularly signed his MCR, and Edwards was not one of those employees. Truxillo further testified that he saw Edwards every day during the preelection period, and he never saw her wearing prounion insignia. Truxillo specifically denied tearing a pin from Edwards' blouse, and he specifically denied telling Edwards that wearing a union pin was grounds for discharge. Truxillo further denied telling employees that they would lose their jobs if the Union was selected by them as their collective-bargaining representative, and he denied telling Edwards that she would be out of her job "in a second" if the Union was selected. Truxillo further denied accusing Edwards of placing a union handbill above the timeclock.

Betanoff (vol. 68) testified that he was the supervisor of Edwards and that she was on his daily MCR. Betanoff denied that at any of the employer campaign meetings that he conducted Edwards said anything, and he denied that he and Edwards ever discussed the Union. Betanoff denied that Edwards ever wore prounion insignia or otherwise showed support for the Union. Betanoff specifically denied that Edwards told him that she planned to vote for the Union, and he denied that he told Edwards that, if the Union was selected as the collective-bargaining representative, she would lose her job.

Betanoff further testified that during the morning of June 25, Edwards called him and:

> [Edwards said:] I am not coming to work.
>
> And then I asked her what happened, and she told me about that they were going to look at her case Monday. She won't come to work, and they won't look at her case until Monday.
>
> I asked her the question, "What happened."
>
> She told me that Security caught her having in her car, in her possession, in her trunk, some cleaning substances.
>
> I asked her a question, "What for? What you were doing with them."
>
> She said, "Well, I was planning to clean my apartment."

(As noted, Edwards testified that she was moving from one house to another; she has never lived in an apartment.) On cross-examination Betanoff further acknowledged that in a pretrial affidavit he stated that: "Edwards admitted to me that she took the cleaning supplies in order to clean her new apartment."

Capaci (vol. 66) testified on direct examination that he knew Edwards, and he saw her at work on a daily basis, but he denied ever seeing her wearing any prounion insignia. Capaci testified that shortly after noon on June 24 dispatcher and supervisor, Ralph Luli told him that he had received an anonymous telephone report that Edwards had placed some cleaning supplies in the trunk of her automobile. Capaci testified that he called Edwards and, without telling her why, asked her to meet him outside the machinery department office. Edwards agreed. According to Capaci:

> Ramona met me outside the machine shop in the open area, and I told her that we had received an anonymous phone call in reference to a theft, that the caller had stated that she had taken some cleaning supplies and placed them in her vehicle. . . .
>
> She became upset and said that she was concerned about what her father [who was then employed by Respondent] would think, that he was a minister in the church, and that she was concerned about losing her job.
>
> And at that time I said, "Ramona, you know, did you take any cleaning supplies?"
>
> And she said, "Let me clear the air at this time. Yes, I did."
>
> I said, "That is a violation of company policy. You could be terminated for that." . . . And I said, "Where are the supplies right now?"
>
> She said, "They are in my car."
>
> I asked her if she would voluntarily retrieve the supplies. She said she would and give them back to me, and we walked on over to her car.

Further according to Capaci, when he and Edwards got to her automobile, Edwards opened a rear door and showed him a single empty box that was on the back seat; Edwards told Capaci that she had gotten the empty box from "the supply shack" (apparently, the porter's shack). Then Edwards opened the trunk (with a key); in it was a box similar to the one on the back seat. In the box, according to Capaci were, "plastic bags, cleanser, cleaning supplies, office cleaning and house cleaning

supplies that you would use in a bathroom or a kitchen, on a desk—furniture polish—stuff like that." Capaci testified that then:

> She . . . said, "There is the supplies that I took, but I want to tell you why I took them."
>
> I said, "Well, we will talk about that later." . . .
>
> Ramona took the supplies out of the trunk and handed the box to me.
>
> I asked her if she would voluntarily come to the office and give a voluntary written statement of what happened, and she said she would.

Further according to Capaci, when they got to his office:

> Well, I asked Ramona what happened, and she told me, just like she stated when we were in front of the machine shop, she wanted to tell me. She wanted to clear the air. She was embarrassed. She was upset, worried about what her father would say.
>
> So I said, "Well, what happened."
>
> She said, "I bought a new house, and I don't have any money to buy the cleaning supplies, so I took these cleaning supplies that were supposed to be for Avondale—Avondale company property."
>
> I said, "Are you willing to give a voluntary written statement—your story of what happened?"
>
> She said, "Yes." And then we initiated the statement.

Capaci testified that before he began writing the statement for Edwards to sign, he read to Edwards the boilerplate statement at the top of a form that indicated that the statement was voluntary. The statement, part of which is quoted above, was completed. Capaci testified that, "[e]very time" that he takes a statement from an employee, he reads what he has written to the employee, and Capaci testified that he did so in Edwards' case. Capaci testified:

> I gave the statement to Ramona to read before she signed it. . . . She read the statement and said that is what she took the supplies for, and [I] showed her on the statement where to sign it. . . . I told Ramona that she could go ahead and return to work and punch out. I believe it was almost the end of the workday, but that while this case was under investigation she would be suspended which is normal procedure.
>
> Ramona wanted to know if she could vote the next day in the Union election. . . . I told her absolutely she could vote. . . . I gave her her badge so that she could come onto company property and vote the next day.

Capaci denied that: (1) there was any other discussion about voting while Edwards was in his office; (2) another person (such as the gate 11 guard) came into his office during the interview of Edwards; (3) he asked Edwards if anyone had a vendetta against her; (4) he told Edwards that he did not believe she had stolen the property; (5) he told Edwards that he was just trying to help her; (6) he told Edwards that the document that she was signing was not an admission of guilt; (7) he told Edwards that the document would help her get her job back; (8) he told Edwards that he did not know how things would go, but he would see what he could do for her; (9) Edwards told him how she was going to vote; (10) he told Edwards that her saying that she would be voting for the Union would not help her job; and, finally, (11) Edwards told him that she could not read. Ultimately, I credit all of these denials except the last.

Capaci testified that he was busy with election duties on June 25. Early on June 28, he contacted Mark Boudreaux, the porter whom Edwards had implicated as having given her the cleaning supplies outside gate 11. Capaci also testified that he talked to Boudreaux's helper (whom Capaci could not name). Boudreaux and the helper, Capaci testified, told him that they had given Edwards cleaning supplies, but only inside the gate, at the machine shop where Edwards did have some cleaning duties. Boudreaux showed Capaci a "disbursement list" that showed that he had left certain supplies at the machine shop. (Neither Boudreaux nor his helper testified.)

Capaci testified that he then contacted Murray Reed, the guard who had been on duty at gate 11 on June 24. (Capaci testified that he spoke to Reed because, although Edwards testified that she got the supplies from Boudreaux outside gate 11, Boudreaux had said that he gave supplies to Edwards inside the gate, at the machine shop. Capaci testified that he reasoned that, if Boudreaux was telling the truth, Edwards must have taken the items through the gate, past the guard, without a property pass. Capaci thought Edwards might be lying about where she got the items to protect Reed.) Capaci testified that Reed told him that he had not seen Edwards take materials through the gate on June 24, but she previously had done so: "And she would frequently comes [sic] in and out with cleaning supplies, and at some times she would forget the paperwork. But that she would always bring the paperwork back." (Reed did not testify.) Capaci issued Reed an oral warning because Reed admitted that he had, at times other than June 24, allowed Edwards to come through gate 11 without paperwork for property that she was carrying.

Capaci testified that he then called the human resources department and spoke to Manager of Employment Julie Bolden. Capaci reviewed the matter with Bolden to see that he was "not overlooking anything." Bolden told Capaci that he was "right in line in terminating Ramona Edwards," and that is what he decided to do. (Respondent did not call Bolden to testify.)

Capaci conducted no other investigation. He contacted Department Superintendent Kaul and told Kaul what had happened. Capaci further told Kaul to handle the paperwork for Edwards's discharge, which Kaul did. Capaci testified that Edwards called him later on June 28; he asked Edwards to come to the plant; when she arrived, Capaci told her that she was discharged for theft. Edwards did not respond. (As noted, Edwards did not testify about how or when she was told that she was discharged, and this testimony by Capaci stands undenied.)

On cross-examination, Capaci acknowledged that his pretrial affidavit states:

> Within an hour of getting the call about Ramona Edwards I went to see her in the machine shop and ask her to come back to my office to discuss the Company business. And when we got back to my office I asked her about the information we had received, and she admitted in the office [that] she had taken the cleaning supplies. I told her that she had committed a serious offence, and asked her if she would voluntarily give the supplies back. She said she would. And we went out to her car which was parked in the parking lot A adjacent to the security guard shack at Gate 11. . . .

> When we arrived at her car she unlocked it and opened it. She then opened the trunk, and I stood nearby while she retrieved the supplies. And we then returned to my office with the supplies.
>
> We did not have any discussions about whether or not she would vote in the Union election.

This affidavit, of course, conflicts with Capaci's testimony about the sequence of his meetings with Edwards and his testimony that her voting was mentioned when they were in his office.

As noted above in the case of alleged discriminatee Brown, Capaci also took statements from guard Agnes Williams and production employee Amos Mistric when he was investigating allegations that Brown had cursed Williams (in a parking lot dispute). As also noted above in the case of alleged discriminatee Dwight Ballard, Capaci took a statement from Supervisor Jesse Caston when he was investigating allegations that Ballard had posted materials on a company bulletin board without permission. In each of those three statements that Capaci took, he used the question-and-answer form that he used when taking the statement from Edwards. The General Counsel also introduced two statements that security department investigator, and Capaci subordinate, Ronnie Legasse took from employees John Porrazzo Jr., and Joseph Serpas during another theft investigation. Legasse used the same question-and-answer form. In each of those five statements, the first question that is asked is: "Can you read and write the English language?" No such question appears in Edwards' statement. On cross-examination Capaci was asked and he testified:

> Q. I understand you took the statement from Ms. Edwards. When you began, did you ever ask her if she could read or write the English language?
>
> A. No, I didn't.
>
> Q. And is there a reason you didn't ask her that?
>
> A. I thought she could read. She was a clerk. Never said she couldn't read.
>
> Q. She never told you that she couldn't read?
>
> A. No. She—it appeared she could read.

Capaci acknowledged, however, that guards such as Agnes Williams are required to be literate. Of course, supervisors such as Caston must be able to read (as the plethora of company forms introduced in this case would indicate).

Kaul (vol. 68) testified that Edwards occasionally cleaned office areas and that she could have gone to the storage building just outside Gate 11 to get cleaning materials and bring them back inside the gate. Kaul testified, however, that in no case would Edwards, in the course of her duties, take cleaning materials out of gate 11. Kaul flatly denied that he ever saw Edwards wearing prounion insignia. He further denied ever asking Edwards if she had posted prounion literature near a timeclock. Kaul further testified that at some point on June 25, Edwards called him. Kaul was asked, and he testified:

> Q. What was said in that conversation?
>
> A. I believe I asked her did she get to vote, or did she vote. And she said yes. She did.
>
> Q. And was anything else said?
>
> A. She said to me, "Don't worry, Mr. Jake. We are going to beat them."

Edwards was called in rebuttal. She denied ever admitting to Kaul or Betanoff that she had stolen the cleaning items; she denied that she called Betanoff on June 25; but she did not deny calling Kaul on June 25, and she did not deny telling Kaul: "Don't worry, Mr. Jake. We are going to beat them."

Edwards' Discharge—Credibility Resolutions and Conclusions

When testifying about her own conduct, Edwards had an extremely unfavorable demeanor, and her testimony about her June 24 trips to her automobile demonstrated that she possessed a clear willingness to lie about the circumstances of her discharge. As noted, on direct examination Edwards stated twice that she had made only one trip to her automobile before Capaci came down to the machine shop; that trip was "when I let the windows down, you know, which was the same time that I put the boxes in." Then counsel for the General Counsel led Edwards to conclude that she made "those three trips" to her automobile during the entire day; as counsel counted the trips, they were: (1) to put the boxes in the back seat and let down the windows; (2) to accompany Capaci; and (3) to go home. On cross-examination Respondent's counsel asked Edwards what the three trips had been. Edwards obviously forgot that the General Counsel had led her to count her going home trip, and she could only think of two. To remove the conflict, Edwards created a second trip that occurred before Capaci arrived at the machine shop: one trip, Edwards testified, was to let her automobile's windows down, and a second trip was to bring the boxes to the automobile. Edwards even supplied the times of the two trips before Capaci arrived at the machine shop: (1) after lunch; and (2) "[a]bout maybe 20, 25 minutes" later. In summary, Edwards felt a necessity to come up with a third trip to the car (before going home), and she was willing to create it. This was not mere forgetfulness; Edwards testified that she could not have taken any of the cleaning materials out of the plant because a guard had inspected what she carried through gate 11. If that proposition had any validity, Edwards would have well remembered her trips to her automobile, and she would not have manufactured another one, much less given its time.

Even before Edwards gave that self-conflicting testimony, however, she had rendered herself incredible in her testimony about the circumstances of her discharge. Edwards testified that she dragged the several boxes that had not been flattened to the gate because she did not know that cardboard boxes could be flattened; after inspecting the boxes, the guard told her that they would not fit in her automobile and he flattened them for her. Edwards appeared to be about 40 years old. I cannot imagine a person having lived that long and not knowing that cardboard boxes can be flattened for easier handling and storage. (The ability to read is not a prerequisite for such knowledge.) I also cannot believe that Edwards would not have known that several nonflattened boxes would not fit in her automobile, especially if a guard could tell that. I believe that the entire story about the guard who helped her was a fiction created to show that anything that she took out of the gate had been well inspected and that she could not have stolen anything.

Edwards also testified that she left her automobile's windows open on every warm day that it did not rain. The effect of that testimony is that, although she left her automobile's windows open almost every day, it just happened that "someone" chose to plant stolen goods in her automobile on the same day that she decided to collect boxes and place them in the automobile. I did not believe that testimony when I heard it, and I still

do not believe it. Even accepting the self-serving premises of Edwards' account, however, there is no evidence that the "someone" was a supervisor or other agent of Respondent.

I do believe that Edwards told Capaci that she could not read. Capaci testified that taking employee statements is "routine." the General Counsel offered five other statements with the "English language" question, one from a guard who is required to be able to read and one from a supervisor who is also required to be able to read. Respondent offered over 1000 documents in an effort to prove consistent conduct in other areas,[410] but Respondent offered no other statements that the security department ever took that did not include the question about the ability to read the English language. I believe, and find, that Edwards told Capaci that she could not read, and I believe that Capaci did not place the "English language" question in her statement for that reason. Nevertheless, Edwards testified that she knew that she was being accused of theft, and she knew that theft was an immediately dischargeable offense. Given those circumstances, I do not believe that Edwards would have signed anything without at least asking that it be read to her; and she would not have signed it unless it was. I credit Capaci's testimony that he did read the confession to Edwards before she signed it.

Even if Capaci did not read the confession to Edwards, she necessarily knew what the document was. Again, Edwards knew that she was being accused of theft, and she knew that theft was an immediately dischargeable offense. Edwards testified, however, that she signed the page-and-one-half document only because of Capaci's representation that it was a "normal formality . . . to help you get your job back." I do not believe that testimony. Capaci had written the statement in front of her; Edwards knew that it was not a formality, normal or otherwise. The long document could have been nothing but a confession, as Edwards assuredly knew. (Certainly, the General Counsel does not suggest anything that it could have been other than a confession). Again, Edwards knew that she was being accused of theft, and she knew that the penalty for theft is discharge; she would not have signed any statement unless she thought she had nothing to lose by doing so; and she would not have thought that she had nothing to lose by signing the statement unless she had, in fact, stolen the cleaning supplies. I believe, and find, that Edwards orally admitted to Capaci that she had taken the cleaning materials; I further believe, and find, that Edwards knew that she was signing a confession of theft on June 24. Although in his testimony Betanoff may have confused "house" with "apartment" (quite possibly because of his own experience), I also credit Betanoff that Edwards admitted the theft to him. I therefore find that Respondent has demonstrated that its supervisors had reasonable cause to believe that Edwards stole the cleaning items before it discharged her.

No other witness for the General Counsel testified to threats of the categorical nature that Edwards described. The immediate question arises: Why would Edwards have been selected for such threats? If Edwards held prounion sympathies, there is no probative evidence that she communicated them to other employees. She did not testify that she ever communicated any prounion sympathies to the Union itself (which may well account for the Union's challenge of her ballot at the election). That is, I could not credit Edwards' testimony that she was threatened by Betanoff and Truxillo because of her expressions of prounion sympathies because I do not believe that she had expressed any prounion sympathies, except for the comparatively remote expression to Genter in November 1992. I especially do not believe that Edwards wore prounion insignia at work. Edwards' father was an employee; if Edwards had worn prounion insignia to work, the General Counsel presumably could have called him to give his daughter's testimony some corroboration; the General Counsel, however, did not do so. Moreover, Constant, Edwards' fellow employee, credibly denied ever seeing Edwards wear any prounion insignia; and Betanoff, Truxillo, and Kaul also credibly denied that Edwards wore prounion insignia or said anything in favor of the Union. Indeed, I do not believe that Edwards actually held prounion sympathies. Although Edwards appeared in rebuttal to deny any June 25 telephone conversation with Betanoff, she did not deny that on June 25 she called Kaul and told him that she had voted, and she did not deny that she then told Kaul: "Don't worry, Mr. Jake. We are going to beat them." That statement, I find, was the true expression of Edwards' sympathies.

(The General Counsel argues that none of Capaci's testimony can be credited because his pretrial affidavit places Edwards at his office before he and she went to her automobile. This statement by Capaci, however, would not alter the substance of Capaci's testimony that Edwards orally confessed to the theft before she signed the confession; also, Capaci's trial testimony was essentially consistent with Edwards' about the sequence of their meeting outside the machine shop which was proximate to the parking area, their going to the automobile, and their then going to his office. The General Counsel further argues that Capaci cannot be credited in his testimony that he did not know of Edwards' alleged prounion sympathies because he wrote a memorandum stating that it was possible to lose the "Labor Board" case. As its context makes clear, however, Capaci was writing that memorandum about the conduct of guard Reed and the mention of the "Labor Board" was made in discussing the possibility of discharging Reed and a case that Reed might file with the Louisiana Department of Labor. Finally, the General Counsel contends that Capaci cannot be credited because of his affidavit that falsely states that there was no discussion about voting when Edwards was in his office on June 24. This has been a serious consideration; nevertheless, I credit Capaci's testimony at trial that Edwards did not tell him that she intended to vote for the Union. Capaci had a more credible demeanor than Edwards, and, again, Edwards' true feelings about the Union, and her voting intentions, were disclosed in her undenied statement to Kaul: "Don't worry, Mr. Jake. We are going to beat them.")

I credit Kaul's testimony that he did not ask Edwards if she posted a union handbill near a timeclock. Moreover, since employees had no right to engage in such postings, I do not understand how such a question could be unlawful. I further credit Betanoff's and Truxillo's denials of the threats and other conduct that Edwards attributed to them. I shall therefore recommend dismissal of the allegations that Edwards was interrogated and threatened in violation of Section 8(a)(1). Moreover, assuming that the General Counsel has made out a prima facie case that Edwards was discharged on the basis of Genter's November 1992 threat to Edwards, I further find and conclude that Respondent has demonstrated that it would have dis-

[410] R. Exhs. 719, 730, and 800 (each rejected) contain, respectively, 181, 350, and 1097 warning notices to employees who were not alleged discriminatees. There were other such exhibits that Respondent offered as evidence of consistent treatment. (As previously mentioned, I admitted such evidence only where the existence of a rule was in issue.)

charged Edwards even absent the prounion sympathies that she once expressed. I shall therefore also recommend dismissal of the allegation that Edwards was discharged in violation of Section 8(a)(3).

b. Glenda Dennis

(1) Dennis' discharge after positive drug test

Glenda Joann Dennis (vols. 54, 55) was employed as an insulation installer until she was discharged on May 20, 1994.[411] The fourth complaint, at paragraph 32, alleges that by discharging Dennis Respondent violated Section 8(a)(3). On May 23, Dennis returned to the plant and requested reinstatement; her request was denied. The fourth complaint, at paragraph 33, further alleges that Respondent's refusal to reinstate Dennis separately violated Section 8(a)(3). The General Counsel contends that Respondent discharged and refused to reinstate Dennis because of her known union activities and expressions of sympathy which included her distributing union authorization cards and wearing prounion insignia. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Dennis may have held at the time of her discharge. Respondent further answers that Dennis was discharged, and denied reinstatement, solely because she tested positive on a routine drug screening test. The General Counsel replies that the defense is a pretext because Respondent knew, or should have known, that the positive result from Dennis' drug test was caused by her lawfully taking prescription medicine. Ultimately, I find and conclude that the supervisors who were involved in Dennis' discharge had no knowledge of her prounion sympathies, and I recommend dismissal on that ground; alternatively, I find that Respondent has demonstrated that it would have discharged Dennis, and would have refused to reinstate her, even absent her protected activities.

Employer Knowledge of Dennis' Prounion Sympathies

Dennis worked under the supervision of Foreman Leon Hilliard. On direct examination, Dennis testified that in March or April 1993, at the beginning of the overt organizational attempt, she placed two "Union-Yes" stickers on her hardhat, "[o]ne in the front and one in the back." Dennis testified that the two stickers remained on her hardhat, which she wore in production areas, through the date of her discharge. On cross-examination, however, Dennis acknowledged that her pretrial affidavit states: "I wore a 'vote yes' sticker on my hardhat from before the election, and it remained on my hardhat till the day I was fired." Dennis further acknowledged that she did tell the Regional Office investigator that she wore only one "Union-Yes" sticker on her hardhat. When asked where she wore that one sticker, Dennis replied: "In the front." On redirect examination, when she was asked to explain the apparent discrepancy between her trial testimony and her affidavit, Dennis replied: "Well, two is a pair. You would consider that as one, wouldn't you?"

Dennis further testified that in March or April 1993, on a day that she had been distributing union authorization cards in the women's restroom before work, she was approached by Hilliard. According to Dennis, Hilliard told her, "that if I was passing out Union cards in the ladies' bathroom to stop it because it would jeopardize my job." Dennis was corroborated in this testimony by current employee Glenda Joseph Dennis (who is no relation to alleged discriminatee Glenda Joann Dennis). Glenda Joseph Dennis (vol. 62) testified that Hilliard made essentially the same statement to her; then she followed Hilliard to alleged discriminatee Dennis' work station; there, she heard Hilliard tell alleged discriminatee Dennis that she was jeopardizing her job by passing out union authorization cards on company property.[412] Hilliard (vol. 76) denied ever discussing union authorization cards with alleged discriminatee Dennis; however, Hilliard was evasive, tended to answer questions that had not been asked, and would not take his eyes from Respondent's counsel while he was on cross-examination. I credit Dennis and Glenda Joseph Dennis who were more credible on the point. Hilliard further denied that he saw alleged discriminatee Dennis wear prounion insignia; I find, however, that Dennis wore at least one "Union-Yes" sticker on her hardhat while working in production areas, and, from that fact, her production supervisors knew of her prounion sympathies.

Dennis further testified that on May 6, the day of Respondent's annual shareholders' meeting, she wore to work a prounion T-shirt, as did many other union adherents. Dennis wore a jumper but, for at least part of her workday, the T-shirt was exposed to her supervisors. Dennis was also corroborated in this testimony by Glenda Joseph Dennis, and I found it credible.

Background of Dennis' Discharge

Dennis testified that on February 11, something flew into her eye as she walked from the parking lot toward her working area. Dennis went to the medical department (or "First Aid Department") where someone flushed out her eye; then she went to work. About 8 a.m., she went back to the medical department complaining of pain. After being examined, Dennis was provided with transportation to the office of Dr. Suzette Killen, an independent provider whom Respondent sometimes uses for employees who are injured on-the-job. Dr. Killen treated Dennis, placed an eye patch over her eye, and wrote her a prescription for 10 capsules of Tylenol 3 With Codeine (Tylenol 3). Dennis was transported back to the medical department. Respondent's medical department can fill some prescriptions, but not those that contain opiates, such as Tylenol 3. A medical department attendant told her to take the prescription for Tylenol 3 to an independent pharmacy and Respondent would be billed. Dennis was sent home by the medical department (because she could not work with an eye patch). Dennis got the prescription for Tylenol 3 filled at a commercial pharmacy, and Respondent's insurance department was billed for the pre-scription. Dennis testified that she took seven of the capsules within the next few days after February 11; she saved the other three Tylenol 3 capsules.

Dennis' Discharge

Dennis testified that she took the remaining three Tylenol 3 capsules in May. On May 20 Dennis was discharged for failure to provide a valid explanation for evidence of codeine and morphine that was discovered in a drug screening test that had been administered by Respondent's medical department. Patricia Pizzo is the director of toxicology at the laboratory that tested a sample of Dennis' urine that was collected on May 17. Pizzo (vol. 58) testified when called by the General Counsel

[411] All dates mentioned in Dennis' case are in 1994, unless otherwise indicated.

[412] No threat or imposition of an unlawfully broad no-solicitation or no-distribution rule is alleged on the basis of this testimony by Glenda Joseph Dennis and alleged discriminatee Dennis.

pursuant to Federal Rules of Evidence 611(c) that codeine, such as that found in Tylenol 3, begins a process of degrading into morphine as soon as it enters the system. A urine sample taken during this process will show both codeine and morphine; in fact, a sample that shows both codeine and morphine is indicative of treatment with such drugs as Tylenol 3. Eventually, all of the codeine degrades to morphine, and urine samples will show only morphine, until all of the morphine is eliminated from the system. (Dennis testified that she found out that codeine degrades to morphine only after her discharge.)

Dennis testified that on May 16 she began experiencing further eye pain—"about the same way it did on the 11th [of February]." Dennis called in sick on May 16; she stayed home from work, and she testified that she took two of the Tylenol 3 capsules that were left over from Dr. Killen's February prescription. On the morning of Tuesday, May 17, Dennis took Advil and the remaining Tylenol 3 capsule, and she went to the plant. She reported again to the medical department. Again, her eye was flushed out; and a urine sample was taken. (Respondent's internal procedures require such a test when an employee reports to work after an absence from a claimed on-the-job injury.)

The medical department personnel sent Dennis to another outside physician, and she did not return to work until Friday, May 20. About quitting time on May 20, Dennis was paged to come to the medical department. There, she met with Linda Blank[413] and Mercedes Bate.[414] Blank is the supervisor of the medical department who is in charge of drug testing procedures; Bate is the medical department's clerk. Dennis was asked on direct examination and she testified:

> Q. And what, if anything, did you take with you when you went to First Aid?
>
> A. My work bag, my hardhat.
>
> Q. And when you got to First Aid, what did you do?
>
> A. Well, I went to the window to let them know I was there, and Mercedes Bates was behind the window and she spotted me and she told me to come on around to the back office.
>
> Q. And once you got to the back office, who, if anyone, was there?
>
> A. Linda Blank [and Bate]. . . .
>
> Q. And at that point where were your hardhat and work bag?
>
> A. On the floor beside me and the hardhat was on top of the work bag.

Dennis was not asked if the hardhat was right side up or upside down. (On cross-examination Dennis acknowledged that she did not wear her hardhat at any time that she was in the medical department.) Dennis was further asked and she testified:

> Q. Now, tell us what, if any, conversation you had once the three of you were assembled.
>
> A. Well, Blank told me that my—the drug report had returned and that it had came back positive and I had a high level of codeine and morphine in my system, and if I couldn't explain where I got it from, she would have to terminate me.
>
> Q. And what, if any, response did you make to that?
>
> A. And I told her about the Tylenol 3 with codeine and the Advil.
>
> She said, "That explains the codeine but not the morphine."
>
> And I told her that I didn't know how the morphine had got in my system. And at that time I showed her my arms showing her that I didn't have no needle marks on them or nothing and I didn't do no drugs, and she gave my medicalfile to [Bate] to take to Dr. Mabey [Respondent's in-house physician] to see if anything in the file contained the morphine, and a few minutes later she [Bate] brought the file back and told [Blank] that Mabey said no.
>
> And at that time Blank told me that she had to terminate me and she took my badge and she gave me two passes to allow me to leave Avondale, and she had me to sign some papers or something.
>
> Q. Did she tell you what, if any, choices you had other than being discharged?
>
> A. Oh. She told me that if I wanted my job back I had to take an eight-week drug [counseling] class, but I had to admit that I was on drugs, and she gave me a little slip with a lady named Jan McMary on it. I guess she was the head over the class that I had to go through to get the job back.
>
> Q. And what was your response to that?
>
> A. I told her no, that I wasn't taking any drugs.

The "papers or something" is critical to this case; Dennis signed a preprinted form which she partially completed. The completed form, with handwritten entries that are underlined here, reads:

> Date test results returned from lab: *Friday, May 20, 1994*
>
> Date Advised of termination: *Friday, May 20,1994*
>
> I have been advised of the results of my drug test by *Linda Blank* in the presence of Mercedes Bate and that according to company policy I have been terminated from employment at Avondale *Shipyards* Division.
>
> I also was advised of what I must do in order to be made eligible for rehire, along with what I need to do to pick up my final check.
>
> In response to the question of when was the lst time I used drugs or alcohol before taking the drug test on *May 17, 1994,* my answer was: *I never done morphine or any medication with codeine.*

The last italizied sentence was written, in longhand, by Dennis. At the end of the document, Dennis affixed her signature, and Blank and Bate signed below Dennis as witnesses; the date May 20, 1994, is written opposite Dennis' signature.

The General Counsel asked Dennis and she testified:

> Q. So why did you sign a form saying that when you knew you had taken the Tylenol 3 with codeine?
>
> A. Well, really at the time I wasn't thinking straight because I had just been terminated, fired, kicked in the butt, so all I was thinking about was where my next meal was coming from or how I was going to pay my bills. They probably could have put a [sic] Declaration of Independence in front of me and I might have signed it, too.

[413] By time of trial, Blank's name was Maggio.

[414] By time of trial, Bate's name was Truxillo, because she had married Supervisor Steve Truxillo who is mentioned in alleged discriminatee Edwards' case. Bate was sometimes referred to as "Bates" by the witnesses.

After signing the form, Dennis left the premises. Dennis testified on June 13 she went to the public library and discovered that codeine degrades to morphine in the system. (On Monday, May 23, Dennis returned to the plant with her brother to ask for reinstatement; that matter is discussed in a separate subsection, below.)

Francis McGill (vol. 53) is employed by Respondent as an electrician. McGill testified that in June he was called to the medical department for a random drug test. At the time, he was taking cough syrup with codeine that had been prescribed by his personal physician. He told that to the attendant who took his specimen, and the attendant appeared to write something down. A few days later he was called to the medical department. When he arrived, an attendant took his badge, which is often the first step in discharging an employee. Blank then appeared and told McGill that he had tested positive for codeine and morphine. McGill told Blank that he was taking prescribed codeine cough syrup, and he tendered his physician's telephone number so that she could verify his representation. Blank refused to call the physician, but she stated that she would call McGill's home and ask his wife to read to her the name of the medicine from the bottle. McGill's wife was not at home, and Blank spoke to McGill's son. The son gave Blank some medicine's name from some bottle that was in the house. Blank called another number; then she reported to McGill that she did not know if the medicine really contained codeine. Again McGill asked Blank to call his physician. According to McGill: "She told me [that] they had to terminate me; I was fired, and I couldn't work for Avondale—neither Avondale or a contractor at Avondale unless I went to drug rehab." The next day, McGill returned to the medical department with a bottle of the prescribed codeine cough syrup and his pharmacy records. He met with Sansoni and tendered the bottle and records, but Sansoni said it was not necessary to look at them. Sansoni told McGill that his discharge had been a "mistake," and McGill could go on back to work. Sansoni did not tell McGill how the discharge had been a "mistake." (McGill was paid for the time that he had lost on the day that Blank had discharged him.)

Dennis' Discharge—Respondent's Evidence

Blank made the decision to discharge Dennis. Blank (vol. 72) and Bate (vol. 67) flatly denied seeing Dennis' hardhat when she was in the medical department on May 20. The testimonies of Blank and Bate are essentially consistent with each other on other points, as well. Their testimonies about Blank's exchanges with Dennis are inconsistent with the testimony of Dennis only in regard to what was said about what, if any, drugs that Dennis may have been taking. Blank and Bate testified that in the interview Dennis never stated that she had taken some Tylenol 3. Both testified that Dennis acknowledged taking only eye drops and birth control pills, even though Blank specifically asked Dennis, several times, if she had recently taken Tylenol 3 or some other form of Tylenol. At the end of her direct examination, Bate was asked, and she testified:

> Q. At any time during that conversation, did Ms. Dennis tell Ms. Blank that she was taking Tylenol 3?
>
> A. No, she did not.
>
> Q. At any time during this conversation, did Ms. Blank tell Ms. Dennis that Tylenol 3 would explain the morphine but not the codeine? . . .
>
> THE WITNESS: No, she did not.

At the end of her direct examination, Blank was asked and she testified:

> Q. Okay. At any time, Ms. [Blank], did Ms. Dennis say that she had been taking Tylenol 3 with codeine?
>
> A. Not once. I questioned her many times on that when—
>
> Q. At any time, did you tell Ms. Dennis that taking Tylenol 3 would explain the morphine but not the codeine?
>
> A. No.

Pizzo, of course, had testified that codeine degrades to morphine, not the other way around. In their direct examinations, however, Blank and Bates were only asked if Blank had told Dennis that her taking Tylenol 3 "would explain the morphine but not the codeine." Of course, that is not what Dennis had testified that she was told by Blank; consistent with the testimony of Pizzo, Dennis testified that, when she told Blank that she was taking Tylenol 3, Blank replied: "That explains the codeine but not the morphine." This is a significant difference because, again, codeine degrades to morphine; morphine does not change to codeine. As phrased, the questions to, and answers from, Blank and Bate make no sense; and, certainly they do not constitute denials of Dennis's testimony that Blank told her: "That explains the codeine but not the morphine."

A factual issue is whether, at the time that she discharged Dennis, Blank knew that codeine degrades to morphine. Blank testified that she had known that fact for years. Blank is not a biochemist or a professional of any other stripe,[415] and she appears to have had no more than on-the-job training.

Dennis' Discharge—Credibility Resolutions and Conclusions

On direct examination, Dennis testified that she wore two "Union-Yes" stickers on her hardhat; on cross-examination, however, Dennis admitted that there was only one sticker on her hardhat. (This false testimony by Dennis on direct examination created an unfavorable impression with me; Dennis also displayed a degree of argumentativeness that further contributed to the unfavorable impression that she left.) Dennis further testified that she was accused by Foreman Hilliard of distributing union authorization cards, and she wore a union T-shirt on May 6, the day of the shareholders' meeting, as other prounion employees did. I have credited that testimony, which was corroborated by current employee Glenda Joseph Dennis, and I credit her testimony that she wore one "Union-Yes" sticker on her hardhat when in production areas. Nevertheless, Dennis was not discharged by a production supervisor; Dennis was discharged by Blank, a supervisor of the medical department.

Dennis testified that she carried her hardhat (with one "Union-Yes" sticker) to the medical department on May 20, and she placed it on the floor on a bag that she was also carrying. Dennis did not testify whether the hardhat was right-side up or upside down, but, in either event, her handling of her hardhat in the medical department was not the open and obvious display of prounion sympathies that she had made in the production areas. Moreover, Bate and Blank flatly denied seeing Dennis' hardhat when she was in the medical department on May 20. This testimony was credible, and the General Counsel suggests no other evidence by which Blank could have learned of Dennis' prounion sympathies before she discharged Dennis. In

[415] As her cross-examination showed, Blank's working vocabulary did not distinguish between "derivative" and "distributive."

other cases where alleged discriminatees credibly testified that they had worn prounion insignia in production areas, I have ultimately charged the production supervisors with knowledge of the employees' prounion sympathies. Employees are necessarily seen by supervisors when the employees are working. In those circumstances I have found the supervisors' denials of relevant knowledge to be incredible. There is, however, no logical basis for charging nonproduction supervisors with knowledge of an employee's prounion sympathies by virtue of the employee's wearing prounion insignia only in production areas. I therefore conclude that the General Counsel has not presented a prima facie case that Dennis was unlawfully discharged, or refused reinstatement, and I shall recommend dismissal of both of those allegations on that basis. For possible purposes of review, however, I shall make further findings of fact.

As noted, when they were on direct examination, Blank and Bate were asked if, during the interview of May 20, Blank told Dennis that Tylenol 3 would explain morphine but not codeine in Dennis' urine specimen. Blank and Bate answered negatively, but those denials were not denials of what Dennis had testified to. Dennis testified that Blank told her: "That explains the codeine but not the morphine." Because there is no denial of Dennis' testimony on this point, and because Dennis was credible in this part of her testimony, I credit Dennis.

For Blank to have told Dennis, "[t]hat explains the codeine but not the morphine," Dennis must have told Blank, at least initially, that she had taken something with codeine, namely Tylenol 3. I believe, and find, that Dennis told Blank, early in the interview of May 20, that she was taking Tylenol 3. When Blank told Dennis that taking Tylenol 3 would not explain the morphine, Dennis accepted that erroneous statement and changed her story to Blank and Bate; Dennis began telling them that she was taking nothing but eye drops and birth-control pills. Then, at the end of the interview, to be consistent with the denials she had orally made, Dennis denied, in writing, that she was taking anything with either codeine or morphine. (Dennis testified that in the discharge interview she was so distraught that she would have signed the Declaration of Independence if it had been placed before her. The question, of course, is not what she merely would have signed; the question is what she would have written out herself, and then signed.) I do not believe the testimony of Blank and Bate that Blank repeatedly asked Dennis if she had not been taking Tylenol 3 or other forms of Tylenol; I believe there were no further questions on the subject after Blank erroneously stated that Tylenol 3 was only an answer to the positive codeine result, not the positive morphine result.

I believe, however, that Dennis was led into lying (orally and on the form) by Blank's ignorance, not by Blank's desire (on behalf of Respondent) to discriminate against Dennis because of her prounion sympathies. Blank (and Respondent's other supervisors who would have had to have been in on the scheme) could not have anticipated that Dennis would lie and say that she had taken nothing that would cause a positive drug test result, rather than insist that she had taken nothing but leftover Tylenol 3. (Dennis' denials of all consumption of opiates are to be contrasted with the case of the General Counsel's witness, McGill, who was also discharged by Blank, but then reinstated; McGill insisted, from start to finish, that he was taking prescription codeine medicine.) That is, Blank did not intentionally entrap Dennis by telling Dennis: "That explains the codeine but not the morphine."[416] Although Blank testified that she had known for years that codeine degrades to morphine, it is apparent to me that she did not know it at the time that she discharged Dennis. It appears, further, that Blank did not know that codeine degrades to morphine even when she discharged McGill a month later. (Blank denied much of McGill's testimony, but I found him credible; moreover, Sansoni did not deny McGill's testimony that Sansoni had admitted to him that his discharge had been a "mistake.")

The General Counsel further contends that, when Dennis' file was brought to him, Dr. Mabey should have figured out that Dennis had been taking the Tylenol 3 that had been prescribed in February. The Tylenol 3 had been prescribed in February, not by Dr. Mabey, but by an outside provider. Although the prescription was ultimately paid by Respondent's insurance department, there is no reason to believe that the prescription, or a record of its payment, would have appeared in the file that Dr. Mabey looked at.[417] Even if it had somehow been reflected in Dennis' medical file, the Tylenol 3 prescription was written in February; neither Dr. Mabey nor Blank would have had reason to believe that Dennis had saved some of it until May, especially in view of Dennis' oral, then written, protestations that: "I never done morphine or any medication with codeine."

For these reasons, even if a prima facie case had been presented, I would recommend dismissal of the allegation that Respondent discharged Dennis in violation of Section 8(a)(3).

(2) Dennis' being refused reinstatement

As noted, on May 23 Dennis applied for reinstatement with David Sansoni, the director of Respondent's medical department. Sansoni refused to reinstate Dennis, and that refusal is alleged as a separate violation. There is no evidence that Sansoni had actual knowledge of Dennis' prounion sympathies, but I nevertheless enter the following findings of fact for possible purposes of review:

According to Dennis, she and her brother Joe Davis went to Sansoni's office on May 23; Dennis acknowledged that she was not wearing prounion insignia, and the Union was not mentioned, during the meeting with Sansoni. Dennis testified:

> [Sansoni] come out there to talk to us, and my brother told him that yes, he know of me, that I did not do drugs, and then he [Davis] asked him [Sansoni] could he do a second urine test on me, and they [Sansoni] said, "No, the first test was accurate." . . .
>
> I was trying to tell him about the Tylenol 3 With Codeine, the Advil and the medications that I had taken all around, and he didn't want to hear about it.

Dennis testified that she and Davis had brought with them the bottles for various prescriptions that Dennis had been taking; these included the bottles for Darvocet,[418] Robitussin, Benadryl, and the Tylenol 3 that she had possessed since February. Dennis was further asked on direct examination and she testified:

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[416] Other evidence negating an intent to entrap Dennis lies in the offers of reinstatement after completion of a drug-rehabilitation program by Blank and Sansoni.

[417] The General Counsel did not contend that Dennis' medical file was not provided pursuant to subpoena.

[418] The Darvocet had been prescribed for Dennis on May 17, after the urine sample was taken.

> Q. When you were speaking to [Sansoni], where were the bottles?
>
> A. Oh. I had it in this purse here. . . .
>
> Q. [O]nce you told [Sansoni] about your medications, what, if anything, [did he say] about them?
>
> A. Oh, he acted like that didn't contain the morphine or the codeine that was in my system.
>
> Q. Did he actually say anything?
>
> A. [Inaudible].
>
> JUDGE EVANS: That was a no. Next question.

Davis (vol. 56) testified that he met Dennis in Respondent's parking lot on May 23 and "she showed me she had the medicine in her pocket." Davis and Dennis then went to Sansoni's office and, according to Davis:

> Okay. Then I said [to Sansoni that] I had her to bring along all the medicine and stuff that she was taking, because I knew she wasn't no drug abuser. And, after I told him that he said, "The test was given by qualified people and it came back positive." . . .
>
> [D]uring the time we was talking, she [Dennis] had the medicine in her hand. But, when I was talking to him, well, he [Sansoni] didn't want to see the medicine.

(Of course, this testimony that Dennis had her medicine bottles "in her hand" conflicts with Dennis' testimony that, while she and Davis were talking to Sansoni, she had the bottles "in this purse here.") Davis further testified that he asked Sansoni if Dennis could be administered another drug test; Sansoni refused and stated: "the drugs had been out of her system like three days." Further according to Davis: "And the only thing that he could really tell us was, you know, that she had to go to this drug class, or something like that that they had over there." Davis did not testify that he or Dennis told Sansoni that she had been taking Tylenol 3, or any other opiate, before her drug test of May 17.

Sansoni (vol. 140) testified that he was away from the plant on May 20, and Blank reported to him on Monday, May 23, that she had discharged Dennis. Blank told Sansoni that Dennis had tested positive for codeine and morphine but Dennis had "adamantly" denied having taken any drugs that would account for the test's results. Sansoni testified that this was the first time that one of Respondent's employees had ever tested positive for opiates but not claimed that he or she was taking medicine prescribed for himself or herself, or for a family member. Sansoni testified that he then examined Dennis' file to see if there was anything that might explain the positive result of the test; he found nothing.

Sansoni agreed that he met with Dennis and Davis later on May 23. Sansoni was asked and he testified:

> Q. What if anything do you recall being said in that conversation? What were you told, and what did you say in response?
>
> A. Basically, they came in requesting that Ms. Dennis be given another drug test. And I informed them that to take another drug test would not prove she did not have drugs in her system on the date the other test was given. It would only prove that she did not have drugs in her system today; that whatever she had a few days ago would—if she [had] abstained, would not necessarily be in her system at the present time.
>
> I also asked Ms. Dennis if she had taken anything in a prescription medicine either that she was prescribed or that someone else was prescribed to her that could account for the results of the test.
>
> Q. What did she tell you? Or what did her brother tell you with respect to that question?
>
> A. Either her or her brother responded that she had taken . . . Tylenol 3 . . . that her mother had. I asked her if she had the bottle of what her mother was taking that she took. She told me she did not. I told Ms. Dennis at that time that if she brought the bottle with her mother's name on it . . . we would determine if it could cross over into morphine, that we would sit down and reevaluate her case.

Sansoni testified that Davis threatened a law suit, and he replied in kind, and then Davis and Dennis left the premises. It is undisputed that Dennis did not return to the plant after May 23.

Dennis and Davis denied that either of them claimed that Dennis had taken a prescription for Tylenol 3 that had been prescribed for their mother.

Dennis' Being Refused Reinstatement—Credibility Resolutions and Conclusions

As noted, Dennis and Davis squarely conflict about whether Dennis' collection of bottles was in her purse or in her hands. Also Dennis offered the conclusion that: "I was trying to tell [Sansoni] about the Tylenol 3 With Codeine, the Advil and the medications that I had taken all around, and he didn't want to hear about it." This is hardly testimony that she told Sansoni about the Tylenol 3 that she received in February, and I do not accept it as such; Dennis' "trying" to say something is not saying it, and Dennis did not testify what led her to the conclusion that Sansoni "didn't want to hear about it." When asked specifically what Sansoni had said, Dennis replied: "Oh, he acted like that didn't contain the morphine or the codeine that was in my system." Dennis was then asked what Sansoni said, not how he acted. Dennis, after evasiveness that is reflected in the quotation above, then admitted that Sansoni did not say that Tylenol 3 did not contain codeine or morphine. Finally, it is to be remembered that Davis did not testify that he or Dennis told Sansoni that she had been taking Tylenol 3, or any other opiate, before her drug test of May 17.

I credit Sansoni over Dennis and Davis. I find that Dennis did not have any medicine bottles with her when she and Davis went to the plant and asked for a second drug test. I find that Dennis did not tell Sansoni (or try to tell Sansoni) that she had been taking prescribed Tylenol 3 before her drug test of May 17. I believe, and find, that either Davis or Dennis told Sansoni that Dennis had taken her mother's Tylenol 3; it is apparent to me that, despite her self-serving testimony, Dennis did not have in May any Tylenol 3 left over from February, and she could not produce for Sansoni the bottle for that prescription (or a bottle for a prescription for her mother). On brief, the General Counsel asks rhetorically why Dennis and Davis would have gone to the plant on May 23 if not to claim that Dennis had been taking the Tylenol 3 that was left over from February. Dennis and Davis went to the plant to do exactly what they did; to wit: present Davis' testimonial that his sister did not use drugs and ask for another testing of Dennis. The claim of leftover Tylenol 3 appears to have surfaced after June 13 when Dennis went to the public library and found out that codeine degrades to morphine. (The claim of the mother's Tylenol 3 surfaced on the spot, when Sansoni suggested that Tylenol 3

may explain the positive test for morphine.) Finally, Sansoni admitted on cross-examination that he would have reinstated Dennis if she had claimed that she had been taking the Tylenol 3 that she had received in February. The General Counsel contends that, even though he made this admission, Sansoni lied when he testified that Dennis made no such claim. If Sansoni had been disposed to lie about the matter, however, it is exceedingly less likely that he would have made the admission.

For these reasons, as well as the fact that the General Counsel has not presented a prima facie case that Sansoni had knowledge of Dennis' prounion sympathies, I recommend dismissal of the allegation that Respondent refused to reinstate Dennis in violation of Section 8(a)(3).

9. Employees warned for safety violations

a. Darrell Smith's warning notice for not wearing safety glasses

Darrell Smith (vol. 12), an electrician, was issued a warning notice on July 23, 1993. The second complaint, at paragraph 105, alleges that by issuing that warning notice to Smith, Respondent violated Section 8(a)(3) of the Act. Paragraph 105 further alleges that, at the same time that Smith was issued a warning notice, other employees working in his area were also issued warning notices, also in violation of Section 8(a)(3). The General Counsel contends that Respondent issued the warning notices because of the employees' known union activities and expressions of sympathy which, in Smith's case, included wearing prounion insignia on his hardhat. The complaint further alleges that, in violation of Section 8(a)(1), Smith was also threatened by Respondent. Respondent denies that the threat occurred. Respondent further answers that its supervisors had no knowledge of any union activities or sympathies of Smith at any relevant time and that Smith was issued a warning notice solely because he was noticed by a supervisor not to be wearing required safety eyeglasses in a production area; Respondent further denies that any other employee was issued a warning notice at the time. The General Counsel replies that Smith had only had his glasses off momentarily when he was confronted by the supervisor, and the General Counsel therefore contends that the warning notice was issued on a pretextual basis. The General Counsel further argues that Smith, and other employees on his crew, were treated disparately because, until the organizational attempt began, employees were no more than orally reminded when they were found without safety glasses in production areas. Ultimately, I find and conclude that the General Counsel has proved that a warning notice was unlawfully issued to Smith, but the General Counsel has not proved that warning notices were unlawfully issued to other employees on Smith's crew.

Smith testified that he regularly wore "Union-Yes" stickers on his hardhat as he was working. Smith testified that on July 22, when he and others were working in a hot place on a hot day:

> At that time [General Foreman] Kenny Danos came by, peeked his head in the room, and I was cleaning my glasses. I had my safety glasses in my hand at that time and he said, "No safety glasses."
>
> And I said, "You have got to be joking; I have them right here in my hand."
>
> He said, "I don't want to hear it; I am writing you up; what is your clock number?" And I gave him my clock number.
>
> And then . . . he walked out [of] the compartment and I walked behind him and said, "You saw me with my safety glasses right there and you are still going to write me up?"
>
> And at that same time the [assistant] superintendent, Gerry Gerdes, patted me on my back and said, "Nice try but it won't work."
>
> And Kenny Danos turned to me and said, "If you have two other prior warnings with this, you are terminated." And at that time I walked off.

Based on this testimony, paragraph 64 of the second complaint alleges that Respondent, by Danos, "threatened its employees with stricter enforcement of rules because its employees aided or supported the Union."

Smith testified that the next day Foreman Dennis Dominique had a "stack" of warning notices as he walked around the work area. When he got to Smith, Dominique presented Smith with one of the warning notices and said, "You are not the only one." Then, according to Smith, Dominique distributed warning notices to other employees in the area. The warning notice that Smith received was signed by Danos and Dominique. The box for general offense-12 under the Avondale Employees' Guide ("Violation of Company safety rules and regulations through carelessness") is checked. The "Reason for Warning" space is completed: "Employee was not wearing safety glasses." Smith testified that he had never before seen Dominique pass out several warning notices at once.

Merland Farria (vol. 35) worked on Dominique's crew with Smith; Farria corroborated Smith's testimony about Smith's confrontation with Danos, including the testimony that, when Danos appeared in the area, Smith's glasses had been off only "[a] couple of seconds." Farria further testified that, when Danos spoke to Smith, Smith had his safety glasses in one hand while he was wiping perspiration from his face with the other. Farria further testified that he saw Dominique distributing "more than one" warning notice the next day, but he did not corroborate Smith's testimony that Dominique distributed a "stack" of warning notices.

Smith acknowledged that there are rules about wearing safety glasses, (although Farria testified that only side shields were required), but, employees "all the time" worked without them. Until the organizational attempt the employees were merely told to put them on if they had them. Smith further testified that, in addition to safety personnel, those who had in the past only reminded him to put on his safety glasses were Dominique and Danos. Farria was not asked about prior enforcement of the eye-protection rule in the crew under Dominiuqe.

Smith's Warning Notice—Respondent's Evidence

Neither Danos nor Dominique testified. Gerdes testified, but he did not deny Smith's testimony that he was present when Smith protested that Danos had seen Smith with his glasses; nor did Gerdes deny that Danos responded that Smith would be discharged if he had two more warning notices; nor did Gerdes deny that he told Smith, "Nice try but it won't work."

Smith's Warning Notice—Conclusions

Smith testified that he regularly wore prounion insignia, a "Union-Yes" sticker on his hardhat, while he was working. His supervisors, Dominique and Danos, were not presented to deny

this testimony, and I found it to be credible. By virtue of Smith's wearing prounion insignia, all of the supervisors who worked around him, including Danos and Dominique, knew of his prounion sympathies. Respondent's animus toward employees who held prounion sympathies, especially those employees who demonstrated their prounion sympathies by displaying prounion insignia, is demonstrated throughout this decision. The General Counsel has therefore presented a prima facie case that the warning notice was issued to Smith unlawfully, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Smith even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, Respondent states:

> The Electrical Department routinely disciplined employees who were caught not wearing their safety glasses both prior to and after the start of the Union campaign. Robert Terry, the department superintendent, testified that a worker's safety is of paramount importance to Avondale and that his supervisors always need to reinforce safety issues. [92:21514–15.]
>
> One of the safety requirements hardest to enforce is the wearing of proper eye protection. [92:21514.] To that end, a supervisor may notice his crew getting a little lax in wearing their safety glasses and hardhats. The supervisor would then put the crew on notice that they were to wear their safety glasses and hardhats and that if the supervisor caught them without them on, the workers would be written up. [92:21514–15.] That is what happened with Danos.

This statement in defense, however, incorporates an admission that Respondent's "routine" enforcement of the safety glasses rule included prior oral warnings before issuance of written ones. Moreover Terry, Gerdes, and all other supervisors who testified on the issue, testified that oral warnings did precede written ones, at least for failures to wear safety glasses.[419] Smith, however, received no such oral warning, according to the undisputed testimony. Also, no supervisor testified that employees are not permitted momentarily to remove their safety glasses to wipe perspiration from their faces. According to this record, that is all that happened in Smith's case.

Finally, the electrical department supervisors conceded that employees are not issued warning notices every time that they are seen without safety glasses. For example, when he was on cross-examination, Terry was asked and he testified (vol. 92):

> Q. Do you sometimes have periods of time in the yard when you are more aggressive or more strictly enforce employees wearing hardhats or safety glasses?
>
> A. If the supervisor feels that his work area, the employees are becoming too lax in safety, then he needs to react to that. He needs to reinforce the safety. The eyeglass thing and the hardhat requirements, as I say in my general notes even to the new employees, are two of the most difficult things to enforce.
>
> And you have to use judgment on that. It has to be a judgment thing. You have got to be reasonable with it; otherwise, you would be writing up everybody in the shipyard every day. And, you know, that is not what we are there for.

[419] As Terry put it, "I would give that employee a verbal [i.e., oral] warning the first time."

Moreover, as noted in the case of alleged discriminatee Dwight Ballard, on December 28, 1994, Respondent's vice president for production, Michael Simpson, sent a letter to all employees indicating that a substantial number of employees had, to that date, refused to follow the rules regarding the wearing of safety equipment, and they had done so with impunity. Simpson states in the letter (which is quoted at length in Ballard's case) that supervisors are to "remind" employees to put on their personal protective equipment, such as safety glasses, and. if the rules were not "uniformly" followed after January 31, 1995, warning notices will then be issued. As I stated in Ballard's case, Simpson's letter is an admission that the rules requiring safety glasses were not being uniformly followed as late as the date of that letter. Simpson would not have issued such a letter if the lack of enforcement uniformity were not significant. Also, it is to be noted that Simpson's letter states that warning notices are to be issued consistently only after a grace period in which employees are to be reminded of the rule.

Gerdes was present when Smith protested Danos' statement that he was to receive a warning notice. Instead of investigating the protest, Gerdes told Smith, "Nice try." It is obvious to me that Gerdes had sponsored the threat to enforce the safety glasses rule on Smith, as well as condoned the threat. After all, it was Gerdes who, as I have found above, told other supervisors within the hearing of alleged discriminatee Chad Durocher on the first workday following the Union's showing in the June 25 Board election:

> Yes, we are going to put a stop to all this good time they have been having; we are going to crack down—yes. We are going to put a stop to all this good time they have been having; we are going to crack down on them; and we are going to force time limits on them going to the bathroom; and we are going to post watches on the workers to make sure that they don't have a chance to have a break.

As Durocher further testified, "[Gerdes] said he had an idea who the union supporters were, that they were going to crack down on the good times they had been having." (I have further concluded that this statement was a threat in violation of Section 8(a)(1), as alleged in the second complaint, at paragraph 58.) The conduct of Danos, Dominique and Gerdes in this instance appear to be an implementation of that threat.

I therefore find that Respondent has not shown that it would have issued the warning notice to Smith, even absent his display of his prounion insignia. I accordingly conclude that by issuance of that warning notice to Smith on July 23, 1993, Respondent violated Section 8(a)(3).

Danos told Smith that he would get a warning notice and, if he had two others in his file, he would be discharged. A threat to issue an unlawful warning notice is, itself, unlawful. The coercive nature of the threat was emphasized by Danos when he told Smith that, if he had two other warning notices, he would be discharged. (And the coercive nature of the threat was exacerbated by the fact that, as shown in the case of discriminatee Marshall, 883 employees were issued three or more warning notices in 12-month periods between 1990 and 1994 without being discharged.) I therefore additionally conclude that, in violation of Section 8(a)(1), Respondent, by Kenny Danos, on July 22, 1993, threatened employees with stricter enforcement of work rules, and discharge, because of their protected activities.

The General Counsel has not, however, proved that Danos issued warning notices to other employees on Smith's crew in violation of Section 8(a)(3). Smith did not see what was on those notices, and he accordingly could not testify that they were issued on pretextual bases. I shall therefore recommend dismissal of that portion of the allegations of paragraph 105 of the complaint.

b. Cornelius King and Leroy Jackson

On July 30, 1993, Cornelius King (vol. 34), a pipefitter's helper, and Leroy Jackson (vol. 36), a pipe tester, were simultaneously issued warning notices. The second complaint, at paragraph 111, alleges that King and Jackson were issued the warning notices in violation of Section 8(a)(3). The General Counsel contends that Respondent issued the warning notices because of King's and Jackson's known union activities and expressions of sympathy which included their speaking favorably about the Union's organizational attempt during employer campaign meetings and wearing prounion insignia. Respondent answers that its supervisors had no knowledge of any prounion sympathies that King or Jackson held at any relevant time. Respondent further answers that Jackson and King were issued the warning notices solely because two supervisors found them together at a place where Jackson was out of his work area and at a time that King was not wearing a required hardhat and safety glasses. The General Counsel replies that the defenses for King's warning for not wearing a hardhat and working without safety glasses is pretextual because King was only stopping for a morning break, as employees are permitted to do, and that King had removed his hardhat and safety glasses only to wipe perspiration from his face and head. The General Counsel replies that the defense for Jackson's warning notice is pretextual because Jackson was not out of his work area at the time in question. Ultimately, I find and conclude that King's July 30 warning notice was issued unlawfully, but Jackson's was not.

On November 10, King was issued a second warning notice. The second complaint, at paragraph 112, alleges that King was also issued this second warning notice in violation of Section 8(a)(3). The General Counsel again contends that the notice was issued because of King's known union activities and sympathies. Respondent answers that the notice was issued solely because King had quit work before lunch, and left his assigned work area, on November 5. The General Counsel replies that the defense is a pretext because King did not quit work early at any time and that, moreover, King was told that he had been caught quitting work early on November 9, not November 5. Ultimately, I find and conclude that King's November 10 warning notice was not unlawfully issued.

At the time that the organizational campaign began in March, Jackson had been employed as a pipe tester for about 8 years; King had been employed as a pipefitter's helper for about 6 months. Their foremen were James Walker and Lawrence Mallini.[420] Their general foreman was John Whittington. Foreman Jim Bennett was an assistant to Whittington.

Jackson testified that he usually arrived at work a full hour before starting time. About a month before the Board election, he posted a union flyer immediately above Walker's desk. When Walker saw it, he commented that no one but Jackson could have put it there because Jackson was "the first one in the morning" to appear for work. Harry Thompson is a prounion employee who sometimes worked with King and Jackson and who figures in the events leading to the July 30 warning notices that Respondent had issued to King and Jackson. On cross-examination, Jackson placed King and Thompson at the event of Walker's remark about the union flyer. Although Thompson, as well as King, testified for the General Counsel, neither was asked to corroborate Jackson in this testimony. Moreover, Walker credibly denied this testimony by Jackson.

Walker, Mallini, Bennett, and Whittington conducted several employer campaign meetings for employees of the pipe department during the organizational campaign; Michael Simpson, vice president for production, attended at least one of those meetings. Jackson testified that he spoke up for the Union at two employer campaign meetings when questions were called for. At one of the employer campaign meetings that Bennett conducted, Walker and Mallini (who jointly issued the July 30 warning notices to King and Jackson) were in attendance. According to Jackson, he asked Bennett about the duties of union shop stewards and:

> He [Bennett] would say that, because I was pushing so hard for the Union, that they probably [would] make me a shop steward, and if they was to make me a shop steward, if I see anybody with their hardhat or safety glasses off I would tell the foreman, and they would write them up.

King testified that it was at a production meeting, not an employer campaign meeting, that Bennett made a comment about Jackson's possibly becoming a union steward. King was asked and he testified:

> Q. By Mr. Bensinger: Tell us, please, what Mr. Bennett actually said.
>
> A. He told us we had better watch ourselves, because Leroy Jackson is pushing to be a union steward; that he going to be writing us Union fines.
>
> Q. And do you recall what if anything prompted this remark by Bennett?
>
> A. Mr. Jackson made a statement that when the Union comes into the yard, things are going to change around here.

Walker testified that he was never present when Bennett made such a remark to Jackson. Respondent, however, did not call Bennett, and it advanced no reason for not doing so.[421] Nevertheless, Jackson and King differ on the significant points of what type of meeting it was (employer campaign meeting or production meeting), what Jackson had done to prompt Bennett's remark (a question about stewards or a strong, prounion statement by Jackson that things would be different when the Union came into the yard), and what Bennett's response was (that, as steward, Jackson would cause warning notices for safety violations or he would cause union fines). Moreover, Walker appeared credible in his denial that he was present when Bennett made such a statement. I accordingly discredit the testimonies of both Jackson and King on this point.

[420] Mallini's name is incorrectly spelled "Mullini," and "Mellini," at various points in the transcript which is hereby corrected.

[421] Respondent also did not call Mallini, whom Jackson (but not King) placed at the meeting in question. Walker, however, testified that Mallini had left the State and his whereabouts at time of trial were unknown. the General Counsel offered no evidence to controvert this testimony.

At a meeting conducted by Simpson 2 days before the Board election, both Jackson and King confronted Simpson. Jackson testified that:

> [Simpson] was speaking so much against the Union I asked him did he ever work for a union. He said, "Never have and never will."
>
> And I asked, "How could you speak on something that you know nothing about?"

Simpson did not deny this testimony which I found credible. Later in the meeting King confronted Simpson about an insurance topic. King's and Jackson's testimonies about this confrontation are undenied, but King's exchange with Simpson did not involve the protected activities of the employees, and it will not be further considered.

King and Jackson testified that, by the time of the June 25 Board election, they were regularly wearing "Union-Yes" stickers on their hardhats, and they continued to do so thereafter.

(1) King's and Jackson's warning notices for safety and loitering violations

An *LSD* is about 560-feet long. Points on an *LSD* are designated by side (port or starboard), deck (e.g., main and 01, 02, 06, above the main deck) and "frame." Frames are structural beams along the sides of the ship that run vertically from the keel to the railing on the main deck. Frames are about 4 feet apart; they are numbered from the bow of the ship to the stern. (Therefore, the first frame of an *LSD* is at the bow, the 70th frame is approximately amidships, and the 140th frame is at the stern.) The "second deck" of an *LSD* is a 15-feet wide perimeter deck that is one level below the main deck. Below the second deck are large spaces for, inter alia, the two-level engine room, a one-level auxiliary machine room-II (AMR or AMR-II), and a one-level "well deck" for storage of whatever the *LSD* is transporting. The "floors" of the engine room, the AMR and the well deck are at the same level; therefore, although the AMR is one deck down from the second deck, its "floor" is two levels below the second deck. The AMR and the second deck are connected by a two-tier stairway on one side of the ship and by an escape "tunnel," which has a ladder, on the other.

King's and Jackson's Warning Notices for Safety and Loitering Violations—the General Counsel's Evidence

King testified that before July 30 he and Jackson usually worked together. On July 30, however, they were assigned to work separately. King testified that he was assigned to place "blinds" in pipes on the second deck. Blinds are temporary plugs that are placed in pipes to allow high-pressure tests for air or liquid leaks in piping systems. (Blinds are used, rather than just closing valves, when the valves are not to be pressurized.) The job was in a hot area on a hot day. About 9 a.m., King encountered a pipe into which he had difficulty inserting a blind. The pipe was only 6 inches above the deck, and to work with it King was required to assume kneeling and bending positions. King took off his hardhat and placed it on the deck as he was working because, as he bent, his hardhat would slip off because of the heat and his perspiration. As King further testified, he continued to keep his safety glasses on as he worked on the recalcitrant pipe.

King further testified that running along the bulkhead, above the system upon which he was working, were pipes of a separate system that was being serviced that day by Jackson. As King was struggling with the blind, Jackson entered the area where King was working. King asked Jackson, a more experienced employee, for help in inserting the blind into the pipe. King and Jackson struggled with the problem pipe, but without avail. Then Thompson, who had much more experience than either King or Jackson, came along. (King testified that Thompson was "checking his system," a third piping system that ran in the area.) King and Jackson asked Thompson for help, and Thompson showed them how the job could be accomplished.

King testified that after the blind was inserted, he was overheated, and, "I sat down and took a break." King did not put his hardhat back on; also, he took off his safety glasses "because I was wiping the sweat off my face." At this time, further according to King, Jackson also sat down to take a break. King testified that he could not recall whether Jackson also took off his hardhat and safety glasses. King did testify that, when he and Jackson sat down to take a break, Thompson also took a break with them, but in a standing position. King testified that Thompson, while taking this break, also took off his hardhat and safety glasses. As he, Jackson and Thompson were taking the break, then-leadman Lindsay (who was a foreman at time of trial) walked by them. King was not asked what, if anything, Lindsay said to the three employees as he passed.

King further testified that, after Lindsay passed by the three employees, Walker and Mallini came to the area. Walker and Mallini told Thompson to put on his hardhat and safety glasses. They further told King and Jackson to come to a nearby room in the passageway where they could be spoken to. King testified that, when they got to the room, he saw that Mallini had two warning notices, one with his badge number and one with Jackson's. Mallini completed the warning notices. The warning notice that Walker and Mallini issued to King has checked the box for Avondale Employees' Guide's major offense-23 ("Deliberate violations of safety, security or plant protection regulations"). The text that Mallini entered on King's warning notice is: "Employee was not wearing safety hat or glasses in an open area on board ship. He was verbally [orally] warned before about this!" Walker, as well as Mallini, signed the warning notice. King signed the warning notice, but before he did so, he wrote in the employee comment section: "Leaning over in my work, putting my blind in on my system. Hardhat kept slipping off my head, so [illegible] took it off till I got finished. Safety glasses in hand, wiping the sweat off my face when foremen came." King testified that he never before had been warned about not wearing his hardhat or safety glasses, although his foremen, including Bennett, Walker, and Mallini, had often seen him do so.

On cross-examination King admitted that he and Jackson received their assignments for July 30 separately, and he did not hear any supervisor give Jackson an assignment that would have brought him to the point where the supervisors found Jackson. King further acknowledged that, when the supervisors came into the passageway, he was sitting on a bucket to take the break, and King further acknowledged that neither he nor Jackson told Walker and Mallini that they were taking a break because of the heat. Finally on cross-examination, King testified that he could not recall whether his assignment was on the port or starboard side of the ship, or at what frame he was working.

Jackson testified that on July 30 he was checking for leaks on the piping of a portion of a system that ran from the AMR to

the second deck where King was working. To do this, according to Jackson, he started in the AMR and, "I would have to walk the entire system out [up] from AMR-II to the second deck." Jackson testified that to get to the second deck he climbed the ladder in the escape tunnel (as opposed to using the stairway). Jackson testified that, because the system upon which King was working was so close to the deck, he got a bucket to sit on while struggling with King to get the blind inserted. Jackson testified that, as he worked in the heat, his safety glasses fogged up, so he took them off. Jackson further testified that he also took off his hardhat. As he, King and Thompson took a break following the insertion of the blind, Jackson testified, none of the three had on a hardhat or safety glasses.

The warning notice that Walker and Mallini presented to Jackson has checked the box for Avondale Employees' Guide's general offense-4 ("Wasting time, loitering or leaving the working place without permission"). In his written comment Jackson stated that he had been following the piping system and that he had been seated to help King. Jackson further testified that employees, in production meetings, are frequently admonished by supervisors to help other employees when they see that they need it.

When asked what he did after he received the warning notice, Jackson responded: "I left and went back into AMR number two." Later in the afternoon, according to Jackson, he went to a container where Walker was doing office work; according to Jackson, Walker told him, "I have no problem with the way you work. I didn't want to write you up. We came on the boat looking for Cornelius to write him up. He [you] just happened to be there." Jackson testified that he did not reply.

Jackson and King testified that they had repeatedly been told by supervisors that, when they sensed that they were becoming overheated, as they were that day, they were to stop and take a break, and that was all that they were doing when found by Walker and Mallini. They further testified that supervisors allowed them often to work without hardhats or safety glasses, the usual exception being when "safety men" were in the area.

On cross-examination, Jackson testified that he started working in the AMR somewhere between deck frames 98 and 118. He further testified that King was working on the starboard side of the ship when his work brought him to King's area. Jackson first testified that it was only 5 feet from where he had left the escape tunnel on the second deck to where King was working. After he gave this testimony, however, Jackson testified that he could not estimate that distance. Jackson further testified that when Walker and Mallini approached King, Thompson and himself, Thompson was standing about 2 feet from himself and King, also taking a break.

Thompson (vol. 159) testified that he, King and Jackson were working on the starboard side, second deck, near the stairway that comes up from the AMR. At the time, he was working about 15 feet away on another system. He walked over to King and Jackson and advised them how to get the blind inserted, then he walked back to his work area and continued working.[422] Thompson testified that as he worked in his place, and King and Jackson worked on the blind, the men continued talking. As they were talking, and King and Jackson continued working, King sat on the deck and Jackson was "leaning" over the (low) pipe. Thompson did not testify that any of the three men took a break of any sort. Thompson testified that when Walker and Mallini came to the area, he was wearing neither hardhat nor safety glasses. Thompson testified that King did not have on a hardhat, which is not disputed. Thompson testified that Jackson was also not wearing a hardhat when Walker and Mallini approached, but Jackson was then wearing safety glasses. Thompson further testified Walker and Mallini said something about "glasses" and "area" to King and Jackson. Walker and Mallini then told Thompson to leave the area, which he did. As he left the area, Thompson testified, he saw Lindsay approaching the supervisors, King, and Jackson. On cross-examination Thompson testified that on July 30, he continued working until "an argument ensued" among King and Jackson and Walker and Mallini.

King's and Jackson's Warning Notices for Safety and Loitering Violations—Respondent's Evidence

Walker (vol. 71) denied that he knew or suspected King or Jackson of any prounion sympathies; specifically, he denied seeing either employee wear prounion insignia. Walker testified that on July 29, he found Jackson sitting on a bucket from 10 to 10:15 a.m., talking to King; at the time he decided to separate King and Jackson. Walker testified that on July 30 he assigned King to work port side, second deck, in the area of frame 128 of the ship. Jackson was assigned to run a test on piping that ran from the centerline in the AMR, to frame 89, starboard side, up two levels to the second deck, and to frame 93, still on the starboard side. (On the second deck, starboard side, Walker further testified, Jackson was to test the system from frame 93 aft to frame 98.) To get from the AMR to that area on the second deck, an employee would logically use the two-level stairway which, Walker testified, was on the starboard side. Walker agreed with Jackson that there was an escape tunnel from the AMR to the second deck, but Walker testified that the escape tunnel is on the port side of the ship, not the starboard side as Jackson claimed. Walker testified that on the afternoon of July 29 he took Jackson to the portion of the piping system that he was to test on July 30, none of which was on the port side of the ship.

On July 30, Walker further testified, he and Mallini were making rounds when they came to King's work area. When they got to the area of frame 135, they stopped because, from there they could see King and Jackson sitting on 5-gallon buckets, doing nothing but talking. Jackson, Walker testified, was wearing his hardhat and safety glasses; King (as King admitted) was wearing neither. Walker and Mallini watched King and Jackson talk for 5 minutes, doing no work; then the supervisors approached the employees. Walker testified that he asked Jackson why he was so far away from his work area; Jackson made no reply. Walker told Jackson that he was to get a warning notice for being out of his work area. Walker further testified that he asked King why he was not wearing a hardhat and safety glasses; King made no reply. Walker testified, "I told him I was going to give him a warning, a written warning, for not having his safety equipment on." Walker denied that King was visibly perspiring and denied that the area was unusually warm. Walker acknowledged that King and Jackson then wrote the above-quoted comments on their respective warning notices, but, as is undisputed, he testified that neither employee

[422] As Thompson testified: "I went back on my job what I was working on which was in the immediate vicinity, and they were working on their job, and I was working on mine. . . . They were working taking a valve out and installing a blind flange in the place where they took the valve out."

said anything about taking a morning break, or that they had stopped working because of the heat. Mallini further denied that Thompson was in the area at the time, and he denied that, later that afternoon, he told Jackson that he and Mallini had been there looking for King and that he had not wanted to issue a warning notice to Jackson.

When asked on direct examination why he wrote on King's warning notice "He was verbally [orally] warned before about this," Walker testified that, during the 30 days prior to the incident, "I had given Mr. King six verbal warnings prior to this incident. . . . I had caught him repeatedly not wearing his safety glasses and hardhat on the ship."

Walker testified that he had previously issued warning notices to other employees for not wearing safety glasses. To prove the point, Respondent introduced three warning notices that Walker issued to other employees on January 6, 1992; each is for the employees' not wearing safety glasses, and each is issued under the Avondale Employees' Guide's general offense-12 ("Violation of Company Safety Rules and Regulations through carelessness"). When asked on direct examination what his practice was regarding safety-equipment violations, Walker answered: "Initially, I catch them the first time, it is a verbal warning. I tell them to put their hardhat and safety glasses, whatever the case may be, put their safety equipment back on, and go about my business."

On cross-examination, Walker confirmed that, by a "verbal warning," he meant that he tells the employee to put on his hardhat or safety glasses, whichever the case may be. Walker further testified that he issues warning notices when he sees an employee "on repeated occasions" not wearing his safety equipment. Walker further testified that he would tell employees "up to six times" to put on their safety equipment before giving them a warning notice for not doing so. For the three employees to whom he issued warning notices in 1992 for safety-equipment violations, Walker testified that he issued "at least" three oral instructions to two of them and four such oral instructions to the other. Walker denied ever telling employees to put on their safety equipment because there was a "safety man" in the area. Walker further testified on cross-examination that he was carrying the Avondale Employees' Guide with him when he and Mallini approached King and Jackson. Walker was asked and he testified:

> Q. And you read out to Mr. King the Company rule that he violated?
>
> A. Yes. I opened the book. I read the thing to him. I read the General offense to him. He turned around. I asked him if he understood it. He said, Yes.

Walker testified that, although Mallini drafted the warning notices to King and Jackson, he reviewed them for correctness before he signed them. As noted, the warning notice to King was not issued under a general offense of the Avondale Employees' Guide; it was written under major offense-23.

As noted, King testified that, before Walker and Mallini approached the area where he was working on July 30, Lindsay walked by. As further noted, Thompson testified that, as he left the area upon orders by Walker and Mallini, he saw Lindsay approaching Walker, Mallini, King, and Jackson. And, as still further noted, Walker testified that it was Mallini who accompanied him to King's work area on July 30; Walker did not place Lindsay at the scene in any way. Lindsay, however, testified (vol. 96) that it was he who accompanied Walker to King's work area on July 30, walking "side-by-side" with Walker; Lindsay did not place Mallini at the scene in any way.

Lindsay testified that Jackson's work area was not near King's work area; he testified that he knew this because: "I was there when Mr. Walker lined him up that morning on what he had to do." Of course, Walker had testified that he lined Jackson up on his job on the afternoon of July 29. When asked on direct examination if he knew why King and Jackson were working separately on July 30, Lindsay replied:

> Yes. In pipe testing, some time you work on a system by yourself. If it is a small enough system, you work on it by yourself. This shouldn't take but just one to put a few bonds in and do a pressure test on a system. You don't need no help in—if they are small, generally use just one person on this particular system.

That is, Lindsay did not testify, as did Walker, that King and Jackson had been separated because they had spent too much time talking.

Further on direct examination, Lindsay was asked and he testified:

> Q. What were Mr. King and Mr. Jackson doing when you first saw them?
>
> A. Well, Mr. King was sitting down on a bucket, as I can remember. And Mr. Leroy, he was kind of like kneeling beside him. Had his hardhat in his lap, and they were just having a discussion.
>
> Q. Was there anything else you noticed about Mr. King?
>
> A. He was sitting down, and he had his feet propped up against the wall and they were just—in just a casual conversation there.
>
> Q. Did you notice anything about Mr. King's shoes?
>
> A. Well, the shoes was off, and he didn't have his hardhat on.

Walker, however, did not mention King's shoes (in his testimony or in the warning notice to King).

On direct examination, Lindsay testified that when he and Walker approached King and Jackson, he heard Walker tell Jackson that he should be in his work area, that King should put on his shoes, hardhat and safety glasses, and that both employees should "get back to work." On cross-examination, however, Lindsay admitted that he heard nothing of what Walker said to King and Jackson. Lindsay did testify however, that when he and Walker got to King's work area, King told him that he was going to stop: "To see why Leroy was out of his area and why King wasn't working." Lindsay further testified, "And I just kept on going." Further on cross-examination, Lindsay testified that neither King nor Jackson was wearing a hardhat or safety glasses when he and Walker walked to King's work area.

King's and Jackson's Warning Notices for Safety and Loitering Violations—Conclusions

I believe, and credit, King's and Jackson's testimony that during the month before the Board election they began wearing "Union-Yes" stickers on their hardhats, and they continued to wear them thereafter. These prounion insignia necessarily would have been seen by their supervisors such as Walker, and I discredit Walker's denial to the contrary. Moreover, it is further undisputed that during an employer campaign meeting conducted by Simpson, Jackson challenged Simpson by stating, "How could you speak on something that you know nothing

about?" Respondent's animus toward such expressions of prounion sympathies, especially Respondent's animus toward the expression of prounion sympathies that is entailed in the wearing of prounion insignia, is established throughout this decision. I therefore conclude that the General Counsel has presented a prima facie case that the warning notices of July 30 were unlawfully issued to King and Jackson, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against King and Jackson even in the absence of their known protected activities. Respondent's defenses must therefore be examined.

I find that the General Counsel's witness Thompson was in King's work area, but as he testified, he did not take a break with them; he kept working after he advised King and Jackson how to get the blind inserted into the pipe.[423] Thompson agreed with Walker that the stairway from the AMR to the second deck is on the starboard side of the ship. Jackson testified, however, that he came up the escape tunnel to get to the second deck. Of course, the escape tunnel and the stairway are on the opposite sides of the ship. Jackson, therefore, was on the port side of the ship when he and King were found by Walker and Mallini, as Walker testified. On the second deck, port side, the escape tunnel is about 120 feet from the point at which Walker and Mallini found King and Jackson, according to the credible testimony of Walker. Jackson first testified that he was only 5 feet from the escape tunnel when he came to King's work area, but then he testified that he could not estimate the distance. Jackson was unimpressive in this exercise. Moreover, Jackson admitted that, after he and King were issued their warning notices of July 30, he immediately went back to the AMR where, he acknowledged, his assignment had started that morning. Jackson did not testify that he had just finished his second-deck work when King asked him for help; I do not believe that he did; I do not believe that, when he came upon King, Jackson was doing his assigned work. I credit Walker; I find that Jackson was on the port side of the ship, second deck, as Walker described. That is, when he was discovered by Walker and Mallini, Jackson was two levels away from, and he was on the opposite side of the ship from, where he was supposed to be working in the AMR; additionally, Jackson was at least 30 feet toward the stern from the escape tunnel that he had used to get to King's (not his) work area.[424] Finally on this point, I accept the General Counsel's testimony that employees are instructed to help each other when the need arises, but there is no credible, probative evidence that employees are encouraged, or even allowed, to go far from their work areas to help other employees without supervisory permission. As well, Respondent's witnesses credibly denied that such is the case. I shall, therefore, recommend dismissal of the allegation that Jackson was unlawfully issued a warning notice on July 30.

The issuance of the July 30 warning notice to King, however, requires a different result.

I do not believe King's testimony that he had only taken off his safety glasses to wipe perspiration; even if he had, this would not excuse his keeping his hardhat off when he began taking a break. I further do not accept the General Counsel's argument that King and Jackson were merely taking a customary morning break when they were found by Walker and Mallini; if they had been, they would have so stated to Walker and Mallini, and they would also have so indicated in their comments on the warning notices. Nor were King and Jackson taking a break because of the heat; if they had done so, they would presumably have so indicated to Walker and Mallini, and they would further have gone for some water. Even if their testimony on these latter points is true, the supervisors saw nothing other than the employees sitting and apparently loafing.

Nevertheless, Jackson was entirely credible in his testimony that, after the warning notices were issued, he went to Walker's office where Walker told him that he and Mallini had been looking for King, not him. The many discrepancies in Lindsay's testimony require me to discredit him entirely; he was not present when Walker and Mallini came to the second deck and issued the warning notices to King and Jackson. King, however, testified that Lindsay walked through the area shortly before Walker and Mallini came there. There is a suspicion that Lindsay (again, then a leadman) immediately went from King's work area to report to Walker and Mallini that King was not wearing a hardhat or safety glasses, and then Walker and Mallini came to the area with at least one warning notice that had King's badge number on it (as King credibly testified). Neither Walker nor Lindsay testified to this innocent scenario, however, and no such finding can be made. The evidence, therefore, is that Walker admitted to Jackson that he and Mallini had been looking for King, and I find that they were; the issue is why.

Walker issued three warning notices for employees not wearing safety glasses in 1992. He testified that he had told those employees three or four times to put on their safety glasses before he did so. Walker testified that he went beyond three or four times with King; Walker testified that he had allowed King to go a full six times in the preceding month without giving him a warning notice. This I do not believe. I credit King and find that Walker had never before told him to put on his safety glasses or hardhat. Even if I am incorrect in this finding, however, Respondent offers no explanation of why the employees of 1992 were issued warning notices under the less severe general offense-12 of the Avondale Employees' Guide but King's warning notice was issued under major offense-23. Certainly, Walker did not testify that he issued King's warning notice under the major offense section of the Avondale Employees' Guide because King was failing to wear both safety glasses and a hardhat. Finally, even Walker testified that he read the "General Offense" to King when he issued him the warning notice; at least by time of trial, therefore, Walker recognized that King was guilty of only the lesser category of offenses under the Avondale Employees' Guide.

As I have concluded before, the aggrandizement of the offense is indicative of unlawful motivation, and I find such motivation in this case. Because King had been given no prior oral warning about his conduct, I conclude that Respondent has not shown that it would have issued to him on July 30 any warning notice even in the absence of his known protected activities. Moreover, Respondent has not shown that it would have issued the warning notice under the major offense section of the Avondale Employees' Guide even in the absence of King's known protected activities. Respondent therefore violated Section 8(a)(3) by issuing the July 30 warning notice to King.

[423] I do not, however, believe Thompson's testimony that neither he nor Jackson were wearing hardhats or safety glasses.

[424] The General Counsel asks that an adverse inference be drawn because Respondent did not call Mallini to testify. Again, however, the General Counsel did not rebut Walker's testimony that Mallini was no longer employed by Respondent, that he had moved to another State, and that his whereabouts were unknown. See *Norbar, Inc.,* 267 NLRB 916, 918 (1983).

(2) King's warning notice for quitting work early

On November 10, King was called to the office of General Foreman John Whittington. According to King, Whittington told King that, on November 9, General Foreman William Fedrick had seen King coming off the ship before the 3:30 p.m. whistle (as opposed to the noon whistle) blew. Whittington presented King with a warning notice that had been signed by Whittington and Fedrick. The warning notice is dated "11–10–93." The box for general offense-4 ("Wasting time, loitering or leaving the working place without permission") is checked. In the space for "Date and Time of Offense" is entered "11–5–93." The text of the warning notice is:

> Loitering. Wasting time. Employee has had verbal [oral] warning prior to this warning notice. This is a final warning. Next warning will result in termination.

King testified that he protested that he had not left the boat early the day before. Whittington paged Federick to Whittington's office. When he got there, Federick insisted that he had seen King leave the ship early the day before. Whittington, further according to King, told King that he accepted Federick's word, and the warning notice would not be rescinded.

King denied that he had ever received an oral warning for leaving the ship early. King further denied that he left the ship early on any occasion during the week before November 10. King was not asked on direct examination if there was any discussion with Whittington or Fedrick about the entry on the warning notice of "11–5–93" as the date of the disciplinary offense.

Fedrick (vol. 71) testified that he was not present in the yard on November 9. The General Counsel does not contest this testimony which I found credible. Fedrick further testified that he was present in the yard on November 5, the date specified on the warning notice in issue. Fedrick testified that on that date, about 20 minutes before the noon whistle (not the 3:30 p.m. whistle) blew, he saw King standing outside the ship (again, which was on the ground) doing nothing. Fedrick watched King for several minutes, then left and got Whittington, King's general foreman, to come to the area. Whittington and Fedrick watched King standing, doing nothing, for a few more minutes when the noon whistle blew. Whittington was leaving the yard at that point, but Fedrick approached King. According to Fedrick, he told King that he would be receiving a warning notice and: "I did tell him that would be his final warning, and if it happens again, he would be terminated." When asked why he made the warning notice "final," Fedrick replied: "Because I had given him verbal warnings prior to this, and I felt that a final warning was adequate." Whittington testified consistently with Fedrick.

King's Warning Notice for Quitting Work Early—Conclusions

November 5 was a Friday. On November 8, Whittington was absent from the yard. As mentioned, Fedrick was absent from the yard on November 9. November 10 was the first opportunity, after noon on November 5, that Whittington and Fedrick were together to sign a warning notice. King generally denied that he quit work early during the week prior to November 10, but he was not asked specifically about the date indicated on the warning notice, November 5. Nor was King called in rebuttal to deny that on November 5, as Whittington and Fedrick testified, he was caught leaving the ship early at noon. I credit the testimony of Whittington and Fedrick and find that they caught King as they described. I further discredit King's testimony that Whittington and Fedrick told him on November 10 that he was being issued a warning notice because of something that had happened on November 9 (again, a date on which Fedrick was not even present at the yard). The General Counsel's sole remaining argument of invalidity to the November 10 warning notice is that Whittington and Fedrick marked it "final." Although cross-examination showed that Fedrick was not really sure about how many times he had spoken to King about quitting work early, I do credit Fedrick's testimony that he had, on at least two occasions, found King leaving the ship before a whistle blew, and he then warned King about his conduct. Under these circumstances, I find that Respondent has demonstrated that it would have issued to King the warning notice of November 10 even in the absence of his wearing of prounion insignia. I shall therefore recommend dismissal of this allegation of the complaint.

10. Assignment of allegedly more onerous work to employees

a. Mark Cancienne

(1) Cancienne's reassignment from inside work to outside work

On June 30, 1993,[425] Mark Cancienne (vol. 22), a first-class welder, was reassigned from an inside job on a ship that was in the water to an outside job on the construction platens that are out in the main yard. On March 1, after his reassignment, Cancienne was suspended for at least part of 1 day. The second complaint, at paragraphs 96(a) and (b), alleges that the reassignment was to more onerous conditions and that by both the reassignment and the suspension Respondent violated Section 8(a)(3). The General Counsel contends that Respondent reassigned and suspended Cancienne because of his known union activities and expressions of sympathy which included his distributing, along with professional union organizers, prounion handbills outside Respondent's gates during the morning of the June 25 Board election. The General Counsel further alleges that, in violation of Section 8(a)(1), a supervisor threatened Cancienne by telling him that his reassignment was the result of his union activities. Also, the General Counsel introduced evidence of two admissions by a supervisor that Cancienne's reassignment was caused by his protected activities. Respondent denies that the supervisor who decided to reassign Cancienne had knowledge of Cancienne's prounion sympathies. Respondent further denies that the threat occurred. Respondent denies the occurrence of one of the alleged admissions that Cancienne was unlawfully reassigned; it does not deny the other, but it argues that the supervisor was not privy to the reason for the reassignment and that he was just speculating, at most. Respondent further answers that Cancienne's reassignment was caused solely by business necessity and that his suspension was ordered when he was found to be loafing. Ultimately, I find and conclude that Cancienne was both unlawfully reassigned and suspended.

Cancienne, whose badge number was 5660, was a pipe welder (as opposed to a structural welder). At the time of the reassignment in question, Cancienne had worked for Respon-

[425] All dates mentioned in Cancienne's case are between April 1993 and March 1994, unless otherwise indicated.

dent for 15 years. Cancienne worked on a ship that was in the water at wet dock-3; Cancienne was then on the crew of Foreman Ernest (Little Foot) Foret Jr.; Foret Jr., reported to General Foreman Ernest (Big Foot) Foret Sr. Foret Sr., reported to Welding Department Superintendent Norris (Black) Pertuit. Cancienne testified that he distributed handbills with union representatives at Respondent's gate for about 30 minutes before work on June 25, the date of the Board election. Standing on the levee, overlooking the activity that morning, were Pertuit and Foret Sr. (Pertuit and Foret Sr., did not deny this testimony; in fact, they acknowledge knowing that Cancienne was a prounion employee.)

Cancienne testified that on June 30, Foret Jr., told him to report to Foreman Robert (Bobby) Ramirez in the platen area. Cancienne did so the next day. On July 2, according to Cancienne, as he was working:

> He [Ramirez] approached me, told me he thought I had a bad attitude.
>
> I told him I was upset about being reassigned. . . .
>
> He said, "You were sent out here because you are prounion. If you tell anyone I said that, I will deny it; it will be your word against mine."
>
> He left; I went to work.

Based on this testimony by Cancienne, paragraph 60 of the second complaint alleges that Respondent, by Ramirez, "told its employees that an employee had been transferred to a more onerous position because he aided or supported the Union."[426] As discussed below, Ramirez denied this testimony by Cancienne.

Cancienne continued to work in the platen area through time of trial. Cancienne did not testify that his work in the platen area was, in any physical way, more onerous than his work on the ships. He did testify that his work on the platens is normally in uncovered areas, whereas his work on ships was usually in covered conditions. The result, according to Cancienne, has been that he has worked fewer hours because the outside workers are more subject to "rain-outs" than workers on ships. A rain-out is called when a supervisor believes that it is raining too hard to work (either safely or productively, or both). Cancienne maintained personal records that indicate that he was rained out on several days while working on the platens. Cancienne testified that no other welders of whom he knew were reassigned from ships to the platens at the same time as he. Cancienne testified that three times during the 2 years prior to the Board election, he was assigned to work in the platen areas, but only for periods of 1 week to a month.

Lawrence Arabie is a 24-year employee who, for a time, was permitted the confidences of certain welding department supervisors. Arabie testified to supervisory admissions of unlawful animus toward Cancienne both before and after the June 25 Board election. Arabie testified that once before the election, when he was working, he was called aside by Foreman Joe Alvarez. Alvarez told Arabie that another employee had said that Arabie had been distributing union authorization cards. Arabie denied the report. Then, according to Arabie:

> And Mr. Alvarez told me that Avondale—that the Labor Board had turned over a list of names to Avondale of people that signed cards. And he said, "Avondale has subpoenaed them and the Labor Board had to turn them over." . . .
>
> And he said the list of names was going to be given to the superintendents that these people work for. "These people will probably lose their jobs." . . .
>
> And I told him that I didn't have anything to worry about; that if my name was on that list, he put my name on that list.
>
> And he told me that Avondale knew that Dago [welder Ronald Taylor, not an alleged discriminatee] and Mark [Cancienne, the only welder named "Mark" referred to] was supporting the Union, and that he had orders to put pressure on them and harass them.
>
> And he said he wasn't going to—he didn't intend to harass them. He wasn't going to harass them. He said that as long as they did their work, he said, "If Big Foot wanted to come and harass them, he could come and harass them."
>
> And he said that he was supposed to send me to [Foreman] Mr. Gralyn Danos so Mr. Danos could harass me and put pressure on me.
>
> And I asked him, I said, "Joe, I said, who told you to send me to Mr. Danos?"
>
> And he said, "Big Foot."
>
> Well, after I said that, he said he was not going to send me. He was going to try and hold onto me for a while.
>
> And he told me not to tell anybody what we talked about. He said it was my word against his, and if I said anything, he was going to deny it.

Respondent did not call Alvarez to testify; Arabie was credible in this testimony, and I do credit it.

Arabie testified that on June 28, the first workday after the Board election, after the noon whistle had blown, he walked down a ship's gangway and he met Cancienne; he shook hands with Cancienne and exchanged a few words. When he turned from Cancienne, Arabie saw Alvarez looking at him and Cancienne. Arabie and Alvarez walked separately toward an office where foremen (and, at that time, Arabie) often took lunch. Arabie testified that when he got to the office Alvarez was standing near the doorway talking to Foreman Gary Plaisance. According to Arabie:

> And Mr. Plaisance said, "Well, he must be a union supporter."
>
> And I asked him if it was a crime to shake hands with another man.
>
> And Mr. Alvarez made a remark that, "Yes, you can lose your job. Big Foot is going to have to hear about this."

Arabie testified that he then went into the office; present were Foremen Alvarez, Malcom Orgeron, Plaisance, Gralyn Danos, and Foret Jr. According to Arabie:

> Mr. Alvarez asked all the other supervisors that what did they think about a man shaking a union person's hand.
>
> And Mr. Orgeron laughed. At first, he said, "Who are you speaking about?"
>
> Mr. Alvarez look at me and said, "Lawrence was shaking 5660, Mark's, hand."

[426] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Cancienne, as well as the charge in Case 15–CA–12171–1.

> And Mr. Gralyn Danos turned and he looked at me and he says he had a feeling I was supporting the Union. And he says, "I will tell Big Foot about this." . . .
>
> And Mr. Alvarez turned, he looked at me again, and he says, "Why don't you be a man and admit that you supported the Union?"
>
> And I got upset about it, and I told him to tell who they want to tell. Do what they want to do. I said, "I don't see anything wrong with me shaking another man's hand."

As well as Alvarez, Respondent did not call to testify Orgeron, Danos, or Plaisance. Respondent did call Foret Jr., but Foret Jr. did not deny this testimony by Arabie. I credit Arabie.

Arabie testified to another conversation in the office that he placed at July 1. Present were Orgeron, Alvarez, Plaisance, Ramirez, and Foret Jr. According to Arabie:

> Mr. Alvarez looked at Ernest Foret, Jr., and he said that, "Big Foot wants you to assign Clock Number 5660, Mark, to Bobby Ramirez on the platen."
>
> And Bobby Ramirez said, "I don't need any more pipe welders. Why is he sending him to me?"
>
> And Mr. Alvarez said, "Big Foot wants you to wring him out because of his union activities."

This testimony was partially denied by Foret Jr., as described below.[427]

On day-59 of the hearing, the General Counsel called Ramirez as an adverse witness. In that examination, Ramirez admitted talking to Arabie from time to time. Then Ramirez was asked and he testified:

> Q. Did you say anything back to him [Arabie] to the effect of, "See, like Mark, between you and me, Mark, that guy that is working in the—that is working for me that is in the Union, why do you think they took him off the ship? He was a union man. They stuck him with my ass, wanting me to burn his ass, and I never did."
>
> A. I don't recall talking to him like that, no.
>
> Q. Now, do you know—do you think you may have said something like that?
>
> A. I definitely didn't say anything to him like that.

Then the General Counsel played for Ramirez a tape recording that was apparently made by Arabie after Arabie had testified on day-32 of trial, October 12, 1994.[428] After the playing of Arabie's late-1994 tape recording, Ramirez was then asked, and he testified:

> Q. [By Mr. Bensinger]: Do you remember, during 1994, you said to Mr. Arabie words to the effect of, "Do you see, like, Mark, between me and you, Mark, that guy that is working for me in the Union, why do you think they took him off the ship? He was a union man. They stuck him with my ass, wanting me to burn his ass, and I never did." . . . Do you recall making a statement like that, to that effect, to Mr. Arabie in 1994?
>
> A. Well, I don't recall, but I heard it on there. I guess I did.
>
> Q. That was your voice?
>
> A. Yes. . . . There is no doubt about it.
>
> Q. [By Mr. Bensinger]: Well, actually, that man Mark—Mark is Mark Cancienne. Isn't that true?
>
> A. Yes.

When asked why he had previously denied stating "anything" of that nature to Arabie, Ramirez first answered that he had not remembered doing so; then Ramirez testified that he and Arabie had been friends for years, "And [on the tape recording] I am trying to give him some information to relieve him because he was under—acting like he was nervous. And that is the bottom line."[429]

Cancienne's Reassignment to outside Work—Respondent's Evidence

When he was called in Respondent's case, Ramirez (vol. 111) testified that, at the time that Cancienne was reassigned to him, he needed "four or five" pipe welders in addition to the six or seven that he already had working under him in the platen area. Ramirez testified that, to get additional pipe welders, he went to his general foreman, Butch Cole, and: "I asked him for some more pipe welders." Later that day Cole told Ramirez that "some welders" would be sent to him the next day from an *LSD*. On the next day, Cancienne arrived with another welder whose name Ramirez could not recall. Ramirez testified that: "I received two that morning, I think, and then two or three weeks later, I got a couple more." Ramirez testified that could not remember their names either. (When asked why he could remember Cancienne's name but he could not remember the names of the other pipe welders who were assigned to him, Ramirez replied, "Because I knew, you know, he was involved in the Union and stuff.")

Ramirez testified that when Cancienne arrived at the platen area, he had a frown on his face. Further according to Ramirez:

> When he got off the truck, I sensed that he was very negative and real rough with me. And I like to—I approach my guys with a good, positive attitude and most of the time with a smile on my face; not all of the time, but most of the time.
>
> Anyway, during the day when I was making the rounds, telling him what to do, he kind of buffered me up again, you know, again with his attitude.
>
> And then, like I said, he was kind of buffing me up, and I said, "Wait a minute. What is your problem?"
>
> He said, "Well, I know why I was sent here."
>
> And right off the bat I says, "I don't care why you was sent here. I needed pipe welders. I know you are involved in the Union. I have seen you out on the gate. I am not

[427] Of course, Cancienne testified that by July 1 he had already been reassigned. There is no issue in this; either Arabie or Cancienne had the dates confused. The MCRs that would show the exact date of Cancienne's reassignment were not offered by Respondent, as discussed infra.

[428] The only recording that Arabie had made by day-32 was then turned over to me for in camera inspection upon Respondent's request under Sec. 102.118 of the Board's Rules and Regulations. Moreover, when he testified on day-32, Arabie made no mention of the conversation the recording of which was played for Ramirez on day-59.

[429] In his discussion of this day-59 testimony by Ramirez, Respondent's counsel argues that I erroneously denied him opportunity to examine "Arabie's tape." (Br. page "Welding-23.") Respondent, however, cites only a ruling that I made on the tape that had been produced for in camera inspection on day-32 of trial (as mentioned in the preceding footnote). After the General Counsel completed his examination of Ramirez on day-59, however, Respondent made no request for further time to examine the tape that had then been played.

> here to hurt you. I am just here to do a job. I am not your problem, Mark."
>
> I says, "You can go tell anybody you want that I am telling you this. It don't make me no difference."
>
> [H]e was real buffy with me and negative. I got to work with these guys
>
> [A]nd he kind of buffered up a little bit with a real negative attitude, and I just felt it was my place to communicate with this man, you know, on a better relationship with him.

Ramirez denied telling Cancienne that he had been assigned to work under Ramirez because he was prounion, and he denied that he told Cancienne that he would deny saying what he had just said. Ramirez was further asked why he had told Arabie: "He [Cancienne] was a union man. They stuck him with my ass, wanting me to burn his ass, and I never did." Ramirez testified that he had only been "running off at the mouth."

Ramirez further denied that any of his supervisors told him that Cancienne was assigned to his supervision because of his union support, and he denied that he told Alvarez that he could not understand why he was being sent a pipe welder. Although he generally denied that he knew beforehand that Cancienne was being sent to him, Ramirez did not deny Arabie's specific testimony that Alvarez told him (Ramirez) that Foret Sr. was sending Cancienne to him because: "Big Foot wants you to wring him out because of his union activities."

On cross-examination, Ramirez denied that he had testified that Cancienne had "buffed" him in any way, and he testified that he did not know what such a term would mean. Ramirez did testify on cross-examination that Cancienne had been "rough" with him, and that Cancienne had appeared "nervous," and that is why he spoke to Cancienne about his attitude. Further, Ramirez acknowledged that he had seen Cancienne distributing handbills for the Union even before the day of the Board election.

Cole, the general foreman to whom Ramirez made his alleged request for additional manpower, did not testify. Pertuit (vol. 104) testified on direct examination that employees are frequently reassigned from ships and about the yard; indeed, without being asked, Pertuit testified: "[Y]ou can move four times in a week." Pertuit further testified, "We reassign people every day." Pertuit was asked what he remembered about Cancienne's reassignment, and he testified:

> I remember when we discussed something that was done at 6:30 in the morning with the general foremen. . . . Butch Cole asked for a pipe welder, and I told Ernest Foret, Sr., to send him a pipe welder. . . . I just made sure that I told him [Foret, Sr.] to send a pipe welder that could handle the kind of work he [Cole] had.
>
> [H]e [Foret, Sr.] said that he would take care of it.

Pertuit testified that the names of no employees were mentioned in this discussion. Pertuit further testified that pipe welding is a "special art" and only about 20 percent of the 400-odd welders in the welding department can do it.

On cross-examination, Pertuit reaffirmed that Cole asked for "a" pipe welder and he told Foret Sr. to send Cole "a" pipe welder. Pertuit testified that over the many years he has disposed of as many as nine requests such as Cole's a day. When asked why he particularly remembered this single request by Cole, Pertuit testified:

> Well, one thing we accent is he was transferred on the platen. He is one of the guys that they transferred, that Foret took off and put on the boat. I mean, once somebody brought it up in here [at the trial] or wherever it was brought up—that particular fellow, that is it.

Pertuit further admitted on cross-examination that the preferred practice is to keep the welders who work on the ships that are in the water on those ships.

When Foret Sr. was called by Respondent (vol. 100), he testified that he made the decision to reassign Cancienne to the platen area; Foret denied that he ever discussed his reasons for transfer with Ramirez or Alvarez. Foret further testified on direct examination that he prefers to keep the same pipe welders on the ships that are in the water because:

> Well, at wet dock-3, I keep the same welders I had with experience due to the fuel tanks, fuel lines on the ship. After it hits the water and put fuel on it, it is standing like a time bomb. You got to know what you are doing. I use the same welders over and over to do the job to deliver the ship.

Foret acknowledged that, of the 400 employees in the welding department, there were only 8 to 12 pipe welders whom he keeps on the ships that are in the water, and, when he was selected for reassignment to the platens, Cancienne had been one of them for years. Foret testified, however, that reassignments such as Cancienne's occurred "daily."

Foret Sr. further testified that at a supervisors' meeting, Pertuit told him that "[T]omorrow he needed a pipe welder to go to Butch Cole." Foret testified that he decided at that meeting that Cancienne would be the pipe welder that he sent to Cole. When asked why he selected Cancienne, Foret replied, "The man could handle the job. That is why I chose Cancienne." Then Foret was led to testify that he selected Cancienne because he had previously worked under Cole in the platen area.

On direct examination, Foret Sr. testified that Cancienne was not mentioned by name in the supervisors' meeting in question. On cross-examination, however, Foret testified that he told Pertuit and the other general foremen who were present that Cancienne would be the pipe welder that he would send to Cole. Finally, Foret acknowledged on cross-examination that he had seen Cancienne wearing prounion T-shirts early in the organizational campaign.

As mentioned above, at the time that he was reassigned from the ship at wet dock-3, Cancienne was working under the direct supervision of Foreman Foret Jr. Foret Jr. testified (vol. 113) that Foret Sr. told him that he should send one pipe welder to Cole; Foret Sr. suggested that Cancienne be sent because he had previously worked with Cole, but Foret Sr. left the selection of which pipe welder to send to the platens up to him. Foret Jr. testified that he had three pipe welders at the time; he had worked previously with the other two, but not Cancienne, and for that reason he decided to keep the other two. Foret Jr. denied that, at the time, he knew of any prounion sympathies that Cancienne may have held. Foret Jr. further denied, generally, that any supervisor told him that Cancienne had been reassigned to the platen area because of his prounion sympathies, but Foret Jr. did not deny that, in his presence, Alvarez told Ramirez that Foret Sr. wanted Ramirez to "wring" Cancienne out because of his union activities.

Although it is undisputed that pipe welders who work on ships sometimes get rained out, Foret Jr., Foret Sr., and Pertuit

acknowledged that pipe welders stand a better chance of being rained out while working in the platen area than they would while working on ships.

Cancienne's Reassignment to Outside Work—Conclusions

As mentioned in the discussion of the case of discriminatee Collins, Ramirez admitted in a pretrial affidavit that: "I recall saying to Collins that I would do what I could to keep the Union out." That unqualified statement to Collins apparently included lying under oath because Ramirez did exactly that. Ramirez categorically denied that he said "anything" to Arabie such as "Mark, that guy that is working for me in the Union, why do you think they took him off the ship; he was a union man; they stuck him with my ass, wanting me to burn his ass, and I never did." (Ramirez finally admitted saying this, but only after he heard his voice on a tape recording.) The credibility to be made at this point is whether Ramirez also lied under oath when he told Cancienne essentially the same thing that he told Arabie. I find that he did. Aside from his demonstrated lie under oath (that he had not told Arabie "anything" like what he did tell Arabie), Ramirez impressed me unfavorably when he stated several times on direct examination that he spoke to Cancienne only because Cancienne had "buffered" him, yet on cross-examination Ramirez denied that he used such a term and that he did not know what it meant. Also, Ramirez was particularly incredible when he testified that he told Cancienne that he did not care who Cancienne told about their conversation. Of course, Ramirez had no reason to say this, and the transparent lie was obviously designed to reply to Cancienne's testimony that Ramirez had told him that he would lie about the threat that he had just made. I credit Cancienne who made a far more favorable impression than did Ramirez. I find that after Cancienne reported to the platen area Ramirez told him that: "[Y]ou were sent out here because you are pro-union." I therefore conclude that, as alleged, Respondent, in violation of Section 8(a)(1), by Ramirez, on or about July 1, 1993, told its employees that an employee had been transferred to a more onerous position[430] because he aided or supported the Union.

In addition to Ramirez' telling Arabie and Cancienne that Cancienne had been reassigned to the platen area because of his union activities, it is undisputed that Alvarez told Ramirez the same thing in the presence of Foremen Foret Jr., Orgeron, Plaisance, and Danos; more specifically, Alvarez told Ramirez that "Big Foot wants you to wring him out because of his union activities." Neither Foret Jr., nor Orgeron, nor Plaisance, nor Danos, nor Ramirez denied that Alvarez said this, and I find that he did. These statements, especially when viewed in the light of the overall evidence of Respondent's animus, at least prove a prima facie case that the reassignment of Cancienne to the platen area was made for unlawful reasons. Another factor requiring the conclusion that the General Counsel has presented a prima facie case is that the reassignment of Cancienne came on the third (or at most fourth) workday following Cancienne's open and obvious union activity of distributing prounion handbills at Respondent's gate on the morning of the Board election. The burden therefore shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Cancienne even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Cancienne acknowledged that, in the past, he had been reassigned to the platen area. The fact that the reassignment was not unprecedented, however, does not resolve the issue. No matter how many times that Cancienne had previously been assigned to the platen area, the issue is why he was assigned there on or about July 1. Moreover, none of Cancienne's prior assignments were made on a permanent basis, as was the assignment of July 1. That is, the issue is why Cancienne received this permanent assignment on July 1.

It is undisputed that when he heard that employee Arabie had shaken the hand of union supporter Cancienne, Alvarez responded that Foret Sr. "is going to hear about this." When Foreman Danos heard that Arabie had shaken the hand of prounion Cancienne, he also announced that he would inform Foret Sr. It is further undisputed that before the Board election, Alvarez told Arabie that Foret Sr. was pressuring him to put pressure on Cancienne and another employee because they were then supporting the Union. Alvarez further told Arabie that Foret Sr. was pressuring him to reassign Arabie to Foreman Danos so that Danos could harass and pressure Arabie. This undenied testimony demonstrates that Foret Sr. had led his foremen to believe that he wanted to know about who was even friendly with prounion employees, and Foret had let his foremen know that, in order to defeat the employees' organizational attempt, he was willing to use the tactic of ordering prounion employees to be reassigned to positions where they could be pressured, or otherwise harassed.

Ramirez testified that he told Cole that he needed "four or five" pipe welders and that he got two (including Cancienne) immediately and two more about 2 weeks' later. Cole did not testify, and there is therefore an initial failure of Respondent to corroborate Ramirez' testimony in this regard. Moreover, Pertuit testified (several times) that Cole only asked for one pipe welder and he told Foret Sr. to send Cole only one pipe welder. Foret Sr. testified that Pertuit only asked for one pipe welder and he told Foret Jr. to send one pipe welder to Cole. Finally, Foret Jr. testified to sending only one pipe welder to Cole. As well as the absence of credible testimony to support Ramirez' testimony that he needed, requested and received multiple pipe welders,[431] there is an absence of documentation that was readily available had Ramirez' testimony been true. Although it introduced hundreds of other MCRs to prove various points, including staffing at various times, Respondent did not offer the MCRs of Ramirez to show that he received pipe welders in addition to Cancienne, and Respondent did not offer the MCRs of any other foremen to show where such pipe welders would have come from. I reject the testimony of Ramirez that several pipe welders, in addition to Cancienne, were sent to him in the period in question. I find that Cancienne was singled out for reassignment to the platen area.

Foret Sr. testified that he made the decision to reassign Cancienne to the platen area at the general foremen's meeting with Pertuit. On direct examination Foret testified that Cancienne's name was not mentioned at the meeting; on cross-examination, however, Foret testified that he announced his decision to reas-

[430] Working in a position that is more subject to layoff, or suspension, because of the weather is necessarily more onerous; it is psychologically more onerous, if not physically.

[431] I reject certain testimony by Foreman Sterling Dolese that he witnessed Ramirez telling Cole that he needed pipe welders; cross-examination showed that Dolese's recollection (which was also unsupported by available documentation) only went to March 1993.

sign Cancienne to all who were there. Pertuit testified, however, that in the meeting there was no mention of names of employees who were to be, or might be, reassigned. I do not believe either version; nor do I believe Pertuit's testimony that he remembered Cole's request for one pipe welder when such requests for reassignments are made hundreds of times a year.[432] I find that Foret made the decision to reassign Cancienne to the platen area without a request from Cole (or Ramirez through Cole).

Foret Sr., after being led, testified that he selected Cancienne because Cancienne had before worked for Cole. Foret did not, however, testify that Cancienne was the only pipe welder on the ships who had worked for Cole, and I do not believe this was the real reason that Foret selected Cancienne for reassignment. Contradicting his father, Foret Jr., testified that he really made the decision to reassign Cancienne. Foret Jr. testified that he selected Cancienne because he (Foret) had worked with the two other pipe welders whom he then supervised. Foret Jr. was unsure of those pipe welders' names, and, certainly, Respondent did not offer the MCRs that would have showed their names and would have allowed scrutiny of Foret Jr's. testimony on this point. Finally, Foret Sr. described ships in the water as "bombs" because of the welding that was being conducted; for this work, he acknowledged, he usually liked to keep Respondent's most experienced pipe welders, of which Cancienne was one. Pertuit also admitted that Respondent prefers to keep the same welders on ships that are in the water. Therefore, assuming that there was need for only one pipe welder to be reassigned to Ramirez, and further assuming that the pipe welder had to come from the ships, and further assuming that Foret Jr. was the only foreman on the ships who had pipe welders, the institutional preference (as admitted by Pertuit and Foret Sr.) was for the most experienced employee to remain on the ships, not the employee who had worked with the foreman the most time.[433] Moreover, the latter assumptions were not, and could not have been, valid; this is because the first assumption (that Ramirez needed one pipe welder) was not proved. In his excess of claiming need for "four or five" welders, when only one pipe welder was shown to have been reassigned, Ramirez was completely incredible. I find that, as Arabie testified, when he first heard that Cancienne was being reassigned to his crew, Ramirez told Alvarez that he did not even need pipe welders. I further find that Ramirez would not have said such a thing had it not been true.[434]

I therefore reject the unsupported, incredible, testimonies of Ramirez, Pertuit, and Foret Sr. that there was need for a one-man reassignment and that Cancienne was selected for nondiscriminatory reasons. That is, Respondent has not shown by a preponderance of the evidence that it would have reassigned Cancienne to the platen area on July 1 even in the absence of his known protected activities. I therefore conclude that by that reassignment Respondent violated Section 8(a)(3).

(2) Cancienne's "rain-out" suspension

It is undisputed that there was a heavy rain on March 1, and many employees were rained out because they were in areas that were not sheltered. Cancienne testified, however, that he was assigned to work in a sheltered area on platen 6 that day. About 11 a.m., Cancienne was approached by his foreman for that day, Sterling Dolese. According to Cancienne:

> He said he had been told make sure I was especially selected for a rain out. . . . He asked me what I done to piss them off.
>
> I told him I didn't know.

Cancienne signed out at 11:10 a.m., and was suspended for the rest of the workday. It is undisputed that none of the other members of Dolese's crew, about five employees, were told to leave for the day.

Cancienne's "rain-out" Suspension—Respondent's Evidence

Dolese (vol. 137) essentially corroborated Cancienne's testimony about what he said to Cancienne on March 1. Dolese testified that when it began raining heavily he ordered Cancienne and three other welders to work in an area that was sheltered. Dolese did not follow the employees to the sheltered area at that time. Dolese testified that about 11 a.m., General Foreman Cole appeared at Dolese's office and told Dolese to go and "send 5660 home immediately."[435] Dolese testified that:

> I argued with him for about five minutes saying that the man is in a dry area; that it was wrong; I shouldn't be going out there and knocking him off; he is in a dry area.[436]

Dolese first testified that Cole replied only: "You have your orders; do what I just told you to do." Dolese (although only after blatant leading for which Respondent's counsel apologized), added that Cole also stated that he was telling Dolese to suspend Cancienne because, "Black Pertuit called." Dolese further testified that, during their 5-minute argument, Cole gave him no reason for the suspension of Cancienne.

Dolese further testified that after the argument and Cole's departure, he walked out of his office and "stood in the rain for about 10 minutes." Dolese testified that he did this because, "I was trying to decide what I should do, whether I should go knock the man off or just do what I was told to do." Then, according to Dolese, "I went in there and said [to Cancienne], I don't know who the hell you pissed off, but I am sending you home." Later that day he approached Cole and told Cole that he was worried about what he had done to Cancienne. Cole replied that Dolese was just to follow orders. Dolese further testified that a month later (after Dolese had been contacted about the charge that had been filed on behalf of Cancienne), he approached Pertuit and asked why he had been told to suspend Cancienne. According to Dolese, "And he says that during that morning when it was raining, he witnessed Cancienne under-

[432] Pertuit's testimony that he remembered Cole's routine request only because of the ensuing litigation is essentially an admission that he was testifying from something other than an honest memory.

[433] Foret Jr. was the only supervisor who denied knowledge of Cancienne's union activities, and his testimony that he made the decision to reassign Cancienne appears only to have been a vehicle for a denial that the General Counsel had presented a prima facie case.

[434] I simply do not believe Foret Sr.'s testimony that he did not discuss the reassignment of Cancienne with subordinate foremen other than Foret Jr. It is obvious to me that he at least told Alvarez, and Alvarez told the other foremen (and Arabie) of Foret Sr's. true reason for selecting Cancienne.

[435] Again, 5660 was Cancienne's badge number. Also, to send an employee "home" was shop argot for suspending him (but, actually, Respondent's supervisors probably did not care where the employee went after he left the plant).

[436] The Tr., vol. 137, p. 34,477, L. 20, is corrected to change "I was wrong" to "it was wrong."

neath the unit not welding, wasting time." Dolese testified that, on previous occasions, he had suspended employees who were loafing in sheltered areas when rain-outs were called. On cross-examination Dolese admitted that, at some times in the past, when he had found members of his crew not working when they should be, he ordered them to get to work, but he did not, on those occasions, suspend the employees.

Pertuit testified that on March 1, as he rode about the platen area, he saw several employees standing around, watching the rain; he called their general foreman (whom Pertuit did not name) and told that general foreman to "go knock those people off," or suspend them (or lay them off) for the remainder of the day. Then Pertuit drove to the area of platen 6. He saw an employee whom he could not recognize because the employee had his back turned, but he could identify him as a welding department employee by the employee's (color-coded) hardhat with an "05" on it. Pertuit testified that the employee was doing: "Nothing. Looking at the rain. . . . Just standing there looking at the rain." Pertuit further testified that he watched the employee doing nothing for: "Two minutes, two and a half minutes." Pertuit called Cole who was the general foreman over that platen area. Pertuit told Cole to "go check who was working in that area and knock him off because he wasn't producing work." When asked what Cole replied, Pertuit responded: "Yes, he probably disagreed with me a little bit." Pertuit insisted. Further according to Pertuit, Cole called him back about 15 or 20 minutes later. According to Pertuit, Cole told him that the employee that he found was Cancienne; Pertuit testified that this was the first that he knew that the employee on platen 6 whom he had seen loafing was Cancienne; Pertuit further testified:

> He [Cole] said that this man [Cancienne] could work where he was at.
>
> And I told him, "No, he wasn't working where he was at because I saw he wasn't working." So I told him to knock him off.

Pertuit did not indicate in his testimony how long it was that he watched the sheltered employees at other platens not working before he called their (unnamed) general foreman; nor did Respondent offer testimony that, on that day, the other general foreman actually suspended those employees and that they did so without warning. On cross-examination, Pertuit testified that Cancienne was "sitting" during the 2 minutes that he observed him.

Cancienne's "rain-out" Suspension—Conclusions

The General Counsel first argues that Respondent has not established that Pertuit saw Cancienne on platen 6 on March 1. The General Counsel points out that Pertuit testified that he saw Cancienne "in" the open end of a unit that was on platen 6, but Dolese testified that, when he questioned Pertuit about the event a month later, Pertuit told him that he had seen Cancienne "underneath" the unit which was up on a jig or platform. Also, Pertuit testified on direct examination that Cancienne was standing to watch the rain, but on cross-examination Pertuit testified that Cancienne was sitting. The differences do raise some suspicion, but, absent rebuttal testimony by Cancienne that he did not pause for 2 minutes (either in or under the unit) to do nothing but watch the rain, I find that Pertuit saw Cancienne doing so.

Nevertheless, a 2- (or 2-1/2) minute pause for employees who have no established work break seems entirely predictable. Apparently Cole thought so, because he argued the matter with Pertuit. It is further obvious that Dolese knew, or reasonably suspected, that a short pause was all that Cancienne had taken, because he not only argued with Cole for about 5 minutes, he stood out in the heavy rain for 10 minutes contemplating whether to disobey the clear order that he had received from Cole. Such disobedience would assuredly have gotten Dolese discharged, and his long period of indecision shows how convinced he was that the suspension of Cancienne could not be explained on any legitimate basis.

Dolese admitted that he had previously told employees to get to work when he found them loafing. There are many instances mentioned in this case where employees were issued disciplinary warning notices for loafing. In this case, however, Cancienne was issued a suspension for his loafing, even though his general foreman and foreman thought the suspension was unjustified. The half-day pay loss for Cancienne was a far greater punishment for loafing (if Cancienne's 2-minute pause could legitimately be called that) than any warning notice that Cancienne might have received. (According to this record Cancienne had received no warning notices; moreover, as shown in the case of discriminatee Marshall, at least 883 employees were issued three or more warning notices in 12-month periods without being discharged.) Finally, Dolese and Pertuit (and other supervisors except, of course, Cole) testified that they had suspended sheltered employees during rain-outs when they found those employees loafing; specifically, Pertuit testified that he ordered an (unnamed) general foreman to suspend other loafing employees that day. I do not believe this testimony; moreover, none of that testimony suggested that those other employees were suspended without a preceding oral instruction to "get to work" that was disobeyed.

The above-described admissions of Alvarez and Ramirez prove that Respondent held the strongest degree of animus toward the protected activities of Cancienne. There is no reason to believe that such animus had dissipated by the time that Pertuit ordered the suspension of Cancienne. Rather, it appears precisely that Pertuit seized upon his chance observation of Cancienne's pause in his work to suspend him, and it appears that Pertuit did so because of Respondent's animus. I so find. In summary, Respondent has not met its burden of proving that it would have suspended Cancienne even absent his known protected activities. I therefore find and conclude that by suspending Cancienne on March 1 Respondent violated Section 8(a)(3).

b. Mamoru Honjo's reassignment from shop work to field work

On April 22, 1994, Mamoru Honjo (vol. 21), a welder, was reassigned from working inside in Respondent's pipe shop to working outside in the welding department.[437] The second complaint, at paragraph 146, alleges that by this reassignment of Honjo Respondent violated Section 8(a)(3). The General Counsel contends that Honjo's reassignment was to a more onerous position and that Respondent reassigned Honjo because of his known union activities and expressions of sympathy which included his distributing union handbills to other employees as they alighted from buses inside Respondent's

[437] All dates mentioned in Honjo's case are from May 1993 through April 1994, unless otherwise indicated.

gates. The General Counsel contends that Honjo's pipe shop supervisor admitted to another employee that Honjo was reassigned because of those handbilling activities. The complaint also alleges that, in violation of Section 8(a)(1), Honjo was interrogated about his union activities and warned that the employees' union activities were being maintained under surveillance. Respondent denies that the admission, interrogation or warning of surveillance occurred. Respondent further answers that Honjo was reassigned along with other employees solely because of economic necessity. Respondent admits that its supervisors knew of Honjo's prounion sympathies, and it admits that the job to which Honjo was reassigned was more onerous than his pipe shop job. Ultimately, I find and conclude that Honjo was unlawfully reassigned to the welding department.

Respondent distinguishes between "loans" and "transfers" of employees between departments. Several of Respondent's supervisors testified that loans are for shorter periods of time; transfers are effectuated, and ASI-22 (transfer) forms are created, when the employee is expected to stay in the recipient department in definitely. I shall use Respondent's terminology in the following recitation of Honjo's case, and "reassignment" where the nature of the change is in issue.

Honjo, a first-class pipe welder, was first hired by Respondent in 1970. Honjo was originally hired into the welding department, but in 1984 he was transferred to the pipe department, and he worked only in the pipe shop until 1993. In 1993, Honjo was formally transferred back to the welding department, but twice thereafter he was loaned (back) to the pipe department. The termination of Honjo's second loan to the pipe department, and the reassignment of Honjo to outside work in the welding department (after the termination of that second loan) is the action of Respondent that is alleged to a violation of the Act.

The specific dates involved are as follows: From November 4, 1970, through May 30, 1984, Honjo was an employee of the welding department. From 1984 through August 8, 1993, Honjo worked only in the pipe shop. From August 9 through August 31, Honjo was on loan from the pipe department to the welding department. On August 31, an ASI-22 (transfer) form was executed, formally transferring Honjo to the welding department, and Honjo continued working in the welding department through November 3. On November 4, Honjo was loaned from the welding department to the pipe department, and he continued to work in the pipe shop through December 31. On January 3, Honjo was returned to the welding department, and he worked there through January 10. On January 11, Honjo was again loaned to the pipe shop where he worked through April 21. On April 22, Honjo was again reassigned to the welding department where he remained through the date of his testimony. (Again, Honjo's final return to the welding department is the only assignment in issue; specifically, Honjo's August transfer to the welding department is not alleged as a violation of the Act.)

The function of the pipe shop is the cutting, bending and welding of pipe to specifications for use in the fabrication and assembly areas. When working in the pipe shop, Honjo was supervised by Foreman Kenneth Mouton; his general foreman was Carroll Sonnier. While Honjo worked in the pipe shop, he was protected from the elements; he had a fan in warm weather and a heater in cold weather. In Honjo's outside work in the welding department, he has been required to do at least some climbing; there was no climbing involved in his job in the pipe shop. Also, as mentioned in Cancienne's case, while working outside, Honjo is subjected to being suspended for the day without pay when it rains. Respondent does not dispute that all of these factors make Honjo's welding department work more onerous than the work that Honjo did in the pipe shop. (As Foreman Mouton put it: "Anybody going back out in the field don't like it.")

Honjo testified that two weeks before the June 25 Board election, he was approached by Mouton who was carrying a clipboard that had upon it some employer campaign literature. According to Honjo (whose first language is Japanese):

> Mr. Mouton show to the clipboard and antiunion material. He show it to me. I look in there. I told Mr. Mouton, this is wrong information. . . .
>
> He got so mad, he go [away from Honjo's work bench].

Honjo testified that he signed a union authorization card, and he attended union meetings, but he wore a prounion button for only 2 or 3 days in December, well after the June 25 Board election. Honjo testified that, about a month after the Board election, he was approached by Pipe Department Superintendent Fradella. According to Honjo:

> Mr. Fradella said that, "I knew you sign union authorization card." And [Fradella said] just like, "You no problem, hard worker." And [Fradella asked,] "Why everybody sign authorization card?"
>
> I don't tell nothing.

Based on this testimony by Honjo, paragraph 59 of the second complaint alleges that Respondent, by Fradella: "(a) created the impression among its employees that their union activities were under surveillance by the Respondent; and (b) interrogated its employees about their union membership, activities and sympathies." As discussed infra, Fradella denied this testimony by Honjo.

Buses deliver employees to points inside Respondent's gates; the passengers, of course, have no opportunity to receive any handbills that may be distributed at the gates. Honjo testified that he took upon himself the duty of sometimes distributing to bus riders handbills that had been distributed by the Union on given days. Honjo testified that on the morning of April 21, he distributed union handbills to employees as they alighted from a bus inside Respondent's yard. The handbill concerned the May 6 meeting of Respondent's shareholders that has been mentioned several times before in this decision. The topic of the handbill was union-sponsored proposals for changes to the ESOP plan; those proposals had become a hotly contested issue on which Respondent, as well as the Union, distributed handbills to the employees. Honjo testified that during the afternoon of April 21, about 5 minutes before the 3:20 p.m. cleanup whistle, he was approached by Foreman Mouton and told that he was being reassigned "outside," or to the Welding Department, starting the next day. Mouton gave Honjo no reason for the reassignment. As mentioned, Honjo remained in the welding department through the date of his testimony.

Current pipe department employee John Holmes (vol. 22) testified that on April 21 he went to Mouton's office to use the telephone. When he completed the call, according to Holmes:

> Well, as I was leaving, I asked him [Mouton], "What is going on with Honjo?"

And he told me that Carroll Sonnier saw Honjo giving out Union material, and he is being shipped out.

And so I said, "You guys are always doing crap like that."

So he said, "It is not me; it is Carroll." So I left.

Based on this testimony by Holmes, paragraph 80 of the second complaint alleges that Respondent, by Mouton, "told its employees that an employee was being transferred because he aided or supported the Union." Mouton denied this testimony, as discussed infra.

Honjo's Reassignment—Respondent's Evidence

On direct examination, Mouton (vol. 147) testified that he played no part in the decision to return Honjo to the welding department. Mouton testified that the first that he heard that such a decision had been made was early in the day of April 21, when Sonnier told him that: "Honjo was going to be shipped out the following morning with a couple of fitters." Mouton was not asked if Sonnier told him at that time why Honjo was being reassigned. Mouton was asked and he testified:

Q. [By Mr. Cupp]: Did you tell Mr. Holmes on the day that you told Mr. Honjo that Mr. Honjo was being sent out of the shop because Mr. Sonnier saw him distributing Union leaflets?

A. Not to my knowledge, no.

Q. Did you ever tell that to Mr. Holmes?

A. No.

Mouton acknowledged that Holmes came to his office to use the telephone, "[q]uite a few times."

Pipe details are orders for pipes that are processed in the pipe shop. Mouton testified that at one point the pipe shop had as many as 500 pipe details per week, but, about the time that Honjo was reassigned to the welding department, the pipe shop was down to 150 pipe details per week. Mouton testified that: "We just had to cut back." Mouton further testified that "around the same time" that Honjo was returned to the welding department, three other welders (whom Mouton named) were also returned to the welding department. Mouton testified that those three welders were faster welders than Honjo. Five other pipe welders were allowed to stay in the pipe shop after April, but each of them was also a faster welder than Honjo. On cross-examination Mouton reaffirmed that he played no part in the decision to reassign Honjo to the welding department. Mouton further testified that no records are kept that would show how fast pipe shop welders worked.[438]

Sonnier (vols. 121, 125) testified for Respondent, but he did not deny seeing Honjo distributing handbills to employees who alighted from the buses on April 21. Sonnier testified that the pipe shop had about 60 employees in 1993 and about 40 in 1994. The pipe shop has had as many as 18 pipe welders but at the time that he testified the number was down to five.

Sonnier identified records that reflect the number of pipe welders who worked in the pipe shop each day from March 1992 through December 1994. The records show that in early 1994 Respondent had as many as 18 pipe welders in the pipe shop at a time and that during the first weeks of April, the pipe-welder complement of the pipe shop dropped from 16 to 13. The return of Honjo to the welding department on April 22 (a Thursday) dropped the number of pipe welders in the pipe shop from 13 to 12. On April 26, 27, and 28, the number returned to 13. On April 29, the number dropped to 12, but it was back to 13 on the next workday, May 2. During May and early June, the number of pipe welders in the pipe shop stayed below 13, but on June 16 the number went back to 13. While the numbers dipped occasionally thereafter, the records show that there were 13 pipe welders in the pipe shop as late as November 10 (and on October 13 there were 14).

Sonnier testified that Honjo was returned to the welding department: "Because the work schedule slowed down." Sonnier testified that a week before Honjo was returned to the welding department, he told Mouton "that we needed to move people." Mouton replied to Sonnier that Honjo "should go." because he was too slow and that, " . . . he [Honjo] is not as good a welder as the rest of them." Sonnier further testified that Mouton recommended that "only" Honjo be returned to welding. Sonnier further testified that he met with Pipe Department Superintendent Fradella and told Fradella that he wanted to move "a welder," Honjo, from the pipe shop. Fradella, according to Sonnier, replied to him, "If you want to move Honjo, we will move Honjo."

On cross-examination, Sonnier testified that when he first notices that an employee is being too slow in his work he speaks to that employee; Sonnier admitted, however, that neither he nor Mouton ever told Honjo that he was too slow in his work, and neither he nor Mouton ever issued a warning notice to Honjo for lack of production.[439] Sonnier further testified that employees are regularly moved in and out of the pipe shop, but there was a "base core" of welders who usually stayed. He admitted that Honjo was one of those welders. Sonnier further admitted that the welders that he tried to keep in the pipe shop were the "more productive."

Fradella (vol. 113) denied that he told Honjo that he knew that Honjo had signed a union authorization card or that he asked Honjo why he had done so. Fradella testified that he first learned that Honjo supported the Union shortly after the Board election when Sonnier told him that, "Honjo was telling people that, now that the election is over, the Union is going to change things around Avondale." Fradella denied that he discussed the reassignment of Honjo with Mouton. Fradella testified that the reassignment of Honjo came about when Sonnier told him that he wished to return Honjo and welder Ralph Taylor to the welding department and he agreed. On cross-examination Fradella admitted that Sonnier did not tell him upon what basis he had selected Honjo and Taylor for reassignment to the welding department.

Honjo's Reassignment—Conclusions

Honjo had a far more favorable demeanor than Fradella, and I credit his testimony that shortly after the Board election Fradella told him that he knew that Honjo had signed a union authorization card and he asked Honjo why some of the other employees had also done so. Honjo had told Mouton that he did not agree with Respondent's preelection propaganda, but there is no evidence that Honjo had told any supervisor that he had signed a union authorization card. Even if he had, Fradella was

[438] Mouton also testified that, as of the date of his testimony, Honjo was working in the pipe shop, but on the night shift. There is no evidence of when or how this night shift assignment first occurred, or how long it was to last, and it will not be considered further.

[439] Honjo had been issued no warning notices during his 23 years of employment by Respondent.

not licensed thereby to ask him why other employees had done so. I therefore conclude that Respondent, in violation of Section 8(a)(1), by Fradella, in July 1993, interrogated an employee about his union activities. I further conclude that by Fradella's informing Honjo that he knew of the particulars of his union activity, Respondent, by Fradella created an impression of unlawful surveillance of an employee's protected activities, also in violation of Section 8(a)(1).[440]

Current employee Holmes testified that, on April 21, the day that Honjo distributed handbills to the bus riders, Mouton told him that Honjo was being "shipped out" because Fradella had seen Honjo doing so. When asked if he had said such a thing, Mouton first replied, "Not to my knowledge, no." Mouton gave an unequivocal denial when thereafter pressed to do so, but he left an unfavorable impression in the process. Respondent suggests no reason why Holmes would have lied and I do not believe that Holmes did lie. I credit Holmes' testimony, and I find and conclude that, in violation of Section 8(a)(1), Respondent, by Mouton, on April 21, 1994, told its employees that another employee had been reassigned because he had aided or supported the Union.

At minimum, Mouton's statement to Holmes establishes a prima facie case that Respondent's April 22 reassignment of Honjo to the welding department violated Section 8(a)(3). The timing of the reassignment, coming immediately on the heels of Honjo's protected activity of distributing the prounion handbills to the bus riders, is another factor that requires a finding of a prima facie case.[441] The burden therefore shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Honjo even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Mouton testified that (and re-affirmed that) he had no input to the decision to reassign Honjo; rather, Mouton testified that decision was announced to him by Sonnier. Sonnier, however, testified that Mouton asked that Honjo, and only Honjo, be reassigned to the welding department. He then went to Fradella and stated that he (and, presumably, Mouton) wanted Honjo (and only Honjo) reassigned to the welding department. Fradella testified, however, that Sonnier came to him and asked that Honjo and one other employee (Taylor) be reassigned to the welding department. Respondent suggests no way that this quagmire of inconsistencies can be reconciled.

Respondent offered vague testimony that "around" the time that Honjo was reassigned to the welding department, other pipe welders were reassigned to the welding department also. Respondent, however, suggests no way to reconcile that (vague) testimony with its records which show that only Honjo was reassigned on April 22. That is, its records show that the number of pipe welders in the pipe shop dropped from 13 to 12 on the day that Honjo was reassigned; the number stayed at 12 for only 2 days (Friday, April 22, and Monday, April 25) but it was immediately returned to 13 the day after that. At times thereafter, the number of pipe welders in the pipe shop returned to 13 (and even 14), but some welder other than Honjo was selected to bring the number to 13 (or 14). Over the years before Honjo's April 21 handbilling activities, when Respondent needed a pipe welder in the pipe shop, it called upon Honjo. Indeed, Respondent left him there for 10 straight years. Respondent did offer testimony that Honjo's welding was slower, and not as good, as that of other welders, but aside from being totally unsupported,[442] that testimony is irreconcilable with the fact that, over the years before he was seen distributing handbills for the Union on April 21, Honjo was repeatedly called (and recalled) to the pipe shop when welders were needed.[443] Respondent's unsupported testimony of Honjo's inferiority to other pipe welders was simply incredible. (Moreover, although Mouton, Sonnier, and Fradella testified that Honjo was slower and less able than other welders, none of those supervisors testified that Honjo was reassigned to the welding department because he was slower, or less able, than the other welders.)

I find that Respondent has not shown that it would have reassigned Honjo to the welding department, at least as early as it did, even absent his known protected activities. I therefore conclude that by its reassignment of Honjo to more onerous work in the welding department, Respondent violated Section 8(a)(3).

c. Richard St. Blanc

On June 29, 1993, Richard St. Blanc (vols. 8, 9), an electrician, was reassigned from inside "bench" work to work on a ship with a crew that was pulling heavy cable. That cable-pulling job lasted for 2 or 3 weeks; then St. Blanc was assigned other work that is not in issue. On July 29, St. Blanc was assigned to a second cable-pulling job that lasted at least 2 more weeks. The second complaint, at paragraphs 92 and 109, respectively, alleges that St. Blanc's June 29 and July 29 cable-pulling assignments were assignments to more onerous jobs and that by making those assignments Respondent violated Section 8(a)(3). Also on July 29, St. Blanc was issued a warning notice. The second complaint, at paragraphs 69 and 70, alleges that the warning notice was issued because St. Blanc had engaged in the protected concerted activity of complaining about working conditions and that by issuing the warning notice to St. Blanc Respondent independently violated Section 8(a)(1) of the Act, as well as Section 8(a)(3). The General Counsel contends that Respondent warned and assigned St. Blanc to cable pulling duties because of: (1) St. Blanc's known protected concerted activities which included his encouraging other employees to complain about working conditions; and (2) St. Blanc's known union activities and expressions of sympathy which included his wearing prounion insignia, serving as an alternate union observer in the June 25 Board election, passing out prounion literature during the hours that the election was conducted, and getting his picture in the local newspaper as a prounion employee. The General Counsel further alleges that, in violation of Section 8(a)(1), supervisors interrogated St. Blanc, threatened him with unspecified reprisals, and threatened him with closer supervision. Respondent denies that the threats or interrogation occurred. Respondent further answers that: (1) St. Blanc was assigned cable-pulling jobs solely because of business necessities, (2) even if St. Blanc's cable pulling assignments were onerous, they were nothing unusual for

[440] See *Electro-Voice, Inc.,* 320 NLRB 1094 (1996), as quoted above.

[441] Respondent argues that its supervisors knew of Honjo's prounion sympathies well before April 22; there is no evidence however, that before that date the supervisors knew of Honjo's activities that were directed against Respondent's position on the hotly contested issue of the Union's proposals for changes in the ESOP plan.

[442] Honjo was never issued a warning notice for slow, or inefficient, welding (or anything else).

[443] As Sonnier admitted, Honjo was part of a "base core" of welders upon which the pipe shop had relied over the years.

electricians, and (3) when he was issued the warning notice, St. Blanc had not been engaging in protected activities because he was not engaging in strike activity but he did stop working and he caused other employees to stop working. Respondent further contends that St. Blanc was issued the warning notice solely because he left his work area and he interfered with the work of other employees. The General Counsel replies that, even if St. Blanc was not engaged in protected concerted activity on July 29, he was disparately treated because he was inadequately warned beforehand, and the General Counsel replies that St. Blanc was disparately punished by being reassigned to cable-pulling as well as given the warning notice. Although I find that St. Blanc's activities of July 29 were not statutorily protected, I nevertheless ultimately conclude that by issuing the warning notice to St. Blanc, and by giving him both of the cable pulling assignments, Respondent violated Section 8(a)(3).

(1) St. Blanc's reassignment from shop work to cable pulling

St. Blanc has been employed by Respondent for about 6 years; currently he is a first-class power electrician (as opposed to a maintenance or an internal communication electrician). In October 1992, St. Blanc sustained a nonoccupational injury to his shoulder that required two operations and the sometimes-wearing of a brace or sling. During that month, St. Blanc was placed on light-duty status and given a bench-electrician's job in the plug shop. The function of the plug shop is to make plugs that may have 50 to 100 pins each; it is not simple work, but there is no evidence that Respondent had ever employed first-class electricians in the plug shop before or after St. Blanc worked there. The plug shop is air-conditioned, and the work there is "clean" (at least as compared to electricians' work on the ships). In April 1993, St. Blanc's doctor, and Respondent's medical department, released him as able to return to regular duties, but St. Blanc was nevertheless retained in the plug shop until June 29 when Electrical Department Superintendent Robert Terry ordered him to be reassigned to a ship. From the time that St. Blanc went on light duty in October through June 13, the plug shop foreman was James Grimes; on June 14, Charles Gaudin replaced Grimes as foreman of the plug shop.[444]

St. Blanc testified that on June 2, he wore a union pin to work for the first time; he wore the pin on a sleeve of his shirt, just above the elbow. During that day, St. Blanc was sent to a ship for a few hours to help make an electrical connection. A general foreman on that ship was Kenny Danos; Danos reported directly to Gerald Gerdes, assistant to Terry. According to St. Blanc:

> Mr. Danos pulled me aside and said, "I am not trying to tell you what to do, but I want you to know that word of you wearing this button has reached Gerry Gerdes." And [Danos further told me that] Gerry Gerdes called back and confirmed with Danos whether I was wearing the button, and he did confirm that. He was just telling me that process took place.

Danos was not called by Respondent to testify.

St. Blanc testified that employees are not required to wear their hardhats while working in the plug shop. St. Blanc further testified that on June 3, Grimes approached him as he worked at his bench in the plug shop; according to St. Blanc:

> Mr. Grimes asked me if I was wearing any stickers or buttons on my hat, and I said, "No; on my sleeve."
>
> And he says, "That is not a very smart thing to do," that I was insulting management, and that every day I was wearing it, I was "fucking up." And then he said, "End of conversation."
>
> That was it.

Based on this testimony by St. Blanc, paragraph 39 of the second complaint alleges that Respondent, by Grimes, "(a) interrogated its employees about their union membership, activities and sympathies; and (b) threatened its employees with unspecified reprisals if they continued to aide or support the Union." As discussed below, Grimes denied this testimony by St. Blanc.

St. Blanc testified that about an hour after Grimes left his bench, he was approached by Terry. St. Blanc testified:

> Well, what he [Terry] did was, he came in to the Plug Shop, and he went directly up to me and asked me to see my hardhat, to make sure it was safe. . . .
>
> I gave him the hat, and he looked it over, and he said, "It seems to be in order," and he handed it back to me.

St. Blanc testified that there were seven other employees in the plug shop when Terry approached him; Terry came and left without conducting an examination of the hardhat of any of those other employees. St. Blanc testified that never before had he had such an inspection of his hardhat. Terry did not deny any of this testimony by St. Blanc. On cross-examination, Terry confirmed St. Blanc's testimony that employees are not required to wear hardhats while working in the plug shop.

As noted above in the case of discriminatee Molaison, when called by the General Counsel as an adverse witness (vol. 42), Terry acknowledged that, during the 30 days before the Board election, he maintained a list of "union supporters." Terry further acknowledged that St. Blanc's name was on that list.

St. Blanc testified that on June 21 he again wore his union button on his sleeve. That day, as he was going to the restroom, he met Terry who was coming from the opposite direction; according to St. Blanc:

> As I was walking to the bathroom, he hollered at me from behind, and I had to turn around to speak to him. He [Terry] said, "Richard, where are you going?"
>
> I said, "I am going to the bathroom right there."
>
> And he said, "I am just checking to make sure everything is okay."
>
> And then we—he was on the Moped and we kind of parted, and as we were parting, I said, "Well, how are you doing, Mr. Terry?"
>
> And he said, "Better than you."
>
> I said, "Well, what do you mean by that?"
>
> And he said, "You figure it out." And then he took off.

As discussed below, Terry's version of this exchange is only slightly different.

On June 24, the day before the Board election, the Regional Office conducted an instructional session for all employees who were to serve as observers. St. Blanc testified that on June 24:

> I called in to Jan, which is Jan Adams, Bob Terry's electricalsecretary, to report to her that I was going to miss that day to come to the orientation to be an observer, and she transferred my phone call to Bob Terry.

[444] This date was determined in Gaudin's testimony; Grimes only used the term "mid-June."

> When she transferred the call, I said, "Hello, Mr. Terry, how are you?
>
> And he said, "Better than you; I hear you want to be an observer for the election" and [he said] that Avondale wasn't going to pay for that, but that he would have to give me an excused absence.
>
> And then he said, "When you report back, I want you to report back to me."
>
> And when he said that, I asked him why.
>
> And he said, "I want to know how many connectors you are doing and the procedures you are following."
>
> And I said, "I keep a log of that for Mr. Gerdes [again, general foreman of the *LSD* program and assistant to Terry] already, and anything you want, I will give it to you."
>
> And he said, "Those are the rules; you want to follow the rules, don't you?"
>
> And I said, "Yes, sir, I do." . . . And then we hung up.

St. Blanc testified that, before this exchange, Terry had never before inquired about his work in the plug shop. Based on this testimony by St. Blanc, paragraph 51 of the second complaint alleges that Respondent, by Terry, "threatened its employees by telling them that he would engage in closer supervision of their work because its employees aided or supported the Union."[445]

On June 25, the day of the election, as an alternate union observer, St. Blanc worked at a polling place for about an hour. During much of the remainder of the day, he stood outside Respondent's administration building and handbilled for the Union. A picture of him doing that, along with discriminatee Perera, appeared in the Times Picayune the next day. After the election, St. Blanc placed union stickers on the front and back of his hardhat.

St. Blanc further testified that when he did return to work on Monday, June 28, he went to Terry's office as Terry had instructed; when he got there, Terry told him that he did not want to see him. Terry confirmed this testimony. St. Blanc testified that, after leaving Terry's office, he then returned to the plug shop and worked the remainder of the day without event. On June 29, however, Gaudin (who, again, had become the plug shop foreman on June 14) told him to report Randy Owen, a foreman over power electrician crews on "B-Hull," or *LSD*-50.[446] St. Blanc testified that when he went to Owen, Owen sent St. Blanc to Foreman Calvin Lewis whose crew was pulling cable at that time.

St. Blanc testified that he pulled cables under Lewis for about 3 weeks. St. Blanc described the work:

> We pulled cable that some other people pulled and they tangled it all up. We were cleaning the bilge out of all the tie wraps and the electricaltrash that was in the bilge. And when you pull cable, you are climbing in the racks, you are pulling the cable, and you are using tie wraps, you know.
>
> . . . .
>
> Well, the conditions on the ship are—they are hot, and they are noisy, and it is filled with smoke . . . . And when you get it [the wire-cutters] on the cable and you cut it, it has a piece of nylon usually about that long [about 12 inches], and they all fall down in the bilge, and other people who don't clean up after themselves, you know, that is what we were cleaning up.

When asked to compare that work with the bench work that he had previously done in the plug shop, St. Blanc testified:

> The bench work is, you know, clean. The environment on the ship, it is hot, and there is smoke, and we are climbing down into the bilge and getting all the dirt and the water and the tie wraps and all on us.

Respondent did not dispute this testimony, and I find that St. Blanc's cable pulling work was more onerous than the plug shop work that St. Blanc had been doing since October 1992. St. Blanc testified that cable pulling does not involve the use of any of the tools of a first-class electrician (except wirecutters for the tie wraps), nor does it require his other skills such as reading blueprints. St. Blanc testified that cable pulling is "primarily" done by helpers.[447]

On cross-examination, St. Blanc admitted that, before his October 1992 injury, he had worked in hot, dirty conditions on the ships. St. Blanc further admitted that cable pulling is "not an unusual job for a power electrician." On redirect examination, however, St. Blanc testified that, before the events of this case, as a first-class electrician, he pulled cable only when he was preparing to make a connection and he found that cable pulling crews had not pulled all the cables that they were supposed to pull. St. Blanc testified: "And if there is a cable or two missing and it is not that big stuff that we are talking about, then you [a first-class electrician] will pull it."

St. Blanc's Reassignment from Shop Work to Cable Pulling—Respondent's Evidence

Grimes (vol. 150) testified that at the time that St. Blanc's light-duty status ended,[448] he personally informed Terry that St. Blanc had been released for regular duties. Grimes testified that St. Blanc was allowed to remain in the plug shop because the plug shop was in a time of "peak load" for completion of the *LSD*-49. By June 14, when he left the plug shop for another supervisory position with Respondent, the work on the plugs for *LSD*-49 was "approximately 98 percent" complete. Grimes further testified that when he left the plug shop, "We was on a downward flow as far as work for *LSD*-49 to be performed." Grimes further testified that, in June, although *LSD*-50 had recently been put in the water, production of its plugs and connectors had not begun because of lack of materials that were supplied by the U.S. Government. As a result, Grimes testified, from early June until June 14, "We didn't have enough work to keep them all really gainfully employed at that time frame. We just almost had to make work to keep them all occupied."

Grimes admitted that he spoke to St. Blanc in early June about the union button that St. Blanc was then wearing. Grimes testified, "When I saw him wearing the button, I told him that I thought it was sort of stupid to wear the button because I didn't

[445] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against St. Blanc, as well as the charge in Case 15–CA–12171–1.

[446] Mentioned in several cases are A, B and C Hulls which were temporary designations for *LSDs* 49, 50, and 51, respectively.

[447] As well as St. Blanc's case, the testimony about who is assigned to cable pulling crews is relevant to the case of alleged discriminatee Sidney Jasmine which immediately follows.

[448] Grimes placed the date in March, although it was actually April.

feel that the Union could do any good for Avondale." Grimes flatly denied, however, that he said anything else to St. Blanc at the time. Upon completion of this testimony, the General Counsel moved to amend paragraph 39 of the second complaint to allege that, by Grimes' admitted statement to St. Blanc, Respondent: "(c) Disparaged, ridiculed and/or scorned its employees because they aided or supported the Union and told its employees their activities on behalf of the Union were futile." Respondent denies that Grimes' admitted remarks to St. Blanc constitute a violation of law.

On cross-examination, Grimes admitted that in June Respondent was desirous of building up an inventory for use when the *LSD*-50 was ready to receive plugs, but he again maintained that a shortage of materials prevented the plug shop from starting to build that inventory. Grimes conceded that there was no documentation which would support his claim of such a shortage of materials. Finally, Grimes admitted that, at the time that he left the plug shop in mid-June, he had planned to use St. Blanc there "indefinitely."

Gaudin testified (vol. 148) that "one or two days" prior to June 29, Terry called him to his office and told him that *LSD*-50 needed "a" power electrician; he told Terry that St. Blanc was available. Terry asked if St. Blanc had recovered from his October injury, and Gaudin replied affirmatively. Terry told Gaudin to have St. Blanc report to *LSD*-50. Gaudin testified that he told Terry that St. Blanc was available because the plug shop had caught up with the work on *LSD*-49 and the work for *LSD*-50 "was starting up, but there wasn't a lot at that particular time." Gaudin concluded: "I was a little bit overstaffed." Gaudin did not mention a lack of materials as a reason for the plug shop's not then working on plugs for *LSD*-50.

On cross-examination, Gaudin admitted that the plug shop had begun working on the plugs for *LSD*-50 as early as October 1992. Later, after repeated leading objections by Respondent's counsel, Gaudin moved the date of work on *LSD*-50's plugs to the last 6 months of 1993, but in further answers Gaudin admitted that *LSD*-50 plugs were being made before St. Blanc was transferred to *LSD*-50. Gaudin further admitted that, had it been up to him, he would have left St. Blanc in the plug shop, and he admitted that, before he was called to Terry's office, he had no intention of calling any superior and telling him that he was "overstaffed" in the plug shop; Gaudin testified, however, "[I]t was coming to that." Gaudin was then asked and he testified:

> Q. Well, can you put in time when it was going to come to the point when you were going to suggest that someone go out of the plug shop?
>
> A. It would have been in the very near future because the 49 was coming to an end as far as plug making goes, and the 50 wasn't far enough along to where I needed a full crew at that time in the plug shop.
>
> Q. Can you be any more specific than that in terms of months or years how much down the road it was it was going to be till you [sent] somebody out of the plug shop?
>
> A. Probably about a month or maybe a month and a half.

After conflicts became apparent, Gaudin was then asked and he testified:

> Q. Now that we have had a chance to go through the status of the 49 and the 50, do you realize that you really weren't overstaffed in the summer of '93?
>
> . . . .
>
> THE WITNESS: I would say I wasn't overstaffed. But I had more—like I said before, I had more people than I would like to have had for the amount of work I had at the time.

(Gaudin did not dispute St. Blanc's testimony that he was transferred to *LSD*-50 on June 29, even though an MCR introduced through Gaudin shows that St. Blanc worked in the plug shop for the first half-hour of June 30.)

On direct examination Terry testified (vol. 90) that the duties of a first-class electrician include pulling cable and, when a ship is in the initial stages of construction, and wireways (which hold the cables) are first installed, there is little for electricians to do but pull cable. Terry testified that, in addition to working on cable pulling crews, first-class electricians pull cable for final "shape-up" when necessary to make "terminations" (or final connections) and when work falls behind schedule. Terry acknowledged that cable pulling crews often include helpers, but he testified that Respondent prefers to have mostly mechanics doing the cable pulling because of its vital importance to the ships.

The work of first-class power electricians, Terry further testified, is only on ships. Terry testified that St. Blanc was first assigned to the plug shop when Terry was notified by the medical department that St. Blanc had suffered an injury which permitted him only to perform light duty. At the time, work was behind in the plug shop, and Terry sent him there. Terry further testified that "shortly before the end of June, before the election," he determined that the number of power electricians on *LSD*-50 was too low. Terry testified that one to 2 weeks before St. Blanc's reassignment, he called all of his general foremen together to tell them that "some additional power mechanics" were needed on *LSD*-50 and ordered them to tell him of any other power electrician who might be available. Terry did not testify that any of the general foremen reported back to him about the availability of any power electrician. Terry did testify that, at the time of the general foremen's meeting, he did not know that St. Blanc was no longer on light duty. Terry testified that Grimes (not Gaudin, who by then was St. Blanc's foreman) told him that St. Blanc was off light duty, "shortly prior to the transfer."

As noted, St. Blanc testified that in two preelection exchanges with Terry, Terry stated that he was doing "better than you." Terry admitted to using the phrase once, on June 23 (not June 21, as St. Blanc testified). Terry admitted that he told St. Blanc that, "I am holding up better than you." Terry further testified that, when St. Blanc asked what Terry had meant, he responded, "You will find out." (St. Blanc, as mentioned, testified that Terry had responded, "You figure it out.") Terry was asked and he testified:

> Q. [By Mr. Hymowitz]: Okay. And when you said, "Better than you," what did you mean when you said that in response?
>
> A. Well, Mr. St. Blanc had been injured—personal injury. He was on limited duty, and I had observed him—I knew he was in that situation at the time. And also, I knew that we had discussed—Mr. St. Blanc, his supervisor and I—it was pointed out to me that he may be off limited duty, and I was in need of some power mechanics, and I was looking at Mr. St. Blanc.

> I had not made a final decision, but I was looking at him. I hadn't checked with the medical department and so forth to see what his physical condition was at the time, but I certainly was considering moving him out of that shop environment and putting him back shipboard. So I feel like that was part of my comment also.
>
> Q. But when you said, "I am doing better than you," what were you referring to in connection with him?
>
> A. When I said that, I was referring to his health . . . meaning the injury.

Terry testified that, at the time, he had not checked with the medical department to see if St. Blanc had been released for regular duty. Terry was not asked why, when St. Blanc asked what Terry had meant by "Better than you," he did not tell St. Blanc that he was referring to St. Blanc's health.

Terry did not deny that, when St. Blanc opened their telephone conversation of June 24 by asking how Terry was, he told St. Blanc "Better than you; I hear you want to be an observer for the election." Terry further admitted that, after hearing that St. Blanc would be absent on June 24 and 25 because of his duties as a union observer, he told St. Blanc to report to his office when he returned to work on June 28. Terry testified that he told St. Blanc to do this because: "I was looking, as I previously stated, at transferring Mr. St. Blanc from the connector [plug] shop back to shipboard duties, and I felt that by the time he came back to work Monday, I would have made a final decision on that." Terry denied that he told St. Blanc to report the numbers of plugs that he had been completing. Terry first testified that he did not "recall" mentioning following the "rules" to St. Blanc in that conversation; even when led, Terry only hesitantly denied making a reference to rules ("Not—no, sir").

Terry agreed with St. Blanc that, when St. Blanc reported to his office on June 28, he told St. Blanc that he did not want to talk to him. When asked why he did not want to talk to St. Blanc, Terry testified:

> I was very disappointed due to the outcome of the vote of the election not being a clear-cut victory for the Company, and knowing Mr. St. Blanc was a union supporter and an observer, et cetera, at that point I just didn't want to discuss it anymore and discuss anything further with him.

Terry further testified that he made the final decision to reassign St. Blanc from the plug shop to *LSD*-50 on that day, June 28.

On cross-examination, Terry claimed that he could not recall how far in advance of St. Blanc's reassignment from the plug shop he became aware that there was a need for more power electricians on *LSD*-50, and Terry testified that he could not recall if any other power electricians were sent to *LSD*-50 as a result of his meeting with his general foremen. Terry testified that Ed Raymond was Grimes' general foreman at the time of this meeting and that Raymond was present at the general foremen's meeting. Raymond did not testify, nor did any other general foreman testify about attending such a meeting. Terry testified that, "I considered every power mechanic in the shipyard that wasn't on the *LSD*-50," but he could not remember the names of any power electrician, in addition to St. Blanc, who was considered for transfer to *LSD*-50, or where any such other power electrician might have worked, or whether any other power electrician, in addition to St. Blanc, was ultimately transferred to *LSD*-50 as a result of his meeting with his general foremen.

Terry testified that he found out from Grimes, "[w]ithin one to two weeks before Mr. St. Blanc was transferred" that St. Blanc was no longer on light duty. He reaffirmed that he made the decision to transfer St. Blanc on June 28, but he disclaimed memory about how many minutes or hours after St. Blanc's coming to his office that date that he made the decision to transfer St. Blanc. On cross-examination (vol. 93) Terry testified that when he told St. Blanc, "You will find out," he was referring to St. Blanc's reassignment that he was then contemplating, but he acknowledged that he did not say so to St. Blanc.

St. Blanc's Reassignment From Shop Work to Cable Pulling—Conclusions

As will be discussed below, Respondent argues that cable pulling is a routine part of the duties of any electrical department mechanic, such as St. Blanc, who is classified as a first-class electrician. One fact, however, is not in issue: cable pulling aboard a ship is more onerous work than the bench work of making plugs in the air-conditioned plug shop. I have so found above. Even if while working aboard a ship a first-class electrician could routinely be expected to pull cable, St. Blanc simply was not working aboard a ship when he received the order that sent him from bench work to cable pulling. Therefore, at least as far as St. Blanc's June 29 cable pulling assignment is concerned, the comparison to be made is between the nature of that assignment and the nature of St. Blanc's immediately antecedent assignment; to wit: bench work in the plug shop. The comparison in issue is not, as Respondent argues on brief, between St. Blanc's June 29 cable pulling assignment and his on-paper classification or even St. Blanc's job assignments before he came to the plug shop.

It is further undisputed that St. Blanc began wearing a union button on June 2. It is further undisputed that General Foreman Kenny Danos told him on that date that "word" had gotten to Gerdes that St. Blanc was wearing a union button, and Gerdes had called Danos to confirm the report. Respondent's animus toward those employees who wore prounion insignia is established throughout this decision, and Danos' remark to St. Blanc was clearly a categorical statement to St. Blanc that he had become an object of that animus. (Although Danos prefaced his remarks to St. Blanc by saying that he was not telling St. Blanc what to do, Danos was clearly indicating to St. Blanc what he should do; to wit: take the union button off or suffer adverse consequences.)

It is further undisputed that, the following day, Terry came to the plug shop and performed a totally gratuitous, individual, and solitary inspection of St. Blanc's hardhat. Apparently included in the "word" that St. Blanc was wearing a union button was also the erroneous information that St. Blanc was wearing prounion insignia on his hardhat (as opposed to his sleeve). It was either that or Terry was engaging in some sort of gamesmanship to hide his real purpose for coming to the plug shop; to wit: a confirmation of the "word" in addition to the confirmation that Gerdes had obtained from Danos.

These undenied demonstrations of animus that were categorically directed toward St. Blanc's wearing of prounion insignia provide an entirely credible background for St. Blanc's testimony that, also on June 3, Grimes told him that he was "fucking up" by wearing a union button. Moreover, St. Blanc

was entirely credible in his testimony that Grimes did exactly that. Such a statement bears its own, obvious, threat. I therefore find and conclude that, in violation of Section 8(a)(1), Respondent, by Grimes, on June 3, 1993, threatened an employee with unspecified reprisals because he was wearing prounion insignia.[449]

It is further undisputed that, during their exchanges of June 23[450] and June 24, St. Blanc casually asked how Terry was. When first asked on direct examination why he had replied to St. Blanc on June 23, "Better than you," Terry first gave the nonresponsive answer that he had previously been considering St. Blanc for transfer and he had heard that St. Blanc "may" be off limited duty. When immediately asked again what he had meant on June 23 by "Better than you," Terry answered, "I was referring to his health." Terry impressed me as an abrupt man; nevertheless, I do not believe he possessed the degree of rudeness (if not cruelty) that is required to reply to a casual inquiry about his health by saying to the inquirer (who "may" still be suffering from an injury), "Better than you."

Terry also testified that in their June 23 exchange he told St. Blanc, "You will find out," when St. Blanc asked what Terry had meant by saying, "Better than you." Albeit in a nonresponsive answer, Terry sought to convey the impression that he was referring to his contemplated transfer of St. Blanc when he gave this response. If it had been true, this testimony would have been consistent with his testimony that he told St. Blanc, "You will find out," not "You figure it out," as St. Blanc testified. Even under Terry's version, however, St. Blanc had just asked what Terry had meant by saying, "Better than you." An answer of "[y]ou will find out" would not have been a response that would indicate why Terry had said, "Better than you" if, as Terry testified, he had been referring to St. Blanc's health. (That is, assuming the necessary degree of rudeness or cruelty in Terry, if Terry had been referring to St. Blanc's health when he said, "Better than you," he would have said something like, "My health is better than your health," not "You will find out," when St. Blanc asked Terry what Terry had meant when he said, "Better than you.") I credit St. Blanc's testimony that Terry replied, "You figure it out," when St. Blanc asked Terry on June 23 what he meant by "Better than you."

Additionally, as is undenied, when St. Blanc again casually asked how Terry was at the start of their telephone conversation of June 24, Terry replied: "Better than you; I hear you want to be an observer for the election." Clearly, therefore, both of Terry's "Better than you" responses to St. Blanc were designed to impress upon him the animus that Respondent held toward his union activities of button wearing and serving as a union observer in the Board election. If there was any doubt about the matter, Terry on June 24 gave the unusual order to St. Blanc to report to his office when he returned from working as a union election observer. The unusual nature of the request was proved by Terry's own testimony that he usually talks to general foremen rather than line foremen.[451] The greater includes the lesser. Terry's giving the (subforeman's level) employee an order to report to him personally, I find, was notice that the employee had been singled out. St. Blanc was not singled out because Terry then contemplated a transfer of the employee,[452] but because of his protected activities. I further find that Terry told St. Blanc that he would have to make an accounting of his work, and that he should be mindful of the "rules," as St. Blanc further testified. Terry obviously did this further to impress upon St. Blanc that, because of his protected activities, he was subject to scrutiny that other employees were not subject to. I therefore conclude that, as alleged, in violation of Section 8(a)(1), Respondent, by Terry, on June 24, 1993, threatened an employee by telling him that he would engage in closer supervision of the employee's work because the employee had aided or supported the Union.

Respondent's knowledge of St. Blanc's prounion sympathies is, of course, not denied; in fact, St. Blanc was on Terry's list of prounion supporters possibly even before Terry knew that he was to serve as an alternate observer in the June 25 Board election.[453] It was not until Terry learned that St. Blanc was to serve as a union observer, however, that St. Blanc was reassigned from the comparatively pleasant atmosphere of the plug shop to the lugubrious duty of cable-pulling on the ship. Terry admitted that he made the decision to reassign St. Blanc on June 28. June 28 was the first workday after the Board election, the results of which Terry was so profoundly disappointed (if not angered). Therefore, in addition to the explicit and implicit expressions of animus contained in Danos' June 3 remark that "word" had reached Gerdes that he was wearing prounion insignia, and in addition to the implicit expression of animus in Terry's June 23 remark of "Better than you. . . . You figure it out," St. Blanc was (1) unlawfully threatened with unspecified reprisals because of his prounion sympathies, (2) unlawfully threatened by the supervisor who ultimately made the decision to reassign him to more onerous duties, and (3) immediately reassigned to more onerous duties after he demonstrated those sympathies by serving as a union observer in the Board election. Even without reference to Respondent's animus toward all other employees who expressed prounion sympathies (by wearing prounion insignia or otherwise), it is obvious that the General Counsel has presented a prima facie case that St. Blanc was unlawfully reassigned to more onerous duties on June 29, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against St. Blanc even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Terry testified that Grimes told him that St. Blanc was off light duty "shortly prior to the transfer." Grimes, however, testified that he told Terry that St. Blanc was off light duty as early as April; Grimes would not have so testified if it had not been true. Terry, therefore, necessarily had known for months that St. Blanc had recovered from his October 1992 injury, but he left St. Blanc in the plug shop until St. Blanc wore prounion

[449] There was, however, no coercive interrogation in the event; also, the General Counsel's amended "disparagement" allegation is entirely superfluous, and his amended "futility" allegation is entirely baseless. I shall therefore recommend that both of these allegations be dismissed.

[450] For purposes of this discussion, I accept Terry's testimony that his first "Better than you" exchange with St. Blanc occurred on June 23.

[451] On day-42 of trial, Terry testified: "I don't normally direct the foremen; I don't normally deal at a foreman's level. I deal at the general foreman level."

[452] To be noted is the fact that, when Terry decided on June 28 to transfer St. Blanc, he did not then talk directly to the employee about the matter.

[453] Terry testified that his list of "Union supporters" was created throughout the month of June.

insignia and disclosed that he was going to act as a union observer.

Terry testified that he met with his general foremen and told them that "some additional power mechanics" were needed on *LSD-50* and told them to let him know the names of "some additional power mechanics" who could be transferred to that ship. Terry was asked and he testified:

> Q. And ultimately, was a particular power electrician found to transfer over to that vessel?
> A. He was.
> Q. And who was that power electrician?
> A. Richard St. Blanc.

This was a clear admission that St. Blanc was the only electrician who was transferred to *LSD-50*, and I do not believe Terry's other testimony that there may have been other transferees but he could not remember the names of others who were similarly transferred. (Certainly, in other cases where Respondent could show that other employees received treatment similar to that received by the alleged discriminatees, it was diligent to do so.) I find that St. Blanc was singled out for transfer to the *LSD-50*. Moreover, Terry's testimony of a meeting of his general foremen was corroborated by none of the general foremen supposedly involved. (This is to be contrasted with the corroboration presented for Terry's testimony about his meeting concerning the petition of alleged discriminatee James "Danny" Cox, supra.)

There is no doubt that Respondent could always use another first-class electrician on a ship that was getting to a stage where any electricians are being used. In view of Terry's lie about the general foremen's meeting, and in view of his lie about discovering that St. Blanc had been released for regular duty only just before his June 28 decision, I do not believe his bare testimony that there was a sudden need to transfer St. Blanc, and only St. Blanc, to the *LSD-50*. Nor do I believe the testimonies of Grimes and Gaudin to the extent that they sought to convey the impression that the plug shop was overstaffed. Gaudin ultimately admitted that his testimony to that effect was not true. Moreover, Gaudin vacillated in his testimony about when it was that the plug shop began working on plugs for *LSD-50*, and, ultimately, he admitted that, on June 28, the plug shop was "[p]robably about a month or maybe a month and a half" away from being overstaffed to the point that he would recommend that an employee be transferred out. Grimes was also completely incredible when he came up with his testimony that a parts-shortage was responsible for the lack of work in the plug shop for St. Blanc; if there had been any truth to that testimony, either Terry or Gaudin would have made mention of the fact. Also Grimes was forced to admit that, as of June 14, Respondent was desirous of building up an inventory for use when the *LSD-50* was ready to receive plugs, and he had planned to keep St. Blanc in the plug shop "indefinitely."

Finally, I believe that both Terry and Gaudin lied when they testified that Terry called Gaudin to his office and asked if Gaudin knew of "a" first-class power electrician who might be transferred to the *LSD-50*. Of course, only one such employee worked under Gaudin at the time, and Terry undoubtedly knew it. I do not believe that such a charade occurred; if it did happen, both Terry and Gaudin knew that Terry was actually telling Gaudin, without saying so, that he wished St. Blanc to be reassigned to the *LSD-50* for ulterior, and unlawful, purposes. In summary, the entire scenario of testimony that Respondent presented in defense of the reassignment of St. Blanc was false. Respondent has not, therefore, met its burden of showing that it would have reassigned St. Blanc to cable-pulling duties on June 29 even in the absence of his protected activities. I therefore find and conclude that by assigning St. Blanc to more onerous duties on June 29 Respondent violated Section 8(a)(3).

(2) St. Blanc's warning notice and second cable-pulling assignment

At some time before July 29, St. Blanc was transferred to *LSD-49* (or the "A-hull" as it was referred to in some testimony). St. Blanc's usual foreman on *LSD-49* was Dennis Foret; on July 29, Foret was absent, and Foreman James Imhoff took Foret's place. July 29 was a typically hot summer day in the New Orleans area. In addition, according to the undisputed testimony of St. Blanc, there was smoke from welding operations that were being conducted in the area to which St. Blanc was assigned, part of the 05-level of *LSD-49*. St. Blanc testified that he was assigned that day to the work of mounting panels with employees Travis Hammond and Howard Breaud. Neither Hammond nor Breaud testified. In doing this work, St. Blanc testified, he, Hammond and Breaud were required to share a drill motor and cord, blueprints and hardware (nuts and bolts). As the three employees were working, some shipfitters who were installing something in the area disconnected a fan that had been providing circulation to the area. The shipfitters told St. Blanc, Hammond and Breaud that the fan would have to stay off for the rest of the day. St. Blanc testified that he then went to the 04-level to find Imhoff "to get some more ventilation put in."

St. Blanc testified that when he found Imhoff, "I told Jimmy that they was pulling the fan aside and [asked] if he could do anything about it." Imhoff replied that he could do nothing and walked away. Further according to St. Blanc, a "safety man" whose first name was Burt was standing "right there." According to St. Blanc, he told Burt, "They are reducing our ventilation up there, and it is already too hot and too much lack of ventilation. I think it is a safety hazard. What do you think? Can we do anything about it?" Burt and St. Blanc went to General Foreman Kenny Danos. According to St. Blanc, "I told Kenny Danos what was going on up there." Danos said he could do nothing about the problem, and he waived to Gerdes, who was in the area, to come over. Danos told Gerdes that "Richard is complaining about the heat." Gerdes told St. Blanc to get back to work and, if he did not like the "working conditions," he could "clock out and go home."

St. Blanc then went back to the 05-level where he spoke to "a group of people who were around me while I was working." St. Blanc did not testify to the number that was in the "group," and he testified that he could identify only Hammond as one of the group's members. According to St. Blanc:

> I told them that I went downstairs and complained about the lack of ventilation and got chewed out, and it is a condition that affects us all, and if they didn't want to speak up for themselves and try to get the ventilation corrected—because I didn't have any luck on my own—that I didn't care if they passed out on the deck, that I was going to make it through the day. And that was it.

St. Blanc testified that his statement to the other employees took "[a] minute," and those employees continued to work during that minute. Darrell Hall is another electrical department

foreman who had a crew working on the 05-level on July 29. St. Blanc further testified that, as he was talking to the group of employees, Hall approached him. St. Blanc testified that Hall "repeatedly asked me if that was my work area." St. Blanc replied that it was. St. Blanc further testified, "He left, and I was resumed working." St. Blanc further testified:

> About 20 minutes later, when I was working, Jimmy Imhoff and Darrell Hall came into the room that I was working in.
>
> They asked me if I was trying to encourage the workers to complain about the lack of ventilation.
>
> I said, yes, I was.
>
> They told me not to do it again. . . . Then they left.

Based on this testimony by St. Blanc, paragraph 67 of the second complaint alleges: "About July 29, 1993, Respondent, by Darryl Hall and James Imhoff at its facility: (a) interrogated its employees about their protected concerted activities; and (b) threatened its employees with unspecified reprisals because they engaged in protected concerted activities."[454]

St. Blanc further testified that 20 minutes after Hall and Imhoff left the 05-level, he was approached by Terry, Gerdes and Hall. According to St. Blanc:

> Bob Terry asked me if I was encouraging the workers to complain about the heat.
>
> I told him the lack of ventilation is a condition that was affecting us all, and then he re-asked the question, if I encouraged them to complain about the heat. And I said yes.
>
> He said, "Well, here is what I am going to do for you, Richard. I am going to give you a final warning citation for being out of your work area and impeding your fellow workers' progress, and I am going to transfer you after lunch . . . to B-hull to pull cable with Frank Lee. That way you will be able to move around and catch a breeze, and maybe you will cool off."
>
> Then I said, "You are trying to punish me, Mr. Terry."
>
> Then he didn't reply. . . . And then they left the room.

As the testimony and a table of organization for the electrical department that is in evidence indicates, Lee is a foreman for crews that primarily pull cable.

Shortly after Terry, Gerdes and Hall left the 05-level, Imhoff approached St. Blanc and presented him with the warning notice that is in issue. The warning notice was signed by both Hall and Imhoff. Checked are the boxes for the Avondale Employees' Guide's general offense-4 ("Wasting time, loitering or leaving the working place without permission."). and major offense-15 (Threatening, intimidating, coercing, or interfering with fellow employees in the performance of their duties."). Time of issuance is stated as: "11:45 a.m.," and the time of offense is stated as: "9:00 a.m., 7/29/93." The "Reason for Warning" space had been completed as:

> Employee was observed out of his immediate work area talking to another craftsmen [sic] which interfered with the performance of that man's duties.
>
> This written warning comes after two verbal [oral] warnings from Darrell Hall (W260) and James Imhoff (W305).
>
> This will be your final warning.

St. Blanc testified that he asked Imhoff who had initiated the notice; Imhoff replied that it was Gerdes. Further according to St. Blanc, he referred to the wording, "comes after two verbal warnings" and:

> I said, "When did I get two verbal warnings?"
>
> And he said, "When we came and talked to you together; that constituted the two verbal warnings."

St. Blanc testified that Imhoff told him to report to Foreman Frank Lee on *LSD-50* "after 12:00 on that day" (or immediately after lunch). Instead, St. Blanc took a pass-out from Imhoff and left the plant at noon. St. Blanc, according to an MCR that was received in evidence, began working under Lee at 7 a.m. the next day.

St. Blanc testified that when he reported to Lee, he was first assigned to wrap "kick pipes." The work was not particularly difficult, but it required modest skills; certainly it required none of the skills that had allowed St. Blanc to rise above a helper's classification. St. Blanc testified that, after he wrapped kick pipes for 2 days, he was assigned to work with the rest of Lee's crew and pull long, extremely heavy cable; St. Blanc testified that the cable that he pulled for 2 months under Lee was "about four inches in diameter." According to St. Blanc, that job was "very strenuous," and about 24 men were required to pull it. There was one other first-class electrician on the crew, but the others were new-hires and recent "transplants" from other departments. That cable-pulling job lasted for 2 months before St. Blanc was assigned to some work that is not in issue herein.

On cross-examination St. Blanc acknowledged that no one else asked him to complain about the ventilation. Further on cross-examination St. Blanc acknowledged that his pretrial affidavit states, in part: "I returned to work the next day and continued to pull the heavy cable until about two weeks . . .". On redirect examination, St. Blanc testified that it was "at least" 2 weeks that he pulled 4-inch cable. St. Blanc again admitted pulling cable when there were just a few small strands needed to complete a connection, but he testified that never before had he been on a cable-pulling crew that pulled cable as large as that which he helped to pull while working on Lee's crew.

St. Blanc's Warning Notice and Second Cable-Pulling Assignment—Respondent's Evidence

Hall, who was the supervisor of another crew working on the 05-level of *LSD-49* on July 29, testified (vol. 148) that early in the day, while he was doing paperwork in his office on the helicopter deck:

> One of my employees, he approached me early that morning saying that Richard St. Blanc was in their work area complaining about the heat and trying to encourage them to go and complain about the heat. And my employee affirmed that he was holding him up as well as other employees from doing their job.

Hall identified the employee who made the report as Edmund Guilliot; Guilliot did not testify. Hall testified that, after receiving Guilliot's report, he went to the 05-level. According to Hall, when he arrived he found St. Blanc who "was standing around, but when he saw me he acted like he was doing a task, but he wasn't. You know, he was standing talking to employees." Hall told St. Blanc that if he was not in his work area he should go there, "because he was holding up my people from doing their

[454] See fn. 445.

job." Hall testified that he could not recall if St. Blanc replied, but he did recall that St. Blanc "left the area at that time."

Hall further testified that about 2 hours' later Guilliot approached him (again on the helicopter deck) and complained that St. Blanc was again interfering with the work of the employees on Hall's crew by encouraging them to complain to their supervisors about the heat. Guilliot asked Hall to come and do something "because he [St. Blanc] was holding him [Guilliot] up from doing his job." Hall contacted Imhoff. Hall and Imhoff then went to the 05-level and confronted St. Blanc. According to Hall, St. Blanc was still in Guilliot's work area. Imhoff asked St. Blanc if Hall had not previously told him to stay in his own work area. St. Blanc replied that he was there because the power electricians had only one set of blueprints to share, "and so he was up there looking at the blueprint to see what he had to do." Imhoff told St. Blanc to go back to his own work area. Hall testified that St. Blanc did walk away, and he and Imhoff talked about the situation. Hall testified: "He asked me what did I want to do about it, and I suggested that we needed to let our general foreman know what had taken place, which is Mr. Kenny Danos."

Hall further testified that he and Imhoff did go to General Foreman Danos and told him what had happened. According to Hall, Danos told Hall and Imhoff that he would report the matter to Gerdes and Terry. Shortly thereafter, Terry and Gerdes approached Hall while he was, again, on the helicopter deck. Hall testified:

> I explained to him [Terry] about the complaint that I had from Edmund Guilliot and that Mr. St. Blanc was complaining about the heat, and he was encouraging other employees to go to their foremens and complain about the heat also.

After that, further according to Hall, he, Terry, and Gerdes went to the 05-level and approached St. Blanc. Terry told St. Blanc "not to be encouraging other employees to complain," because the foremen knew about the heat situation and all that could be done was being done. Hall was then asked and he testified:

> Q. Did Mr. Terry ever tell St. Blanc that he was going to get a warning notice for disturbing other people?
>
> A. Not to my knowledge.
>
> Q. Did Mr. Terry say that Mr. St. Blanc was going to get a warning notice for complaining about the heat?
>
> A. Not to my knowledge.
>
> Q. Did Mr. Terry say that St. Blanc was—he was going to transfer St. Blanc to another ship in order for him to catch a breeze and cool off?
>
> A. Not to my knowledge.

After this testimony Hall was shown the above-quoted warning notice that was issued to St. Blanc. Hall testified that he did not know who drafted the warning notice, and he denied knowing when he signed it as the "Witness." When asked why he signed as the "Witness," Hall answered: "Well, that is just the normal procedure that I would sign as a witness by my employee [Guilliot] being involved in it, and I was the one that voiced a complaint."

On cross-examination Hall was asked if Guilliot had told him how St. Blanc had interfered with his work; Hall replied, "He [Guilliot] basically said that he [St. Blanc] was in his [Guilliot's] way." Hall admitted, however, that Guilliot did not say how it was that St. Blanc could have gotten "in his way." Later in his cross-examination, Hall testified that he could not recall if Guilliot had told him how St. Blanc had impeded his work. Still later in the cross-examination, Hall admitted that Guilliot described no act by St. Blanc that would have interfered with Guilliot's work. Hall also admitted that he, himself, saw St. Blanc do nothing that would have interfered with the work of other employees.

Hall admitted that he occasionally found employees talking and not working, and he would tell them to get to work. If he came back later and the employee was still talking, without working, he would give him an oral warning. Hall further testified that he played no part in issuing the warning notice to St. Blanc, he did not know who wrote it out, and he did not remember who brought it to him for signing. In none of his testimony did Hall make mention of a warning notice for St. Blanc being discussed between himself and Imhoff, inside or outside the presence of St. Blanc.

Imhoff (vol. 148) testified that Hall came to him on July 29 and stated that "Richard had been caught out of his work area several times stopping his people, Darrell's people, from doing their assigned job." Imhoff further testified that Hall then told him: "That it wasn't the first time; he had given him two verbal [oral] warnings before Darrell had come to see me." Imhoff responded to Hall: "Let's go talk to Richard St. Blanc." When they reached St. Blanc, further according to Imhoff, he asked St. Blanc what he was doing out of his work area, but, "He didn't give any particulars of why he was there." Imhoff testified that he then told St. Blanc that he would be getting a warning notice; St. Blanc replied, "You have got to do what you have got to do." Imhoff further testified that Hall then left the area and he and St. Blanc "continued to talk." Imhoff testified that he did not know where Hall went as he and St. Blanc "continued to talk." (Of course, this is contrary to Hall's testimony that he and Imhoff went to see Danos who, in turn, stated that he would notify Terry and Gerdes about the situation.) Imhoff further testified that, after Hall left the area, he and St. Blanc continued to talk and he explained to St. Blanc that he agreed that "work conditions were getting kind of unbearable."

Imhoff further testified that, after he and St. Blanc spoke, he went directly to his office, wrote out the warning notice, took it to Hall to sign as a witness, and then took it to St. Blanc. Imhoff flatly denied that he consulted in any way with Terry, Gerdes, Danos or "anybody" else about the warning notice or its wording. Imhoff testified that, when he presented the warning notice to St. Blanc, St. Blanc asked for a pass-out to leave at noon.

Imhoff denied that he accused St. Blanc of trying to get other employees to complain about the heat. He testified that he issued the warning notice to St. Blanc only "for being out of his assigned work area and for impeding production of other workmen." Finally on direct examination, Imhoff denied that he had any input into the decision to reassign St. Blanc from *LSD-49* to *LSD-50*.

On cross-examination, Imhoff testified that Hall told him that he (Hall) had warned St. Blanc about being out of his area and disturbing employees on July 28. Imhoff then testified that the decision to issue a warning notice to St. Blanc was "pretty much a co-decision between Darrell Hall and myself." When asked to describe how the "co-decision" came about, Imhoff testified:

> Just after we confronted St. Blanc, and he really didn't have any definitive answers of why he was where he was or what he was talking about, couldn't prove—when he couldn't prove that, I said, "Well, I am going to leave it up to Darrell."
>
> And Darrell says, "This is the third time; we can't keep having this; write the citation."
>
> And I agreed that if it was the third time, he had two verbal warnings before that, is why he got the citation.

Imhoff then testified that, when he was drafting the warning notice, he was counting oral warnings that Hall had said he had given to St. Blanc the day before. Imhoff acknowledged that he had not given any previous oral warnings to St. Blanc.

Gerdes (vols. 122, 123) testified on direct examination that when he and Terry came to St. Blanc's work area Terry spoke to St. Blanc, and St. Blanc complained about the heat; Terry agreed that it was terrible and told Gerdes to investigate the matter. Gerdes testified that he then contacted Imhoff and Foret (although, again, Foret was not there that day), and Imhoff and Foret told him that the matter was being corrected. Without first asking Gerdes what else was said during the exchange between St. Blanc and Terry, Respondent's counsel led Gerdes directly to denials that Terry asked St. Blanc if he had been encouraging other employees to complain about the heat, that Terry told St. Blanc that he was going to be issued a warning notice, that St. Blanc was going to be reassigned to another ship, or that he could then cool off as he caught breezes while cable-pulling. Gerdes further testified that St. Blanc did not ask Terry if Terry was punishing him. Gerdes further testified on direct examination that, because of the work flow, he often moved personnel from ship to ship, but he did not testify that there was any need to transfer St. Blanc from one ship to another on July 29 or 30.

On cross-examination, Gerdes was evasive about how he and Terry happened to be together on *LSD-49*, but he did testify:

> I do remember that day Mr. Terry was with, and I think it was Imhoff - Mr. Imhoff, and Mr. Foret, that did say that Richard St. Blanc was—they said something to the effect—it was either to myself or Mr. Terry, that it was not the heat, but it was the disruption or lost time we were having. . . . The disruption was that Mr. St. Blanc was supposedly soliciting employees to complain.

Gerdes testified that he and Terry went to St. Blanc's work area only: "Because we didn't know what the condition was."

It will be remembered that, in the discussion of the case of alleged discriminatee John Joseph, Gerdes was asked on cross-examination if there were rules about when electricians could leave the ship. Gerdes did not mention an "11:30 rule" on cross-examination, but, after Respondent's counsel requested a break, Gerdes came back on redirect examination and testified that there was such a rule and that Joseph had clearly violated it. After that same counsel requested break, Gerdes also testified on redirect examination that the *only* report that he and Terry received about St. Blanc was that: "He was all over the ship. He was out of his work area, and he was wasting time. . . . And there were other people that he was conversing with that were also wasting time." Then Gerdes was led to testify that neither he nor Terry had come to the ship to investigate the reports that they had received about St. Blanc.

When returned to re-cross-examination, however, Gerdes was asked if Imhoff had not told him and Terry that St. Blanc was soliciting other employees to complain; Gerdes replied, "Yes, to that—somewhat to that degree. Yes." Gerdes was also asked how his testimony on redirect examination could be reconciled with his cross-examination; Gerdes testified, "I think I expressed my feelings to you about what Mr. St. Blanc had said." Of course, Gerdes had not been asked about his "feelings."

On direct examination Terry testified (vol. 90):

> I was making my rounds with [Gerdes], and we were on *LSD-49* up in the superstructure of the vessel, and I happened to walk in there in Mr. St. Blanc's work area, and Mr. St. Blanc reported to me that he was very concerned about the lack of ventilation or inadequate ventilation in his work area at that time.

Terry testified that he agreed with St. Blanc that it was hot, and he told Gerdes to investigate the matter. Terry testified that he did not recall anything else being said between him and St. Blanc; Terry specifically denied asking St. Blanc if he had been encouraging other employees to complain about the lack of ventilation, or that St. Blanc told him that he had been encouraging other employees to complain about the lack of ventilation, or that he told St. Blanc that he was going to cause a warning notice to be issued to St. Blanc for being out of his work area and impeding other employees, or that he was going to transfer St. Blanc to another ship after lunch to pull cable and "catch a breeze." Terry further denied that he ordered any supervisor to issue a warning notice to St. Blanc.

Terry testified that after he returned to his office, "that same day" (July 29), Foret called him "to give me an update," on work that had been done to improve the ventilation in the area where St. Blanc had been working. (As mentioned, of course, Foret was absent on July 29; that is why Imhoff was then substituting as St. Blanc's foreman. Terry's willingness to lie about the acts of persons who were not present was first demonstrated in the case of discriminatee Molaison where Terry testified that he took Molaison's confession of misconduct and discharged Molaison for that confessed misconduct even though Terry, himself, was not present on the day that Molaison was discharged.)

On cross-examination (vol. 92) Terry again testified that he and Gerdes were making routine rounds when St. Blanc approached him about the heat. Terry denied that, before St. Blanc approached him, anyone had reported to him that St. Blanc had been complaining about the heat. Terry denied that he knew anything about the warning notice that St. Blanc received, and he denied knowing that St. Blanc was transferred to another ship after their exchange on *LSD-50* . He admitted that employees are allowed to talk while they are working.

St. Blanc's Warning Notice and Second Cable-Pulling Assignment—Conclusions

In his lengthy brief on the issues surrounding St. Blanc's warning notice and second assignment to cable-pulling, the General Counsel repeatedly argues that St. Blanc's complaints were concerted, and the General Counsel demonstrates why those complaints should be considered to be concerted. This was an easy argument, and demonstration, to make; even Gerdes admitted that, when he and Terry came to the ship, Imhoff told them that St. Blanc had caused a "disruption," and Gerdes admitted, "The disruption was that Mr. St. Blanc was

supposedly soliciting employees to complain."[455] Therefore, St. Blanc was at least suspected of engaging in concerted activities immediately before he was issued a warning notice and reassigned to cable-pulling duties.

The General Counsel, however, makes no argument on brief of how it can be said that St. Blanc's activities of July 29 were statutorily protected. On brief, the General Counsel does not contend that St. Blanc was engaging in any strike, or prestrike, activity. As St. Blanc, at all relevant times, was being paid to work, he should have been working, or talking and working, and his nonwork activities were therefore not protected. The General Counsel never contends that St. Blanc continued working every minute that he spoke to other employees, and I do not believe that he did. Nor do I believe St. Blanc's testimony that he was always in his immediate work area when he was talking to the other employees about the working conditions. I do not believe St. Blanc's testimony that he only spoke to employees when he was going to share blueprints or tools. That is, although neither Guilliot's report to Hall, nor Hall's or Imhoff's observations of St. Blanc, is probative evidence that St. Blanc caused any other employee to stop working, I nevertheless find that St. Blanc stopped his own work to encourage other employees to complain, and St. Blanc's so doing was not activity that was protected under the Act.[456] Therefore, St. Blanc was subject to discipline for his conduct of July 29, but, because a strong prima facie case of unlawful discrimination has been made by the General Counsel, Respondent must have demonstrated that St. Blanc was disciplined in a *nondisparate* way.

The warning notice that was issued to St. Blanc recites: "This written warning comes after two verbal [oral] warnings from Darrell Hall (W260) and James Imhoff (W305)." Moreover, Hall testified that he would issue at least two oral warnings to an employee whom he found to be talking instead of loafing. The recitation in the warning notice and the admission by Hall make it clear that Respondent did not consider St. Blanc to be subject to a warning notice until he committed the offense after two oral warnings, or at least *after* two oral instructions to get back to work.

Imhoff testified that Hall had told him that he had warned St. Blanc about his conduct twice the day before, and these are the warnings to which he made reference in the warning notice. Imhoff is belied by his own words on the warning notice which are that both he and Hall had previously warned St. Blanc twice. Moreover, if Hall had warned St. Blanc the day before, and if he had told that to Imhoff, Hall assuredly would have so testified. Hall, I find, had done no such thing, and Imhoff's testimony on the issue was clearly false. St. Blanc did get two instructions to stop talking about the lack of ventilation; the first was when Hall came to the 05-level, and the second was when Hall and Imhoff came there together. Contrary to the assertion on the warning notice, there is simply no evidence that St. Blanc continued talking to other employees after his second instruction not to do so.[457] The recited predicate for the warning notice, therefore, was missing and its spurious nature is thereby disclosed.

Imhoff, I further find, also falsely testified that, in St. Blanc's presence, he asked Hall what he thought should be done and Hall replied, "This is the third time; we can't keep having this; write the citation." Hall did not testify that a warning notice was even mentioned when he was in the presence of Imhoff and St. Blanc (and neither did St. Blanc). Indeed, Hall testified to total ignorance of how, or when, the warning notice came to be drafted; he further testified that he signed the warning notice as a witness only because a member of his crew, Guilliot, had been involved. Respondent suggests no rationale by which the testimonies of Hall and Imhoff on this point can be reconciled.

Hall further testified that, after he and Imhoff left St. Blanc, they went to General Foreman Danos to report the matter. Danos told them that he would report the matter to Terry and Gerdes. Clearly Danos did so because, as St. Blanc testified, within 20 minutes after Hall and Imhoff had left St. Blanc on the 05-level, Terry and Gerdes appeared. (And, as St. Blanc and Hall testified, Hall was with them.)

Gerdes was evasive and forgetful about why he and Terry came to be in St. Blanc's work area. Terry testified that he and Gerdes were making routine rounds, and they "happened" upon St. Blanc. Hall, however, testified that when Terry and Gerdes came to the ship he told Terry and Gerdes that: "St. Blanc was complaining about the heat, and he was encouraging other employees to go to their foremens and complain about the heat also." It was then that Hall, Terry and Gerdes went to St. Blanc's work area. Hall would not have so testified if it had not been the truth.

Terry and Gerdes testified that, when they "happened" upon St. Blanc, Terry only commiserated with St. Blanc about how hot it was and Terry ordered an investigation (which included Foret, who was absent that day). Gerdes admitted that, when he and Terry got to the ship, Imhoff told them that St. Blanc had caused a "disruption . . . supposedly soliciting employees to complain," but both Terry and Gerdes denied that Terry asked St. Blanc if he were "soliciting employees to complain." That is, Respondent would have me believe that, although Terry and Gerdes got a report from Hall and Imhoff that St. Blanc was "soliciting employees to complain," when Terry and Gerdes got to St. Blanc, they only discussed the heat and what would be done about it. The palpable nature of this lie would be evident even without a relevant background, but here the situation developed with the proven background of Terry's fury at the concerted activity of alleged discriminatee James (Danny) Cox and his petition about working conditions, as discussed above. But more importantly, Terry and Gerdes were shown to have been testifying untruthfully by the testimony of their own subordinate. As Hall testified, when they came to the ship, Hall told Terry and Gerdes that St. Blanc "was encouraging other employees to go to their foremens and complain," Then, further according to Hall, Terry (with Gerdes along) went to St. Blanc on the 05-level and Terry there told St. Blanc "not to be encouraging other employees to complain." Again, Respondent

[455] Other evidence that St. Blanc's activities were concerted lies in St. Blanc's credible testimony and the above-quoted admissions by Hall.

[456] St. Blanc's testimony that Hall and Imhoff asked him what he was doing, and told him to stop it, was credible. Because St. Blanc's activity was not statutorily protected, however, the testimony cannot, of course, support the allegations of unlawful interrogation or threat. I shall therefore recommend dismissal of those allegations of the complaint.

[457] I further find that, as St. Blanc testified, when he asked when his second warning had occurred, Imhoff replied that the dual visit by him and Hall was being counted as two warnings.

suggests no way that the testimonies of Terry and Hall can be reconciled.

Hall would not have testified that Terry told St. Blanc "not to be encouraging other employees to complain" unless it had been the truth. When further asked on direct examination if Terry had also (1) told St. Blanc that he was going to get a warning notice for disturbing other employees, (2) told St. Blanc that he would get a warning notice for complaining about the lack of ventilation, or (3) told St. Blanc that he was going to transfer St. Blanc to another ship in order for him to catch a breeze and cool off, Hall tried to avoid lying by answering repeatedly: "Not to my knowledge." This tactic, in my opinion as the trier of fact, was an admission that St. Blanc, not Terry or Gerdes, testified truthfully. I find that, as St. Blanc testified, Terry asked St. Blanc if he was encouraging other employees to complain about the lack of ventilation, and when St. Blanc replied affirmatively Terry told St. Blanc that he was going to cause St. Blanc to be issued a warning notice and that he was going to cause St. Blanc to be transferred to the cable-pulling crew of Lee on *LSD-50*. I further find that Terry did exactly that.

In addition to Hall, other supervisors consistently testified that, before issuing warning notices for loafing-type infractions, they gave multiple oral warnings beforehand. As noted, however, the warning notice that was issued to St. Blanc was spurious from its inception because St. Blanc had not repeated his offense after his second oral warning, contrary to the recitation of the warning notice. The only reason that the warning notice would have included a recitation that two oral warnings had preceded St. Blanc's last infraction is that Terry had ordered that St. Blanc get a warning notice; Imhoff knew that he had to draft the warning notice to look at least facially valid by including at least one oral warning that had not been given. I so find. Accordingly, I find that Respondent has not shown that it would have issued the warning notice to St. Blanc, even in the absence of his protected activities that preceded July 29. I therefore conclude that by issuing that warning notice Respondent violated Section 8(a)(3).

It is further clear that Terry did, in fact, order that St. Blanc be reassigned to the cable-pulling crew of Lee on *LSD-50*. The MCRs in evidence prove that St. Blanc reported to Lee at 7 a.m. on July 30. Respondent makes no suggestion of where St. Blanc might have gotten the orders about where to report on that day if they did not come as St. Blanc testified. That is, Terry told St. Blanc that he would be transferred, and minutes later, according to St. Blanc's credible testimony, Imhoff told St. Blanc to report to Lee's crew.

Although Gerdes testified generally that transfers of employees among ships are often necessary, neither Gerdes nor any other supervisor testified that there was any business necessity for the transfer of St. Blanc from *LSD-49* to *LSD-50* on July 29. The sequence of events, and the credited testimony, prove that St. Blanc was transferred as punishment. Assuming that the warning notice was punishment only for St. Blanc's nonprotected activity, and further assuming that the warning notice was lawfully issued, Respondent makes no argument that employees are sometimes punished by reassignments, as well as warning notices, for loafing-type offenses (or any disciplinary offenses). Respondent has made no effort to show why St. Blanc was so disproportionately punished by his reassignment on July 29. Respondent has therefore not shown that St. Blanc would have been reassigned on July 29, even absent his protected activities that preceded that date.

The only issue remaining is whether the work to which St. Blanc was assigned on *LSD-50* was more onerous than that which he had been doing immediately theretofore on *LSD-49*. St. Blanc testified that the pipe-wrapping work that Lee ordered him to do during the first 2 days was demeaning for a first-class electrician, and I find that St. Blanc reasonably so concluded. Moreover, St. Blanc's testimony that the cable that he thereafter pulled for at least 2 weeks was the heaviest that he had ever pulled, and that testimony was not disputed (although Terry did credibly testify that none of the ship's cables was as large as four inches in diameter). I therefore find that the work to which St. Blanc was assigned for at least 2 weeks after he was transferred to *LSD-50* was more onerous than the journeyman electrician's work that St. Blanc had been doing on *LSD-49*.

Accordingly, I find and conclude that Respondent assigned St. Blanc to more onerous duties in violation of Section 8(a)(3).[458]

d. Sidney Jasmine

On December 20, 1993, Sidney Jasmine (vols. 23, 52), a first-class electrician, was reassigned from the job of installing electricalpanels to the job of pulling cable. On June 2, 1994, when Jasmine was trimming wires for terminations of a cable in a console, Electrical Department Superintendent Robert Terry told Jasmine to pick up the refuse as he went, rather than finish his trimming and then do the sweeping. The second complaint, at paragraph 132, and the fourth complaint, at paragraph 35, respectively, allege that the cable-pulling assignment and the pickup order constituted assignments to more onerous jobs and that by making those assignments Respondent violated Section 8(a)(3). The General Counsel contends that Respondent ordered the reassignment and issued the pickup order because of Jasmine's known union activities and expressions of sympathy which included his wearing and displaying prounion insignia and his speaking up for the Union during an employer campaign meeting. Respondent answers that the reassignment and the order were nothing more than routine work assignments that were based on the needs of the jobs. Ultimately, I find and conclude that Jasmine's cable-pulling assignment was made in violation of Section 8(a)(3) but the pickup order was not.

(1) Jasmine's reassignment from skilled work to cable-Pulling

Internal communications equipment throughout a ship includes such utilities as fire alarms and public address systems. For several months before December 20, 1993, Jasmine worked as an internal-communications electrician on *LSD-50*. Jasmine testified that, as an internal-com-munications electrician, he "hooked up," or completed, connections of cables that other employees had previously pulled to internal communications panels or consoles. Louis Lester (vol. 135), Jasmine's foreman, described the internal communications work that Jasmine was doing at the time of the reassignment in question; Lester testi-

[458] Even if the work on *LSD-50* was not more onerous, the statutory word "discriminate" means to treat differently, not just to treat worse (or even better). By the reassignment as punishment, in addition to the punishment of the warning notice, St. Blanc was treated differently. And, as I have concluded, St. Blanc was treated differently because of his protected activities that preceded July 29.

fied that, after the cable had been pulled to the panel that Jasmine was installing:

> He had to straighten it [the cable] out, get it untangled, get the panels ready, and you had like this box, what we call a trough. He had to bolt to the top and drill it out first, put all his ampere seals on it, fit it, put it up top, run his cables, get them in, mark them, pull them back out, strip it, clean it, put them back in, and shape, because according your drawing—
>
> That is why you had to be real good, because some conductors went to—you had eight panels, and we have some conductors in this one, some in this one, some in this one, on down the line.

Jasmine admitted to doing only a minimal amount of cable-pulling before the events of this case.

(As a matter of background, the General Counsel introduced Jasmine's testimony that in late 1992 he was given cable-pulling assignments immediately after an incident in which he spoke up for a fellow employee in a dispute with Electrical Department Foreman Jerry Kaywood. According to Jasmine, the cable-pulling assignment lasted until shortly after he made a complaint at an employer campaign meeting in April, as discussed below. As well as background for Jasmine's comment that was made at that employer campaign meeting, the General Counsel contends that Jasmine's testimony about the 1992 cable-pulling assignment, coupled with the evidence of the case of discriminatee St. Blanc, shows that Respondent uses cable-pulling assignments as punishment. The General Counsel called employee Samuel Selmon (vol. 30) to corroborate Jasmine's testimony about his 1992 cable-pulling assignment, but Selmon testified that he and Jasmine were assigned to cable-pulling some 2 months after the Kaywood incident. Kaywood did not testify, but there is no evidence (such as an admission or testimony about an admission) that would indicate that the 1992 assignment to Jasmine was made as punishment. Moreover, the circumstantial evidence of timing is too weak to support a conclusion that in 1992 Jasmine was given a cable-pulling assignment as punishment. I find that St. Blanc's case is the only case in which the General Counsel has shown that, before Jasmine's December 20 assignment to cable-pulling, Respondent used a cable-pulling assignment as punishment.

Jasmine testified that he began wearing a prounion sticker on his hardhat, and displaying one on his lunchbox, from the time that the Union began its organizational campaign in March through the date of his testimony. Jasmine testified that in April, Foreman Ronald Lee conducted an employer campaign meeting. Present were Terry and General Foremen Henry McGoey and Arnold Dufrene. Jasmine testified that at the meeting he spoke up and complained about his assignments to cable-pulling (and cable-strapping, which is essentially the same thing). Jasmine testified that he concluded his comment by saying: "I was a prime example of why we needed a union."

Jasmine testified that shortly after this meeting, he was reassigned to work as an internal-communications electrician on the crew of Foreman John Crutchfield. Jasmine stayed on Crutchfield's crew for several months. Jasmine testified that while he was working under Crutchfield he told Crutchfield that, "the Union would be more of a benefit to us." Crutchfield did not testify and this testimony by Jasmine stands undenied.

Jasmine continued to work for Crutchfield and other internal-communications foremen on *LSD-50* until the time of the assignment that is in issue here. Jasmine testified that in November, when Lester was his foreman and Jimmy Mancuso was his general foreman, he was approached by Lester; Lester told Jasmine that he was pleased with Jasmine's work, but Mancuso did not want Jasmine to continue working on *LSD-50.* On December 17, Jasmine was working in a place known as Damage Control Central (or DC Central), which is the control center for alarms and other disaster-related communications, when he was approached by Lester. According to Jasmine, Lester told him that on December 20 he was to report to another ship, the mine hunter, to pull cable because Mancuso did not want him working in DC Central.[459]

On the mine hunter Jasmine worked under Foreman Delling Thibodeaux. Jasmine compared the cable-pulling work that he did under Thibodeaux with the internal communications work that he had done on *LSD-50* as:

> Well, IC [internal communications] work is clean work. It is not very strenuous work in comparison to cable pulling. It [cable-pulling] is dirty. It is strenuous, and there is a lot of climbing involved. You have to climb over motors or tanks or whatever obstacle may be in the path of the cable that you are pulling. It is very physical.

This testimony was not disputed. Jasmine further testified that, when he was cable-pulling, he was using none of the skills he had needed to work as a first-class internal-communications electrician. Jasmine testified that he continued pulling cable until May 1994 when he was assigned to do internal communications work aboard the mine hunter. Although Jasmine was a first-class electrician, the leadman for the cable-pulling aboard the mine hunter was Karon Bradley, a second-class electrician. There were about 12 employees on Bradley's crew (again, under Foreman Thibodeaux), and Jasmine testified that he was the only first-class electrician for about 2 months. In February, two other first-class electricians joined the crew. Jasmine testified that, in his prior experience, second and third class electricians, and helpers, usually manned cable-pulling crews, not first-class electricians.

Jasmine's Assignment to Cable-Pulling—Respondent's Evidence

Respondent's engineering department writes work orders for specific jobs (such as cable-pulling) that are to be done on a ship. The work order numbers appear on the MCRs that the employees sign each day. Through Robert Oehmichen (vol. 153), Respondent's manager of production engineering, and through Jennifer Adams (vol. 154), a project leader in Respondent's information resources department, Respondent introduced records that reflect that Jasmine worked on cable-pulling crews for all, or almost all, of the full workdays from June 18 through September 28, 1990, from April 21 through May 27, 1992, and from September 2, 1992, through March 31, 1993. Jasmine was not called in rebuttal to contradict this evidence.

Foreman Lester testified that it was he who selected Jasmine for transfer from the *LSD-50* to the mine hunter. Lester freely admitted that he knew at the time that Jasmine was a prounion employee; Lester had heard Jasmine talking about the Union as he worked and, as Lester put it: "He wore union stickers on his

[459] On Br., p. "Electrical-159," Respondent states that the General Counsel's witness Merland Farria contradicts Jasmine's testimony about "this event." Farria, however, testified about an (ultimately irrelevant) event that occurred a week before December 17.

hat." Lester testified that in November General Foreman Mancuso told him that Terry had been dissatisfied with the quality of the electricians that the *LSD* program had theretofore sent to the (newer) mine hunter program. Lester further testified that during the week of December 17, General Foreman Mancuso told him that Terry had ordered Mancuso to send a first-class internal-communications electrician to the mine hunter. Lester testified that, at the time, he had two internal-communications electricians on his crew, Jasmine and William Evans. Lester testified that he selected Jasmine because he knew that Jasmine did good work, but Evans had only been on his crew for about 2 weeks and Lester had not formed an opinion of him. Lester had other first-class electricians on his crew, but he did not consider them because they were not internal-communications electricians and Mancuso had told him that Terry specifically wanted an internal-communications electrician sent to the mine hunter.

Lester testified that when he told Jasmine that he was to be transferred, he only stated that the mine hunter program needed another internal-communications electrician. Lester denied that he told Jasmine that Mancuso did not want him working in DC Central; Lester denied mentioning Mancuso at all. (And Lester also denied that Mancuso had told him that he did not want Jasmine in DC Central.) Finally, Lester testified that he could not have told Jasmine that he would be pulling cable on the mine hunter because he did not know that Jasmine would be pulling cable on the mine hunter. Lester acknowledged that, when Jasmine left *LSD-50*, there were about 3 weeks of work left for him to do on the panel of DC Central that he had been working on.

On cross-examination Lester testified that in the few weeks before December 17 his crew was pulling cable and "hooking up" (completing installation of power or internal communications cable). Lester testified that he had Jasmine hooking up, rather than pulling cable, because "I knew he was a very good hook-up man." Lester was asked what he usually did when he found that he needed more labor. Lester testified that he would go to his general foreman and: "If I am hooking up, I would say, 'I need more hook-up people.' If I am pulling cable, I just say, 'I need more bodies.'" Further during cross-examination, Lester admitted that, although the job on which Jasmine was working on December 17 would have taken only about 3 more weeks, there were at least 2 additional months of work on *LSD-50* that he intended to assign to Jasmine.

Mancuso (vols. 131, 141) testified that Terry "called and just told me he needed a first-class IC mechanic [for the mine hunter program] and not to send him any trash." Mancuso denied that Jasmine's name was mentioned in the telephone call with Terry. Mancuso testified that he contacted Lester because "[h]e is the IC foreman." Mancuso acknowledged that on *LSD-50* he had another internal communications foreman, Crutchfield, but he did not call Crutchfield about Terry's order because Crutchfield's crew was doing work that had to be completed before the work of Lester's crew.

Mancuso testified that he called Lester and: "I told him we needed a first-class IC mechanic to go to the mine hunter," and Lester selected Jasmine. Mancuso denied that he ever told Lester that he did not want Jasmine working in DC Central. Mancuso further testified that he had no reason to say such a thing because Jasmine was a good worker. Mancuso confirmed that Jasmine still had work to do on the *LSD-50*, but he sent Jasmine to the mine hunter, "Because Mr. Bob [Terry] wanted me to send him a first-class IC mechanic." Mancuso denied that he had any knowledge of Jasmine's prounion sympathies.

On cross-examination Mancuso testified that, before the week of December 17, he told all of his 16 foremen on the *LSD-50* to expect to lose some electricians to the mine hunter program, but he admitted that Jasmine was the only one whom he could remember who went to the mine hunter. Mancuso testified that he had a "general sense" that there were such others.

Terry (vol. 90) testified that Production Vice President Simpson told him that the needs of the mine hunter were paramount to the needs of all other ships in the yard because the mine hunter was behind schedule and that failure of the mine hunter program could bring financial ruin to the Company.[460] Terry further testified that the mine hunter has the most computers and the most complex electrical wiring systems of any ship that Respondent has ever built. Terry testified that the ship is the only one that Respondent has built that has four segregated wireways. The segregated wireways are necessary, Terry testified, to prevent the creation of electromagnetic interference that disrupts the operation of the computers. It is therefore imperative, Terry testified, that the cables of the mine hunter be pulled correctly within those wireways.

Terry testified that he decided to use first-class electricians to pull the cables on the mine hunter because:

> Number one, we started to realize rework because the cabling was being installed in the wrong wireways, and number two, we realized schedule slippage. So my decision was to infuse the job with a higher skill level of people so that I could improve the quality of the work and also the production of the work.

Terry testified that to accomplish that end:

> What I did was, I called a meeting of my general foremen, which represents all of the work in the shipyard. Each general foreman [is] basically assigned to a different contract.
>
> And I know as the manager of the Electrical department where we can—where the talent is, where the most expertise is, and also schedule adherence, what that is across the board in the department.
>
> And I made the general foremen aware that we had this need on the mine hunter program to get additional skill level higher expertise people assigned to the job to assist in cable-pulling. And in particular, I told General Foreman Jerry Gerdes that I wanted him to give at least one first-class IC mechanic to the mine hunter program, because that was an area, one particular area where we needed the help.

Terry denied that, at the time of this meeting, he knew of Jasmine's prounion sympathies, or even knew who Jasmine was. Terry denied that he named any electrician to be transferred from the *LSD* program to the mine hunter program.

On cross-examination Terry testified that during the period in question he was transferring "four to six people at a time" from the *LSD* program to the mine hunter program, but he confirmed that at his meeting of general foremen he asked Gerdes for only one first-class internal-communications electrician to be sent to the mine hunter. This testimony, however, was con-

[460] Simpson (vol. 139) supported this testimony.

tradicted by Lester; on cross-examination Lester testified that *LSD-50* had four, or more, segregated wireways.

Gerdes (vols. 122, 123) also testified that he attended a meeting of general foremen with Terry and that meeting concerned staffing of the mine hunter program. Gerdes testified: "He did say he wanted a cross-sector of the five groups, first-, second-, third-, fourth-class of lighting, power, IC, electronics, cable-puller, and electrical layout personnel."[461]

Gerdes was further asked and he testified:

> Q. [By Mr. Hymowitz]: Now, what did you do after you received this message from Mr. Terry?
>
> A. I immediately went and had meetings with my supervisors on both [*LSD*] ships at that time and discussed with them as a group what peoples we could release—our better peoples—our top-of-the-line mechanics we could release without impacting the job—my job—to send over to the mine hunters.
>
> Q. Now, did you specifically select yourself—did you specifically select anybody to go over to that particular mine hunter job?
>
> A. No.
>
> Q. Who did the selections?
>
> A. The line supervisors—of [from] the five groups that we just expounded upon.

Thibodeaux (vol. 130) testified that, at the time that Jasmine was transferred to his crew on the mine hunter, "We were heavily pulling cable at this time. Also the status of the job at that time, we were running behind." Thibodeaux testified that, about a week before Jasmine was transferred to his crew, he met with his general foreman, Jerry Bourque, and told him that he needed more first-class internal-communications electricians to help pull cable because he then had only "approximately three" on his crew. Thibodeaux testified that Bourque said that he would get back to Thibodeaux about the matter. Thibodeaux further testified that he asked for first-class electricians because of the complexity of the cable-pulling aboard the mine hunter and the close quarters in which work had to be done (a mine hunter being much smaller than other ships).

On December 20, Jasmine's first workday under Thibodeaux, Thibodeaux had a crew of 13 employees, including Jasmine. Seven of those employees, including Jasmine, were first-class electricians. Two of those first-class electricians, in addition to Jasmine, were internal-communications electricians; they also pulled cable, according to Thibodeaux. Thibodeaux did not testify that any other employees (first class or otherwise) were transferred to his crew about the time that Jasmine was transferred to his crew. Thibodeaux acknowledged that the leadman of the cable-pulling employees, Bradley, was a second-class electrician; Thibodeaux testified that he made Bradley the leadman because he had been on the mine hunter even longer than Thibodeaux himself. Thibodeaux further acknowledged that, when Jasmine arrived for work on his crew, he was wearing prounion stickers on his hardhat.

Respondent also introduced the testimony of Electrical Department Foreman Randy Owen who was in charge of a power crew (as opposed to an internal communications crew) when Jasmine arrived on the mine hunter. Owen testified (vol. 136) that several members of his power crew were first-class electricians, and several of them pulled "cable," but he acknowledged that most of those "cables" were actually "feeder" lines to cables; that is, they were not the full cables of the weight that some employees on Thibodeaux's crew were pulling.[462]

Jasmine's Reassignment to Cable-Pulling—Conclusions

Respondent contends that no prima facie case of unlawful discrimination against Jasmine has been established because Jasmine, himself, was never unlawfully threatened and because of the lapse of time between Jasmine's speaking at an April employer campaign meeting and his December 20 reassignment to cable-pulling aboard the mine hunter. As admitted by Thibodeaux, however, Jasmine continued to wear prounion insignia on his hardhat through the date of the reassignment. As I have concluded above, Respondent's supervisors continued to unlawfully threaten its employees for wearing prounion insignia even after December 20; to wit: Machine Shop Foreman Autin, in April or May 1994, Paint Department Foreman Sanchez, on or about April 20, 1994, and Sheetmetal Department Foreman DeNicola, on June 6, 1994, threatened Respondent's employees specifically because they were wearing prounion insignia. There is no reason to believe that, about December 20, there was some hiatus in Respondent's animus toward its employees who wore prounion insignia. Moreover, as I have further concluded above, Respondent's threats in various forms continued through 1994, including a threat of discharge by Production Vice President Simpson and, specifically, a threat of transfer to more onerous working conditions by Pipe Shop Foreman Mouton. Again, there is no reason to believe that this animus had somehow abated at the time of Jasmine's reassignment.

As well as wearing the prounion insignia, Jasmine did speak up for the Union at an employer campaign meeting conducted by Foreman Lee by saying: "I was a prime example of why we needed a union." Terry, it is undisputed, was present at that meeting. Despite his denials, Terry is further charged with knowledge of Jasmine's prounion sympathies by Jasmine's wearing of prounion insignia. Terry testified that he regularly made "rounds" to inspect the work of the electrical department employees, and Terry assuredly would have seen Jasmine wearing his hardhat with the prounion stickers. Additionally, Terry acknowledged keeping a list of "Union supporters," and he acknowledged that he charged his subordinate supervisors with keeping him informed of who those prounion employees were. From Jasmine's comments to his supervisors, as well as his wearing of prounion insignia, it is safe to conclude, as I do, that Jasmine was on Terry's list of union supporters. I find that Terry, as well as all other supervisors who were involved in the decision to reassign Jasmine to cable-pulling duties aboard the mine hunter, knew Jasmine, and they knew of his prounion sympathies. The General Counsel has, therefore, presented a prima facie case of unlawful discrimination against Jasmine, and Respondent must have demonstrated by a preponderance of the evidence that it would have reassigned Jasmine to cable-

[461] The General Counsel moves on brief to correct the transcript, vol. 122, p. 30,017, L. 9. This testimony by Gerdes makes the motion moot; moreover, the transcript is correct.

[462] Contrary to the assertion of Respondent (at Br., p. "Electrical-155"), Owen did not testify that any other employees were transferred to his crew about the time that Jasmine was transferred to Thibodeaux's crew. Jim Trent, according to Thibodeaux, was the third electrical department foreman on the mine hunter at the time that Jasmine was transferred to his crew; Trent did not testify, and there is no evidence that he received any electricians at the time.

pulling aboard the mine hunter even in the absence of Jasmine's protected activities.

It is undisputed that Jasmine's work aboard the mine hunter was less sophisticated, more strenuous and relatively less "clean" than the internal communications work that Jasmine had been doing for about 8 months aboard the *LSD-50*. The work to which Jasmine was assigned on December 20 was, therefore, more onerous than the work which he had been doing when that assignment was made. The only remaining issue is whether Respondent would have selected Jasmine for that more onerous work even absent his protected activities.

On brief, page "Electrical-163," Respondent states:

> On Thibodeaux's crew in addition to Jasmine, 3 other First Class Electricians pulled cable. In fact over 20 electricians were transferred to the [mine hunter] at around the same time Jasmine was transferred.

There is documentary evidence for the proposition of Respondent's first quoted sentence; there is none for the second. For all of Respondent's testimony about the necessity of transferring electricians, specifically first-class electricians, and more specifically first-class internal-communications electricians, there is no evidence (other than bare, vague testimony) that anyone else was reassigned from other ships to the mine hunter at the same time that Jasmine was reassigned. Terry testified that he could recall the names of no other employees who were similarly reassigned to the mine hunter; Mancuso testified that he had a "general sense" that there were others, but he also could recall no names. Respondent's case was as well prepared as it could have been; it is certain that if Respondent could have shown that someone else was similarly reassigned, it would have done so.[463]

Terry testified that Simpson told him that the needs of the mine hunter were paramount to the needs of all other ships in the yard because the mine hunter was behind schedule and that failure of the mine hunter program could bring financial ruin to the Company. Terry further testified that, because of what Simpson had told him, he called a meeting of his general foremen and told them that he needed "a" first-class internal-communications electrician to be reassigned to the mine hunter; he further testified that he told Gerdes to make sure that "a" first-class internal-communications electrician was reassigned to the mine hunter. Gerdes, however, testified that Terry asked him to produce five "groups" of electricians, not specifically an internal-communications electrician. Indeed, Gerdes testified that Terry told him and the other general foremen at the meeting that "he wanted a cross-sector of the five groups, first-, second-, third-, and fourth-class of lighting, power, IC, electronics, cable-puller, and electricallayout personnel." Gerdes further testified that he went and told his subordinate supervisors to suggest employees from "the five groups that we just expounded upon." Also, rather than telling his general foremen that the needs of the mine hunter program were paramount, and that they should send their best employees to the mine hunter program, Gerdes testified that he told his general foremen to send whatever employees that they could, "without impacting the job—my job." (Gerdes' "job," of course, was the *LSD* program.) The testimony of Gerdes and Terry is too conflicting for logical resolution,[464] and no other general foreman who was supposedly at the meeting testified. I find that both Gerdes and Terry testified falsely on this point; I find that the meeting of the general foremen did not occur.

As well as squarely conflicting with Terry about what he told his general foremen to do, Gerdes' testimony is revealing on another point; to wit: cable-pullers were in a category, if not a classification, separate and apart from journeymen electricians such as internal-communications electricians, power electricians, layout electricians and lighting electricians. Jasmine, himself, had been assigned to periods of cable-pulling before his internal communications work on *LSD-50*. Nevertheless, the clear preponderance of the evidence is that, although all electricians pulled some cable at some times, the work of pulling cable day-after-day-after-day was *usually* assigned to lower-skilled employees, such as all members of the crew of discriminatee Vernon Charles, as discussed above.[465] As Lester so graphically testified, when he needs additional labor: "If I am hooking up, I would say, 'I need more hook-up people.' If I am pulling cable, I just say,' I need more bodies.'" That is, as the General Counsel's witnesses testified, cable-pulling was not *usually* assigned to employees of the skill level of Jasmine. (Lester's quoted testimony, alone, is a testament to the skill and quality of Jasmine's work.) As St. Blanc and other electricians testified, most of the cable-pulling that they did was in the unusual cases of a few cables that may have been omitted by the usual cable-pulling crews. Even if the cable-pulling aboard the mine hunter required some number of first-class electricians, internal-communications electricians or otherwise, there is no evidence of any increase in that need around December 20, and, again, Respondent has not shown that any other employees were reassigned to the mine hunter to meet such a suddenly increased need.

Terry did not testify that, in addition to his meeting with Gerdes and the other general foremen in the *LSD* program, he also spoke to Mancuso individually. Mancuso, however, was very clear that he was contacted individually by Terry and told to send a first-class internal-communications electrician to the mine hunter. At the time, Mancuso had 16 line foremen under him on the *LSD-50*. Terry did not simply forget about such an important individual. Even if he could have otherwise forgotten about Mancuso, or what he said individually to Mancuso, Terry certainly knew by time of trial that Jasmine had come from Mancuso's ranks of electricians, and it would have been impossible for Terry to have forgotten about such an exchange with Mancuso if it, in fact, occurred.

I am not required to resolve the conflicts between Terry, Gerdes and Mancuso about what employees (or, more precisely, employee) that Terry wanted to be reassigned to the mine hunter. I find that all three men were testifying untruthfully about the matter. As the General Counsel points out on brief, Mancuso testified well after Terry and Gerdes, and Gerdes had utterly failed to corroborate Terry. Mancuso's testimony about his order from Terry, I find, was an orchestrated attempt to substitute a plausible, but false, scenario for the selection of Jasmine after Terry's testimony was shown to be

[463] For example, Respondent could have, but did not, produce the MCRs that would have shown when the other first-class electricians arrived on the mine hunter. I draw an adverse inference for its failure to do so.

[464] Certainly, Respondent on brief suggests no way to resolve the conflicts between Terry and Gerdes.

[465] Also, Jasmine had done highly skilled internal-com-munications work for 8 months after his last period of cable-pulling; there is no evidence that any other employee who demonstrated such skills was ordered to pull cable day-after-day, except St. Blanc.

false by the testimony of Gerdes. Lester's testimony about his part in the process, I find, was but another piece of false testimony in the substitute scenario of how Jasmine was singled out for reassignment.

I believe that, although Lester did not tell Jasmine that Mancuso wanted Jasmine out of DC Central, Lester did tell Jasmine that he was going to the mine hunter to pull cable, which is exactly what happened. Even if I am incorrect about what Lester told Jasmine, however, Respondent has not met its *Wright Line* burden by presenting the absolutely irreconcilable testimonies of Terry, Gerdes, and Mancuso in defense of the prima facie case that the General Counsel presented for Jasmine's reassignment to cable-pulling on the mine hunter. Moreover, Respondent has not shown that any other employees were reassigned to the mine hunter at the time that Jasmine was. Again, to meet its *Wright Line* burden, Respondent could have, but did not, produce records that would have shown when other first-class electricians on Thibodeaux's crew arrived there. For all this record shows, they had been on Thibodeaux's crew for months.

I also do not believe Thibodeaux's testimony that he, as a line foreman, coincidentally requested that a first-class internal-communications electrician be assigned to his crew for cable-pulling. This testimony was not corroborated by the general foreman to whom he made the request, Bourque, and it appears to be nothing more than more late-surfacing testimony designed to cover the inconsistencies between Terry, Gerdes, and Mancuso (each of whom testified that the impetus for the transfer came from above, not from a foreman's level). Finally, even if Thibodeaux's testimony were true, the failure of corroboration would require the conclusion that his request played no part in the reassignment of Jasmine on December 20.

Respondent has therefore not shown that it would have reassigned Jasmine to more onerous duties on December 20 even in the absence of his known protected activities. I conclude that by doing so it violated Section 8(a)(3).

(2) Jasmine's order to pick up refuse that he was creating

Jasmine testified that, on June 2, 1994, he was assigned to install an internal communications panel on the mine hunter. As he stripped the cable ends of their sheathing materials, refuse accumulated on the deck. Electricians, Jasmine testified, usually do all the end-stripping and then cleanup the refuse. Jasmine testified that on June 2, however, Terry approached him and told him to place the sheathing materials into a bag as he stripped the end of each cable. This had the effect of slowing Jasmine down in that day's work, but he was not otherwise penalized by Terry's instruction.

Terry testified, however, that the panel upon which Jasmine was working was in an extremely narrow passageway; moreover, there was a hatchway (opening in the deck) that was quite near, and anyone who slipped on the material possibly could have fallen into the hatchway.

The General Counsel offered no rebuttal of Terry's testimony in this regard, and I found Terry credible on this point. I find that Respondent has demonstrated that it would have ordered Jasmine to pick up the sheathing material as he stripped each cable end even in the absence of his known protected activities. I shall therefore recommend dismissal of this allegation of the complaint.

e. Harold Dennis' reassignment from a truck-driving job to a welding job

On June 29, 1993, Harold Dennis (vol. 32) was reassigned from the job of driving a garbage truck to the job of welding scaffolds aboard ships. The second complaint, at paragraph 95, alleges that the reassignment was to a more onerous position of employment, and Respondent admits that fact.[466] The complaint further alleges that the assignment violated Section 8(a)(3), and Respondent denies that allegation. The General Counsel contends that Respondent made the assignment because Dennis had placed a prounion sticker on his lunchbox and because, before the June 25 Board election, Dennis refused the requests of two supervisors to wear a "Vote-No" sticker on his hardhat. The complaint further alleges that the supervisors' requests constituted an interrogation in violation of Section 8(a)(1). Respondent contends that the requests did not occur. Respondent answers that, if Dennis had any prounion sympathies, its supervisors did not know of the fact, and it answers that the reassignment was made because of business necessities.[467] Ultimately, I find and conclude that the General Counsel did not prove a prima facie case that Dennis was unlawfully reassigned.

Dennis was hired in 1988 as a tacker-welder in the shipfitting department. In 1989, Dennis was transferred to the CDC (cleanup during construction) operation[468] where he worked as a garbage truckdriver until the events of this case. Dennis testified that he placed a prounion sticker on his lunchbox during the organizational campaign, but he kept the lunchbox in his truck, or other places away from casual observation, and there is no credible evidence that the sticker could have been seen by any supervisor before June 29.

As a garbage truckdriver, Dennis drove one of two garbage trucks that Respondent operated. The other garbage truck was operated by employee LeRoy Daphne. As garbage truckdrivers, Dennis and Daphne drove the trucks around the yard collecting steel, sand, and trash, and they took such to a dump.

Dennis testified that during the week before the Board election, he started his days by coming to an office on wet dock-3 that was used by CDC General Foreman Donny Harris and Foreman Adrian (Champ) Champagne to enter his time on the MCR. Dennis testified that on June 23, he went to the office before 7 a.m., as usual. When he got there, Daphne, Champagne, and Harris were already in the room. Dennis noticed some "Vote-No" stickers that were in the room. According to Dennis, "Champ and Donny Harris say, 'You all take these "Vote-No" stickers and put them on your hardhat.'" Based on this testimony by Dennis, paragraph 50 of the second complaint, as amended at trial, alleges that Respondent, by Harris and Champagne, "interrogated employees about their union

[466] As well, Dennis credibly testified to facts that require the conclusion that his welding work was more onerous than his truck-driving work.

[467] Respondent further contends that no charge was filed that supports the 8(a)(3) allegation. Respondent acknowledges that the charge in Case 15–CA–12234–1, filed on July 26, alleges that Respondent violated Section 8(a)(3) "by change of conditions of employment" of Dennis. On brief, Respondent contends that: "An onerous reassignment is not closely related to a change of condition[s] of employment as a matter of law." For this "matter of law," Respondent cites no authority. The complaint allegation is obviously supported by the charge.

[468] At the time, CDC was a division of the paint department.

membership, activities and sympathies."[469] Dennis further testified that Daphne took one of the stickers and placed it on his hardhat. Dennis took a sticker, but, when he got outside the office door, he threw it away. Dennis testified that Daphne wore the "Vote-No" sticker on his hardhat through the election day.

Dennis testified that when he arrived at work on June 29, he was called to the office of Leroy Cortez, the superintendent of CDC. Dennis testified that Cortez said that superintendents of other departments were complaining that Dennis had been stopping other employees to talk when they, and Dennis, should have been working. Cortez further told Dennis that, because of those complaints, he was going to transfer Dennis to the supervision of Foreman Tommy Richard to build scaffolds. Dennis immediately reported to Richard and began building scaffolds. (Again, Respondent does not deny that scaffold-building was more onerous than truck driving.) Dennis continued to build scaffolds under Richard until January 1994 when Cortez transferred Dennis to another truck-driving job. Dennis testified that he is satisfied with his second truck-driving job; the General Counsel does not ask that Dennis be reinstated to driving the garbage truck.

Dennis testified that when he was assigned to the garbage truck, he talked to other employees no more than was necessary to get the job done. He further testified that during the first week that he was transferred to scaffolding, Timmy Gaudet drove the truck that he had been driving; previous to that week Gaudet had worked in scaffolding. Gaudet had no experience as a garbage truckdriver, and Daphne trained Gaudet on Monday, June 28, the first day after the Board election. Dennis testified that after that first week, employee Vic Cortez, who had previously substituted for Daphne and Dennis when either of them was absent, began driving the garbage truck that Dennis had previously driven. Dennis further testified that Vic Cortez, as well as Daphne and Gaudet, wore "Vote-No" stickers on their hardhats before the election.

As noted, the allegation that employees were interrogated by being offered "Vote-No" stickers was amended at trial. The original complaint had alleged that it was Cortez who had offered the "Vote-No" stickers to employees. The original allegation was based on a March 7, 1994 affidavit in which Dennis testified that it was Cortez who offered him the sticker on June 23, and that Cortez had done so in Cortez' office. Dennis was asked on cross-examination, and he testified:

> Q. [By Ms. Canny]: As of March 7, 1994, wasn't it your recollection that Mr. Cortez is the one who said something to you on approximately June 23, 1993, about stickers?
>
> A. No.

That is, although he had remembered that it was not Cortez who offered him the "Vote-No" stickers, he testified in his March 7, 1994 affidavit that it was. When given an opportunity to explain the inconsistency on redirect examination, Dennis testified that in his affidavit he named Cortez, not Harris and Champagne because, "Well, I look at about Leroy Cortez being the superintendent; that he calls all the shots. That is why I said Leroy Cortez." Dennis was not asked on redirect examination why he had stated that the interrogation occurred in Cortez' office, rather than the office of Harris and Champagne.

I simply do not believe Dennis' trial testimony that he named Cortez as his interrogator in his affidavit, even though he was actually interrogated by Harris and Champagne, because Cortez was the organizational superior of Harris and Champagne. Moreover, the General Counsel offers no explanation for Dennis' testifying in the affidavit that the interrogation occurred in Cortez' office and Dennis' testifying at trial that the interrogation occurred in the office of Harris and Champagne. Harris (vol. 110) denied that the interrogation occurred, and, on the basis of this record, I cannot find that it did. I shall therefore recommend dismissal of this 8(a)(1) allegation of the complaint. Moreover, Harris testified that Dennis did, in fact, wear a "Vote-No" sticker on his hardhat for a while. Dennis was not called in rebuttal to deny this testimony, and I credit it.[470] I therefore find that the General Counsel has not presented a prima facie case that Dennis was unlawfully discriminated against in violation of Section 8(a)(3), and I shall also recommend dismissal of that allegation of the complaint.

f. Lorraine Moses' assignment to the building area

On June 2, 1993, Lorraine Moses (vol. 35), a laborer, was reassigned from a job of cleaning compartments on a launched ship (a ship that was in the water) to cleaning units that were on platens in the building area of the yard. The second complaint, at paragraph 83, alleges that Moses' reassignment was to a more onerous job and that by making the reassignment Respondent violated Section 8(a)(3). The General Counsel contends that Respondent reassigned Moses because of her known union activities and expressions of sympathy which included her speaking favorably about the Union at an employer campaign meeting. The General Counsel further alleges that, in violation of Section 8(a)(1), Moses was threatened with discharge because of her prounion sympathies and that Moses was, on a separate occasion, instructed not to talk with union representatives. Respondent denies that the threat and the instruction occurred. Respondent further answers that its supervisors had no knowledge of any prounion sympathies that Moses may have had at any relevant time and that Moses' transfer was caused solely by business necessity. Finally, Respondent answers that Moses' work in the building area was no more onerous than the work that she had done before.[471] Ultimately, I find and conclude that Moses was reassigned to more onerous work in violation of Section 8(a)(3).

From 1988 through the time that she testified, Moses was employed by Respondent in the cleanup-during-construction department (CDC). As that name implies, a principal function

[469] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Dennis, as well as the charge in Case 15–CA–12171–1.

[470] I also credit Cortez' testimony about the complaints that he received from other supervisors about Dennis' wasting time, and that those complaints, and lack of need, were the reasons that he transferred Dennis. I further credit Cortez that, after Dennis was sent to build scaffolds, it was only sporadically that CDC needed the operation of two garbage trucks, and Cortez could more economically fill CDC's occasional need with other CDC employees rather than transferring Dennis back from building scaffolds.

[471] Respondent further contends that no charge was filed that supports the 8(a)(3) allegation for Moses. Respondent acknowledges, however, that the charge in Case 15–CA–12234–5, filed on July 26, alleges that Respondent violated Sec. 8(a)(3) "by change of conditions of employment" of Moses. The complaint allegation is therefore supported by the charge.

of CDC is to do cleanup work at various stages of construction.[472] Picking up trash, sweeping, dusting, wall-washing and mopping are principal functions of the CDC employees, and that is the type of work that Moses did during her tenure with Respondent.[473] At wet docks-3 and -4, ships undergo the final steps of construction before and after launchings. As final installations of equipment are made, and rework is done, compartments of ships at wet docks-3 and -4 are continually cleaned. This final, or finish, cleaning continues until the times of final inspections and acceptances by the Navy. Moses testified, without contradiction, that, until the events of this case, she had always done cleaning of compartments of ships that were at wet docks-3 and -4.

Moses testified that when she was working on ships on wet dock-3, she performed finish cleaning after "call-outs" and Navy inspections. On "call-outs," Moses typically accompanied inspectors from Respondent's quality assurance (QA) department. Inspectors came to the area when QA had been notified that certain rooms were finished according to Avondale's standards. If deficiencies were found by the QA inspectors, then Moses would perform whatever cleaning was necessary. Once QA passed on a compartment, the Navy inspectors were notified. Moses performed a similar role during those inspections (a process that was called "selling it to the Navy"). On the ships at wet dock-3 and -4, Moses usually worked in the "house" portion of the ship. This portion was mostly composed of compartments on the second deck up through the 06-level. Moses also performed some cleaning on lower levels, in areas such as the restrooms or control rooms in the vicinity of the engine room. Usually, Moses would not perform work in the bilges or the tanks. That work, and cleaning work in other portions of the engine room, was typically performed by male CDC employees. Moses further testified that the physical work environment at wet dock-3 was usually pleasant because there was a greater control of temperature; there were either blowers or fans on wet dock-3 ships, and house portions of those ships were air-conditioned after a certain point in construction.

It is necessary to establish a chronology of Moses' assignments through both the testimony and the documentary exhibits in evidence: The *T-AG* (the *TAG*) is a reconnaissance ship that had been at wet dock-3 (first on land and then in the water) since May 1991 (according to Respondent's "Master Yard Schedule"). Moses testified that she worked under Foreman Joe Cardella on the *TAG* from the time that it reached wet dock-3 until the time that the *TAG* was launched, finished and delivered to the Navy. Respondent introduced records that the *TAG* was delivered to the Navy on May 26. Moses testified that, after working on the TAG, she worked for 2 weeks on *LSD-49* which was also at wet dock-3. Respondent introduced documents reflecting that Moses worked on *LSD-49* at wet dock-3 on Monday, May 31 and Tuesday, June 1. The exhibit (R. Exh. 720), starts on May 31, and there is no relevant documentation for Thursday, May 27, or Friday, May 28, and Moses could possibly have worked on *LSD-49* on those dates also. I shall assume that she did because it is undisputed that Moses went directly from the *TAG* to the *LSD-49*, and there is no reason to believe that Moses was absent on May 27 or 28. Moses testified that her work on *LSD-49* ended when she was reassigned to work in that part of the building area which is known as "Wet dock-2" (which, even though it is called a "dock" is actually a unit-building area). Respondent introduced MCRs of Foreman Billy Ledet that reflect that Moses began working in the building area beginning on June 2. Therefore, although Moses testified that her reassignment to the building area occurred in April, and the complaint alleges that the reassignment occurred in May, I find that Moses' reassignment from *LSD-49* at wet dock-3 to the building area at wet dock-2 occurred on June 2. In summary, Moses worked on the *TAG* at wet dock-3 for several months ending on May 26. On May 27, 28, and 31 and June 1, Moses worked on the *LSD-49* at wet dock-3. On June 2, Moses was reassigned from the *LSD-49* at wet dock-3 to the building area at wet dock-2. (Again, it is by this June 2 reassignment that Respondent is alleged to have violated Section 8(a)(3).)

To continue her overall chronology: Moses continued working at wet dock-2 until July 28, at which time she was injured on the job. She returned to work, still at wet dock-2, on October 25. On October 26, Moses was absent. October 27 was Moses' last day to work for Respondent, as she then went on indefinite medical leave thereafter. Moses was terminated in 1994 after she had not returned to work for 12 months. (The lawfulness of Moses' termination, which occurred after Moses testified, is not in issue herein.)

Moses testified that in April, while she was still on the *TAG*, Foreman Joe Cardella conducted an employer campaign meeting. Moses testified that at one point in the meeting she spoke up and:

> I asked why do we need 32 vice presidents—why do employees need 32 vice presidents when we can't get no kind of raise. . . . And I told them that, "When we vote for a president, we give him a chance; why not give the Union a chance?"

Moses testified that Cardella did not respond to her. Moses testified that alleged discriminatee Josephine Hartman and employee Noreen Turner also spoke up. Moses testified that Hartman complained about her wages being cut, but she did not testify that Hartman said anything about the Union when Hartman did so.[474] Turner did not testify, and Hartman did not corroborate this testimony by Moses. Nevertheless, although Cardella (vol. 150) generally denied that Moses ever made any statements about the Union to him, Cardella did not deny this specific testimony by Moses. I credit Moses.[475]

Moses testified that on June 1, when she was working on *LSD-49*, General Foreman Harris ordered her to go to the office of CDC Superintendent Leroy Cortez. According to Moses:

> He [Cortez] said that his boss had jumped on him saying that two ladies was accused of making a statement in front of [Electrical department Superintendent] Bob Terry. . . . He said the two ladies had said, "Let's go up the stairs before . . . a foreman jumped on our ass." . . . He was saying we said it, myself and Cathy Henry. . . .

[472] CDC also has a "Construction Services" function which includes such activities as scaffold building and garbage-truck driving. Alleged discriminatee Harold Dennis, whose case is discussed infra, is a construction services employee.

[473] Moses is no longer an employee of Respondent because she did not report to work for a year after an injury.

[474] Moses' testimony that Hartman complained without reference to the Union is consistent with testimony by Superintendent Cortez that I credit in Hartman's case, infra.

[475] Respondent argues on brief that Moses cannot be credited because her testimony was not corroborated by current employee Cathy Henry. Moses, however, did not place Henry at the meeting.

> He said I would have to be moved to wet dock-2 because of this.

Moses denied that she made any such statement that could have been heard by Terry, and, in that regard, Moses was corroborated by Henry (vols. 60, 61) who was also called by the General Counsel. Further according to Moses, when Cortez finished talking to her about the reassignment to wet dock-2:

> He said while I was there, he wanted to talk to me about the Union. . . . He asked me what do I think about Avondale insurance.
>
> I told him I think it was too high; $16 a week was too high for one person, and I had to take my son off of there and get a cheaper insurance. . . .
>
> And he wrote something down, but I couldn't tell what it was, and then I went back to work.

The questioning by Cortez is not alleged as a violation of the Act. The General Counsel argues that Cortez' reference to Terry was a pretext for the reassignment of Moses to the building area, and the General Counsel further argues that the exchange demonstrates Cortez' knowledge of Moses' prounion sympathies.

On the following day, June 2, Moses was reassigned to work under Foreman Billy Ledet at wet dock-2. Ledet's crew was working on a *TAO* that was being fitted with a second hull (pursuant to then-new Federal regulations that require double hulls on some ships). Moses testified that her work there was harder and under more difficult conditions, although it was work that other employees (including other women) were doing at the same time. Moses described her work at wet dock-2 thusly:

> It was hot. There was no lighting. It was full of water and mud and trash. . . .
>
> I had to pick up different irons and mud and trash and water and go in some holes and—where they don't have no heat or no air, no nothing; is just nothing but heat. I crawled in. And sometimes, you have to lay on your stomach to crawl in some of the holes, and climb over a lot of things, a lot of angles, sort of, where you have to stand up and go through one part of the hole and climb over the part of the hole.
>
> Some parts, you have to—you can't stand up in it; you have to go through it laying on your stomach, to get to one little section, to go to the other section, or to leave out where they have a hole in the wall and the floor. And, you know, it is very unsafe. . . . [b]ecause you would have to walk on the scaffold boards. And if they don't have no light in some of the areas, they have a hole on—in the floor where you could easily fall down because it is not covered up.

Moses further testified that, before she was assigned to wet dock-2, she had never been required to work in unventilated areas, or in mud or standing water, or in areas where she would be required to crawl. Finally, Moses testified that she had never before been required to work in areas that she considered unsafe.

Moses testified that, while she was working on wet dock-2, an employer campaign meeting was conducted in the office of General Foreman Ruben Barrios. After the meeting, she asked to speak to Cortez who had been present during the meeting. According to Moses, she asked Cortez how much longer she was going to be required to stay at wet dock-2, and Cortez replied, "Not that long." Moses was then asked, and she testified:

> Q. And what, if anything, else did Mr. Cortez say?
>
> A. He said that I am not supposed to be talking to no one outside the gate dealing with the Union, neither getting any kind of union papers. . . . Then I went to work.

Based on this testimony by Moses, paragraph 24 of the second complaint alleges that Respondent, by Cortez, "told its employees that they could not talk to any of the union organizers handbilling at the Respondent's gates or take any handbills from them."[476] (The complaint further alleges that this incident occurred in May. Moses did not advance a date in her testimony, but she did testify that it happened after her reassignment to wet dock-2, but before another employer campaign meeting that occurred in May. Implicitly, therefore, Moses was testifying that her encounter occurred in May. Also, on cross-examination, Moses acknowledged that her pretrial affidavit states that this incident occurred in May. As noted above, however, it has been established that her reassignment to wet dock-2, where the incident allegedly happened, occurred on June 2, and, if it happened at all, it happened in June.)

As mentioned, from July 28 until Monday, October 25, Moses was absent from work because of a job-related injury. When she returned to work on October 25, she was sent back to wet dock-2 under Supervisor A. J. Rodrigue. She was assigned to cleaning tanks at the bottom of a unit. Moses testified that she asked Rodrigue why she had been sent to work on wet dock-2 and:

> [Rodrigue] said he don't know why they are pulling me back there; they just—he had just had to, you know, put me back to work. He said he didn't know why they were treating me like that, either. . . . [Rodrigue also said that] I better be careful because it looks like they are trying to fire me.

Moses testified that she was absent on October 26, but she returned to work on Wednesday, October 27. Moses testified that on October 27, she was spoken to rudely by General Foreman Donald Harris. Afterwards, she went to Rodrigue in his office. Moses was asked and she testified:

> Q. And what, if any, discussions did you have with A. J. [Rodrigue]?
>
> A. I asked him why did Harris talk to me like that.
>
> Q. And what, if any, response did A. J. make?
>
> A. He said I had better [?] because it looked like Harris was trying to fire me.[477]
>
> Q. And what else, if anything, did A. J. say?
>
> A. He was telling me about I had to be careful; it looked like he was trying to fire me. . . . That I had to—Harris wanted me in the tanks because that was—the hardest part of the job is going in the tanks.

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[476] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Moses, as well as the charge in Case 15–CA–12171–1.

[477] I insert the question mark into the quotation to indicate that the witness never indicated what Rodrigue was telling her that she "had better" do.

Based on this testimony by Moses, paragraph 77 of the second complaint alleges that Respondent, by Rodrigue, "threatened its employees with discharge by telling them that Respondent was going to fire an employee because of the employee's union activities."[478] Rodrigue did not testify. Respondent formally denied that, at the time of this incident, Rodrigue was a supervisor under Section 2(11) of the Act. Moses testified that on October 25 and 27 she signed the MCR of Rodrigue, and, during that time, Rodrigue wore a white hardhat, but this is not the only evidence on the issue.

I find and conclude that Rodrigue was a statutory supervisor through at least October 27 for the following reasons: (1) Although Moses was shown to be confused about other dates of her employment history, Respondent did not dispute that Moses returned from her accident and worked on October 25 and 27. Respondent also did not dispute Moses' testimony that she was presented Rodrigue's MCR to sign on those dates. As the MCR form indicates, only salaried supervisors maintain (and complete) those forms. Respondent's vice president of personnel, Ernest Griffin, testified (vol. 28) that all salaried supervisors have the authority, inter alia, to discipline employees by issuing warning notices and even discharging employees. (2) Such deduction, however, is not entirely necessary in the case of Rodrigue, at least for his authority as of October 25 and 27. In what is apparently a most remarkable coincidence, CDC Superintendent Cortez, on October 27, 1993, testified in the representation case, and Cortez' testimony on that date involved the issue of the supervisory status of Rodrigue. On day-31 of the trial in this case (Oct. 11, 1994) the General Counsel called Cortez as an adverse witness. During that examination, after being shown a copy of the transcript of his October 27, 1993 testimony in the representation case, Cortez acknowledged that he then testified that Rodrigue was, as of that date, a salaried line foreman of the CDC department and that Rodrigue then possessed the same supervisory authorities as all other salaried foremen in CDC, including the authority effectively to discipline employees. Although confirming the truth of that 1993 testimony, Cortez further testified on day-31 that, shortly after October 27, 1993, Rodrigue was demoted to a nonsupervisory employee. Cortez was vague about when Rodrigue's demotion occurred. At one point he testified that it was "at least two weeks" after October 27; at another point, Cortez testified that Rodrigue was demoted, "[j]ust a day or two," after October 27. At any rate, Cortez testified, both in the representation case and in this case, that Rodrigue was a line foreman of the CDC department through October 27, 1993, and that, as such, Rodrigue possessed the authority to discipline employees. I therefore find and conclude that, at least through October 27, Rodrigue was a supervisor within Section 2(11) of the Act.

Moses' Assignment to the Building area—Respondent's Evidence

Cardella testified that he started working a crew on the *TAG* at wet dock-3 about 6 months before it was launched on June 6, 1992; therefore, Cardella would have started on the *TAG* in late 1991. Cardella testified that Moses began working on the *TAG* at wet dock-3 when he did because she came with him to the *TAG* after *LSD-48* was finished at wet dock-3. Cardella could name only two other employees who had stayed on his crew through the different ships, as did Moses. Cardella confirmed that his crew did cleanup work before Navy inspections and call-outs, but he testified that the members of his crews cleaned engine rooms as well as compartments. Cardella denied that there was a division of labor between the men and the women under his supervision.

Cardella testified that he was reassigned to the building area at wet dock-2 on May 27, the day after the *TAG* was delivered. At wet dock-2, there were two types of construction going on, the completion of the second hull for a *TAO* and completion of the units that made up *LSD-51*'s "house" (again, the superstructure, where living and control compartments are located). Cardella testified that his crew worked on *LSD-51*.

On cross-examination Cardella testified that he did not know who made the decision where to send Moses after she worked on the *TAG*. Cardella testified that his general foreman just told him where to send the employees that he was not taking with him to the units of *LSD-51* at wet dock-2. Further on cross-examination Cardella could name only two other employees who usually were assigned to clean compartments in the upper areas of the ships (and one of those was alleged discriminatee Josephine Hartman).

Ledet (vol. 150) testified that he could not remember what work his crew was doing on June 2 when Moses arrived from wet dock-3; specifically, he testified that he could not remember what work Moses did under him, other than to say that she was "cleaning up." Therefore, Moses' testimony that she cleaned the hull or bilges of the *TAO*, and other dirty, muddy areas, stands undenied.

Harris (vol. 110) testified that he made the decision to move Moses away from wet dock-3, but he denied that he knew about any prounion sympathies that Moses may have had. Harris confirmed that in 1993, Moses was one of the employees who usually did room cleaning on "lead" ships, or ships that were being readied for sea trials. (Harris referred to such employees as "my finishing people.") Harris also confirmed that Moses was one of the employees who went with Navy personnel when final inspections were being done. The other employees who went on final inspections were Leadperson Craft and alleged discriminatee Hartman. Harris further testified that he kept his "better workers" on the *LSD-49*, and Moses was not one of them. When asked to name who his better workers were, Harris named only Leadperson Willa Mae Craft, employee Cathy Henry, and one "David." Harris was not asked on direct examination why he did not consider Moses one of his better workers.

Harris was asked and he testified:

> Q. And after the *TAG* was delivered, do you know what happened to Lorraine Moses?
> A. She went to the -49.
> Q. At some point, was she moved from the -49?
> A. She was moved from the -49 to the -51.
> Q. Why was she moved from the -49 to the -51?
> A. Because I needed some more people over there.

On cross-examination, after an extensive exercise in evasiveness, Harris admitted that "[m]ost of the time," Moses worked in the "house" portion of ships. Harris was further asked and he testified:

> Q. Would you agree with me, sir, that it would be the practice for the foremen working under your direction in CDC to typically try to send their more responsible or better employees with the Navy inspectors?

[478] See fn. 476.

A. Not really.

Further on cross-examination Harris described Moses as only a "fair" employee. When asked why he did so, Harris replied: "She griped about her job. She didn't like the working area when she [got] dirty. She was kind of slow on her inspections and all." Harris admitted, however, that he could not say how often it was that Moses griped about her job; in fact, he could not say if any "griping" by Moses that he had personally witnessed occurred in the 1990s. Harris further professed memory of only one occasion when a compartment that was assigned to Moses was not ready when an inspection was scheduled; however, Harris could only guess that that one occasion occurred in the 1990s. Harris testified that either Cardella or Emilio Gonzalez was the foreman on that occasion; Gonzalez did not testify, and Cardella mentioned no such occasion in his testimony.

Cortez (vols. 96, 97) was asked on direct examination and he testified:

> Q. Did you ever make a decision in May or June of 1993 to move Ms. Moses in particular from one work location or assignment to another?
>
> A. No, I did not.
>
> Q. In May or June or July of 1993, did you ever have a conversation with Ms. Moses concerning her move from one work location to another?
>
> A. Not to my knowledge, no.
>
> Q. Did you ever promise Ms. Moses anything about being able to work in the finishing area?
>
> A. No.
>
> Q. Did you ever tell Ms. Moses she would be able to work in the finishing area again?
>
> A. No.

Cortez was asked nothing else about exchanges he may have had with Moses.

On cross-examination Cortez was asked and he testified:

> Q. Now, how about Lorraine Moses? Before she was injured, what kind of employee was she?
>
> A. A pretty good employee.
>
> Q. And was she one of these—did she gripe sometimes?
>
> A. Not that I—I don't think so.

Moses' Assignment to the Building Area—Conclusions

Moses testified that for years before her June 2 assignment to wet dock-2 she only cleaned compartments. Although Respondent showed that Moses did some work on wet dock-2 before the events of this case, it made no attempt to show, and it did not show, that she previously did other than room-cleaning type work. Certainly, Respondent did not show that Moses was required to do the heavy bilge-cleaning-type work that she was sent to do on June 2. It is further undeniable that such work is more onerous than room-cleaning work. I credit Moses' testimony in this regard, and I find that the work to which Moses was assigned on June 2, and thereafter, was more onerous than that which she had done before. (Specifically, I credit Moses' testimony that engine-room cleaning, and other such work, had been assigned principally to male employees when she was working under Cardella.)

In his brief direct examination about Moses, Cortez did not deny that he knew that Moses bore prounion sympathies and he did not deny that he told Moses not to talk to union representatives at Respondent's gates and not to take handbills from them. I find that he did, and I conclude that, in violation of Section 8(a)(1), Respondent, by Cortez, in June 1993, ordered an employee not to take literature from union representatives and not to talk to them at Respondent's gates.

It is further undenied that Foreman, and Statutory Supervisor A. J. Rodrigue told Moses on October 27 that he thought Harris was trying to discharge her. No mention of the Union was made during this exchange, however, and the General Counsel makes no argument that a reasonable employee necessarily would have concluded that Rodrigue was telling Moses that Harris was attempting to discharge her because of her protected activities. I shall therefore recommend dismissal of paragraph 77 of the second complaint.

It is further undisputed that in an April employer campaign meeting Moses spoke up to Cardella and rhetorically asked why Respondent needed "32 vice presidents when we can't get no kind of raise." Moses further told Cardella, "When we vote for a president, we give him a chance; why not give the Union a chance?" Respondent contends, however, that the General Counsel has not presented a prima facie case that Moses' June 2 reassignment was unlawfully motivated because Harris made the decision to reassign Moses and Harris denied knowing of any prounion sympathies that Moses may have held. I disagree. The General Counsel has shown that Cardella knew before the reassignment that Moses favored the Union. I do not believe that Cardella would have withheld this information from his superior, Harris, and, from Cardella's knowledge alone I would impute relevant knowledge to Harris. Moreover, Cortez, Harris' superior, certainly knew after the reassignment that Moses favored the Union; otherwise, Cortez would not have taken the trouble to instruct Moses, unlawfully, not to talk to union representatives or take their literature. Therefore, the supervisors immediately above and below Harris knew of Moses' prounion sympathies before and after the assignment, and I find that Harris did also. Respondent's animus toward employees who held prounion sympathies is established throughout this decision. Accordingly, the General Counsel has presented a prima facie case, and Respondent's defense for Moses' June 2 reassignment must be examined.

Harris testified that he assigned Moses to the building area because he needed more labor for *LSD-51*. However, it is undisputed that Moses was not assigned to *LSD-51*; instead she was assigned to clean bilges and tanks of the *TAO*. Ledet, her supervisor at wet dock-2, testified that he could not remember what Moses did at wet dock-2; in fact, he could not remember what his entire crew was doing at the time in issue. This testimony was simply incredible. At any rate, Moses' testimony about what she did stands undenied. Moreover, Moses' testimony is supported by Cardella's testimony that there were the units of only two ships at wet dock-2 when Moses was sent there, *LSD-51* (where there was compartment-cleaning to be done) and the *TAO*; Moses, again, was not on the *LSD-51*.

Harris further testified that he did not continue Moses' working on the *LSD-49* at wet dock-3 because she was not one of his "best," or even "better" employees because she griped and she was sometimes slow. Harris could only be vague when asked why he said these things. Moreover, Cardella, who had been Moses' direct supervisor for at least 2 years, offered no such testimony. Indeed, Cardella testified that Moses had followed him, over a 2-year period, from the *LSD-48* to the *TAG*. If Moses' work had been deficient in any meaningful way, Cardella presumably would not have retained her on his crews

(and he would not have given her the additional responsibilities of going with Navy personnel on final inspections). Finally, Cortez acknowledged that Moses was "[a] pretty good employee," and he denied that she ever griped. Harris' testimony about not continuing Moses with *LSD-49*, or not continuing her with Cardella's crews that were doing more compartment-cleaning on the house units of the *LSD-51*, was simply not credible.

Finally, Moses testified that Cortez is the supervisor who told her that she would be reassigned to wet dock-2; she further, specifically, testified that Cortez first accused her of misconduct (that was witnessed by Electrical Department Superintendent Terry) and stated that her misconduct was the reason that she was being reassigned. After he told her of the reassignment, further according to Moses, Cortez told her that he wanted to talk about the Union, and then asked her what she thought of Respondent's insurance program. When Cortez was on direct examination, however, he was not asked to deny this specific testimony by Moses; instead, he was only asked generally if he discussed a reassignment with Moses. Cortez answered, "Not to my knowledge, no." Respondent's failure to seek specific denials is telling; the diffidence reflected in Cortez' answer is even more telling. I find that Moses testified truthfully that Cortez told her that she was being reassigned to wet dock-2 because of spurious charges of misconduct.

On June 2, there was plenty of finish work at wet dock-3. As admitted by Harris, on June 2 there was another *TAO* at wet dock-3, as well as *LSD-49*. (On Br., p."CDC-CS-113," Respondent identifies that ship as *TAO-202*, and Respondent states that it was at wet dock-4, where Moses also sometimes worked.) The compartments of that *TAO* would have needed finish cleaning, as well. Cortez did not tell Moses that she was being reassigned because (as Harris testified) she was needed more at wet dock-2 than on wet dock-3. Moses was productively working on *LSD-49*; she knew that there was more work to do on *LSD-49;*[479] and she presumably knew that there was another *TAO* at wet dock-3 that would need much finish cleaning. Any assertion that she was needed more at wet dock-2 than at wet dock-3, therefore, would have been effectively challenged as nonsense by Moses. For that reason, I find, Cortez advanced as a pretext for the reassignment the lie that she had been seen by Terry engaging in misconduct. It further appears to this finder of fact that, when Cortez then told Moses that he wanted to talk about the Union, and he asked Moses what she thought about Respondent's insurance program, Cortez was offering a reprieve from the wet dock-2 assignment if Moses would give the "right" answer. Moses, instead, criticized the insurance program, and Cortez accordingly sent her away to the more onerous work in the bilges and tanks of the *TAO* at wet dock-2.[480] The Board has noted that, in any large organization, jobs of relatively unskilled employees can be shuffled among other employees at any time.[481] That is obviously what happened here with Moses, and it happened for an unlawful purpose.

In summary, Cortez (not Harris) made the decision to send Moses to more onerous work on June 2, and he did so because of her expressed prounion sympathies of which Cortez knew. That is, Respondent has not shown that it would have reassigned Moses to wet dock-2 when it did, even in the absence of her known protected activities. I therefore find and conclude that by assigning Moses to more onerous work on June 2, 1993, Respondent violated Section 8(a)(3).

g. Josephine Hartman's isolation and assignment to the building area

Josephine Hartman (vol. 30) was a laborer who, until the events of this case, usually cleaned rooms on launched ships at wet dock-3. On June 28, 1993, when she was working on *LSD-49*, Hartman was ordered to clean rooms alone rather than jointly with another employee as she had done in the past. That assignment lasted for 1 week. On July 13, Hartman was reassigned from the job of cleaning rooms on ships to the work of cleaning units in the building area. The second complaint, at paragraphs 93 and 99, respectively, alleges that Hartman's assignments were to an isolated job, and to a more onerous job, in violation of Section 8(a)(3). The General Counsel contends that Respondent made these assignments to Hartman because of her known union activities and expressions of sympathy which consisted of her speaking favorably about the organizational attempt during two employer campaign meetings. The General Counsel further alleges that, in violation of Section 8(a)(1), Hartman was interrogated by one supervisor and she was told by another supervisor that she was reassigned to isolated work because of her union activities. Respondent denies that either the interrogation or the isolation remark (as I shall call it) occurred. Respondent further denies that the individual who allegedly made the isolation remark is a supervisor within Section 2(11) of the Act. Respondent further denies that any of its supervisors knew of any prounion sympathies that Hartman may have held at any relevant time, and it answers that Hartman's assignments were made solely because of business necessities.[482] Ultimately, I find and conclude that the General Counsel has not presented a prima facie case that Hartman was unlawfully discriminated against.

Hartman has been employed by Respondent since 1973 in the CDC department. She testified that she has always done cleaning work such as trash pickup, dusting, sweeping, and mopping. Hartman testified that she spoke up for the Union at two employer campaign meetings that were conducted in the CDC department about a week apart during the month preceding the June 25 Board election. At the first meeting CDC Superintendent Leroy Cortez addressed about 18 employees. Present also were General Foreman Donald Harris, Foremen Tracy Plaisance, and Emilio Gonzalez. According to Hartman:

> He [Cortez] was just stating that the Union wouldn't be good for Avondale, that Avondale would be better without the Union, that the contracts would be given to nonunion shipyards before the Union one. And he was speaking—at the time they had union—Bayou Steel was

[479] Moses gave credible testimony in this regard; moreover, according to Respondent's master yard schedule, the *LSD-49* was not scheduled for delivery until August 1994.

[480] As Rodrigue, it is undisputed, told Moses, "Harris wanted me in the tanks because that was—the hardest part of the job is going in the tanks."

[481] *Flexsteel Industries*, 316 NLRB 745, 757.

[482] Respondent further contends that no charge supports the 8(a)(3) allegations for Hartman. Respondent acknowledges, however, that the charge in Case 15–CA–12234–3, filed on July 26, alleges that Respondent violated Sec. 8(a)(3) "by change of conditions of employment" of Hartman. The complaint allegation is therefore supported by the charge.

> on strike, and National Canal-Villere [a local chain of grocery stores] was on strike. And he was talking about the Union wasn't any good.
>
> And then I asked him, why was he saying that the Union wasn't any good, because the people of National Canal-Villere are only trying to keep their benefits, their current rate of pay, and their benefits what they already had. They weren't asking for any more money.

Hartman testified that at the second June meeting:

> Well, Leroy [Cortez] was speaking again about the benefits of being nonunion, and, you know, he was just talking about Avondale would get these contracts without a union. And he told me that he knew I was for [the] Union. And I asked him, how did he know that. He said because I was wronged; I was cut, and they didn't give me my pay back.

(The background for this remark lies in certain testimony by Hartman that during the first 2 weeks of 1987 she was laid off. When she was called back, it was at a reduced hourly rate of pay.) Hartman testified that after this meeting:

> Well, when we were getting ready to leave and go back to the ship, Leroy Cortez called me aside and asked me, what did I think the ladies[483] thought, and I told him I did not know what the ladies thought, I could only speak for myself.
>
> And then he asked me, did I have confidence in management, and I told him no. And he asked me, "What about the Union?" I told him I didn't know, and if I knew for sure, it would be easier for me to make my decision.

Based on this testimony by Hartman, paragraph 33 of the second complaint alleges that, in violation of Section 8(a)(1), Respondent, by Cortez, "interrogated its employees about their union membership, activities and sympathies and the union membership, activities and sympathies of their fellow employees."[484]

For at least 1 month before the Board election, Hartman had been performing her work assignments on *LSD-49* along with another employee, Kathy Henry. On Monday, June 28, the first workday after the June 25 Board election, Hartman and Henry were approached by Leadperson Willa Mae Craft. According to Hartman:

> She said, "I have to separate you; I am going to tell you, Donald Harris told me to separate you all," because I had influenced the ladies to vote for the Union at the last minute. . . .
>
> She told me to go on one side of the ship, and she told Kathy to go on the other side and work by ourselves.

Current employee Henry (vols. 60, 61) also testified that Craft made the remarks in issue. Based on this testimony by Hartman and Henry, paragraph 57 of the second complaint alleges that, in violation of Section 8(a)(1), Respondent, by Craft, "told its employees that an employee was being isolated from other employees because the employee aided or supported the Union."[485] Respondent denies that Craft is a supervisor within the meaning of Section 2(11) of the Act, and Respondent denies that Craft made the remark in question. Craft (vol. 101) denied that she made the remark, but I found Henry and Hartman more credible, and I find that Craft did make the remark. The only issue, therefore, is Craft's supervisory status.

Section 2(11) of the Act defines "supervisor" as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the statutory definition is couched in the alternative, possession of any one of mentioned indicia of supervisory status establishes an individual as a supervisor under the Act. The General Counsel contends that he has proved that Craft did "direct" the work of crews of female CDC employees, and that she did "discipline" them, within the meaning of Section 2(11). The evidence, however, is that the only direction of work that Craft gave was of a most "routine" nature; the work was the cleaning of rooms, much like cleaning rooms in a home, as the General Counsel acknowledges on brief. Moses did tell employees which rooms to clean, and when, but no "independent judgment" was employed by Craft; rooms were cleaned after crews of construction workers finished whatever they had been doing. Even in giving these directions, Craft acted as a mere conduit; the construction departments told CDC supervision when they were through, and the word came down through foremen to Craft. Finally for the General Counsel's "direction of work" contention, it is to be noted that the General Counsel acknowledges that salaried foremen also directly supervised Moses, Henry, Hartman, and the approximately 6 to 10 other employees who cleaned rooms with Craft; if Craft were also a statutory supervisor, this would be an elevated supervisory ratio for this most routine work that the employees do. Also, there is no probative evidence that Craft disciplined employees. None of the General Counsel's witnesses testified that Craft ever disciplined them. During the rebuttal phase of the General Counsel's case, Respondent produced documents pursuant to subpoenas concerning other topics, and one of those documents was a warning notice that Craft had signed as a "Witness." The warning notice is to an employee for absenteeism, but it is dated "9–5–91." No other warning notice signed by Craft was offered by the General Counsel. Aside from the singularity and remoteness of the warning notice, however, it is to be noted that employees sometimes did sign warning notices as witnesses. For example, alleged discriminatee Joseph Melton signed as a "Witness" to a warning notice that was issued by Pipe Department Foreman James Walker.[486] Neither party contends that Melton was ever a supervisor. There being no probative, credible, evidence that Craft possessed any of the statutory indicia of supervisory

[483] The female employees who cleaned rooms on ships were sometimes referred to by the witnesses as "the ladies."

[484] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Hartman, as well as the charge in Case 15–CA–12171–1.

[485] Id.

[486] Compare the signatures on R. Exhs. 361 and 363 with the G.C. Exh. 72.

status at any relevant time,[487] I shall recommend that paragraph 57 of the second complaint be dismissed.

Hartman testified that after Craft separated her from Henry, she was assigned to clean rooms by herself for the remainder of the week. Hartman testified that, theretofore, she had only occasionally been required to work alone in performing her cleaning duties on ships at wet dock-3. Hartman testified that on July 5 she began a 1-week vacation. When she returned to work on July 13, she was assigned to work in the building area until January 1994 when she was reassigned to do finish cleaning on ships at wet dock-3.

Hartman testified that the two employer campaign meetings at which she spoke up for the Union occurred in June. Hartman further testified that Henry was present at both meetings, and, "Lorraine Moses, I think was there." Moses, it has been shown above, was not working in the wet dock-3 area after June 1, and Hartman's expressed doubt about Moses' being at the June meetings was well founded. Henry, however, was at wet dock-3 during June. Henry testified that some employees spoke up for the Union at employer campaign meetings that she attended while working at wet dock-3, but she could not remember who they were.

Cortez (vols. 96, 97) admitted that Hartman spoke up at one employer campaign meeting that he conducted, but he denied that Hartman ever spoke in favor of the Union. (Rather, Cortez testified, Hartman spoke only about the historic failure of Respondent to pay her for wages that she had lost after her layoff.) Cortez further denied that he told Hartman that he knew that she was in favor of the Union, and he denied asking Hartman how she or any other employees felt about the Union.

It is understandable why Moses did not corroborate Hartman's testimony about what she said at employer campaign meetings. (Moses had been reassigned to the building area at the time of the employer campaign meetings in question, and Hartman was simply mistaken about the possibility that Moses was present during the employer campaign meetings that Hartman attended in June.) It is not understandable, however, how Henry could have failed to corroborate Hartman about her prounion statements at employer campaign meetings if that testimony had been truthful. Certainly, Henry knew Hartman, and she appeared to be present to help Hartman to the extent that she honestly could. I credit Cortez' denial of Hartman's testimony that she spoke up for the Union at any employer campaign meeting at which he was present. I further believe Cortez' testimony that he did not ask Hartman how she, or any other employees, felt about the Union.

Although Craft told Hartman that she was being assigned to work alone because Harris suspected her of influencing other employees to vote for the Union, Craft was not a supervisor, and there is no evidence that Harris, did, in fact, tell that to Craft. Having discredited principal parts of the testimony upon which the General Counsel relies as support for a prima facie case that Hartman was unlawfully discriminated against by her assignment to work alone and her assignment to work in the building area, I shall recommend that paragraphs 33, 93, and 99 of the second complaint be dismissed.

[487] The General Counsel further contends that Craft was Respondent's agent within Sec. 2(13) of the Act because she spoke against the Union at employer campaign meetings. All employees were allowed to voice their opinions at such meetings, however, and there is no evidence that any supervisors ever led the employees to believe that Craft was speaking for Respondent.

h. Larry Gibson

Larry Gibson (vols. 26, 60) is a former painter who, on May 28, 1993, was reassigned from the crew of one foreman to the crew of another.[488] The second complaint, at paragraph 85, alleges that this reassignment was to more onerous working conditions and that by making that assignment Respondent violated Section 8(a)(3). The General Counsel contends that the reassignment involved Gibson's going from a job of touchup painting to a more onerous job of using hand-held power tools (power-tooling). The General Counsel contends that Respondent assigned Gibson to the power-tooling job because he had, just the week before, responded affirmatively to an unlawful interrogation of himself and discriminatee Ancar at a local grocery store (Comeaux's). Respondent denies that the interrogation occurred, but, as I have found above in Ancar's case, it did. Respondent contends that Gibson's reassignment was not more onerous than other work that he had previously done and that it was made solely because Gibson was used to doing that type of work.[489] Ultimately, I find and conclude that the reassignment of Gibson was unlawful.

On May 10, 1994, Gibson, who had been absent because of a nonwork-related problem with his feet, asked for light-duty work, but his request was denied; Gibson did not come to work for several months thereafter when his condition improved. The fourth complaint, at paragraph 27, alleges that Respondent's denial of light-duty work to Gibson violated Section 8(a)(3). The General Counsel contends that Respondent denied Gibson light-duty work because of his known union activities and expressions of sympathy which included his wearing of prounion insignia, his responding affirmatively to the interrogation mentioned above, and his serving as an alternate union observer at the June 25 Board election. Respondent answers that Gibson was not given light-duty work because his condition was not work related, he did not request a light-duty job in appropriate fashion, and there was no light-duty work available at the time that Gibson was competent to do. Ultimately, I find and conclude that the denial of light-duty work to Gibson, which was in effect a suspension,[490] was also unlawful.

(1) Gibson's assignment to power-tooling

Reporting to Paint Department General Foreman Tommy Bourgeois at wet dock-3 during 1993 were three "lead" foremen: Carl Mott Jr., Terry Knight, and Terry Merna. Reporting to each lead foreman were several "line" foremen. Those line foremen reporting to Mott included Randall Laborde, Eldon

[488] Gibson had been discharged by time of trial; his discharge is not alleged as a violation of the Act.

[489] Respondent further contends that no charge was filed that supports the 8(a)(3) allegations for Gibson. Respondent acknowledges, however, that the charge in Case 15–CA–12211–2, filed on July 9, 1993, alleges that Respondent violated Sec. 8(a)(3) "by change of conditions of employment" of Gibson. The complaint allegation is therefore supported by the charge. Respondent also contends on brief that, because a similar charge on behalf of employee James Lanham was withdrawn, the General Counsel "is estopped" from acting on Gibson's charge. The withdrawal of Lanham's charge was necessarily voluntary, but, even if it had not been, Respondent cites as a basis for its position no authority under any aspect of the law of estoppel. (At minimum, there was no litigation of Lanham's charge.) Respondent's "estoppel" argument is therefore also without merit.

[490] Whether it was lawful or not, the denial of light duty to Gibson on May 10 was a suspension because, by that denial, Respondent prevented Gibson from working until he was able to assume full duties.

Pierre, and Richard Sahuque. Gibson testified that from about 1991 until May 1993, he only did touchup painting and "selling" of compartments of ships at wet dock-3 to Respondent's quality assurance (QA) inspectors. Compartments (and some of the structures within compartments) went through several painting processes, and the inspectors would inspect after each. In selling compartments, Gibson testified, he would accompany the QA inspectors. If the QA inspectors found discrepancies, Gibson would fix them with a roller or brush. While doing touchup painting and room-selling, Gibson testified, he would use power tools for scraping or buffing, but only for "[f]ive or ten minutes" per room. Gibson testified that the only exception to his touchup painting of rooms (and incidental power-tooling of small surface areas during that process) was when he was called upon to use power tools to apply an abrasive, "Non-Skid," to weather-exposed decks of ships. Gibson further testified that the application, and subsequent painting, of occurs only about 3 weeks before sea trials, or near the end of the building processes of ships. Gibson testified that "most often" his foreman was Laborde and, from March through May 25, Laborde was his only foreman. In May, Gibson was working on *LSD-49* which was only at the beginning of the construction processes that are performed at wet dock-3.

As found above, Gibson and discriminatee Ancar met Foremen Laborde and Mott at a local grocery store one afternoon in mid-May. At that time, in violation of Section 8(a)(1), Mott asked Ancar and Gibson if they had signed union authorization cards. Both Ancar and Gibson replied affirmatively. When Mott asked Gibson and Ancar if they would vote for the Union, both replied that they would. When Mott asked the employees why they felt that way, Gibson went to his automobile and brought back some prounion literature that he gave to Mott. Gibson had previously told Laborde (who was then his personal friend) of his prounion sympathies, but he had not previously told Mott. In Respondent's case, Mott admitted that he made the decision to reassign Gibson from Laborde's crew to Pierre's crew on May 31.

Gibson testified that on Pierre's crew he did power-tooling, and only power-tooling. More specifically, Gibson testified that he was required only to use heavy, air-driven handtools that scraped, chipped, and buffed slag from welds and other metal detritus so that painting could be done. Gibson testified that no other member of Pierre's crew was required to do power-tooling; the other members did only spray and brush painting. Gibson further testified that all of the work that he did on Pierre's crew was outside, where he was sometimes rained out, and some of his work was on scaffolds on the sides of the ship. Gibson testified that the power-tooling was hard, dirty, and dusty work that was quite unlike the work that he was required to do when he was working on Laborde's crew. When asked to compare his room-selling work with power-tooling on the outside of the ship, Gibson replied: "Don't get sent home. Not on scaffolds. Better condition working." Gibson testified, without qualification, that when he worked on Laborde's crew, he worked in air-conditioning. Finally, Gibson testified that when he was reassigned to Pierre's crew, three other employees were brought to Laborde's crew to do touchup painting.

On June 30 Gibson was reassigned from Pierre's crew to the crew of Foreman Sahuque. Gibson testified that he was then required to do power-tooling in the tanks of *LSD-49* and painting there that involved climbing on beams. Gibson further testified that he also was required to paint with epoxy paint which had "real bad" fumes. Gibson testified that there was inadequate ventilation as he worked in the tanks under Sahuque.

Current employee Leonard Watkins (vol. 44) testified about power-tooling:

> Well, it is hard. It is dusty. It is just a filthy job. I mean when you are working overhead, you have got stuff falling in your eyes. You have got protection for your eyes, but it is not 100 percent. When you are working on a deck, your back hurts and your knees hurt, and it is still the same amount of dust and rust [and] fumes, all over the place. . . . It is pretty noisy. . . . But if you wear earplugs, it is bearable.
>
> They have got the kind [of power tool] that sands like a big, heavy-duty sander. They have got the kind that chips away paint, and they have got the kind that scrapes, too. But mostly what they use is the big sanders, like a big, high-power [disk] sander.

Respondent did not dispute Watkins' description of power-tooling work.

Gibson's Power-Tooling Assignment—Respondent's Evidence

Attendance registers (G.C. Exh. 693 and R. Exh. 727) show that from January 1 through Friday, March 5, Gibson was on the crew of Foreman Luke Ledet. During the week of March 8 through 12, Gibson was on crews of Knight, Bourg Jr., and Ledet. From Monday, March 15, through Tuesday, April 13, Gibson was on the crew of Bourg, Jr. From Wednesday, April 14, through Tuesday, May 11, Gibson was on sick leave. From Wednesday, May 12 through Friday, May 28, Gibson was on Laborde's crew. Therefore, contrary to Gibson's testimony that he was on Laborde's crew for almost all of March, April and May before he was reassigned to Pierre's crew, he was on Laborde's crew for only 13 workdays during that period. As well as also showing that, from Monday, May 31, through Tuesday, June 29, Gibson was on Pierre's crew, the exhibits further show that from Wednesday, June 30, through Friday, December 24 Gibson was on Sahuque's crew. (As discussed in the second section of his case, Gibson started extensive sick leave on Monday, December 27.)

Laborde testified that during May and June his crews did work in compartments that preceded installation of insulation. After any power-tooling in a compartment, the room is "blown down" to free it of dust; then spray painting and touchup painting are done. Touchup painting is done with a swab or brush. Foremen, not employees, usually accompany QA inspectors when a room is supposed to be ready for inspection. The foremen will tell an employee if any discrepancies are found, and that employee will do more touchup painting. Then insulation is applied, and the compartment is painted again. Laborde further testified that before insulation is installed in compartments, they are not air-conditioned; there are ducts for ventilation, but they are not completely efficient. Employees working outside compartments therefore have better air to breathe. Laborde testified that when Gibson was on his crew, his crew only did painting that comes prior to insulation (when there was no air-conditioning). Laborde was further shown his MCRs for May 31 and June 1; Laborde testified that two of the employees on those MCRs were newly assigned to his crew on May 31 because they were slender and could get into overheads where power-tooling needed to be done; Gibson is hardly a slender

person. Laborde, however, did not testify that while Gibson was on his crew, all members of his crew did power-tooling, he did not testify that he saw Gibson doing any power-tooling, and he did not deny that Gibson participated in the selling of compartments to the QA inspectors. Also, Laborde did not testify that Gibson was removed from his crew to make room for employees of slender build.[491]

On cross-examination, Laborde testified that, when Gibson was on his crew, "I believe he was doing some light power-tooling and touching up prior to insulation." When asked if Gibson's "light power-tooling" consisted only of doing incidental work, Laborde completely evaded answering. Further on cross-examination Laborde acknowledged that Ancar, who was also removed from his crew on May 31, is about 5 foot 7 inches, and weighs about 160 pounds. (At the time that Ancar testified, however, he was quite slender.) Laborde further admitted that, after Gibson (and Ancar) left his crew, other members of his crew continued to do touchup painting. Finally on cross-examination, Laborde testified that it was Lead Foreman Mott who told him that Gibson was to be moved from his crew to Pierre's; Laborde testified, however, that Mott did not tell him why the move was being made. (Laborde further acknowledged that Ancar was moved from his crew, also on May 31, but he testified that he did not know why. There is no allegation that Ancar's reassignment violated the Act.)

Mott (vol. 126) testified that "shrinking" is a process whereby the bulkheads (interior walls) and overheads (ceilings) of a ship are heattreated in order to remove superficial buckling that occurs when (the enormous) weights are put above them. The process results in the need for repainting of essentially all overheads and bulkheads after a ship reaches wet dock-3. Mott was asked why he reassigned Gibson from Laborde's crew to Pierre's crew on May 31, and he testified:

> Well, because there again, we was doing interior work, new construction. The ship was shrunk solid, and Larry was a NonSkid roller, and he was an exterior person. He knew the exterior, so I moved him to the outside.

Mott was not asked why he chose to remove Gibson on May 31 and not before that date. Mott testified that he considered power-tooling outside of compartments more agreeable work than power-tooling inside compartments because there was a greater concentration of dust on the inside. Mott further testified that Gibson was one of "maybe a handful" of employees who had been trained to apply NonSkid to decks. Mott did not dispute Gibson's testimony that NonSkid is applied only toward the end of the construction process at wet dock-3, shortly before sea trials. Mott did not testify that Gibson did, in fact, apply any NonSkid before the end of 1993 when he was on Pierre's crew or Sahuque's crew.

Pierre (vol. 114) testified that, when Gibson was on his crew, he did power-tooling of decks, but Pierre did not testify that Gibson's power-tooling on his crew included the application of NonSkid. (In fact, Pierre did not mention NonSkid in his testimony.) Pierre acknowledged that Gibson did work on a scaffold, but, Pierre testified, "Most of the time, he wasn't on a scaffold." Pierre further testified that other employees on his crew did power-tooling. Pierre denied that any member of his crew was ever required to power-tool for an entire day; he testified that, on days that Gibson did power-tooling, he also would spend part of the day painting. Pierre also testified that, while Gibson was on his crew, his crew was never rained out.

Gibson's Power-Tooling Assignment—Conclusions

I shall not repeat Watkins' unchallenged (and credible) testimony of the nature of power-tooling; it is hard, dirty work—much harder and dirtier than touchup painting (or any other type of painting).

Gibson clearly exaggerated the amount of time that he spent on Laborde's crew. I further find that Gibson was never rained out when he worked on Pierre's crew; he did paint, as well as power-tool, on Pierre's crew; and the other members of Pierre's crew also did power-tooling. Nevertheless, after considering all of the testimony, it is clear to me, and I find, that Gibson did substantially more power-tooling on Pierre's crew than the "touch-up" power-tooling that he had done on Laborde's crew. In addition, Gibson was required to do the more difficult, dangerous work of power-tooling on scaffolds while working on Pierre's crew (albeit not "[m]ost of the time," as Pierre would put it). Moreover, although it was shown that Gibson was not on Laborde's crew before May 12, it is not disputed that he spent most of his time during the period from March through May 12 indoors, doing touchup painting. It is further not disputed that, during this period, he did accompany QA inspectors and do final touchesup (to get painted areas passed to the next stage of construction). Finally, Laborde essentially corroborated Gibson by testifying that Gibson did only "light" power-tooling, as part of the process of touchup painting, during the period from May 12 through 28. I therefore find that the work to which Gibson was assigned on May 31 was more onerous than that which he had done before. This more onerous work assignment, however, lasted only until June 30 when Gibson was reassigned to Sahuque's crew. It is apparent, even by Gibson's own account, that the power-tooling that he did on Sahuque's crew was only incidental to his painting work, just as it was incidental to his painting work when he was on Laborde's crew. The other adverse factors to which Gibson credibly testified that he was subjected while working on Sahuque's crew are the normal conditions of any painter. (Indeed, the working conditions of Sahuque's crew appeared to be better than those of Pierre's crew.)

Therefore, the issue becomes whether the General Counsel has presented a prima facie case that Gibson's assignment to more onerous work on Pierre's crew was unlawfully motivated. The date of the meeting at Comeaux's Grocery Store was not established, except that it was in mid-May. The assignment came on May 31. Therefore, within no more than 10 or 11 days after Gibson was interrogated by Mott, and within nor more than 10 or 11 days after Gibson responded affirmatively to that interrogation,[492] Gibson was reassigned to more onerous work by Mott. The timing, alone, supplies the element of animus for Gibson's case. Moreover, Respondent's animus toward employees' prounion sympathies is established throughout this decision. Accordingly, I find and conclude that the General Counsel has presented a prima facie case that Gibson's May 31

[491] Gibson testified that, on May 28, he heard Lead Foreman Knight tell Laborde that "changes" were to be made on May 31. Laborde and Knight (vol. 115) denied that testimony. I believe Gibson, but the testimony proved nothing.

[492] As well as answering affirmatively to Mott's interrogation about whether he had signed a union authorization card and whether he would vote for the Union, Gibson told Mott why he thought a union would be beneficial for the employees, and he also presented Mott with union literature.

reassignment was unlawful, and Respondent's defense for that action must be examined.

Mott testified that "Larry was a NonSkid roller, and he was an exterior person. He knew the exterior, so I moved him to the outside." Even if Gibson was "an exterior person," he had not suddenly become such. Laborde testified that Mott did not tell him why he was taking Gibson from his crew and sending him to Pierre's; if it had been because Gibson was "an exterior person," or any other legitimate reason, Mott would presumably have told Laborde so. Mott's testimony that Gibson's ability to roll NonSkid played a part in the reassignment was a complete fabrication. Gibson's testimony that NonSkid is not applied until just before sea trials was not disputed. Respondent's records show that the first sea trial of *LSD-49* was not scheduled until April 18, 1994, almost a year later. Laborde testified that, after Mott reassigned Gibson to Pierre's crew, his crew received two "slimmer" painters; Laborde, however, never testified that, somehow, Gibson was removed from his crew to make room for those slimmer painters. Indeed, Laborde did not testify that Gibson's comparative heft in any way interfered with his ability to do interior work, and, as I have noted, Respondent did not dispute Gibson's testimony that for several months he had done only interior work, except when he performed occasional NonSkid applications. That is, neither Mott nor Pierre testified that there was some particular need for another "exterior person" on Pierre's crew at the time that Mott ordered the reassignment (except for the NonSkid testimony of Mott that I have discredited).

Respondent has therefore not shown that it would have reassigned Gibson to more onerous work on May 31 even in the absence of his known protected activities. Accordingly, I conclude that by doing so Respondent violated Section 8(a)(3).

(2) Gibson's being denied light-duty work

Gibson testified that during the week before the June 25 Board election he placed a union sticker on his hardhat, but he took it off immediately after the election. At the election, Gibson served as an alternate observer. For several hours on the day of the election, Gibson and other alternates stood outside Respondent's headquarters building, and at a main gate, where they carried signs and passed out union literature. Gibson credibly testified that, as he did so, Mott, Laborde and Pierre came to the area and watched for about 20 minutes; at one point Gibson saw Laborde looking at him and shaking his head.

In late December 1993, because of a condition that did not relate to his employment with Respondent, Gibson had surgery on his feet. As noted above, Gibson began sick leave on December 27. Gibson testified that on May 3, 1994, he went to his doctor's office.[493] On a prescription form, the doctor wrote:

> Larry Gibson may return to light duty at this time with no excessive standing or climbing.

The note was originally dated "4/3/94," but the "4" that would indicate April is marked over with a "5." The note was not introduced through Gibson, and he was not asked about the alteration on direct examination or cross-examination.

Gibson testified that on May 10 he went to Respondent's medical department and presented the note to two attendants whose names he did not know. The attendants told him to go to Paint Department Superintendent Bourg and ask him about getting light-duty work. Gibson further testified that he then went to Bourg and presented the doctor's note to him. According to Gibson, Bourg asked him no questions about the doctor's note. Bourg did ask Gibson if his condition was work related; Gibson replied that it was not, and Bourg told him: "[W]e could have [placed] you somewhere if . . . it was a job-related, . . . [b]ut if it is not job-related, we don't have no light-duty work."

Gibson testified that Bourg told him to go back to the medical department. There the attendant told him that he was to call in each day thereafter and see if there was any light-duty work, and that Gibson was to return when his doctor released him to full duty. Gibson further testified that there were several light-duty jobs that, theretofore, had been made available to injured employees; these included some touchup painting jobs, color-coding of pipes, taping, crushing empty paint cans, small tool repair, and toolroom work. Gibson testified that he returned to work about July 20 when he was first able to resume regular painter's duties.

Paint department employee Vernon Forest (vol. 60) testified that at different times in 1992, 1993, and 1994 he asked Bourg for light-duty work because he had bleeding ulcer and colon problems. Forest testified that when he asked for light duty in 1992 and 1993, Bourg put him in the repair shop where he did light repairs and sometimes drove the Bobcat (a small tractor-sweeper). Forest further testified that everyone in the shop was "sick." Forest testified that Bourg never asked him if his ulcer and colon condition were work related. Forest acknowledged that the last two times that he asked for light duty Bourg denied his request. (Forest was on medicalleave at the time that he testified.) On cross-examination Forest acknowledged that Bourg required him to go through the medical department before Bourg would give him a light-duty job.

Paint department employee James Lanham (vol. 61) testified that he sustained neck and back injuries in an automobile accident in 1986. After missing some time because of those injuries, Lanham later returned to work. In 1991, however, he had something of a relapse of his symptoms; Lanham testified that he began having trouble with his shoulders and neck and "I just couldn't do my job." He then missed 22 workdays, but returned with restrictions that he could not lift more than 50 pounds and could not work "with my hands over my head." Lanham went to the medical department where he was examined by Dr. Mabey (the Respondent's in-house physician) and given forms to take to the paint department. Lanham met with Bourg and General Foreman Tommy Bourgeois. At the conclusion of that meeting, according to Lanham, Bourg told Bourgeois to "find me something to do that I don't have to work with my hands over my head or lift over 50 pounds." The next day, Lanham was given brush-painting jobs; shortly thereafter he was assigned to light duty in toolrooms where he worked until 1993. On cross-examination Lanham was asked if the paper from the medical department did not tell Bourg how long his restrictions were to last; Lanham testified that "I didn't get to read it." (That answer was incredible.)

The General Counsel called Bourg as an adverse witness on day-59 of trial. Bourg asserted unequivocally: "I don't give light duty to a personal injury." By "personal," Bourg explained, he meant not work related. If an injury is work related, Bourg testified, he would attempt to find suitable light-duty work for an employee. Bourg further testified that he does not give light-duty work to any employee (even if a malady was work related) unless that employee presents a completed, stan-

[493] All dates mentioned in the remainder of Gibson's case are in 1994, unless otherwise indicated.

dardized, form from the medical department which lists the limitations of the employee and the durations of those limitations.

Bourg was shown the doctor's note quoted above, but he flatly denied that Gibson presented him with that paper or any other paper. Bourg testified that Gibson came to him and asked for light-duty work because he was limited in how much he could walk and "he said he couldn't climb or stand for any length of time." Bourg admitted that he told Gibson that if his condition were work related he would attempt to find light-duty work for him, but, since it was not, he would make no such attempt. Bourg testified that not putting employees on light duty unless their injuries were work related was "my rule," and it had been his rule since 1989 when he became superintendent of the paint department.

Bourg testified that he could not remember Lanham, but he did remember Forest. Bourg testified that he knew that Forest suffered from a bleeding ulcer, and he admitted to placing Forest on light duty because of it, but Bourg testified: "I thought at the time it was work related, because, you know, we do deal with hazardous types of chemicals. And I thought the stuff that he was dealing with at that time was—may have caused this." Bourg acknowledged, however, that he had no reason to think that Forest ever received workers' compensation for the time that he lost because of his ulcer condition. Bourg testified that each time that Forest asked him for light-duty work, he did not consider the request unless Forest presented forms completed by the medical department stating the nature and duration of Forest's incapacity. Bourg testified that, at some point, the medical department personnel told him that Forest's condition was not work related, and he thereafter did not assign Forest to light-duty work.

When Bourg was called in Respondent's case (vol. 82), he was asked nothing about Gibson; on cross-examination, however, Bourg was asked and he testified:

> Q. In regard to employees in the Paint Department that become medically unfit in circumstances such as when their health no longer allows them to be out in the dust and paint fumes, instead of firing those employees, you put them in positions such as the tool room or in hazardous waste areas.
>
> A. If there is spots available, we do. We make an effort to—instead of terminating that employee, yes, sir. We try to find work within the yard.
>
> Q. For example, a job might be the can-crusher?
>
> A. Could be the can crusher; could be anything; could be even outside my department.
>
> Q. Or—and tool room man would be an example.
>
> A. It could be.

(Again, a can-crusher is a pneumatic machine that was sometimes operated by employees on light duty.)

Denial of Light-Duty Work to Gibson—Respondent's Evidence

Respondent called Bourgeois (vol. 132) who testified that he once gave Lanham a toolroom assignment, but Lanham was not on light duty at the time, and Lanham's physical condition had nothing to do with his assignment. Bourgeois, however, did not deny that he attended a meeting with Lanham and Bourg and in that meeting Bourg told Bourgeois to get Lanham a light-duty job.

Respondent called several other witnesses who testified that all of the light-duty jobs that Gibson named required "some" climbing and "some" standing, and that Gibson was not qualified to do some of them, even if he had been fully able.

Respondent's medical director, David Sansoni (vol. 140), testified that the medical department attendants would never accept as conclusive evidence of a need for light duty a private doctor's memorandum that was (1) altered or (2) does not contain a diagnosis and estimation of period of disability. Sansoni further testified that the attendants are required to give standardized forms to the employees and tell them to have their physicians complete them with a diagnosis and a prognosis. (The details of this procedure, including the wording of the forms used, are found above in the case of alleged discriminatee Charles Giles.)

Denial of Light Duty to Gibson—Conclusions

I simply do not believe that Gibson attempted to come back to work after being on sick leave for nearly 6 months, and attempted to be placed on light duty, without presenting any documentation. Respondent stressed in the above-decided absenteeism cases that its employees are regularly told that they must bring some documentation to explain every absence. Moreover, no reasonable employee would attempt to seek light duty without some documentation. It is further clear that employees know that they must come through the medical department when they return from extended absences due to health reason. I believe, therefore, that Gibson did take the doctor's note to the medical department.

I do not believe, however, that Gibson was told by any medical department attendants that he should just take the doctor's note to Bourg. Sansoni was credible in his testimony that the attendants are required to give the standardized forms to the employees and tell them to have their physicians complete them with a diagnosis and a prognosis.[494] Lanham and Forest had to go through this procedure before receiving light-duty work assignments. I believe, and find, that the attendants gave Gibson the forms that are routinely required of employees who come back from sick leave and request light duty (again, see Giles' case above).

Gibson, it appears to me, did not take the standardized forms back to his doctor because his doctor had found that Gibson was able to return to work (albeit on light duty) as of "4/3/94," as the doctor stated in his note. Any answers that the doctor would have given on the standardized forms simply would not have jibed with Gibson's presentation of himself as newly ready to go back to work on May 10. Therefore, I find that the medical department personnel told Gibson to follow the usual procedures, but Gibson declined to do so. Gibson, instead, went directly to Bourg, presented the doctor's note, and requested light duty. Gibson's alteration of the note and his disregard of Respondent's procedures, however, became irrelevant because Bourg essentially admitted that, no matter what Gibson had done, he would not have given Gibson a light-duty job.

The doctor's note that Gibson presented to Bourg stated, "[N]o excessive standing or climbing." It did not state "[N]o climbing or excessive standing." The doctor plainly meant that Gibson should do no "excessive" climbing and he should do no "excessive" standing, as Bourg assuredly knew. (And if Bourg

[494] Sansoni was further credible in his testimony that the medical department would never accept such an obviously altered memorandum as that which Gibson presented.

had had any doubt about the matter, he could have asked Gibson what the note meant.) Therefore, Respondent's testimony that all light-duty paint department jobs require "some" standing and "some" climbing is hardly persuasive. Moreover, Respondent's testimony that Gibson was unqualified for various light-duty jobs in the paint department is simply not relevant because Bourg's own testimony made it clear that he was not going to give Gibson a light-duty job even if there were available many of light-duty jobs in the paint department and Gibson was qualified to do all of them. I also found to be incredible the testimony of Respondent's witnesses that Gibson was not suited for any possible light-duty job in the yard. It is clear that, even if Gibson had not done every possible light-duty job before, he could have performed some of them with a minimal amount of training; for example, color-coding of pipes. Finally, even if this testimony were relevant (and credible) it would not prove a defense. Bourg testified that he would search the yard to honor light-duty requests, if they were work related. That qualification was proved false, as I find infra, by the evidence relating to Forest and Lanham. Therefore, to have treated Gibson nondisparately, Bourg would have had to search the yard for a light-duty job that he could do.

Bourg and Gibson agree that Bourg asked Gibson if his condition was work related. Bourg did not testify that he asked Forest if his condition was work related, and Forest credibly denied Bourg did so. Bourg did not bother to investigate the matter until Forest had been on light-duty jobs for 2 years, and it appears that Bourg's investigation occurred only after the Gibson matter arose. Bourg knew that Forest was not receiving workers' compensation, and his testimony that he once believed that Forest's ulcer condition was work related was simply not credible. Lanham, as well, was placed on light duty for about a 2-year period because he had suffered an injury in an automobile accident. Bourgeois' testimony to the contrary did not include a denial of the meeting among Lanham, Bourg, and Bourgeois in which Bourg told Bourgeois to find Lanham a light-duty job. Moreover, Bourg was not called by Respondent to deny Lanham's testimony on this point. I therefore discredit Bourgeois' testimony to the extent it conflicts with Lanham's. Accordingly, I find that Gibson was treated disparately.[495]

There is no reason to believe, and I do not believe, that in 1994 there was a dissipation of the animus that caused Gibson's assignment to more onerous work in 1993. If anything, there is reason to believe that Respondent's animus toward Gibson's protected activities increased after he served as an alternate union observer in the Board election.[496] It has also been proved that Gibson was treated disparately; therefore, Respondent has not shown that it would have suspended Gibson from May 10 to July 20, by denying him light duty, even in the absence of his protected activities. I therefore conclude that by the May 10 suspension of Gibson Respondent violated Section 8(a)(3).[497]

i. Harold Mikkel's harassment and assignments to do other employees' work

Harold Mikkel (vol. 13), a sheet metal mechanic, was given several instructions and several assignments by a supervisor in mid-May 1993. The second complaint, at paragraph 84, alleges that these instructions and assignments constituted assignments of onerous work and harassment[498] in violation of Section 8(a)(3). The General Counsel contends that the assignments to Mikkel were made because of his known union activities and expressions of sympathy which included his wearing prounion insignia and speaking favorably about the organizational attempt. At paragraph 25, the second complaint further alleges that, in violation of Section 8(a)(1), Mikkel was warned by a supervisor that his union activities would be futile. Respondent denies that the warning occurred. Respondent further answers that the assignments in question were nothing but routine work instructions.

Only Mikkel testified in support of these allegations, and all of Mikkel's testimony concerns one statement and several acts by one supervisor, Foreman Percy Waugespak. Waugespak, however, denied Mikkel's testimony about the warning, and he explained the basis for his instructions to Mikkel, and Waugespak was at least as credible as Mikkel. I therefore find and conclude that the General Counsel has failed to prove by a preponderance of the evidence that the threat to Mikkel occurred or that there was any unlawful discrimination against Mikkel. I shall therefore recommend that these allegations of the complaint be dismissed.

j. Archieve Triggs and Gerald Leban

The steel control department (steel department) is responsible for receipt and distribution of very large and heavy steel plates and beams that arrive at the yard by rail. In performing this function, the steel department operates two stationary cranes and two moveable cranes. The moveable cranes operate on standard (57-inch) rails. The moveable cranes are called "locomotive cranes" because the power units are diesel locomotives that have cranes as superstructures. After lifting steel from incoming freight trains, the locomotive cranes drop the steel on cars that are coupled to the locomotive cranes. The steel is either taken immediately to various points in the yard, or it is stored in the steel department's receiving area for later distribution. In either event, the distribution is accomplished in large part by use of an internal rail system. One point to which the locomotive cranes regularly takes steel is the shot-blast area. In that area are located the steel department's two stationary cranes which are magnetic cranes. Each of the steel department's four cranes has an operator and an expediter. The expediter organizes the work and serves as a communications link

[495] As Respondent points out on brief, Forest and Lanham were prounion employees, but they became so only after the organizational campaign attempt began in March 1993 which was after they were assigned light-duty jobs because of their conditions that were not work related. Moreover, Bourg did not testify that he knew that Lanham and Forest ever held prounion sympathies.

[496] As found above, on May 28, 1993, Sheetmetal Department General Foreman Michael Torres unlawfully threatened union election observer Michael James Boudreaux with unspecified reprisals because Boudreaux was not on Respondent's "side." Immediately after Giles served as an observer, he was assigned to more onerous, and humiliating, duties. Immediately after St. Blanc served as a union observer, he was reassigned from bench work to the more onerous work of cable-pulling. Union election observer Perera was unlawfully issued three warning notices, two of them in 1994.

[497] Gibson's apparent alteration of the doctor's note, and his admitted failure to appear for work even for a week after he received that "5/3/94" note, make it apparent that he was less than conscientious about working. Of course, if at the compliance stage Respondent can show that Gibson was able to assume full duties before July 20, any backpay due to him will be accordingly reduced.

[498] Actually, the complaint does not use the word "harassment," but that is the essence of the allegation that was made, and the matter was fully litigated.

for the operator. Crews on the locomotive cranes also have two or more riggers.

Archieve Triggs (vol. 21) is an expediter. Gerald Leban is a rigger who sometimes works with the locomotive-crane crews and sometimes with other crane crews in the yard. This is because riggers are not assigned permanently to the steel department; riggers are permanently assigned to the crane-and-rigging department (crane department) which dispatches riggers to the many departments that use the many cranes (of many types) throughout the yard. At the times in question, Leban was assigned to Triggs' crew (as it was called at the hearing) on Locomotive Crane-19. Frederick Leggins, Herford Parker, and Calvin Williams were also riggers who often worked on Triggs' crew.

Triggs testified that, at some time after the June 25 Board election, his supervisors began watching his crew more closely; Triggs further testified that, at the same time, the supervisors began assigning to him, and to the riggers who worked with him (mostly Leban and Leggins), cleaning duties that the crew had never before been assigned to do. Triggs testified that Respondent assigned no such duties to the crane operator who worked with him. Paragraphs of the second complaint that allege violations of Section 8(a)(3) are:

> 89. Since about June 25, 1993, Respondent imposed more onerous working duties on its employees assigned to the locomotive-crane crew employees, including Gerald Leban, Frederick Leggins, Herford Parker, Archieve Triggs, Calvin Williams, and other employees known to the Respondent. . . .
>
> . . . .
>
> 91. Since about June 25, 1993, Respondent more closely supervised the employees under the supervision of Dennis Zeringue.

The General Counsel contends that Respondent more closely supervised Triggs' crew, and assigned to Triggs and his riggers new cleaning duties, because of the known union activities and expressions of sympathies of Triggs and the riggers. Those activities included the wearing of "Union-Yes" stickers, the wearing of prounion T-shirts, and the refusals of those employees to wear "Vote-No" stickers that were allegedly distributed by supervisors. Respondent answers that there were no changes in the supervision or duties of Triggs' crew around the time of the election, except those changes that were called for by the needs of the job. Ultimately, I find and conclude that Respondent did not violate Section 8(a)(3) in regard to its supervision of Triggs and the other locomotive crane crew members.

(The original charge in Case 15–CA–12334–2, filed on September 24, 1993, alleged that Respondent had violated "Section 8(a)(1) and (3)" by "interfering, restraining and coercing in the exercise of employees['] rights because of their membership and [/] or activity in [sic] behalf of the Metal Trades Counsel." The charge then names Triggs, Parker, Leban, Leggins, and Williams. An amended charge was filed on May 26, 1994, specifically alleging the imposition of "more onerous working duties" on the named employees, and the amended charge further alleges that Respondent "more closely supervised" the named employees. On brief, Respondent contends that the original charge is too "conclusory" to be valid, and that the amendment is beyond the 6-month limitations period of Section 10(b). These objections were not raised at trial, and the allegations were fully litigated. Therefore, Respondent's contention must be rejected on this basis alone. Moreover, the original charge tolled the running of the statute because: (1) it specifically alleged that the named employees' rights had been violated by Respondent's violations of Section 8(a)(3); and (2) it alleged that employees "membership" rights had been interfered with, the literal topic of Section 8(a)(3). Finally, although the amended charge was filed more than 6 months after the alleged discrimination, it was timely filed because it "relates back" to the original charge. *Kelley-Goodwin Hardwood Co.,* 269 NLRB 33, 36–37 (1984). I therefore reject Respondent's contentions in this regard.)

The second complaint, at paragraph 128, further alleges that on October 13, 1993, Triggs and Leban were issued warning notices in violation of Section 8(a)(3). The General Counsel contends that the warning notices were issued because of the Union activities of Triggs and Leban, as mentioned above. The complaint further alleges that, in violation of Section 8(a)(1), Triggs was warned by a supervisor that the employees' collective-bargaining efforts would be futile. Respondent denies that the futility warning occurred. Respondent further answers that Triggs and Leban were issued warning notices on October 13 solely because they left their work area to observe the aftermath of an accident that involved a boom that fell from a gantry crane. The General Counsel replies that many other employees left their work area at the same time to see the result of the fall of the gantry-crane's boom, but only Triggs and Leban were punished, and that Triggs and Leban were therefore disparately treated.[499]

Foreman Floyd Fontenot is the immediate supervisor of the two locomotive-crane crews. Dennis Zeringue is Fontenot's general foreman. Leban's foreman in the rigging department is Johnny Bachus, but when he is assigned to the different cranes in the yard, Leban also reports to the supervisors in charge of the cranes in those departments, such as Fontenot and Zeringue.

Triggs testified that during the preelection period he regularly wore one or two "Union-Yes" stickers on his hardhat. Triggs further testified that the four riggers who were assigned to the steel department during the preelection period (Leban, Leggins, Williams, and Parker) also wore "Union-Yes" stickers on their hardhats. Triggs further testified that, conversely, none other of the operators or expediters in the steel department wore "Union-Yes" stickers; in fact, according to Triggs, the three other steel department expediters and the crane operators wore "Vote-No" stickers. Triggs further testified that he acquired six or seven prounion T-shirts about the time of the June 25 Board election, and he thereafter wore one to work almost every day. On cross-examination Fontenot acknowledged that he knew at least a month before the Board election that Triggs and the riggers who usually worked with him, Leban and Leggins, were prounion employees. Fontenot further acknowledged that the operator of the crew on which Triggs worked did not wear any prounion insignia. Fontenot further acknowledged that he reported his knowledge of the prounion sympathies of Triggs, Leban and Leggins to Zeringue.

[499] On brief, Respondent also contends that this allegation of the complaint must be dismissed because it was not stated in the original charge. Again, this contention was not raised at trial, and the matter was fully litigated. Moreover, the complaint allegations of related violative conduct that occurred after the filing of the original charge are supported by that original charge under Sec. 10(b). *NLRB v. Fant Milling Co.,* 360 U.S. 301 (1959).

Triggs testified that about 2 weeks before the June 25 Board election Zeringue called him aside and engaged him in a long conversation about the organizational attempt, which Triggs recounted (at length). Triggs testified:

> [Zeringue] was telling me about how far a black man have come in the Company since he had been there, and I told him [that] I wasn't interested in that, because I would like to advance as far as I can myself.
>
> And he asked me, what did I think the Union could do for me? I told him, "I don't know, but I would like to find out. If the Union come in the yard, I would like to find out for myself what they could do for me." And [I told Zeringue that] I didn't know specifically [what the Union could do for me], but the Company wasn't doing nothing for me.
>
> And I also told him during this same conversation [that] my daddy worked for a union for 45 years, and it hadn't hurt him; it had done a lot of benefits for him. . . .
>
> [A]fter I told him about I thought what the Union might do for me would they come through, he say [that] that ain't never going to happen as long as he there.
>
> And there wasn't much more to it. He walked off. He also offered me a "Vote-No" sticker during this conversation, and I told him I wasn't going to wear that. . . . He had some—a handful of stickers, "Vote-No" stickers, that he was issuing to whoever wanted them. . . . He inquired, you know, about, "Do [you] want one of these stickers?"
>
> [I said], "No, I don't want none of them; I am not going to wear it."

Based on this testimony by Triggs, paragraph 38 of the second complaint alleges that Zeringue, "informed its employees that it would be futile for them to select the Union as their bargaining representative."[500]

Zeringue (vol. 78) acknowledged that he spoke individually with Triggs about the organizational attempt, but he testified that:

> Well, I just told him that I just didn't see any benefit to the Union being in the Company, that I think it has a lot of interruptions and stops the flow of the yard, the way it works now, that it was no benefit at all for the Union to be in the Company.

Zeringue flatly denied that he told Triggs that the Union would not come into the yard if he had anything to do with it. Zeringue, however, did not deny asking Triggs what he thought the Union could do for him, and he did not deny offering to Triggs and other employees "Vote-No" stickers.

I credit Triggs. Zeringue sounded as if he were reciting what he was supposed to have said to employees rather than what he did say. Moreover, although Zeringue testified that he had received Respondent's TIPS instructions not to threaten, interrogate, promise or conduct surveillance, he did not deny that he interrogated Triggs by asking Triggs what he thought the Union could do for him, and he did not deny that he interrogated Triggs by offering him a "Vote-No" sticker. Finally, Zeringue offered no testimony that he was instructed not to warn employees that their collective-bargaining efforts would be futile, and I believe, and find, that he did so. That is, I find and conclude that, in violation of Section 8(a)(1), Respondent, by Zeringue, in June 1993, warned an employee that the employees' collective-bargaining efforts would be futile.

(1) Locomotive-crane crew's cleanup assignments and closer supervision

Triggs testified that before the election, when a crane broke down, the operator would help any mechanic that was called. Triggs testified that he would sometimes also help the mechanic, but usually he would do nothing while the repairs were being made. Triggs testified that after the election he and his riggers were assigned to do cleanup when the crane was down for repairs and that Zeringue, at least on some occasions, stood and watched them.

Zeringue, however, credibly testified that cleanup was part of the locomotive-crane crew's regular duties. For periods in the spring, the locomotive cranes suffered a spate of breakdowns, and the rigging crews were often idle for half-hour periods or more. When this occurred, Zeringue and Fontenot required the employees to police the area, rather than to just sit around. Zeringue acknowledged that he did stand and watch Triggs' crew, but only after the crew had repeatedly stood and done nothing when they should have been doing some cleaning. I credit Zeringue's testimony on this point, and I shall recommend dismissal of the allegations of the complaint that Triggs' crew was assigned onerous duties, and was more closely supervised, after the Board election, in violation of Section 8(a)(3).

(2) Triggs' and Leban's warning notices for leaving the work area

As previously mentioned, a Mississippi River levee runs through Respondent's property. On October 13, a boom fell from a gantry crane that was operating on the riverside of the levee. Triggs testified that he and Leban left their work area, which was outside the levee, to view the aftermath of the accident. When they got to the top of the levee, according to Triggs, there were about 150 other employees there, including forklift driver Wendell Fontenot, son of Foreman Floyd Fontenot. Triggs testified that after he and Leban had stayed about 5 minutes, Fontenot approached them and told them to return to their work area. Later in the day, Fontenot issued warning notices to Triggs and Leban. Fontenot stated on each warning notice: "Employee left work area to go across the levee to "check-out" a Gantry Boom that had just fallen." Triggs testified that when Fontenot issued the warning notice to him, "I say, 'Your son was up there; you didn't write him up.' He told me his son didn't work for him."

Fontenot acknowledged that many other employees, including his son, were standing on the levee, doing nothing, at the time that he saw Triggs and Leban on the levee. Fontenot further testified, however, that none of those other employees were working under his supervision as were Triggs and Leban. There is no evidence to the contrary. Also, there is no evidence that any employees, other than Leban and Triggs, left their work areas outside the levee to watch the aftermath of the accident that had occurred on the riverside of the levee (where the employees had been in more potential danger and were reasonably distracted from their work).

In summary, as Triggs acknowledged, he and Leban were out of their work area at the time that Fontenot saw them on the top of the levee. I therefore find and conclude that Respondent

[500] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Triggs, as well as the charge in Case 15–CA–12171–1.

has shown that it would have issued the October 13 warning notices to Triggs and Leban, even absent their union activities. Accordingly, I shall recommend dismissal of this allegation of the complaint.

11. Denial of benefits to employees

a. Robert Ruiz' being denied the use of a telephone

Robert Ruiz (vol. 53), a shipfitter, testified that on May 12, 1994, he asked for permission to use a pay telephone during working time, but he was denied that permission by his foreman. The fourth complaint, at paragraph 28, alleges that the supervisor's action violated Section 8(a)(3). The General Counsel contends that Respondent denied the permission to Ruiz because of his known union activities and expressions of sympathy which included his wearing prounion insignia. The complaint further alleges that the supervisor threatened Ruiz with unspecified reprisals in violation of Section 8(a)(1). Respondent denies that there is a charge that supports either the allegation of the threat or the allegation of denial of telephone use.[501] Respondent also denies that the threat or the refusal to allow Ruiz to use the telephone occurred. Ultimately, I find and conclude that the threat and the denial of telephone use occurred, that the allegations are supported by timely filed charges, and that Respondent violated the Act by this conduct.

Threat to Ruiz—The General Counsel's Evidence

Ruiz testified that since the organizational campaign began in March 1993, he has maintained up to 10 "Union-Yes" stickers on his hardhat while he worked; he further has inscribed prounion slogans on his hardhat. Ruiz testified that on one occasion when he had such stickers on his hardhat:

> Well, I had a glass welding [shield] lens in my pocket, and I didn't want it to break in my pocket; I was en route to bring it to my toolbox. And I walked past Keith Folse, my foreman, and he asked me where I was going. And I said, "I am going to bring this into my toolbox so it doesn't get broken."
>
> And he said, "No, no; just go back on your unit."
>
> And I said, "Why?"
>
> And he said, "Man, just go back on your unit. You had better watch your butt. You know they are out to get you." So, you know, with the urgency in his voice and everything, I went back to my job site.

When asked when this occurred, Ruiz testified, "I think it was November." Based on this testimony by Ruiz, paragraph 9 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Folse, "[a]bout November 1993," threatened employees with unspecified reprisals.

The charge in Case 15–CA–12600, the only charge filed specifically on behalf of Ruiz, was filed on May 11, 1994. If it were proved that the exchange between Ruiz and Folse occurred on or before November 11, 1993, the allegation of paragraph 9 of the complaint would not be supported by that charge because of the 6-month limitations period of Section 10(b) of the Act. The limitations period is an affirmative defense; therefore, if it is found that the event occurred, Respondent has the burden of proving that it occurred outside the statute's limitations period. *St. Mary's Infant Home,* 258 NLRB 1025 (1981).

On cross-examination, Ruiz was asked to be more specific about the date of his exchange with Folse that he placed in November. Ruiz testified that he could not remember whether the exchange was in early or late November 1993, but, "It was sometime in November. It was cool and rainy, and it just—you know, that month stuck with me." (Ruiz testified that he was sure that it did not occur in October.) Ruiz acknowledged that in his May 16, 1994 pretrial affidavit he stated that "Keith Folse has said to me on several occasions throughout the year that I had better watch my butt because they are out to fire me," and Ruiz acknowledged that the affidavit does not state when any of those "several occasions" were. Ruiz insisted that the occasion to which he referred was in November because it was in that month that he bought the glass welding-shield lens from the company safety store and the incident happened on the "same day." Ruiz went to lengths in his testimony to explain that, when he was threatened by Folse, he was concerned about getting the newly purchased lens secured before he received a warning notice for a safety violation (carrying around a piece of unsecured glass). Ruiz acknowledged that purchases from the company safety store can be made only through payroll deductions.

Threat to Ruiz—Respondent's Evidence

Neal Robert (vol. 87) operates the company safety store. Robert testified that he searched Respondent's records for October and November 1993, and he found only one purchase by Ruiz. That was a purchase of some work gloves on November 15. Robert further testified that the store sells two types of lenses, a plain green-filter lens that sells for $1 and a mirror-faced lens that sells for about $32. Robert testified that he performed a computer search of his records; as well as finding no purchases for Ruiz during October or November other than the gloves, he found no purchases of a mirror lens by Ruiz during 1993. Robert was not asked if his search showed any purchase by Ruiz of a green-filter lens during 1993.

Folse (vol. 87), who admitted seeing Ruiz wear "Union-Yes" stickers on his clothing and wear prounion T-shirts, was asked and he testified:

> Q. Do you recall when, if ever, Mr. Ruiz needed to purchase something from the safety store?
>
> A. Not directly.
>
> Q. In November 1993 did you have any conversations with Robbie Ruiz about a welding lens?
>
> A. Not that I recall.

Folse denied that he ever told Ruiz that someone in management was trying to fire him. Folse testified that Ruiz had "bragged" about getting two warning notices when he was loaned to another department and worked for other supervisors. Folse was further asked and he testified:

> Q. Did you ever tell Mr. Ruiz to watch his butt?
>
> A. I told him that he had a lot of citations, that it is time for him to start slowing down a little bit and take it easy.
>
> Q. Did you ever use the words watch your butt?
>
> A. I don't know the exact words.

When asked why he admonished Ruiz to "slow down," Folse replied that Ruiz then had two warning notices and: "Well, for

[501] I have disposed of Respondent's contention about the lack of a supporting charge for certain other 8(a)(1) allegations in sec. IV(A)(1) of this decision. Respondent's contention in regard to the alleged threat to Ruiz, however, has more substance, and that contention is considered here.

one reason, both citations were grounds for termination if we wanted to terminate him, so I mean, he needed to be warned that he was running a thin line, you know." Folse testified that he thought the warning notices from the other supervisors had been for wasting time.

On cross-examination, Folse testified that he had admonished Ruiz "a couple of times" about "watching himself" because he had gotten too many warning notices, but he could remember the dates of neither of those occasions. When asked why he had given these admonishments to Ruiz, Folse testified: "Because after three citations an employee can be terminated, and he had more than three citations. . . . He had over three." Folse testified that he thought that, as well as two warning notices for wasting time that were written by foremen of other departments, he had also written "one or two" safety warning notices for Ruiz.

The parties stipulated that Ruiz received no warning notices in 1992. On June 2, 1993, Folse issued Ruiz a warning notice for not wearing long sleeves as required by Respondent's safety regulations for employees who do welding. The parties stipulated that Ruiz was issued no other warning notices in 1993. On May 6, 1994, Ruiz was issued a warning notice by another supervisor for wasting time. On May 19, 1994, Folse issued Ruiz a warning notice for not wearing a safety belt. On July 14, Ruiz was issued another warning notice for wasting time by another supervisor. Folse admitted that this was the warning notice that Ruiz had bragged about. The parties stipulated that Ruiz was issued no other warning notices in 1994.

Threat to Ruiz—Conclusions

I find that Folse did threaten Ruiz, and he did so at some point between March and September 30, 1993. I further find that the allegation of the complaint is supported by a timely filed charges, although not the charge filed on behalf of Ruiz.

Ruiz testified that, when he was attempting to secure his glass welding-shield lens, Folse told him to "watch [his] butt" because "You know they are out to get you." Folse testified that he could not recall using the phrase "watch your butt," but he denied telling Ruiz that management was "out to get" him. If Ruiz were prone to lie about the matter, he could have done a much better job by adding a word or phrase to the threat that expressly referred to the Union. (At least, if he had wanted to lie, Ruiz could have created some negative mention of the Union by Folse at some other time.) Moreover, in his quoted evasiveness when questioned about the lens incident, Folse was incredible. I credit Ruiz.

The Union was not mentioned by Folse, but Ruiz was wearing prounion insignia at the time. The wearing of prounion insignia has been found to be the express basis of many threats in this decision, and there is no other feasible explanation for Folse's admonition to Ruiz. Folse testified that he admonished Ruiz to watch himself because Ruiz had received multiple warning notices, but he was entirely vague and forgetful about when he did so. Certainly, to the extent that it attempted to convey the impression that in 1993 he would have admonished Ruiz to watch himself because of his multiple warning notices, Folse's testimony proved to be false; Ruiz had received no warning notices in 1992, and he received only one warning notice in 1993 (from Folse). At another point Folse testified that his admonition came after Ruiz bragged about getting a warning notice from another supervisor; on cross-examination, however, Folse admitted that Ruiz' bragging must have occurred after a 1994 warning notice. Therefore, the "bragging" premise for Folse's admonishment to Ruiz could not apply to any 1993 threat. That is, there is no legitimate explanation for Folse's telling Ruiz in 1993, as I find that he did, to "watch [his] butt" because other supervisors were "out to get" him. The only questions are when in 1993 the threat occurred and whether the complaint's allegation is supported by a timely filed charge.

The threat did not occur in December 1993, a month that was entirely within the 10(b) limitations period for Ruiz' May 11, 1994 charge. The General Counsel apparently possessed no inkling that the lens incident, and threat, occurred in December; if he had, he would have called Ruiz in rebuttal and had Ruiz produce his pay stubs that reflected a payroll deduction in that month. (Alternatively, the General Counsel would have subpoenaed relevant records of Respondent.)

The threat did not occur in November 1993, a month that would have been at least partially within the limitations period of Ruiz' charge. When he was asked when it was that Folse threatened him, Ruiz testified,"I think it was November." Ruiz appeared to be only guessing at the date. In addition, on cross-examination, Ruiz insisted that the threat occurred on the same day that he purchased the welding-shield lens. Respondent, however, proved that the only purchase that Ruiz made in October or November 1993 was Ruiz' November 15 purchase of some work gloves. Respondent thereby eroded the premise of Ruiz' guess, and Respondent thereby proved that the event happened before November, or even October 1993.

Respondent did not, however, prove that the threat did not occur in 1993 at some time on or before September 30. Ruiz testified that the threat occurred when he was attempting to take the time to secure a welding-shield lens that he had bought that day. Respondent proved that Ruiz did not purchase an expensive ($32) mirror lens at the company safety store at any time in 1993. Ruiz, however, did not testify that the lens that he purchased was a mirror lens; moreover, Folse testified that tack-welders, such as Ruiz, did not usually purchase mirror lenses. Respondent's proof, therefore, did not negate Ruiz' testimony that he bought some welding-shield lens in 1993 (and, according to Folse's testimony, it was probably a cheap ($1) green-filter lens). Nor does Respondent's proof negate Ruiz' testimony that, on the day that he bought some welding-shield lens, he was threatened.

I credit Ruiz' testimony that he was wearing "Union-Yes" stickers at the time of the threat which, as I have found above, occurred before October. The organizational campaign began, and the employees started wearing prounion insignia, in March 1993. Therefore, as I further find, the threat occurred between March and September 30, 1993. Because all dates before October 1993 were more than six months before May 11, 1994, paragraph 9 of the complaint is not supported by Ruiz' charge of that date. Therefore the allegation must be dismissed if Ruiz' charge is the only charge to be considered. Ruiz' charge, however, is not the only charge to be considered.

As discussed in the consideration of the alleged plant-closure threat by Respondent's president, Bossier, the first charge in this matter was the charge filed on June 7, 1993, on behalf of alleged discriminatee James (Danny) Cox. All allegations of Respondent's unlawful expressions of animus toward the employees' prounion activities that occurred within 6 months before that date, the proof of which would tend to support Cox's charge, are supported by that charge. Certainly, a threat against

wearing prounion insignia would tend to support Cox's charge. (The fact that Respondent ultimately defended against the Cox charge and complaint allegations is irrelevant.) In addition, under *NLRB v. Fant Milling Co.,* 360 U.S. 301 (1959), the Cox charge supports all subsequent complaint allegations that would tend to prove the merit of that charge. Finally, any number of the discrimination charges that were filed after Cox's charge also support the allegations of Folse's threat; for example, the charge in Case 15–CA–12225, which was filed on behalf of discriminatee Charles Fleming on August 31, 1993, would support any allegation of such unlawful expressions of animus as Folse's threat that occurred on or after March 1, 1993. The allegation of paragraph 9 of the fourth complaint, therefore, is supported by a timely filed charge.

I therefore find and conclude that, in violation of Section 8(a)(1), Respondent, by Folse, at some time between March and September 30, 1993, threatened an employee with unspecified reprisals because he was wearing prounion insignia.

Ruiz' Being Denied use of a Telephone—the General Counsel's Evidence

Ruiz testified that about 2:30 p.m. on May 11, 1994, he asked Folse if he could be momentarily excused from working on a platen to make a personal telephone call. After obtaining permission from Folse, he went to use a telephone that was near his work area and made the call. The telephone that he used, Ruiz testified, was about 60 feet from a building where supervisors congregated; the building had a large window from which anyone inside would have an unobstructed view of the telephone that Ruiz used.

Ruiz testified that about 11 a.m. on May 12, he again asked Folse for permission to use the telephone. According to Ruiz:

> Well, I asked Keith [Folse] if I could use the phone at about 2:30 p.m, when I go on break, to make an important phone call, and he said no, that he can't let me go. And I said, "Why?"
>
> And he said the previous day, when I used the phone, two bosses saw me on the phone and told Keith—instructed Keith not to give me permission to use the phone any more or I could get fired—they would fire me.
>
> So I said, "Well, I have an important phone call to make. Could I knock off early?"
>
> He said, "Sure; I would rather see you knock off a little early than get fired." So I knocked off.

Ruiz acknowledged that Folse did not say who the "bosses" were.

Ruiz' Being Denied use of a Telephone—Respondent's Evidence

On direct examination, Folse testified that, until October 1993, David Zeringue was the superintendent of the shipfitting department. Zeringue retired in October and, before then, Zeringue told him that he had seen Ruiz talking on the telephone "many times." Zeringue told Folse to keep Ruiz in his work area during working time. Folse further testified that he then went to Ruiz and told him to secure a yard pass ("blue pass") when he wanted to leave his work area to use the telephone (or for any other reason). Ruiz replied that he would. Folse testified that before this occasion, Ruiz had never asked for permission to leave the work area to use the telephone. Folse further testified that, on several subsequent occasions when Ruiz came to him and asked for a pass to use the telephone, he gave it to Ruiz without any discussion. Folse testified that he could not remember if Ruiz ever asked him for permission to use a telephone 3 hours later in the day.

On cross-examination Folse disclaimed all memory about when it was that he told Ruiz to get a pass if he wanted to leave the job to use the telephone; Folse admitted that he could not even say if it occurred in 1993 or 1994, but he insisted that it was only once because Ruiz thereafter complied with his instruction to get a pass before leaving the work area to use the telephone.

Ruiz' Being Denied use of a Telephone—Conclusions

Folse testified on direct examination that in 1993, before Zeringue retired in October, Zeringue told him to keep Ruiz working, rather than using the telephone. Folse testified that he then instructed Ruiz to request a pass to use the telephone (and that Ruiz thereafter did make such requests, and that he thereafter granted such requests). On cross-examination, however, Folse admitted that he could not remember if his instruction to Ruiz came in 1993 or 1994. If there had been any truth to Folse's testimony on direct examination, he would have at least related the event to his instruction about Ruiz that came from Zeringue. Folse was not credible on this point; moreover, I do not believe that Ruiz constructed the event out of whole cloth. I find that Respondent denied Ruiz the use of the telephone on May 12, 1994.

Folse admitted that he saw Ruiz wearing prounion insignia and prounion T-shirts. As I have concluded above, Ruiz, like so many other employees, was threatened with discrimination for wearing prounion insignia. The General Counsel has therefore presented a prima facie case that Ruiz was unlawfully denied the use of a telephone on May 12. Because Respondent denies that its alleged action occurred, it has presented no defense for that action. Therefore, unless there is no charge to support the allegation, as Respondent further contends, a violation must be found.

Again, the only charge on behalf of Ruiz was filed on May 11, the day before the denial of the telephone use. Moreover, that charge alleged only the unlawful issuance of a warning notice to Ruiz on May 6. Respondent contends that, because the filing of the charge predated the denial of telephone use to Ruiz, and because the charge alleged a different violative offense (a warning notice, as opposed to a denial of telephone use), the complaint's allegation regarding the denial of telephone use to Ruiz is not supported by that charge. I reject these contentions. The charge was not a charge of unlawful denial of telephone use, but it was a charge of unlawful discrimination under Section 8(a)(3). Again, as the Supreme Court held in Fant Milling, related unlawful acts that are committed after the filing of a charge come within that charge. Therefore the fact that the charge was filed one day before the alleged conduct occurred does not vitiate the charge as a basis for the complaint's allegation. Moreover, in *Waste Management of Santa Clara Co.,* 308 NLRB 50 (1992), the Board held that, even though allegations of a charge were dismissed, that charge supported other allegations of a complaint where the same subsection of the Act was invoked, the conduct alleged in the charge and the conduct alleged in the complaint occurred in the "same general time period," and the theory of the complaint was the same as that of the charge, that the employer was committing unlawful acts of resistance to an organizational campaign. This case meets all three criteria: the charge and the complaint both

allege violations of Section 8(a)(3); there is less than a week's difference in the dates of the warning notice and the denial of the telephone use; and the theory of interference with the Union's campaign is the same. The allegation of the complaint that Respondent discriminated against Ruiz by denying him telephone use on May 12 is therefore supported by a timely filed charge.

Ruiz testified that, because permission to use the telephone was denied to him on May 12, he was forced to leave work at 2:30 p.m. Respondent, of course, possessed Ruiz' payroll records, but it did not dispute this testimony by Ruiz that he lost one hour's pay on May 12. By Respondent's conduct, therefore, Ruiz was in effect suspended for the hour that he was forced to miss to make the telephone call. I therefore find and conclude that, by denying Ruiz telephone use, and suspending Ruiz, on May 12, Respondent violated Section 8(a)(3).

b. Kenneth Patterson's being denied a wage increase

Kenneth Patterson (vol. 54), a sheet-metal mechanic's helper, did not receive a wage increase about May 18, 1994. The fourth complaint, at paragraph 29, alleges that Patterson was on that date denied a wage increase in violation of Section 8(a)(3). The General Counsel contends that Respondent denied an increase to Patterson because of his known union activities and expressions of sympathy which included his wearing prounion insignia. The General Counsel further alleges that, in violation of Section 8(a)(1), Patterson was instructed to remove prounion insignia from his clothing and Patterson was threatened with loss of a wage increase because he had been wearing prounion insignia. Respondent denies that the threat and instruction occurred. Respondent further answers that its supervisors had no knowledge of any union activities or sympathies of Patterson at any relevant time and that Patterson was not entitled to a wage increase at the time claimed by the General Counsel. Ultimately, I find and conclude that Respondent did not unlawfully withhold a wage increase from Patterson.

Patterson worked as a sheet-metal mechanic's helper under the direct supervision of Foreman Nathan Howard. Patterson testified that he wore a union T-shirt, and placed "Union-Yes" stickers on his hardhat, for the first time, on May 6, the day of the stockholders' meeting that was conducted at Respondent's administration building. Patterson further testified that on May 13, he worked with employee David Thompson who was also wearing a union T-shirt and "Union-Yes" stickers on his hardhat. According to Patterson:

> Me and David was working up in the pilot house and Nathan Howard come up and told us, "You need to throw them Union shirts away and take them stickers off your hardhats." . . .
>
> David asked him, did he [Howard] want him [Thompson] to get him [Howard] a union shirt, and he [Howard] got mad and walked away.

(Thompson did not testify.) Based on this testimony by Patterson, paragraph 13 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Howard: "[I]nstructed its employees to remove union insignia from their clothing."[502]

Patterson further testified that about May 18 Howard conducted a safety meeting. At the end of the meeting Howard asked if any employees had any questions. Several employees asked about wage increases. Howard asked which among them thought that they deserved a wage increase. Patterson responded to Howard that he deserved a wage increase because, "I could do some sheet metal welding, I could read a blueprint, do some of the pickup lists and do fitting." Howard replied to Patterson that he did not deserve a raise. (Patterson testified that mechanics, not helpers, were paid to do fittings.) Patterson further testified that later in the day:

> As me, Thomas and Larry Rossier was coming on the boat, Nathan Howard walked up and pulled me over to the side. . . .
>
> Nathan Howard told me the reason why I couldn't get no raise was because a man seen me with a union shirt on.
>
> And I asked him, "That is the reason why I can't get a raise, because of the Union shirt?"
>
> He said, "Yes."
>
> And I told him, "They don't need for me to do any more fitting then." Then I walked away.

Based on this testimony by Patterson, paragraph 16 of the fourth complaint alleges that, in violation of Section 8(a)(1), Respondent, by Howard: "[I]nformed its employees that an employee was not getting a wage increase because of his activities in support of the Union."[503]

On direct examination, Howard (vol. 144) denied telling Patterson to remove his prounion insignia, and he denied telling Patterson that he would not receive a wage increase because he had been seen wearing a prounion T-shirt. Further on direct examination, Howard flatly denied that he ever saw Patterson wearing a prounion sticker or T-shirt. On cross-examination, however, Howard was asked the same questions, and Howard then replied about Patterson that "[h]e may have" worn prounion stickers and "[h]e may have" worn prounion T-shirts. Howard thereby retracted his direct examination's unequivocal denials about what he saw Patterson wear. In going through this exercise, Howard demonstrated that he was not a reliable witness, at least about what he had said to Patterson. I credit Patterson.

I find and conclude that, in violation of Section 8(a)(1), Respondent, by Howard, on May 13, 1994, instructed its employees to remove union insignia from their clothing. I further find and conclude that, in violation of Section 8(a)(1), Respondent, by Howard, on May 18, threatened an employee that he would not receive a wage increase because that employee had been seen wearing prounion insignia.

Patterson further testified that later in 1994 other employees in the sheet metal department received merit wage increases, but he did not. Respondent, however, adduced evidence that from January 1, 1994, through January 31, 1995, only four merit wage increases were issued in the sheet metal departmentto helpers such as Patterson. Patterson was one of these four, but all of the wage increases were issued in order of seniority and Patterson was the least senior of the four helpers who received the wage increases. The General Counsel made no attempt to rebut this evidence which I found credible and probative. On brief, the General Counsel argues that, because Howard unlawfully threatened Patterson with a denial of wage

[502] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV(A)(1) of this decision, I find and conclude that this allegation is supported by the timely filed charge of discrimination against Patterson, as well as the charge in Case 15–CA–12171–1.

[503] Id.

increase, the matter is proved. I disagree; a threat unlawfully to withhold a wage increase fortifies a prima facie case of an unlawful withholding, but it hardly creates a conclusive presumption. In this instance, Respondent has shown that it would not have granted Patterson a wage increase during 1994 even in the absence of his protected activities. Accordingly, I shall recommend dismissal of that allegation of the complaint.

c. Respondent's differing allowances for its employee—witnesses at representation hearing

The second complaint alleges:

> 133. About January 7, 1994, Respondent discriminated against the employees whose names are set forth below, who were subpoenaed by the Respondent and who are supporters of the Union, by paying them a lesser amount than that paid to those employees who testified at the request of the Respondent and were not supporters of the Union:
>
> Harold DiMaggio — Richard St. Blanc
> Chester Green — Ray Steward
> Philip Perera — Harry Thompson
> Terry L. Perkins

(These seven individuals had served as observers at the June 25 Board election, and they will be referred to as "the observers.") The second complaint further alleges:

> 150. Respondent engaged in the conduct described above in paragraph 133 because Respondent expected the named employees to testify against its interests at a representation hearing before the Board in Case No. 15–RC–7767.

The complaint further alleges that, by this alleged conduct, Respondent violated Section 8(a)(3) and (4) of the Act.

On day-9 of the hearing, the parties entered the following stipulations:

> 1. "[A]bout January 7, 1994, in connection with the post-election hearing in Avondale Industries, Inc., case number 15–RC–7767, the Employer through its agents served a subpoena ad testificandum on each of the below-listed employees, each an employee within the meaning of the Act, [and] each of whom the Union [had] advised Avondale [at some point in time before the election] would serve as an observer for the Union at the June 25, 1993, representation election at Avondale: [Names of the seven observers are listed.]"
>
> 2. "[O]n January 7, 1994, the Employer personally served subpoenas on the above-listed employees during their respective hours of work at Avondale. The subpoenas commanded the attendance of the above-listed individuals at the post-election proceeding on January 18, 1994. With their respective subpoenas, the alleged discriminatees each received a check in the amount of $50.52 for their subpoena witness fee and anticipated transportation expense, $40 and $10.52 respectively."
>
> 3. "Due to a postponement of the hearing not caused by the Employer on January 18, 1994, the above-listed individuals honored their respective subpoenas on January 19, 1994. After reporting to the hearing, the above-listed individuals were released by approximately 10:30 a.m. without testifying."
>
> 4. "The hearing was located at [Regional Office address], approximately 12 miles from the work location of each of the employees at [Respondent's address]."
>
> 5. "On January 19, 1994, the regular work shift times for each of the above-listed employees was 7:00 a.m. to 3:30 p.m."

On day-30 of trial, Respondent's counsel represented that:

> 1. "In this [the representation] proceeding, Respondent paid employees other than those subpoenaed their lost wages."
>
> 2. "Those who voluntarily appeared here were paid their lost wages. Certain individuals, including the seven individuals named in paragraph 133, but also including all [other] individuals who are [had been] identified as union observers to the Company, were subpoenaed [by Respondent], as well as a number of other individuals who were subpoenaed to attend this [the representation] proceeding."
>
> 3. "For individuals who were subpoenaed [by Respondent] and whose attendance was compelled by subpoena, they were paid the regular witness fee, not their lost time."
>
> 4. "They [the employees who were not subpoenaed] punched off their regular number—signed off their regular MCR and signed on a new MCR when they got in the [Company] van to come down to the proceeding, and when they got back to Avondale, they signed off [on] that MCR."
>
> 5. "For individuals who [were not subpoenaed and who] did come [to the representation hearing], and who were stuck here over the lunch period, rather than sending them off into the city and hoping they were back in time to testify, we provided them lunch."
>
> 6. Counsel further conceded that, during the course of the representation hearing (which lasted several months), there were 150 of these nonsubpoenaed employees whom it compensated for the wages that they lost in appearing pursuant to Respondent's requests.

Respondent's subpoenas required the observers to appear at the hearing at 10 a.m. on January 19. Three of those observers testified for the General Counsel. Perera (vol. 10) testified that he worked from 7 to 9 a.m. on January 19; he came to the Regional Office where he was first met by a union organizer; he was taken to meet a field examiner with whom he sat and gave an affidavit for 2 hours; when he finished, the organizer told him that the observers had been released and he could go home, which is exactly what he did. Perera admitted that he could have been back to the plant within 30 minutes after he left the Regional Office. St. Blanc (vol. 9) admitted that he did not attempt to go to work at his usual starting time of 7 a.m., work as long as he could, and then go to the hearing (as Perera did). Instead, St. Blanc went directly from his home to the hearing. When he was released at 10:30 a.m., St. Blanc stayed in the downtown New Orleans area for an hour or more, and then he went back home (rather than go to the plant to finish his shift). Green (vol. 35) made similar concessions. Except for Perera's working for 2 hours before coming to the representation hearing, there is no evidence that any of the observers attempted to come to work before they came to the hearing, and there is no evidence that any of the observers attempted to return to work after they were released.

Of the employees whom it called as witnesses, Respondent provided transportation for those who had not served as union

observers at the Board election, and whom it had not subpoenaed, and it provided transportation expenses for the seven observers whom it had subpoenaed; therefore, there is no evidence of discrimination in regard to transportation allowances. The issue lies in the differences in other moneys paid to the representation-case witnesses, all of whom were Respondent's. Respondent called the employees who were not subpoenaed "volunteers." They may have come forward, but Respondent did not have to transport them, and it did not have to pay them their regular hourly wages for all the time that they were away from the plant. By offering this compensation, or at least agreeing to pay it, Respondent in effect requested the employees to appear and testify for it. That is, all of the witnesses concerned here were Respondent's witnesses, and the issue is whether it was unlawful discrimination for Respondent to have paid its witnesses who had not been union observers their full day's wages while paying its witnesses who had been observers only the statutorily required witness fee of $40, which was less than a full day's wages.

On brief, the General Counsel cites *Electric Research I,* 187 NLRB 733 (1971). In that case, the Board found a violation of Section 8(a)(4) where the employer denied a perfect attendance award to employees who had appeared at a representation hearing pursuant subpoenas that had been requested by a union. Respondent, on the other hand, cites *Electric Research II,* 190 NLRB 778 (1971), which found no violation in the employer's paying its witnesses to a Board hearing their full wages for the day while not paying the General Counsel's witnesses anything; the Board found no obligation of a party to "subsidize its opponent." To the same effect is *Rexart Color & Chemical Co.,* 246 NLRB 240 (1979), which is also cited by Respondent. None of these cases is controlling here; each involves employers' treatment of witnesses called by the opposing parties. All of the witnesses involved in this case were, as I have noted, Respondent's witnesses.[504] The issue, therefore, is whether Respondent unlawfully discriminated among its witnesses.

As Respondent argues, on January 19, with the exception of Perera's working for 2 hours before the representation hearing convened, the seven observers chose not to work before going to the hearing and after they were released. It is also true that, as well as paying the seven observers the statutory fee ($40) for the one-half hour that it required them to be at the representation hearing, Respondent did nothing to prevent those employees from earning their regular wages for the remainder of the day. It is further possible that, if the seven alleged discriminatees had spent no more time than necessary away from the plant, they could well have done *better* monetarily *because* they were subpoenaed. That is, for the day, they could have cleared $40 *plus* their wages for at least 5 hours if: (a) they had worked from 7 to 9 a.m.; (b) they had gotten to the hearing by 10 a.m.; (c) they had taken the modest efforts that would have been required to return to the plant within 2 hours after they were released at 10:30 a.m.; and (d) they had worked from 12:30 to 3:30 p.m.[505]

Nevertheless, Respondent caused two groups of employees to be at the representation hearing; to wit: (1) a group of seven employees who had been observers at the Board election, and (2) a group of 150 employees who had not been observers. Respondent paid the observers the statutory minimum of $40; it paid the members of the group who had not been observers a full-day's pay, which amounts were undoubtedly greater than $40. Respondent argues that the observers could have returned to work, and that is true. For that circumstance to be a factor that defeats a charge of discrimination, however, Respondent would have had to show that the 150 employees to whom it paid a day's wages worked before and after they came to the hearing.[506] There was no such showing. Respondent's representations that the nonobservers were on their regular MCRs when they were not at the hearing (or in transit) is not evidence of that fact,[507] and Respondent's representations are certainly not evidence that they actually did any work before or after they came to the hearing.

In summary, the difference in Respondent's treatment of the two groups of employees whom it caused to be at the representation hearing was based on the prior union activity of one of the groups, service as union observers. This was discrimination and it was discrimination based on prior union activity.

I therefore find and conclude that, by discriminating against the seven above-named employees in regard to pay for a day that the employees were compelled by Respondent to appear at a Board representation hearing because those employees had served as union observers at the June 25, 1993 Board election, Respondent violated Section 8(a)(3) of the Act.[508] Finally, Respondent used the subpoenas as an excuse for its discrimination against the seven union election observers whom it required to appear at the representation hearing, but its treatment of those employees was not caused by their appearance at the hearing; therefore, I shall recommend dismissal of the 8(a)(4) allegation of the complaint.

12. Employees transferred to the Westwego yard, then warned or discharged for various reasons

As mentioned in the introductory section of this decision, Respondent's Westwego yard is about 3 miles down-river from the main yard. Located at the Westwego yard is Respondent's small boat division where Respondent builds barges and small boats such as tour boats and casino gambling boats. The vice president of Respondent who is in charge of the Westwego operation is Barry Heaps. Immediately subordinate to Heaps at Westwego is Ronald Johnson, production superintendent. General Foremen Robert Luttrel and Devon Barber, and several foremen, report to Johnson and Heaps.

[504] This factor, among others, also distinguishes *Confort & Co.,* 275 NLRB 560 (1985), which is also cited by Respondent. In that case, the employer denied holiday pay to an employee who had finished testifying but stayed at a hearing to assist the General Counsel on the day before Thanksgiving. Holding the subpoena "irrelevant," the Board found no violation because the employer acted on a good-faith interpretation of a collective-bargaining agreement, and the Board further found that the employer acted upon previously existing policies about which it adduced probative, credible evidence. (On brief, Respondent represents the existence of some such policies, but it had adduced no evidence of their existence at trial.)

[505] St. Blanc testified that he was making $11.75 per hour. The $40 witness fee more than covered the pay for the 3 hours that the subpoena required him to miss work.

[506] A different conclusion would require that the General Counsel prove the negative proposition that all employee-witnesses to whom Respondent paid a full day's wages did not work full days.

[507] Respondent did not produce any such MCRs.

[508] At the compliance stage of this proceeding, the statutory fees that the observers received, of course, are to be deducted from gross backpay.

Before the events of this case, Respondent's last contract to build a small boat at Westwego was completed early in 1993. By June, the employee complement at Westwego was down to about 20 employees. On July 8, 1993, Respondent obtained a contract to build a casino gambling boat at Westwego. During July and August Respondent transferred 30 employees from the main yard to Westwego to begin preparing the yard for construction and to start the initial building phases of the contract.

The complaints allege that, in violation of Section 8(a)(3), 5 of the 30 employees who were transferred to Westwego in 1993 were selected because of their protected activities at the main yard; to wit: Edward Armstrong, Joseph Melton, Luis Gonzalez, Walter Brown, and Charles Fleming. Armstrong, Melton, and Gonzalez were pipefitters or pipe-testers at the main yard; Brown and Fleming were welders. Armstrong, Melton, Brown, and Fleming were discharged while they were working at Westwego; Gonzalez was issued a warning notice. The complaints further allege that by discharging Armstrong, Melton, Brown, and Fleming, and that by issuing the warning notice to Gonzalez, Respondent violated Section 8(a)(3) of the Act. Respondent answers that all 30 main yard employees were selected for transfer to Westwego because of business necessities; Respondent further answers that Armstrong was selected for transfer for the additional reason that he had a poor disciplinary record. Finally, Respondent contends that Gonzalez was warned and that the other four alleged discriminatees were discharged solely because of their misconduct. The General Counsel replies that the business-necessity defense is a pretext as shown by the fact that none of the five alleged discriminatees were used at Westwego for the skills that they possessed; instead they were given menial jobs at Westwego. The General Counsel further replies that none of the employees engaged in the misconduct which Respondent attributes to them; alternatively, the General Counsel replies that the five alleged discriminatees were disparately treated because other employees engaged in similar conduct but they were not similarly disciplined or discharged. Ultimately, I find and conclude that: (1) Armstrong, Melton, Gonzalez, and Brown were unlawfully transferred to Westwego; (2) Fleming was not unlawfully transferred to Westwego; (3) Armstrong, Melton, and Fleming were unlawfully discharged; (4) Brown was not unlawfully discharged; and (5) Gonzalez was not unlawfully issued a warning notice.

(Alleged discriminatee Charles Kent was also transferred to Westwego and thereafter discharged; Kent, however, was not transferred to Westwego until 1994, and his transfer is not alleged as a violation of the Act. Kent's case, however, does involve some of the same supervisors as those who appear in the cases of Armstrong, et al., and it is placed at the end of this section of the decision.)

a. Edward Armstrong

Edward Armstrong (vols. 4, 5, 35), a pipefitter, was transferred from the main yard to the Westwego yard on July 30, 1993, and on September 13 Armstrong was discharged. Paragraph 110 of the second complaint and paragraph 27 of the first complaint allege, respectively, that by transferring and discharging Armstrong Respondent violated Section 8(a)(3). The General Counsel contends that Respondent transferred and discharged Armstrong because of his known union activities and expressions of sympathy which included Armstrong's wearing prounion insignia, Armstrong's displaying a prounion sign during a plantwide employer campaign meeting conducted by Respondent's chief executive, Albert Bossier, and Armstrong's appearing on a television newscast to speak in favor of the Union. The complaint further alleges that, in violation of Section 8(a)(1), Armstrong was specifically threatened with transfer and discharge because of his union activities. The complaint further alleges that Armstrong, Melton, Gonzalez, and other employees who were transferred to Westwego were unlawfully threatened by a Westwego supervisor's statement that the transferees would not have been transferred had it not been for their prounion sympathies. Respondent denies that the alleged threats occurred. Although Respondent admits that some of its supervisors knew of Armstrong's prounion sympathies, it further answers that Armstrong was selected for transfer solely because of business necessities and a poor disciplinary record. Respondent further answers that Armstrong was discharged solely because he intentionally engaged in the safety-rules violation of wearing an unauthorized faceshield while welding, and Respondent contends that Armstrong did so at a time when he had been issued several other warning notices, including specifically a recent final warning notice for safety violations. The General Counsel replies that the business-necessity defense for Armstrong's transfer was a pretext as shown by the fact that Armstrong was never used as a pipefitter at Westwego. The General Counsel further answers that the welding-shield defense is a pretext because Armstrong, and other welders, had previously been allowed to use "unauthorized" shields with impunity. Ultimately, I find and conclude that Armstrong was both transferred and discharged in violation of Section 8(a)(3).

(1) Armstrong's pretransfer conduct and the alleged threats to him

As noted early in this decision, Albert Bossier, Respondent's president, gave several preelection speeches to yard-wide gatherings of employees in the area outside the Shot House. Armstrong testified that he brought a sign to Bossier's June 21 meeting. The sign was made of cardboard; it was about 2 feet by 3 feet; further according to Armstrong, the sign said: "Vote Yes Union." Armstrong further testified that he held the sign above his head during the entirety of the 30-minute meeting. Armstrong testified that after the meeting, he folded the sign and placed it into his clothing. As he left the meeting and walked toward his work area, he was followed by two men whom he recognized as electrical department supervisors who were speaking into walkie-talkies. When he got to his work area at wet dock-3, he saw Electrical Department Assistant Superintendent Gerry Gerdes and Electrical Department General Foreman Kenny Danos, as well as the two men with the walkie-talkies. The latter two men began pointing to Armstrong and speaking to Gerdes and Danos. When he got to a materials cage where the pipefitters stored their tools, Armstrong began collecting what he needed to get back to work. He looked up and saw Danos and Gerdes watching him. As he left the materials cage area, he turned and saw Danos and Gerdes going through his box of tools. By that time, further according to Armstrong, Tate LeFort, Armstrong's foreman, had also come to the area. As Armstrong walked by LeFort, he heard Gerdes ask LeFort what Armstrong's name and badge number were; LeFort told Gerdes.

Armstrong further testified that later on June 21 LeFort called him to his office. Present also were Charles Knowles, a

pipefitter, and Raymond Oliveri, leadman for LeFort. According to Armstrong:

> My foreman [LeFort] had called me up there, and—to inform me that he had been to a meeting. Management had called him to a meeting, and he informed me that all foremans involved in the incident with the "Vote Yes" sign were at this meeting, along with several members of management. He didn't go into detail on their names.
>
> And he informed [me] that they had had a meeting and had come to the conclusion that they could do nothing to me directly for holding up this sign, but that they wanted me out of their shipyard.

Armstrong testified that he did not respond to LeFort.

Knowles did not testify. Leadman Oliveri was called as a witness by the General Counsel.[509] Oliveri (vol. 7) testified that Armstrong's sign said, "Vote Onion," not "Vote Union," and that he only saw Armstrong showing the sign to a few people, not holding it above his head.[510] Oliveri testified that, after Bossier's meeting, "I seen Ed running around the buildings, and the electrician foremen chasing him." Oliveri also testified that Gerdes asked him who Armstrong was and who Armstrong's foreman was. Oliveri told him. Further, Oliveri testified that, later on June 21, when Armstrong was not present, LeFort told him that he had attended a meeting with higher management; according to Oliveri:

> He [LeFort] came back from the meeting and told me that he had got his ass jumped because he couldn't control his people. . . . He said [Production Vice President Michael] Simpson is the one that jumped him. . . . He said he [Simpson] jumped him because he couldn't control his people.
>
> Well, later on, about 2:00 o'clock, Ed Armstrong had come in to check on something, and that is when [LeFort] told him what had went on. And he [LeFort] told him [Armstrong] that they [Simpson, et al.] told him they wanted him out, out of the yard. And he [LeFort] said he wasn't going to fire him, but he said he [Armstrong] would be lucky to stay there 60 days if he didn't watch himself, that people were going to be looking out for him. He done marked himself.

Armstrong had not testified that, on June 21, LeFort said that Armstrong might be out of the yard in "60 days." As will be seen, however, Armstrong did testify that LeFort made such a statement on June 23, at a time that Oliveri was also present.

On June 22, further according to Armstrong, as he and Knowles waited in LeFort's office to sign out for the day:

> My foreman, Tate LeFort, had walked up on us to give us a time sheet to sign out with. And as he walked up, he noticed I had "Vote Yes" stickers on my hardhat. And he turned to me and said, "Ed, if you don't remove the "Vote Yes" stickers from your hardhat, you are going to cause me to have to make you lose your job." . . .
>
> I didn't respond anything.

In Respondent's case, LeFort testified that Armstrong had placed prounion insignia on his hardhat at the first of the organizational campaign in March. LeFort further testified that he told all members of his crew that they should not cover up the "6" on their hardhats (which designates the pipe department) with the prounion stickers, or anything else, but he denied that he told Armstrong that he could be discharged for having such stickers on his hardhat. Armstrong gave no indication of why LeFort would have "noticed" the stickers on June 22.

On June 23, at lunchtime, camera crews from a local television station came to a gate at the main yard. Many employees and supervisors exit that gate at lunchtime to buy food at an establishment across the road. Armstrong testified that, as he left the gate, he saw the camera crew completing an interview with Pipe Department Foreman Ronald Oliveri (again, brother of Leadman Raymond Oliveri). Armstrong testified that the camera crew then stopped him because he was wearing prounion stickers on his hardhat. The television crew asked him for comments, and Armstrong was recorded making comments favoring the Union. While Armstrong was being interviewed, Oliveri stood within a few feet of Armstrong. (During that evening's news program, when Armstrong's image appeared on screen, so did his name and "Pipe Department." Pipe Department General Foreman John Whittington admitted seeing Armstrong on that broadcast.)

Armstrong testified that at the end of the June 23 shift he went to LeFort's office to sign out for the day. Leadman Oliveri and Knowles were there as well as LeFort. According to Armstrong:

> Mr. LeFort, as I walked into his office, said, "Ed, I will make a bet with you." And I just waited for a minute. And he said, "I will give you 60 days; I bet you [that] you will be gone in 60 days. They don't care if you collect unemployment or not; they just want you out of their yard."

Leadman Oliveri did not testify that LeFort made a "60-day" threat other than on June 21.

Based on Armstrong's and Oliveri's testimony, the first complaint alleges the following:

> 21. About June 21, 1993, Respondent, by Tate LeFort at its facility, threatened to remove an employee from the main shipyard because he had aided or supported the Union.
>
> . . . .
>
> 23. About June 22, 1993, Respondent, by Tate LeFort at its facility, threatened its employees with discharge if they continued to wear "Vote Yes" stickers on their hardhats.
>
> 24. About June 23, 1993, Respondent, by Tate LeFort at the facility, threatened its employees with discharge because they had aided or assisted the Union.

On July 13, Foreman Ronald Oliveri issued a warning notice to Armstrong for intentionally unsafe conduct. The issuance of that warning notice is not alleged as a violation of the Act, but the warning notice is an important part of Respondent's defense for Armstrong's ultimate discharge, and the circumstances surrounding its issuance will be discussed in detail below. The

[509] Leadman Raymond Oliveri is the brother of pipefitting Foreman Ronald Oliveri. Ronald testified for Respondent on certain other issues that are raised in Armstrong's case. At various points the transcript misspells "Oliveri" as "Olivera," and it is accordingly corrected.

[510] Armstrong was recalled much later in the hearing by the General Counsel; he was not asked then (or in rebuttal) about this testimony by Oliveri, and, for possible purposes of review, I find that the sign said, "Vote Onion." As will be discussed, however, all who saw the sign, or heard of it, considered it to be a prounion sign.

General Counsel, however, offered the July 13 warning notice in his case because of what Armstrong wrote in the "Employee Comment" section of the warning notice when it was issued to him. In his comment, after claiming that he had done nothing wrong intentionally, Armstrong wrote:

> This is just another instance where, because I am prounion, management is trying to do anything they can to "get me out of this yard."

The quotation marks are original; that is, Armstrong, himself, placed the last six words of his comment on the warning notice in quotation marks. The General Counsel introduced the warning notice, with Armstrong's quotation of someone else's words, as corroboration for Armstrong's testimony that LeFort had told him that management wanted him "out of their shipyard."

Armstrong's Pretransfer Conduct and the Alleged Threats to Him—Respondent's Evidence

LeFort (vol. 143) testified that Armstrong regularly took passouts on Fridays and was regularly absent on Mondays, but, when he did appear for work, he was an excellent pipefitter. (LeFort acknowledged that he never issued a warning notice to Armstrong for his attendance problems.) LeFort testified that during the morning of June 21, shortly before Bossier's speech, he entered a materials cage in a work area. As he did so, Armstrong folded a piece of cardboard into three sections, placed it under his arm and started walking out of the cage. LeFort asked Armstrong what he had; Armstrong replied, "Nothing," and he continued walking. LeFort further testified that as Armstrong hurriedly left the cage, he left on a desk a mutilated box that had been made of the same type of cardboard as the piece of cardboard that Armstrong had under his arm. Also on the desk, according to LeFort, was a felt-tip marking pen, the cap of which was off.

LeFort testified that when it was time for the Bossier speech he and his crew walked together to the Shot House area. LeFort stood about 10 feet from Armstrong during the speech. According to LeFort:

> He [Armstrong] had a piece of cardboard about two foot long, about a foot wide, and it was folded in three. And he carried it, and during the speech he would flash it like this, like somebody with a trench coat that had—you know, a flasher would flash. And it said, "Vote Onion" on the sign—not "union," but "onion"; that is what he had written on there. And he would flash it like that periodically.
>
> It [the sign] was something put together probably in maybe two minutes. Real makeshift.

LeFort further testified that Armstrong never held the sign above his head during the speech. LeFort did testify that, as he and the rest of his crew walked back to the work area, Armstrong did hold the sign above his head.

LeFort testified that he did not see Gerdes or anyone else following Armstrong back to the work area at wet dock-3. LeFort acknowledged, however, that when he did get to the work area, he was met by Gerdes who "asked me who the man was with the sign." LeFort testified that he and Gerdes were near the pipefitters' materials cage at the time, but he did not see Gerdes, or anyone else from the electrical department, go into the cage at the time.

LeFort further testified that a few minutes after Gerdes left the area he received a telephone call from Pipe Department Superintendent Frank Fradella. According to LeFort:

> [Fradella] asked me if one of my men had made a sign on Company time. And I said I didn't know. I said, "I didn't see him make the sign, but I walked in right when he was folding up the sign."
>
> He said, "Well, I want you to get the man's personnel record and meet me by Mr. Simpson's office."

LeFort secured Armstrong's file and immediately went to Simpson's office where he met Fradella. When he and Fradella went into Simpson's office, Simpson's subordinate vice president in charge of the pipe department, Ken Genter, was also there. According to LeFort, Simpson "asked me if the man came to work with the sign or if he had made the sign on his time, on Company time." LeFort told Simpson what he had seen that morning in the materials cage. LeFort testified that he told Simpson that, although he did not see the lettering on the sign at the time, "I knew he had made the sign."

Further according to LeFort, Simpson then asked to see Armstrong's personnel file. Although warning notices are counted against employees for only 12 months, as discussed in the introductory section of this decision and in the cases of several other alleged discriminatees, Armstrong's file contained warning notices dating all the way back to 1987 when Armstrong was first employed by Respondent. Those warning notices that had been issued in the 12-month period immediately prior to June 21 were:

> 1. On October 6, 1992, Armstrong was issued a warning notice for a violation of the Avondale Employees' Guide's General Offense-12 ("Violation of Company Safety Rules and Regulations through carelessness"). The text of the warning notice is: "Not wearing hardhat in production area. Any further violation of Company rules will result in termination."
>
> 2. Also on October 6, 1992, Armstrong was issued a warning notice under General Offense-4 ("Wasting time, loitering or leaving the working place without permission"). The text of the warning notice is: "Going to lunch early."
>
> 3. On March 3, 1993, Armstrong was issued another warning notice under General Offense-4. The text of the warning notice is: "Employee was not in his work area; he was loitering and not doing job assigned."
>
> 4. On May 23, 1993, Armstrong was issued a warning notice for "Excessive absences and pass-outs."

Further according to LeFort:

> Mr. Simpson took the file and he paged through it, looked at it, then he closed the file, and he threw it on the desk. And he said, "This man has entirely too many violations. There won't be any more violations [warning notices] written on this man; if this man violates any more Company policy, I want you to terminate him."

LeFort further testified that, at some point during the meeting, Simpson asked him why Armstrong "was still working in the shipyard." LeFort testified that:

> And I told him [Simpson] that he [Armstrong] was a good man when he worked. And when he worked, he was a good guy. He just liked to take off every Friday early and miss

> every Monday, and if you would check his record, you would see that. But when he worked, he was a good worker. He really was.

LeFort testified that he then left Simpson's office.

LeFort did not testify that Simpson, at any time during the June 21 meeting in his office, said anything to him by way of admonishment about allowing Armstrong to make a "Vote Onion" sign, or any sign, on working time. LeFort, however, testified that, when he left Simpson's office and returned to his office, he was met by Leadman Oliveri. He told Oliveri, "I got chewed out because Mr. Simpson thought Ed had made the sign on Company time." LeFort denied telling Oliveri that he had been chewed out because he "couldn't control his people," as Oliveri had testified. LeFort testified that Armstrong then entered his office and:

> He [Armstrong] asked me if he was going to be fired for having a sign at the Union meeting. . . .
>
> I told him no, that we weren't going to do him nothing for the sign at the Union meeting. But I told him that I couldn't write him any more citations because he had excessive violations in his file, and that if he violated any more company policies I was going to have to terminate him.

LeFort testified that nothing else was said during that meeting in his office. LeFort denied then telling Armstrong, or ever telling Armstrong, that some members of management wanted him out of the yard, that he would be lucky to stay 60 days, that he had "marked" himself, or that upper management wanted him discharged. At no point, however, did LeFort testify that he told Armstrong that Armstrong was suspected of having made the prounion sign on working time.

Simpson testified (vol. 139) that after the Bossier speech of June 21, when he and his secretary returned to his office, "She [the secretary] asked had I noticed the individual going through the crowd with a sign, and I said, "No. I said, Who was it?" And she said she didn't know but she thought it was a pipefitter [by his green hardhat]." Simpson testified that his secretary did not tell him what the sign said, or how big it was, and he did not ask. Ultimately, however, Simpson acknowledged that, "I inferred that it was something in favor of the Union." Simpson testified that he was concerned solely because, as Simpson phrased it: "How does a person who is working in the shipyard get a chance to make a sign?" Simpson testified that he called Fradella. According to Simpson, "I asked if he had seen a pipefitter carrying a sign, and I would like to know who it is. And as I recall, he had the information; he was able to identify the individual." Simpson told Fradella to bring the employee's foreman to his office. When Fradella, LeFort and Genter assembled in his office, he asked LeFort: "Where did this guy get this sign? How do you get a sign like that on Company time?" Simpson testified that LeFort replied, "I don't know." (That is, Simpson did not testify, as did LeFort, and as Fradella did also, that LeFort explained how he had come upon Armstrong in the materials cage where Armstrong appeared to have made the sign.) Simpson testified that he then reviewed Armstrong's file and found "at least 20" warning notices, many of which were for wasting time. (Simpson acknowledged that the warning notices went back more than a year in time, but he testified that he did not know how far back they went.) After examining the warning notices, Simpson asked Fradella and LeFort why Armstrong was still working for Respondent; LeFort replied that Armstrong was a good worker when he came to work, and Fradella told him, "when you are short of pipefitters, you will carry people who don't perform exactly as you would like them." Simpson further testified that he told Fradella and LeFort (there, in the presence of Genter), "Well, we have carried this person long enough; if he continues to mess up, then you are going to have to terminate him." Simpson did not testify that he chastised LeFort in any way for allowing Armstrong to construct a sign on working time.

On cross-examination Simpson testified that, after he reviewed Armstrong's personnel file, "I said, 'Well, if this individual messes up any more, I think you ought to fire him.'" Simpson acknowledged that he was not aware of any other employee who carried a prounion sign at any Bossier speech. Further on cross-examination, Simpson was asked and he testified:

> Q. Sir, did you ever allow that Mr. Armstrong could have made the sign at home and carried it onto Company property?
>
> A. I considered that.
>
> Q. Did you ever consider that Mr. Armstrong made the sign during lunchtime or some other non-working period?
>
> A. I considered that.
>
> Q. And, sir, is it in some way inappropriate for the employee to have made the sign at home and to put it in his or her pocket and to then bring it onto [the] property?
>
> A. I judged at the time that he couldn't have done that . . . [because] I don't know how you would walk in the gate with a sign of some size without somebody seeing it.
>
> Q. Well, sir, I thought you told us earlier that you didn't know how large the sign was.
>
> A. It was large enough to be seen.

Simpson acknowledged that he did not undertake any investigation to determine when and where the sign was made other than to ask LeFort (who, again, according to Simpson replied, "I don't know.").

Fradella (vol. 142) testified that immediately after the June 21 Bossier speech Gerdes called him and: "He just told me that one of my people was carrying a union sign at the Bossier meeting. . . . [Gerdes said:] 'You better find out what is going on.'" Fradella testified that Gerdes did not know Armstrong's name, and he found out who was carrying the sign by inquiring of his general foremen. Fradella testified that shortly after Gerdes' call he received the call from Simpson. Fradella testified, "He [Simpson] said did I know that one of my employees had a union sign at the speech."

Fradella further testified that when he and LeFort met with Simpson and Genter, Simpson first asked when the sign had been prepared; LeFort responded that he thought Armstrong had prepared it "right before" the Bossier speech, and he told Simpson what he had seen in the materials cage. Simpson then examined Armstrong's personnel file and the warning notices in it. (Fradella testified, "They ran from 1987 up to the present time.") Upon completion of his examination of the warning notices, further according to Fradella, "Mr. Simpson said, the next time he does anything out of the ordinary, he doesn't want to see another warning; he wants the man terminated." Fradella denied that there was any mention of the Union during the meeting in Simpson's office; Simpson and LeFort did also. (Genter did not testify.) As did LeFort, Fradella failed to testify

that Simpson chastised LeFort in any way for allowing Armstrong to make a sign on working time.

Gerdes (vols. 122, 123) testified that after the Bossier speech he rode his motor bike to an area near a ship. He saw a group of pipefitters standing around in a circle, with one pipefitter in the middle. General Foreman Danos just happened to be in the vicinity also. LeFort was also near, and Gerdes asked LeFort what the pipefitters were doing; LeFort replied that he did not know. Gerdes testified: "And so naturally, I was on my bike, and we were about half a block, or a fourth a block apart. I says, 'I will go check on it.'" When asked on direct examination why he took it upon himself to do so, Gerdes replied: "Because it was suspicious. . . . Well, everyone was supposed to be going back to work." As he approached, further according to Gerdes, Armstrong left the group and walked quickly between two containers (boxcars without undercarriages that were used for storage or field offices, as described above). Gerdes testified:

> I was curious. I took the same path. I walked back there, and he was just standing there. . . . He [Armstrong] had something in his hand. I didn't know what it was. I couldn't see. . . . I asked him what he was doing and how come he wasn't working. . . . [Armstrong replied:] "None of your business." . . . [H]e told me I was harassing him. . . . So I told him go to back to work, which he did.

Then, further according to Gerdes, LeFort appeared. He asked LeFort if Armstrong worked for LeFort, and LeFort replied that he did. Gerdes testified, "I left." Gerdes did not testify that he told Fradella, or Simpson, or any other supervisor of the incident. Gerdes denied that he chased Armstrong, and he denied that he was assisted in following Armstrong by men with walkie-talkies. Gerdes denied going through Armstrong's tools or searching for any objects in the area where he found Armstrong. No mention of a sign ("union" or otherwise) was made during Gerdes' testimony.

Armstrong's Pretransfer Conduct and the Alleged Threats to him—Conclusions

According to Gerdes, he saw pipefitters standing around, and their supervisor was right there, but he took it upon himself to investigate the matter himself because it was "suspicious." As he approached, the group did breakup, and the employee who had been at the center walked away quickly. As a supervisor, of course, Gerdes would have wanted the group to breakup, and he would have wanted the group to do so quickly. There could have been nothing "suspicious" in Armstrong's walking away quickly. There was nothing even remarkable about Armstrong's quickly walking away from the group of pipefitters, other than that Armstrong was the employee who had held up the "union sign" (as Gerdes told Fradella) at the Bossier speech. Even before that, however, as an Electrical Department Supervisor Gerdes would have seemingly left it to the pipe department supervisor who was present, LeFort, to breakup the assembly.[511] Finally, Gerdes conflicts directly with LeFort; LeFort did not testify that Gerdes asked him what the men were doing (and LeFort did not testify that he told Gerdes that he did not know). LeFort, instead, testified that Gerdes "asked me who the man was with the sign." Gerdes' testimony, I find, was completely false. I credit Armstrong and Raymond Oliveri, and I find that men (probably including Danos who did not testify) with walkie-talkies directed Gerdes to Armstrong, and they did so because he had displayed a prounion sign at the Bossier speech. Gerdes followed (actually, chased) Armstrong, and Gerdes and Danos searched Armstrong's things in the pipefitters' cage in an attempt to find the sign. Then, as LeFort testified, Gerdes asked him who "the man was with the sign"was. I further believe, and find, that it was Gerdes, not Simpson's secretary, who told Simpson about the sign. I do not believe that the secretary of Simpson was out in the crowd of production workers, in a position of seeing Armstrong "flash" (as Leadman Oliveri described it) the prounion sign, and Respondent offered no testimony of how the secretary could have seen Armstrong with the sign at the Bossier speech, but Simpson could not.

Fradella testified that Gerdes called him and "told me that one of my people was carrying a union sign at the Bossier meeting. . . . [Y]ou better find out what is going on." Then Fradella received a call from Simpson who asked, "[D]id I know that one of my employees had a union sign at the speech." It is plain enough from Fradella's testimony that the only concern of Simpson (and Gerdes) was that Armstrong's sign was a "union sign."

Simpson then convened a meeting in his office of LeFort, Fradella, Genter and himself. LeFort and Fradella testified that LeFort explained how he came upon Armstrong in circumstances that would indicate when and where Armstrong made the sign. Simpson, however, testified that LeFort told him that he did not know how the sign could have been made. Simpson testified falsely on this point, I believe, in order to convey the impression that he believed that a significant amount of working time was used in creating the sign. LeFort, however, testified that: "It [the sign] was something put together probably in maybe two minutes. Real makeshift." LeFort undoubtedly told this to Simpson also, but, even before that, any description of the sign that Simpson received before he ordered the supervisors, and Armstrong's personnel file, to his office would have led Simpson to the conclusion that little, if any, working time was used in making the sign.[512] Nevertheless, Simpson, the penultimate supervisor of 4000 production and maintenance employees, took the time personally to examine Armstrong's file. According to LeFort, Simpson then said that Armstrong would be discharged if he "violates any more Company policy." Fradella testified that Simpson said that Armstrong would be discharged "the next time he does anything out of the ordinary." Even Simpson testified that he told Genter, LeFort, and Fradella that Armstrong should be discharged "if he continues to mess up." If Simpson had been interested solely in Armstrong's assumed waste of working time, he would not have issued only such broad edicts. If Simpson had really believed that Armstrong had violated a policy against wasting time, he would have ordered a warning notice to be issued to Armstrong, or, at least, Simpson would have asked the supervisors why they had not already done so. Finally, not one of the supervisors testified that Simpson, in any way, chastised LeFort

[511] In the case of alleged discriminatee Donald Mason, supra, Gerdes admitted that he issued a warning notice to Mason for standing around, but he did not even speak to the "three or four" employees of other departments who were standing around with Mason. (And the supervisor of those other employees was not in the vicinity, as LeFort was in the vicinity of the pipefitters when Gerdes approached Armstrong.)

[512] I discredit Simpson's testimony that no one described the sign to him, and he did not ask anything about it.

for allowing the sign to be made on working time. I find that, except as a possible reason to discipline or discharge Armstrong, Simpson was not interested in the factors of when and where Armstrong made the prounion sign that he displayed at the Bossier speech of June 21.

Leadman Raymond Oliveri testified that when LeFort returned to his office, LeFort told him Simpson "jumped him because he couldn't control his people." LeFort, however, testified that he told Oliveri that he had been "chewed out" only because he had allowed Armstrong to make the sign on working time. Again, however, neither LeFort, nor Fradella, nor Simpson nor Genter (who did not testify at all) testified that Simpson did anything to "chew" on LeFort for allowing Armstrong make the sign on working time.[513] What LeFort meant by "control" became clear when Armstrong entered the office.[514] As LeFort testified, "I told him no, that we weren't going to do him nothing for the sign at the Union meeting. But I told him that I couldn't write him any more citations because he had excessive violations in his file, and that if he violated any more company policies I was going to have to terminate him." LeFort did not testify that he told Armstrong what "policy" Armstrong had violated; LeFort never testified that he orally warned, or otherwise admonished, Armstrong about wasting working time by making the sign. LeFort further did not testify that he told Armstrong that he was "chewed" upon because Simpson thought the sign had been made on working time. All of these factors fortify my conclusion that Simpson had not actually been interested in where and when Armstrong's prounion sign was made.

The first complaint, at paragraph 21, does allege that on June 21, LeFort threatened to get Armstrong "out of the yard." Armstrong and Raymond Oliveri testified that LeFort did make such a threat on June 21. Additionally, Armstrong claimed in the written response to his July 13 warning notice that he had been told that management wanted to "get me out of this yard." As will be seen, Armstrong was not told that he would, in fact, be transferred to Westwego until July 30, a full 2 weeks after he entered the quotation on his July 13 warning notice. On brief, Respondent makes no suggestion of why Armstrong would have placed the quotation marks on his "Employee's Comment" if he was not quoting something that he had been previously told; this hardly could have been an oversight as it is a warning notice upon which Respondent's defense for the ultimate discharge of Armstrong greatly depends. I find that Armstrong used quotation marks in his concluding comment to the warning notice because LeFort had, in fact, threatened him with discharge if he again violated Respondent's nonunion policy, and LeFort, at least, told Armstrong that management wanted him out of the yard because of his protected activity of displaying a prounion sign at the Bossier speech of June 21. I therefore conclude that, in violation of Section 8(a)(1), Respondent, by LeFort, on June 21, 1993, threatened to remove an employee from the main shipyard because he had aided or supported the Union, as alleged in paragraph 21 of the first complaint.

Leadman Raymond Oliveri testified that, as part of his June 21 threat to Armstrong, LeFort forecasted that Armstrong would be out of the yard in "60 days."Armstrong placed LeFort's 60-day prediction at June 23. Armstrong further testified that LeFort added on June 23: "They don't care if you collect unemployment or not; they just want you out of their yard." Neither Oliveri nor Armstrong testified that LeFort made the 60-day prediction twice. The General Counsel offers no explanation of how the testimonies of his witnesses could be so different on this point. I believe that LeFort made the 60-day prediction during the June 21 exchange as Oliveri, who impressed me favorably, testified. In view of his conflict with Oliveri, however, I do not credit Armstrong's testimony that there was a second such threat on June 23. Finally, I credit LeFort's denial that he "noticed" Armstrong's prounion insignia (that Armstrong had worn from the start of the organizational campaign in March) and then threatened Armstrong with discharge because he wore it. I shall therefore recommend that paragraphs 23 and 24 of the first complaint be dismissed.

(2) Armstrong's transfer to the Westwego yard

Leadman Oliveri testified that during the 2 weeks following the June 21 Bossier speech at which Armstrong displayed the "Vote Onion" sign, he had three or four conversations with LeFort about Armstrong, and:

> [LeFort] told me—he went to the [management] meetings. Every time he come back from the meetings, he said they asked him the same thing, if they ever got rid of Ed [Armstrong] yet. . . . He always told me it was Simpson that wanted him. . . . Simpson kept jumping him about when he was going to get rid of Armstrong.

LeFort denied this testimony by Oliveri.

Carl "Black" Abadie is a pipe department general foreman who, at the time of these events, was over all pipefitter foremen such as LeFort. Oliveri testified that "two, three times" between June 21 and July 30:

> [W]hen we [LeFort and himself] would get ready to leave the boat, Black would be up there when we would get ready [to] walk down. . . . [Abadie] would ask Tate [LeFort] if he had gotten rid of Ed [Armstrong] yet or not.

LeFort also denied this testimony by Oliveri; Abadie did not testify.

Armstrong testified that on Friday, July 30, LeFort called him to LeFort's office and told him that he was to be immediately transferred to Westwego "because they needed pipefitters who could both fit pipe and test pipe." Armstrong testified that there was much pipefitting and much pipe-testing work remaining to be done in his area when he was told this by LeFort. This is not disputed; indeed, as quoted above, on June 21, LeFort and Fradella told Simpson that one of the reasons that Armstrong had not previously been discharged was because the pipe department was short of pipefitters and Armstrong was an excellent one.

At the same time that Armstrong was transferred to Westwego, pipefitters James Melton, Luis Gonzalez, and Ken Madere were also transferred. As further discussed below, the second complaint alleges that the transfers of Melton and Gonzalez violated Section 8(a)(3). (No such allegation is made for Madere on whose behalf no charge was filed and who, apparently, was not a prounion employee; Madere did not testify.) On August 2, the four pipefitters reported to Barry Heaps, the vice president of Respondent's small boat division which is the Westwego operation. When they arrived, according to Arm-

[513] Again, LeFort testified that he told Oliveri that he had been chastised by Simpson, but he did not testify that that actually happened.

[514] I do not credit Armstrong's testimony that he was summonsed to the office by LeFort.

strong, Heaps, "threw his hands open" and stated, "What did they send me pipefitters for?" Melton (vol. 12) also testified:

> Barry Heaps and Billy Sixworth both said they don't know why in the world they sent us to Westwego yard, because they didn't have any pipe testing or pipefitting work in that yard to be done at all.

("Sixworth" is apparently "Sigsworth." Sigsworth is an engineer, according to documents introduced by Respondent on day-155 of trial. Sigsworth did not testify.)

Armstrong testified that he did no pipe testing or fitting work at Westwego through the date of his discharge, September 13. During his first week at Westwego he, Melton, and others moved furniture and mopped and waxed floors in a building that was being refurbished. During the following week, Armstrong and Melton assembled some stair railings which did involve some tack welding, but not pipefitting work. After that, Armstrong and Melton were assigned to a crew that used cutting torches to disassemble some metal skids that had been dragged out of the Mississippi River. Thereafter, Armstrong was assigned to: shovel debris from an area, dig trenches, help pull trees out of the Mississippi River (a process described in detail in the account of Melton's discharge), scrub toilets and floors in a bathroom, and pick up trash with his hands and with a stick-and-nail device.

Armstrong further testified that during his first week at Westwego Foreman Jerry Petticrew conducted a safety meeting for employees. After the safety subjects had been completed, Petticrew stated, for the benefit of the recently transferred employees, that certain rules existed at Westwego that did not exist at the main yard. Armstrong testified:

> [W]e were being instructed—the new people—that he [Petticrew] was taking this time to instruct us as far as how to go to the bathroom—we had to inform them; go get water—we had to inform them. . . .
>
> And we complained a little bit verbally out loud about it, not saying we wouldn't do it, but saying just that, that we didn't have to do that in the main yard, why here?
>
> Well, [Foreman] Haywood LaSalle stood up and said, "If you all would have voted the way the Company wanted you to, you wouldn't even be over here." And everybody cracked up laughing, taking it as a joke.

Gonzalez, who testified in Spanish, but who had some command of English, testified that he attended a Westwego meeting that was conducted by a foreman. Gonzalez was asked and he testified:

> Q. Do you recall whether or not anything was said to you about why you were at Westwego?
>
> A. Three days after we were transferred, there was a meeting, and the foreman said, All the new [employees who] was right here were told not to vote for the Union; that is why you are here.
>
> Q. Could you please say for us in English what was said at this meeting?
>
> A. Every people new here I told you no vote for union. You work now here for vote for union.

Melton testified that at a safety meeting LaSalle told employees "[I]f we would have voted right, we wouldn't have been in Westwego in the first place." Based on this testimony by Armstrong, Gonzalez and Melton, paragraph 71 of the second complaint alleges that "Respondent, by Haywood LaSalle or Jerry Petticrew, threatened its employees by telling them that they had been transferred to Respondent's Westwego shipyard because they [had] aided or supported the Union."[515] LaSalle and Petticrew denied that any such statement was made by either of them.

As will be discussed in detail in their individual cases, pipefitters Melton and Gonzalez also testified that they were given jobs quite unlike what they had been doing at the main yard, at least initially. Melton, actually a pipe tester, testified that he was given the same jobs as Armstrong, but no pipefitting or pipe testing work, before he was discharged on August 23. Pipefitter Gonzalez testified that he was assigned to cleaning duties, moving furniture and helping pull heavy objects from the Mississippi River, but he was not given any pipefitting work during the 3-month period following his transfer to Westwego.

As further evidence that the selections of Armstrong, Melton, Gonzalez, Brown, and Fleming for transfer to Westwego were unlawfully motivated, the General Counsel introduced the testimony of Douglas Menier, a former leadman at Westwego. Menier (vol. 32) testified that he was employed by Respondent at the Westwego yard from January through June 1994, when he was discharged. Menier testified that he and Westwego Foreman Dan Wheeler often ate lunch together in Wheeler's office during that period. Menier testified that the Union was mentioned in three conversations with Wheeler from January through April; the first two of these conversations were at lunchtime, and the last was not. Menier testified that at the first lunchtime conversation with Wheeler:

> We was talking about [Westwego Foremen] Jerry Petticrew and Haywood LaSalle. . . . [h]ow Haywood was always messing up, putting bulkheads in wrong. He couldn't read the drawings very well, and . . . [Wheeler] . . . [s]aid that the reason Haywood still had his job [was] because he had that hit list of all the Avondale employees; Union employees that was sent there to be terminated.

Menier testified that at the second such lunchtime conversation Wheeler was again talking about Petticrew and LaSalle when he said:

> [t]hat the reason Jerry [Petticrew] still had his job, [was] because he knew about the hit list. But he didn't want to fire anybody from the hit list. He just didn't want to fire nobody like that. . . . [Wheeler also said that] he thinks Jerry got a raise because he knew about that list.

The third conversation with Wheeler, according to Menier, occurred when he saw Wheeler out in the Westwego yard. According to Menier, Wheeler was expressing anger at Westwego General Foreman Devon Barber. Menier testified:

> Well, he [Wheeler] was mad. He had just come out of the office, and he was mad at Devon for something. I don't know [what]. And . . . [Wheeler] said that he didn't have to worry about his job because he knew about that hit list.

[515] Respondent contends that this 8(a)(1) allegation is not supported by a timely filed charge. For the reasons stated above in sec. IV,(A),(1) of this decision, I find and conclude that this allegation is supported by the timely filed charges of discrimination against Armstrong, Melton, and Gonzalez, as well as the charge in Case 15–CA–12171-1.

> And he said if they tried to fire him, he would just report [the list], but he didn't say to who.

Wheeler denied all of this testimony by Menier.

As still further evidence of unlawful motivation in the transfer of Armstrong, the General Counsel introduced evidence of Leadman Oliveri who testified that, at the main yard, on the day that Armstrong was transferred to Westwego, LeFort told him that he was going to Abadie and complain, "because he didn't want Ed to leave. He wanted to keep Ed." Oliveri testified that later:

> Then he [LeFort] went and seen Black [Abadie], and then he come back later and told me that Black told him there wasn't nothing he could do about it . . . because Mike Simpson had give the names of the ones they wanted transferred to Westwego.

LeFort denied this testimony also.

Armstrong's transfer to the Westwego yard—
Respondent's evidence

Respondent's evidence of economic necessity for the transfer of 30 employees to the Westwego yard in July and August was presented principally through Heaps, the vice president and general manager of Respondent's Westwego operation. Heaps (vol. 68) testified that gaming boats are (by Louisiana law) patterned after Nineteenth Century Mississippi River gambling boats: they include three or four decks of gambling areas, a shapely bow and a working paddle wheel. Heaps testified that on July 8 Respondent signed contracts to build two gaming boats in 1 year's time. This was a short schedule, and Respondent built portions according to when the engineering drawings became available.

Heaps further testified that Respondent's last contract at Westwego had been finished in January 1993, and there were only about 20 employees working at Westwego when the gaming-boat contracts were secured. To perform the gaming-boat contracts, Heaps testified, he decided to use a combination of new hires, subcontractors and employees who were to be transferred from the main yard. Heaps testified that this is what the Westwego operation had done to perform under a contract that had been completed in late 1992 or early 1993. Heaps testified that the first employees that he wanted were shipfitters, welders and pipefitters, even though the initial work to be done only involved cleaning debris from the yard and the Mississippi River bank (where a new dock would be built for work involved in the contracts). This debris included steel structures that were on the ground and in the river, and trees that had grown up along the bank. To secure these employees, Heaps contacted Simpson. Heaps testified that he told Simpson that he needed 30 employees from the main yard and: "I was trying to get a mix of classes, but mostly experienced people who were versatile in the work that we do." Heaps testified that he wanted Simpson to send him skilled tradesmen "immediately," even though the initial phase of construction was cleanup work, because some engineering drawings were coming each day that could be worked on, at least for a few hours, and: "the worst thing that could happen to me in this tight time frame was for me to get a dozen people for three hours and then they would go back [to the main yard], and then the next day [that I had engineering drawings to be worked with] I would get different people, so you would go through that learning curve every day."

On cross-examination Heaps testified that, in several conversations during July and August, he asked Simpson for 30 employees in the classifications pipefitters, welders and shipfitters to be transferred to Westwego, and he told Simpson how many employees in each classification that he wanted, but he could not remember what numbers he gave Simpson. Heaps asked for classifications even by level (first or second class shipfitters, for example).

Simpson testified that when he received Heaps' request, he contacted his subordinate vice presidents, Ken Genter and Emil Foret; Genter was in charge of pipefitters, and Foret was in charge of welders and shipfitters. Simpson testified that he did not name any of the employees to be transferred to Westwego. He gave Foret no advice about how to select employees because Foret had been through the process before. Simpson testified however, that he did give Genter advice. Simpson was asked and he testified:

> Q. And what did you tell Mr. Genter at the time that you gave this advice to him?
>
> A. I said, "This is an opportunity to move some of your problem people, some of the people that require more attention than you would like to have to give them, to another yard."
>
> Q. And why did you make this statement to him?
>
> A. Because it was an opportunity to move people that he was having trouble controlling here to an area where perhaps we could control them better.
>
> Q. And why did you believe that the Westwego yard was an area where people could be controlled better?
>
> A. A single project, wide open type of construction, at least initially, easy to see your people, easier for them to see you, and it was a simpler type of work requiring, in many instances, a lesser skill level.

Simpson testified that Heaps requested workers even down to fourth-class mechanics. Simpson acknowledged that there was work for all of the employees at the main yard at the time, but "I get paid for making these decisions regarding answering priorities."

Fradella testified that the first he knew of the transfer of pipefitters to Westwego was from a telephone call from Genter. Fradella could not set the date of the call, but he testified that Genter told him that: "[T]he Westwego yard needed four pipefitters. And he told me to send four people that were knowledgeable people, and if I had any problem people to get rid of them then." Fradella further testified that he immediately selected Armstrong, "Because of the amount of citations I saw in his folder. . . . I saw them at the Simpson meeting, right after the Bossier meeting [on June 21]." Fradella testified that he then called John Whittington, the pipe department general foreman at wet dock-3 and told him that "I wanted Ed Armstrong to go and one other person that was knowledgeable in the pipefitting field." Fradella testified that he then called David Whitney, the pipe department general foreman in the unit-construction area and told him that: "I needed two knowledgeable people to go to Westwego yard, that they would be transferred, and if he had any people that had problems as far as citations were concerned, to send those." Melton and Gonzalez were then working under Whittington and Whitney, respectively. Fradella denied that he chose Melton or Gonzalez for transfer.

Whittington testified for Respondent (vols. 74, 76), but on direct examination he was not asked anything about the subject of the Westwego transfers or what he was told by Fradella. Before he was called by Respondent, however, Whittington had been called as an adverse witness by the General Counsel on day-43 of trial. At that time, Whittington was asked and he testified:

> Q. And at that time, the only people transferred [to Westwego] were Mr. Armstrong and one other person. Correct?
>
> A. From my crew. No, there were other people from the shipyard that were transferred. But for the people that worked directly for me, those were the two names that were given to me to transfer.
>
> Q. Do you recall the name of the other person [in addition to Armstrong]?
>
> A. Joe Melton. . . .
>
> Q. Was it Mr. Abadie [again, the general foreman over all other Pipe Department general foremen at Wet Dock-3] or Mr. Fradella who gave you the information that the two individuals were being transferred?
>
> A. It was either one of them. . . . I just don't remember which one.
>
> Q. And it is correct that he simply gave you a document with two clock numbers written on it, isn't it?
>
> A. Yes, sir.
>
> Q. You didn't have names, just clock numbers. Correct?
>
> A. Clock numbers. . . . There could have been two or three more clock numbers on it, but the only two clock numbers that pertained to me were on that list.

That is, Fradella testified that he left the choice of a pipefitter from wet dock-3, in addition to Armstrong, up to Whittington; Whittington, however, testified that he was told, in writing, to transfer Melton, as well as Armstrong. On brief, Respondent acknowledges that Fradella and Whittington testified "differently," but it makes no suggestion of how their testimonies can be reconciled.

Whitney (vol. 137) testified that he received his instructions to transfer pipefitters to Westwego from Genter, not Fradella. (On brief, Respondent makes no suggestion of how this conflict can be reconciled, either.) Whitney testified that Genter told him to send "quarters-type people" who are employees who do pipefitting for the living quarters and other areas where Navy personnel are regularly stationed (as opposed to "machinery-space-type people"). Whitney further testified that Genter told him, "Send your trash," which is what we normally do anyway. By "trash," Whitney testified, he meant "lesser qualified people." Whitney further testified that he had transferred employees out of his department before, and stated that he always sent his "trash" because: "I would be a fool to send my best fitter. I am going to keep my best people and get rid of my worst people." Whitney also testified that he communicated to his subordinate supervisors that: "I need to send some people to Westwego; let's get rid of some of our trash." Whitney testified that he did not recall who recommended them, but, ultimately, on the basis of his foremen's recommendations, he selected Gonzalez and Madere (again, a non-alleged discriminatee) to be transferred.

Whitney testified that he had personally hired Gonzalez, but he selected Gonzalez for transfer to Westwego: ". . . [b]ecause he was very hard to understand. He could not understand us but very little, and he was not able to do the work that was performed throughout our area." (Whitney testified that he selected Madere because: "He griped about everything.") When asked if he mentioned the Union when discussing the selection process with his foremen, Whitney flatly denied it. When asked if the Union was mentioned when Genter told him to transfer some "quarters-type people" to Westwego, Whitney testified, "Not that I can recollect, sir." On cross-examination, Whitney was firm that Genter told him to "send trash people." Whitney testified that he believed it was Gonzalez' foreman who told him that Gonzalez was hard to understand, but he did not recall who that foreman was. Gonzalez' foreman was, in fact, David Daigle; Daigle did not testify.

Armstrong's Transfer to the Westwego Yard—Conclusions

Respondent admits that its supervisors had knowledge of Armstrong's extensive union activities and, in view of the evidence of Respondent's animus toward such activities, and in view of LeFort's specific threat that Armstrong would be out of the main yard in "60 days," there is no question that the General Counsel has presented a prima facie case that Armstrong was transferred to Westwego, and then discharged, in violation of Section 8(a)(3). Respondent's defenses for those actions must therefore be examined.

Evidence that at least some of the transferred employees were transferred because of their prounion sympathies lies in the credible testimony by Armstrong, Melton, and Gonzalez that LaSalle, at a Westwego safety meeting, told the "new" employees that they would not have been transferred there had they not "voted" for the Union. That some employees laughed at the time does not lessen the coercive impact that it would have had on the employees who heard it, and it is not a defense to the allegation made in the complaint. I conclude that, in violation of Section 8(a)(1), Respondent, by LaSalle, on August 2, 1993, threatened its employees by telling them that they had been transferred to Respondent's Westwego shipyard because they had aided or supported the Union.

Further evidence that at least some employees were transferred to Westwego because of their prounion sympathies lies in the credible testimony of former Westwego Leadman Menier. Menier credibly testified that Westwego Foreman Wheeler told him three times that there was a list of "union employees that was sent there to be terminated." Wheeler would not have said such a thing unless at least some of the main yard employees who had been transferred to Westwego were, in fact, marked for future termination (whether the list had been reduced to writing or not). Such transfers would, of course, be violative; the question is which employees were transferred because of their union activities or prounion sympathies.

It is clear enough that in July and August the Westwego yard was not ready for building boats, at least not boats the size of the gambling boats that Respondent had contracted to build. The cleaning up and preparation of the yard had to be done first, then things had to be fitted and welded as engineering drawings were received. Such fitting and welding was the traditional work of shipfitters and welders, and it is not illogical that Respondent would want some those craftsmen there and ready when their work could begin, even if they had to be occupied with unskilled work while they waited. The Board, therefore, will not substitute its judgment for Respondent's in its decision to move, as it did, 11 welders and 15 shipfitters to Westwego in

July and August. (The issues of why it selected two particular welders, alleged discriminatees Brown and Fleming, will be discussed infra.)

There is, however, absolutely no logic offered by Respondent for its transfer to Westwego of pipefitters Armstrong, Melton and Madere, and pipe-tester Melton. The closest Respondent comes to logic is Heaps' testimony that "[T]he worst thing that could happen to me in this tight time frame was for me to get a dozen people for three hours and then they would go back [to the main yard]." The question immediately arises, however: Why would Westwego have to send employees back after only a few hours, or even days? Also, Simpson expressed complete willingness to transfer employees permanently; he made no reservation that the transfers were to be on a temporary basis. Moreover, the employees were told on a Friday that they should be at Westwego on the following Monday; that is, Respondent was able to move employees immediately. There was, therefore, no reason that pipefitters, whose skills would not be used until much later, had to be moved as soon as they were. Indeed, General Foreman Whitney testified that Genter told him that Respondent wanted "quarters-type" pipefitters moved. These, necessarily, would be among the last pipefitters to be needed in construction, if not the last, and certainly they would follow shipfitters and welders by a long period of time. I therefore do not believe, and do not credit, the testimony of Heaps and Simpson that Heaps' original request for labor included pipefitters or pipe-testers. I do believe, and I credit, the testimony of Armstrong and Melton that, when they arrived at Westwego, Heaps threw up his hands and asked, rhetorically, "Why did they send me pipefitters for?" As Heaps further said then, he had no pipefitting or pipe-testing work to be done. Finally, the proof that the transfers of the pipefitters were, at least, accelerated beyond any business necessity is found in the fact that the pipefitters did no pipefitting or pipe-testing for months; Melton was quickly discharged, but Armstrong did no pipefitting through the date of his discharge on September 13 (or about 1-1/2 months later) and Gonzalez did none for a full 3 months after the August 2 transfer of the pipefitters to Westwego (as Gonzalez testified in his case, infra). Instead, they were taken from where they were needed (as proven by the fact that on June 21 LeFort and Fradella told Simpson that the only reason that Armstrong was employed was because they were "short" of pipefitters) and put to menial cleaning tasks, and comparatively menial tack-welding and cutting-torch tasks (as described in the cases of Armstrong and Gonzalez, infra).

Specific evidence that Armstrong was selected for transfer to Westwego because of his extensive expressions of prounion sympathies (by his sign at the Bossier speech and his appearing on television, as well as his wearing prounion insignia) lies in the testimony of Leadman Oliveri who testified that before the transfer, LeFort told him that Simpson "kept jumping him about when he was going to get rid of Armstrong," and that Abadie, in Oliveri's presence, asked LeFort "if he had gotten rid of Ed [Armstrong] yet." Although LeFort denied this testimony, Abadie did not testify, a factor that I consider critical. I credit Oliveri. I further credit Oliveri that, on the day that Armstrong was transferred, LeFort told Oliveri that he had asked Abadie if the transfer could be canceled, but Abadie replied that it could not "because Mike Simpson had give the names of the ones they wanted transferred to Westwego." As well as the better credibility of Oliveri[516] and the absence of Abadie, Whittington testified that there was a list of employees to be transferred. Whittington testified Fradella or Abadie gave him a list of employees' badge numbers that indicated that Armstrong and Melton were to be transferred to Westwego; Whittington was given no choice in the matter. Whittington would not have given such testimony if it had not been true. On the basis of the credible testimony of Oliveri, and the admission by Whittington, I further discredit the testimony of Fradella that he left the choices of pipefitters, other than Armstrong, to be transferred to Westwego up to the general foreman.

Simpson testified that he did not select Armstrong to be transferred to Westwego; I do not believe that testimony. I believe that, as LeFort plainly stated to Oliveri, and then to Armstrong, when LeFort returned from the June 21 meeting in Simpson's office, and as LeFort later told Oliveri after Armstrong had been transferred, Simpson wanted Armstrong "out of the yard." Heaps' request for labor at Westwego, I believe, was seen by Simpson as a convenient opportunity to fulfill that desire. I further believe that Simpson ordered Armstrong out of the yard because of the prounion sign that Armstrong held up at the June 21 Bossier speech (and, possibly, because of Armstrong's television appearance on behalf of the Union). The chase by Gerdes and the inordinate attention that the penultimate supervisor of 4000 employees gave to the matter belie any contention that Simpson passed up the chance to discriminate against such a salient union advocate.

Nevertheless, the testimony of Fradella that he selected Armstrong for transfer, and why, must be addressed. Fradella testified that Genter told him to send to Westwego "four people that were knowledgeable people, and if I had any problem people to get rid of them then." Fradella further testified that he selected Armstrong because of the warning notices that he had seen in Armstrong's file when he was in Simpson's office on June 21.[517]

Fradella's testimony that Genter told him to get rid of "problem people" is consistent with Whitney's testimony that Genter told him to get rid of "trash." It is further consistent with Simpson's testimony of what he told Genter. I do not, however, believe Fradella and Whitney to the extent that they sought to convey the impression that "problem people" or "trash" were understood by them to mean anything other than prounion employees. I also do not believe that Simpson, who testified that he was willing to sacrifice needed craftsmen for the benefit of the Westwego operation's success, gave such an order to Genter. In the first place, this testimony requires the perception of Westwego as something of a dumping ground for misfits, not a co-equal part of Respondent's operation. (Certainly, Heaps did not testify that he was under the impression that he was leaving himself open to receiving the dregs of the main yard when he asked Simpson for labor help.) In the second place, the superintendent of the welding department, Pertuit, testified to

[516] As Respondent points out on brief, Oliveri testified that he thought Armstrong should have been discharged long before he was transferred. Further evidence that Oliveri was not testifying to help Armstrong was shown by his "Vote Onion" testimony that contradicted Armstrong's.

[517] It is to be noted that Fradella did not testify that Armstrong's July 13 warning notice (upon which Armstrong quoted the phrase "get me out of this yard") had anything to do with Armstrong's transfer. Indeed, Fradella was absent on July 13, and there is no evidence that he ever found out about the incident of that date.

receiving no such instruction from his vice president, Foret. If there had been such a practice of dumping misfits (as Simpson and Whitney, in effect, testified), Pertuit would have testified that ridding himself of undesirables was at least an option in his selection processes. Finally, Melton and Gonzalez were not only first-class pipefitters whose talents and training were going to waste at Westwego,[518] they had absolutely perfect disciplinary records; neither had ever been issued a warning notice. (On the other hand, they were, as I discuss in their cases, known prounion employees.) I believe, and find, that Simpson told Genter, and Genter told the superintendents,[519] to use Westwego's need for labor to rid themselves of prounion employees, particularly Armstrong, immediately. Thereafter, because there was no pipefitting work for him to do at Westwego, Armstrong, an excellent pipefitter whose talents were really needed at the main yard, was assigned to the comparatively demeaning tasks of shoveling debris, digging trenches, pulling trees out of the Mississippi River, scrubbing toilets and floors in a bathroom, and picking up trash with his hands and with a stick-and-nail device.

In summary, the preponderance of the evidence is that, if it had not been for Simpson's desire to rid the main yard of the prominent prounion employee Armstrong, Respondent would not have transferred any pipefitters to Westwego, at least as early as it did. Respondent did transfer Armstrong, and it simultaneously transferred other pipefitters that it did not then need at Westwego to cast an aura of legitimacy to Armstrong's transfer. (In the process, it unlawfully transferred two other prounion employees, Melton and Gonzalez, as I find and conclude infra in their cases.) Respondent has therefore not shown that it would have transferred Armstrong to Westwego even in the absence of his protected activities (at the main yard). I therefore find and conclude that by transferring Armstrong to its Westwego yard on August 2, 1993, Respondent violated Section 8(a)(3) of the Act.[520]

(3) Armstrong's discharge for using an unauthorized welding shield

Background—Armstrong's July 13, 1993 Warning Notice

Respondent contends that part of the reason that Armstrong was ultimately discharged is found in the circumstances of a warning notice that was issued to Armstrong on July 13. (This is the warning notice which the General Counsel placed into evidence because of Armstrong's entry in the employee comment space, as quoted above.) Respondent also contends that its supervisors' decision to issue a warning notice to Armstrong on July 13, rather than discharge Armstrong, proves that it had no animus against Armstrong's prounion sympathies. Again, the issuance of Armstrong's July 13 warning notice is not alleged as a violation of the Act, and the General Counsel asked Armstrong nothing about the underlying incident. The following account, therefore, is taken solely from the testimony of Respondent's witnesses.

LeFort testified that on July 13 Foreman Ronald Oliveri called him and stated that he wished to issue a warning notice to Armstrong because Armstrong had emptied on to a deck a bucket that contained oil and oily rags. LeFort testified that he told Oliveri that he did not think that Armstrong could be issued another warning notice because "he had too many violations in his file already." (LeFort did not testify that he told Oliveri that Simpson had, on June 21, stated that Armstrong was to be discharged, not issued another warning notice, upon his next offense.) Foreman Oliveri (vol. 142) testified that he did, in fact, witness Armstrong spilling the contents of a bucket, about a gallon of oily fluid and some rags, on to a deck near a drain that led to the Mississippi River. Armstrong claimed that the spill was accidental, but Oliveri believed that it was not. Oliveri testified that he then called LeFort and said that he intended to issue a warning notice to Armstrong. Oliveri did not testify what LeFort responded; specifically, Oliveri did not testify that LeFort told him that Armstrong had too many warning notices to be issued another. (On cross-examination Oliveri denied that anyone told him that Simpson had said that Armstrong should be discharged upon his next offense.) Oliveri testified that he then went to examine Armstrong's personnel file. (When asked on cross-examination why he sought Armstrong's personnel file, Oliveri did not testify that it was because of anything that LeFort had told him; Oliveri answered: "To see what the file had in there, what type of person this was. Were there any other types of citations or violations, you know.") Oliveri testified that after he secured and examined Armstrong's file, he decided that, in view of the many warning notices that he saw there, Armstrong should be discharged. He called LeFort and told LeFort that he thought Armstrong should be discharged and LeFort replied: "This is your call." (As Oliveri put it on cross-examination, "I mean, he basically left it up to me.") Oliveri further testified that he then attempted to call Fradella and Simpson, but both were out for the day. Oliveri then called Genter. (Oliveri testified that he attempted to call his superiors because "he [Armstrong] was known as being a union person and that he would probably scream and holler and say that I didn't have a right to do what I wanted to do.") Oliveri did reach Genter; when he did so he told Genter that he wanted to discharge Armstrong because Armstrong had intentionally spilled oil on a deck and because Armstrong had a large number of warning notices in his file. Oliveri testified that Genter told him, "Well, it is your call. You want to get rid of him, you do it." (That is, Genter, who was present when Simpson said on June 21 that Armstrong was to be discharged on his next offense, left the matter up to Oliveri.) Oliveri then prepared a ASI-22 (discharge) form for Armstrong and gave it to Genter's clerk for processing. Oliveri then went to Armstrong and LeFort and told Armstrong that he was discharged. Armstrong asked to speak to Genter, and Oliveri allowed Armstrong to use his telephone in private. After Armstrong spoke to Genter, Genter spoke to Oliveri and stated that he would come

[518] As Simpson testified, the Westwego work was: "simpler type of work requiring, in many instances, a lesser skill level." Moreover, I have discredited above testimony by Heaps and Simpson that Heaps told Simpson that he needed pipefitters, much less first-class pipefitters.

[519] It was Genter, it will be remembered, who told alleged discriminatee Ramona Edwards in November 1992, "Do you know that you can be fired immediately for that?" when Edwards told Genter that the employees needed a union. Moreover, Whitney testified that he could not remember if Genter had mentioned the Union when Genter was telling him to transfer employees, leaving open the distinct possibility that Genter did so, and did so in an unlawful sense.

[520] Why the nonunion Madere was also sent to Westwego at the same time as Armstrong is not an issue before me. Certainly the transfer of Madere does not legitimize, and create a defense for, the allegations that the three other pipefitters were unlawfully transferred to Westwego. If it were, an employer could cloak any numbers of unlawful transfers (or other acts) by including one nonunion employee in its actions.

to the scene of the spill and examine the matter further. Genter did come to the scene and, outside the hearing of Armstrong, told Oliveri and LeFort that he believed Oliveri but Armstrong was still claiming that the spill was accidental and that only a warning notice should be issued. Then Oliveri issued to Armstrong a warning notice under the Avondale Employees' Guide's major offense-23 ("Deliberate violations of safety, security or plant protection regulations.") The text of the warning notice is: "Deliberate violation of safety regulation. [Armstrong] observed disposing of hazardous waste improperly, making working conditions unsafe. Next warning notice will result in termination." (The failure of Genter, Oliveri, and LeFort to mention Simpson's June 21 imperative to discharge Armstrong on the occasion of his next disciplinary offense, much less carry that imperative out, went unexplained.)

Background—Use of Different Types of Welding Masks by Armstrong and Others

On September 10, while working at Westwego, Armstrong was given a tack-welding job. The job, according to Armstrong, was to attach a set of prebuilt steps to span a 3-foot drop from a platform upon which a unit was to be built. While he was working on this job, which was in an open area, Armstrong used a welding shield, or mask, of which Respondent had not approved. Armstrong was issued a warning notice for using the unauthorized welding shield, and then he was immediately discharged. Respondent contends that Armstrong was discharged for using the unauthorized welding shield and because of his prior disciplinary history which included Armstrong's just-discussed July 13 warning notice for the safety-rules violation of spilling oil on a deck and Armstrong's October 6, 1992 warning notice for the safety-rules violation of not wearing a hardhat in a production area. (Respondent does not contend that Armstrong's other prior warning notices were part of the reason for his discharge.)

Blindness is not the only peril to which welders are subjected; slag and sparks can fall on welders, causing serious burns to the face, to the top of the head and to the ears, as well as to other parts of the body. Respondent's employees who regularly perform welding work are required to own shields, and they are required to wear them while welding. Received in evidence were four examples of different types of welding shields. (1) One welding mask that was introduced in evidence is a full-face shield which is the type that one usually sees a welder use. More particularly, the full-face shield is made of fiber-metal, and it is shaped something like a rectangular-based bowl. At the top and toward the rear of each side, the full-face shield has fixtures by which it attaches to, and pivots on, fixtures on a hardhat. It covers the face fully from over the top of the forehead to under the chin, and around the sides to cover the ears. Its vertical dimension is 14 inches, and its horizontal dimension, at the ears, is about nine inches. (The lens area of each welding mask that was introduced in evidence is approximately 1 and 3-fourths inches by 4 inches.) (2) The second type of welding shield that was introduced into evidence is made from a heavy piece of leather that is 12 inches (horizontally) by 9 inches. When it is to be used, the leather is folded at vertical creases that are 3-1/2 inches from the lateral borders. The center section, which holds the lens, is approximately 5 inches wide, the 3-1/2-inch border sections fold back toward the ears, but they do not cover them. An elastic band runs between the border sections to allow the leather mask to be slipped over the head of a welder and held in place. (3) Also introduced in evidence was a "cut-down" shield; Armstrong testified that it was this shield that he used on the stairs job on September 10. The cut-down shield was, at one time, a full-face shield. The part of the front that goes over the forehead, and the part of the front that goes under the chin, have been cut off. Also, the sections of the full-face shield that wrapped around to cover the ears have been cut off, reducing the side coverage from about 5 inches to about 2 inches (that is, the ears have no protection with the cut-down shield). Holes have been punched at the upper corners of the cut-down shield, and through those holes are run the ends of a (nonelastic) strap which would hold the mask in place when it is slipped over the head. (4) Finally introduced in evidence was a cardboard shield; this mask is of the same size and shape as the leather shield, but it is made of cardboard and it is covered, front and back, with duct tape. It is undisputed that any such cardboard shield is less protective than any of the other shields, and its use presents additional danger because of the flammable glue on the duct tape.

Respondent contends that the full-face shield and the leather shield (which is only to be used in extremely tight places) are the only welding shields that it authorizes or approves for use by employees who do welding. The General Counsel, however, offered testimony that, in the presence of supervisors, and with impunity, Respondent's employees performed welding using cut-down shields and even one cardboard shield. The General Counsel contends that, because it had previously allowed welders to use cut-down shields, and even the cardboard shield, Respondent treated Armstrong disparately when it discharged him for using the cut-down shield. Respondent answers that (1) its supervisors never allowed the use of the cut-down shield or the cardboard shield, (2) even if credited, the General Counsel's evidence relates only to the use of unauthorized welding shields at the main yard, not Westwego, and (3) most importantly, the cut-down shield that was received in evidence was not the shield that Armstrong was using on September 10; Respondent contends that Armstrong was using an even smaller shield which was less protective and which had to be held with one hand while the welder welded with the other.

Armstrong testified that he never used the full-face shield during his 6-year tenure with Respondent. Rather, Armstrong testified that he used the cut-down shield, "[d]aily, at least." Armstrong testified that he began using the cut-down shield when he was first employed by Respondent in order to get into "tight" places on ships, to jobs such as tack-welding of pipe-hangers on overheads (ceilings) of ships. Armstrong testified that, before he was transferred to Westwego, he had also seen "[p]robably 50 to 100" other welders use such cut-down shields at the main yard, in tight places and in open places. Armstrong testified that a safety inspector once saw him using his cut-down shield but said nothing. Armstrong further testified that some foremen, including LeFort and Lawrence Mallini, watched him as he used the cut-down mask at the main yard.

On cross-examination Armstrong acknowledged that when a safety inspector saw him using the cut-down shield he was tack welding in a tight place, but he insisted that LeFort and Mallini saw him using the cut-down shield in open, as well as tight, areas. LeFort denied ever seeing Armstrong use any cut-down shield; Mallini did not testify. (As mentioned in the cases of alleged discriminatees King and Jackson, Mallini had moved to another state by time of trial, and his whereabouts were unknown.)

Current employee, and pipefitter, Frank Moran (vol. 9) testified that he has been employed by Respondent for 5 years, and he has a cut-down shield "exactly" like Armstrong's. He further testified that he owns no other welding shield, and he uses the cut-down shield regularly in the open and in tight spaces, and he has used it in the presence of Pipe Department Foreman Lawrence Mullins. Moran testified that he has never been disciplined for wearing the shield. Moran further testified that in 1994 he was issued a certification for tack-welding by Respondent; he took the test using his cut-down shield that is the same as Armstrong's, and the instructor did not object. He was issued the certification. Mullins testified for Respondent, but he did not deny this testimony by Moran.

Current employee Betty Dumas (vol. 52) testified that she had been a pipe-tester for about 2 years. During the 2 years preceding her becoming a pipe-tester, Dumas was a pipefitter. Dumas testified that the cardboard shield that was introduced in evidence, as described above, belongs to her. During the 2 years that she was a pipefitter, Dumas testified, she used only the cardboard mask. She used it in tight areas as well as open areas on the platforms, every day, because she had to tack weld all of the pipe that she installed. Dumas testified that when her helper did tacking for her, he borrowed the cardboard shield. Dumas further testified that even Foreman David Daigle once borrowed the cardboard shield when he did some tack welding where she was working. Dumas was asked and she testified:

> Q. Did Mr. Dave Daigle ever see you use your [cardboard] shield?
>
> A. All the time. That is all I had.

Finally, Dumas testified that Sheetmetal Department Foreman Jesse Caston worked around her on platen 10; Caston saw her using the cardboard shield but said nothing to her about it. Again, Daigle did not testify; Caston testified for Respondent, but he did not deny this testimony by Dumas.

Respondent called several main yard supervisors to testify that anything less than the full-face shield was unacceptable, except that the leather shield was acceptable for tight places. This testimony, however, does not detract from the fact that there is undisputed testimony that Pipe Department Foremen Daigle, Mullins, and Mallini allowed Armstrong, Dumas, and Moran to use lesser welding shields while doing tack welding. LeFort denied it, but I do not believe that Armstrong was lying when he testified that the cut-down shield was the only welding shield that he used since he first came to work for Respondent. I credit Armstrong over LeFort on this point. Finally, Moran's testimony that he took a test for a welder's certification using a cut-down shield is not denied, and I found it credible, and compelling.[521] In summary, I find that Armstrong used only the cut-down shield at the main yard before he was transferred to the Westwego yard, and his supervisors there knew it.

[521] If Moran was not issued a welding certification in 1994, Respondent could have easily proved it. If Moran was issued a certification, the official who tested him could have been produced to deny, if untrue, Moran's testimony that he took the test with a cut-down shield. On brief, Respondent levels an (unsupported) attack against Moran's credibility, but it offers no explanation of why it did not produce evidence to deny his testimony.

Armstrong's Discharge at Westwego—The General Counsel's Evidence

After Armstrong's transfer to Westwego he continued to wear prounion insignia, as two of his supervisors, General Foreman Luttrel and Foreman Petticrew, acknowledged when they testified. Armstrong further testified that he used the cut-down mask on the few welding assignments that he received at Westwego before the date of his discharge; he testified that some of that welding was in the presence of Luttrel, General Foreman Barber and Foreman LaSalle.

Armstrong testified that at Westwego Luttrel and Heaps gave him most of his assignments; others were made by engineers in the area, the names of whom Armstrong did not know. On September 9, according to Armstrong:

> He [Luttrel] informed me that management wanted him to come down a little harder on us, meaning the four pipefitters who had been put onto his—on his time sheet. But he also told me that as long as we did the different chores that we were given that he saw nothing else that he could do, as long as we did what he told us.

Armstrong testified that, later in the day when he asked to take a break because he was becoming overheated, Luttrel told him that: "I had better hope the Union gets in so that they can protect my job for me." Based on this testimony by Armstrong, paragraph 25(a) of the first complaint alleges that Luttrel unlawfully threatened Armstrong. Luttrel (vol. 83) denied this testimony by Armstrong, but I found Armstrong credible on this point. I conclude that Respondent, in violation of Section 8(a)(1), by Luttrel, on September 7, 1993, threatened its employees with discharge because they had aided or assisted the Union.

September 9 was Luttrel's last day as the direct supervisor of Armstrong. On September 10, Luttrel was replaced by Foreman Frank Guerrera who gave Armstrong the assignment to tack weld the railing on the stairs to the platform (again, in an open area). According to Armstrong, as he did the welding:

> Frank Guerrera came up and tapped me on the shoulder and informed me that Devon Barber, the general foreman, did not want me to use the welding shield that I was using. So I told him, "okay," and I went and put the welding shield that I was using up.

Armstrong further testified that at that point it began to rain, and all employees were told to leave for the day. Armstrong testified that as he was leaving the premises, Guerrera came to him and asked him to come to the office, "and sign a written citation [that had] to do with the shield that I had been using." Armstrong testified that he responded to Guerrera that he was already signed out and asked if the matter could wait until the next workday, Monday, September 13. Guerrera said that it could. Armstrong denied that Guerrera attempted to hand him a warning notice on September 10.

Armstrong testified that when he got home on September 10, he made two telephone calls back to the plant. In the first, he spoke to Paul Jones, a nonsupervisory inspector in Respondent's safety department. In the second, he told Barber that Jones had just told him that cut-down shields were permissi-

ble.[522] Armstrong testified that Barber replied that "we would talk about it Monday."

Armstrong further testified that on Monday, September 13, he was approached by Foreman Petticrew who gave Armstrong a warning notice that had been signed by Barber and Guerrera. The box for the Avondale Employees' Guide's major offense-23 ("Deliberate violations of safety, security or plant protection regulations.") is checked. In both the spaces for the time of the offense and for the time of issuance of the warning notice is written "9–10–93—1:00 p.m." The text of the warning notice is simply the text of major offense-23. In the "Employee Comment" section of the copy that was received in evidence is written: "Refused to Sign.—D.B." (Armstrong testified that Petticrew did not ask him to sign the warning notice and that the entry of "Refused to Sign.—D.B." was on it when Petticrew handed the warning notice to him.)

Armstrong testified that he was assigned to clean restrooms on September 13. About 11:30 a.m. he was again approached by Petticrew. Petticrew told Armstrong that he was discharged; when Armstrong asked why, Petticrew replied that he was "probably" being discharged for "the incident on Friday." Armstrong asked for a further explanation, but Petticrew would say nothing more. Armstrong further testified that he asked Petticrew if he could see Barber or Heaps; Petticrew replied that neither Barber nor Heaps wanted to see him. Armstrong then left the premises.

On cross-examination, Armstrong acknowledged that on September 10, for part of the time that he was doing the tack welding on the stairs, he did not have the shield strapped on his head; he held it with one hand while he operated the welding device (a "whip") with another.

Armstrong's Discharge at the Westwego Yard—Respondent's evidence

Guerrera did not testify. Petticrew (vol. 85) testified that at some point before September 13, he saw Armstrong doing some tack welding on a dock.[523] At the time Armstrong was using a hand-held welding shield that was much smaller than the cut-down shield that Armstrong claimed to have used throughout his employment with Respondent; Petticrew testified that the hand-held shield that Armstrong was using on the dock covered only from just above the level of his eyes to his mouth-line. Petticrew testified about the hand-held shield that Armstrong was using: "It was completely covered with duct tape." Petticrew testified that at the time he told Armstrong that the hand-held shield was not approved and he should not be using it. Armstrong agreed and later, when Petticrew came back to the dock, Armstrong was using a full-face shield to complete the tack-welding job. Petticrew acknowledged that he did not give Armstrong an oral or written warning of discipline about using an unauthorized welding shield.

Petticrew testified that Armstrong was assigned to his crew for the first time on September 13. Petticrew further testified that on that date General Foreman Barber called him to his office and, "He [Barber] said he [Armstrong] had got a safety violation citation, and Mr. Ronnie Johnson [the production superintendent for Westwego] informed him we had to let him loose because he had a tremendous citation prior of that one." (Petticrew did not testify what he was referring to as "that one.") Petticrew testified that he then went to Armstrong and, "I told him he was terminated. I had to terminate him because he has—the write-up he had and it led back to the tremendous write-up he had prior to it." Petticrew testified that Armstrong claimed that he was being discharged because of his union activities and that the welding shield that had caused his discharge had been "approved." Petticrew asked Armstrong to show him the shield, and Armstrong showed Petticrew the hand-held shield that Petticrew had previously (on the dock) told Armstrong not to use. Petticrew testified: "I said that wasn't safety-approved, OSHA approved and that. And also, I told him I had seen him with the shield before that."

On cross-examination, however, Petticrew was asked and he testified:

> Q. [By Mr. Lurye]: Sir, when Mr. Armstrong told you on September 13 that he was written up for a welding shield that was approved to be used, you didn't say anything to him to the effect of, "Hey, Ed, do you remember I told you two weeks ago that wasn't approved?"
>
> A. No, I didn't.

Petticrew did not dispute Armstrong's testimony that, before he told Armstrong that he was discharged, he gave the welding-shield warning notice to Armstrong with "Refused to Sign" previously entered.

On direct examination, Barber (vol. 74) testified that he saw Armstrong using an unauthorized welding shield on September 10. Barber flatly denied that the shield was the cut-down shield that Armstrong claimed in court to have used for years at the main yard and claimed to have been using that day. Barber described the welding shield that Armstrong was using on September 10 as being cut from a full-face shield, and he estimated the dimensions at slightly smaller than those described by Petticrew. Barber denied that there was any strap (elastic or otherwise) on the mask, and Barber testified that it could only be hand-held. Barber made no mention of duct tape being on the welding shield, as had Petticrew. Barber testified that he told Armstrong to stop his work, and he then radioed Guerrera to come to where he and Armstrong stood. When Guerrera arrived, further according to Barber, "I pointed out the safety violation that I had witnessed, and [I] instructed Mr. Guerrera that it was in violation and I wanted a citation given to Mr. Armstrong." Further according to Barber, he and Guerrera went to his office, and he drafted the warning notice that is quoted above, and he gave it to Guerrera to attempt to give to Armstrong. Barber told Guerrera to deliver it to Armstrong, and Guerrera left his office. Guerrera radioed back that Armstrong was refusing to sign the warning notice. Barber ordered Armstrong to his office where Armstrong persisted in his refusal to sign the warning notice. Barber testified that he then wrote "Refused to Sign" on the warning notice and then gave a copy to Armstrong.

Barber further testified on direct examination that he then took one copy of the warning notice to the office of Westwego Production Manager Johnson for routing to the human resources department at the main yard. Barber testified that he told Johnson that: "Mr. Armstrong was using a modified version of the [approved, full-face] shield and he refused to sign [the warning notice]." Johnson, further according to Barber, made no comment at the time.

[522] Jones was called by Respondent and credibly denied that he told Armstrong any such thing.

[523] This was not pipefitting work; Armstrong was building a handrail for the dock.

Barber agrees with Armstrong that Armstrong called him later that afternoon and claimed that he had been told by someone at the main yard that a modified welding shield was permissible, and he replied that he and Armstrong would talk about the matter on Monday, September 13.

Barber testified that early on September 13, Johnson told him:

> . . . that Personnel at the main yard had been contacted. Best I can recall, he said he contacted them and informed them of the citation that was given to Mr. Armstrong.
>
> And he told me that Personnel was checking on the citation, and don't take any action or don't say anything to Mr. Armstrong about the conversation on the shield.

Barber, however, did not testify that he had told Johnson that he had told Armstrong that they would talk about the warning notice again on Monday.

Barber testified that about an hour later Johnson called him into his office and:

> [H]e informed me that Personnel at the main yard indicated that they had quite a number—now, he did not tell me the number—of previous safety violations and citations against Mr. Armstrong. And that he had made the decision to terminate Mr. Armstrong . . . [and to] go out and inform him and clear him out. Get him out of the yard.

Barber further testified that he then told Petticrew that Johnson had decided to discharge Armstrong because of his "safety violations," and that he ordered Petticrew to discharge Armstrong and escort him out of the yard.

On cross-examination, Barber was asked about his confrontation with Armstrong on September 10, and Barber testified:

> Q. Didn't Mr. Armstrong tell you that shields of the kind that he was using were permitted in the main yard?
>
> . . . .
>
> [A.] THE WITNESS: Yes. . . .
>
> Q. [By Mr. Morgan]: And he said he had used it for a number of years in the main yard. Correct?
>
> A. Best I can recall, he said he did. Yes.

Further on cross-examination, Barber was asked and he testified:

> Q. [By Mr. Morgan]: But I understood you to tell them that the rules don't change because they have come from the main yard to the Westwego Yard?
>
> A. No. We don't change any rules. In other words, we just have to work productively or more productively. . . .

Finally, at one point on cross-examination Barber also testified that he did not believe that prounion insignia such as that which Armstrong wore indicated that an employee favored the selection of the Union as a collective-bargaining representative. When asked to explain, Barber testified:

> THE WITNESS: I wear stickers on my hat. We hire people from—off the street that has stickers on their hats. And it is various stickers; various slogans. It don't mean that that person or I am myself a supporter of whatever I am wearing a sticker on. It might be just—and I know they do, people do it—might just be some kind of practical joke or something.
>
> I mean, just because he has a union sticker on his hat or whatever, it don't indicate that he is a union supporter. No.

As the finder of fact, I discredit Barber in portions of his testimony as discussed below, and this obviously disingenuous answer is part of the reason.

Johnson (vol. 82) testified that between 2 and 3 p.m. on September 10, Barber brought to him the above-quoted warning notice to Armstrong and told Johnson that "Edward Armstrong was using a homemade welding shield." Johnson was asked and he testified:

> Q. And what did you do with this document after you received it from Mr. Barber?
>
> A. I looked at it and reviewed it and sent it on to the main yard, called the main yard.

Johnson testified that usually when he received copies of warning notices to employees he would check their personnel files, but he did not then have Armstrong's personnel file. Julie Bolden, manager of employment, is the first assistant to Human Resources Department Vice President Ernest Griffin. Johnson testified: "That Monday, I called the main yard. I think I talked with Julie Bolden to look at his file and let me know what was in there. . . . To look in his [Armstrong's] file and see if there were any previous write-ups." Johnson testified that Bolden called him back later in the morning. Johnson was asked and he testified:

> Q. [By Mr. Hymowitz]: Now, would you describe what Ms. Bolden told you when you heard back from her.
>
> A. She told me that he had previous safety write-ups, and that he could be terminated.
>
> Q. And what did you decide to do after you heard from Ms. Bolden?
>
> A. I decided to terminate him . . . because of the previous write-ups he had and working unsafe. I feel that working with a homemade welding shield is unsafe.

Johnson denied that there was any discussion with Bolden about Armstrong's prounion sympathies; in fact, Johnson denied knowing of any prounion sympathies that Armstrong may have held. Johnson further testified that during 1993 he walked through the Westwego yard "[f]ive, six times a day, maybe more," and he regularly saw employees performing welding tasks; he testified that he never saw a welding mask like Armstrong's cut-down shield.

On cross-examination, Johnson further testified that Barber told him that the shield that Armstrong was using was handheld and that it had been cut out of a standard full-face shield. When Barber reasserted that he did not call Bolden until September 13, he was asked and he testified:

> Q. Is there a reason you didn't do it that afternoon [of September 10]?
>
> A. We had a rain-out day that afternoon. It was after 2:30, between 2:00 and 3:00 when he brought it up to me, and it would have been too late that day to call the main yard.
>
> Q. Don't they work in Personnel until about 4:00 o'clock, 5:00 o'clock?
>
> A. I am not sure what the hours are. I really don't know. I would imagine they would be there.

Johnson was further asked and he testified:

Q. And how did that happen? Who called who?

A. I think I called Julie Bolden.

Q. Had you turned in the warning at that time?

A. I think it was turned in to Pam, Barry Heaps' secretary. It might have been going that way at the time. I am not sure.

Q. Is it possible Ms. Bolden called you after she received the warning?

. . . .

A. I don't remember. I thought I had called her that morning.

Johnson was further asked and he testified:

Q. Tell us that conversation [with Bolden], if you will, please.

A. I asked her to look into Ed Armstrong's file and see if—what kind of records he had, if he had any write-ups, attendance.

. . . .

Q. And what else?

A. That is about it. I don't remember what else.

Q. After that conversation was over, did you subsequently talk to Ms. Bolden again?

A. Yes. . . . She called me back.

Q. Tell us as best you can who said what during that conversation.

A. She had told me that he had previous write-ups, safety write-ups, and that he could be terminated.

Q. Did she say anything about his attendance?

A. I don't recall if she did.

Q. Did she say anything about any other warnings?

A. No. Just [that] he had previous safety write-ups.

Johnson acknowledged that Bolden did not tell him the number of Armstrong's prior safety warning notices, their dates, or the nature of the allegedly unsafe conduct for which Armstrong had been previously warned.

Further on cross-examination, Johnson acknowledged that he gave an affidavit to a Regional Office investigator on February 1, 1994. In that affidavit, Johnson mentions only one call with Bolden; Johnson states that it occurred on September 13; and Johnson states that Bolden called him.[524] As read to Johnson for confirmation (by both the General Counsel and Respondent's counsel), Johnson's affidavit first states: "The following Monday, I received a call from Julie [Bolden] (in Personnel) who told me that Armstrong should be terminated because of previous violations he had in the main yard."

On redirect examination Johnson testified that the "should" in the affidavit should have been "could." Johnson testified: "That has got an error when I was proofreading it, I guess. It should be, 'could be terminated.'"

On re-cross-examination Johnson was read the next sentence of his affidavit, and he testified:

Q. Sir, isn't it correct that in your affidavit, immediately following that sentence, you say, "I then conveyed this message to Devon Barber. I was not further involved in the discharge of Edward Armstrong." . . . Do you agree that appears as I read it to you?

A. Yes. . . .

Q. What I am asking you, sir, is: Isn't it correct that the message you conveyed to Devon Barber was that Mr. Armstrong should be fired.

A. No.

Q. Did you leave it to Mr. Barber's discretion as to whether Mr. Armstrong should be fired?

A. No.

Q. You told him that he should be fired, didn't you?

A. Yes. I told Devon Barber that the man should be fired. Yes. . . .

Q. Excuse me. The sentence I read to you: "I then conveyed this message to Devon Barber." Is that incorrect, too?

A. I conveyed the message to Devon Barber that I made the decision to terminate him.

Q. Well, your affidavit doesn't say that, does it?

A. No, it doesn't.

Further cross-examination of Johnson on the point was persistently interrupted by baseless objections by Respondent's counsel, and I was constrained to stop the debacle in this manner:

Q. Would you agree with me that your affidavit says that Julie Bolden told you that Ed Armstrong should be fired and that you conveyed that message to Mr. Barber? Would you agree that that is what it says?

MR. HYMOWITZ: Objection, Your Honor. He is now paraphrasing an affidavit. It is an improper use of the affidavit. He can ask him what precisely was in the affidavit. And this has been asked and answered already, Your Honor, in addition to that.

JUDGE EVANS: Overruled. He is asking him if that would be a fair reading of the two sentences together. I think it is proper.

[To the witness:] Would a fair reading of that testimony—of that statement, those two sentences, be that Bolden told you that Armstrong should be fired, and you turned around and told Devon Barber that Julie Bolden said that Ed Armstrong should be fired?

MR. HYMOWITZ: Objection to the form of the question, Your Honor. Should this be a fair reading? It is speculation. Different laymen could read different things, Your Honor.

MR. LURYE: I object to that [Respondent's Counsel's leading objection], Judge.

JUDGE EVANS: All right. I will say for the record, I think that would be a fair reading of the statement.

I remain of that view.

Armstrong's Discharge—The General Counsel's Evidence of Disparate Treatment

On rebuttal, as evidence of disparate treatment of Armstrong, the General Counsel introduced several warning notices that had been issued to other employees.

On March 10, 1994, Barber issued to Westwego employee Raymond Morris (employee 1392) a warning notice under the Avondale Employees' Guide's major offense-23 (again, "Deliberate violations of safety, security or plant protection regulations"). The text of the notice is: "Failure to wear grinding shield while grinding. Has had a verbal [oral] warning." the

[524] Respondent stipulated that another affidavit that Johnson gave Respondent's counsel on the issue also does not mention his calling Bolden about Armstrong.

General Counsel contends, of course, that Armstrong had received no prior oral warning of discipline before Barber issued him a warning notice for using an unauthorized welding shield.

Armstrong was discharged upon being issued his third safety-rule-violation warning notice in 12 months, two of which were issued under major offense-23, one of which was issued under general offense-12. On rebuttal, however, the General Counsel further introduced evidence that other employees received three or more general offense-12 (safety) warning notices without being discharged, or they received (two or more) major offense-23 or major offense-2 ("Intentional negligence") warning notices without being discharged; to wit:

43. On August 13, 1993, Barber, himself, issued to Westwego employee Fred Miller (employee number 12937) a warning notice under the Avondale Employees' Guide's Major Offense-2 ("Intentional negligence, inefficiency or failure to complete job assigned.") for allowing the boom of a crane he was operating to hit the boom of another crane, "knocking handrails off his crane." Barber's warning notice to Miller concludes: "Final Notice." On December 2, 1993, Barber issued to Miller a Major Offense-23 warning notice for negligently operating a crane and allowing cables to strike the ground near Petticrew, Johnson and Barber, himself. The warning notice concludes: "This Is The Final Notice." On December 4, 1993, Barber issued Miller a second Major Offense-23 warning notice, and his third Major Offense safety warning notice in 12 months, for failing to sound his horn while conducting a lift. Barber notes that Miller had been "informed by Paul" [apparently Paul Jones, who is mentioned above], safety inspector, that he had to blow his horn when lifting & transporting a load. Hayward LaSalle [also] told him this procedure. On December 7, 1993, Barber issued Miller another Major Offense-23 warning notice for dropping a load while operating a crane. The record does not indicate whether Miller was discharged this, Miller's third Major Offense-23 warning notice, and his fourth Major Offense safety warning notice, in 12 months.

44. In June 1991 Paint Department employee number 325 (name illegible) was issued two Major Offense-23 warning notices for leaving out paint thinner and wearing a beard. The employee was not discharged after this second Major Offense safety warning notice because, on September 12, 1991, he was issued his third Major Offense-23 warning notice for simultaneously smoking and painting.

45. In October 1991 and January 1992, Paint Department employee number 2983 (name illegible) was issued three Major Offense-23 warning notices, two for not wearing safety glasses and the third for power-tooling without goggles or a face-shield. (Again, he obviously was not discharged upon the occasion of his second Major Offense safety warning notice, as was Armstrong.)

46. In the period from December 30, 1991, through October 20, 1992, Paint Department employee number 12062 (name illegible) was issued five General Offense-12 warning notices for not having proper face protection while spraying, painting with an unsafe hand light, power-tooling without eye protection and twice for not wearing a hardhat. (The third in this series of safety warning notices was marked "Final Notice.") This employee was still not discharged, as shown by several subsequent warning notices in the file for other misconduct.

47. During three months of 1991, Paint Department employee number 9656 (name illegible) was issued three Major Offense-23 warning notices, and he obviously was not discharged upon the occasion of his second.

48. Between June 7 and October 19, 1991, Paint Department employee Rodney Lee (employee number 769) was issued three Major Offense-23 warning notices for not having proper safety equipment (and, obviously, he was not discharged upon the occasion of his second Major Offense-23 warning notice).

49. Between July 31, 1990, and October 10, 1991, Paint Department employee number 1534 was issued four General Offense-12 warning notices for safety violations and one Major Offense-23 warning notice for another safety violation. Thereafter, on December 30, 1991, this employee was issued another Major Offense-23 warning notice for not wearing safety glasses after "several verbal warnings."

50. Between February 11, 1991, and January 6, 1992, Paint Department employee number 1864 was issued two General Offense-12 and one Major Offense-23 warning notices for not wearing safety glasses. This employee was still not discharged, as reflected by subsequent warning notices that are in evidence.

51. On June 11 and August 23, 1991, Paint Department employee number 9656 (name illegible) was issued Major Offense-23 warning notices for not having, or using, safety equipment; thereafter, on September 6, 1991, this employee was issued his third Major Offense-23 warning notice, so he obviously was not discharged after the first two.

52. On July 27, 1990, and May 1, 1991, Paint Department employee Billy Baldridge (employee number 1095) was issued General Offense-12 warning notices for working without safety glasses. On June 5, 1991, this employee was issued a Major Offense-23 warning notice for wearing a beard. Baldridge was still not discharged, a fact reflected by subsequent warning notices that are in evidence.

53. Between November 12, 1990, and September 23, 1991, Electrical Department employee Nena St. Julien was issued three General Offense-12 warning notices for not wearing various types of safety equipment. St. Julien was still not discharged, a fact that is shown by a Major Offense (unnumbered, but marked "Other") warning notice that she was issued on January 29, 1992, for wearing "Loop-type earrings in a production area."

54. Between May 21, 1990, and May 8, 1991, Paint Department employee number 401 (name illegible) was issued four General Offense-12 warning notices for not wearing various types of safety equipment.

55. On June 4 and June 8, 1990, Paint Department employee Edward Morgan (employee number 1778) was issued two General Offense-12 warning notices for not wearing safety glasses. On July 11, 1990, Morgan was issued a Major Offense-23 warning notice, also for not wearing safety glasses. On March 5, 1991, Morgan was issued another General Offense-12 warning notice for not wearing safety glasses, and on April 5, 1991, Morgan was issued another Major Offense-23 warning notice for not wearing eye protection while power-tooling. On May 1, 1991, Morgan was issued his third Major Offense-23 warning notice (and sixth safety warning notice) in 12

months. From that point through October 8, 1991, Morgan was issued four other warning notices, the last of which was another Major Offense-23 warning notice for failing to wear safety glasses. (Thereafter, on October 23, 1991, Morgan was issued a warning notice for absenteeism, thus showing that he still had not been discharged for his multiple safety violations.)

56. On September 17, 1990, and August 13, 1991, respectively, Paint Department employee Irvin Session (employee number 10660) was issued Major Offense-23 warning notices for leaving paint cans open overnight and not wearing safety glasses. On September 12, 1991, Session was issued his third Major Offense-23 warning notice in 12 months, again for not wearing safety glasses.

57. Between December 2, 1993, and May 24, 1994, Shipfitting Department employee Fitzgerald Marcey (employee number 676) was issued three warning notices for running in a production area; the last of these safety warning notices concluded: "Continue to do so will result in your termination," thus indicating that the employee was not discharged upon the occasion of his third safety warning notice in a year.

58. Between June 20 and July 31, 1990, Paint Department employee Wade Kerr was issued three General Offense-12 warning notices for not wearing or using safety equipment; he was still not discharged, a fact reflected by several subsequent warning notices that are in evidence.

59. Between October 23, 1990, and June 21, 1991, Paint Department employee Ronald Brady was issued three General Offense-12 safety warning notices, but he was still not discharged according to subsequent warning notices in evidence.

60. In a three-month period during 1991, Paint Department employee Corey Holmes (employee number 223) was issued three Major Offense-23 warning notices for safety violations, but he was still not discharged as reflected by the fact that he received several more warning notices that are in evidence, including a 1994 General Offense-12 safety warning notice.

61. Between May 1, 1991, and February 5, 1992, Paint Department employee Martha Cox (employee number 2013) was issued four Major Offense-23 safety warning notices for not wearing or using various items of safety equipment. Cox was still not discharged, as reflected by several subsequent warning notices in evidence.

As further evidence of disparate treatment of Armstrong, the General Counsel relies on warning notices that Respondent introduced in its case; to wit:

20. Between July 31, 1990, and June 21, 1991, Paint Department employee Harold Randle (employee number 1534) was issued four safety warning notices, the third of which is under the Avondale Employees' Guide's Major Offense-23. Randle was discharged in 1993 (for insubordination), but not before he was issued one more Major Offense-23 safety warning notice on December 30, 1991.

21. Respondent also introduced the ASI-22 (discharge) form of Paint Department employee G. Hernandez (employee number 2983). The stated basis for the discharge is "Employee has been given (4) citations for safety violations. Were given on 10/15/91, 1/8/92, 1/28/92 and 3/30/92." Evidently, Hernandez was not discharged after his third warning notice for safety violations as was Armstrong.

Armstrong's Discharge at the Westwego Yard—Conclusions

As is undisputed, after Armstrong's transfer to Westwego he continued to wear prounion insignia. Johnson claims to have made the decision to discharge Armstrong, and Johnson (who testified that "[f]ive, six times a day, maybe more" he walks through the Westwego yard) would have seen Armstrong wearing such prounion insignia. I find that he did. Moreover, on September 9, General Foreman Luttrel told Armstrong that he had been instructed to "come down a little harder" on the four transferred pipefitters, and Luttrel further told Armstrong, unlawfully, that he would be discharged if the Union were not selected as the employees' collective-bargaining representative. Finally, Westwego Foreman Wheeler repeatedly told Menier that at least some of the employees who had been transferred to Westwego from the main yard were there to be discharged because of their known prounion sympathies. I therefore find and conclude that the General Counsel has presented a prima facie case that Armstrong's discharge was unlawful, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Armstrong even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

When Johnson was first asked on direct examination what he did with the warning notice that Barber brought to him on September 10, Johnson replied, "I looked at it and reviewed it and sent it on to the main yard, called the main yard." Then Johnson testified that he called the main yard on September 13. The truth, I find, was Johnson's first answer; he only "sent it on to the main yard"; Johnson did not call the main yard on either September 10 or September 13. I do not believe Johnson's self-serving testimony that, although Armstrong had been at Westwego for 38 days, he had not received Armstrong's personnel file (with his prior warning notices), and that is why he called Bolden on September 13. Also, as quoted, at one point Johnson testified that he called Bolden to ask only about Armstrong's prior warning notices for absenteeism; as he did so, he showed me that he was foisting about for a justification for the discharge. More importantly, Johnson rendered himself incredible as he testified on cross-examination that, on September 13, "I think I called Julie Bolden. . . . I don't remember. I thought I had called her that morning." Either way, if he had called Bolden or Bolden had called him, Johnson would have remembered it, and such hesitation, reservation and qualification would not have appeared in Johnson's testimony. Finally on this point, Johnson was plainly lying when he testified that he did not call the personnel department office on September 10 only because it was raining. I do not believe that Johnson called Bolden at all.[525] I find that, as admitted in Johnson's quoted affidavit, Bolden called Johnson and told him that Armstrong should be discharged, and Johnson, in turn, told Barber to dis-

[525] In an attempt to corroborate Johnson, Barber testified that early on September 13 Johnson told him not to speak to Armstrong about the warning notice because he had a call in to personnel. This testimony was undoubtedly false; Barber had not told Johnson of Armstrong's call back to the plant on September 10, and Johnson had no reason to believe that Barber would be discussing the warning notice with Armstrong again.

charge Armstrong. Johnson would not have said such in his affidavit if it had not been true.[526]

On its face, the warning notice that Barber had drafted for Armstrong showed nothing unusual. Manager of Employment Bolden, a first assistant to an executive in Respondent's central office, would not have acted upon it unless she had knowledge of Armstrong's prounion activities and background, and Simpson's animus toward it. The totality of the circumstances, including Bolden's failure to testify, impels me to so find.

Petticrew testified that he saw Armstrong using a nonapproved welding shield, but he did nothing about it. Petticrew testified, several times, that the welding shield that he saw was completely covered with duct tape, and it was much smaller than Armstrong's cut-down shield. Barber also described the shield that Armstrong was using as much smaller than Armstrong's cut-down shield, but he made no mention of duct tape. Both described the shield that Armstrong was using as one that could only be hand-held. I do not believe either Petticrew or Barber. No welder would have only a hand-held mask; any welder would know that, for some jobs, he would need two hands. Moreover, the duct tape described by Petticrew appears to be nothing more than his imagination, or perhaps his memory of being shown the above-described cardboard shield during pretrial. The mendacity of Barber was demonstrated in his testimony that he believed that an employee did not necessarily have prounion sympathies just because he wore prounion insignia; other evidence of Barber's mendacity is found in Melton's case where he gave extensive testimony about witnessing misconduct by Melton, but Barber's testimony was so at odds with the testimony of Respondent's other witnesses that Respondent does not even mention Barber's testimony about Melton on brief. I find that Armstrong was using the cut-down shield that he had used for years at the main yard in the presence of supervisors there.

As I have mentioned, it is undisputed that Respondent's supervisors permitted Moran to take a welding-certification test with shield that was essentially identical to Armstrong's, and I found credible Dumas' testimony that for 2 years she used a tape-covered welding shield at the main yard (even though that shield, itself, was flammable). More importantly, Armstrong's testimony that he had used the cut-down shield in the presence of LeFort and Mallini without warning was credible. Armstrong, therefore, was issued a warning notice, and ultimately discharged, for doing what had been permitted by his supervisors at the main yard and a supervisor at Westwego, Petticrew.[527] Also, Barber testified that "[w]e don't change any rules" at Westwego, and he admitted that Armstrong told him that he had been permitted to use the cut-down shield at the main yard; nevertheless, Barber issued the warning notice to Armstrong.

I find that Respondent issued a warning notice to Armstrong, and then discharged him on the basis of that warning notice, even though the conduct for which the warning notice was issued was known to have been permitted at the main yard for years. The September 10 warning notice to Armstrong being completely invalid, Respondent, I further find, has not shown that it would have warned and discharged Armstrong even in the absence of his known protected activities. Without more, therefore, I would conclude that by discharging Armstrong Respondent violated Section 8(a)(3). There is, however, more.

I find further evidence of unlawful discrimination against Armstrong in the cases of disparate treatment that have been proved by the General Counsel. As demonstrated by the listing above, a significant number of employees were permitted, in the 1990–1994 period, to accumulate three presumably valid safety warning notices, or two major offense warning notices, within 12-month periods, without being discharged; Armstrong, however, was discharged when he had accumulated only two valid, major offense, safety warning notices (those of October 6, 1992, and July 13, 1993). A specific example of such discrimination against Armstrong lies in Barber's treatment of Westwego employee Miller, before and after the discharge of Armstrong. On August 13, Barber issued to Miller a major offense warning notice for allowing the boom of a crane he was operating to hit the boom of another crane, "knocking handrails off his crane." Barber's warning notice to Miller concludes: "Final Notice." Then, on December 2, Barber issued to Miller another major offense warning notice for negligently operating a crane and allowing cables to strike the ground near Petticrew, Johnson, and Barber, himself. The warning notice concludes: "This Is The Final Notice." On December 4, or 2 days later, Barber issued Miller a third major offense safety warning notice in 12 months for failing to sound his horn while conducting a lift. Then, on December 7 (or 2 more workdays later), Barber issued Miller his fourth major offense safety warning notice, and his third major offense-23 warning notice, in 12 months for dropping a load. If Miller was then discharged, Barber was not recalled in surrebuttal to so testify. Assuming, however, that Miller was discharged on the occasion of his fourth safety violation, he certainly was not discharged on the occasion of his third. (Also, Millers' first or second major offense could well have killed or injured someone, including Barber.)

Further evidence of discrimination by Barber against Armstrong lies in the March 10, 1994 warning notice that Barber issued to Westwego employee Raymond Morris. That warning notice also was issued under the Avondale Employees' Guide's major offense-23, and it states: "Failure to wear grinding shield while grinding. Has had verbal [oral] warning." Morris could well have been blinded by grinding with no shield the first time that he did it, but then he got from Barber only an oral warning, according to the text of the written warning notice.[528]

I therefore find that Respondent has not shown that it would have discharged Armstrong even in the absence of his protected activities (including protected activity of displaying his prounion sign at the June 21 Bossier speech). Accordingly, I con-

[526] See *Alvin J. Bart & Co.,* 236 NLRB 242 (1978). Neither on brief nor reply brief does Respondent mention Johnson's affidavit about which it made so many arguments, and so many objections, at trial. On the other hand, Respondent argues strenuously that affidavit statements and omissions are controlling in the case of alleged discriminatee Joseph Melton, and in the cases of other alleged discriminatees, as described infra.

[527] I discredit Petticrew's testimony that he had told Armstrong not to use a smaller welding shield; if he had, he would have told Armstrong on September 13 that he had warned Armstrong about using it. Petticrew admitted on cross-examination that he did not.

[528] On brief, Respondent argues to be controlling the fact that Armstrong's supervisors categorized Armstrong's last two safety-rules violations as deliberate. This argument, again, assumes the validity of the welding-shield warning notice; moreover, Johnson testified that he knew nothing of the number or nature of the warning notices that Armstrong had received when "he" decided to discharge Armstrong.

clude that by discharging Armstrong Respondent violated Section 8(a)(3) of the Act.[529]

(For possible purpose of review, I enter here another credibility resolution: Barber testified that on September 10 he gave the warning notice to Guerrera and told Guerrera to give it to Armstrong. Barber further testified that Guerrera radioed him that Armstrong would not accept the warning notice, and Barber told Guerrera to bring Armstrong to his office where he told Armstrong that if he did not sign the warning notice, he would write "Refused to Sign" on it. Armstrong, however, testified that Guerrera only asked him to come to the office at the end of the (rain-out) day and that Guerrera did not have the warning notice with him. I do not believe Barber's testimony on this point, and I do not believe that Armstrong went to Barber's office on September 13. Employees regularly refuse to sign warning notices, and the threat to write "Refused to Sign" would have been a threat of nothing. Guerrera did not testify, and Armstrong was credible in his testimony that Guerrera did not have the warning notice when Guerrera asked him to come to the office on September 10. Armstrong was further credible in his testimony that "Refused to sign" was already on the warning notice when Petticrew presented it to him on September 13, something that Petticrew did not deny.)

b. Joseph Melton

Joseph Melton (vol. 12) was a pipefitter and pipe-tester at the main yard until July 30, 1993, when he was transferred to the Westwego yard. On August 23, Melton was discharged while working at the Westwego yard. Paragraphs 110 and 116 of the second complaint allege, respectively, that by transferring and discharging Melton Respondent violated Section 8(a)(3). The General Counsel contends that Respondent selected Melton for transfer to Westwego (along with pipefitters Armstrong and Gonzalez and welders Walter Brown and Charles Fleming), and discharged Melton, because of his known or suspected union activities and expressions of sympathy which included his making comments favorable to the organizational effort at employer campaign meetings. The General Counsel further alleges that, in violation of Section 8(a)(1), Melton was instructed not to speak about the Union while working at the main yard. The General Counsel further contends that a supervisor admitted to another employee that Melton was transferred and discharged because of his union activities. Respondent denies that the instruction to Melton and the supervisor's admission to another employee occurred. Respondent further answers that its supervisors had no knowledge of any union activities or sympathies of Melton at any relevant time, that Melton was transferred to the Westwego yard solely because of business necessity, and that Melton was discharged because, when he was working in a flat-bottomed boat on the Mississippi River, he deliberately disobeyed a foreman's order to wear a life jacket. The General Counsel replies that the business-necessity defense asserted for the transfer was a pretext as shown by the fact that Melton was never used at Westwego as a pipefitter or pipe-tester; the General Counsel further replies that the defense asserted for the discharge is pretextual because any violation of safety rules by Melton was unintentional; alternatively, the General Counsel replies that Melton was treated disparately because other employees who engaged in safety violations were issued lesser, or no, discipline. Ultimately, I find and conclude that Melton was both unlawfully transferred and discharged.

At the main yard, Melton reported directly to Foreman Timmy Benoit. Melton was asked about his duties as a pipe-tester, and he testified:

> The first thing you do when you start to test the system, you put air pressure on it. . . . You make up what is called a test connection. All the ships—in fact, the whole shipyard—has a community air supply which has approximately 120 pounds of air pressure. In other words, there's air manifolds all over the yard. . . . You make up a test connection and you break a flange or wherever you need to get into this system, you break some sort of system to put air in it, to test it with air. . . . After you put the air on it, then you go along with soap and water and you check all your joints to make sure you don't have any leaks. If you have any leaks, like weld leaks, well, then, the pipe testers has a welder working with them that welds up the leaks.
>
> And once you get all the air leaks stopped, then you fill the system with whatever you are going to use to test it with—normally water. . . . Once you test it with air, then you put hydraulic oil in it and pressure it up. You also have hydrostatic, where you put water in it and pressure it up. It depends on what kind of tests they call for for that specific system.

Melton testified that he performed such tests on systems from 50 to 500 feet in length; with pipes from half-inch to 30 inches in diameter. Melton's rate of pay as a first-class pipe-tester was $10. per hour, one of the higher wage rates that is mentioned at trial. Benoit acknowledged on cross-examination that Melton was one of his most skilled pipe-testers.

Melton testified that in early June an employer campaign meeting was conducted in a conference room near Simpson's office. Present were many pipe department employees and supervisors including Whittington, Benoit, LeFort, and Oscar Rabestein. Whittington conducted the meeting and read a statement, after which he entertained questions. Melton testified:

> And someone asked him [Whittington] about raises, and he said, "Well, we don't have any money and we don't have any new contracts."
>
> And I said, "Well, if you didn't have so many vice presidents, then you wouldn't have that problem."
>
> He said, "Well, I don't have anything to do with that."
>
> And I said, "Well, if you got rid of the vice presidents, you would have enough money to give everybody a raise."

Whittington did not deny this testimony by Melton.

Melton testified that about June 30, he was working on board a ship under construction with two other pipe-testers (whom he did not name) when Foreman Oscar Rabestein walked by. According to Melton:

> I was doing my job testing the systems, but I was talking with them about the Union benefits and wages and job descriptions, things like that, you know. . . . Oscar came up on us and told me that I wasn't—that I couldn't talk to anybody about anything union while I was working. And I

[529] There is no evidence to contradict Respondent's testimony that on June 21 Simpson ordered Armstrong's discharge upon the occasion of his next offense, and there is no dispute that he was not discharged on the occasion of his July 13 safety warning notice. The General Counsel, however, was not required to prove the negative, why Armstrong was not then discharged.

> explained to him that I was doing my job and I hadn't stopped them from doing their job; they were doing their job as well. And with that, he left.

Based on this testimony by Melton, paragraph 47 of the second complaint alleges that Rabestein discriminatorily promulgated a no-solicitation rule. Rabestein denied this testimony by Melton, but I found Melton credible on the point. I therefore find and conclude that, in violation of Section 8(a)(1), Respondent, by Rabestein, about June 30, promulgated a rule discriminatorily precluding its employees from talking about the Union during working time.

(1) Melton's transfer to the Westwego yard

Melton further testified that on July 30 he was approached by Foreman Benoit and told that he was being immediately transferred to Westwego. According to Melton:

> He [Benoit] said, "Man, I don't know what is going on. I talked to everybody to try to get this stopped and everybody told me the same thing: It came from higher up and there wasn't a thing they could do about it."
>
> I said, "Well, Timmy, what am I going to be doing over there?"
>
> And he said, "I have no idea. Nobody don't know that, either."
>
> And he said, "Look, I talked to all the people. I talked to [Carl (Black)] Abadie; I talked to John Whittington. I talked to everybody trying to stop this transfer, and they all told me the same thing: There wasn't nothing they could do about it. It came from higher up."
>
> I said, "Well, Timmy, how about if I go talk to them?"
>
> He said, "Fine."

Further according to Melton:

> I left and went to Black Abadie's office, and I asked him, "Black, I said, What is going on? Why am I being transferred?" He said, "I don't know. It came from up above. There ain't nothing I can do about it."

Benoit denied the above testimony; again, Abadie did not testify.

Melton testified that at the time he was transferred, there were six ships in the area still under construction; 5 pipe-testing crews, with from 8 to 15 pipe-testers each, had been working on those ships.

As found in Armstrong's case, when Melton, Armstrong, and Gonzalez arrived at Westwego, they were met by Westwego Vice President Heaps and engineer Sigsworth who said they did not know why pipefitters and pipe-testers were being sent to them because there was no pipe-testing or pipefitting work for them to do. During their first day at Westwego Melton and the other pipe department transferees were assigned jobs of moving furniture and cleaning. Later, Melton and Armstrong were put to work building railings and cutting up metal skids that had been dragged from the Mississippi River. Melton did no work akin to that which he had done as a pipe-tester at the main yard.

As discussed above in the case of discriminatee Eddie Johnson, Johnson was hired by Respondent on August 27, or 4 days after Melton was discharged. Johnson was assigned to work for Benoit at the main yard, as Melton had done before he was transferred to Westwego. Johnson testified (vol. 57) that he had never met Melton, but at some point after he was hired, Benoit mentioned Melton to him. According to Johnson:

> Well, Timmy told me: "Eddie, personally, you know, I don't care if the Union come in because if the Union come in, you guys will probably get more money . . . because I am at the bottom of the pay scale for foremans.
>
> "But if I was you, I would be careful who I talk to about the Union. There was a guy named Joe Melton who used to work here for me. Just the way you are talking the Union, that is the way he was talking.
>
> "Black Abadie transferred him [Melton] to Westwego, but two weeks later they fired him. Black and John [Whittington] would do the same thing to you. If I was you, I would be real careful, because I have heard that anybody that is affiliated with union people, they want to fire them.
>
> "Now, we had this conversation, but, we didn't have this conversation, because anybody that asks me I will deny it."

In Johnson's case, I credited this testimony over Benoit's denial. I further concluded that Benoit's telling an employee that another employee had been transferred because of his union activities, that the employee was then discharged, and that "I have heard that anybody that is affiliated with union people, they want to fire them," was a violation of Section 8(a)(1) as alleged in the fourth complaint, at paragraph 8.

Melton's Transfer to the Westwego Yard—
Respondent's Evidence

As noted in Armstrong's case, Whittington testified that either Abadie or Fradella gave him a slip of paper that listed the badge numbers of Armstrong and Melton, and either Abadie or Fradella told him that the employees with those badge numbers were to be immediately transferred to Westwego; Whittington had no input into the decision to select Melton as one of the employees to be transferred to Westwego. Benoit testified that he was informed by Whittington that Melton was to be transferred because: "It was just that we had to cut back." Benoit denied telling Melton that he did not know what was going on and that he did not know why Melton was being transferred to Westwego. Benoit testified that "many" of his employees were moved about the same time because his work had "caught up." On cross-examination, Benoit acknowledged that he had gotten no advance notice of Melton's transfer to Westwego.

Neither Fradella nor Whittington testified that there was any lack of work for pipe-testers at the main yard, and Benoit acknowledged that there were about 12 pipe-testers that continued to be used at wet dock-3 after Melton was transferred to Westwego. Again, Benoit acknowledged that Melton was one of his more highly skilled employees. Moreover, as noted in Armstrong's case, Simpson testified that there was work for all of the transferred employees to do in the main yard, but he had to make a decision to send them anyway for the good of the Company.

Melton's Transfer to the Westwego Yard—Conclusions

Respondent denies that its supervisors knew that Melton favored the Union. Respondent does not deny, however, that Melton spoke up at an employer campaign meeting and voiced the commonly held concern, and the Union theme, that wages should be higher for all employees. Melton emphasized the point by stating that, if Respondent would rid itself of some of its vice presidents, wage increases for all employees could be given. In this context, Melton's concerted activity was also union activity of which Respondent is charged with knowl-

edge.[530] Also, Melton's talking about the Union was of sufficient note to Rabestein that Rabestein unlawfully told Melton to stop it. Finally, as I have further found, Benoit told employee Eddie Johnson that Melton had been talking about the Union and, as a result, he was transferred from the main yard and he was later discharged. I therefore find that Respondent's main yard supervisors knew that Melton was a known actively prounion employee. Respondent's animus toward such employees having been demonstrated throughout this decision, I conclude that the General Counsel has presented a prima facie case that Melton was unlawfully transferred, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Melton even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, page "Inter-Department Transfers—69, 70," Respondent states:

> It is uncontroverted that when the Pipe Department in the past transferred workers to other Avondale yards, the selection criteria was the same. [Production Vice President] Simpson and [General Foreman] Whitney testified [that] with prior contracts the criteria was to send employees with discipline or performance problems. Melton's selection was in keeping with past practices and consistency with past practices negates a claim for antiunion motivation for the transfers. [Citations omitted.]

The gaping failure of evidence in this assertion is that Melton had a perfect disciplinary record. He had never been issued a warning notice, and Benoit considered him one of his best employees.

The second factor to be noted in Respondent's assertion on brief is that it does not assert the defense that was asserted at the hearing. Benoit testified that, although Melton was an excellent employee, he had to be transferred because there was not enough work for him at the main yard. Cross-examination of Benoit proved this assertion false when Benoit admitted that as many as 12 pipe-testers were being used at wet dock-3, alone. Moreover, Simpson acknowledged that there was plenty of work for all of the employees who were transferred to Westwego. Whittington, Melton's general foreman, did not testify that Melton was transferred because of lack of work at the main yard. If that had been the case, Whittington presumably would have known about it, and Whittington would have so testified. The failure of corroboration of Benoit's testimony, coupled with the failure of Respondent even to cite Benoit's testimony on brief, demonstrates that Benoit's testimony, that lack of work was the reason for Melton's transfer, was a complete lie.

Benoit's demonstrated willingness to lie under oath fortifies my conclusion that he told Johnson that Melton had been transferred to Westwego because he had been talking about the Union. Benoit's demonstrated willingness to lie under oath, and Melton's better demeanor, further cause me to believe, and find, that Benoit told Melton that he had tried to get Melton's transfer to Westwego stopped, but orders had come from "higher up." I further believe Melton's undisputed testimony that Abadie told him that he did not know why Melton was being transferred to Westwego; he only knew that the order "came from up above," and that there was nothing that he could do about it. If there had been a legitimate reason for the transfer of Melton, the senior general foreman on the ship, Abadie, assuredly would have been told what it was, and he would have been called to so testify. Also, Melton's immediate general foreman, Whittington, would have been told if there had been a legitimate reason for selecting Melton for transfer. Whittington testified, however, that he was not given any reason for Melton's transfer; he was just given a piece of paper with Melton's badge number (and Armstrong's badge number) on it. Finally, Benoit was Melton's immediate supervisor; he was in a position to know the true reason that Melton was selected for transfer to Westwego, and he admitted to Johnson that it was because Melton had been talking about the Union. (Benoit also told Johnson that Melton was discharged at Westwego because of his talking about the Union at the main yard, but that is another matter that will be discussed below.)

As I stated in Armstrong's case, Respondent had no demonstrably legitimate reason for transferring any pipefitters, or pipe-testers, to Westwego in July and August 1993. Certainly there were no pipes to be tested at Westwego. Respondent would assuredly need employees with Melton's skills later, when there were pipes to be installed and tested, but there is no reason to believe that it could not have transferred employees as quickly, and as permanently, at such later times when it actually needed them. Finally, even if Respondent needed some pipe department employees at Westwego, there is no reason to believe that, during the summer of 1993, it needed first-class mechanics such as Melton. Nevertheless Respondent was willing to waste Melton's special skill, for which he was highly paid, in order to get him out of the main yard as soon as a colorable excuse to do so presented itself.

Melton's case fortifies my finding that the only purpose of transferring pipe department mechanics to Westwego during the summer of 1993 was to provide an artificial aura of legitimacy to the transfer of Armstrong (the sign-bearer at Bossier's June 21 speech). One nonunion employee, Madere, also got caught in the process, but Respondent used the Westwego contract as a pretext to rid the main yard of at least one more prounion employee, Melton.

That is, I find that Respondent has failed to show that it would have transferred Melton to Westwego even absent his known protected activities, or the protected activities of Armstrong, and I conclude that, on August 2, 1993, Respondent did transfer Melton from the main yard to Westwego in violation of Section 8(a)(3) of the Act.

(2) Melton's discharge for improper life-jacket use

On August 23, the day he was discharged, Melton was assigned to work with Armstrong pulling trees that had grown up around a dock in the Mississippi River. A moveable crane was on the dock, and Melton was in a flat-bottom boat. Melton described the process:

> When I initially started, I just hooked the chain above the water on the trees, and the crane pulled it, and it broke the tree off. A cypress tree, when it is growing in water, it comes up so far and it has got a big trunk on it, and then it gets like a little skinny part that goes up that actually has the leaves on it.
>
> And I had to hook the chain onto the trunk part in order to pull the roots. . . .

[530] See *Neff-Perkins Co.,* 315 NLRB 1229 fn. 1 (1994).

> And so in order to hook the chain underwater on the trunk of the tree, I was wearing a Mae West life jacket, which is a real bulky life jacket. It has two tie wraps on it.
>
> I took the life jacket off. I put the life jacket on the seat beside me. I laid down in the boat and hooked the chains underwater and continued pulling them. I pulled approximately 50 trees from 7:00 till 10:00.

Armstrong was working on the dock while Melton was in the boat. Armstrong's job was to unwrap the chain from the tree that the crane had lifted to the dock. Further according to Melton:

> At 10:00, Bob Luttrel came by the river and told me to put my life jacket on. And I explained to him at that time why I had taken it off, because I couldn't reach deep enough in the water to tie the chain on the trunk of the tree.
>
> And he says, "It doesn't matter. Put it on." So I put it on and tied it and went back to work. . . .
>
> At 11:45, Bob Luttrel called me back over to the dock and told me I was terminated. And I said, "Why?"
>
> He said, "Because your life jacket is untied." The top tie was untied; the bottom one was not. It had one tie wrap untied.
>
> He had a warning slip that he told me was my termination slip.

The notice that Luttrel handed Melton recites as a date and time for the offense, "8–23–93 10:00 a.m. & 11:45 a.m." The box for Avondale Employees' Guide's major offense-23 is marked and the text of the notice states:

> Deliberate violations of safety, security or plant protection regulations. In flatboat without life jacket; foreman instructed him to wear it at all times. Found again in flatboat with life jacket improperly secured.

The life vest had two canvas ties; as Melton acknowledged, the top tie was undone when he was approached at 11:45 a.m. by Luttrel for the second time. Melton was asked and he testified:

> Q. Do you know how the top one became untied?
>
> A. Leaning over in it and being in the limbs of the trees, the limbs untied it.
>
> Q. [By Mr. Morgan]: What happened when Mr. Luttrel gave you your warning notice and told you you were terminated?
>
> A. I read it, and I said, "What is this? I am losing my job because my life jacket is untied?"
>
> He says, "You are terminated," and he says, "There is nothing I can do about this. I didn't have anything to do with this, and there is nothing I can do about it."

Melton testified that he told Luttrel that he had not done anything deliberately. At the space for employee comments, Melton wrote:

> Tree limbs untied vest and I did not notice—foreman came with termination papers & no warnings. Violation warranted no more than a citation.

Neither in his protestations to Luttrel, nor in his comment on the warning notice, nor in his pretrial affidavit, did Melton state that only one of the ties on the life vest was untied.

On cross-examination, Melton acknowledged that he did not wear union insignia such as pins, T-shirts or stickers, as some other union supporters did. Further on cross-examination, when he was asked why he did not point out to Luttrel, or say in his employee comment on the warning notice, that one tie was still tied when confronted by Luttrel, Melton answered, "I was so upset when this happened from losing my job for something like this. It really never even crossed my mind until later on that I did untie the bottom one when I took it off." Melton testified that it was a day or two after his September 23 discharge that he realized that one tie was still tied, but he further acknowledged that in his November 5 pretrial affidavit, he stated: "I had on the life vest at the time, but it was untied, which had been caused by the tree limbs."

Armstrong, who was working on the dock the day of Melton's discharge, as described above, testified that when Luttrel called Melton to the dock, only the top tie of Melton's life vest was untied. Armstrong further corroborated Melton's testimony that, during the week before Melton's discharge, employee David (last name unknown to Melton) sometimes worked in a flat-bottom boat in the River without a life vest.

Melton's Discharge—Respondent's Evidence

Luttrel testified that early on August 23, when he gave Melton the tree-pulling assignment: "I told Melton to go to the toolroom, get a life jacket, wear it at all times while he was in the flatboat." Luttrel further testified that later in the morning Westwego Production Manager Johnson radioed him that there was an employee in a flatboat not wearing a life jacket. Luttrel went to the bank. When he saw Melton and told him to put on the life jacket, Luttrel testified:

> Melton said, "This is bull shit; you all are picking on me because I am union."
>
> I said, "Melton, this has nothing to do with the Union; this is strictly an Avondale safety violation."

Luttrel testified that Melton then came to the shore, got his life jacket, tied it properly and got back in the boat. Luttrel then went to Johnson's office and told him what had happened, including Melton's statement about the Union. Luttrel denied that Melton told him that he had taken the life jacket off because he could not get the chain around the tree trunks without doing so.

Luttrel further testified that later in the morning Johnson radioed him to come back to the river bank. When he got there, Johnson pointed to Melton who was wearing the life jacket, but with both ties untied and "laying back on his shoulders." Johnson told Luttrel, "[W]e need to terminate him." Luttrel then called Melton to the bank and told him that he was discharged. Luttrel acknowledged that Melton said that the trees had caused the ties on the life jacket to come undone; Luttrel testified, however, that he did not believe Melton because other employees had performed the same operation and had kept their life jackets tied. Luttrel denied that he, at any point, told Melton that he had had nothing to do with Melton's discharge. Luttrel further denied that Armstrong was in the area while Melton was in the boat without a properly secured life jacket; Luttrel testified that, at the time, Armstrong was putting tree detritus in a dumpster.

Johnson (vol. 82) testified consistently with Luttrel. Johnson testified that he saw Melton first wearing no life jacket, and then wearing a life jacket with both ties untied, and he radioed Luttrel on both occasions, as Luttrel testified. Johnson testified that he decided to discharge Melton because: "I knew he was

just blatantly disrespecting our or disregarding our safety rules. He was just talked to about it."

Melton's Discharge—Conclusions

As I have found above, Benoit told alleged discriminatee Eddie Johnson that Melton had been talking about the Union and that Melton was thereafter transferred to Westwego and discharged. This was a threat to Johnson, and an admission that Melton was transferred to Westwego unlawfully, as I have found. I do not, however, agree with the General Counsel that Benoit's statement to Johnson was also an admission that Melton's discharge was unlawful. Benoit was far down the supervisory chain, and he was removed from Westwego, and there is no evidence that he would have, in fact, known that there was an unlawful reason for Melton's discharge, as well as his transfer.

On the other hand, as I have concluded above, Melton was, in fact, transferred to the Westwego yard because of his protected activities at the main yard. Although his supervisors at Westwego denied that they knew that Melton was prounion before August 23, I do not believe their testimonies. As Wheeler told Menier, there was a list of employees who were transferred to Westwego to be discharged because they were prounion. I do not believe that the list could have been created, or the employees unlawfully transferred, without the knowledge of such supervisors as Johnson, the supervisor who made the decision to discharge Melton. Moreover, before Melton was discharged, he told Luttrel that he was prounion, and Luttrel admits that he told this to Johnson. Respondent's animus toward such prounion employees is established throughout this decision. I therefore conclude that the General Counsel has presented a prima facie case that Melton was unlawfully discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Melton even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

I do not believe Melton's testimony that the ties on his life jacket were undone by the trees that he was pulling from the Mississippi River. If that had happened, Melton most certainly would have known about it when it happened. If he did not know about it when it happened, he would have known about it, and corrected the matter, the first time that he straightened up after pulling a tree out of the river, and he would have then corrected the situation. Finally, if Melton had really believed that the tree branches had undone the ties of his life jacket, he would have mentioned it in his comment on the warning notice and the affidavit that he gave to the Regional Office investigator weeks later. I believe, and find, that Melton intentionally untied, or at least left untied, the ties to his life jacket.

Melton was discharged upon the occasion of his first disciplinary offense, ever. As appendices B and C of this decision demonstrate, other employees were allowed to accumulate up to 14 warning notices in 12-month periods without being discharged. Aside from cases of theft, grossest insubordination, willful damage to company property or sleeping, Respondent has offered no evidence that would demonstrate that any nonunion employee was ever discharged for one offense. (Respondent offered, and I rejected on other grounds, three warning notices and three ASI-22 (discharge) forms as evidence that Westwego employees were discharged for one safety violation. As Respondent stated many times during the hearing, however, its ASI-22 forms normally recite only the last offense upon which discharges depended. The personnel cards, showing warning notice histories of the three employees concerned, were not offered. Finally, one of these three warning notices is illegible, and another shows that the employee involved actually injured another employee.)

On brief, page "Westwego Yard—52," Respondent states that: "Moreover, Avondale conclusively showed that it would have taken the same action regardless of whether Melton was engaged in any union activities." In so stating this conclusion, Respondent implicitly recognizes its burden to show that it would have discharged Melton even in the absence of his known protected activities. Nevertheless, further on brief, at "Westwego Yard—58," Respondent states: "It is a major offense of Avondale's Employee Guide to deliberately violate a safety regulation. See RE 12, § 23 at p. 16. The Guide states that employees *may* be discharged for a first major offense if the violation is serious." (Emphasis added.) In so stating, Respondent acknowledges that the Avondale Employees' Guide does not require the discharge of employees who engage in an intentional safety violation, and it can hardly defend itself on the basis of an imperative that does not exist. Moreover, the issue is what Respondent's practice was, not merely how the Avondale Employees' Guide could be read.

The record is replete with case in which employees were issued major offense warning notices without being discharged. Specifically, by evidence of disparate treatment introduced in rebuttal, the General Counsel has shown that a significant number of employees have been issued major offense warning notices for safety infractions and not discharged. Many of those are listed in Armstrong's case, supra. To be noted among them, especially, is the case of Westwego employee Miller. Just before Respondent discharged Melton, General Foreman Barber issued Miller a major offense warning notice for negligently operating a crane, striking one crane-boom with another. Then, after Melton was discharged, Barber issued Miller three additional major offense warning notices, all under major offense-23 (like Melton's). If Miller was discharged even on his fourth safety major offense, Barber was not called in surrebuttal to so testify. At any rate, Miller was not discharged after his third major offense safety infraction. On brief, Respondent offers no reason why the treatment of Miller is not compelling evidence of disparate treatment of Melton. I find that it is.

Finally, in his Exhibit 774, and other exhibits, the General Counsel introduced a plethora of warning notices that were issued to employees for safety violations, and recitations in those notices, or subsequent warning notices that are in evidence, show that the employees were not discharged. Many of these were issued under major offense-23 of the Avondale Employees' Guide. Many others, however, were issued under general offense-12 ("Violation of Company safety rules and regulations through carelessness"), and the described actions of those employees were at least as deliberate as Melton's. (Chief among these are cases in which employees worked at heights without safety belts; this was conduct that is as close to Melton's case as can reasonably be expected to be found because employees do not often work over water.)

I agree with Respondent that the General Counsel's parol evidence of unpunished safety infractions at Westwego was not probative. Again, however, Respondent offers no reason why the documentary evidence of disparate treatment should not be controlling in Melton's case, other than to say that the warning

notices to other employees somehow do not tell the full story. (Certainly, I afforded Respondent all the time that it could use on surrebuttal to offer any evidence that would detract from the plain import of the warning notices.) Accordingly, I find that Respondent has not shown that it would have discharged Melton even absent his known prounion sympathies, and I conclude that by discharging Melton Respondent violated Section 8(a)(3) of the Act.

c. Luis Gonzalez

Luis Gonzalez (vol. 45), a pipefitter, worked in the main yard until he was transferred to the Westwego yard on August 2, 1993. On August 5, Gonzalez was issued a warning notice. Paragraphs 110 and 114 of the second complaint, respectively, allege that by transferring and warning Gonzalez, Respondent violated Section 8(a)(3). The General Counsel contends that Respondent transferred Gonzalez (along with Armstrong, Melton, Brown, and Fleming) to Westwego, and warned Gonzalez, because of his known union activities and expressions of sympathy which included his wearing prounion insignia and mentioning the Union to a supervisor. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Gonzalez may have held at any relevant time and that Gonzalez was transferred to the Westwego yard, along with other employees, because of business necessities. Respondent further answers that Gonzalez was issued a warning notice solely because of his violation of an established safety rule, not wearing tinted safety goggles while cutting steel with a torch. The General Counsel replies that the business-necessity defense for the transfer is a pretext as shown by the fact that Gonzalez was not used as a pipefitter at Westwego until 3 months after his transfer. The General Counsel further replies that Respondent's defense for the warning notice was a pretext because Gonzalez had previously been allowed to use clear goggles while using a cutting torch, and other employees were allowed to do so afterwards. Ultimately, I find and conclude that Gonzalez was transferred unlawfully, but Respondent did not violate the Act by issuing the warning notice to him.

Spanish is the first language of Gonzalez, and he was interrogated through a translator. It soon became apparent, however, that Gonzalez knew at least some English and he could testify in English about what some supervisors had said to him at various times. Certain of that testimony is discussed in Armstrong's case, supra.

Gonzalez testified that he "regularly" wore union stickers "on" his hardhat and shirts. At another point Gonzalez testified that he wore a prounion sticker only on the inside of his harhat. Gonzalez further testified that during the preelection period he spoke up, in English, at employer campaign meetings; Gonzalez testified: "In all of our meetings I would say vote for me and vote for the Union." Gonzalez testified that during several employer campaign meetings supervisors, including his immediate supervisor, Foreman David Daigle, told the employees that those who wore union stickers, or spoke in favor of the Union, would have "problems." He testified that, several times before the June 25 Board election, Daigle told him not to wear union stickers, "neither on my shirt nor the hardhat," and that, on one occasion, Daigle tore one of the stickers from his shirt and threw it away. Gonzalez further testified that he placed a union sticker on the inside of his hardhat during the campaign; occasionally when he took his hardhat off to work in tight spaces, Daigle would comment on the sticker which he then could see. Gonzalez was asked to testify in English what comment Daigle would make on such occasions, and Gonzalez responded: "No put the sticker in the hat. Take it out, man. You got a problem; take out the sticker in the hat." Gonzalez further testified that on one occasion Daigle asked him for a union sticker; Gonzalez gave Daigle one; and Daigle stuck it on to the back of another supervisor's hardhat.

Gonzalez further testified that, during an employer campaign meeting that was conducted by Pipe Department General Foreman Whitney 3 or 4 weeks before the June 25 Board election:

> I asked him [Whitney] why Avondale didn't pay more to its employees.
>
> And he responded, "Yes, you are being paid more."
>
> And I said, "Where?"
>
> And he said, "It is reflected on the papers."
>
> I told him I didn't need it on the papers, but in my check, in my pocket.
>
> I also mentioned to him why I made $10 when there were others who earned $11.75 and with the same work.
>
> Then he told me that there were two ratings, an old one and a new one.
>
> I asked him why. And he said, "This is Avondale."
>
> And I said, "This is not good."

Gonzalez testified that he placed prounion stickers "in different parts in Avondale [in] different places." Gonzalez testified that Daigle once accused him of putting up union stickers in the restroom, but he denied doing so. Gonzalez also testified that Whitney once accused him of putting union stickers on a wall; Gonzalez testified, in English:

> David Whitney . . . said, "I know you put this sticker in different area the Avondale."
>
> I told him, "No[t] me."
>
> He said, "I know you put a sticker."
>
> I told David Whitney: "I vote for Avondale; I no vote for union."
>
> This is big man. I told him, "Vote for Union, me fight."

Gonzalez further testified that when he made this last statement, Whitney patted him on the back and walked away. Gonzalez testified that this exchange with Whitney also occurred "two or three weeks before the election."

On cross-examination, Gonzalez first confirmed, then he denied, that he told Daigle that he had placed prounion stickers on a restroom wall. Also, while he was on cross-examination, the General Counsel stipulated that Gonzalez' pretrial affidavit: (1) states at one point: "I did not wear any union sticker at work where the Company could see it;" (2) says nothing about any supervisor telling him that if he wore prounion insignia he would have "problems;" (3) says nothing about Daigle telling him that he could not wear prounion insignia on his shirt or hardhat; (4) says nothing about Daigle taking a sticker from his shirt and throwing it away; (5) says nothing about Daigle taking a prounion sticker out of his hardhat; and (6) says nothing about Daigle asking him for a prounion sticker and then placing it on the hardhat of another supervisor. On redirect examination, Gonzalez testified that there were many "mistakes" in the affidavit, but on re-cross-examination Gonzalez acknowledged that he had been given an opportunity to make changes in his affidavit before he signed and swore to it.

Daigle did not testify, but, in view of the many unexplained conflicts with Gonzalez' affidavit, I do not believe, and do not credit, Gonzalez' testimony about things that Daigle said, and did, about his wearing or handling the prounion stickers. I also credit Gonzalez' affidavit over his trial testimony and find that he never wore prounion insignia where any supervisor could see it.[531]

Whitney denied knowing of any prounion sympathies that Gonzalez may have had, but he did not deny that Gonzalez spoke up for the Union at an employer campaign meeting that he conducted. Whitney testified that he could not recall speaking to Gonzalez about prounion stickers that had been placed on walls about the plant. On cross-examination Whitney was asked and he testified:

> Q. Did you ever have any one-on-one conversations with Luis Gonzales concerning union activity?
>
> A. I could not say as to whether I did or not, sir. I do not remember.
>
> Q. You just don't remember one way or the other?
>
> A. No.

In summary, Gonzalez admitted that at one point, when he was accused by Whitney of putting prounion stickers on a restroom wall, he told Whitney that he would not vote for the Union and that he would, indeed, "fight" against the movement to secure votes for the Union in the Board election. Respondent argues that this admission negates any contention that Respondent's supervisors, especially Whitney, thought that Gonzalez held prounion sympathies at the time that he was transferred to Westwego. Whitney, however, on direct examination and cross-examination, testified that he could not recall any exchanges about the Union, or prounion stickers, with Gonzalez. There is no reason to believe that, at time of trial, Whitney could not remember Gonzalez' admission, but he remembered it at a time that he selected Gonzalez for transfer to Westwego. That is, Gonzalez' admission was simply not a factor in the decision to transfer Gonzalez to Westwego.

On the other hand, what Whitney did not deny, and what Whitney would have remembered at the time that Gonzalez was transferred to Westwego, was: (1) Gonzalez' speaking up at an employer campaign meeting and saying that the employees should be receiving greater wages; (2) Whitney's response that the employees' wage increases were on paper; and (3) Gonzalez' rejecting that response by saying that raises that are only on paper (as opposed to being in pocket) do not help the employees. Whitney was also unlikely to forget, and I find that he did not forget, that Gonzalez rejected Whitney's offered explanation of Respondent's two-tier wage system as the reason for certain wage differences by saying, "This is not good."

There is no evidence, or contention, that at employer campaign meetings Gonzalez repeated "vote for me and vote for the Union" in such a way that any supervisors would have heard him. Therefore, I find that the only prounion activity in which Gonzalez engaged at the main yard, before his transfer to Westwego, was his speaking up at one employer campaign meeting and challenging Whitney about the employees' not receiving sufficient wages and Respondent's two-tier wage system.

[531] See *Alvin J. Bart & Co.,* 236 NLRB 242 (1978).

(1) Gonzalez' transfer to the Westwego yard

Gonzalez testified that he was informed of his transfer by Daigle. Gonzalez asked if he was being selected for transfer, "if it was because of the Union that they were transferring me." To that question Daigle only replied: "You are transferred to Westwego."

Gonzalez testified that on the first day that he reported to Westwego, he and other transferees from the main yard moved furniture; for the next 3 weeks he performed cleaning duties. After that Gonzalez was assigned to crews pulling heavy metal objects from the Mississippi River and more cleaning duties. Gonzalez testified that it was 3 months before he was assigned any pipefitting work at Westwego.

Gonzalez' Transfer to the Westwego Yard—Respondent's Evidence

As noted above, Whitney testified that he selected Gonzalez for transfer to Westwego because Genter (not Fradella, as Fradella testified) told him to select his "trash" for transfer. Whitney considered Gonzalez "trash" because Gonzalez' foreman (whose name Whitney did not remember) had reported to him that he had experienced trouble understanding Gonzalez' heavily accented English, and the foreman also reported that Gonzalez did not do his work correctly because he did not understand the instructions that he had been given.

Gonzalez' Transfer to the Westwego Yard—Conclusions

Gonzalez spoke up at one employer campaign meeting and challenged his general foreman, Whitney, on two points, wages and wage differentials. Gonzalez did so in disputation of Whitney's arguments that the employees should reject the Union as their collective-bargaining representative. This act of Gonzalez, therefore, was union activity,[532] activity against which Respondent has demonstrated clear and pervasive animus. I therefore find and conclude that the General Counsel has presented a prima facie case that Gonzalez was transferred to Westwego, and later warned, because of those protected activities, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Gonzalez even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, Respondent states that Gonzalez was transferred because he was an employee with "discipline and performance problems." Like Melton, however, Gonzalez had never received a warning notice, and Respondent makes no suggestion of what discipline problems Gonzalez may have presented. (As explained in Armstrong's case, however, even if there had been some disciplinary problem with Gonzalez, Respondent has not convinced me that its supervisors actually considered Westwego to be something of a dumping ground for misfits.) Also, Respondent offered no evidence that Gonzalez had presented it with any performance problems, other than Whitney's bare statements which depend on the double-hearsay reports of a foreman, the name of whom Whitney could not recall. Also Whitney's testimony conflicts with itself because Whitney testified that he personally hired Gonzalez; Whitney presumably satisfied himself at that time that Gonzalez could understand English and could be understood sufficiently to perform the work. Moreover, Gonzalez was rated as a first-class pipefitter, nothing less, and it is unbelievable that Respondent would

[532] See *Neff-Perkins Co.,* 315 NLRB 1229 fn. 1 (1994).

have allowed Gonzalez to achieve, and maintain, that rating if he could not do pipefitting work well. Finally, Whitney's testimony squarely conflicts with the above-noted testimony of Fradella; Whitney testified that he got his instructions to transfer "trash" from Genter, not Fradella. Respondent notes the conflict between Fradella and Whitney on brief, but offers no theory of how the testimonies of Whitney and Genter can be reconciled. It is apparent to me that Whitney's conflict with Fradella was caused by the fact that Fradella was lying when he said that he left choices of transferees up to his general foremen, and Whitney was lying in an attempt to hide the fact that he, like Whittington, received a piece of paper with badge numbers of pipefitters whom he had no choice but to transfer to Westwego.

I firmly believe that Gonzalez was just another pipefitter (as it happened, a prounion pipefitter) who was transferred to Westwego to give some aura of legitimacy to pipefitter Armstrong's transfer to Westwego.[533] Even if this theory of the violation is incorrect, however, it must be found, as I do, that Whitney's bare, uncorroborated, hearsay, contradicted and self-conflicting testimony is not probative evidence that could begin to meet Respondent's burden under *Wright Line*. I therefore conclude that by transferring Gonzalez from the main yard to the Westwego yard on August 2, 1993, Respondent violated Section 8(a)(3) of the Act.

(2) Gonzalez' warning notice for not wearing tinted goggles

On August 5, Gonzalez was assigned to do some cutting-torch work, something that he had done before at Westwego. As he was doing the work, Foreman Jerry Petticrew gave Gonzalez a written warning notice signed by General Foreman Devon Barber and Petticrew. General offense-12 is checked, and the text of the warning notice is: "Violation of Company rules and regulations through carelessness (Burning with hand torch without using proper safety equipment)." Gonzalez asked what the warning notice was for; Petticrew responded that it was for using clear goggles rather than tinted goggles while doing the cutting-torch work.

Gonzalez testified that he, and others, had previously used clear goggles while doing cutting-torch work. Gonzalez further testified that one week after he got the warning notice, Petticrew passed by him; Gonzalez pointed to another employee who was then doing cutting torch work with clear goggles. According to Gonzalez, "He looked at me, then the other person, and kept on walking."

Petticrew credibly denied allowing other employees to use cutting torches without tinted eyewear. Moreover, Petticrew testified that he simultaneously issued a warning notice to the nonunion pipefitter Madere at the same time for the same conduct. Although, as discussed earlier, Petticrew admitted giving an oral instruction to Armstrong when Armstrong was using an improper welding shield, and Petticrew did not give such an oral instruction to Gonzalez, he also did not give one to Madere. Although Petticrew's actions toward Gonzalez are seemingly arbitrary, they were equally, and simultaneously, arbitrary toward the nonunion employee Madere. Under the circumstances, I find and conclude that Respondent has show that Gonzalez would have been issued a warning notice, even absent his protected activities, and I shall therefore recommend dismissal of this allegation of the complaint.

d. Walter Brown

Walter Brown (vols. 27, 28, 158) worked in the main yard for 23 years. Brown was classified as a welder, but during his last 4 years of employment in the main yard he was assigned to the shipfitting department as a tank-tester. Brown was transferred from the main yard to the Westwego yard on July 13, 1993. On September 23, Brown was discharged while working at the Westwego yard. Paragraphs 98 and 123 of the second complaint, respectively, allege that by transferring and discharging Brown Respondent violated Section 8(a)(3). The General Counsel contends that Brown (along with Melton, Armstrong, Gonzalez, and Fleming) was transferred and discharged because he expressed prounion sympathies by wearing prounion insignia, speaking up to supervisors in favor of the Union, and responding affirmatively to an unlawful interrogation. Respondent denies that the interrogation occurred. Respondent further denies that any of its supervisors knew of any prounion sympathies that Brown may have held at any relevant time. Respondent further answers that Brown was transferred to Westwego solely because of business necessities. Respondent also answers that Brown was discharged solely because he cursed a supervisor and was insubordinate. The General Counsel replies that the business-necessity defense for the transfer is a pretext as shown by the fact that Brown was never used as a welder at Westwego. The General Counsel further replies that the insubordination-cursing defense is a pretext because Brown did not engage in the conduct attributed to him by Respondent; alternatively, the General Counsel contends that Brown was treated disparately because other employee were allowed to engage in similar conduct but they received lesser, or no, discipline. Ultimately, I find and conclude that Brown was unlawfully transferred to Westwego, but he was not unlawfully discharged.

Brown was classified as a first-class welder, and he was formally assigned to the welding department, but during his tenure he was occasionally assigned to the shipfitting department to do tank-testing. These assignments lasted for various periods of time, and, as noted, Brown had been working in the shipfitting department, doing tank-testing work, for 4 years before his transfer to Westwego. As a tank-tester, Brown filled water, fuel, or cargo tanks with liquids or air and checked for air or water tightness. John Ernst (vol. 147) is an assistant superintendent of the shipfitting department who is in charge of tank-testing. When asked on direct examination to describe tank-testing, Ernst testified:

> Tank and compartment testing requires that a person go up to a compartment or a tank, blank [temporarily close] off all of the openings, and apply pressure to that compartment or tank, and use a soap solution to find the leaks in the compartment or tank, and if necessary, weld a weld-leak or tighten a bolted joint or flange in order to make that compartment or tank tight.

Brown testified that, although he was classified as a first-class welder, he did welding only sporadically when working in tank-testing. Brown testified that welders and pipe testers usually work together, and he welded only when a welder was

[533] On brief, Respondent argues that Whitney knew that Ken Madere's brother, Tim, also a pipefitter, was a prounion employee and Whitney did not transfer him. Whitney, however, did not testify that he knew of Tim Madere's prounion attitude before the selections for Westwego were made. Moreover, the General Counsel is not required to prove the negative, why Respondent did not transfer Tim Madere.

absent. Brown testified that he had not done any welding during the 2 years prior to his transfer to Westwego.

Brown testified that he placed a union sticker on the bill of his hardhat in April or May, but he did not testify about how long it remained there. The General Counsel called Clifford Dumas (vol. 58) to testify in support of the discharge allegation made for Brown. According to Respondent's records, Dumas, a shipfitter, was transferred to Westwego on July 19. Dumas testified that he had not known Brown before his transfer to Westwego, but Brown worked with him "pretty much every day" at Westwego. While he was on direct examination, Dumas was not asked if Brown ever wore prounion insignia at Westwego. On cross-examination, Dumas testified that he could remember no "union activities" in which Brown engaged at Westwego. On redirect examination Dumas was not asked if he considered wearing prounion insignia to be a form of union activity, and I must assume that he did.

Brown testified that on April 2 he received a handbill from Jimmy Russ, one of the Union's organizers. The handbill was apparently issued in something of a reply to a company handbill; the company handbill had asked employees to attempt to get the organizers to sign a "guarantee" that they would not be required to strike if the Union was selected as their collective-bargaining representative. The Union's handbill also asked the employees to attempt to get the supervisors to sign a "guarantee." The text of the handbill is lengthy and I shall not quote it all; three of the "guarantees" will suffice:

> I'll stop all the harassment and get rid of all the petty work rules. I will treat every worker with the dignity and respect he or she deserves.
>
> I'll pay every worker the average wage that the Unionized workers in the area [are] now receiving. . . .
>
> I'll never again unjustly lay off, discipline or fire any worker.

(The handbill concludes: "If the Boss does not sign this guarantee, VOTE YES.") Brown took the handbill to Ernst's office and asked the clerk, Douglas (last name unknown to Brown) to give it to Ernst and ask Ernst to sign it. Brown testified that later that day, as he was walking by Ernst: "John Ernst stopped me and said that he couldn't sign that handbill because he didn't think he believed in it, and he wasn't going to sign it."

Brown further testified on direct examination that, in early May, another employee told him to go to the office of his supervisor, Albert Young. When there, according to Brown:

> He [Young] asked me how did I feel about the Union, sir. . . .
>
> I said, I can't miss anything I never had before . . . .
>
> I said the Union could help us in many ways in benefits and in wages. . . .
>
> He went on to say that the Union will have you paying dues and different other things . . . .

Based on this testimony by Brown, paragraph 26 of the second complaint alleges that Respondent, by Young, "interrogated its employees about their union membership, activities and sympathies." On cross-examination, Brown acknowledged that his pretrial affidavit says that Young approached him in his work area rather than calling him to an office. When he took Brown on redirect examination, the General Counsel did not attempt to elicit from Brown any explanation for this inconsistency, although the General Counsel did attempt to elicit an explanation of another of Brown's conflicts with his affidavit, as discussed below.

Brown further testified that during May 1993 he accepted a few handbills that were being distributed at a gate at the main yard. He brought some of the handbills to an office that was only used by tank-testers and laid them on the desk. After a while Young entered the office. According to Brown:

> Out loudly he [Young] said, "Who brought these papers in here?" And no one answered. Then he continued to say, "Well, I know who brought them in here; Brown brought them in."

Brown testified that he was the only tank-tester by the name of Brown.

Brown further testified that on June 10 an employer campaign meeting was conducted by Ernst and Young; about 25 employees attended. During the meeting, according to Brown:

> John Ernst had made a statement that the Union was causing the shipyards on the East Coast to close down and—on account of high wages and so forth, sir. And I made the statement that there was no need for him standing up there lying to me, or I am lying to him. My mind was made up.

As discussed infra, Brown's supervisors denied this testimony about his union activities and his interrogation by Young.

(1) Brown's transfer to the Westwego yard

According to Brown, on July 13, without any prior notice, Young called him to his office and told him that he was being transferred to Westwego the next day. Brown testified that, when he asked why, Young told him that it was Ernst's decision. Brown went to Ernst who told him that he was being transferred because Westwego needed welders and Norris Pertuit, superintendent of the welding department, had selected him. Brown called Pertuit; Pertuit told him that he was being transferred because Westwego needed welders. Brown protested that he had not done any welding for a year, but Pertuit said, "We still need welders over there." Brown testified that, at the time that he was transferred, there was still tank-testing work to do on the ship that he had been working on; also tank-testing on a "sister" ship had just begun. Brown further testified that, both before and after he was transferred to Westwego, a billboard at Respondent's property line stated that Respondent was hiring tank-testers.

Brown testified that when he first arrived at Westwego, he went to Jerry Petticrew, day shift shipfitting foreman. According to Brown: "When I reported to Westwego, Jerry Petticrew had stated to me that he don't know why I was sent over there, because there was no work there for me to do." Brown testified that there was, in fact, no welding work for him to do when he arrived at Westwego. On his own, he found work to do; he assisted a crane operator by rigging equipment to be lifted. Then, for about a month, Petticrew assigned him to work on cleanup crews, "Picking up scrap iron, boards, cutting down trees." After that, Brown was transferred to the second-shift crew of Foreman Dan Wheeler (who is mentioned above in Armstrong's case). On Wheeler's crew, Brown served as a helper to shipfitter Dumas. Through the date of his discharge on September 23, Brown did no welding, other than comparatively simple tack-welding such as that which shipfitters usually do.

Brown's Transfer to the Westwego Yard—
Respondent's Evidence

According to documents introduced by Respondent, of the 30 employees who were transferred to Westwego during the summer of 1993, 11 were welders. The two highest-paid welders were Brown and alleged discriminatee Fleming. Respondent's records further show that, although Brown was transferred to Westwego on Tuesday, July 13, the other 10 welders were not transferred to Westwego until the following week. (Nine were transferred on Monday, July 19, and the last welder was transferred to Westwego on July 20.)

Pertuit (vol. 141) testified on direct examination that Emile Foret (Simpson's subordinate vice president) called him and said that Westwego needed 11 welders in "approximately a week." Foret gave him no suggestions of which welders to pick or the basis upon which selections should be made. Pertuit testified that he told his general foremen to give him the badge numbers of welders who drove themselves to work and were not dependent on buses or car pools to get to Westwego. Pertuit testified that this was the criterion that he had used when called upon to send welders to Westwego in 1990 at the start of the prior Westwego contract. Pertuit testified that he told the general foremen that he would select from their suggestions which welders would be sent.

Pertuit testified that none of his general foremen suggested Brown as a candidate for transfer to Westwego. Pertuit testified that he selected Brown because, as he walked about the plant, he had seen Brown doing only tank-testing work, not welding work. (Indeed, when Brown described his tank-testing work, he did not mention any type of welding; Brown, in fact, denied that he had done any welding for years.) Pertuit testified that a further reason that he selected Brown for transfer was that he knew that Brown drove his own vehicle to work.

Pertuit testified that, even before July, he had asked Ernst several times to return Brown to the welding department because Brown was not doing any welding as a tank-tester; Pertuit testified that Ernst refused because he stated that he intended to use Brown as a welder at some point in the future. Pertuit further testified that immediately after he got the request from Foret, he went to the office of Ernst. Pertuit testified:

> I just told John Ernst I was looking for welders; I needed welders to go to Westwego. And Brown was filling up tanks, and he wasn't doing welding at the time, and he [Brown] was a first-class welder. . . .
>
> [Ernst replied that] [h]e would like to keep him doing what he was doing. But I told him, I said, "No, you don't need [Brown] as a welder; I need him as a welder."

Pertuit testified that Ernst told him that his tank-testing work was slowing down, anyway. Pertuit further testified that he asked Ernst to confirm that Brown had his own transportation to work. When Ernst did that, Pertuit told Ernst to send Brown back to the welding department for transfer to Westwego.

Pertuit testified that, of the 11 welders who were sent to Westwego in July and August, he knew the union allegiance of only one, alleged discriminatee Charles Fleming (whose case is discussed next). Pertuit denied that he ever saw Brown wear prounion insignia or that he had otherwise been informed that Brown favored the Union. Pertuit acknowledged that there was "plenty" of work for the 11 welders to do in the main yard when the transfers to Westwego took place. Pertuit acknowledged that Brown was the only welder who protested being transferred to Westwego.

As noted, Brown was transferred to Westwego on July 13, and the other 10 welders were transferred on July 19 and 20. On cross-examination, Pertuit testified that Foret told him to have the 11 welders to Westwego "the following week." Pertuit was then asked and he testified:

> Q. [By Mr. Morgan]: Sir, is there any reason you know why Walter Brown was transferred a week before the other ten employees?
>
> A. No, I sure couldn't answer that. I don't know.
>
> JUDGE EVANS: I will ask you, sir. How could that have happened? Given the sequence that you have given us, that you recall what Mr. Foret said, "Next week have eleven guys over there," and as far as you recall you did what you were told, how could it be that Brown showed up—got over there a week early?
>
> THE WITNESS: To be honest with you, I can't answer that, Your Honor. I don't know.
>
> JUDGE EVANS: And you don't remember even though Brown was the only one who was protesting the move. Is that true? That is what you are telling me?
>
> THE WITNESS: He is the only one that requested to stay where he was. He didn't actually—
>
> JUDGE EVANS: Yes. I am saying even though [Brown was] the one guy who protested, you can't remember why he had a different arrival date [at Westwego]?
>
> THE WITNESS: No, I sure can't.

Respondent introduced its Exhibits 852 and 921 which show that, of the 15 shipfitters who were sent to Westwego in July, 9 were transferred in the same week that Brown was transferred, 1 week before any other welders were transferred.

Ernst (vol. 147) acknowledged that he received the union "guarantee" handbill that Brown left with his clerk, but Ernst denied that he ever mentioned it to Brown, and he denied discussing it with Pertuit. Ernst further testified that Brown was one of several welders that had been loaned to the tank-testing operation by the welding separtment. By July Brown was doing mostly tank-testing and little welding. At that time:

> [Pertuit] went out on the job and noticed that Walter Brown was doing tank-testing work and not welding, and he approached me about it and asked me why was he doing the tank-testing work when he needed welders so badly. And I told him that we were catching up. And he said, Well, I would like to have him back. . . . Said he wanted to send him to Westwego; he had a—he had to send a lot of welders to Westwego. . . .
>
> So we sent him back.

Ernst testified that Brown left his supervision "the next day" after Pertuit requested his return. Ernst testified that he told Young that Brown was to be sent back to the welding department. Ernst acknowledged that there were two other welding department welders on Young's crew at the time that Pertuit requested the return of Brown, but neither of them was mentioned when Pertuit asked that Brown be returned to the welding department for transfer to Westwego. Ernst testified that he did not replace Brown, and his operation now has no welding department welders assigned to it.

Young (vol. 147) flatly denied that he had any conversations about the Union with Brown, he denied that he ever asked

Brown if he favored the Union, he denied that Brown told him that he would vote for the Union, and he denied that he ever saw Brown wear prounion insignia.

Brown's Transfer to the Westwego Yard—Conclusions

When he was on direct examination, Brown did not testify when he wore a "Union-Yes" sticker on the bill of his hardhat; on cross-examination he testified that he began wearing the sticker in "April or May," but he did not testify to how long he wore it; for all that this record shows, Brown took the sticker off immediately after he put it on. Brown's fellow employee, and the General Counsel's witness, Dumas did not corroborate Brown's testimony to the extent it may have been intended to convey the impression that Brown wore prounion insignia at Westwego; moreover, Dumas testified that he could remember no union activity that Brown engaged in at Westwego. It is clear enough to me that Brown did not wear prounion insignia after his transfer to Westwego. I am further unconvinced by his testimony that Brown wore prounion insignia long enough to be noticed by his supervisors, and I credit the denials of Young, Ernst, and Pertuit that they saw Brown wearing any prounion insignia in the main yard.

I further credit Young's denial that he interrogated Brown. Brown testified that another employee told him to go to Young's office, the classic locus of managerial authority. If that had happened, it would assuredly have been mentioned in Brown's affidavit. Not only was the office not mentioned, Brown testified in his affidavit that Young questioned him in his work area. The difference is too much to logically overcome, a fact reflected by the General Counsel's not even attempting to secure an explanation of the inconsistency from Brown on redirect examination. The inconsistency causes me to discredit Brown on this point, and I shall therefore recommend dismissal of that allegation of the complaint.

Other testimony by Brown that bears on the issue of relevant employer knowledge, however, is not in dispute. First, Brown sent to Ernst a union "guarantee" handbill that, in effect, asked supervisors to sign a statement that all of the Union's propaganda was true. Second, when Young found some union handbills on his desk, he stated that "Brown" must have put them there. Third, Brown answered Ernst's statements at a June 10 employer campaign meeting by stating: "that there was no need for him standing up there lying to me, or I am lying to him."[534] These three elements of undisputed testimony by Brown show that, at the time of his transfer to Westwego, Respondent's supervisors knew of his prounion sympathies. Pertuit testified that he made the decision to transfer Brown, but I do not credit Pertuit's testimony, or Ernst's, that before the transfer Ernst had not told Pertuit about the "guarantee" handbill that Brown had sent to him. This is a virulently antiunion employer and I simply do not believe that the assistant superintendent of one department, Ernst, would have failed to tell the superintendent of the department from which Brown had come, Pertuit, of the "guarantee" handbill that Brown had submitted, in effect asking Ernst to admit that he had harassed workers, imposed petty work rules, and unjustly laid off and discharged workers. I further believe, and find, that Pertuit had knowledge of Brown's speaking up to Ernst at an employer campaign meeting and, in effect, accusing him of lying. Therefore, I conclude that the General Counsel had presented a prima facie case that Brown was unlawfully transferred to Westwego, and later discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Brown even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

On brief, Respondent argues that: "Brown was transferred because the Westwego yard needed welders and Brown was available." As I indicated in Armstrong's case, I believe that Respondent has advanced a plausible reason for transferring some welders to Westwego in July, but that does not mean that it has advanced a plausible reason for transferring all 11 of the welders in July. If Brown's welding talents, in addition to those of the other 10 welders, were needed at the Westwego yard, they would presumably have been used before he was discharged on September 23, some 40 days after the transfer. They were not; instead, when he arrived at Westwego, Brown was told by Petticrew that there was no welding work for him to do and he was assigned to doing rigging work. After that, he was given cleaning and shipfitter's-helper work through the day that he was discharged. As Brown did this rigging, cleaning and helping work at Westwego, he was being paid the highest pay of any welder who got transferred to Westwego. Although the Board will not substitute its judgment for Respondent's business decisions that contain at least some plausible basis, the decision to transfer Brown, at least as early as July 13, has none.

Moreover, Brown was "available," but no more so than the approximately 350 other welders that were in the welding department at the time. And there were other available welders who were then doing tank-testing work. Ernst testified that there were several welders working in tank-testing at the time that Pertuit requested that Brown be returned to the welding department, and he further acknowledged that there even were two welders working on Young's crew at the time. None of these other welders, however, was suggested for transfer to Westwego by Pertuit. (At one point Pertuit testified that he asked Ernst to check and find out if Brown did, in fact, drive his own vehicle to work. Pertuit did not ask Ernst to check on any other employee.) Also, none of the other 10 welders who were transferred to Westwego had been working in the shipfitting department as tank-testers. Therefore, although Pertuit testified that there was "plenty" of welding work for the welders in the welding department, and although Pertuit testified that Ernst told him that he did not need welders to test tanks, and Ernst testified that his need for welders was slowing down, Pertuit did not select any other welders from tank-testing to go to Westwego, only Brown. And Brown was transferred to Westwego a week before any other welders, but Pertuit could not explain why.

Finally, Respondent contends that Brown was selected because he had his own transportation to work. Heaps, however, did not testify that he, as vice president of the Westwego operation, required employees to have their own transportation. Also, the pipe department supervisors (Fradella, Whitney, Whittington, and LeFort) did not testify that they considered an employees' owning his own vehicle to be a requirement for selecting an employee for transfer. If private transportation had been some kind of job requirement for working at Westwego, Heaps would presumably have so testified. I do not believe that trans-

[534] Ernst only denied having a "discussion" about the Union with Brown; to the extent that this testimony was designed to express a denial of Brown's specific testimony, I discredit it.

portation was a factor in the selection process of Brown (or Fleming in the case that immediately follows in this decision).

Respondent's defense for the transfer of Brown requires belief in its testimony that Pertuit, alone, made the decision that Brown be transferred to Westwego. I do not, however, believe that testimony. I believe that Ernst suggested that Brown be transferred to Westwego, and Pertuit agreed. As I stated in Armstrong's case, I do believe that Heaps requested that shipfitters and welders be sent to him from the main yard in July. I further believe that Heaps first requested shipfitters; this is why nine shipfitters were sent to Westwego before any other employees were sent, except Brown. I further believe that Ernst selected Brown to go along with the first nine shipfitters in order to rid himself of the employee who sent him the union handbill (which asked Ernst to agree to "stop" various practices) and who, in effect, accused Ernst of lying at an employer campaign meeting. Because Brown was Ernst's choice for transfer, Pertuit was completely unable to suggest any reason why Brown was selected to go to Westwego a week before all 10 other welders, even though Brown was the only one of the 11 welders who objected to the transfer to Pertuit, personally. At minimum, Pertuit's testimony that he could not remember why Brown was transferred to Westwego a week before the other welders is incredible. The spurious nature of the testimony that Pertuit made the decision to transfer Brown to Westwego is further shown by the fact that Pertuit and Ernst differed on when Pertuit asked that Brown be taken from the shipfitting department and returned to the welding department; Pertuit testified that the request was made many times, but Ernst testified that it was made only once, the day before Brown's transfer to Westwego. Finally on this point, I found totally incredible Pertuit's testimony that he decided to transfer Brown because he saw Brown doing only tank-testing work; other welders who were then assigned to tank-testing were presumably not doing welding work either, and Pertuit did not even consider any of them for transfer.

I find that Brown was transferred to Westwego, at the suggestion of Ernst to Pertuit, because of his protected activities of sending the handbill to Ernst and contradicting Ernst at an employer campaign meeting. Respondent has therefore not shown that it would have transferred Brown to Westwego, at least as early as it did, even in the absence of his protected activities. Accordingly, I conclude that by transferring Brown to Westwego on July 13, 1993, Respondent violated Section 8(a)(3) of the Act.

(2) Brown's discharge for insubordination and cursing a foreman

Brown testified that in mid-August, after he was assigned to work on the second shift under Wheeler, Wheeler asked him "how did I feel about the Union." As he had responded to Young (at the main yard), Brown told Wheeler "I can't miss nothing I never had." This questioning is not alleged as a violation; the General Counsel introduced the exchange as evidence of Respondent's knowledge of Brown's continuing prounion sympathies at Westwego through the date of his discharge on September 23. Also as evidence of Respondent's knowledge of Brown's prounion sympathies after he was transferred to Westwego, the General Counsel further relies on the fact that on July 21, the Union, on behalf of Brown, filed the charge in Case 15–CA–12225–3, alleging that Brown's transfer to Westwego had violated Section 8(a)(3).

Brown testified that on the day of his discharge he was working with employee Dumas. Brown assisted Dumas in a job of leveling a large object. Measurements had to be taken; Brown and Barber had only a tape measurer, and they decided they needed a surveyor's stick. Surveyors' sticks are about 6 or 7 feet long, and they fold (according to Dumas). From where Dumas and Brown were working, the nearest place that surveyors' sticks were stored was Barber's office, about one-fourth mile away. Brown started walking toward Barber's office. At a point beyond Dumas' hearing, Brown saw Petticrew (who was working late) and Wheeler standing in a road. Petticrew had a bicycle. Brown testified that he then asked Petticrew if he could borrow the bicycle to get a surveyor's stick. According to Brown:

> Jerry said I didn't need a surveyor stick, to use a measuring tape.
>
> And I said that I couldn't use a measuring tape because a measuring tape is not accurate.
>
> So he said, "That is what I use—a fucking tape." . . .
>
> I said, "That is why all the work around here is wrong."
>
> Then he said, "That is why I use a tape."
>
> So I walked away from him. . . . I was going to get the surveyor—towards the office, sir. . . .
>
> He called me back. . . . He said, "You cursed me." . . .
>
> I said, "Curse you? If I did, I am sorry."
>
> He said, "That is not good enough." He told Dan Wheeler, "Automatic insubordination. Fire him."

Petticrew walked toward Barber who had come to the area. Wheeler escorted Brown from the yard. Brown testified that he had walked "[a]bout seven or eight feet" from Petticrew when Petticrew called him back. Brown denied cursing Petticrew or using any curse words in the exchange with Petticrew.

Brown testified that the next day he returned to the Westwego plant and spoke with Heaps in an attempt to regain his job. According to Brown, "I said, 'Jerry said I cursed him. If I did, I was sorry; But I didn't curse him.'" Brown testified that Heaps said he would look into the matter.

On cross-examination Brown acknowledged that in a statement that he gave to the Louisiana Department of Labor, about a week after the discharge, he stated:

> When discussing the conversation with Mr. Petticrew, it was hot and tempers were short. I do not recall either one of us cursing, but when I walked off he called me back and said that I cursed him. I did not remember cursing him, but I apologized anyway.
>
> He got on his bike and went to the superintendent [apparently Barber] and told him I said fuck him. I was fired for insubordination. I do not recall cursing him, and I think that I would have remembered that.

On redirect examination Brown could not explain why his statement to the Louisiana Department of Labor stated that he could recall no cursing in his exchange with Petticrew.

Brown's Discharge—Respondent's Evidence

Petticrew testified:

> So then Dan [Wheeler] was talking and Mr. Brown came up. He says, "Man, let me use your bike. I am going to get the stick."

> I said, "You don't need to go get the stick. No, you are not using my bike. . . .
>
> [Brown replied,] "Man, let me use your fucking bike.
>
> I told him no.
>
> Then he turned around and he said, "Man, fuck you. I don't have to put up with your shit."
>
> And at that time, I terminated him. And I asked Mr. Wheeler to clear him off the yard, bring him to the tool room and clear out. And I informed that I had fired him for insubordination, that I don't curse my people. And I don't expect my people to curse me.

Petticrew denied that Brown offered any sort of apology. Petticrew testified that he discharged Brown because: "Mr. Brown was cursing and not following orders. Cursed me."

Wheeler testified:

> And Mr. Brown told him to, "Let me use your bike. I am going to get the fucking stick."
>
> Mr. Petticrew told him, "No."
>
> Mr. Brown then told him, "Fuck you. I am not going to put up with any of your shit," and he started to go off, and Mr. Petticrew terminated him.

Wheeler also denied that Brown offered any sort of apology.

Brown's Discharge—Conclusions

As well stated by Respondent on brief: "Brown's excuse, 'If I did, I am sorry,' is the type of statement made by someone who knows he did something wrong, but doesn't want to admit it." I agree. Moreover, I found the testimony of Petticrew and Wheeler credible on the point of what Brown said to Petticrew.

The General Counsel introduced a great deal of evidence that other employees had cursed around, and at, supervisors without punishment; however, I found this evidence to be unpersuasive. Unlike many other elements of the employment relationship which arguably can involve discipline, one's sensitivity to being cursed is an intensely personal thing. Like all other human beings, different supervisors are going to react differently to different cursings by different people in different circumstances. There can be no accurate, or fair, comparison of any two such situations, unless it is shown that one individual employee has been allowed to curse one individual supervisor with essentially similar words under essentially similar circumstances. Without such history, an employee assumes the risk of how the supervisor will react, no matter what some other supervisor has done (with different cursings by different people, under different circumstances). Here, certainly, there is no history between Brown and Petticrew which could be argued to license Brown to respond to Petticrew as he did and tell Petticrew, "Fuck you."

Moreover, Brown admitted that he combined his cursing of Petticrew with direct insubordination of Petticrew's order to go back to his job and use the tape for the leveling job. Brown admitted that he turned from Petticrew and started walking toward Barber's office to get a surveyor's stick, something that Petticrew had just told him not to do. Again, by engaging in such conduct, Brown assumed the risk of how Petticrew would react.

I therefore conclude that Respondent has shown that, even absent his protected activities, it would have discharged Brown, and I shall therefore recommend dismissal of this allegation of the complaint.

e. Charles Fleming

Charles Fleming (vol. 22), a welder, was transferred from the main yard to the Westwego yard on July 21, 1993, and Fleming was discharged on August 26 while working at the Westwego yard. Paragraphs 102 and 118 of the second complaint, respectively, allege that by transferring and discharging Fleming Respondent violated Section 8(a)(3). The General Counsel contends that Fleming (along with Brown, Armstrong, Melton, and Gonzalez) was transferred to Westwego and discharged because of his known union activities and expressions of sympathy which included his serving as an alternate observer for the Union at the June 25 Board election, his wearing prounion insignia, and his speaking favorably about the organizational attempt directly to supervisors. Respondent admits that its supervisors at the main yard knew of Fleming's prounion sympathies, but Respondent answers that Fleming was transferred to the Westwego yard, along with the 29 other employees, solely because of business necessities. Respondent further answers that Fleming was discharged solely because he was insubordinate to, and cursed, a foreman. The General Counsel replies that the business-necessity defense for the transfer was a pretext as shown by the fact that Fleming was not used as a welder at Westwego until just before his discharge, and he was then used only in a limited capacity that did not take advantage of his skills. The General Counsel further replies that the insubordination defense is a pretext because the conduct attributed to Fleming did not occur. Alternatively, the General Counsel replies that Fleming was treated disparately because other employees were allowed to engage in similar conduct but they received lesser, or no, discipline. Ultimately, I find and conclude that Fleming was not unlawfully transferred to Westwego, but he was unlawfully discharged.

Fleming credibly testified that he wore a "Union-Yes" sticker on his hardhat from the week before the June 25 Board election until he was discharged, and he also wore a union pin on his work clothes during the week before the election. Fleming further testified that, 2 weeks before the June 25 Board election, in a work area:

> Vice President Carroll Danos had paperwork on NASCO and the Union there causing them to lose the Texaco contract, and he was showing me this paperwork on it. And he was showing me paperwork on the Metal Trades Council, a financial statement, saying that this is where my union dues will be going. . . .
>
> [In reply] I just commented on the statement he had given about the financial statements about our union dues, concerning I was saying that the peoples need the Union here at Avondale, and it would be beneficial for the people to have a union here at Avondale.

Fleming further testified that two days before the Board election Danos spoke at an employer campaign meeting conducted in the office of General Foreman Norman Brown. According to Fleming:

> Vice President Carroll Danos was talking about the Company didn't have any money to give raises, and the Company had no contracts, and he didn't know when they would get a contract.
>
> And he was talking about the Union would be bad for the Company because for—there might be a strike called;

> the Union might want to get raises, get money from the Company to get raises.
>
> And after he finished talking, I spoke out and said—I explained to them, the peoples there, that a union is the peoples, and the membership—members have to vote a union—vote for a strike if there would be a strike.
>
> [At that point] Vice President Carroll Danos asked me to leave the meeting and go back to work.

Fleming testified that he obeyed Danos' instruction and left the meeting.

It is undisputed that Fleming was a alternate observer for the Union at the Board election, and the Union notified Respondent that Fleming would be acting as such.

(1) Fleming's transfer to the Westwego yard

Fleming testified that on Friday, July 16, he was doing heli-arc pipe welding, a more sophisticated type of welding that is done at the main yard. There was much work for him to do, but about noon he was approached by Foreman Douglas LeBlanc and told to report to the Westwego yard. Fleming testified that he asked LeBlanc why he was being transferred to the Westwego yard, and LeBlanc told him that "an order had come down from the superintendent's office."

On Monday, July 19, Fleming was assigned to work under Westwego Welding Foreman Jerry Petticrew. For the first 3 days that he was at Westwego Fleming was assigned to do rigging rather than welding work. During the next several weeks he did welding work, but not heli-arc welding of pipe as he had done at the main yard.

Fleming's Transfer to the Westwego Yard—Respondent's Evidence

As noted in Brown's case, Pertuit testified that he asked his general foreman to submit to him names of welders who had their own transportation as candidates to be transferred to Westwego. LeBlanc (vol. 152) testified that he was present with General Foreman Norman Brown when Pertuit asked Brown to submit such names. After Pertuit left their presence, LeBlanc told Brown that he knew that Fleming and welder Ralph Laurent had their own transportation to work. The next day, Brown told LeBlanc that Fleming and Laurent would be transferred to Westwego during the following week. On the day before Fleming and Laurent were to be transferred, LeBlanc told them to report to Westwego the next workday. LeBlanc testified that he told Fleming that the reason he was being transferred was that Fleming had his own transportation. LeBlanc acknowledged that Fleming had spoken openly in favor of the Union at one employer campaign meeting and that he had worn various types of prounion insignia. LeBlanc testified, however, that Laurent never wore prounion insignia and he had no idea whether Laurent had favored the Union. On cross-examination, LeBlanc acknowledged that he named no other employees who had their own transportation to Brown, and Brown did not ask for any other names. Brown did not testify.

Fleming's Transfer to the Westwego Yard—Conclusions

Respondent admits that its supervisors knew of Fleming's prounion sympathies at the time of his transfer to Westwego. Specifically, Pertuit admitted that Fleming spoke up in favor of the Union at employer campaign meetings. Also, it is undisputed that Fleming was an alternate observer at the Board election. I have credited Fleming's testimony that he wore prounion insignia through the date of his discharge. Respondent's animus toward such expressions of prounion sympathies, especially expressions through the wearing of prounion insignia, is established throughout this decision. I therefore find and conclude that the General Counsel has presented a prima facie case that Fleming was unlawfully transferred to Westwego, and thereafter discharged, and the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Fleming even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

A week after Brown was transferred to Westwego, Respondent transferred 10 welders to Westwego, including Fleming. The General Counsel has proved that Brown was transferred for spurious reasons, principally because Brown was never used as a welder at Westwego. The same is not true of Fleming. Fleming did welding within a few days after his transfer. Perhaps it was not as sophisticated a type of welding as he had done at the main yard, but it was welding that Respondent needed to be done. Although it was a few days before Fleming did that welding, he, along with the other welders, was ready as the engineering drawings arrived. From all that is shown by this record, Fleming was called upon to weld as soon as any welder was. Finally, although he had plenty of work to do at the main yard, so did all of the other welders.

I shall therefore recommend that the allegation that Fleming was unlawfully transferred to Westwego be dismissed.

(2) Fleming's discharge for insubordination and cursing a foreman

On the morning of August 26, Fleming was assigned to weld some beams on to some plates. He worked at that job for 2 hours, but then he was approached by Eugene Edwards, a leadman who also worked under Petticrew. Edwards told Fleming that the plates had previously been lined up incorrectly (by the shipfitters, not Fleming or any other welder) and that the welds that Fleming had done would have to be torn out. Edwards told Fleming to go and weld at another point in the project and do similar welding there. Fleming went to the other point and welded for 2 more hours. At some point, Edwards and Petticrew approached Fleming. Petticrew said that the second section had also been laid out wrong, and Fleming's work, again, would have to be torn out. Fleming's reaction to Petticrew is the reason advanced for the discharge.

According to Fleming:

> Foreman Jerry Petticrew came up on the plate, him and three other work leadermans. I was working, welding. He turned and told me to stop welding.
>
> I said, "Hell, you want me to work or not work?"
>
> He said, "When I tell you to work, you work, and when I tell you to stop, you stop."
>
> I said, "Yes, right."
>
> He say, . . . "I am terminating you for insubordination."
>
> So I gathered my tools up and turned them in to the toolroom. . . . I was escorted out of the yard by work Leaderman Eugene [Edwards].

Although he admitted cursing during the exchange with Petticrew, by using the word "hell," Fleming denied cursing Petticrew or otherwise cursing during the exchange.

Edwards, who was still employed by Respondent at time of trial, was called by the General Counsel. Edwards testified:

> Fleming was welding, you know, because we had told—it was told all right to weld the beams into another section of a beam. We stopped where we were at, and he only had to move like two feet, and he was welding something, and Jerry [Petticrew] said . . .” Stop.”
>
> And that is when Fleming said, “Man, what the . . . fuck is going. You want me to work, or you don’t want me to work.
>
> And Jerry [Petticrew] says, “Look, if I tell you to work, you work; and when I tell you to stop, you stop.” . . . He [Fleming] said, “Man, you all just can’t get your shit straight.” . . .
>
> And then . . . [Petticrew] said, “You are fired.” . . .
>
> Well, I had told him [Fleming], “Look, stop welding. Go over there and clean the welds off.”. . . So he went over there and started cleaning the weld, and Jerry said, “You are fired.”
>
> I go [ask Petticrew], “Fired for what?”
>
> And he says, “For not doing what I told him.”
>
> I said, “I didn’t hear him refuse to do anything.” . . .
>
> And he says, “Didn’t you hear him say, no, he wouldn’t?”
>
> I said, “No, I did not hear that.”

Edwards testified that he was less than 3 feet from Petticrew and Fleming when those two had their exchange, and he heard nothing that Fleming said that would indicate that Fleming was refusing to stop welding. Edwards further testified that Fleming, in fact, stopped welding when Petticrew told him to stop.

Fleming’s Discharge—Respondent’s Evidence

Petticrew testified that he discharged Fleming for “Insubordination of cursing me and disrespecting an order.” Petticrew testified that when the confrontation with Fleming occurred, Leadman Johnny Edge was right beside him, but Leadman Edwards was 10 feet away. According to Petticrew:

> Well, when I observed it was in the wrong location, I asked Mr. Charles [Fleming] to stop welding it, to hold up welding. And he stood up and he told me—he says, “Man, I am not going to be messed with. I am welding this.” But he was pretty angry and he had a high voice.
>
> And he took his welding line and he threw it down. So I explained to him that the beam was in a location—I said, “Just hold up till we get some engineering to see if this is right or wrong,” because I felt it was wrong, which it was.
>
> And he said, “Man, why don’t you go fuck off somewhere else. You don’t know what the fuck you want. I am welding this fucking thing.”
>
> I said, “Charles, I am your foreman. Just do what I am telling you. I am telling you to stop welding. There ain’t no big harm because you have got to stop working, you know.”
>
> So again, he said, “Go fuck off somewhere else.” And at that time, Your Honor, that is when I terminated him.

Petticrew further testified:

> Well, after I terminated Mr. Brown [sic], I turned around—and again, I am standing right here and I turned around and he [Edwards] was standing right here. And I asked him—because I had him as my lead—my welding leaderman and I asked him, “Now, you heard that, the guy cursing me out and you heard I terminated him.” . . .
>
> He said yes.
>
> So at that time, I said, “Well, get him out.”

Petticrew denied that Edwards told him that he had not heard Fleming refuse to stop welding.

Petticrew testified that within an hour after the incident, he had Edge write out a statement concerning what he heard. Respondent placed Edge’s statement, and a statement that Petticrew had also made on that day, into evidence. The statement by Edge is essentially consistent with the trial testimony by Petticrew. Respondent did not call Edge to testify.

During the General Counsel’s case, Fleming denied that he refused to follow Petticrew’s instruction to stop welding; he denied that he cursed Petticrew; he denied telling Petticrew to “go fuck off somewhere else”; he denied that he told Petticrew, “you don’t know what the fuck you want”; he denied telling Petticrew, “I am fucking welding this”; he denied that he told Petticrew that he would not “be messed with,” and he denied that he threw his welding stick to the ground.

Fleming’s Discharge—Conclusions

Again, Fleming had expressed his prounion sympathies to his supervisors at the main yard, he was even ordered out of an employer campaign meeting by one of Respondent’s vice presidents because he vocally supported the Union, he served as an alternate observer at the Board election, and he continued to wear prounion insignia after he was transferred to the Westwego yard. Respondent’s animus toward such employees is established throughout this decision, and Respondent’s reason for discharging Fleming must be examined.

Petticrew testified that he discharged Fleming for “Insubordination of cursing me and disrespecting an order.” This two-part reason is essentially the same as that advanced for Petticrew’s lawful discharge of Brown, but the evidence in support of the defense is quite different.

The insubordination part of the defense requires the conclusion that Fleming expressed an intent to continue to do work which he had just been told was laid out incorrectly. Aside from the fact that Fleming would have known that the work would have to be redone, probably by him, there is no contention either that Fleming wanted to do work that was wrong or that he was unwilling to take a break. In addition to the illogic of the proposition, the testimony that was offered in support was credibly denied not only by Fleming but by current employee Edwards. Finally, Respondent failed to call Edge to testify on the matter, even though it possessed a written statement from Edge that was consistent with the testimony of Petticrew. Respondent offered no reason for not calling Edge, even though it ostensibly had every reason to rely on his testimony.

I believe, and find, that Fleming questioned why he was being told by Petticrew to stop work, but he did not refuse to stop working. (That is, when Petticrew told Fleming to work when he said to work and to stop when he said to stop, Fleming stopped.) Fleming, in questioning why he was being told to stop working, did use the word “fuck,” as described by Edwards, but he did not use the word as Brown did (“fuck you”), and he did not tell Petticrew to “fuck off.” (Even if Fleming had said the latter, the imperative was no more than common shop talk for “go jump in the lake,” and it certainly had no more demeaning connotation toward Petticrew.) Fleming simply did not curse Petticrew, and I do not believe that Petticrew thought

he had been cursed. That is, I find that Fleming neither cursed Petticrew nor refused to stop welding when Petticrew told him to stop welding.

I therefore find that Respondent has not shown that it would have discharged Fleming even absent his prounion sympathies, and I conclude that by discharging Fleming Respondent violated Section 8(a)(3) of the Act.[535]

f. Charles Kent's discharge for poor workmanship

Charles Kent (vols. 52, 99) was a shipfitter at the Westwego yard until he was discharged on June 6, 1994.[536] The fourth complaint, at paragraph 37, alleges that Kent's discharge violated Section 8(a)(3). The General Counsel contends that Respondent discharged Kent because of his known union activities and expressions of sympathy which included his wearing and otherwise displaying prounion insignia. Respondent answers that its supervisors had no knowledge of any prounion sympathies that Kent may have held at any relevant time, and it further answers that Kent was discharged solely "for negligence and inefficient work."[537] the General Counsel replies that the defense asserted is a pretext because Kent only did acceptable work; alternatively, the General Counsel replies that Kent was treated disparately because other employees were merely given warning notices for unacceptable work. Ultimately, I find and conclude that Kent performed unsatisfactorily, but he was treated disparately, and he was discharged unlawfully.

Kent worked at the main yard until he was transferred to the Westwego yard in May.[538] At the Westwego yard Kent worked as a shipfitter under the immediate supervision of Petticrew and Barber. Kent testified that from February through the date of his discharge he wore "Union-Yes" stickers on his hardhat, and he maintained such a sticker on his lunch kit.

On June 6, Petticrew assigned Kent to install a water-tight door frame into a bulkhead. It is not necessary to detail this work. It suffices to say that according to the affidavit that Kent gave during the investigation, and according to some admissions that he made at trial, Kent did a plainly unacceptable job. Kent testified that he and his helper finished the job by lunchtime. When they returned to the area from lunch, according to Kent:

> Petticrew came down; he just start shouting, "You have to go. You have to go. I can't put up with you. You have to go. I can't tolerate you. You have got to go." Just kept repeating it over.
>
> I told him I needed my job. Could I be transferred back to the main yard. But he just say, "You have to go. Come up to the office."

Kent followed Petticrew to an office. Petticrew went in and came back out with a warning notice. Citing major offense-2 of the Avondale Employees' Guide, Petticrew wrote:

> Intentional negligence, inefficiency or substandard workmanship. Employee has problems following instructions. Discharge.

Kent testified that he asked Petticrew what "intentional negligence" meant; Petticrew would only repeat that "You have to go."

Petticrew testified that he discharged Kent for his "negligence" and "inefficiency" in performing his June 6 assignment. When asked what he meant by those terms, Petticrew testified: "Well, I felt that he wasn't paying attention to me, neglected me, and did it the way he wanted to do it, or he just didn't want to do it." Petticrew did not testify that any warning notices that Kent may have received played any part in his decision to discharge Kent.

Kent's Discharge—Conclusions

Kent testified that he wore "Union-Yes" stickers on his hardhat, and he kept one on his lunchbox at Westwego. Petticrew denied seeing the prounion insignia that Kent wore, but I do not credit that denial. As stated before, Respondent's animus toward the organizational attempt in general, and Respondent's animus toward those who wore prounion insignia in particular, is found throughout this decision. As I have found above, such prounion insignia were often made the object of threats to employees. In the first discharge case that I considered in this decision, that of Barbara Marshall, I summarized the evidence of Respondent's animus toward those who wore prounion insignia, much of which evidence went undenied at trial. Kent's case is the last allegedly unlawful discharge to be considered, and the summary, in truncated form, bears repeating: to wit: (1) Autin told employee Adeline Plaisance that he could not believe that she would wear prounion insignia because, "Well, the stickers on your hat. . . . If the wrong people got ahold of it, it could hurt you. . . . I am just telling you this for your own good." (2) DeNicola told employee Junius Duplantis that: "the guys walking around with stickers and shirts on better hope that the Union gets in because if it don't, they are gone." (3) Falgout told employee Richard Bell that, "Well, if you like working for me and I was you I would take that sticker off your hat because if you-know-who found out, he would have a fit about the sticker." (4) A. S. Russel told discriminatee Michael Molaison, who was wearing a "Union-Yes" sticker on his hardhat, that "we wasn't supposed to have anything on our hardhats except the numeral that represented what department we was in, our clock number and our name on our hardhat." (5) Crutchfield told employee Romalis Martin that he had removed the "Union-Yes" sticker from the hardhat of Martin "because some superintendents were asking who were wearing stickers and who weren't." (6) Kenny Danos told discriminatee Richard St. Blanc that "I am not trying to tell you what to do, but I want you to know that word of you wearing this button has reached Gerry Gerdes [the de facto assistant superintendent of the Electrical Department]." (7) Grimes told St. Blanc that he was "fucking up" by wearing a union button. (8) Folse threatened alleged discriminatee Robert Ruiz with unspecified reprisals because he was wearing prounion insignia. (9) Nathan Howard instructed alleged discriminatee Kenneth Patterson and another employee to remove union insignia from their clothing. (10) Howard further told Patterson that he would not receive a wage increase because he had been seen wearing prounion insignia. (11) Finally, Bourgeois told his employees that they would be

[535] In view of my finding that Fleming engaged in no misconduct, I need not address the General Counsel's alternative theories of disparate treatment of Fleming. (If I did, however, I would note the many instances of insubordination that were punished only by warning notices that are listed in the case of alleged discriminatee Charles Bennett, supra, as well as the many exhibits that the General Counsel cites on brief.)

[536] All dates mentioned in Kent's case are in 1994, unless otherwise indicated.

[537] R. Br. P. "Westwego Yard—73."

[538] Again, the complaint does not allege that Kent's transfer to Westwego violated the Act.

discharged if they were caught wearing a prounion sticker. Other such threats are found throughout the above sections of this decision. A prima facie case of unlawful discrimination against Kent having been established by the General Counsel, the burden shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same actions against Kent even in the absence of his known protected activities. Respondent's defenses must therefore be examined.

Well before Kent testified, the General Counsel served upon Respondent Subpoena Duces Tecum B-87873, which demanded, inter alia, notes that had been created regarding Kent's discharge. Kent testified on day-52 of trial. On day-87, Respondent's counsel stated that he had just gotten to the investigation of the Kent case 3 weeks before, and he had found notes and a photograph to which the notes referred. Counsel offered no reason, or testimony, to explain why he did not seek and produce the notes, and photograph, when they were subpoenaed.[539] Upon the General Counsel's objections and motions, I excluded under *Bannon Mills*[540] the notes and photograph and testimony provable by the notes and photograph. On brief, Respondent urges reversal of my rulings. I have considered the authorities that Respondent cites, but none covers the case where a party simply ignores a subpoena as did Respondent in Kent's case. As I stated at trial by written ruling,[541] I believe that Respondent's ignoring the subpoena is tantamount to willfulness. I adhere to my ruling.[542]

On brief, although Respondent makes an extensive argument that I erred in excluding its evidence of just how bad Kent's work was, Respondent makes no argument that, had its proffers been accepted, it would have been able to meet its *Wright Line* burden. That is, Respondent does not argue that its rejected evidence would have shown that Kent would have been discharged even absent his expressions of prounion sympathies. Indeed, of the 47 discharges involved in this decision, Kent's is the only case where Respondent makes no *Wright Line* argument.

The reason for Respondent's failure even to make a *Wright Line* argument is obvious. The General Counsel introduced over 100 warning notices, issued in the period of 1990 through 1994, for violations of major offense-2. By the content of these warning notices, or by other documents that are in evidence, the General Counsel proved that none of these employees were discharged.[543] Moreover, there is no evidence, other than Petticrew's conclusion, that Kent's inferior work performance was intentional. (Even on brief Respondent does not even contend that its rejected evidence would show that Kent's actions were intentional.) Petticrew's invocation of major offense-2, therefore, seems purely arbitrary.

I therefore find that Respondent has failed to show that it would have discharged Kent even in the absence of his protected activities. Accordingly I conclude that by discharging Kent Respondent violated Section 8(a)(3) of the Act.

13. Refusals to hire employee-applicants

During 3 days in August 1993,[544] 23 prounion individuals applied for work with Respondent, but none was interviewed and none received an offer of employment. The second complaint, at paragraph 119, alleges that each of the applicants was refused employment because Respondent's supervisors knew or suspected that they possessed prounion sympathies. Respondent answers that none of the applicants was hired because they: (1) were unqualified for any of the jobs that were available, (2) showed an inadequate work history on their applications, or (3) showed on their applications that they had a history of wages that were far in excess of anything that Respondent was then paying. Respondent further denies knowledge of prounion sympathies in the cases of several of the applicants. Ultimately, I find and conclude that Respondent did unlawfully fail to hire applicant Cynthia Johnson, but I further find and conclude that: (1) One of the alleged discriminatees was not a bona fide applicant for any of the positions for which he applied; (2) One of the alleged discriminatees was not a bona fide applicant for some of the jobs for which he applied; (3) the General Counsel has failed to prove that Respondent had knowledge of two of the applicants' prounion sympathies; and (4) Respondent has demonstrated by a preponderance of the evidence that it would not have hired any of the remaining applicants even in the absence of their known prounion sympathies.

Applicants for employment with Respondent come to its personnel office at the main yard. They are greeted by a clerical who gives them applications to complete. After completing and returning the applications, the applicants stay in a waiting room to see if they will be interviewed. Placement Supervisor Bruce Nunez is in charge of reviewing all applications for employment and for interviewing those applicants in whom Respondent may be interested in hiring. Nunez testified[545] that he screens as many as 80 applications a day. Nunez testified that he will not interview an applicant whose application: (1) reflects a "poor work history," (2) indicates that the applicant has worked for more than $10 per hour but is applying for an entry-level position, or (3) indicates that the applicant is seeking work for which Respondent has no openings at the time that the application is submitted.

Nunez testified that he marks all of the applications that he screens with a letter code. Code "I" indicates that the applicant has been satisfactorily interviewed and his application is in process; that process includes scheduling for drug tests, review by departmental superintendents (if the application is for a skilled position), and an orientation class. Code "F" indicates that the applicant was interviewed but was "not interested" in what he was offered or was not interested in anything that Re-

[539] On Brief, p. "Westwego Yard-74," Respondent states: "It is undisputed that the photographs of Kent's attempt to install the watertight door were not subpoenaed at all." This statement is false. See the colloquy of day-87 of trial where counsel acknowledged that Petticrew's notes, which incorporate the photograph, were, in fact, subpoenaed. (The Tr. 20, 163, LL. 11–12, is corrected to change "MR. CUPP: And I realize that is not my strong star you made here." to "MR. CUPP: And I realize that is not my strongest argument here.")

[540] 146 NLRB 611 (1964).

[541] See exhibit ALJ-4 (originally misnumbered, and sometimes referred to at trial, as ALJ-3).

[542] In making my rulings on this issue, I was not unmindful of the fact that I had denied the General Counsel's motions to include many more complaints in this proceeding, and a second trial of this Respondent, with many more subpoenas to it, would most probably follow. If Respondent were allowed to ignore the subpoena in Kent's case, it would necessarily be encouraged to ignore subsequent subpoenas.

[543] I need not detail these exhibits which include G.C. Exhs. 775(a) through (zzzzz) and 798(a) through (bbb).

[544] All dates in this section of the decision are in 1993, unless otherwise indicated.

[545] Nunez was called as an adverse witness by the General Counsel on day-33 of trial, and he was called as Respondent's witness on day-66.

spondent might have to offer. Code "G" indicates that the applicant was not interviewed. Nunez testified that he does not consider an interview to have taken place unless he at least checks an applicant's Social Security number and INS identification; he did not do so for any of the applicants involved herein.

Nunez testified that when he receives a large number of applications, and he knows that some or all of the applicants will not be hired, he announces their names over a PA system. If applicants in the waiting room want to know more, and they approach the clerical, she will tell Nunez. Nunez will speak to them and briefly state the reasons that they are being rejected. Nunez testified that his routine PA announcement is: "Can I have your attention? The following applicants we are not able to place at this time. However, your applications will be maintained in our files for future consideration." Then Nunez reads the names of applicants whom he is not going to interview. (I shall refer to this announcement as "the rejection announcement.") Although all rejected applicants hear this message (either in a group or individually), some would never be contacted because of what their applications had revealed.

On August 16, Respondent placed an advertisement in the *Times Picayune* stating:

> Avondale Industries, Inc., Shipyards Division, seeks the following personnel:
>
> FIBERGLASS MECHANICS
>
> MAINT. MECHANICS
>
> SECURITY GUARDS
>
> MAINT. ELECTRICIANS
>
> ELECTRONICS TECHS.
>
> LIGHTING ELECTRICIANS
>
> POWER ELECTRICIANS
>
> INT. COMM. ELECTRICIANS
>
> EXPERIENCED HELPERS
>
> (PIPEFITTING-SHEETMETAL)
>
> and Entry Level Helpers
>
> Qualified candidates should apply in person.
> [Address]

Some of the alleged discriminatees (the applicants) testified that they went to the plant's personnel office and applied after seeing this advertisement; some applicants did not make reference to the advertisement. It is obvious from the whole of the testimony that representatives from different local unions in the area encouraged most of the applicants to apply. Several of the applicants wore prounion insignia to the premises when they applied; several made reference to unions on the faces of their applications. (All of the applicants, however, disavowed any intent to organize for any union, and there is no evidence that any of the applicants gave Respondent's supervisors or agents any reason that they were seeking jobs, in whole or in part, to organize for any union.)

a. Applicants who had usually worked as guards, laborers or pipefitters

(1) James Bishop

James Bishop (vol. 42) is a member of Local 60 of the Plumbers' and Steamfitters' Union in the New Orleans area. He worked in the construction trades for 25 years until he suffered crushed disks in his spinal column in 1986. Since that time his ability to lift weights has been impaired and he has held such jobs as selling tires and running a limousine service.

Bishop testified that in August he heard at the Plumbers' union hall that Respondent might be hiring soon. On August 16, he noticed the advertisement in the *Times Picayune* for various positions including maintenance mechanics, pipefitting helpers and entry-level helpers. On August 17, Bishop presented himself at Respondent's personnel office and asked for an application. At the time, he was wearing a Plumbers' union cap with a Plumbers' union pin in it. In the application's space for "Position(s) for which you are applying," Bishop wrote, "pipefitter, plumber, maintenance mechanic." In an adjacent space for "Yrs. Exp.," Bishop wrote, "25." In spaces where the application form instructs applicants to "Give your complete employment history for the past five (5) years," Bishop listed construction industry employers for whom he claimed to have worked from 1967 through 1989 (but not thereafter). Bishop listed his last wage rate at $16.50 per hour. In a space that has no heading, Bishop wrote: "All jobs from Plumber & Steamfitters Local #60." Finally, in a space that directs the applicant to "List any specialized crafts or shop machines which you are qualified to operate," Bishop wrote "forklift."

Bishop testified that, after completing the application and waiting over an hour, he heard the rejection announcement over the PA system. Bishop went to the clerk's window and complained that Respondent was engaging in "false advertising." The clerk directed him to Nunez' office. When he arrived there, Nunez, without looking up at him, stated that "[w]e are not hiring." Bishop asked about the advertisement, and Nunez replied, "I don't have nothing for you. You can go." Bishop then left. While still on direct examination, Bishop admitted that his statement on his application that he had worked in the construction industry as late as 1989 was false because he had been on disability retirement since 1986. When asked why he made the false entry, Bishop answered: "To show that there wasn't that many years in gap of employment at my trade." Bishop testified that he could do types of work other than pipefitting and maintenance mechanic but on cross-examination he admitted that his pretrial affidavit states that he did not list those other areas "because I was applying for a pipefitter, plumber, or maintenance mechanic position and not something else." Bishop further admitted that, as his pretrial affidavit states, Nunez told him that Respondent was only hiring pipefitter helpers on August 17.

Nunez coded Bishop's application "G." On direct examination, Nunez was asked why he did not "offer Mr. Bishop a position."[546] Nunez replied: "Because pipefitter positions were not available on the day that Bishop applied." Nunez further testi-

[546] This is how Respondent questioned Nunez on all of the refusal-to-hire cases. Because Nunez testified that he did not interview any of the applicants involved herein, it is clear that Nunez' answers to these questions included his testimony of why he did not considered the applicants for employment.

fied that he did not consider Bishop for a maintenance mechanic position because his application reflected no maintenance mechanic background and no skills in repairing "heavy industrial equipment," such as locomotives and gantry cranes, and that was the only category of maintenance personnel that Respondent was then seeking to employ.

Nunez further testified that: "If we are having difficulty in placing applicants in any craft, I may choose to go back to the applications that we have on file back to three months, retrieve the most recent one first and pull out the applications for the applicants that appear qualified for the openings that are available at that time." This is an acknowledgment that applications are maintained for at least three months. Applications are filed by months, and each month's applications are maintained alphabetically. Applicants of the most recent month are called first, and they are called in alphabetical order. Because Respondent does, in fact, utilize this system, Nunez' testimony that he did not consider an applicant because there were no jobs available on the very day that the applicant applied cannot be credited. (That is, Respondent does not throw away an application because there are no jobs available on the day that it was filed.) Therefore, in determining whether Respondent would have considered an applicant, I shall review its record of hiring applicants during the remainder of August and the first 3 full months following the dates of the applications in issue here, September, October and November (the August through November period).

According to documents introduced by the General Counsel, during the August through November period Respondent hired 26 pipefitters (and 16 pipefitters' helpers). In a corner of Bishop's application is written: "Called—Message—9/1/93."[547] Nunez testified that such notations are made on applications when jobs become available and previous applicants have indicated that they were looking for such jobs. Bishop, however, testified that he was never contacted by Respondent after August 17 even though he had listed on his application the telephone number of his limousine service which has a 24-hour answering service. I do not believe Bishop; I find on the basis of Respondent's business record that he was called on September 1, but Bishop did not respond. Of the 26 pipefitters whom Respondent hired during the August through November period, however, 25 were hired after the telephone call that Bishop ignored. Moreover, Nunez did not testify that Respondent destroys the applications of those who do not respond to telephone calls, and I do not consider Bishop's not responding to the September 1 telephone call to be a deciding factor.

Bishop testified that he had been looking for work in the construction industry before he applied at the personnel office, but I simply do not believe that testimony. Bishop had left the construction industry in 1986 (not 1989 as he falsely stated on his application) because of his back injury, and he did not testify that his ability to lift weight had somehow returned. Bishop was not applying for an office clerical job; he was applying for a construction industry craft job. All such jobs require employees to do at least some lifting. Whatever his motives for applying may have been, I do not believe that Bishop was a bona fide applicant for employment, and I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to hire him.

[547] The Tr., Vol. 65, p. 13, 973, LL. 10–11, is corrected to change "Message of '93" to "Message of 9/1/93."

(2) Leroy Robin

On August 17, Leroy Robin applied for a job as a pipefitter. Robin was not called to testify, but his application states that he has 25 years' experience as a pipefitter, and it lists jobs that he held in the construction industry from December 1991 through August 1993. The last wage rate that Robin listed was $13.50 per hour. In the space for specialized skills, Robin stated that he was a certified pipe welder and a certified pipe brazer. Robin apparently left the premises after hearing a rejection announcement.

Nunez coded Robin's application "G." Nunez testified that Robin was offered no job because: "No positions were available for the experience that he possessed and indicated on his application."

Robin did not indicate on his application that he had any relationship with any labor organization, and if he maintained any prounion sympathies there is no evidence of how Nunez would have known about it. The General Counsel has therefore failed to present a prima facie case that Robin was unlawfully discriminated against, and I shall recommend dismissal of the complaint allegations that are made on his behalf.

(3) Ronald Noil

Ronald Noil (vol. 44) went to the plant on August 18 with applicants Cynthia Johnson and Waynell Simon. (And Noil testified that the three were driven to the plant by a representative of the local Laborers' Union.) Noil testified that he, Johnson and Simon wore 2-inch diameter stickers that had the emblem of Laborers' Local 699. (Noil has been a member of that union for several years.) The application filed by Noil on August 17 does not state what position he is applying for, but in the space for listing his specialized skills he entered "laborer." In the spaces for listing his last 5 years' employment, Noil listed only "Todd" at "Patterson [Street]." For the dates of that employment, Noil listed "From" 1979, but he left the space for "To" blank. In the space for "Position and duties," Noil wrote "None," but he stated that his salary was $9 per hour. In the space for reason for leaving, Noil wrote "None." Noil testified that he worked at Todd Shipbuilding (which he thought Respondent had purchased) from 1979 until about 1984. Noil left the premises after hearing a rejection announcement. (On cross-examination Noil admitted that he had worked for other employers since 1984; he explained that he listed only Todd on his application because he thought he would be hired solely on the basis of his experience there.) The records in evidence demonstrate that Respondent hired in excess of 50 helpers (or laborers) during the August through November period.

Nunez coded Noil's application "G." Nunez testified that he did not hire Noil because, "Mr. Noil did not indicate any employment history since 1979."

On his application, Noil did not indicate that he had any relationship with any labor organization. Also, Noil did not confront Nunez before (or after) he filed his application, and Nunez could not have seen the prounion insignia that he was wearing. That is, there is no evidence that would charge Respondent with knowledge of any prounion sympathies that Noil may have held at the time that Nunez made his decision not to consider Noil's application. I therefore find and conclude that the General Counsel has not presented a prima facie case that Respondent unlawfully discriminated against Noil. Moreover, Respondent has demonstrated that it would not have considered any applicant who entered such a poor work history on his application.

Accordingly, I shall recommend dismissal of the allegations made on behalf of Noil.

(4) Waynell Simon

Waynell Simon (vol. 37), the sister of applicant Cynthia Johnson who is discussed below, testified that she wore a union sticker to the premises when she applied for a job, but her memory (and description) of that sticker was vague. In her application's space for type of job that she sought, Simon entered "Security guard—Laborer—Tool Room." In the spaces for listing her last 5 years' employers, Simon indicated that she had been employed by four employers from June 1992 through June 1993. As a 1992 employer Simon listed, "Laborers' Local." In the spaces for the names of two other "employers," Simon lists Sears and "Laborers' Local 698." Simon indicated on the application that she did toolroom work for Sears, Laborers' Local 689 and "G&C," although on cross-examination she admitted that she only did cashier work at Sears. The last wage rate that Simon indicated receiving was $10.25 per hour. Simon left the premises after she heard the rejection announcement that included her name and Johnson's. As noted, the records in evidence demonstrate that Respondent hired in excess of 50 helpers during the August through November period.

Nunez coded Simon's application "G." Nunez testified that he did not offer a job to Simon: "Because Ms. Simon had no experience in security for the position for which she applied, as well as the other position she applied for, she made significantly more money that we were willing to offer to entry level helpers at that time. . . . [A]t that time that she applied and for the labor position, which is basically an entry-level helper's position, she made in excess of $10 [per hour], which was significantly more than what we paid for entry-level helper's positions." At the time, according to Nunez (and according to records received in evidence), Respondent was paying $4.72 per hour for entry-level laborers, and experienced laborers were paid up to $6.76 per hour. Nunez further testified that there were no toolroom jobs or security jobs available at the time that Simon applied.

Simon made her prounion sympathies clear on the face of her application, and, in view of Respondent's demonstrated animus against its employees' protected activities, it must be held that the General Counsel has established a prima facie case of unlawful discrimination against Simon. Respondent, however, has shown that Simon would have qualified only for entry-level jobs and that it would not have hired her because of the great disparity between her last wages and what Respondent was paying such employees. I shall therefore recommend dismissal of allegations of the complaint that are made on behalf of Simon.

(5) Cynthia Johnson

Cynthia Johnson (vol. 37) testified that she wore a large "Union-Yes" sticker (the same that worn by many of the other alleged discriminatees and described above) when she went to apply. On her application, Johnson indicated that she was seeking employment as a "Security Guard," and she stated that she had 2 years' experience in such work. In the spaces for listing the employers of her last 5 years, Johnson listed four, one of which was "Labor Local 689." As the positions that she had held, Johnson listed "Holewatch" and "Security Guard." She listed her last rate of pay as $8 per hour. The records in evidence demonstrate that Respondent hired four security guards during the August through November period.

Nunez coded Johnson's application "G." Nunez testified that he did not offer a job to Johnson because: "She applied for a security guard position. Security guard positions were not available on that date and—nothing further." Nunez acknowledged that, from her application, Johnson appeared to be qualified for a security job with Respondent.

When he decided not to consider Johnson for employment, Nunez knew of Johnson's prounion sympathies from the entries on the face of Johnson's application and, in view of Respondent's demonstrated animus against its employees' protected activities, it must be found that a prima facie case of unlawful discrimination against Johnson has been presented. Respondent's defense must therefore be examined. Other than Nunez' discredited testimony that he did not hire Johnson because no job was available on the very day that she applied, Respondent offers no reason for its not considering Johnson for one of the four plant guard jobs that were available during the August through November period. Respondent, therefore, has not demonstrated that it would have refused to consider and hire Johnson even absent her known prounion sympathies. I therefore find and conclude that by refusing to consider and hire Johnson, Respondent violated Section 8(a)(3).

(6) Joseph Coleman

On August 26, Joseph Coleman (vol. 40) was driven to the plant by a union representative. With Coleman and the representative was applicant Ferdinand Abbot. Coleman testified that he wore a large Laborer's union sticker on his shirt. Coleman stated on his application that he was seeking work as a laborer and that he had 30 years' experience as such. As his employer from 1965 through 1993, Coleman listed, "Local #689." As his last wage, Coleman listed $10.89 per hour. After he submitted the application, Coleman was shown to Nunez' office. According to Coleman, Nunez acknowledged that Respondent was hiring helpers, but Nunez also told him that Respondent was paying only $4.75 per hour. Coleman replied: "Well, I usually get more than that but I need the job, I need to go to work and feed my family." Nunez told him to go back to the waiting room. A while after Abbot returned to the waiting room, he heard a rejection announcement and he left. As noted, the records in evidence demonstrate that Respondent hired in excess of 50 helpers during the August through November period.

Nunez coded Coleman's application "F," but he candidly admitted at trial that he did not recall what was said during his interview of Coleman. Coleman's testimony about what he said to Nunez, therefore, stands undenied. When asked why he did not hire Coleman, Nunez answered: "Mr. Coleman applied for a laborer position. His wages were what I consider to be significantly more than what we offer for entry-level helpers' position."

Coleman made his prounion sympathies clear on the face of his application, and in view of Respondent's demonstrated animus against its employees' protected activities, it must be held that the General Counsel has established a prima facie case of unlawful discrimination against Coleman. Respondent, however, has shown that Coleman would have qualified only for entry-level jobs and that it would not have hired him because of the great disparity between his last wages and what Respondent was paying such employees, even if Coleman, himself, was willing to accept less. I shall therefore recommend dismissal of

allegations of the complaint that are made on behalf of Coleman.

(7) Ferdinand Abbott

Abbott testified that he wore a large union sticker on his shirt and a union pin on his cap when he went to the plant to apply for work at Respondent's personnel office. On his application Abbot indicated that he was seeking work as a laborer and that he had 15 years' experience. Abbott listed two prior employers, but not the dates of his employment. In the first space for prior positions of employment Abbot wrote "Labor Union." As his last wage rate, Abbott listed $10.89 per hour. Abbot testified that he was asked into Nunez' office where Nunez told him that Respondent was hiring only painters' helpers.[548] As noted, Abbot left with Coleman after the rejection announcement. As noted, the records in evidence demonstrate that Respondent hired in excess of 50 helpers during the August through November period.

Nunez marked Abbot's application "F." Nunez testified that he did not consider Abbot for employment because: "Mr. Abbot's application was incomplete, although not always does that constitute me not interviewing an applicant. His wages were significantly more than we offered for entry-level helpers positions."

Abbot made his prounion sympathies clear on the face of his application, and, in view of Respondent's demonstrated animus against its employees' protected activities, it must be held that the General Counsel has established a prima facie case of unlawful discrimination against Abbot. Respondent, however, has shown that Abbot would have qualified only for entry-level jobs and that it would not have hired him because of the great disparity between his last wages and what Respondent was then paying such employees. I shall therefore recommend dismissal of allegations of the complaint that are made on behalf of Abbot.

b. Applicants who had usually worked as carpenters

Jimmy Russ was the Union's chief organizer. On August 25, Russ went to the hall of the Carpenters' Union and encouraged members there to go to Respondent's personnel office and apply for work. That day, 14 Carpenters' union members (carpenters) did go to Respondent's plant and apply for work; on August 26, two more carpenters did so. Nunez refused to hire any of the carpenters. Nunez did have brief exchanges with some of the carpenters, but he admitted that he did not interview any of them.

Nunez admitted that, when the group of 14 carpenters came to the personnel office on August 25, the clerical came to his office and:

> The personnel clerk that was working the window that day came to my office and made it known to me that a group of applicants were requesting applications and that they were wearing T-shirts and some of the applicants were wearing T-shirts and caps displaying union logos.

The "group" consisted solely of carpenters, and this admission compels the conclusion that Nunez knew that all carpenters who applied on August 25 held prounion sympathies. It is further safe to conclude, as I do, that when two more carpenters appeared on August 26, Nunez suspected that they also possessed prounion sympathies; moreover, those last two carpenters met with Nunez before they were rejected, and they were wearing prounion insignia at the time. Therefore, it must be concluded that a prima facie case of unlawful discrimination has been made out for each of the carpenter applicants.

Nunez testified that after the carpenters' applications were brought to him, he reviewed them for about 30 minutes and:

> I decided to address a group of applicants that had applied for carpentry positions because we had no carpentry positions available. We had not hired a carpenter in several years. I chose to go and address the group personally to avoid having them come back to the window and asking the same questions and the personnel clerk having to deal with that number of applicants asking the same questions. And ultimately she would have to refer them back to my office if she couldn't answer the ques-tions that they asked.

Nunez testified that the last time that Respondent had hired a carpenter was "some time in 1991." This testimony by Nunez was not disputed by the General Counsel; moreover, the General Counsel did not adduce any evidence that any carpenters were hired during the August through November period. I shall therefore recommend dismissal of all of the allegations that Respondent unlawfully refused to employ any of the carpenter applicants as carpenters. I will, however, address the General Counsel's additional contentions that Nunez also unlawfully refused to consider any of the carpenters for employment.[549]

(1) Dale Vasquez

Dale Vasquez (vol. 38) testified that when he went to the plant (with at least 13 other carpenters) he was wearing a T-shirt that had "Carpenters' 1846 Local Union" printed on the front. Also he had a union pin in his shirt, and he wore a baseball cap with some union logo. On his application Vasquez indicated that the positions for which he was applying were "Carpenter [space] Maintenance." For his prior employment, Vasquez named five employers and stated that he had done carpentry work for each. Vasquez listed his last wage as $13.75 per hour. Vasquez left the space for listing specialized skills blank. Vasquez testified that after he and the other carpenters completed their applications and they waited for a while, Nunez came into the waiting room and made the rejection announcement that included his name. Vasquez testified that after Nunez made the announcement he approached Nunez and stated that he was also a qualified welder, but Nunez ignored him. Vasquez further testified that he was, in fact, a welder, but he acknowledged on cross-examination that his pretrial affidavit states: "I am not supposed to do welding permanently because I got burnt eyes in the past. My doctor told me that I would eventually go blind from it. It is a condition which is caused from

[548] On direct examination, Abbot also testified (with obvious reluctance) that Nunez also said to him: "I see that you are union." Nunez credibly denied commenting on any applicant's prounion insignia; moreover, Abbot admitted on cross-examination that Nunez had made no such comment. (The General Counsel on brief twice quotes Abbot's testimony on direct examination without even acknowledging Abbot's admission on cross-examination.)

[549] Several of the carpenters testified that they possessed specialized skills such as welding. I do not believe any of such testimony that was offered by carpenters who did not indicate such experience on their applications. I therefore reject the General Counsel's contentions that Respondent unlawfully refused to consider such carpenters for other jobs as well as carpentry jobs.

bright light that makes the eyes unusable due to the pain. However, I would have taken a welding position at Avondale until they could transfer me to another position."

Nunez testified that: "Mr. Vazquez . . . was a carpenter, [and] based on the information he provided and his skills and his past work history. We did not have carpentry positions available at that time.[550] And he also listed, as well, 'carpentry maintenance' and our maintenance department does not hire carpenters. He did not have the skills necessary to qualify for any of the other openings that were available at that time. . . . [and I did not consider him because] his wages were significantly more than what we offer for entry-level helper positions." Nunez was credible in this testimony, and he was credible in other testimony that Respondent was seeking only maintenance employees who had experience working on heavy equipment such as cranes. The General Counsel introduced no evidence to the contrary. Finally, because of his vulnerability to blindness, I do not believe that Vazquez was a bona fide applicant for any employment that might involve welding. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Vasquez.

(2) Harry Ory

Harry Ory (vol. 38) is a retired carpenter who was collecting both a union pension and Social Security at the time he went to the personnel office with the other carpenters. Ory testified that when he went to apply he wore on his shirt four or five stickers that said "union." On his application, Ory indicated that he sought work of "scaffolding carpenter or maintenance," and he indicated that he had 30 years of experience. Because he had been retired for 3 years,[551] Ory listed his prior employment only through 1990, and he indicated that he had done carpentry work and scaffold-building for those employers. Ory indicated that his last hourly wage rate was $14. In the space for indicating special experience, Ory wrote: "power tools [space] table saw." When Nunez came into the waiting room to announce that Respondent had no jobs for the applicants that he named, Ory approached Nunez and asked why none of the "union" applicants were being interviewed; Nunez only replied, "We have no job for you." Ory then left the premises.

Nunez did not code Ory's application. Nunez testified: "Mr. Ory, as well, had the skills of a carpenter and we did not have carpenters positions available and he did not possess the skills to qualify for the openings that we had available for maintenance at that time. . . . The scaffolds are fabricated by the scaffolding department and are primarily fabricated out of metal and the carpentry department supplies the scaffolding department with the scaffold boards." Nunez further testified that he did not consider Ory for any scaffold-building position because: "scaffolding position is basically that of a person who has ship-fitting skills, burning skills. He did not indicate any skills that could have qualified him for that position." the General Counsel made no effort to rebut this testimony, and I found it credible. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Ory.

(3) Jerry Bychurch

Jerry Bychurch (vol. 39) testified that when he went to the personnel office with the other carpenters, he wore a T-shirt that said "Vote-"Union-Yes"." As the position that he applied for, Bychurch put "maintenance," and he stated that he had 38 years of experience. Bychurch listed his five former employers, ending in April 1993. All of the employers were in the construction industry, and Bychurch listed his jobs with those employers as "carpenter & scaffold-builder, . . . const. foreman" and "carpenter layout." Bychurch indicated that his last hourly wage rate was $13.91. In the space for listing specialized skills, Bychurch wrote "cabinet maker & gen. carpentry." Bychurch left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not enter a code on Bychurch's application. Nunez testified that he did not consider Bychurch for employment because: "Mr. Bychurch, although he applied for a maintenance position of 33 years, as he indicated on his application, experience, he indicated no experience on his application that would have qualified him for maintenance. It appeared that Mr. Bychurch's background was carpentry-related and we did not have any carpentry positions available." Nunez further testified that he did not consider Bychurch for a maintenance mechanic position because: "he did not possess the skills in repairing heavy industrial equipment." the General Counsel made no effort to refute this testimony, and I found it credible. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Bychurch.

(4) Leon McGuire

Leon McGuire (vol. 39) testified that he was wearing a Carpenters' union T-shirt when he applied. On his application McGuire indicated that he was applying for a job as "maintenance carpenter," and he indicated that he had 35 years of experience. McGuire listed employers that he had through June 1993. McGuire indicated that he did "carpentry" for each of those employers, and his last hourly wage rate was $17.76. McGuire left the space for listing specialized skills blank. McGuire testified that, after Nunez read out the names of the rejected applicants, he asked Nunez for a business card. Nunez took McGuire back to his office and gave him one. McGuire told Nunez that he would call back and see if there were any jobs available to him, and Nunez replied, "Don't waste your time." McGuire then left the premises. Nunez did not deny this testimony.

Nunez testified that he did not consider McGuire for any employment because: "Mr. McGuire was a carpenter by trade and did not indicate any skills that could have qualified him for any other openings that were available at that time." Nunez further testified that he did not consider McGuire for a maintenance mechanic's position because: "he didn't have the skills necessary to repair heavy equipment." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, McGuire.

(5) Ellis Gauthier

Ellis Gauthier (vol. 41) testified that he wore a Carpenter's union T-shirt when he applied with the rest of the carpenters. On his application Gauthier wrote that he was applying for work as a "carpenter," and he stated that he had 25 years' ex-

[550] Because, according to the record, Respondent hired no carpenters at any relevant time, I accept such testimony by Nunez to indicate that Respondent did not then anticipate hiring carpenters at any time during the foreseeable future, which was the fact.

[551] Ory's testimony that he had previously been seeking work when he applied with Respondent was incredible.

perience. Gauthier listed four employers that he worked for through December 1992.[552] Gauthier indicated that he had done carpentry or "repair" work for each of those employers, and his last hourly wage rate was $11. Gauthier left the space for listing specialized skills blank. Gauthier left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Gauthier's application. Nunez testified that he did not consider offering Gauthier a job because "Mr. Gauthier is a skilled carpenter. We had no carpenter positions available at that time." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Gauthier.

(6) Edward McCallef

Edward McCallef (vol. 39) testified that he wore a Carpenters' union cap when he went to apply for employment with Respondent. On his application, McCallef stated that he was seeking work as a "carpenter," and he had 35 years' experience. McCallef listed only one prior employer; he worked as a carpenter from August 1991 through February 1992,[553] and his last hourly wage rate was $12.31. McCallef left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code McCallef's application. Nunez testified that he did not consider McCallef for employment because: "Mr. McCallef is a carpenter by trade and did not have the skills necessary to qualify for any of the positions that were available at that time."[554] Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, McCallef.

(7) Ivar Mikalsen

Ivar Mikalsen (vol. 40) retired from the carpentry trade in 1992, and he has been living on a pension and Social Security (and a couple of odd jobs) ever since.[555] Mikalsen wore a Carpenters' union cap when he submitted his application. On his application he stated that he sought work as a "carpenter," and that he had 40 years' experience. Mikalsen listed employers for whom he worked until 1992, he stated that he had been a carpenter for each, and he stated that his last hourly wage rate was $17.67. Mikalsen left the premises when he heard Nunez make the rejection announcement that included his name. Mikalsen left the space for listing specialized skills blank.

Nunez did not code Mikalsen's application. Nunez testified that he did not consider Mikalsen for employment because: "Mr. Mikalsen was a carpenter by trade and did not have the skills necessary to qualify for the openings that were available and we were not hiring carpenters at that time." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Mikalsen.

(8) Eugene Short

Eugene Short (vol. 41) was wearing a Carpenters' union cap, T-shirt and badge when he went to apply for employment. On his application Short stated that he sought work as a "maintenance mech." and that he had 25 years' experience. Short listed four prior employers and stated that he did carpentry, drywall, scaffold-work, or "general maintenance" work for each. Short's last hourly wage rate was $13.42. In the space for specialized skills, Short listed "fork lift, all carpentry shop tools." Short left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Short's application. Nunez testified that he did not consider Short for employment because: "Mr. Shoat's [sic] background reflected that he was a skilled carpenter and he did not have the skills necessary to qualify for a maintenance mechanic position of what he applied for. And we did not have carpentry positions available at that time." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Short.

(9) Michael Magee

Michael Magee (vol. 41) wore a "Union-Yes" sticker on his cap when he appeared at the personnel office and filed an application. Magee stated on the application that he sought a "maintenance" job and that he had 16 years' experience. Magee listed only one prior employer, a construction company. Magee stated that he worked for that company from "9/20/92" until "12/28/93." (Magee testified that he had meant "12/28/92" because that was when he was last laid off.) Magee stated that he had been a carpentry foreman for the construction company, and that his hourly wage-range was from $12.85 to $14.61. Magee left the space for listing specialized skills blank. Magee left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Magee's application. Nunez testified that he did not consider Magee for employment because: "Mr. Magee was a carpenter. He applied for a maintenance position. He did not have the skills to qualify for the maintenance position that was available at that time." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Magee.

(10) Oliver Cooper

Oliver Cooper (vol. 44) wore a Carpenters' union cap when he went to the personnel office to apply. On his application, Cooper stated that he was seeking work as a "maint. carpenter," but he left the space for "Yrs. Exp." blank. Cooper's listing of prior employers indicates that he had not worked for any employer since 1982,[556] he was paid $13.80 per hour for the job that he worked that year. Cooper left the space for listing specialized skills blank. Cooper left the premises when he heard Nunez make the rejection announcement that included his name.

[552] Gauthier's testimony that he had previously been seeking work when he applied with Respondent was incredible.

[553] McCallef's testimony that he had previously been seeking work when he applied with Respondent was incredible.

[554] Nunez testified that the fact that McCallef listed only 2 years' of employment did not affect his decision.

[555] Mikalsen's testimony that he had previously been seeking work when he applied with Respondent was incredible.

[556] Cooper's testimony that he had previously been seeking work when he applied with Respondent was incredible.

Nunez coded Cooper's application "G." Nunez testified that he did not consider Cooper for employment because: "Mr. Cooper's application reflects that he has carpentry background and which we had no carpentry openings available as well as he does not indicate any employment since 1982. . . . Mr. Cooper does not indicate any experience that would qualify him to repair heavy equipment." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Cooper.

(11) Mariel Lavigne

Mariel Lavigne (vol. 43) wore a Carpenters' union cap and a "Union-Yes" sticker on his shirt when he went to the personnel office. On his application, Lavigne stated that he was seeking work of "maintenance or carpenter," and he stated that he had 35 years' experience. In the spaces for listing the applicant's last 5 years for employment, Lavigne listed four prior employers, all construction companies, but he listed no employers for whom he might have worked since 1984.[557] On his application, Lavigne stated that he worked as a carpenter for each of the employers that he did list, and listed his last hourly wage rate as $14.45. In the space for specialized skills, Lavigne wrote, "crane operator—15 yrs. experience." Lavigne left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Lavigne's application. Nunez testified that he did not consider Lavigne for employment because: "Mr. Lavigne was a skilled carpenter. We did not have any carpentry positions available at that time and he did not have experience that would qualify him for the maintenance position that he also applied for." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Lavigne.

(12) Rene Stoute

Rene Stoute (vol. 42) wore a Carpenters' union cap and a T-shirt that said "Vote-"Union-Yes"" when he went to Respondent's personnel office. On his application, Stoute indicated that he sought the work of "carpenter maintenance," and he stated that he had 32 years' experience. In the spaces for listing his last 5 years' employers, Stoute listed four employers for whom he worked between March 1989 through January 1992.[558] For each of those employers, Stoute indicated that he was a "union carpenter" or "foreman," and his last hourly wage rate was indicated to be "$13.26 plus benefits." In the space for specialized skills, Stoute wrote: "carpenter maintenance." Stoute left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Stoute's application. Nunez testified that he did not consider Stoute for employment because: "Mr. Stout was a skilled carpenter and we did not have carpenter's positions available at that time, although he listed his position that he was applying for as a carpenter maintenance. Our maintenance doesn't have carpenters." Nunez further testified that he did not consider Stoute for a helper's position because: "his wages were significantly more than what we offer entry-level helpers." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Stoute.

(13) Firmin Maurice

Firmin Maurice (vol. 41) wore a Carpenters' union cap and a "Vote-Yes" T-shirt when he went to Respondent's personnel office. On his application, Maurice stated that he was seeking work in "maint. or anything" and that he had 17 years' experience. In the spaces for listing his employers during the last 5 years, Maurice listed three employers for whom he had worked as a carpenter (or carpenter foreman) from 1986 through October 1992.[559] Maurice indicated that his last hourly wage rate was $14.06. Maurice left the space for listing specialized skills blank. Maurice left the premises when he heard Nunez make the rejection announcement that included his name.

Nunez did not code Maurice's application. Nunez testified that he did not consider Maurice for employment because: "Mr. Maurice's background reflected that he was a carpenter by trade and did not have the skills necessary to qualify for the maintenance position." Nunez further testified that when an applicant places "anything" in the space for job desired, he usually means that he would accept entry-level jobs. Nunez did not consider Maurice for such because: "his wages that he was accustomed to earning [were] significantly more than we offer for entry-level positions." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Maurice.

(14) Bennie Cuenca

Bennie Cuenca (vol. 40) did not have any prounion insignia on his clothing when he went to Respondent's personnel office on August 25. He did carry a large pocket calculator in his shirt pocket; on the back of that calculator was a sticker that had "America works best when we say . . . Union Yes." Thereafter follows a large check mark that is the same as the check marks in the "Union-Yes" stickers that many of the production and maintenance employees wore during the campaign. When Cuenca went to the clerk's window and asked for an application, the calculator was turned so that the sticker did not show. On his application, Cuenca indicated that he was seeking "carpenter" work and that he had 18 years' experience; Cuenca also indicated that he was seeking work as an electrician's helper, and he indicated that he had six months' experience in doing that kind of work. Cuenca did list his employers for the prior 5 years (ending in March 1993), and he stated that he worked as a "journeyman carpenter" for each. Cuenca further indicated that his last hourly wage rate was $12.75, and his two jobs before that paid $14.21 per hour. Cuenca left the space for listing specialized skills blank.

Cuenca testified (and many other of the carpenters corroborated him) that when Nunez called out the names of the other rejected carpenters, Nunez did not call his name. Cuenca waited several minutes more, and the clerk told him to go back to Nunez' office. As he walked there, he turned the calculator around so that the word "union" was plainly visible. When he got to Nunez, Nunez stated that all electrical department jobs had been filled the day before and that the only jobs that Respon-

[557] Lavigne's testimony that he had previously been seeking work when he applied with Respondent was incredible.

[558] Stoute's testimony that he had previously been seeking work when he applied with Respondent was incredible.

[559] Maurice's testimony that he had previously been seeking work when he applied with Respondent was incredible.

dent then had were for welders and tackers. Cuenca thanked Nunez and left. Nunez denied that he saw such a calculator, but I believe Cuenca's testimony on this point, and I find that Nunez did see the prounion insignia. Moreover, as noted, Nunez admitted that the personnel office clerk had told him that all of the applicants were wearing prounion insignia; this would necessarily cause Nunez to suspect that Cuenca held the same sympathies as the other applicants that were there at the time. The records in evidence demonstrate that Respondent hired 43 electrical department helpers during the August through November period.

Nunez coded Cuenca's application "G." Nunez testified that he did not consider Cuenca for employment because: "Mr. Cuenca's background indicated that he was a skilled carpenter. We had no carpenters available—carpenter positions available at that time. He also applied for electrician's helper. Electrician helper positions were not available at that time that he applied as well." Nunez further testified that: "I called Mr. Cuenca into my office to explain to him that we had been hiring electrician helpers, advanced level, and that his application would be maintained and if an additional position became available, he would be considered." (Nunez denied that this constituted an interview.)

Nunez acknowledged that he did hire a electrician's helper about September 3, but he added: "[T]he offer of employment to that electrician's helper was made long before Mr. Cuenca even applied and I believe he [the helper who did get hired] had a physical problem that he had to resolve." The records in evidence show that Respondent hired one Ronald Parquet as an electrical department helper on September 3 at a rate of $6.76 per hour. Apparently this was the employee to whom Nunez referred.

Assuming that Nunez' reason for hiring Parquet, rather than Cuenca, is valid, this does not explain why Respondent did not offer Cuenca one of the jobs that the 42 other applicants for electrical department helper positions received. Nevertheless, as quoted in Simon's case, Nunez credibly testified that Respondent did not hire anyone at an entry-level position who had been making in excess of $10 per hour. Cuenca had been making well in excess of that figure, and his 6-months' experience as an electrician's helper would have qualified him for no more than an entry-level position in the electrical department. There is no reason to believe that Nunez would have made an exception in Cuenca's case had he not worn (or carried) prounion insignia when he applied for employment. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Cuenca.

(15) David Grafe

On August 26, David Grafe (vol. 42) and Steven Appel (vol. 37) went together to the personnel office. Grafe wore a Carpenters' union cap and a shirt with a "Union-Yes" sticker on it. On his application, Grafe indicated that he sought work as a "carpenter," and he stated that he had 20 years of experience. Grafe listed five employers from 1990 through February 1993, he stated that he did "form. carp." or "scaffolding" work for each of them, and he listed his last hourly wage rate as $14.36. Grafe left the space for listing specialized skills blank. Grafe testified that after he and Appel finished filling out their applications, they were told by the clerk to go back to Nunez' office. When they got there, according to Grafe, Nunez stated that he noticed that he and Appel were union members. Further according to Grafe, Nunez told him and Appel: "Well, usually our carpenters here stay here at Avondale a lifetime then they retire. . . . We don't have anything for you all right now." Grafe and Appel then left the premises. Again, Nunez credibly denied that he told any applicant that he noticed that they were "union."

Nunez coded Grafe's application "G." Nunez testified that he did not consider Grafe for employment because "Mr. Grafe, as well, is a carpenter and we did not have carpenter positions available at that time and he did not have the skills necessary to qualify for the openings that were currently open." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Grafe.

(16) Steven Appel

Appel also wore a Carpenters' union cap and a "Union-Yes" sticker when he and Grafe went to the personnel office. On his application, Appel indicated that he sought work of "carpenter/maint," and he stated that he had 15 years' experience. Appel listed five former employers and stated that he had been a carpenter, carpenter foreman, or "project superintendent" for those employers. Appel listed his last hourly wage rate as $15 (although an earlier wage rate was $18 per hour). In the space for specialized skills, Appel entered, "table saws, drill press, etc." Appel testified consistently with Grafe about their meeting with Nunez.

Nunez did not code Appel's application. Nunez testified that he did not consider Appel for employment because: "Mr. Appel applied for a carpentry or maintenance position. Avondale did not have any carpenter positions available. He did not indicate any experience on his application that would have qualified him for the maintenance mechanic's position and he made significantly more than what Avondale offered for entry-level helper positions." Nunez was credible in this testimony which the General Counsel did not seek to refute. I shall therefore recommend dismissal of the allegation that Respondent unlawfully refused to consider, as well as hire, Appel.

CONCLUSIONS OF LAW

1. By the following acts and conduct Respondent has violated Section 8(a)(1) of the Act:

(a) Gerdes, on June 28, 1993, threatened Respondent's employees with more strict enforcement of work rules because they had aided or supported the Union or because Respondent suspected them of having aided or supported the Union.

(b) DeNicola, about June 14, 1993, threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(c) DeNicola, on June 28, 1993, threatened Respondent's employees with more strict enforcement of work rules because they had aided or supported the Union or because Respondent suspected them of having aided or supported the Union.

(d) DeNicola, in late July 1993, threatened Respondent's employees with discharge because they had worn prounion insignia.

(e) Torres, on June 28, 1993, threatened an employee with unspecified reprisals because of his participation in a Board-conducted election.

(f) Autin, in April or May 1994, threatened its employees with unspecified reprisals because they had worn prounion insignia.

(g) Fedrick, in May 1993, threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(h) Falgout, on October 22, 1993, threatened Respondent's employees with unspecified reprisals because they had worn prounion insignia.

(i) Terry, in July 1993, threatened Respondent's employees with discharge if they filed charges under the Act.

(j) Fruchtnicht, in early June 1994, threatened Respondent's employees with unspecified reprisals if they filed charges under the Act.

(k) Reeves, in March or April 1993, interrogated Respondent's employees about their union membership, activities or desires.

(l) Emil Foret Jr., about June 1, 1993, interrogated Respondent's employees about their union membership, activities, or desires.

(m) Clement, in late September 1993, threatened an employee that it would deny him a transfer because an unfair labor practice charge had been filed on behalf of that employee.

(n) Bourg Sr., in the spring of 1993, solicited Respondent's employees' grievances and promised to remedy them in order to discourage prounion sympathies.

(o) Benoit, on June 9, 1994, threatened to withhold wage increases from an employee because that employee had been wearing prounion insignia.

(p) Bourgeois, in April or May 1993, threatened Respondent's employees with discharge if they wore prounion insignia or were seen reading prounion literature.

(q) Pierre, in April or May 1993, interrogated Respondent's employees about their union membership, activities or desires.

(r) Sanchez, on or about April 20, 1994, instructed an employee to remove prounion insignia from his clothing.

(s) Bourgeois, on March 11, 1993, threatened Respondent's employees with layoffs if they selected the Union as their collective-bargaining representative.

(t) Rotolo, in mid-June 1993, interrogated Respondent's employees about their union membership, activities or desires.

(u) Christiansen, in March 1993, threatened Respondent's employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

(v) Christensen, in mid-April 1993, interrogated Respondent's employees about their union membership, activities or desires.

(w) Russell, about June 2, 1993, instructed Respondent's employees not to wear prounion insignia.

(x) Cortez, in late May 1993, threatened Respondent's employees with unspecified reprisals because they mentioned the word "union" in discourse with supervisors.

(y) Ledet, in late May 1993, interrogated Respondent's employees about their union membership, activities, or desires.

(z) Caston, on or about May 17, 1993, threatened Respondent's employees by telling them that other employees had been discharged because of their union activities.

(aa) DeNicola, in mid-July 1993, told employees that other employees would not be reinstated because they were prounion.

(bb) DeNicola, in mid-July 1993, told employees that it would be futile for them to select the Union as their collective-bargaining representative.

(cc) Simpson, on May 17, 1994, threatened an employee with discharge or other unspecified reprisals because he had engaged in union or other protected concerted activities.

(dd) Jay Pertuit, on April 17, 1993, threatened Respondent's employees with discharge if they signed union authorization cards.

(ee) Carl Mott Jr., in mid-May 1993, interrogated Respondent's employees about their union membership, activities, and desires.

(ff) Nealy, about June 18, 1993, interrogated employees about their union sympathies.

(gg) Poche, in late June 1993, created the impression that Respondent's employees' protected activities were under its surveillance.

(hh) Poche, in late June 1993, interrogated an employee about his union membership, activities, or desires.

(ii) Poche, in late June 1993, threatened an employee that indulgences or privileges would be withdrawn if that employee supported the Union.

(jj) Pretlove, in April 1993 promulgated a rule precluding Respondent's employees from talking about the Union.

(kk) Pretlove, in April 1993, threatened Respondent's employees with discharge if they talked about the Union during working time.

(ll) Christiansen, in June 1993, interrogated an employee about his union membership, activities, or desires.

(mm) Christiansen, in June 1993, threatened an employee with unspecified reprisals because of the employee's expression of interest in union activities.

(nn) Christiansen, on June 25, 1993, solicited employees to demonstrate against the Union.

(oo) DeNicola, about June 1, 1993, created the impression that Respondent's employees' union activities were under its surveillance.

(pp) Reeves, on May 17, 1993, threatened Respondent's employees with unspecified reprisals because of their union or protected concerted activities.

(qq) Taylor, in late June 1993, threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(rr) Bourgeois, in early March 1993, threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(ss) Bourg, in March 1993, threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(tt) Mullins, on June 22, 1993, threatened Respondent's employees with unspecified reprisals because of their prounion sympathies.

(uu) Boudreaux, on September 7, 1993, created the impression of surveillance in an employee.

(vv) Ramirez, in March 1993, threatened Respondent's employees with unspecified reprisals because of their union activities.

(ww) Ernest Foret Sr., on June 1, 1993, threatened Respondent's employees with discharge or unspecified reprisals if they continued to assist the Union.

(xx) Benoit, in September 1993, threatened Respondent's employees with transfer or discharge if they continued to support the Union.

(yy) Whittington, in April 1994, threatened Respondent's employees with discharge if they supported the Union.

(zz) Navarro, in June 1993, interrogated Respondent's employees about their union membership, activities or desires.

(aaa) Carr, on March 15, 1993, solicited the grievances of Respondent's employees and promised to remedy those grievances.

(bbb) Boudreaux, on June 21, interrogated an employee about his union activities.

(ccc) Boudreaux, on June 21, coercively created an impression of surveillance of an employee's protected activities.

(ddd) Murray, on March 22, 1993, interrogated Respondent's employees about their union membership, activities or desires.

(eee) Caston, in the spring of 1993, warned Respondent's employees that their efforts to secure collective bargaining would be futile.

(fff) Kenny Danos, on July 22, 1993, threatened employees with stricter enforcement of work rules, and discharge, because of their protected activities.

(ggg) Ramirez, on or about July 1, 1993, told Respondent's employees that an employee had been transferred to a more onerous position because he aided or supported the Union.

(hhh) Fradella, in July 1993, created an impression of unlawful surveillance of an employee's protected activities.

(iii) Fradella, in July 1993, interrogated an employee about his union activities.

(jjj) Mouton, on April 21, 1994, told Respondent's employees that another employee had been reassigned because he had aided or supported the Union.

(kkk) Grimes, on June 3, 1993, threatened an employee with unspecified reprisals because he was wearing prounion insignia.

(lll) Terry, on June 24, 1993, threatened Respondent's employees by telling them that he would engage in closer supervision of their work because Respondent's employees aided or supported the Union.

(mmm) Cortez, in June 1993, ordered an employee not to take literature from union representatives and not to talk to them at Respondent's gates.

(nnn) Zeringue, in June 1993, warned an employee that the employees' collective-bargaining efforts would be futile.

(ooo) Folse, at some time between March and September 30, 1993, threatened an employee with unspecified reprisals because he was wearing prounion insignia.

(ppp) Howard, on May 13, 1994, instructed Respondent's employees to remove union insignia from their clothing.

(qqq) Howard, on May 18, 1994, threatened an employee that he would not receive a wage increase because that employee had been seen wearing prounion insignia.

(rrr) LeFort, on June 21, 1993, threatened to remove an employee from the main shipyard because he had aided or supported the Union.

(sss) LaSalle, on August 2, 1993, threatened Respondent's employees by telling them that they had been transferred to Respondent's Westwego shipyard because they had aided or supported the Union.

(ttt) Luttrell, on September 7, 1993, threatened Respondent's employees with discharge because they had aided or assisted the Union.

(uuu) Rabestein, about June 30, 1993, promulgated a rule discriminatorily precluding Respondent's employees from talking about the Union during working time.

2. By the following acts and conduct Respondent has violated Section 8(a)(3) and (1) of the Act.

(a) Discharging the following-named employees:

Jose Aguilar	Eddie Johnson
Isador Ancar	Marie Joseph
Edward Armstrong	Charles Kent
Dwight Ballard	Barbara Marshall
Charles Bennett	Joseph Melton
Michael Boudreaux	Michael Molaison
Johann Burton	Patrick Noah
Vernon Charles	Octave Rouege
Leroy Clark	Audra Scott
Keith Collins	Eugene Sheard
Charles Fleming	Joseph Simpson
Julie George	William Smith
Carlos Henriquez	Donald Thompson
Vincente Hernandez	Donald Varnado

(b) Suspending the following-named employees on or about the dates set opposite their respective names:

Dwight Ballard	February 2 and June 29, 1994
Mark Cancienne	March 1, 1994
Larry Gibson	May 10, 1994
Robert Ruiz	May 12, 1994
Lennie Valentine	February 2, 1994

(c) Issuing warning notices to the following-named employees on the dates set opposite their names:

Dwight Ballard	April 26, 1994
Dwight Ballard	May 18, 1994
Dwight Ballard	June 6, 1994
Dwight Ballard	June 28, 1994
Harold Adams	August 30, 1993
Carlos Henriquez	February 1, 1994
Joe Howard	October 12, 1993
Cornelius King	July 30, 1993
Michael Molaison	June 3, 1993
Donald Mason	December 9, 1993
Donald Mason	May 19, 1994
Philip Perera	June 30, 1993
Philip Perera	March 10, 1994
Philip Perera	March 16, 1994
Darrell Smith	July 23, 1993
Octave Rouege	June 15, 1993 (2)
Richard St. Blanc	July 29, 1993
Lennie Valentine	July 15, 1994

(d) Assigning the following-named employees to more onerous work on or about the dates set opposite their respective names:

Mark Cancienne	June 30, 1993
Larry Gibson	May 31, 1993
Charles Giles	June 21, 1993
Mamoru Honjo	April 22, 1994
Loraine Moses	June 2, 1993
Sidney Jasmine	December 20, 1993
Richard St. Blanc	June 29, 1993
Richard St. Blanc	July 29, 1993

(e) Denying Robert Ruiz the use of a telephone on May 12, 1994.

(f) Discriminating against the following-named employees in regard to pay for a day that these employees were compelled by Respondent to appear at a Board representation hearing:

Harold DiMaggio	Ray Steward
Chester Green	Richard St. Blanc

Philip Perera Harry Thompson
Terry L. Perkins

(g) Refusing to hire Cynthia Johnson because of her known or suspected prounion sympathies.

3. Respondent has not otherwise violated the Act as alleged herein.

4. Because of their misconduct that has been proved, Isador Ancar and Octave Rouege are not entitled to reinstatement, and Ancar and Rouege are entitled only to partial backpay.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged 28 employees, and having discriminatorily refused to hire 1 employee, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharges to the dates of proper offers of reinstatements, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.,* 231 NLRB 651 (1977).[560] Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order, requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods,* 242 NLRB 1357 (1979). Moreover, other special remedies are required to dissipate the effects of Respondent's conduct.

I have found that, in the period from March 1993 through June 1994, Respondent violated Section 8(a)(1) on 73 different occasions. In addition, in violation of Section 8(a)(3), Respondent has discharged 28 employees, suspended 5 employees, issued 18 warning notices to employees, assigned onerous work to 8 employees, denied employment to 1 employee-applicant, and denied 8 employees benefits to which they would otherwise have been entitled. In *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 473–474 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996), where there was a larger unit of employees (6000 in *Fieldcrest*, as opposed to 4100 here) but a lesser number of unfair labor practices, the Board held that "we find that the Respondent's unfair labor practices are so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." 318 NLRB at 473. The quantity and severity of the unfair labor practices found herein, combined with Respondent's simultaneous refusal to bargain with the Union as found in the collateral proceeding, require special remedies in this case, as well. The circumstances of *Fieldcrest Cannon, Inc.,* however, included an unresolved question concerning representation, and the access provisions of the Board's remedy in that case were directed at securing a valid resolution of that question. Here, however, the Charging Party has already been certified by the Board as the collective-bargaining representative of Respondent's production and maintenance employees, and such remedies are unnecessary to achieve a valid election. Therefore, I here grant only the requests of the General Counsel and the Charging Party for the following notice remedies:[561]

(1) In addition to posting at its Avondale and Westwego facilities copies of the attached notice that is marked "Appendix A," publish the notice in any of its internal newsletters and mail copies of the notice to all its present employees and all employees on Respondent's payroll since March 11, 1993, when Respondent began its unlawful conduct. All such notices, whether mailed, posted or published, are to be signed by Respondent's chief executive officer, Albert Bossier.

(2) Convene during working time all employees at Respondent's Avondale and Westwego facilities, by shifts, departments, or otherwise, and have Albert Bossier read the notice to the employees, or, at Albert Bossier's option, permit a Board agent to read the notice to the employees. If Albert Bossier chooses to have a Board agent read the notice to the employees, he shall be present while the notice is read. In either event, adequate presentation and amplification facilities shall be provided by Respondent at its costs.

The reading of the notice by Bossier, or his presence while the notice is read, is necessary because it was he who directed Respondent's campaign, according to Production Vice President Simpson and Personnel Vice President Griffin. As I have found, that campaign contained an outrageous and pervasive number and nature of unfair labor practices. If the employees did not, in fact, know that it was Bossier who was directing Respondent's scofflaw campaign against their efforts to exercise their rights under the Act, they would reasonably have assumed it. (If from nothing else, the employees would have assumed it from Bossier's June 1, 1993 speech that labeled all prounion employees as "whiners, malcontents and slackers" solely because they did support the Union.) Until Respondent's employees are effectively given assurance that Albert Bossier knows that they have rights that are protected by law, the atmosphere of intimidation that he created will never be dispelled. Only when Bossier signs the notice and reads it to the employees will that assurance be effectively given.[562]

[Recommended Order omitted from publication.]

APPENDIX B

Employees who were shown by the General Counsel's Exhibit 364 to have received three or more warning notices (WN) within 12-month periods from 1990 through 1994 without being discharged. The employees are sorted according to the count (#) of those who received each quantity of warning notices.

Tot.	Badge	Name	WN	#	Period
1	13162	Oscar James	10	1	6/91–6/92
2	480	Anthony Robinson	9	1	4/91–1/92

[560] Limited remedies for discriminatees Isador Ancar and Octave Rouege are specified in the narratives of their cases.

[561] The other notice remedies that the General Counsel and the Charging Party request are not called for in terms of need or the authorities cited.

[562] Of course, if Bossier is no longer Respondent's chief executive officer, his successor shall comply with the notice provisions of this decision. If the Board does not order Bossier to read the notice to the employees, it should, at least, order Production Vice President Simpson to do so. To the production and maintenance employees, Simpson is the most visible vice president; moreover, a reading by anyone lower in Respondent's hierarchy would have substantially less effect.

Tot.	Badge	Name	WN	#	Period
3	9925	Calvin McGaughy	9	2	__/91–12/91
4	2013	Martha Cox	9	3	5/91–2/92
5	10989	Thomas White	9	4	10/90–9/91
6	3032	Jasper White	9	5	10/90–8/91
7	316	Leonard Brousseau	8	1	3/91-1/92
8	1848	Floyd Naquin	8	2	5/91–1/92
9	2987	Gary Smith	8	3	5/91–4/91
10	10672	Kenneth Patterson	8	4	5/91–3/91
11	9851	Frank Savoie	7	1	10/12/90–10/9/91
12	4274	Jonathan Vidrine	7	2	4/92–3/93
13	11606	Randall Sheffield	7	3	1/91–12/91
14	11099	Lawrence Williams	7	4	12/91–9/92
15	1864	Chris Orbeck	7	5	2/91–1/92
16	1586	Todd Terrington	7	6	3/91–2/92
17	2602	John Wright	7	7	6/91–9/92
18	4085	Robert Bennett	7	8	8/91–7/92
19	3058	William Brown	7	9	1/91–12/91
20	4295	Leo Leger	7	10	2/91–1/92
21	1138	Vernon Charles	7	11	2/92–12/92
22	9646	Dale Hughes	7	12	6/91–3/92
23	4551	Jerry Hollingsworth	7	13	4/91–1/92
24	125	Billy Duet	7	14	5/91–4/92
25	3469	Leroy Coler	7	15	10/90–6/91
26	2836	Walter Anderson	6	1	4/92–3/93
27	5127	Irvin C. Aucoin	6	2	2/93–1/94
28	9603	Curtis R. August	6	3	3/91–8/91
29	5389	Alfred Adams	6	4	9/90–6/91
30	5504	Waylon Young	6	5	12/91–4/92
31	6883	Robert C.Witherell	6	6	6/91–4/92
32	5614	Bobby Winkles	6	7	12/91–12/92
33	4663	Charles Cain	6	8	9/91–7/92
34	4136	Jimmie Valdery	6	9	11/91–6/92
35	1557	Brian Thibodaux	6	10	4/93–3/94
36	12062	Rene' Stewart	6	11	5/92–2/93
37	10796	Carol Steele	6	12	5/91–3/92
38	1259	Reynard Smith	6	13	7/28/92–7/13/93
39	1454	Hollis Smith	6	14	7/90–5/91
40	4814	Leonard Scott	6	15	9/91–5/92
41	2920	Ronnie Sandifer	6	16	11/24/92–11/29/93
42	9713	Javier O. Rosales	6	17	8/2/90–8/2/91
43	395	Tracy Robinson	6	18	8/91–5/92
44	9861	Aaron Clark	6	19	11/91–11/92
45	5758	James Roberts	6	20	10/30/90–10/3/91
46	424	Anthony Preston	6	21	6/91–10/91
47	12301	Roderick Percy	6	22	2/91–12/91
48 48	477	Conrad Noel	6	23	5/91–3/92
49	3706	Roger Mclaine	6	24	5/93–11/93
50	4290	Gregory Martin	6	25	8/91–4/92
51	9660	Forres Collins	6	26	6/90–11/90
52	10911	Michael Martin	6	27	__/91–8/91
53	10671	Leanetta Jackson	6	28	5/91–2/92
54	223	Carey Holmes	6	29	6/91–12/91
55	401	Carey Holmes	6	30	5/90–4/91
56	102	Terrell Griffin	6	31	6/91–5/92
57	12015	Robert Griffin	6	32	6/90–3/91
58	639	Nicole Gibson	6	33	5/91–3/92
59	12367	Toby J. Boudreaux	6	34	8/93–5/94
60	3504	Joseph Gassenberger	6	35	2/20/91–2/19/92
61	5743	Jerome Ferdi-	6	36	1/92–12/92

Tot.	Badge	Name	WN	#	Period
		nand			
62	10990	Vernell Edwards	6	37	10/90–6/91
63	10525	Solomon Durousseau	6	38	5/91–1/92
64	2265	Jerry Deese	6	39	5/91–1/92
65	893	Arthur Bourgeois	5	1	4/91–3/92
66	3910	Joseph Boines	5	2	10/91–1/92
67	5413	David Bergeron	5	3	3/91–2/92
68	5369	Alejandra Barrera	5	4	2/92–12/92
69	520	LesDraion Young	5	5	10/93–8/94
70	12133	John Dozier	5	6	9/90–9/91
71	1767	Cedric Branche	5	7	1/92–12/92
72	2378	Linda Windham	5	8	7/91–2/92
73	10506	Oscar Briggs	5	9	11/90–10/91
74	12058	Willie Dawson	5	10	2/92–11/92
75	6841	Leonard T. Watkins	5	11	6/91–5/92
76	5207	Rodney Washington	5	12	1/92–12/92
77	1278	Andre Aguillard	5	13	8/91–2/92
78	528	Gerald Duhe	5	14	9/93–12/93
79	5685	Donna Dunn	5	15	5/91–9/91
80	2550	TeDarryle Edwards	5	16	5/93–4/94
81	6878	William Tarrence	5	17	10/92–8/93
82	529	Mark Stockman	5	18	5/92–6/92
83	11313	Nena St. Julien	5	19	11/90–10/91
84	4680	Gregory Alexander	5	20	12/91–9/92
85	1525	Ansley Smith	5	21	1/93–2/93
86	4011	Don Smith	5	22	7/92–1/93
87	4103	Elijah Epps	5	23	8/91–7/92
88	6929	Frank Louis Smith	5	24	9/90–6/91

Tot.	Badge	Name	WN	#	Period
62	10990	Vernell Edwards	6	37	10/90–6/91
63	10525	Solomon Durousseau	6	38	5/91–1/92
64	2265	Jerry Deese	6	39	5/91–1/92
65	893	Arthur Bourgeois	5	1	4/91–3/92
66	3910	Joseph Boines	5	2	10/91–1/92
67	5413	David Bergeron	5	3	3/91–2/92
68	5369	Alejandra Barrera	5	4	2/92–12/92
69	520	LesDraion Young	5	5	10/93–8/94
70	12133	John Dozier	5	6	9/90–9/91
71	1767	Cedric Branche	5	7	1/92–12/92
72	2378	Linda Windham	5	8	7/91–2/92
73	10506	Oscar Briggs	5	9	11/90–10/91
74	12058	Willie Dawson	5	10	2/92–11/92
75	6841	Leonard T. Watkins	5	11	6/91–5/92
76	5207	Rodney Washington	5	12	1/92–12/92
77	1278	Andre Aguillard	5	13	8/91–2/92
78	528	Gerald Duhe	5	14	9/93–12/93
79	5685	Donna Dunn	5	15	5/91–9/91
80	2550	TeDarryle Edwards	5	16	5/93–4/94
81	6878	William Tarrence	5	17	10/92–8/93
82	529	Mark Stockman	5	18	5/92–6/92
83	11313	Nena St. Julien	5	19	11/90–10/91
84	4680	Gregory Alexander	5	20	12/91–9/92
85	1525	Ansley Smith	5	21	1/93–2/93
86	4011	Don Smith	5	22	7/92–1/93
87	4103	Elijah Epps	5	23	8/91–7/92
88	6929	Frank Louis Smith	5	24	9/90–6/91

Tot.	Badge	Name	WN	#	Period
89	9397	Kevin Slugher	5	25	5/91–4/92
90	1177	Bruce Baradell	5	26	3/20/91–3/17/92
91	2020	Ronnie Scott	5	27	11/92–1/93
92	781	Glenn Sanders	5	28	7/91–11/91
93	4142	Jennifer Russell	5	29	2/92–3/92
94	11817	Joseph Rivers	5	30	__/29/92–1/5/93
95	737	Richard Ray	5	31	8/90–6/91
96	5019	Otis Fazande	5	32	2/92–5/92
97	11963	Reginald Ratliff	5	33	4/91–12/91
98	11621	Ernest Ranson	5	34	11/91–12/91
99	9604	Anthony Davis	5	35	1/93–12/93
100	9643	Richard Pierite	5	36	3/91–1/92
101	1133	Maurice Pierce	5	37	1/92–11/92
102	10210	Gerard Fernandez	5	38	12/90–10/91
103	4408	Vayman Ferreira	5	39	11/91–3/92
104	4397	Philip Perera	5	40	6/93–3/94
105	9149	Michael Pearson	5	41	7/90–7/91
106	3082	Robert Pate	5	42	11/92–12/92
107	3221	Ramiro Campo	5	43	7/91–12/91
108	3358	Michael Parks	5	44	9/91–4/92
109	5754	Roland Florence	5	45	1/91–12/91
110	1365	Emanuel Francis	5	46	8/91–3/92
111	5440	Cory Meaux	5	47	__/93–6/93
112	1463	Dedrick Marshall	5	48	9/91–4/92
113	1881	Michael Manning	5	49	3/91–8/91
114	4852	Clint Louis	5	50	6/92–3/93
115	11507	Randall Kowalewski	5	51	5/91–1/92
116	3357	Michael Francis	5	52	6/91–9/91
117	4308	Daryl Cuquet	5	53	1/91–12/91

Tot.	Badge	Name	WN	#	Period
90	1177	Bruce Baradell	5	26	3/20/91–3/17/92
91	2020	Ronnie Scott	5	27	11/92–1/93
92	781	Glenn Sanders	5	28	7/91–11/91
93	4142	Jennifer Russell	5	29	2/92–3/92
94	11817	Joseph Rivers	5	30	__/29/92–1/5/93
95	737	Richard Ray	5	31	8/90–6/91
96	5019	Otis Fazande	5	32	2/92–5/92
97	11963	Reginald Ratliff	5	33	4/91–12/91
98	11621	Ernest Ranson	5	34	11/91–12/91
99	9604	Anthony Davis	5	35	1/93–12/93
100	9643	Richard Pierite	5	36	3/91–1/92
101	1133	Maurice Pierce	5	37	1/92–11/92
102	10210	Gerard Fernandez	5	38	12/90–10/91
103	4408	Vayman Ferreira	5	39	11/91–3/92
104	4397	Philip Perera	5	40	6/93–3/94
105	9149	Michael Pearson	5	41	7/90–7/91
106	3082	Robert Pate	5	42	11/92–12/92
107	3221	Ramiro Campo	5	43	7/91–12/91
108	3358	Michael Parks	5	44	9/91–4/92
109	5754	Roland Florence	5	45	1/91–12/91
110	1365	Emanuel Francis	5	46	8/91–3/92
111	5440	Cory Meaux	5	47	__/93–6/93
112	1463	Dedrick Marshall	5	48	9/91–4/92
113	1881	Michael Manning	5	49	3/91–8/91
114	4852	Clint Louis	5	50	6/92–3/93
115	11507	Randall Kowalewski	5	51	5/91–1/92
116	3357	Michael Francis	5	52	6/91–9/91
117	4308	Daryl Cuquet	5	53	1/91–12/91

Tot.	Badge	Name	WN	#	Period
118	518	Louis Korlman	5	54	9/91–6/92
119	2426	Harold Gassenberger	5	55	2/92–5/92
120	2303	John Joseph	5	56	11/92–10/93
121	563	Armand Jones	5	57	1/90–12/90
122	11016	Brian Johnson	5	58	1/91–12/91
123	4879	Kenneth R. Johnson	5	59	1/91–10/91
124	6913	Earl Gebhart	5	60	1/91–8/91
125	3291	Glenn Jeffreys	5	61	12/91–11/92
126	12992	Julie George	5	62	9/92–7/93
127	4216	Warren Gilbert	5	63	10/91–3/92
128	2942	Chad Granier	5	64	6/91–5/92
129	4348	Everette Bailey	5	65	1/94–9/94
130	5690	Robert Jagodzinski	5	66	12/91–7/92
131	1029	Byron Jackson	5	67	8/92–8/92
132	9561	Marshall Hunter	5	68	3/91–1/92
133	5846	Vernon Griffin	5	69	1/91–7/91
134	4666	Jeffrey Huff	5	70	12/90–9/91
135	11635	Allen Howe	5	71	7/91–3/92
136	3001	Duane Coston	5	72	10/93–5/94
137	4751	Wayne Hoffman	5	73	10/93–5/94
138	5862	Joseph Hirstuis	5	74	3/91–8/91
139	5854	Nelson Harrison	5	75	1/94–11/94
140	2995	Eric Harris	5	76	2/91–12/91
141	9656	Glenn Harris	5	77	5/91–12/91
142	2097	Ricky Harrington	5	78	5/91–4/92
143	10608	Billy W. Griffin	5	79	9/92–8/93
144	5343	Joseph Coon	4	1	9/92–2/93
145	2764	Wanda Bankston	4	2	10/92–5/93
146	3270	A.C. Cockran	4	3	12/92–10/93
147	425	Nelson Cleveland	4	4	8/91–4/92
148	1596	Cornelius Clay-	4	5	9/92–12/92

Tot.	Badge	Name	WN	#	Period
119	2426	Harold Gassenberger	5	55	2/92–5/92
120	2303	John Joseph	5	56	11/92–10/93
121	563	Armand Jones	5	57	1/90–12/90
122	11016	Brian Johnson	5	58	1/91–12/91
123	4879	Kenneth R. Johnson	5	59	1/91–10/91
124	6913	Earl Gebhart	5	60	1/91–8/91
125	3291	Glenn Jeffreys	5	61	12/91–11/92
126	12992	Julie George	5	62	9/92–7/93
127	4216	Warren Gilbert	5	63	10/91–3/92
128	2942	Chad Granier	5	64	6/91–5/92
129	4348	Everette Bailey	5	65	1/94–9/94
130	5690	Robert Jagodzinski	5	66	12/91–7/92
131	1029	Byron Jackson	5	67	8/92–8/92
132	9561	Marshall Hunter	5	68	3/91–1/92
133	5846	Vernon Griffin	5	69	1/91–7/91
134	4666	Jeffrey Huff	5	70	12/90–9/91
135	11635	Allen Howe	5	71	7/91–3/92
136	3001	Duane Coston	5	72	10/93–5/94
137	4751	Wayne Hoffman	5	73	10/93–5/94
138	5862	Joseph Hirstuis	5	74	3/91–8/91
139	5854	Nelson Harrison	5	75	1/94–11/94
140	2995	Eric Harris	5	76	2/91–12/91
141	9656	Glenn Harris	5	77	5/91–12/91
142	2097	Ricky Harrington	5	78	5/91–4/92
143	10608	Billy W. Griffin	5	79	9/92–8/93
144	5343	Joseph Coon	4	1	9/92–2/93
145	2764	Wanda Bankston	4	2	10/92–5/93
146	3270	A.C. Cockran	4	3	12/92–10/93
147	425	Nelson Cleveland	4	4	8/91–4/92
148	1596		4	5	9/92–12/92

Tot.	Badge	Name	WN	#	Period
		ton			
149	6886	Darryl R. Bannister	4	6	12/91–9/92
150	3419	Mark Cuquet	4	7	7/91–1/92
151	3150	Philip Celestin	4	8	10/92–4/93
152	12662	Sterling Carter	4	9	4/91–8/91
153	554	Henry Carey	4	10	9/90–7/91
154	12875	Johnny Carcisse	4	11	12/91–6/92
155	943	Stephan Caillouet	4	12	5/91–1/92
156	5378	James Cagelosi	4	13	4/10/90–4/2/91
157	5033	Reginald Byes	4	14	12/91–2/92
158	6932	Michael Bush	4	15	2/94–11/94
159	4398	Ronald Brown	4	16	2/90–1/91
160	1366	Rhonda Davis	4	17	12/91–7/92
161	9604	Anthony Davis	4	18	10/90–9/91
162	10471	Spencer Brown	4	19	12/90–11/91
163	4925	Ronnie W. Davis	4	20	9/92–9/93
164	5105	Ronnie Davis	4	21	6/91–4/92
165	12788	Charles Davis	4	22	2/92–2/93
166	10184	Derric Brown	4	23	5/90–2/91
167	3754	James Brown	4	24	1/93–9/93
168	1237	Willie Brock	4	25	2/94–8/94
169	6874	Kerry J. Brashears	4	26	3/92–2/93
170	2775	Raul Delapaz	4	27	7/93–1/94
171	3156	Kirby Womack	4	28	5/93–1/94
172	5173	Terrence Witson	4	29	4/91–2/92
173	2628	Fred Wilson	4	30	11/90–6/91
174	4046	Kevin Williams	4	31	8/92–7/93
175	2358	Brian Desselle	4	32	7/92–7/93
176	2713	Merlin Williams	4	33	5/93–5/94
177	1884	Tony Williams	4	34	9/5/91–9/3/92
178	10242	Margie Adams	4	35	1/91–12/91

Tot.	Badge	Name	WN	#	Period
149	6886	Darryl R. Bannister	4	6	12/91–9/92
150	3419	Mark Cuquet	4	7	7/91–1/92
151	3150	Philip Celestin	4	8	10/92–4/93
152	12662	Sterling Carter	4	9	4/91–8/91
153	554	Henry Carey	4	10	9/90–7/91
154	12875	Johnny Carcisse	4	11	12/91–6/92
155	943	Stephan Caillouet	4	12	5/91–1/92
156	5378	James Cagelosi	4	13	4/10/90–4/2/91
157	5033	Reginald Byes	4	14	12/91–2/92
158	6932	Michael Bush	4	15	2/94–11/94
159	4398	Ronald Brown	4	16	2/90–1/91
160	1366	Rhonda Davis	4	17	12/91–7/92
161	9604	Anthony Davis	4	18	10/90–9/91
162	10471	Spencer Brown	4	19	12/90–11/91
163	4925	Ronnie W. Davis	4	20	9/92–9/93
164	5105	Ronnie Davis	4	21	6/91–4/92
165	12788	Charles Davis	4	22	2/92–2/93
166	10184	Derric Brown	4	23	5/90–2/91
167	3754	James Brown	4	24	1/93–9/93
168	1237	Willie Brock	4	25	2/94–8/94
169	6874	Kerry J. Brashears	4	26	3/92–2/93
170	2775	Raul Delapaz	4	27	7/93–1/94
171	3156	Kirby Womack	4	28	5/93–1/94
172	5173	Terrence Witson	4	29	4/91–2/92
173	2628	Fred Wilson	4	30	11/90–6/91
174	4046	Kevin Williams	4	31	8/92–7/93
175	2358	Brian Desselle	4	32	7/92–7/93
176	2713	Merlin Williams	4	33	5/93–5/94
177	1884	Tony Williams	4	34	9/5/91–9/3/92
178	10242	Margie Adams	4	35	1/91–12/91

Tot.	Badge	Name	WN	#	Period
179	11281	Nilton J. Dominique	4	36	10/91–4/92
180	1941	Terry White	4	37	9/90–9/91
181	9580	Timothy White	4	38	3/90–5/90
182	2981	Mervin White	4	39	9/90–8/91
183	6928	Jerry Weber	4	40	4/91–4/92
184	537	Ray Washington	4	41	4/91–1/92
185	4176	Yvette Doyle	4	42	1/92–6/92
186	2156	John Warr	4	43	9/91–4/92
187	5190	Carl A. Dragg	4	44	2/94–11/94
188	12709	Carmalee Dubose	4	45	10/91–5/92
189	481	Estiben Villafuerte	4	46	7/91–3/92
190	11056	Celeste Dufrene	4	47	2/91–1/92
191	1969	Edward Veal	4	48	7/91–1/92
192	5395	Donald Varnado	4	49	1/92–12/92
193	567	Robbie Uzee	4	50	10/90–7/91
194	11061	Patrice Dumas	4	51	3/94–7/94
195	12944	Steve Turnage	4	52	6/91–8/91
196	1446	David Towns	4	53	9/90–7/91
197	5820	Harold Towns	4	54	3/91–12/91
198	11255	Sean P. Thornton	4	55	4/90–11/90
199	11434	Reginald Duplessis	4	56	3/91–1/92
200	2142	Anthony Thomas	4	57	8/91–6/92
201	893	Arthur Bourgeois	4	58	9/92–7/93
202	2513	Monica Thomas	4	59	5/92–1/93
203	1485	Charles Edwards	4	60	7/91–5/92
204	5156	Tricia A. Thomas	4	61	1/92–1/93
205	2142	Anthony Thomas	4	62	10/92–1/93
206	9138	James Theriot	4	63	1/92–1/93
207	3154	Christopher	4	64	2/94–6/94

Tot.	Badge	Name	WN	#	Period
180	1941	Terry White	4	37	9/90–9/91
181	9580	Timothy White	4	38	3/90–5/90
182	2981	Mervin White	4	39	9/90–8/91
183	6928	Jerry Weber	4	40	4/91–4/92
184	537	Ray Washington	4	41	4/91–1/92
185	4176	Yvette Doyle	4	42	1/92–6/92
186	2156	John Warr	4	43	9/91–4/92
187	5190	Carl A. Dragg	4	44	2/94–11/94
188	12709	Carmalee Dubose	4	45	10/91–5/92
189	481	Estiben Villafuerte	4	46	7/91–3/92
190	11056	Celeste Dufrene	4	47	2/91–1/92
191	1969	Edward Veal	4	48	7/91–1/92
192	5395	Donald Varnado	4	49	1/92–12/92
193	567	Robbie Uzee	4	50	10/90–7/91
194	11061	Patrice Dumas	4	51	3/94–7/94
195	12944	Steve Turnage	4	52	6/91–8/91
196	1446	David Towns	4	53	9/90–7/91
197	5820	Harold Towns	4	54	3/91–12/91
198	11255	Sean P. Thornton	4	55	4/90–11/90
199	11434	Reginald Duplessis	4	56	3/91–1/92
200	2142	Anthony Thomas	4	57	8/91–6/92
201	893	Arthur Bourgeois	4	58	9/92–7/93
202	2513	Monica Thomas	4	59	5/92–1/93
203	1485	Charles Edwards	4	60	7/91–5/92
204	5156	Tricia A. Thomas	4	61	1/92–1/93
205	2142	Anthony Thomas	4	62	10/92–1/93
206	9138	James Theriot	4	63	1/92–1/93
207	3154		4	64	2/94–6/94

Tot.	Badge	Name	WN	#	Period
		Theriot			
208	12172	Guy Tessier	4	65	5/92–1/93
209	822	Freddie Aizen	4	66	3/90–3/91
210	13058	Brian Ellis	4	67	12/91–7/92
211	9863	Stanley Terrell	4	68	8/90–7/91
212	9221	Clayton Tarver	4	69	8/91–5/92
213	10850	Kim Swanson	4	70	3/91–7/91
214	836	Michael Enger-ran	4	71	1/93–8/93
215	4168	Perry Suggs	4	72	5/91–8/91
216	10047	Ted Stone	4	73	6/91–3/92
217	12062	Rene' Stewart	4	74	5/91–4/92
218	6943	Fabian P. Steib	4	75	12/92–2/93
219	4347	Raynell Fair	4	76	10/90–7/91
220	388	Robert St. Pe	4	77	2/92–10/92
221	3101	Pairlee Spur-lock	4	78	6/93–12/93
222	3284	Keith Beasley	4	79	8/91–3/92
223	5108	Joseph Bel-monte	4	80	8/93–12/93
224	4380	William Smith	4	81	2/93–10/93
225	9766	Jeffrey Favro	4	82	2/91–8/91
226	9765	Calvert Smith	4	83	5/91–6/91
227	4050	Denise Smart	4	84	10/91–3/92
228	4048	Dennis Smart	4	85	10/91–6/92
229	10459	Van Small	4	86	7/92–5/93
230	5408	Gregory Simeon	4	87	10/90–8/91
231	700	Dave Feurtado	4	88	10/92–3/93
232	9696	Albert Shep-pard	4	89	2/91–5/91
233	3149	Gene Shelby	4	90	6/90–3/91
234	2021	Eugene Sheard	4	91	1/93–6/93
235	3037	Michael Folse	4	92	1/22/91–1/16/92
236	10632	Wayne M. Shea	4	93	11/90–9/91
237	5283	Albert Francis	4	94	12/90–10/91
238	5185	Michael Belton	4	95	7/91–1/92

Tot.	Badge	Name	WN	#	Period
208	12172	Guy Tessier	4	65	5/92–1/93
209	822	Freddie Aizen	4	66	3/90–3/91
210	13058	Brian Ellis	4	67	12/91–7/92
211	9863	Stanley Terrell	4	68	8/90–7/91
212	9221	Clayton Tarver	4	69	8/91–5/92
213	10850	Kim Swanson	4	70	3/91–7/91
214	836	Michael Enger-ran	4	71	1/93–8/93
215	4168	Perry Suggs	4	72	5/91–8/91
216	10047	Ted Stone	4	73	6/91–3/92
217	12062	Rene' Stewart	4	74	5/91–4/92
218	6943	Fabian P. Steib	4	75	12/92–2/93
219	4347	Raynell Fair	4	76	10/90–7/91
220	388	Robert St. Pe	4	77	2/92–10/92
221	3101	Pairlee Spur-lock	4	78	6/93–12/93
222	3284	Keith Beasley	4	79	8/91–3/92
223	5108	Joseph Bel-monte	4	80	8/93–12/93
224	4380	William Smith	4	81	2/93–10/93
225	9766	Jeffrey Favro	4	82	2/91–8/91
226	9765	Calvert Smith	4	83	5/91–6/91
227	4050	Denise Smart	4	84	10/91–3/92
228	4048	Dennis Smart	4	85	10/91–6/92
229	10459	Van Small	4	86	7/92–5/93
230	5408	Gregory Simeon	4	87	10/90–8/91
231	700	Dave Feurtado	4	88	10/92–3/93
232	9696	Albert Shep-pard	4	89	2/91–5/91
233	3149	Gene Shelby	4	90	6/90–3/91
234	2021	Eugene Sheard	4	91	1/93–6/93
235	3037	Michael Folse	4	92	1/22/91–1/16/92
236	10632	Wayne M. Shea	4	93	11/90–9/91
237	5283	Albert Francis	4	94	12/90–10/91
238	5185	Michael Belton	4	95	7/91–1/92

Tot.	Badge	Name	WN	#	Period
239	1315	Audra Scott	4	96	8/92–5/93
240	3238	Richard Schex-nayder	4	97	12/91–1/92
241	496	David Savoie	4	98	10/92–1/93
242	3104	Karl Savoie	4	99	1/91–5/91
243	781	Glenn Sanders	4	100	1/93–12/93
244	3818	Anthony San-chez	4	101	5/91–1/92
245	3123	Roger Sallinger	4	102	2/93–12/93
246	12012	Robert Ruiz	4	103	6/93–5/94
247	4498	Larry Rozier	4	104	9/90–8/91
248	560	Brenda Gary	4	105	9/91–6/92
249	3507	Corey Bou-dreaux	4	106	2/93–12/93
250	4498	Larry Rozier	4	107	2/94–8/94
251	10764	James Rowan	4	108	11/90–6/91
252	1840	Octave Rouege	4	109	10/91–7/92
253	6948	Dale Roger	4	110	3/91–2/92
254	644	Joseph Rodri-gue	4	111	5/90–1/91
255	11897	Michael Robin-son	4	112	7/91–5/92
256	1337	Jonathan Gib-son	4	113	12/93–6/94
257	150	Bruce Benson	4	114	5/90–3/91
258	1248	Adam Gibson	4	115	4/90–2/91
259	722	Ronald Allen	4	116	6/91–11/91
260	12144	Oliver Gill	4	117	7/91–12/91
261	4622	Keith Robert-son	4	118	1/92–10/92
262	4532	Furness Girard	4	119	__/92–12/92
263	509	Kela Givens	4	120	6/92–7/92
264	9927	Carolyn Rat-cliff	4	121	2/91–12/91
265	1733	Raymond Ra-balais	4	122	6/91–1/92
266	3327	Lionel Billiot	4	123	5/92–7/92
267	2474	Chris Plaisance	4	124	12/28/90–12/6/91
268	5951	Henry Pierre	4	125	8/90–7/91
269	919	William Per-	4	126	12/90–9/91

Tot.	Badge	Name	WN	#	Period
240	3238	Richard Schex-nayder	4	97	12/91–1/92
241	496	David Savoie	4	98	10/92–1/93
242	3104	Karl Savoie	4	99	1/91–5/91
243	781	Glenn Sanders	4	100	1/93–12/93
244	3818	Anthony San-chez	4	101	5/91–1/92
245	3123	Roger Sallinger	4	102	2/93–12/93
246	12012	Robert Ruiz	4	103	6/93–5/94
247	4498	Larry Rozier	4	104	9/90–8/91
248	560	Brenda Gary	4	105	9/91–6/92
249	3507	Corey Bou-dreaux	4	106	2/93–12/93
250	4498	Larry Rozier	4	107	2/94–8/94
251	10764	James Rowan	4	108	11/90–6/91
252	1840	Octave Rouege	4	109	10/91–7/92
253	6948	Dale Roger	4	110	3/91–2/92
254	644	Joseph Rodri-gue	4	111	5/90–1/91
255	11897	Michael Robin-son	4	112	7/91–5/92
256	1337	Jonathan Gib-son	4	113	12/93–6/94
257	150	Bruce Benson	4	114	5/90–3/91
258	1248	Adam Gibson	4	115	4/90–2/91
259	722	Ronald Allen	4	116	6/91–11/91
260	12144	Oliver Gill	4	117	7/91–12/91
261	4622	Keith Robert-son	4	118	1/92–10/92
262	4532	Furness Girard	4	119	__/92–12/92
263	509	Kela Givens	4	120	6/92–7/92
264	9927	Carolyn Rat-cliff	4	121	2/91–12/91
265	1733	Raymond Ra-balais	4	122	6/91–1/92
266	3327	Lionel Billiot	4	123	5/92–7/92
267	2474	Chris Plaisance	4	124	12/28/90–12/6/91
268	5951	Henry Pierre	4	125	8/90–7/91
269	919		4	126	12/90–9/91

Tot.	Badge	Name	WN	#	Period
		kins			
270	1009	William Grady	4	127	11/90–1/91
271	9622	Harden Palmer	4	128	2/90–6/90
272	4590	Roman Nunez	4	129	1/92–5/92
273	2333	Eric Gray	4	130	2/94–6/94
274	477	Conrad Noel	4	131	4/90–3/91
275	4800	Dwayne M. Green	4	132	4/92–3/93
276	3664	Edmond Nodd	4	133	3/90–9/90
277	5365	Daniel Noah	4	134	4/94–12/94
278	2818	Dwayne Nich-olson	4	135	12/90–10/91
279	4304	Charles Greenwood	4	136	12/92–10/93
280	2818	Dwayne Nich-olson	4	137	12/91–9/92
281	4255	Doris Najolia	4	138	6/93–2/94
282	9749	Allison D. Griffin	4	139	9/91–7/92
283	4929	Alice Myles	4	140	11/91–1/92
284	915	Herion Murphy	4	141	7/92–12/92
285	11365	Johnny Mouton	4	142	8/91–4/92
286	2948	Leonard Mor-gan	4	143	9/90–4/91
287	9871	Ronald Gross	4	144	9/91–12/91
288	228	Shelia Gross	4	145	10/91–9/92
289	11074	Calvin Grows	4	146	12/92–4/93
290	2948	Leonard Mor-gan	4	147	6/92–5/93
291	1507	Kenneth Moore	4	148	8/90–6/91
292	3498	David Guillard	4	149	12/90–3/91
293	9718	Silas L. Guil-lory	4	150	8/93–4/94
294	1657	Kenneth Guil-lory	4	151	7/91–11/91
295	6973	Sidney Mont-gomery	4	152	9/90–4/91
296	12999	Joseph Mire	4	153	4/91–11/91
297	404	Ronald Miller	4	154	1/93–12/93
298	1854	John Handy	4	155	10/91–12/91
299	3537	Rickie Miles	4	156	11/91–7/92

Tot.	Badge	Name	WN	#	Period
270	1009	William Grady	4	127	11/90–1/91
271	9622	Harden Palmer	4	128	2/90–6/90
272	4590	Roman Nunez	4	129	1/92–5/92
273	2333	Eric Gray	4	130	2/94–6/94
274	477	Conrad Noel	4	131	4/90–3/91
275	4800	Dwayne M. Green	4	132	4/92–3/93
276	3664	Edmond Nodd	4	133	3/90–9/90
277	5365	Daniel Noah	4	134	4/94–12/94
278	2818	Dwayne Nich-olson	4	135	12/90–10/91
279	4304	Charles Greenwood	4	136	12/92–10/93
280	2818	Dwayne Nich-olson	4	137	12/91–9/92
281	4255	Doris Najolia	4	138	6/93–2/94
282	9749	Allison D. Griffin	4	139	9/91–7/92
283	4929	Alice Myles	4	140	11/91–1/92
284	915	Herion Murphy	4	141	7/92–12/92
285	11365	Johnny Mouton	4	142	8/91–4/92
286	2948	Leonard Mor-gan	4	143	9/90–4/91
287	9871	Ronald Gross	4	144	9/91–12/91
288	228	Shelia Gross	4	145	10/91–9/92
289	11074	Calvin Grows	4	146	12/92–4/93
290	2948	Leonard Mor-gan	4	147	6/92–5/93
291	1507	Kenneth Moore	4	148	8/90–6/91
292	3498	David Guillard	4	149	12/90–3/91
293	9718	Silas L. Guil-lory	4	150	8/93–4/94
294	1657	Kenneth Guil-lory	4	151	7/91–11/91
295	6973	Sidney Mont-gomery	4	152	9/90–4/91
296	12999	Joseph Mire	4	153	4/91–11/91
297	404	Ronald Miller	4	154	1/93–12/93
298	1854	John Handy	4	155	10/91–12/91
299	3537	Rickie Miles	4	156	11/91–7/92

Tot.	Badge	Name	WN	#	Period
300	3215	Steven Menard	4	157	4/93–7/93
301	968	Arnold McCallon	4	158	6/92–9/92
302	858	Ronald Matherne	4	159	3/90–10/90
303	2477	Brian Marziale	4	160	7/90–2/91
304	12908	Frank Booker	4	161	2/91–12/91
305	1463	Dedrick Marshall	4	162	2/94–8/94
306	1195	Gregory Marina	4	163	12/92–6/93
307	2198	Robert Malcolm	4	164	4/91–11/91
308	4351	Jason Maderios	4	165	11/91–7/92
309	5295	Butch Lott	4	166	3/90–9/90
310	4850	Carlos Lewis	4	167	3/93–6/93
311	2493	Aretha Lewis	4	168	10/92–10/93
312	713	James Hartsuff	4	169	8/93–3/94
313	548	Walter Lewis	4	170	__/92–__/92
314	2062	Carl Hawkins	4	171	9/5/9191–9//492
315	10670	Charles Lee	4	172	1/92–8/92
316	2122	Carl LeBlanc	4	173	6/91–3/92
317	6966	Dechauon Lavigne	4	174	7/8/91–7/8/92
318	12424	Frankie Heims	4	175	2/92–10/92
319	3334	Gregory Langley	4	176	5/90–11/90
320	2983	Gustavo Henrandez	4	177	7/91–1/92
321	5117	Perry Landry	4	178	1/92–5/92
322	81	Emile Landry	4	179	5/92–2/93
323	4536	Ronald Kruse	4	180	11/91–6/92
324	564	Charles Herbert	4	181	7/91–5/92
325	1886	Derrick Kirton	4	182	10/93–3/94
326	546	Jay Herpin	4	183	10/91–3/92
327	1309	Matthew King	4	184	3/90–3/91
328	5838	Idalberto Juarez	4	185	6/91–1/92
329	11032	Carl Hilaire	4	186	4/91–11/91
330	2492	Michael Joseph	4	187	8/92–3/93
331	1409	Marie Joseph	4	188	8/92–6/93
332	3842	William Jones	4	189	8/91–5/92
333	4790	Jacob Hodges	4	190	12/91–5/92
334	2956	Daryl Jones	4	191	7/92–9/92
335	1885	Jennifer Jones	4	192	1/92–11/92
336	13791	Henry Johnson	4	193	7/93–6/94
337	2579	Charles Johnson	4	194	7/93–11/93
338	2997	Carey Johnson	4	195	10/92–9/93
339	2393	Gary Johnson	4	196	6/91–12/91
340	2878	Dexter Johnson	4	197	10/90–1/91
341	471	Dennis Janatik	4	198	2/91–10/91
342	2885	Ronald Jackson	4	199	1/92–12/92
343	3017	Ervin Jacks	4	200	7/91–6/92
344	2715	Earl Irving	4	201	6/90–4/91
345	2017	Alvester Hughes	4	202	3/93–9/93
346	2968	Ryan Hudson	4	203	1/94–6/94
347	522	George Hopkins	4	204	6/91–1/92
348	5901	Dale Horn	4	205	7/27/90–7/15/91
349	3445	Abby Howard	4	206	4/93–9/93
350	3316	Joseph Howard	4	207	10/91–1/92
351	9928	Leon Howard	4	208	6/94–10/94
352	1225	Ivan Houston	3	1	11/91–1/92
353	6849	James Houston	3	2	1/91–7/91
354	7251	Gloria Hornes	3	3	9/93–6/94
355	11973	Tommy Howard	3	4	__/91–__/91
356	265	Allen Horn	3	5	1/94–8/94
357	896	Joe Howard	3	6	10/93–9/94
358	1814	Carl Cooper	3	7	12/90–9/91
359	4892	Helen M. Hudson	3	8	3/92–1/93
360	4746	Woodrow Honroe	3	9	6/92–5/93
361	2968	Ryan Hudson	3	10	11/92–7/93

Tot.	Badge	Name	WN	#	Period
362	1814	Carl Cooper	3	11	9/93–2/94
363	4666	Jeffrey Huff	3	12	9/92–4/93
364	2017	Alvester Hughes	3	13	7/91–12/91
365	4746	Woodrow Honroe	3	14	__/91–9/91
366	10606	William Bailey	3	15	7/91–6/92
367	1810	Bernadette Hughes	3	16	10/91–3/92
368	6877	Charles Hunt	3	17	2/92–12/92
369	7106	Mark Condrey	3	18	1/91–8/91
370	10882	Jeffery Inmon	3	19	2/90–9/90
371	3989	Lonnie Holt	3	20	1/91–5/91
372	2006	Jerome Isom	3	21	1/92–7/92
373	2006	Jerome Isom	3	22	4/93–1/94
374	223	Carey Holmes	3	23	12/93–9/94
375	1092	Michael Bor-den	3	24	10/93–2/94
376	172	Frank Collins	3	25	7/90–5/91
377	2885	Ronald Jackson	3	26	2/93–4/93
378	2786	Bennie Jackson	3	27	5/91–4/92
379	10758	Darren K. Boothe	3	28	3/93–1/94
380	902	Lawrence Jacobs	3	29	7/92–10/92
381	770	Roy Bourgeois	3	30	4/91–12/91
382	9660	Forres Collins	3	31	9/91–4/92
383	11720	Waynell Jami-son	3	32	2/90–__/90
384	4914	Eric C. Holmes	3	33	7/91–10/91
385	5633	Vincent Cleve-land	3	34	2/92–10/92
386	4141	Stanley Jenkins	3	35	9/93–11/93
387	5109	Russell Jennings	3	36	__/92–11/92
388	2268	Eddie Johnson	3	37	3/91–9/91
389	4027	Robert Johnson	3	38	4/93–2/94
390	4914	Eric C. Holmes	3	39	3/90–7/90
391	1092	Michael Bor-den	3	40	1/92–7/92
392	4945	Christopher	3	41	5/92–2/93

Tot.	Badge	Name	WN	#	Period
363	4666	Jeffrey Huff	3	12	9/92–4/93
364	2017	Alvester Hughes	3	13	7/91–12/91
365	4746	Woodrow Honroe	3	14	__/91–9/91
366	10606	William Bailey	3	15	7/91–6/92
367	1810	Bernadette Hughes	3	16	10/91–3/92
368	6877	Charles Hunt	3	17	2/92–12/92
369	7106	Mark Condrey	3	18	1/91–8/91
370	10882	Jeffery Inmon	3	19	2/90–9/90
371	3989	Lonnie Holt	3	20	1/91–5/91
372	2006	Jerome Isom	3	21	1/92–7/92
373	2006	Jerome Isom	3	22	4/93–1/94
374	223	Carey Holmes	3	23	12/93–9/94
375	1092	Michael Bor-den	3	24	10/93–2/94
376	172	Frank Collins	3	25	7/90–5/91
377	2885	Ronald Jackson	3	26	2/93–4/93
378	2786	Bennie Jackson	3	27	5/91–4/92
379	10758	Darren K. Boothe	3	28	3/93–1/94
380	902	Lawrence Jacobs	3	29	7/92–10/92
381	770	Roy Bourgeois	3	30	4/91–12/91
382	9660	Forres Collins	3	31	9/91–4/92
383	11720	Waynell Jami-son	3	32	2/90–__/90
384	4914	Eric C. Holmes	3	33	7/91–10/91
385	5633	Vincent Cleve-land	3	34	2/92–10/92
386	4141	Stanley Jenkins	3	35	9/93–11/93
387	5109	Russell Jennings	3	36	__/92–11/92
388	2268	Eddie Johnson	3	37	3/91–9/91
389	4027	Robert Johnson	3	38	4/93–2/94
390	4914	Eric C. Holmes	3	39	3/90–7/90
391	1092	Michael Bor-den	3	40	1/92–7/92
392	4945		3	41	5/92–2/93

Tot.	Badge	Name	WN	#	Period
		Johnson			
393	4291	Gertrude Johnson	3	42	12/91–1/92
394	5873	Michael Clark	3	43	2/93–1/94
395	401	Carey Holmes	3	44	6/91–1/92
396	4062	Cherlyn Holmes	3	45	7/92–8/92
397	10143	Clarence D. Johnson	3	46	1/94–6/94
398	5576	Melissa Johnson	3	47	4/90–10/90
399	1977	Sebrin Bourgeois	3	48	10/92–1/93
400	1095	Billy Baldridge	3	49	2/92–2/92
401	12440	Rudolph Johnson	3	50	4/91–12/91
402	5528	Otis Jones	3	51	11/92–12/92
403	435	Wilbert Hogan	3	52	6/91–4/92
404	182	Marlon Cox	3	53	9/92–1/93
405	563	Armand Jones	3	54	5/91–3/92
406	9908	Earl Jones	3	55	5/21/90–5/10/91
407	9615	Joel Hobbie	3	56	7/91–7/92
408	12214	Gary Jones	3	57	11/92–7/93
409	9094	Earl Jones	3	58	1/91–3/91
410	2155	Warren Clark	3	59	9/91–9/92
411	219	Eldridge Jones	3	60	1/93–1/93
412	11937/10112	Clarence Jones	3	61	7/90–1/91
413	3264	Juan Jones	3	62	5/90–4/91
414	6371	David Banks	3	63	9/91–7/92
415	3226	Allan Jordan	3	64	8/91–6/92
416	3644	Louis Cincore	3	65	3/93–6/93
417	1857	Eddie Hill	3	66	12/92–3/93
418	4877	David Henry Jr.	3	67	12/90–4/91
419	11032	Carl Hilaire	3	68	9/90–10/90
420	1169	Mark Jules	3	69	1/94–3/94
421	1867	Archille Julian	3	70	12/91–1/92
422	757	David Jupiter	3	71	10/91–5/92

Tot.	Badge	Name	WN	#	Period
393	4291	Gertrude Johnson	3	42	12/91–1/92
394	5873	Michael Clark	3	43	2/93–1/94
395	401	Carey Holmes	3	44	6/91–1/92
396	4062	Cherlyn Holmes	3	45	7/92–8/92
397	10143	Clarence D. Johnson	3	46	1/94–6/94
398	5576	Melissa Johnson	3	47	4/90–10/90
399	1977	Sebrin Bourgeois	3	48	10/92–1/93
400	1095	Billy Baldridge	3	49	2/92–2/92
401	12440	Rudolph Johnson	3	50	4/91–12/91
402	5528	Otis Jones	3	51	11/92–12/92
403	435	Wilbert Hogan	3	52	6/91–4/92
404	182	Marlon Cox	3	53	9/92–1/93
405	563	Armand Jones	3	54	5/91–3/92
406	9908	Earl Jones	3	55	5/21/90–5/10/91
407	9615	Joel Hobbie	3	56	7/91–7/92
408	12214	Gary Jones	3	57	11/92–7/93
409	9094	Earl Jones	3	58	1/91–3/91
410	2155	Warren Clark	3	59	9/91–9/92
411	219	Eldridge Jones	3	60	1/93–1/93
412	11937/10112	Clarence Jones	3	61	7/90–1/91
413	3264	Juan Jones	3	62	5/90–4/91
414	6371	David Banks	3	63	9/91–7/92
415	3226	Allan Jordan	3	64	8/91–6/92
416	3644	Louis Cincore	3	65	3/93–6/93
417	1857	Eddie Hill	3	66	12/92–3/93
418	4877	David Henry Jr.	3	67	12/90–4/91
419	11032	Carl Hilaire	3	68	9/90–10/90
420	1169	Mark Jules	3	69	1/94–3/94
421	1867	Archille Julian	3	70	12/91–1/92
422	757	David Jupiter	3	71	10/91–5/92

Tot.	Badge	Name	WN	#	Period
423	2870	Otis Jupiter	3	72	11/90–8/91
424	2856	Dennis Kees	3	73	__/91–9/91
425	3997	Warren Kelly	3	74	10/91–5/92
426	5072	Michael King	3	75	12/91–3/92
427	5026	Doral Hester	3	76	5/92–6/92
428	3502	Arnold Heron	3	77	6/94–9/94
429	2809	Dedric Knight	3	78	6/91–2/92
430	2907	James Knight-shead	3	79	2/90–9/90
431	12714	Gary Charles	3	80	2/92–12/92
432	12055	Wayne Carter	3	81	2/90–9/90
433	4447	Marion Henry	3	82	5/93–12/93
434	10403	Gregory Henry	3	83	4/91–7/91
435	9885	Joseph Landry	3	84	3/91–1/92
436	4887	Allen Landry	3	85	1/92–12/92
437	1984	Eddie Landry	3	86	10/21/91–10/5/92
438	12411	Carlos Henri-quez	3	87	12/91–5/92
439	4724	Leroy Landry	3	88	11/90–7/91
440	3832	Herbert Hen-derson	3	89	1/92–6/92
441	6966	Dechauon Lavigne	3	90	2/90–1/91
442	5804	Ivory Haynes	3	91	1/91–10/91
443	5674	David LeBlanc	3	92	3/91–9/91
444	1858	Robert Hayes	3	93	5/90–10/90
445	7045	Jesse J. Le-Bouef	3	94	12/92–12/93
446	4227	Randy Haw-kins	3	95	12/91–1/92
447	4295	Leo Leger	3	96	5/90–12/90
448	10992	Ephriam Avila	3	97	11/90–10/91
449	11091	Taris Lemon	3	98	12/91–6/92
450	4222	James Hawkins	3	99	12/91–2/92
451	5444	Linda Lewis	3	100	12/93–2/94
452	9215	Kerry Lewis	3	101	11/91–9/92
453	9215	Kerry Lewis	3	102	11/90–10/91
454	4861	Vernon Lewis	3	103	2/92–6/92

Tot.	Badge	Name	WN	#	Period
424	2856	Dennis Kees	3	73	__/91–9/91
425	3997	Warren Kelly	3	74	10/91–5/92
426	5072	Michael King	3	75	12/91–3/92
427	5026	Doral Hester	3	76	5/92–6/92
428	3502	Arnold Heron	3	77	6/94–9/94
429	2809	Dedric Knight	3	78	6/91–2/92
430	2907	James Knight-shead	3	79	2/90–9/90
431	12714	Gary Charles	3	80	2/92–12/92
432	12055	Wayne Carter	3	81	2/90–9/90
433	4447	Marion Henry	3	82	5/93–12/93
434	10403	Gregory Henry	3	83	4/91–7/91
435	9885	Joseph Landry	3	84	3/91–1/92
436	4887	Allen Landry	3	85	1/92–12/92
437	1984	Eddie Landry	3	86	10/21/91–10/5/92
438	12411	Carlos Henri-quez	3	87	12/91–5/92
439	4724	Leroy Landry	3	88	11/90–7/91
440	3832	Herbert Hen-derson	3	89	1/92–6/92
441	6966	Dechauon Lavigne	3	90	2/90–1/91
442	5804	Ivory Haynes	3	91	1/91–10/91
443	5674	David LeBlanc	3	92	3/91–9/91
444	1858	Robert Hayes	3	93	5/90–10/90
445	7045	Jesse J. Le-Bouef	3	94	12/92–12/93
446	4227	Randy Haw-kins	3	95	12/91–1/92
447	4295	Leo Leger	3	96	5/90–12/90
448	10992	Ephriam Avila	3	97	11/90–10/91
449	11091	Taris Lemon	3	98	12/91–6/92
450	4222	James Hawkins	3	99	12/91–2/92
451	5444	Linda Lewis	3	100	12/93–2/94
452	9215	Kerry Lewis	3	101	11/91–9/92
453	9215	Kerry Lewis	3	102	11/90–10/91
454	4861	Vernon Lewis	3	103	2/92–6/92

Tot.	Badge	Name	WN	#	Period
455	713	James Hartsuff	3	104	8/92–7/93
456	11222	Milton Harry	3	105	12/18/90–12/4/91
457	9339	Sammie Lewis	3	106	2/91–6/91
458	9491	Bruce Lightell	3	107	12/93–9/94
459	9491	Bruce Lightell	3	108	9/90–8/91
460	6810	Howard Lip-pincott	3	109	5/90–12/90
461	1437	Aubert Craig	3	110	1/90–6/90
462	12481	Eugene Lochbrunner	3	111	1/93–8/93
463	10124	Betty London	3	112	7/90–8/90
464	5295	Butch Lott	3	113	2/93–4/93
465	10458	Mark D. Harri-son	3	114	8/91–6/92
466	12662	Sterling Carter	3	115	6/92–4/93
467	3137	Daryl Louviere	3	116	12/93–3/94
468	5421	William Lundy	3	117	10/91–1/92
469	3302	James Lyons	3	118	11/90–10/91
470	386	Keith Madere	3	119	2/92–1/93
471	5942	Douglas Crain	3	120	3/90–7/90
472	652	Matthew Magee	3	121	11/91–4/92
473	2185	Frank Magee	3	122	3/94–7/94
474	1692	Donald Magee	3	123	12/91–12/92
475	1542	Fleming Magee	3	124	7/92–3/93
476	12281	Donald Harris	3	125	9/92–11/92
477	12055	Wayne Carter	3	126	4/91–4/91
478	828	Kerry Creason	3	127	1/91–2/91
479	3962	Steven Marque	3	128	6/90–5/91
480	1044	Joseph Carter	3	129	6/92–2/93
481	270	Dwayne Harris	3	130	7/94–10/94
482	2745	Danny Harris	3	131	8/90–5/91
483	9763	Gale J. Blanch-ard	3	132	10/90–9/91
484	298	Sidney Martin	3	133	5/91–10/91
485	315	Oscar Martinez	3	134	2/92–10/92
486	3821	Douglas Harris	3	135	5/90–8/90
		Harold Math-			

Tot.	Badge	Name	WN	#	Period
456	11222	Milton Harry	3	105	12/18/90–12/4/91
457	9339	Sammie Lewis	3	106	2/91–6/91
458	9491	Bruce Lightell	3	107	12/93–9/94
459	9491	Bruce Lightell	3	108	9/90–8/91
460	6810	Howard Lip-pincott	3	109	5/90–12/90
461	1437	Aubert Craig	3	110	1/90–6/90
462	12481	Eugene Lochbrunner	3	111	1/93–8/93
463	10124	Betty London	3	112	7/90–8/90
464	5295	Butch Lott	3	113	2/93–4/93
465	10458	Mark D. Harri-son	3	114	8/91–6/92
466	12662	Sterling Carter	3	115	6/92–4/93
467	3137	Daryl Louviere	3	116	12/93–3/94
468	5421	William Lundy	3	117	10/91–1/92
469	3302	James Lyons	3	118	11/90–10/91
470	386	Keith Madere	3	119	2/92–1/93
471	5942	Douglas Crain	3	120	3/90–7/90
472	652	Matthew Magee	3	121	11/91–4/92
473	2185	Frank Magee	3	122	3/94–7/94
474	1692	Donald Magee	3	123	12/91–12/92
475	1542	Fleming Magee	3	124	7/92–3/93
476	12281	Donald Harris	3	125	9/92–11/92
477	12055	Wayne Carter	3	126	4/91–4/91
478	828	Kerry Creason	3	127	1/91–2/91
479	3962	Steven Marque	3	128	6/90–5/91
480	1044	Joseph Carter	3	129	6/92–2/93
481	270	Dwayne Harris	3	130	7/94–10/94
482	2745	Danny Harris	3	131	8/90–5/91
483	9763	Gale J. Blanch-ard	3	132	10/90–9/91
484	298	Sidney Martin	3	133	5/91–10/91
485	315	Oscar Martinez	3	134	2/92–10/92
486	3821	Douglas Harris	3	135	5/90–8/90

Tot.	Badge	Name	WN	#	Period
487	3703	erne	3	136	__/91–11/91
488	2571	Jody Matherne	3	137	__/90–8/90
489	11083	August Mathe-rne	3	138	5/91–3/92
490	828	Kerry Creason	3	139	2/94–12/94
491	2629	John Mathurin	3	140	12/91–7/92
492	2629	John Mathurin	3	141	10/90–8/91
493	11159	Will McCad-ney	3	142	2/90–12/90
494	357	Kevin Har-grove	3	143	6/92–5/93
495	1156	Paul McCloud	3	144	10/91–3/92
496	11282	Larry McClure	3	145	1/91–8/91
497	5527	Willie Arso	3	146	4/92–12/92
498	4649	Tyrone McGowan	3	147	6/92–10/92
499	1798	Ronald Blair	3	148	1/91–10/91
500	3187	Christopher Carley	3	149	11/92–11/92
501	4951	Preston Hardy	3	150	6/12/90–6/4/91
502	1038	Glenn Hanegan	3	151	7/91–5/92
503	4913	Troy Hamrick	3	152	6/90–12/90
504	9946	George Miller	3	153	__/91–8/91
505	5225	Michael C. Halphen	3	154	9/91–12/91
506	10899	Robert Mitchell	3	155	4/92–10/92
507	11265	Nelson Mitchell	3	156	7/91–8/91
508	5544	Frederick Mitchell	3	157	8/91–7/92
509	9718	Silas L. Guil-lory	3	158	7/91–4/92
510	12958	Willie Mont-gomery	3	159	4/91–5/92
511	1507	Kenneth Moore	3	160	10/91–5/92
512	9069	Frank Moran	3	161	7/94–9/94
513	5220	Thomas Guidry	3	162	4/91–1/92
514	9206	Ernest J. Borne	3	163	11/21/91–11/20/92
515	10209	James Cantrelle	3	164	9/92–1/93
516	10056	Kevin Morvant	3	165	2/91–1/92

Tot.	Badge	Name	WN	#	Period
488	2571	Jody Matherne	3	137	__/90–8/90
489	11083	August Mathe-rne	3	138	5/91–3/92
490	828	Kerry Creason	3	139	2/94–12/94
491	2629	John Mathurin	3	140	12/91–7/92
492	2629	John Mathurin	3	141	10/90–8/91
493	11159	Will McCad-ney	3	142	2/90–12/90
494	357	Kevin Har-grove	3	143	6/92–5/93
495	1156	Paul McCloud	3	144	10/91–3/92
496	11282	Larry McClure	3	145	1/91–8/91
497	5527	Willie Arso	3	146	4/92–12/92
498	4649	Tyrone McGowan	3	147	6/92–10/92
499	1798	Ronald Blair	3	148	1/91–10/91
500	3187	Christopher Carley	3	149	11/92–11/92
501	4951	Preston Hardy	3	150	6/12/90–6/4/91
502	1038	Glenn Hanegan	3	151	7/91–5/92
503	4913	Troy Hamrick	3	152	6/90–12/90
504	9946	George Miller	3	153	__/91–8/91
505	5225	Michael C. Halphen	3	154	9/91–12/91
506	10899	Robert Mitchell	3	155	4/92–10/92
507	11265	Nelson Mitchell	3	156	7/91–8/91
508	5544	Frederick Mitchell	3	157	8/91–7/92
509	9718	Silas L. Guil-lory	3	158	7/91–4/92
510	12958	Willie Mont-gomery	3	159	4/91–5/92
511	1507	Kenneth Moore	3	160	10/91–5/92
512	9069	Frank Moran	3	161	7/94–9/94
513	5220	Thomas Guidry	3	162	4/91–1/92
514	9206	Ernest J. Borne	3	163	11/21/91–11/20/92
515	10209	James Cantrelle	3	164	9/92–1/93
516	10056	Kevin Morvant	3	165	2/91–1/92

Tot.	Badge	Name	WN	#	Period
517	2631	Sharee Motley	3	166	9/91–3/92
518	12985	Homer Boswell	3	167	5/91–1/92
519	3437	Richard Crespo	3	168	8/91–6/92
520	3521	Russell Murry	3	169	8/90–4/91
521	3958	Nolan Crochet	3	170	5/91–9/91
522	12015	Robert Griffin	3	171	8/91–1/92
523	4299	Darren Nance	3	172	3/90–7/90
524	794	Kenny Armstrong	3	173	2/90–7/90
525	11512	Wayne A. Naquin	3	174	1/91–10/91
526	5020	Joseph C. Narcisse	3	175	3/90–10/90
527	5673	Troy Newby	3	176	12/92–7/93
528	11377	Tran Nguyen	3	177	1/91–7/91
529	2963	Charles Gregory	3	178	1/93–1/93
530	4304	Charles Greenwood	3	179	11/13/90–11/1/91
531	5247	Elaine Green	3	180	3/94–8/94
532	5166	Mack Green	3	181	__/94–10/94
533	9645	Joseph Noel	3	182	1/91–8/91
534	1798	Ronald Blair	3	183	10/92–1/93
535	9913	William Green	3	184	1/93–5/93
536	1144	Lloyd Grant	3	185	7/92–7/92
537	10122	Irwin J. Ockman	3	186	1/93–9/93
538	2099	Robert L. Olinde	3	187	9/94–12/94
539	9161	Anthony J. Onebene	3	188	7/92–2/93
540	9161	Anthony J. Onebene	3	189	6/91–11/91
541	9306	Alexander Antonio	3	190	2/93–12/93
542	2620	Solomon Ott	3	191	__/91–__/91
543	2917	Larry Overton	3	192	1/90–5/90
544	9622	Harden Palmer	3	193	3/91–12/92
545	1318	Cynthia Crosby	3	194	7/92–12/92
546	6879	Calvin G. Parker	3	195	8/92–8/93
547	1589	Kodome Cannon	3	196	5/91–1/92
548	5496	Durand Campbell	3	197	1/93–7/93
549	10118	Isadore Ancar	3	198	8/91–1/92
550	10672	Kenneth Patterson	3	199	2/94–11/94
551	2458	Madeleine Paul	3	200	12/91–4/92
552	5496	Durand Campbell	3	201	6/94–8/94
553	1956	Manuel Penaranda	3	202	3/93–2/94
554	10332	Roy L. Bingham	3	203	12/90–8/91
555	3368	Marty Bourgeois	3	204	3/90–12/90
556	922	Isaac Gordon	3	205	3/90–10/90
557	7086	George Perque	3	206	7/94–11/94
558	3045	Michael Perry	3	207	6/91–4/92
559	2787	Carolyn Peters	3	208	12/90–10/91
560	12554	James Peters	3	209	6/91–4/92
561	9104	Errol Phillips	3	210	1/93–3/93
562	2143	Matthew Phoenix	3	211	5/93–2/94
563	12649	Allen Pichon	3	212	1/92–12/92
564	5378	James Cagelosi	3	213	10/26/92–10/26/93
565	3053	Tony Bradley	3	214	8/91–6/92
566	1721	Ruben Gonzalez	3	215	9/91–12/91
567	11615	Douglas Pierre	3	216	9/90–1/91
568	2362	Farren Gomez	3	217	9/92–10/92
569	4660	Marsha Plaisance	3	218	1/92–8/92
570	6939	Stephen R. Plessy	3	219	3/26/91–3/11/92
571	4307	Samuel Goff	3	220	9/91–10/91
572	2161	Willest Glover	3	221	9/92–4/93
573	4632	Edgar Rabel	3	222	5/92–2/93
574	4632	Edgar Rabel	3	223	3/91–8/91
575	5266	Steve R. Ramsey	3	224	4/91–2/92

Tot.	Badge	Name	WN	#	Period
576	1534	Harold Randle	3	225	6/91–12/91
577	1534	Harold Randle	3	226	6/92–11/92
578	1069	Denise Butler	3	227	11/92–2/93
579	2881	Darren Gloster	3	228	__/20/92–1/13/93
580	9927	Carolyn Ratcliff	3	229	8/93–2/94
581	5488	Frank Butler	3	230	5/93–12/93
582	4267	Johnnie Burton	3	231	12/91–11/92
583	1685	Romarus Reaves	3	232	9/92–10/92
584	2890	Murray Reed	3	233	4/90–1/91
585	2991	Walter Reed	3	234	1/90–5/90
586	11284	Willis Reed	3	235	11/92–7/93
587	11284	Willis Reed	3	236	7/91–1/92
588	9714	Joseph Rhyans	3	237	3/91–8/91
589	920	Fabien Richardson	3	238	5/93–3/94
590	11870	Bradford Riebow	3	239	3/90–12/90
591	5779	Douglas Riggs	3	240	7/90–6/91
592	5049	Larry Riles	3	241	9/91–8/92
593	3003	Kathleen Del Rio	3	242	12/92–4/93
594	3007	Raymond Burks	3	243	8/92–4/93
595	349	Andy Bergeron	3	244	5/92–4/93
596	1164	Carl Robertson	3	245	12/92–3/93
597	4598	Keith Gillespie	3	246	4/90–7/90
598	5393	Alvin J. Robichaux	3	247	5/90–5/90
599	12817	James Crutchfield	3	248	3/90–6/90
600	11343	George Gibson	3	249	11/90–9/91
601	9721	Larry Robinson	3	250	11/90–1/91
602	12458	Elray Boudreaux	3	251	4/90–3/91
603	9195	Steven Rodgers	3	252	3/91–3/92
604	11342	Vaughn Rodgers	3	253	8/91–12/91
605	3570	Scott Ghorace	3	254	9/90–4/91
606	10114	Gary Rodrigue	3	255	9/90–1/91
607	1780	Arthur Roering	3	256	8/88–3/89
608	1780	Arthur Roering	3	257	9/90–11/90
609	11733	Luiz A. Cruz	3	258	10/23/91–10/20/92
610	1460	Donald Romero	3	259	6/91–9/91
611	2618	Carolyn Bennett	3	260	11/93–5/94
612	2236	Lumas Rose	3	261	9/90–8/91
613	3417	Jerome Cummings	3	262	8/91–9/91
614	4122	Alvin Roussell	3	263	9/92–1/93
615	1554	Victor Wayne Roussell	3	264	12/93–12/94
616	4122	Alvin Roussell	3	265	10/91–1/92
617	2426	Harold Gassenberger	3	266	3/90–12/90
618	1	Michael Rowel	3	267	__/93–9/93
619	560	Brenda Gary	3	268	7/90–10/90
620	71	Rene Rubi	3	269	9/90–8/91
621	3117	Michael Gardner	3	270	7/91–4/92
622	9229	Richard L. Rushing	3	271	7/90–3/91
623	5974	Chester Van Buren	3	272	1/90–11/90
624	11515	Earl P. Ryan	3	273	5/93–8/93
625	11515	Earl P. Ryan	3	274	3/94–__/94
626	5748	Daniel Saenz	3	275	2/92–3/92
627	5927	Wade Ganier	3	276	9/90–2/91
628	17759	William M. Gallo	3	277	8/90–5/91
629	195	Robert Sanders	3	278	1/92–8/92
630	1426	Averil Sanders	3	279	9/92–8/93
631	1441	Raymond Bunch	3	280	6/92–7/92
632	5640	Charles Gaines	3	281	7/91–3/92
633	4867	Jerry Barnes	3	282	2/92–10/92
634	5482	John All	3	283	1/91–9/91
635	9851	Frank Savoie	3	284	12/93–8/94

Tot.	Badge	Name	WN	#	Period
636	2674	Kenneth Franklin	3	285	1/93–5/93
637	12568	Terence Czop	3	286	6/94–10/94
638	1779	Byron Saxton	3	287	3/93–7/93
639	3308	Mitchell Schebb	3	288	2/91–8/91
640	5957	Harry Schexnayder	3	289	6/90–5/91
641	5957	Harry Schexnayder	3	290	8/91–4/92
642	1365	Emanuel Francis	3	291	3/94–10/94
643	5718	Susan Scioneaux	3	292	9/90–1/91
644	12303	Edgar Brumfield	3	293	2/91–9/91
645	12568	Terence Czop	3	294	2/91–8/91
646	2806	Roosevelt Scott	3	295	8/91–7/92
647	10452	Calvin Francis	3	296	1/91–11/91
648	9552	Vernie C. Forest	3	297	4/91–6/91
649	12568	Terence Czop	3	298	1/93–9/93
650	2021	Eugene Sheard	3	299	1/91–7/91
651	5482	John All	3	300	2/92–6/92
652	889	Sherman Fleming	3	301	__/91–12/91
653	183	Carl Shelton	3	302	7/90–4/91
654	13292	Charles Fleming	3	303	3/92–3/93
655	12438	William Shroyer	3	304	9/93–6/94
656	12438	William Shroyer	3	305	12/90–7/91
657	4840	Anthony Silbernagel	3	306	1/90–8/90
658	5997	Dwight Damond	3	307	2/92–6/92
659	2043	Jeffery Simmons	3	308	11/90–9/91
660	2042	Darlene Singleton	3	309	2/91–8/91
661	2042	Darlene Singleton	3	310	7/92–1/93
662	4436	Albert Brown	3	311	3/93–8/93
663	10459	Van Small	3	312	5/91–12/91
664	3125	Delrick Darby	3	313	2/91–1/92
665	891	Michael Boudreaux	3	314	9/91–9/92
666	6836	Ramon A. Felix	3	315	__/91–12/91
667	9765	Calvert Smith	3	316	1/90–7/90
668	9604	Anthony Davis	3	317	2/94–2/94
669	4380	William Smith	3	318	10/90–5/91
670	10255	Carl Favorite	3	319	9/92–2/93
671	1290	Kahalid Fard	3	320	3/93–8/93
672	1259	Reynard Smith	3	321	9/90–6/91
673	2473	Nicholas Smith	3	322	1/92–10/92
674	15850	Michael Falgout	3	323	3/90–12/90
675	4398	Ronald Brown	3	324	4/92–11/92
676	1750	Emanuel Smith	3	325	3/91–8/91
677	6908	Gerard Brown	3	326	__/91–11/91
678	3786	Jerald Brown	3	327	1/92–4/92
679	10471	Spencer Brown	3	328	2/93–6/93
680	9685	Carl A. Smith	3	329	10/90–6/91
681	3322	Joseph Soileau	3	330	10/91–11/92
682	12692	Charles Solomon	3	331	1/92–3/92
683	446	Randy Falgout	3	332	7/91–8/91
684	11962	Keith Falgoust	3	333	9/91–4/92
685	3282	Robert St. Amant	3	334	10/91–6/92
686	9129	Michael Brown	3	335	4/91–3/92
687	2524	J.C. Fairley	3	336	7/92–12/92
688	388	Robert St. Pe	3	337	8/93–5/94
689	5752	Joseph Starks	3	338	2/94–11/94
690	4742	Ronald Beasley	3	339	3/91–6/91
691	3030	Janet Every	3	340	3/90–3/91
692	3889	Michael Stein	3	341	1/92–4/92
693	3681	Craig Stevenson	3	342	8/91–1/92
694	9246	Richard A. Stewart	3	343	7/90–7/91

Tot.	Badge	Name	WN	#	Period
695	13042	Cynthia Stewart	3	344	5/91–1/92
696	4252	Bernell Stewart	3	345	5/92–1/93
697	4687	Edward Stewart	3	346	7/93–1/94
698	12598	Atheian Baudoin	3	347	4/93–3/94
699	9277	Dana Everhardt	3	348	7/90–1/91
700	4687	Edward Stewart	3	349	7/90–12/90
701	4252	Bernell Stewart	3	350	5/94–7/94
702	1343	Terry Brown	3	351	2/91–10/91
703	2992	Ingrid Evans	3	352	12/92–4/93
704	3356	Chester Davis	3	353	10/92–1/93
705	1820	Curtis Elmore	3	354	2/91–12/91
706	3094	Daniel Talley	3	355	6/91–6/92
707	10293	Anthony Brown	3	356	5/92–12/92
708	1820	Curtis Elmore	3	357	3/92–10/92
709	1774	Leroy Taylor	3	358	7/91–3/92
710	23	Gardenia Taylor	3	359	1/92–11/92
711	3442	Ralph Taylor	3	360	12/92–6/93
712	13058	Brian Ellis	3	361	6/93–4/94
713	2100	Richard Efans	3	362	11/92–10/93
714	1586	Todd Terrington	3	363	4/92–12/92
715	8303	Terry P. Bourg	3	364	3/94–10/94
716	10990	Vernell Edwards	3	365	12/91–1/92
717	4516	Gerald Edwards	~~3~~	366	2/91–12/92
718	5805	Raymond Thibodaux	3	367	5/90–4/91
719	4841	Alfred Bartley	3	368	3/91–7/91
720	5805	Raymond Thibodaux	3	369	12/26/91–12/1/92
721	3972	Veronica Thibodeaux	3	370	5/93–2/94
722	4575	Timothy Thibodeaux	3	371	6/91–1/92
723	4699	Ricco Davis	3	372	10/90–6/91

Tot.	Badge	Name	WN	#	Period
696	4252	Bernell Stewart	3	345	5/92–1/93
697	4687	Edward Stewart	3	346	7/93–1/94
698	12598	Atheian Baudoin	3	347	4/93–3/94
699	9277	Dana Everhardt	3	348	7/90–1/91
700	4687	Edward Stewart	3	349	7/90–12/90
701	4252	Bernell Stewart	3	350	5/94–7/94
702	1343	Terry Brown	3	351	2/91–10/91
703	2992	Ingrid Evans	3	352	12/92–4/93
704	3356	Chester Davis	3	353	10/92–1/93
705	1820	Curtis Elmore	3	354	2/91–12/91
706	3094	Daniel Talley	3	355	6/91–6/92
707	10293	Anthony Brown	3	356	5/92–12/92
708	1820	Curtis Elmore	3	357	3/92–10/92
709	1774	Leroy Taylor	3	358	7/91–3/92
710	23	Gardenia Taylor	3	359	1/92–11/92
711	3442	Ralph Taylor	3	360	12/92–6/93
712	13058	Brian Ellis	3	361	6/93–4/94
713	2100	Richard Efans	3	362	11/92–10/93
714	1586	Todd Terrington	3	363	4/92–12/92
715	8303	Terry P. Bourg	3	364	3/94–10/94
716	10990	Vernell Edwards	3	365	12/91–1/92
717	4516	Gerald Edwards	~~3~~	366	2/91–12/92
718	5805	Raymond Thibodaux	3	367	5/90–4/91
719	4841	Alfred Bartley	3	368	3/91–7/91
720	5805	Raymond Thibodaux	3	369	12/26/91–12/1/92
721	3972	Veronica Thibodeaux	3	370	5/93–2/94
722	4575	Timothy Thibodeaux	3	371	6/91–1/92
723	4699	Ricco Davis	3	372	10/90–6/91

Tot.	Badge	Name	WN	#	Period
724	4282	Larry Edwards	3	373	4/90–3/91
725	5156	Tricia A. Thomas	3	374	6/93–3/94
726	5244	Dewery Thomas	3	375	3/90–12/90
727	9785	Richard P. Ebert	3	376	12/91–10/92
728	10865	Betty Thomas	3	377	7/91–10/91
729	5519	Darryl Duplessis	3	378	2/93–10/93
730	705	Patrick Thompson	3	379	2/91–10/91
731	11235	Louis Thornton	3	380	7/91–11/91
732	9616	John Davis	3	381	12/92–5/93
733	859	Clifford Dumas	3	382	7/92–12/92
734	9664	Byron Dumas	3	383	3/91–2/92
735	4123	Phuong Tram	3	384	7/90–6/91
736	6864	Michael Treme	3	385	5/91–7/91
737	6864	Allen Trosclair	3	386	12/92–1/93
738	747	Arthur Truitt	3	387	10/29/90–10/19/91
739	9664	Byron Dumas	3	388	9/93–11/93
740	9882	Hasker Turner	3	389	1/91–5/91
741	12256	Christopher Duhe	3	390	2/92–5/92
742	3383	Kevin Bartley	3	391	9/91–3/92
743	2460	Delando Davis	3	392	5/91–11/91
744	3068	Roger Dufrene	3	393	6/94–11/94
745	10734	Thomas K. Barber	3	394	7/93–1/94
746	1863	Chad Bourgeois	3	395	9/92–8/93
747	3285	C.L. Wade	3	396	2/92–7/92
748	2959	Wade Walker	3	397	9/94–12/94
749	2959	Wade Walker	3	398	9/92–11/92
750	3893	LaMar Walker	3	399	5/93–3/94
751	4205	Raphael Delbuno	3	400	7/92–3/93
752	537	Ray Washington	3	401	8/93–3/94
753	1118	Tyrone Brousseau	3	402	4/90–4/91

Tot.	Badge	Name	WN	#	Period
725	5156	Tricia A. Thomas	3	374	6/93–3/94
726	5244	Dewery Thomas	3	375	3/90–12/90
727	9785	Richard P. Ebert	3	376	12/91–10/92
728	10865	Betty Thomas	3	377	7/91–10/91
729	5519	Darryl Duplessis	3	378	2/93–10/93
730	705	Patrick Thompson	3	379	2/91–10/91
731	11235	Louis Thornton	3	380	7/91–11/91
732	9616	John Davis	3	381	12/92–5/93
733	859	Clifford Dumas	3	382	7/92–12/92
734	9664	Byron Dumas	3	383	3/91–2/92
735	4123	Phuong Tram	3	384	7/90–6/91
736	6864	Michael Treme	3	385	5/91–7/91
737	6864	Allen Trosclair	3	386	12/92–1/93
738	747	Arthur Truitt	3	387	10/29/90–10/19/91
739	9664	Byron Dumas	3	388	9/93–11/93
740	9882	Hasker Turner	3	389	1/91–5/91
741	12256	Christopher Duhe	3	390	2/92–5/92
742	3383	Kevin Bartley	3	391	9/91–3/92
743	2460	Delando Davis	3	392	5/91–11/91
744	3068	Roger Dufrene	3	393	6/94–11/94
745	10734	Thomas K. Barber	3	394	7/93–1/94
746	1863	Chad Bourgeois	3	395	9/92–8/93
747	3285	C.L. Wade	3	396	2/92–7/92
748	2959	Wade Walker	3	397	9/94–12/94
749	2959	Wade Walker	3	398	9/92–11/92
750	3893	LaMar Walker	3	399	5/93–3/94
751	4205	Raphael Delbuno	3	400	7/92–3/93
752	537	Ray Washington	3	401	8/93–3/94
753	1118	Tyrone Brousseau	3	402	4/90–4/91

Tot.	Badge	Name	WN	#	Period
754	11373	Tommy Downing	3	403	12/90–5/91
755	9174	Paul Washington	3	404	4/93–11/93
756	985	Melvin Douglas	3	405	10/90–3/91
757	2899	Ronald Washington	3	406	11/92–12/92
758	84	Christine Washington	3	407	1/92–1/93
759	3743	Brian Washington	3	408	9/90–4/91
760	3852	Paulette Washington	3	409	1/92–7/92
761	3743	Brian Washington	3	410	1/93–10/93
762	5791	Bertrand Brooks	3	411	6/91–10/91
763	6841	Leonard T. Watkins	3	412	__/90–5/90
764	9806	Jurlean Weaver	3	413	7/91–12/91
765	6961	Brian O. Weber	3	414	5/93–6/93
766	6961	Brian O. Weber	3	415	2/91–8/91
767	3708	David Doucet	3	416	1/14/91–1/10/92
768	2738	Allie Ray White	3	417	8/93–4/94
769	3574	Cary Doucet	3	418	11/93–6/94
770	10906	Kevin Doris	3	419	8/17/92–8/9/93
771	2172	Edward White	3	420	12/93–4/94
772	4038	Jeffrey Donovan	3	421	1/93–2/93
773	2516	Pamela Adams	3	422	10/92–8/93
774	11379	Elnora White	3	423	6/91–9/91
775	1022	Peter Adams	3	424	0
776	3075	David Wiley	3	425	2/93–8/93
777	3599	Bobby Willard	3	426	9/91–11/91
778	4177	Jules Domecq	3	427	6/91–2/92
779	5337	Bradford Williams	3	428	1/91–6/91
780	4046	Kevin Williams	3	429	6/90–3/91
781	3980	Warren Williams	3	430	6/91–2/92
782	1467	Kurt Dixon	3	431	6/93–10/93
783	2808	Geraldine Williams	3	432	8/91–7/92
784	1384	Brandon Williams	3	433	7/92–7/92
785	4186	Frank Dickson	3	434	9/91–12/91
786	974	Dennis Dempster	3	435	3/94–__/94
787	2979	Joseph Demagnus	3	436	8/91–11/91
788	455	Welson Breaux	3	437	1/90–6/90
789	9654	Phil Barre	3	438	5/91–1/92
790	4961	Errol J. Winn	3	439	10/90–7/91
791	3724	Joseph Winzy	3	440	7/90–6/91
792	4128	Freddie Deloney	3	441	10/91–9/92
793	1767	Cedric Branche	3	442	9/93–6/94
794	12395	Michael Woodson	3	443	11/92–5/93
795	12395	Michael Woodson	3	444	7/91–9/91
796	9750	Gerald Wright	3	445	7/94–10/94
797	5389	Alfred Adams	3	446	10/91–5/92
798	9750	Gerald Wright	3	447	3/90–11/90
799	4051	Samuel Young	3	448	5/92–1/93
800	9955	Andrey Barquero	3	449	4/90–1/91
801	969	Paul Abingdon	3	450	7/94–12/94
802	9980	Charles Zappala	3	451	10/90–9/91

APPENDIX C

Employees, in addition to those listed on the General Counsel's Exhibit 364, listed by badge numbers, who were shown by the General Counsel's Exhibits 760, and higher, to have received three or more warning notices (WN) within 12-month periods from 1990 through 1994. The employees are sorted according to the count (#) of those who received each quantity of warning notices.

Tot.	Badge	WN	#
1	91560	14	1
2	751	12	1
3	4686	10	1
4	53841	10	2

Tot.	Badge	WN	#
5	10684	10	3
6	1001	9	1
7	171	8	1
8	91713	8	2
9	12148	8	3
10	11367	8	4
11	3156	8	5
12	5862	8	6
13	1833	7	1
14	10660	7	2
15	10658	7	3
16	12883	6	1
17	53280	6	2
18	2628	6	3
19	5729	6	4
20	8930	6	5
21	5122	6	6
22	10550	6	7
23	1295	6	8
24	2503	6	9
25	2071	6	10
26	11827	6	11
27	2230	6	12
28	462	5	1
29	1134	5	2
30	931	5	3
31	11316	5	4
32	726	5	5
33	829	5	6
34	815	5	7
35	12301	5	8
36	11867	5	9
37	10543	5	10
38	9884	5	11
39	11938	5	12
40	9168	5	13
41	12158	5	14
42	8155	5	15
43	12539	5	16
44	1809	5	17
45	5761	5	18
46	767	5	19
47	15507	5	20
48	5389	5	21
49	2914	5	22
50	4472	5	23
51	4122	5	24
52	2013	5	25
53	17670	5	26
54	3870	5	27
55	732	4	1

Tot.	Badge	WN	#
6	1001	9	1
7	171	8	1
8	91713	8	2
9	12148	8	3
10	11367	8	4
11	3156	8	5
12	5862	8	6
13	1833	7	1
14	10660	7	2
15	10658	7	3
16	12883	6	1
17	53280	6	2
18	2628	6	3
19	5729	6	4
20	8930	6	5
21	5122	6	6
22	10550	6	7
23	1295	6	8
24	2503	6	9
25	2071	6	10
26	11827	6	11
27	2230	6	12
28	462	5	1
29	1134	5	2
30	931	5	3
31	11316	5	4
32	726	5	5
33	829	5	6
34	815	5	7
35	12301	5	8
36	11867	5	9
37	10543	5	10
38	9884	5	11
39	11938	5	12
40	9168	5	13
41	12158	5	14
42	8155	5	15
43	12539	5	16
44	1809	5	17
45	5761	5	18
46	767	5	19
47	15507	5	20
48	5389	5	21
49	2914	5	22
50	4472	5	23
51	4122	5	24
52	2013	5	25
53	17670	5	26
54	3870	5	27
55	732	4	1

Tot.	Badge	WN	#
56	2367	4	2
57	1291	4	3
58	828	4	4
59	1555	4	5
60	504	4	6
61	12937	4	7
62	11836	4	8
63	2670	4	9
64	11831	4	10
65	11111	4	11
66	3032	4	12
67	3043	4	13
68	10918	4	14
69	10870	4	15
70	9603	4	16
71	7370	4	17
72	5597	4	18
73	5535	4	19
74	3659	4	20
75	3800	4	21
76	5522	4	22
77	5198	4	23
78	5125	4	24
79	4829	4	25
80	4696	4	26
81	459	4	27
82	4418	3	1
83	1937	3	2
84	4537	3	3
85	4563	3	4
86	4568	3	5
87	4392	3	6
88	4196	3	7
89	2007	3	8
90	4839	3	9
91	4875	3	10
92	4996	3	11
93	1926	3	12
94	3907	3	13
95	2125	3	14
96	1903	3	15
97	3830	3	16
98	3579	3	17
99	3413	3	18
100	5602	3	19
101	5621	3	20
102	5646	3	21
103	1832	3	22
104	5755	3	23
105	1827	3	24
106	1800	3	25

Tot.	Badge	WN	#
57	1291	4	3
58	828	4	4
59	1555	4	5
60	504	4	6
61	12937	4	7
62	11836	4	8
63	2670	4	9
64	11831	4	10
65	11111	4	11
66	3032	4	12
67	3043	4	13
68	10918	4	14
69	10870	4	15
70	9603	4	16
71	7370	4	17
72	5597	4	18
73	5535	4	19
74	3659	4	20
75	3800	4	21
76	5522	4	22
77	5198	4	23
78	5125	4	24
79	4829	4	25
80	4696	4	26
81	459	4	27
82	4418	3	1
83	1937	3	2
84	4537	3	3
85	4563	3	4
86	4568	3	5
87	4392	3	6
88	4196	3	7
89	2007	3	8
90	4839	3	9
91	4875	3	10
92	4996	3	11
93	1926	3	12
94	3907	3	13
95	2125	3	14
96	1903	3	15
97	3830	3	16
98	3579	3	17
99	3413	3	18
100	5602	3	19
101	5621	3	20
102	5646	3	21
103	1832	3	22
104	5755	3	23
105	1827	3	24
106	1800	3	25

Tot.	Badge	WN	#
107	6595	3	26
108	6869	3	27
109	7068	3	28
110	3367	3	29
111	1665	3	30
112	1610	3	31
113	1598	3	32
114	9231	3	33
115	9473	3	34
116	9495	3	35
117	9533	3	36
118	3365	3	37
119	9795	3	38
120	9880	3	39
121	1544	3	40
122	9931	3	41
123	10362	3	42
124	10400	3	43
125	10424	3	44
126	10427	3	45
127	1486	3	46
128	1381	3	47
129	1353	3	48
130	1290	3	49
131	386	3	50
132	3183	3	51
133	2409	3	52
134	11056	3	53
135	2571	3	54
136	11137	3	55
137	1274	3	56
138	1196	3	57
139	11644	3	58
140	11823	3	59
141	912	3	60
142	11828	3	61
143	2717	3	62
144	2575	3	63
145	789	3	64
146	11873	3	65
147	773	3	66
148	11982	3	67
149	12122	3	68
150	772	3	69
151	468	3	70
152	725	3	71
153	12334	3	72
154	712	3	73
155	12609	3	74
156	12719	3	75
157	676	3	76

Tot.	Badge	WN	#
108	6869	3	27
109	7068	3	28
110	3367	3	29
111	1665	3	30
112	1610	3	31
113	1598	3	32
114	9231	3	33
115	9473	3	34
116	9495	3	35
117	9533	3	36
118	3365	3	37
119	9795	3	38
120	9880	3	39
121	1544	3	40
122	9931	3	41
123	10362	3	42
124	10400	3	43
125	10424	3	44
126	10427	3	45
127	1486	3	46
128	1381	3	47
129	1353	3	48
130	1290	3	49
131	386	3	50
132	3183	3	51
133	2409	3	52
134	11056	3	53
135	2571	3	54
136	11137	3	55
137	1274	3	56
138	1196	3	57
139	11644	3	58
140	11823	3	59
141	912	3	60
142	11828	3	61
143	2717	3	62
144	2575	3	63
145	789	3	64
146	11873	3	65
147	773	3	66
148	11982	3	67
149	12122	3	68
150	772	3	69
151	468	3	70
152	725	3	71
153	12334	3	72
154	712	3	73
155	12609	3	74
156	12719	3	75
157	676	3	76

Tot.	Badge	WN	#
158	12892	3	77
159	2614	3	78
160	12970	3	79
161	13067	3	80
162	13076	3	81
163	13762	3	82
164	625	3	83
165	608	3	84
166	591	3	85
167	325	3	86
168	176	3	87
169	74	3	88

APPENDIX D

EMPLOYEES WHO WERE ISSUED FOUR OR MORE WARNING NOTICES FOR ABSENTEEISM IN 12-MONTH PERIODS BEFORE THE ORGANIZATIONAL CAMPAIGN BEGAN ON MARCH 1, 1993

1. On March 21 and August 15, 1990, pipe department employee Butch Lott (5295) was issued warning notices for absenteeism. On September 11, 1990, Lott was issued his third warning notice for absenteeism; absences of August 21 and 27 and September 11 are cited. (It is to be specifically noted that, unlike alleged discriminatee Isador Ancar, Lott was not discharged on his second absence that followed his second warning notice; the same is to be noted about all of the comparative cases listed in this appendix.) On November 19, 1990, Lott was issued his fourth warning notice for absenteeism; the number of days involved is not indicated. Lott was still not discharged, a fact shown by several subsequent warning notices that are in evidence.

2. On April 10 and September 18, 1990, paint department employee Conrad Noil (447) was issued warning notices for absenteeism. On October 22, 1990, Noil was issued his third warning notice for absenteeism; absences of October 8, 16, and 22 are cited. On March 26, 1991, Noil was issued his fourth warning notice for absenteeism in a 12-month period; absences of February 26 and March 6, 12, and 18 are cited.

3. On April 29, 1991, Noil was issued his fourth warning notice for absenteeism in the 12-month period that began with his warning notice of September 18, 1990; absences of April 1, 11, and 29 are cited. The warning notice is marked "Final Warning."

4. On October 23, 1991, Noil, despite his prior express final warning, was issued his third warning notice for absenteeism in the 12-month period that began with his warning notice of March 26, 1991. On January 6, 1992, Noil was issued his fourth warning notice for absenteeism in the 12-month period that began with his warning notice of March 26, 1991; absences of December 16, 23, and 30, 1991, are cited. (That is, this was the third time that Noil was issued his fourth warning notice for absenteeism in a 12-month period.)

5. On March 16, 1992, despite his prior express final warning and other warnings, Noil was issued his fourth warning notice for absenteeism in the 12-month period that began with his warning notice of April 29, 1991; absences of February 28 and March 4 and 10 are cited. The warning notice is marked: "Absences of 3 or more days in a 30-day period. Failure to call in to the main paint office during all of your absences. You are hereby warned of excessive absences. Final Warning." (That is, unlike the case of alleged discriminatee Octave Rouege, Noil's warning notice for absenteeism includes a warning notice for failing to call in during his absences. It is further to be noted that this was the fifth time that Noil was issued his fourth warning notice for absenteeism in a 12-month period.)

6. On August 8 and December 28, 1990, electrical department employee Sammie Lewis (9339) was issued warning notices for absenteeism. On February 4, 1991, Lewis was issued his third warning notice for absenteeism. That warning notice cites absences of January 22, 28, and February 4, 1991. (Again, after being issued his third warning notice, Lewis was not, like Ancar, discharged on his absence of January 28, his second absence after his second warning notice.) On June 18, 1991, Lewis was issued his fourth warning notice for absenteeism. The notice cites absences of May 20 and June 3, 4, and 17, 1991. The warning notice concludes: "This is your final written warning." (That is, as well as compiling an absenteeism record that was worse than Ancar's with his January 28 absence, the notation of "final" warning compels the conclusion that Lewis was still not discharged when he was issued his fourth warning notice. Rather, Lewis was simply issued another warning notice which was marked "Final" and warned of future discipline during his future employment with Respondent. The same conclusion, of course, is to be made in all other comparative cases that include such warnings of future discipline.)

7. On August 13, 1990, and February 6, 1991, paint department employee Anthony Ausama (4829) was issued warning notices for absenteeism. The second of these warning notices cited absences on January 2, 14, and 23 and February 4, 5, and 6. (Of course, the first three listed of absences could have been the subject of a second warning notice and the absences of February 4, 5, and 6 could have been the subject of a third warning notice to Ausama. Additionally, it is to be noted that absences on consecutive days of February 4, 5, and 6 constitute a separate violation of major offense-1 under the Avondale Employees' Guide. Nevertheless, Ausama was given only a single warning notice for general offense-1 on this occasion. The alleged discriminatees' absences, it is to be noted, were not so liberally treated.) On March 25, 1991, Ausama was issued his third warning notice for absenteeism; dates of March 13, 19, 25, and 26 are cited. The warning notice concludes: "Final Warning!" On April 17, 1991, despite his prior express final warning and other warnings, Ausama was issued his fourth warning notice for absences on March 26 and April 9 and 17, 1991. The text of the warning is: "Unexcused absences of 3 working days in a calendar month. You have already received a final warning. If you continue to miss time from work unnecessarily you could be discharged for any future absences. You have been warned."

8. On September 19, 1990, and January 23, 1991, paint department employee Russell Guillory (9884) was issued warning notices for three or more absences within 30-day periods. On April 17, 1991, Guillory was issued his third warning notice for absenteeism. This warning notice cited four absences in March and April 1991. On June 27, 1991, Guillory was issued his fourth warning notice for absenteeism; four absences in June are cited.

9. On July 11, 1991, Guillory was issued his fifth warning notice for absenteeism; absences on four dates in July are cited. The warning notice concludes: "Final Warning."

10. On September 20 and December 11, 1990, paint department employee Evert Carter (5761) was issued warning notices for absenteeism. The second of those warning notices cited absences of November 27 and 29 and December 4, 7, and 10, 1990. (Of course, the first three of these November and December absences could have been the subject of a separate warning notice, and the absences of December 7 and 10 would be the first and second absences after a second warning notice, which would have placed Carter in the same position as Ancar when he was discharged.) On January 21, 1991, Carter was issued his third warning notice for absenteeism. The dates of December 31, 1990, and January 3, 9, and 15, 1991, are cited. On June 7, 1991, Carter was issued his fourth warning notice for absenteeism. Absences of May 8, 20, 28, and 31 and June 6, 1991, are cited. The text of the warning notice concludes: "You are hereby warned of future absenteeism. Final Warning."

11. On October 9, 1990, and April 3, 1991, pipe department employee Kevin Stewart (3243) was issued warning notices for absenteeism. On April 26, 1990, Stewart was issued his third warning notice which cites absences of April 3, 9, 10, 11, 12, and 25, 1990. Major offense-1 of the Avondale Employees' Guide, 3 consecutive days of absence, is circled and references are made to absences on April 9, 10, and 11. The warning notice concludes: "This your final warning. Any other violations of this matter will result in discharge." (Of course, a separate warning notice for three absences in 30 days, under general offense-1, could have been issued to Stewart based his absences of April 3, 12, and 25, but it was not. This is just another example of why comparisons of only raw numbers of warning notices do not give a complete picture of the indulgences that were afforded other employees but not Ancar and the other alleged discriminatees who were discharged for absenteeism.) On October 2, 1991, despite his prior express final warning and other warnings, Stewart was issued his fourth warning notice for absences on September 10, 13, and 25 and October 1 and 2, 1991.

12. On October 31, 1990, and June 17, 1991, paint department employee Robert Bryant (5729) was issued warning notices for absenteeism. The second of these notices is marked: "Final Warning!" On September 5, 1991, despite his prior express final warning, Bryant was issued his third warning notice for absences on August 7, 19, and 27, 1991. The notice concludes: "You are hereby warned of absenteeism." On September 12, 1991, despite his prior express final warning and other warnings, Bryant was issued his fourth warning notice for absenteeism.

13. On November 1, 1990, paint department employee Fred Wilson (2628) was issued one warning notice for 10 absences in October 1990. (Of course, these 10 absences could have been the subject of three separate warning notices and Wilson's subsequent absences should be viewed accordingly). On April 10, 1991, Wilson was issued his second warning notice for absenteeism; seven absences within a 30-day period are cited, and the notice includes a warning for the offense of failing to call in on any of his days of absence. The warning notice concludes: "Final Warning." On May 13, 1991, despite his prior express final warning, Wilson was issued his third warning notice for absenteeism; five absences in a 30-day period are cited; to wit: April 15, 16, and 17 and May 2 and 13, 1991; the notice includes a warning for the offense of failing to call in on three of those dates. On June 7, 1991, Wilson was issued his fourth warning notice for absenteeism in a 12-month period; four absences within a 30-day period are cited, and it includes a warning for failing to call in on three of those dates.

14. On November 11, 1991, Wilson was issued his fourth warning for absenteeism in the year that began with his warning notice of April 10, 1991. This warning notice was issued under major offense-1 of the Avondale Employees' Guide, as it is for 5 consecutive days of absenteeism. (March 4 through 8.) The warning notice further includes a warning for failing to call in on any of Wilson's consecutive days of absences. The warning notice concludes: "Continue to miss work and you will be terminate for chronic absenteeism. Final warning."

15. On March 13, 1992, Wilson was issued his fifth warning notice for absenteeism in the year that began on April 10, 1991. Six days of absence within a 30-day period are cited, and the notice includes a warning for failure to call in on 4 of those days. This warning notice also concludes: "You are hereby warning of chronic absenteeism. Final Warning." (The illustrative nature of Wilson's case is discussed in detail in the narrative of Ancar's case.)

16. On November 5, 1990, and May 28,1991, paint department employee John Aguillard (931) was issued two warning notices for absenteeism. On July 10, 1991, Aguillard was issued his third warning notices for absenteeism; four absences are cited. The warning notice concludes: "This department will not tolerate absenteeism. You are hereby warned of chronic absenteeism." On September 5, 1991, despite the message that the paint department does not tolerate absenteeism, Aguillard was issued his fourth warning notice for absenteeism; four absences are cited. The warning notice concludes: "You are hereby warned of absenteeism."

17. On November 12, 1991, again despite the message that the paint department does not tolerate absenteeism, Aguillard was issued his fourth warning notice for absenteeism in the 12-month period that began with his May 28, 1991 warning notice. Five absences are cited. The warning notice concludes: "Continue to miss work and you will be terminated for chronic absenteeism. Citations given 5/28/91, 7/10/91, 9/5/91, 11/12/91, for absenteeism. Final Warning." (That is, on its face, this warning notice noted that it was Aguillard's fourth in 12 months. Respondent offers no explanation of how this could be, but Ancar and Rouege were discharged for two absences after their second warning notices.)

18. On November 16, 1990, and April 29, 1991, paint department employee James Kosales (9713) was issued separate warning notices for missing three days in a 30-day period. On August 28, 1991, Kosales was issued his third warning notice for missing 3 days in a 30-day period. The warning notice concludes: "You are warned of absenteeism." On October 23, 1991, Kosales was issued his fourth absenteeism warning notice in a 12-month period.

19. On December 5, 1990, and August 2, 1991, paint department employee Leo Lager (4295) was issued two warning notices; the first warning notice was for four absences, and the second was for five absences. On September 9, 1991, Lager was issued his third warning notice for absenteeism; four absences are cited. The warning notice concludes: "You are hereby warned of absenteeism." On December 6, 1991, Lager was issued his third warning notice for absenteeism within the year that began with his August 2, 1991, warning notice. This

last warning notice cites five absences within a 30-day period. The notice concludes: "You are hereby warned of chronic absenteeism. Continue to miss work and action will be taken." On January 6, 1992, Legar was issued his fourth warning notice for absenteeism in the year that began with his August 2, 1991, warning notice. Four absences within 30 days are cited, and the notice includes a warning for the offense of failing to call in on all of the days of absence listed.

20. On January 2, 1991, paint department employee William Brown (3058) was issued one warning notice for seven absences within a 30-day period. The warning notice concludes: "Final Warning!" On May 14, 1991, despite his prior express final warning, Brown was issued his second warning notice for absenteeism; four absences with a 30-day period are cited. On September 27, 1991, despite his prior express final warning and other warning, Brown was issued his third warning notice for four absences within a 30-day period. On December 6, 1991, despite his prior express final warning and other warnings, Brown was issued his fourth warning notice for absenteeism; four absences within a 30-day period are cited.

21. On January 28 and April 18, 1991, paint department employee Karen Gillin (11111) was issued two warning notices for absenteeism. The second of these concludes: "Chronic absenteeism can result in loss of employment if continued. You have been notified of this problem. FINAL WARNING." On May 20, 1991, despite her prior express final warning, Gillin was issued her third warning notice, this one for six absences in a 30-day period. The notice further includes a warning for failing to call in on 4 of those 6 days. On September 9, 1991, Gillin was issued her fourth warning notice for absenteeism. Seven absences in a 30-day period are cited. The warning notice concludes: "Continue to miss work and action will be taken. You are hereby warned of Chronic absenteeism. Final warning." (Of course, Gillin could have been issued her fourth warning notice for absenteeism after the first three of her seven absences; again the count of warning notices only understates the indulgences that were afforded to the employees before the organizational campaign began.)

22. On February 6 and February 20, 1991, paint department employee Joe Gassenberger (3504) was issued warning notices for absenteeism. (The second of these warning notices was for seven different absences in a 30-day period and therefore could have been the subject of two separate warning notices, making three warning notices for Gassenberger in 1 month, but it was not.) On August 13, 1991, Gassenberger was issued his third warning notice for absences on July 17 and 18 and August 9, 1991. On December 6, 1991, Gassenberger was issued his fourth warning notice for absenteeism. The warning cites absences of November 19 and 20 and December 6, 1991. The warning notice further includes a warning for Gassenberger's failure to call in on any of the days that he was absent. The warning notice concludes: "You are hereby warned of chronic absenteeism. Continue to miss work and action will be taken."

23. On January 6, 1992, Gassenberger was issued his fifth warning notices for absenteeism within a 12-month period. Cited are absences of December 9, 23, and 24, 1991.

24. On February 19, 1992, Gassenberger was issued his fifth warning notice in the 12-month period that began with his warning notice of February 20, 1991. This last warning notice notes absences of February 5, 11, 13, and 14. This warning notice concludes, "Final Notice," and Gassenberger was therefore presumably still not discharged.

25. On February 14, and September 6, 1991, paint department employee Byron Trudeaux (11316) was issued warning notices for 3 days of absenteeism in two 30-day periods. The warning notice of September 6, concludes: "Final Notice." On September 13, 1991, despite his prior express final warning, Trudeaux was issued another warning notice for absences on five different dates between November 18 and December 9, 1991. This notice also includes a warning for the offense of failing to call in to the paint department office on December 6 and 9, 1991. The warning notice concludes: "You are hereby warned of chronic absenteeism." On January 6, 1992, despite his prior express final warning and other warnings, Trudeaux was issued his fourth warning notice for absenteeism in a 12-month period. The warning notice cites Trudeaux's absences of December 20, 23, and 30, 1991, and January 3, 1992. (The warning notice does not indicate that Trudeaux was discharged after this fourth warning notice, but, at least he was not discharged on December 20, 23, or 30 after having previously been issued three warning notices for absenteeism.)

26. On February 18 and July 8, 1991, paint department employee Norman Lesterich (11827) was issued two warning notices for absences within 30-day periods. On August 14, 1991, Lesterich was issued his third warning notice for five absences within a 30-day period. The notice concludes: "You are warned of absenteeism." On September 5, 1991, Lesterich was issued his fourth warning notice for absenteeism; five absences within a 30-day period are cited. This warning notice also concludes: "You are hereby warned of absenteeism."

27. On October 10, 1991, Lesterich was issued his fifth warning notice for absenteeism; three absences within a 30-day period are cited.

28. On December 13, 1991, Lesterich was issued his sixth warning notice for absenteeism in a 12-month period; absences of November 6, 14, 18, 21,and 25 and December 10 and 16, 1991, are cited. This notice also includes a warning for the offense of "failure to call in during absences of 11/14, 11/21, and 11/25, 1991." It concludes: "Continue to miss work and action will be taken. You are warned of absenteeism." Below this wording is the following entry, apparently made by the clerk of the paint department: "Employee being discharge for this being his eight notice for missing time." (This is the only notation of a discharge that was included on any of the warning notices upon which this Appendix is based.) To compare accurately Lesterich's case with Ancar's, it is to be noted that Lesterich was not discharged for at least six absences after his fifth warning notice within the 12-month period.

29. On February 26, 1991, paint department employee Kevin Cheatham (11367) was issued a warning notice for absences on February 1, 5, 6, 7, 11, 14, and 15. (Of course, under the Avondale employees guide, the absences of February 1, 5, and 6, and the absences of February 7, 11, and 14, could have been made the basis for two separate warning notices, but Respondent indulgently combined all the offenses into one warning notice). On March 6, 1991, Cheatham was given a warning notice for the additional absences of February 20, 25, and 26. On March 12, 1991, after having received two warning notices, Cheatham was issued a third warning notice for absences on March 6, 7, and 11, 1991. This notice concludes: "Final Warning!" On May 22, 1991, despite his prior express final warning and other warnings, Cheatham was issued his fourth warning notice of the year for absenteeism. Absences of May 1, 6, 8, and 15 are cited. The warning notice concludes only: "Second Notice."

30. On June 24, 1991, despite his prior express final warning and other warnings, Cheatham was issued his fifth warning notice of the year for absenteeism. His absences of June 4, 6, and 10 are cited. The warning notice concludes: "You are hereby warned of absenteeism."

31. On October 23, 1991, Cheatham was issued his sixth warning notice of the year for absenteeism. Absences of September 30 and October 7, 8, and 17 are cited.

32. On December 13, 1991, Cheatham was issued his seventh warning notice of the year for absenteeism. The warning notice concludes: "You are hereby warned of absenteeism. Continue to miss work and action will be taken."

33. On January 6, 1992, Cheatham was issued his eighth warning notice for absenteeism in the year that began with his warning notice of February 26, 1991. Absences on December 16, 23, 24, 26, and 30 are cited. The notice further includes a warning for the offense of Cheatham's failure to call in during his absence of December 24. There is no indication whether Cheatham was discharged after this last warning notice, but, at least, he was not discharged after his absences of December 16, 23, 24, or 26, 1991, which followed his seventh warning notice. (This, of course, was a great deal more absenteeism after many more warning notices than that which Ancar experienced.)

34. On March 4, and April 1, 1991, paint department employee Gregory Lee (9168) was issued two warning notices for absenteeism. On June 10, 1991, Lee was issued his third warning for missing 5 days in May, and the notice includes a warning for failure to call in on three of those five dates. This warning notice concludes: "You are hereby warned for absenteeism." On October 23, 1991, Lee was issued his fourth warning notice for three absences in a 30-day period.

35. On January 6, 1992, Lee was issued his fifth absenteeism warning notice for missing 3 days during the proceeding December.

36. On March 5, and April 29, 1991, paint department employee Michael Himel (10138) was issued warning notices for absenteeism. (Both of these warning notices cited five absences within 30-day periods). On May 15, 1991, Himel was issued his third warning notice for three absences within the month of May. The warning notice also includes a warning for the offense of failure to call in to the plant during two of those absences. On June 6, 1991, Himel was issued his fourth warning notice for absenteeism; three absences in a 30-day period are cited. The warning notice concludes: "Final Warning," and Himel was presumably still not discharged.

37. On March 5, 1991, paint department employee Tammie Long (10684) was issued a warning notice for five absences in a 30-day period. On June 5, 1991, Long was issued a second warning notice for six absences in a 30-day period; this notice also includes a warning for the offense of failing to call in on five of those six absences. The warning notice concludes: "Final Warning." On August 12, 1991, despite her prior express final warning and other warnings, Long was issued her third warning notice for absenteeism; six absences in a 30-day period are cited. The warning notice concludes: "You are warned of absenteeism." On September 9, 1991, despite her prior express final warning and other warnings, Long was issued her fourth warning notice for absenteeism. Absences on four dates in a 30-day period are cited; also the notice includes a warning for the offense of failing to call in on three of those four dates. The notice concludes: "Continue to miss work and action will be taken. You are warned of chronic absenteeism. Final warning."

38. On January 6, 1992, despite her prior express final warnings and other warnings, Long was issued her fifth warning notice in a year for absenteeism. The notice cites three absences and includes a warning for her failure to call in on two of those absences.

39. On January 23, 1992, again despite her prior express final warnings and other warnings, Long was issued her sixth warning notice for absences; absences on four different dates are cited.

40. On March 12 and May 8, 1991, employee 4823 (whose signature is illegible) was issued warning notices for absenteeism. On July 31, 1991, employee 4823 was issued his third warning notice for absenteeism; absences of July 2, 8, 10, 15, and 23 are cited. (That is, this employee was not issued a warning notice for his next three absences following his second warning notice.) On September 5, 1991, employee 4823 was issued his fourth warning notice for absenteeism within a 12-month period. Absences of August 6, 13, 26, and 27 and September 3 are cited. The warning notice concludes:"You are hereby warned of absenteeism."

41. On March 12 and June 10, 1991, paint department employee K. Butler (1288) was issued warning notices for absenteeism. On August 12, 1991, Butler was issue his third warning for absenteeism; absences of July 15, 16, 17, 24, and 29 and August 7, 1991, are cited. The notice concludes: "You are warned of absenteeism." On October 15, 1991, Butler was issued his fourth warning notice for absences. Three dates are cited, and the warning notice concludes: "You are hereby warned of chronic absenteeism. Continue to miss time and disciplinary action will be taken. Final Warning."

42. On December 6, 1991, despite his prior express final warning and other warnings, Butler was issued his fifth warning notice in 7 months for absenteeism; absences of November 4, 19, 20, and 21 and December 3, 1991, are cited. The warning notice concludes: "You are hereby warned of chronic absences."

43. On April 29 and May 13, 1991, paint department employee Reginald Ratliff (11963) was issued warning notices for absenteeism. On October 23, 1991, Ratliff was issued his third warning notices for 3 days of absence during the month of October. On December 13, 1991, Ratliff was issued his fourth warning notice for absenteeism. The notice further includes a warning for failure to call in on 3 of the 4 days of absence cited. The warning notice concludes: "You are hereby warned of absenteeism. Continue to miss work and action will be taken."

44. On May 10, August 20 and October 19, 1991, paint department employee Gregory Martin (4290) was issued three warning notices for absenteeism. (The first of these warning notices covered nine absences; the second covered four.) On October 23, 1991, Martin was issued his fourth warning notice for absenteeism in a 12-month period.

45. On March 19, 1992, Martin was issued his fifth warning notice for absenteeism in a 12-month period; the dates of February 21 and 28 and March 2 and 16 are cited; also included in this one warning notice is a warning for "Failure to call into the main paint office during all of your absences." The warning notice concludes: "Final Warning." (Martin was still not discharged; on November 16 and December 3, 1992, Martin was issued more warning notices for absenteeism.)

46. On May 17 and October 31, 1991, paint department employee Jay Dean (2265) was issued warning notices for absenteeism. On December 6, 1991, Dean was issued a third warning

notice for absenteeism. This notice includes a warning for the offense of failing to call in during any of the absences cited. The notice concludes: "You are hereby warned of chronic absenteeism. Continue to miss work and action will be taken." On December 31, 1991, Dean was issued his fourth warning notice for his absences on December 10, 13, 24, and 31.

47. On January 13, 1992, Dean was issued his fifth warning notice for absenteeism in the year that began on May 17, 1991.

48. On September 17, 1992, Dean was issued his fifth warning notice for absenteeism in the period which began with his warning notice of October 31, 1991. Citing absences of August 3, 11, and 19, and September 3 and 8, 1992, the warning notice concludes: "Violation of any other Company rules or regulations will result in your termination. Final warning," and Dean was presumably still not discharged.

49. On May 26 and June 10, 1991, paint department employee Solomon DuRousseau (10525) was issued warning notices for absenteeism. On August 16, 1991, DuRousseau was issued his third warning notice for absenteeism; absences of July 29 and August 16 are cited. (This warning notice was not marked "Final"; instead it was marked: "You are warned of absenteeism.") On October 23, 1991, DuRousseau was issued his fourth warning notice for absenteeism; absences of October 2 and 14, and consecutive absences of October 7, 8, 9, and 10, are cited. (The consecutive absences, of course, constituted a violation of major offense-1, but they were not made the subject of a separate warning notice, and this warning notice was marked for general offense-1, only.) The warning notice is not marked "Final," or otherwise marked.

50. On December 13, 1991, DuRousseau was issued his fifth warning notice for absenteeism; absences of November 12 and 25 and December 5 are cited. The warning notice concludes: "You are hereby warned of chronic absenteeism."

51. On January 6, 1992, DuRousseau was issued his sixth warning notice for absenteeism; absences of December 16, 20, 30, and 31 are cited. The warning notice is not marked "Final," or otherwise marked.

52. On July 23, 1992, DuRousseau was issued his fifth warning notice for absenteeism within the 12-month period that began with his August 16, 1991 warning notice. Absences of July 20 and 22 and "other" are cited. The notice concludes: "You are hereby notified that you have been absent an excessive amount of work [days]. Should you continue to do this, immediate disciplinary action will be taken." That is, DuRousseau was still given another chance. (And DuRousseau was still not discharged for three more absences that he later had beginning on January 27, 1993; instead, he was then given another warning notice marked: "Final Warning—Violation of any other Company rules or regulations will result in your termination.")

53. On May 29, 1991, paint department employee Daniel Goodman (2445) was issued a warning notice for three absences in the month of May. Goodman's prior record of absenteeism is not in evidence, but the warning notice concludes: "You are being warned that chronic absenteeism can result in loss of employment with this department." On August 12, 1991, despite this warning of finality, Goodman was issued his second warning notice for absenteeism; on that warning notice four absences within a 30-day period are cited. The warning notice concludes: "You are warned of absenteeism." On August 27, 1991, Goodman was issued his third warning notice, this time for four more absences. The notice also includes a warning for the offense of failing to call in on each of those 4 days of absence. The warning notice concludes: "You are hereby warned of chronic absenteeism." On October 7, 1991, Goodman was issued his fourth absenteeism warning notice for three more absences. The warning notice concludes: "Continue to miss work and you will be terminated for chronic absenteeism. Final Warning."

54. On June 25, September 5 and 18,1991, paint department employee Gerrod Brown (6908) was issued warning notices for absenteeism. On February 11, 1992, Brown was issued his fourth warning notice for absenteeism. Five absences in a 30-day period are cited, and the notice concludes: "If you miss any more work time or received another citation for any reason, you will be terminated.—Note—employee has four citations in folder.—Final Warning."

55. On July 31, 1991, paint department employee Michael Robinson (11897) was issued one warning notice for six absences in the month of July. On December 6, 1991, Robinson was issued a warning notice for four more absences. The latter notice also includes a warning for the offense of failing to call in during any of the absences. The warning notice concludes: "Continue to miss work and action will be taken by the main paint office." On March 31, 1992, Robinson was issued his third warning notices for absenteeism; four absences within a 30-day period are cited. (This, of course, is not a case of four warning notices for absences, but it is a case of three warning notices covering 14 absences which could have been the subject of four separate warning notices under general offense-1 of the Avondale Employees' Guide, and I find that it is appropriate to include this case in this Appendix. The discharges of the alleged discriminatees, of course, are defended on the bases of far fewer absences.)

56. On August 23 and September 18, 1991, paint department employee Oscar James (13162) was issued warning notices for absenteeism. On October 28, 1991, James was issued his third warning notice for absenteeism; absences of September 30 and October 16 and 28 are cited. On January 2, 1992, James was issued a fourth warning notice for absenteeism; absences on December 16, 20, 26, 27, and 31 are cited.

57. On March 11, 1992, James was issued his fifth warning notice for absenteeism; absences of March 9, 10, and 11 are cited. This warning notice was issued under general offense-1 of the Avondale Employees' Guide, not major offense-1 (three consecutive absences) as it could have been.

58. On June 15, 1992, James was issued his sixth warning notice for absenteeism in a 12-month period; the dates of May 15 and June 2, 11, and 15 are cited. James was still not discharged, a fact shown by another warning notice (for tardiness) that James was issued on June 24, 1992.

59. On September 9, 1991, paint department employee Leonard Scott (4814) was issued a warning notice for missing six days in a 30-day period. The notice concludes: "You are warned of absenteeism." On October 25, 1991, Scott was issued his second warning notice for absenteeism; four absences in a 30-day period are cited. The notice also includes a warning for the offense of failing to call in on any of the days Scott absences. (It is to be noted that these two warnings could well have been the subject of three separate warning notices for absenteeism as they involved 10 days of absence.) On December 6, 1991, Scott was issued his third warning notice for absenteeism. Six days of absences within a 30-day period are cited. The warning notice concludes: "You are hereby warned

of chronic absenteeism. Continue to miss work and action will be taken by the paint office." On January 6, 1992, Scott was issued his fourth warning notice for absenteeism; four absences are cited.

60. On February 5, 1992, Scott was issued his fifth warning notice, this one for seven absences in a 30-day period. The notice further includes a warning for the offense of failing to call in to the main painting office during all of these absences. The warning notice concludes: "You are hereby warned [that] upon your next unexcused absence you will be terminated. Final warning."

61. Despite the categorical warning in his fifth warning notice, on May 29, 1992, Scott was issued a sixth warning notice, this time for six absences within a 30-day period. This last warning notice concludes: "Violation of any other Company rules or regulations will result in your termination. Do not continue to miss time at work or action will be taken by the paint office."

62. On September 9 and October 23, 1991, paint department employee Alvin Roussel (4122) was issued warning notices for absenteeism. On December 6, 1991, Roussel was issued his third warning notice for absenteeism; the dates of November 21 and December 2 and 6 are cited. On January 6, 1992, Roussel was issued his fourth absenteeism warning notice within a twelve-month period; the dates of December 9 and 16, 1991, and January 3, 1992, are cited. (I cannot tell if Roussel was then discharged, but he was plainly not discharged after his two absences which followed his third warning notice for absenteeism. The treatment of Roussel is another to be contrasted with that of Ancar whom Respondent contends was discharged because he was absent twice after his second warning notice for absenteeism.)

63. On October 11 and December 6, 1991, paint department employee number 1156 (name illegible) was issued two warning notices. The first of these is for four absences within a 30-day period; the second is for five. The latter warning notice concludes: "You are hereby warned of chronic absenteeism. Continue to miss work and action will be taken by the paint office." On March 16, 1992, this employee was issued his third warning notice for three absences in a 30-day period. The notice further includes a warning for the offense of failing to call in "during all of your absences." The warning notice concludes: "You are hereby warned of excessive absenteeism. Final Warning." (This, of course, is not a case of four warning notices for absences, but it is a case of three warning notices covering 12 absences. Again, these absences could have been the subject of four separate warning notices under general offense-1 of the Avondale Employees' Guide, and they constitute a far worse record than that upon which Respondent defends the discharges of Ancar and the other alleged discriminatees. I therefore find that it is appropriate to include this case in this Appendix.)

64. On October 19 and October 23, 1991, paint department employee Joseph Bonier (3910) was issued warning notices for absenteeism. On November 7, 1991, Bonier was issued his third warning notice for absenteeism. The warning notice cites absences of October 28 and 29 and November 4 and 6, 1991. The notice further includes a warning for the offenses of not calling in on each of those dates. The warning notice concludes: "Continue to miss work and you will be terminated for chronic absenteeism. Final warning." On December 6, 1991, despite his prior express final warning and other warnings, Bonier was issued his fourth warning notice for absenteeism. The notice cites his absences on nine dates; to wit: November 8, 12, 13, 18, 25, and 26 and December 2, 3, and 4. (Of course, these nine absences could have been the subject of three separate warning notices, the last of which would be for major offense-1 of the Avondale Employees' Guide, missing three consecutive workdays in a row. Also to be noted is the fact that these absences fell closely after Bonier's warning notice of November 7, but they caused no more than essentially the same comment on the warning notice; to wit: "You are hereby warned of chronic absenteeism. Continue to miss work and you will be terminated for chronic absenteeism by the paint office." Bonier's case is to be specifically compared with that of alleged discriminatee Marie Joseph whom Respondent contends was discharged because she was absent once within 7 workdays after having received a warning notice for absenteeism.)

65. On January 6, 1992, despite his prior express final warnings and other warnings, Bonier was issued his fifth warning notice for absenteeism. Cited are absences of December 27, 30, and 31, 1991, and January 3, 1992. (Because Departmental Superintendent Bourg signed this warning notice, it is unlikely that Bonier was also discharged. If, however, Bonier was terminated upon issuance of this last warning notice, it is plain enough that he still was not discharged until he had cumulated at least three absences after his fourth warning notice within a 3-month period.)

66. On March 13 and October 30, 1992, paint department employee number 9861 (name illegible) was issued warning notices for absenteeism. On November 11, 1992, employee 9861 was issued his third warning notice for absenteeism in the year. The notice cites absences of October 13 and 19, and November 9 and 11, 1992. The notice further recites that the employee failed to call in to the paint office on November 11. The warning notice concludes: "Violations of any other Company rules and regulations will result in your termination. Final warning notice." On January 27, 1993, despite his prior express final warning and other warnings, employee 9861 was issued a fourth warning notice for his absenteeism within the 12-month period that began March 13, 1992. After noting absences of January 4, 14, and 25, 1993, the warning notice concludes: "Final warning. Violation of any other Company rules or regulations will result in your termination." (Employee 9861 was still not discharged; in fact, on May 21, 1993, despite his prior express final warnings and other warnings, he was issued another warning notice for absenteeism, his fourth in the 12-month period which began with his warning notice of October 30, 1992. After noting absences of April 13 and 28, and May 21, that warning notice recites: "You are hereby notified that you have been absent an excessive amount of workdays. Should you continue to do this immediate disciplinary action will be taken." This last warning shows that the employee was even then not discharged.)