

Rankin & Rankin, Inc. and Chauffeurs, Teamsters & Helpers Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO. Case 20-CA-27717

March 24, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On April 17, 1998, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent 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 and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs if they selected the Union as their bargaining representative. We affirm this finding.

On March 13, 1997,³ in the early stages of the Union's organizing campaign, the Respondent held a group meeting for employees and supervisors to talk about the Union. The Respondent's president, Cheryl Rankin, although present, did not speak at the meeting. The credited evidence shows that Lenond Lewis, the Respondent's chief executive officer, told employees, inter alia, that, if the union demanded higher wages and the company disagreed, the union could call a strike and the em-

ployees could be replaced by new employees who would be hired for less money. Lewis' remarks were made only 2 days after President Rankin, the Respondent's top management official, had approached employees in the lunchroom and coercively threatened them, including Chris Folkman. Folkman, a leading union organizer, was unlawfully discharged just prior to the March 13 meeting.⁴ The judge found that Lewis' remarks, given their context, were unlawful. We adopt the judge's analysis.

Contrary to our dissenting colleague, we find that, notwithstanding the 2-day separation, the blatant "close the doors" threat made by the Respondent's president, Cheryl Rankin, is a relevant consideration in evaluating whether a threat of reprisal was implicit in CEO Lewis' statement about the fate of employees if a union came in and a strike ensued. Like Rankin, Lewis was a high-ranking management official, and he, in fact, directly reported to her. Rankin's presence at the March 13 meeting and her failure to speak out to clarify Lewis' statements about the Union conveyed to employees that the Respondent was speaking with one voice in connecting job loss to the ongoing union activity. Since Rankin's earlier statement had clearly shown that the Respondent was predisposed to retaliate against union activity, and since Lewis made his remarks within hours of unlawfully discharging union supporter Folkman, we find ample basis for concluding that Lewis' statement about hiring workers for less money to replace employees who joined a union strike would, in the words of the Board in *Eagle Comtronics*, 263 NLRB 515, 515-516 (1982), "be fairly understood as a threat of reprisal against employees."⁵

ORDER

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

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

⁴ As more fully discussed in his decision, the judge found that Rankin's threat of plant closure and Folkman's discharge violated Sec. 8(a)(1) and Sec. 8(a)(1) and (3), respectively.

⁵ Although, as our dissenting colleague notes, in *Mack's Supermarkets*, 288 NLRB 1082 fn. 3 (1988), and *Neo-Life Co. of America*, 273 NLRB 72 (1984), the Board noted that the statements about replacing strikers occurred in the same conversation with other statements found to be unlawful threats, neither decision decrees a "single conversation" rule. Rather, the issue is whether there is a context in which the striker replacement statement would reasonably be perceived as a threat of reprisal rather than a dispassionate, albeit incomplete, statement of the law. For the reasons stated above, we think such a context was shown here.

Having found that Lewis' statement about striking employees amounted to an unlawful threat of job loss, we find it unnecessary to pass on whether his remarks about "people in the union [who] would have seniority over" the Respondent's employees were unlawful because such an additional finding would not affect the order in this case.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

At fn. 17 of his decision, the judge erroneously stated that employee Chris Folkman had never drilled base plates before being asked to do so by the Respondent on March 12, 1997. The record reveals, however, that Folkman had drilled two or three base plates before March 12. This error by the judge does not affect our decision. Also, the judge in his decision at times incorrectly referred to employee Todd DeGraff as "McGraff."

Member Brame notes that there were no exceptions filed to the judge's findings that Production Manager Chris Koski's comments to employees in the lunchroom on March 11, 1997, and Supervisor Jeff Lovejoy's comment to employee Todd DeGraff on March 14, 1997, violated Sec. 8(a)(1) of the Act.

² We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

³ All dates are in 1997, unless otherwise indicated.

“(a) Within 14 days from the date of this Order, offer Chris Folkman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for all his earnings lost as a result of its discrimination against him in the manner set forth in the remedy section of this decision.”

2. Substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, post at its Roseville, California facility copies of the attached notice marked “Appendix.”⁶¹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1997.”

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

MEMBER BRAME, dissenting in part.

I agree with my colleagues’ adoption of the judge’s decision, but with the following one exception. I would reverse the judge and find that the Respondent’s chief executive officer Lenond Lewis’ comments to employees on March 13, 1997,¹ did not violate Section 8(a)(1) of the Act.

On March 13, the Respondent held a group meeting to discuss union organizing. Several managers and supervisors attended this meeting, but Lewis was the only one to speak on behalf of the Respondent. He told the employees that he wanted to explain “some of the benefits or non-benefits” of being represented by a union; that if the union demanded higher wages and the company disagreed, the union could call a strike and the employees could be replaced by new employees who would be hired for less money; and that, if the employees chose to be represented by a union, other union members would have greater seniority “and they’d come in and work for us and we’d have to wait for other jobs.” Lewis also told the employees “that he was not opposed to anybody being pro-union or against the Union. Either way it was fine as far as the company was concerned.” Two days before this meeting, the Respondent’s president, Cheryl Rankin, had made a threat to several employees in the

lunchroom that she would close the facility rather than let the Union in.

In *Eagle Comtronics*, 263 NLRB 515, 515–516 (1982), the Board found that an employer’s incomplete statement of the law concerning the permanent replacement of employees in the event of an economic strike is not coercive “[u]nless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats.” In that case, during preelection meetings with employees, Manager Heinrich told them that, in the case of an economic strike, strikers “could be replaced with applications on file.” The Board found that Heinrich’s statement, although not a full recitation of the employees’ *Laidlaw*² rights, was not coercive because no threat was implied and no other unlawful statements had been made by Heinrich at these meetings. Accord: *Reno Hilton*, 320 NLRB 197, 208 (1995) (no violation based on the employer’s statement that “if employees went out on strike, management could hire permanent replacements”).

Relying on *Eagle Comtronics*, the judge found that Lewis’ remark about strike replacements was unlawful because it occurred 2 days after President Rankin had unlawfully threatened employees with plant closure; Rankin had attended the March 13 meeting; and Lewis frightened employees with job loss when he spoke about union members with greater seniority filling jobs ahead of current employees. Unlike my colleagues, I am troubled by the judge’s reasoning. As the United States Court of Appeals for the District of Columbia Circuit recently counseled, albeit under different factual circumstances, “[I]n evaluating an employer’s conduct under Sec. 8(a)(1), the Board must consider ‘whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate.’ [Citation omitted.] In this case, the circumstances raise such a weak inference of intimidation that it is an intolerable stretch to say that substantial evidence supports it.” *McClatchy Newspaper v. NLRB*, 131 F.3d 1026, 1036 (1997).

The threat of plant closure on March 11 was communicated by a different speaker during a different conversation with a different audience on a different day.³ Further, Rankin’s statement was predicated on the notion of unilateral employer action to shut down, while Lewis’ remark presupposed continued operation and addressed the Respondent’s lawful options in the event of union-initiated action.

I also do not adopt the judge’s implicit finding that Lewis’ remarks about other union members with greater

² *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1969).

³ *Cf. Mack Supermarkets*, 288 NLRB 1082, 1091–1092 (1988), and *Neo-Life Co. of America*, 273 NLRB 72 (1984) (unlawful strike replacement statements were made during a single conversation which also included other threats communicated by the same employer representative).

¹ All dates are in 1997, unless otherwise indicated.

seniority who would “come in and work for us and we’d have to wait for other jobs,” was outside the protection of Section 8(c) of the Act. First, this statement constituted, at most, a misrepresentation under the Board’s *Midland*⁴ standard, which the employees were capable of evaluating on their own. Second, in referring to the workings of the Union’s seniority system, Lewis was discussing matters within the Union’s control, not the Respondent’s. Thus, there can be no finding of a violation of Section 8(a)(1) because the action suggested by Lewis was not within the Respondent’s power to carry out.⁵

In these circumstances, I would dismiss this allegation involving Lewis’ March 13 comments.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT issue written warning notices to our employees because they engaged in union or other protected concerted activities.

WE WILL NOT discharge our employees because they engaged in union or other protected concerted activities.

WE WILL NOT interrogate our employees about their union sympathies and activities.

WE WILL NOT threaten our employees with closure of our business because they engaged in union or other protected concerted activities.

WE WILL NOT disparage our employees, who engages in union or other protected concerted activities, in front of

⁴ *Midland National Life Insurance*, 263 NLRB 127 (1982) (*Midland* found misrepresentations insufficient even to set aside an election, a tighter standard than for finding unfair labor practice conduct. See *General Shoe*, 77 NLRB 124, 127 (1948)). Further, applying the *Midland* standard in *Metropolitan Life Insurance Co.*, 266 NLRB 507, 508 (1983), the Board found permissible an employer’s statement that the union could fine members as well as nonmembers.

⁵ *Hampton Inn*, 309 NLRB 942 (1992) (no violation based on employer’s statement about strike violence by union supporters); *Sears Roebuck & Co.*, 305 NLRB 193 (1991) (no violation based on employer’s description of the collection of union dues by the use of violent union activity); and *Hickory Creek Nursing Home*, 295 NLRB 1144 (1989), enf. 924 F.2d 1057 (6th Cir. 1990) (no violation based on the employer’s indication of how the union might spend employees’ dues payment).

other employees in order to discourage the latter employees from supporting a union.

WE WILL NOT threaten our employees with loss of their jobs if they select a union as their collective-bargaining representative.

WE WILL NOT create, amongst our employees, the impression that we are engaging in surveillance of their union or other protected concerted activities.

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

WE WILL, within 14 days from the date of the Board’s Order, offer Chris Folkman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any earnings lost as a result of our unlawful discharge of him.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to Chris Folkman’s unlawful written warning notices and unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful written warning notices and discharge will not be used against him in any way.

RANKIN & RANKIN, INC.

William Baudler, Esq., for the General.

Charles W. Nugent III, Esq. and Timothy J. Long, Esq. (Orrick, Herrington & Sutcliffe), of Sacramento, California, appearing on behalf of the Respondent.

Alan Daurie, appearing on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. An original and a first amended unfair labor practice charge, in the above-captioned matter, were filed by Chauffeurs, Teamsters & Helpers Local Union No. 150, International Brotherhood of Teamsters, AFL–CIO (the Union) on March 17 and May 1, 1997,¹ respectively. Based on the unfair labor practice charges, on June 13, the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint, alleging that Rankin & Rankin, Inc (Respondent) engaged in, and is engaging in, acts and conduct, violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, the above-captioned matter was brought to trial before me on July 15 and 16, 1997, in Sacramento, California. At the hearing, all parties were afforded the opportunity to examine and to cross-examine every witness, to offer into the record any relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and counsel for Respondent and have been carefully considered. Accordingly,

¹ Unless otherwise noted, all events occurred during 1997.

based on the entire record here, including the posthearing briefs and my evaluation of the testimonial demeanor of the several witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California corporation, has an office and a place of business located in Roseville, California (the facility), and, at that location, is engaged in business in the steel and sheet metal fabrication industry. During the calendar year ending December 31, 1996, in the normal course and conduct of its business operations, Respondent performed services, valued in excess of \$50,000, for customers located in States other than the State of California. Based on the foregoing, Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. ISSUES

The complaint alleges, and the General Counsel sought to establish, that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by issuing warning notices to and terminating its employee, Chris Folkman, because he engaged in activities in support of the Union. The complaint further alleges, and the General Counsel further sought to establish, that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by interrogating its employees about their activities in support of the Union, by creating the impression amongst its employees that it was engaging in surveillance of their union activities, by threatening to close its facility if its employees continued to engage in protected concerted activities, by disparaging employees, who were engaging in activities in support of the Union, in front of their fellow employees, and by threatening employees with loss of employment because they engaged in activities in support of the Union. Respondent denies the commission of any of the alleged unfair labor practices and asserts that it terminated employee Folkman for valid business considerations.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, a California corporation, is engaged in the steel and sheet metal fabrication industry, manufacturing and installing store fronts and canopies for gas stations and car washes. The record establishes that Cheryl Rankin² is the president and her husband Don is the vice president of the corporation and that the Rankins have incurred a substantial indebtedness in financing their business venture.³ Also, Lenond Lewis is Respondent's chief executive officer (CEO); Chris Koski is the production manager; Timothy Webster is the foreman over the structural steel department; and Jeff Lovejoy is the foreman over the sheet metal fabrication section. The parties stipulated that Cheryl Rankin, Lewis, Webster, and Lovejoy are supervi-

² Cheryl Rankin is responsible for all bookkeeping operations and for supervising the office work.

³ Cheryl Rankin testified that, as of March 1997, she and her husband were \$2,500,000 to \$3 million in debt. However, the record was not clear whether such is a personal or a corporate debt.

sors within the meaning of Section 2(11) of the Act. The record further establishes that the floor of the manufacturing facility is divided into steel fabrication and sheet metal fabrication sections, with an equal number of employees working in each, and that the sections are physically divided by vertical supports and shelving.⁴

Alleged discriminatee Chris Folkman, the son of a business agent for the Union, began working for Respondent in August 1996 as a "steel shop laborer" in the steel fabrication department, where he worked until his termination on March 13, 1997. Although unskilled in fabrication work, Folkman was immediately assigned the task of cutting out I-beams and columns on a steel saw. After performing this work for 2 months, he was assigned to work on the Piranha machine, utilized for punching holes in and bending steel, on which he worked until his termination. Two of Respondent's other employees, Todd DeGraff and Jason Bos, have been Folkman's friends since high school and, during the course of conversations in the fall of 1996, the three employees would customarily discuss problems at work—in particular, Respondent's lack of paid vacations and sick leave and its policy of paying overtime only after 40 hours of work in a week rather than after 8 hours of work in a day. According to Folkman and DeGraff, commencing in November or December 1996 and continuing through February 1997, these conversations included the subject of union representation and the merits and benefits of such. Eventually, according to DeGraff, they spoke about "a meeting to explain to the other workers . . . the benefits and what [union representation had] to offer," and, as his father was employed by the Union, Folkman suggested that labor organization as the employees' potential bargaining representative. Taking the initiative, the alleged discriminatee arranged for an employee meeting with representatives of the Union at his home after work on March 13 and, within a week of the meeting, orally informed other employees of the meeting and its subject. Folkman testified that, after mentioning the meeting to several employees, "I had about five or six people committed to attend." Besides arranging this employee meeting, Folkman also arranged for the Union to send a letter, identifying him as a union supporter, to Respondent.⁵ On March 11, Respondent received the Union's letter, which was addressed to Cheryl Rankin. Typed on stationery bearing the Union's name, signed by Alan Daurie, a business representative, and dated March 7, the letter stated:

Please be advised that Chris Folkman wishes to be identified as a Teamster supporter and Employee Organizing Committee member. It is Chris Folkman's intent to organize [Respondent] into the Teamsters Union. This list does not claim to include all Teamster supporters working at [Respondent]. This letter is to alert you that Chris Folkman is to be given all legal rights due for his protected activities. Violations of the [Act] and other laws may result in charges being filed.

⁴ In the steel fabrication section, Respondent's employees manufacture the support columns for the canopies, and, in the sheet metal department, the ACM panels for the canopies are fabricated. Cheryl Rankin estimated that, in March, Respondent employed approximately 20 individuals in its fabrication shops.

⁵ Folkman explained to Jason Bos that the letter had a dual purpose—"to inform the company that he would be helping to establish a union shop" and to "give him some grounds with job security."

Rankin read the letter “just before lunch,” showed it to her husband,⁶ and, carrying the letter and the 1997 W-2 forms for herself and her husband, walked into the employee lunchroom in order “to find out what was going on.” Among the employees seated at tables and eating lunch at the time were Folkman, Bos, Darren Reynolds, Todd DeGraff,⁷ and Wyatt Ludwig. According to Reynolds, who worked for Respondent from December 1996 until he was terminated in May 1997 for excessive absences and who was able to identify the documents which Rankin was carrying as she entered the lunchroom, Rankin “walked over towards Chris, and asked him what they were all about, why he had done this to them, and what he was trying to do. . . . She said that [her husband] and herself had only made it on \$25,000 a year, that they couldn’t afford to give raises. And that they’d fight the Union if [the employees] tried to bring it in, and that they’d close the doors before . . . they’d ever have a union there.”⁸ Reynolds stated that he responded to Rankin, saying “that no one there felt like they had a lot of job security;” that Ludwig mentioned the amount of time he had been employed and said he “hadn’t got his scheduled raise;” and that Folkman also responded to her questions in a calm manner. At this point, Reynolds recalled, Rankin turned and walked out, and Chris Koski and employee Scott Zufelt entered; the witness did not hear what, if anything, Koski might have said. Folkman testified that, on entering the lunchroom, Cheryl Rankin approached him and placed the Union’s letter on the table in front of him. He looked down at the letter and turned to Rankin, and she asked, “Why?” According to Folkman, he explained about overtime and no paid vacations or sick leave.⁹ Rankin then placed the two W-2 forms on the table, and the forms read that each Rankin had earned \$20,000 in salary the past year. She said “that they put everything they have into the company, that they couldn’t afford a union.” Then, Rankin said, “[S]he wondered why people didn’t come to her first. She said that she would shut down her company before she would allow a union in her shop” and added “that she would fight it all the way.”¹⁰ Continuing, Folkman testified that Rankin then turned and left the room and that, a moment later, Koski and Zufelt entered. The latter asked what was going on, “and Wyatt Ludwig . . . replied . . . that Cheryl was just in the lunchroom, threatening to shut down the company if we brought a union in.” To this, Chris Koski¹¹ said, “They will shut it down.” And

⁶ According to Rankin, her husband does not become involved in employee relations, a matter which is left to Lewis and the immediate supervisors.

⁷ While Chris Folkman did not identify him as being present, both Cheryl Rankin and Darren Reynolds testified that DeGraff was in the lunchroom when Rankin entered the room on March 11. DeGraff was called as a witness by counsel for the General Counsel but was asked no questions regarding what occurred in the lunchroom that day.

⁸ Reynolds stated that Rankin stood “right in front of [Folkman], right across from myself;” that she “was not happy;” and that he was able to ascertain this from “just her facial expression, her tone of voice. It wasn’t a loud voice, it was just not a happy one.”

⁹ During cross-examination, Folkman recalled that, besides himself, Reynolds, Ludwig, and Bos replied to Rankin’s questions.

¹⁰ Folkman described Rankin as being upset but speaking in a normal tone of voice.

¹¹ Respondent denies that Chris Koski is a statutory supervisor. In this regard, Len Lewis testified that, prior to becoming the chief executive officer of Respondent, he had been the production manager, a supervisory position and that when he became the CEO of the Company in late 1996, he “moved” Koski into his former position. In this

then he said that, “I can’t believe we’ve got a bunch of [fucking] queers trying to pull this stuff.”¹²

Cheryl Rankin’s version of what occurred is not dissimilar to the foregoing. She recalled that, after approaching Folkman and placing the Union’s letter on the table in front of the employee, “I asked him why do you think we need this, what’s wrong Chris looked at me and he said, good; it finally got here. I said what’s this all about? What is the problem?” Folkman replied that the employees “have a lot of complaints. We have a lot of things that we are not happy with” and mentioned vacation pay, sick leave, and payment of promised raises. Bos interrupted and emphasized that employees had not received scheduled and promised pay raises. Rankin replied, saying that Respondent was changing its “system” for paying raises and that employees had received fully paid benefits on January 1. Folkman responded that “if somebody works for you, you owe them this.” According to Rankin, she became irritated at Folkman’s last comment, “and I said that I would close this place. I would give up. I can’t deal with it anymore.”¹³ Employee Bos, who testified on behalf of Respondent, stated that he was present during this lunch encounter but could only recall that various individuals spoke, that he expressed “a few concerns” about raises and future benefits, and that he and Folkman had “mutual” concerns.

Rankin further testified that, immediately after leaving the lunchroom, she went to Len Lewis’ office and showed him the Union’s letter. While professing an inability to recall what she said about the letter, Rankin did recall not disguising her opposition to the Union and instructing Lewis to schedule a meeting with Respondent’s employees. “I wanted him to get to the bottom of what the problem was and answer any concerns or questions [the employees] might have” and to find “solutions” in order to make the employees happy and for Respondent to avoid dealing with the Union. She added that she put the Union matter “into Lewis’ hands as he “is the person I go to help me solve problems.”

Chris Folkman reported for work the next morning, March 12, and began working on the Piranha machine, and “I had been there no more than an hour, when Tim Webster came up to me and told me that he was going to have me drill base plates that day,”¹⁴ using the magnetic drill.¹⁵ Webster added that there

regard, Cheryl Rankin announced to Respondent’s employees that Koski would be taking Lewis’ place and she conceded that Lewis’ former position was a supervisory position; Tim Webster and Jeff Lovejoy, both admitted statutory supervisors, report directly to Koski for scheduling and work assignment purposes; and Koski refers to himself as the “shop foreman.” Moreover, the record reveals that Koski assigns work to shop employees, reassigns them from job to job when necessary, requests that employees work overtime, approves requests for sick leave or vacation leave, and issues discipline to employees.

¹² While his memory of the lunchroom incident was limited, DeGraff agreed that Koski termed the union supporters fucking queers and that he was “ranting and raving” about the Union.

¹³ Questioned by Respondent’s counsel as to why she made such a comment, Rankin averred that “too many things . . . were beating” on her that month, including “I had an employee that I trusted back stab me.”

¹⁴ According to R. Exh. 4, Folkman’s timecard for March 12, he worked 3 hours on the Piranha machine that day.

¹⁵ Folkman testified that the drill is normally operated by employee, Kevin O’Connor, but that O’Connor “was sweeping the floor” during that morning.

were “upcoming jobs” which would require many base plates and that he needed 80 of them drilled¹⁶ and ready for use.¹⁷ The record reveals that this particular machine is a 50- to 60-pound portable drill with an electromagnet attached at the bottom; that base plates are inch and a quarter thick, rectangular, 75- to 80-pound pieces of steel, which form the anchors for the columns of the canopies; that, depending on the size of the hole and the thickness of the steel through which the bit must bore, different size drilling bits are utilized;¹⁸ and that, for drilling purposes, a base plate is placed on top of two steel saw horses, the center shaft of the drill bit is aligned over a punch mark through which the hole is to be drilled, the magnet is switched on in order to hold the base plate in place, the drill itself is then turned on and slight pressure is applied to the wheel, which controls the drill bit, to ensure that the bit drills through the steel. That morning, the undrilled base plates were stacked on a pallet, and Folkman placed one on the steel saw horses, obtained the correct size drill bit¹⁹ from a toolbox located in a cabinet and inserted it in the drill, aligned the drill over a punch mark in the base plate, switched on the magnet and the drill, and started drilling the first hole. However, “I couldn’t drill through. So, I went and got Tim . . .” to come and help. According to the alleged discriminatee, “it looked like [Webster] was trying to figure out what was going on . . . what was wrong. And then he . . . put all of his weight on the wheel that lowers the drill bit . . . He was up on his tip toes, as if he was trying to force down all of his weight on to the wheel” that turns the drill bit. Webster then told Folkman to skip drilling through the hard spots in the base plates, and, thereafter, as he proceeded to drill holes in the base plates that day, Folkman utilized “just enough pressure so that the drill bit would keep biting the steel.” After a while, as he drilled into a base plate, “I broke a bit . . . and it broke before I knew it was hard or what . . . the drill stopped for like a tenth of a second and then it just snapped . . . it just shattered” into three large and several smaller pieces. Folkman walked over to Webster and showed him the pieces of drill bit, and, without examining the pieces of the drill bit, the latter said, “[T]here’s another bit in the drawer, you can go get that and keep drilling.” The alleged discriminatee then obtained what he characterized as another used drill bit, one which was coated in oil and not wrapped, from the same toolbox, inserted the drill bit into the drill and continued drilling base plates, without incident, for the remainder of the day.²⁰

¹⁶ Four holes are drilled through each base plate.

¹⁷ Folkman testified that he had limited experience in operating the magnetic drill, having been assigned to operate it no more than 15 times over the course of his employment and for no more than an hour at a time. He added that he received no more than 5 minutes of instructions on how to operate the machine from Steve Gibson (consisting of how to turn the drill on and off and how to align the drill bit) and no instructions that morning on how to do the job. Further, he had never drilled base plates before, having previously used the machine to drill holes in thinner I-beams.

¹⁸ Apparently, a drill bit costs over \$100. According to Tim Webster, all drill bits are kept in a steel case inside an unlocked cabinet, and new ones are encased in “green plastic coating.” He added, “If it was used, it wouldn’t have that green plastic coating.”

¹⁹ According to Folkman, it was a used drill bit.

²⁰ Folkman estimated that he completed 12 base plates that day. He added that neither Webster nor anyone else approached with criticism regarding how he was using the drill.

On March 13, on reporting for work, Folkman told other employees, including Todd DeGraff, that “there wasn’t going to be any union meeting that night . . . because no one wanted to support it.” Folkman began working “over on my machine,” the Piranha; however, after no more than 10 minutes, Webster approached and told him to continue drilling base plates with the magnetic drill. Again, according to the alleged discriminatee, the regular drill operator, Kevin O’Connor, “was cleaning up . . . I believe he was sweeping the floor again, and I think he walked around the shop and picked up . . . pieces of wood laying around and stuff.”²¹ As requested, Folkman commenced drilling base plates, and after finishing “probably about five of them,” the second drill bit broke. “This time it just broke without even stopping . . . I’m drilling, and the next thing I know it was broken . . . [T]here was no time—as soon as the drill seized up, it broke . . . It broke in the plate,” on which he was drilling. Employee Steve Gibson observed what had occurred and immediately walked over to where Tim Webster was working. As Folkman approached Webster, he heard Gibson say “that it was not my fault, there’s nothing I could have done to avoid it.” Folkman showed Webster all the broken bit pieces, which were not stuck in the base plate; the two walked back to where the former had been drilling the base plate; and, after examining the base plate, Webster instructed him to remove the broken bit pieces from the base plate and to clean up the mess. Folkman specifically denied that Webster ever asked what had happened, ever accused him of operating the magnetic drill negligently, or investigated the matter in any way. Folkman did as Webster requested, and the latter then assigned him a new set of plans for work on the Piranha machine.

That afternoon, at approximately 1:30 p.m., Folkman noticed that no supervisors were on the shop floor, and there is no dispute that all were attending a meeting in the conference room. Later, after Folkman’s afternoon break, at approximately 3 p.m., Len Lewis approached and said he wanted to speak to him. Folkman followed Lewis into the conference room, and, after both were seated, Respondent’s CEO handed Folkman two warning notices, one dated March 11 and the other March 12, and a letter, dated March 12. The March 11 warning notice (G.C. Exh. 8), signed by Tim Webster, reads, as follows:

Warned Chris Folkman several times to quit conversing during company time. Chris was conducting personal business and preventing other Employees from doing their jobs at least (8) times today. This was Chris last chance to continue Employment with this company. I have told him if I had any more problems he would be let go. Given this set of circumstances I am prompting that Chris Folkman be fired as of 3-12-97.

The March 12 warning notice (G.C. Exh. 9), also signed by Tim Webster, reads, as follows:

Chris Folkman has broken two Hogen drill bits in a six hour period. Chris has been trained on the proper use to avoid breakage. Because of this incident I can no longer have Chris do one of the jobs he was hired for.

The letter, dated March 12 and signed by Lewis, is headed “substandard work performance, work rule violations” and reads, as follows:

²¹ Folkman denied that O’Connor operated a saw on either of the 2 days.

It has been brought to my attention that you have received another written warning. You have received several warnings to date. 1. Your first written warning was December 7, 1996 when you skipped a mandatory work day. You agreed in the employee warning report you received and signed the company statement concerning your violation of work rules was accurate. 2. Second you received a verbal warning on January 21, 1997 for repeatedly talking and interrupting others during work hours. 3. On January 29, 1997, Tim Webster sat down with you and told you that your performance was substandard and your attitude needed to improve. Tim told you that you would be terminated if as of now job performance and attitude did not improve. 4. On March 11, 1997, Tim Webster again spoke with you about engaging in personal business while on company time and preventing other employees from doing their jobs. 5. On March 12 & 13, 1997, you again have violated one of our work rules. You have broken two Hogen Bits, each costing the company \$106.00. Approximately two months ago, after you broke your first Hogen Bit, Tim informed you that if you broke another Hogen Bit you would be terminated. You have now broken 2 in the last 6 hours of work, this is not acceptable (And these latest incidents where in addition to others that have occurred in the past, e.g., failure to properly use punch dies on the Piranha). 6. Your behavior unfortunately seems to indicate an unwillingness to comply with company rules as does your unacceptable work performance. We have rules and we expect them to be followed. In light of the repeated warnings you have received regarding your deficient work performance and your failure to improve your performance, we have no other choice but to release you from employment with Rankin & Rankin Inc. effective immediately.

As to what occurred during the meeting, according to Folkman, "I looked at [the documents] and I began to point out different things on all three . . . that were not true. He proceeded to [say] who's he supposed to believe, me or a supervisor? That's why he has Tim as a supervisor, because he knows he can trust him. He [said] . . . he's never broken a jaw bit before . . . I [said] . . . that he was firing me because of my organizing efforts," and that what was in the documents "are not the actual reasons you're using to terminate me." Lewis did not reply to this. He then told Lewis that Webster never warned him that he needed to improve his work performance and challenged Lewis to look at surveillance tapes to verify his continued talking to other employees.

With regard to the March 11 warning notice, Folkman denied being aware of or seeing the warning notice until it was given to him by Lewis. Asked if Webster ever warned him about talking to other employees that day during work time, Folkman replied, "Not once."²² Further, asked if Webster ever told him any more problems and he would be fired, Folkman said, "[N]ot once had I ever been warned that I would be fired." He added that Webster himself would speak to employees while they worked. "He would just go around to different employees and kind of chit chat with them. He liked to talk about sports a lot . . . and he make bets with people on upcoming

²² Folkman averred that, for the last 2 weeks of his employment, "I made it a point to work extremely hard . . . Because I was planning on sending the Union letter to [Respondent] . . . I didn't want them to have any kind of legal excuse to terminate me."

sporting events during company time." Folkman added that, on a daily basis, Lewis would bet with him on sports events.

Turning to the termination letter, as to paragraph 1, Folkman conceded receiving a written warning in December 1996 regarding "a mandatory day that I had missed, it was a Saturday." He added that the lunch, on the day before, had been a Hawaiian-style meal, and "I woke up . . . with the stomach flu. So I called in and left a message on the machine . . . that I would not be able to come in that day." As to paragraph 2, Folkman denied the asserted January 21, 1997 verbal warning for talking to other employees. "That did not happen." Continuing, Folkman denied ever receiving any verbal warnings, for talking to other employees or interrupting employees while they worked, during his employment by Respondent.²³ Concerning paragraph 3, Folkman denied that such an incident ever occurred ("No, he did not sit me down and talk to me about those things") and termed the paragraph "an absolute lie."²⁴ With regard to paragraph 5 and what work rule he had violated, Folkman did not know the rule to which the letter referred. He recalled that Lewis "just told me that because of the warning they had put out . . . He said that I had broken two drill bits . . . in consecutive days. He said that . . . he doesn't know how that could happen, and that I was warned about it . . . [H]e never said that it was because I was negligent or malicious."²⁵ As to the last sentence of paragraph 5, Folkman steadfastly denied improperly using punch dyes on the Piranha machine. ("I know that I did not improperly use punch dyes and punches on the Piranha") and speculated that the accusation may refer to a time "when another employee broke a punch on the Piranha." He added that, at the time he was moved to the Piranha machine, of the 30 punches and dyes, "all but probably about five" were damaged to some degree.

At the conclusion of his meeting with Lewis, the alleged discriminatee left Respondent's facility. Later, as the remaining employees were finishing work, Jeff Lovejoy informed them that there would be a meeting in the conference room. Present were the employees, the supervisors, and Cheryl Rankin, and Len Lewis conducted the meeting. According to employee Todd DeGraff, Lewis began by asking if anyone had questions. No one asked a question, and "he said he wanted to talk to us about . . . union organization, that he was sure that Chris had talked to us about unions and he wanted to kind of have their

²³ Folkman did concede "there were a couple of times" that Webster motioned to him with his hand to stop talking. Folkman recalled another occasion "when [Webster] came up to Kevin O'Connor and myself and mentioned to us that he didn't care if we talked, but . . . just don't do it when we're really busy and not to let Don Rankin see us."

²⁴ Folkman stated that, in about January or February, "I heard a rumor . . . that my job was in jeopardy . . . that Tim was watching me on the surveillance camera to see if I was doing my job right." That day, he spoke to Lewis, who denied that Folkman's job was in danger and told him to speak to Webster. Folkman then spoke to Chris Koski, who said he knew nothing. The next morning, Webster called Folkman into his office "to talk to me about the rumors that I had heard . . . [Webster] said that there were no rumors going around. He said that he didn't have to look on the camera to see if I was doing my job right . . . He said, 'You're not going to get fired. You're a good employee, so don't worry about it.'"

²⁵ Specifically regarding broken of drill bits, the alleged discriminatee recalled that, in January or February, after Kevin O'Connor broke a bit on the magnetic drill, "Tim Webster came out and told everybody in the shop that . . . Don Rankin . . . told him to warn everybody the next person to break one would be terminated."

side known He said . . . he wanted to explain to us some of the benefits or non-benefits of having a union there. . . . He said that if we were to . . . try to get higher wages, that we'd all have to be fired and let go, that they'd hire new employees for less money. . . . He talked about seniority in the unions. If we were to go union . . . other people in the union would have seniority over us and they'd come in and work for us, and we'd have to wait for other jobs." During cross-examination, DeGraff agreed that what Lewis actually said was, if the Union demanded higher wages, the Company could disagree and, if the Company disagreed, the Union could call a strike. When asked if Lewis actually said employees would be replaced rather than fired in the event of a strike, DeGraff said he could not recall exactly what Lewis said. Darren Reynolds corroborated DeGraff that Lewis said that "if they did bring the Union in . . . union members [who] had more seniority than we had would take our positions and we'd be laid off." Jason Bos also testified about this meeting and recalled Lewis saying "that he was not opposed to anybody being pro-union or against the Union. Either way it was fine as far as the company was concerned." Asked if Lewis discussed what could happen in the event of a strike, Bos recalled Lewis saying that there could be a strike but added that "he didn't really go into detail about it." Finally, asked if there was discussion about people from other places having more seniority than him, Bos replied, "After the meeting . . . somebody made a statement that other people from the Union could be used in place of [our] employees because we were part of the Union; meaning that [Respondent] would not be the sole hiring facility." Bos added that the speaker was not a management official. Notwithstanding testifying extensively on behalf of Respondent, Lewis neither denied nor explained any of the comments, which were attributed to him during the March 13 employee meeting.

According to Todd McGraff, Respondent was aware of the union meeting, which was to have occurred at Folkman's home after work on March 13. Thus, McGraff testified that, the next day, near a table on which they were laying out some sheet metal, "my supervisor, Jeff Lovejoy, just asked me . . . 'How did the Union meeting go last night?'"²⁶ Also, McGraff identified a copy of Respondent's newsletter, *The Rankin Review*, which is distributed to its employees with their paychecks. He testified that the issue was published within days of Folkman's termination. In an article, entitled "Message from Cheryl," Respondent's corporate president, after explaining the "cons" of union representation, wrote, in part:

First let me tell you how my last two couple of weeks have been. It started with \$3,000.00 worth of damage being done to two cars by R.B. not tying down materials good enough which allowed it to come loose and hit the cars. It was followed by being served with a lawsuit over Dan Knapp's car accident in my vehicle which hit a family of four and they want several millions of dollars in damages, followed by my son being in a head on collision which was his fault, followed by worrying over Don having headaches every day and the doctor ordering a cat scan of his head, followed by being told I should put my eight year old dog to sleep, followed by our partners of our old building in Newcastle trying to rip us off

²⁶ McGraff stated that he had never mentioned the meeting to Lovejoy, that the meeting had been publicized "just by word of mouth," and that he and Lovejoy were not social friends. Lovejoy was not called as a witness, and McGraff's testimony was uncontroverted.

by saying we walked away from our property so it's no longer ours and is leaning towards legal actions to get back what is rightfully ours and has concluded with receiving the letter about Folkman trying to unionize my plant. Don and I have been self employed for twenty three years, we have worked at building this business for thirteen years, we didn't work this hard to allow someone who's only been with us a matter of months to come in and start telling us how to run our business. Even without the courtesy of coming in and talking to us before he took this action to see if the problems could be worked out without another party involved.²⁷

With regard to Respondent's defense to the allegation that Folkman was unlawfully terminated, Tim Webster, who was Chris Folkman's supervisor, testified that, in January 1997, Folkman "was interrupting other employees as far as talking all the time and I had to disrupt him quite a few times." Webster added that "some of the times I talked to him and told him to quit interrupting people; get back to your station, you have work to do. And some of the time, I would do it from a distance." However, rather than getting better, Folkman's performance "went downhill," and, as a result, according to Webster, he had "enough of it" and wanted to terminate Folkman.²⁸ Thereafter, on January 29, "I sat him down and told him that I wasn't happy; that I wanted to terminate him because he is talking too much and he is not doing his job, and he is not keeping up. I also told him that Len told me to give him another chance."²⁹ To this, Folkman's only response was "okay and that he understood." Asked, by me, if he gave a written warning to Folkman on January 29, Webster answered, "I didn't actually write it myself, but I did give it to him and talk to him about it." Webster added that the warning notice was "for talking and interrupting other employees." During cross-examination, asked if he had given any written warnings to Folkman prior to March 11, Webster said, "Just the one on the 29th" and identified General Counsel's Exhibit 14, as the document, which he gave to the alleged discriminatee on January 29. That document, which bears Webster's signature and the date (1-39-97), reads, as follows:³⁰

Today 1-29-97 I pulled Chris Folkman in the office and had a very long talk with him. I told Chris I still wasn't happy with his job performance and his attitude. I warned him if he continues not to perform his job duties and doesn't change his attitude I'm going to let him go.

On identifying the document, the following questions and answers ensued:

Q. That was not given to Mr. Folkman, was it?

A. No.

²⁷ DeGraff identified R.B. as employee Randy Britt, a driver for the shop. He added that Britt continued to work after Folkman was fired for, at least, 2 months. Cheryl Rankin identified Britt as a maintenance field person and stated that Britt had been terminated on March 2. Respondent offered no records to corroborate Rankin's testimony.

²⁸ Webster maintained that Folkman's talking directly impacted on his job performance—"He was behind on some jobs back then because he was talking all the time."

²⁹ Webster stated that Lewis told him this on the day before "at the end of the day."

³⁰ The document itself is a plain sheet of lined paper.

Q. In fact, the company has written warning forms, does it not, when an employee is being written up for violating a rule?

A. Yes

JUDGE LITVACK: So, what was it that you gave to Folkman? You told me that you gave him a warning. The Witness: Well, obviously I was mistaken. I make mistakes just like everybody else. I'm human, too . . . this is a note I made for myself . . . I gave him a verbal warning, but I didn't give him a written warning.³¹

Webster testified that, notwithstanding the above warnings, the alleged discriminatee's job performance did not improve, and "I just talked to [Folkman] several times" but "not formally." Finally, on March 11, with Folkman's behavior worse than before,³² Webster spoke to Lewis about Folkman, drafted General Counsel's Exhibit 8, and "I gave it to Len Lewis . . . in his office." Lewis said he would get back to Webster. Asked, during cross-examination, why he did not give the warning notice to the employee,³³ Webster explained, "I could have given it to Folkman if I wanted to. But . . . I had already given him verbal warnings many times and I just had enough of it. So I wanted to terminate him."³⁴ Respondent's supervisor denied knowledge of the Union's letter, regarding Folkman, at the time he drafted the above written warning.

Regarding the events of March 12 and 13, Webster testified that, as Kevin O'Connor was busy completing another work assignment and as Folkman had completed an assignment on the Piranha machine, he assigned the alleged discriminatee to drill holes in base plates with the magnetic drill. In this regard, Respondent's Exhibit 5, Webster's employee assignment sheet for the week of March 10 through 14, reveals that O'Connor worked 6 hours sawing I-beams and 1 hour on the hydraulic hand punch for project 6I139 on March 11 and 4 hours sawing I-beams and 4 hours on the hydraulic hand punch for project 6I139 on March 12. Based on this assignment sheet, which, Webster stated, he compiles, on a daily basis, from the employees' timecards, Respondent's supervisor testified that O'Connor

³¹ Webster testified that he prepared G.C. Exh. 14 on January 29 "after" he spoke to Folkman. Webster added that he did not give a written warning to the employee because he does not want to hound employees and because he believes written warnings should only be given to employees who don't adhere to oral warnings.

During cross-examination, Webster was shown G.C. Exh. 15, a similar document to the foregoing and bearing the signature, "Tom" Webster, and the date, 2-21-97. On viewing the document, the witness averred, "It's my writing. I did it. It looks like it says Tom Webster." Stating that his name is Tim and that he never forgets his name, Webster admitted "I don't know how or why he wrote "Tom." The document reads, as follows:

Re: Employee verbal warning

On 2-21-97 I gave Chris Folkman several verbal warnings during the day to quit talking and interrupting others while their trying to perform their normal job duties. I also asked Chris to start spending more time on keeping up with his job duties instead of interrupting others all the time.

³² Asked if there was anything different about Folkman's behavior on March 11 than on any other day since January 29, Webster said, "No."

³³ As indicated by the forms themselves, Respondent's written warning policy includes having the offending employee execute the warning notice and affording him an opportunity to respond in writing.

³⁴ Employee Jason Bos testified that the shop is extremely noisy, and, in order to be heard, one must raise his voice.

did no sweeping on March 12. According to Webster, on reassigning Folkman, "I just told him to go over and drill base plates . . . I told him to be careful." Thereafter, "I went back and forth, seeing how he was doing." After a while, Folkman reported that he had broken a drill bit—"He just walked over to me and he said that I broke a bit. What do you want me to do?" Then, "I went and got him a new bit, and handed it to him. . . . I told him to go back and drill base plates." Asked where he obtained the drill bit, Webster stated, "I kept it locked up in the cabinet," which is located "right by the base plates."³⁵ He added that "it was a new bit . . . [I]t had a green plastic coating on the end of it."³⁶ Webster further testified that, after giving the new drill bit to Folkman, he went to Len Lewis' office, and "I told him I wanted to terminate Folkman Actually . . . I told him that Chris Folkman broke a drill bit and that Don Rankin . . . gave me directions that if anyone breaks a drill bit . . . they want to fire them . . . [Lewis] told me that he would get back to me."³⁷

The next day, as O'Connor continued working on project 6I139,³⁸ Webster again assigned Folkman to drill base plates with the magnetic drill. At some point in the morning, he became aware that Folkman had broken the replacement drill bit—"he came up to me, smiling and giggling, and said that I broke another bit I just told him to clean up the shop and I will be back out." At this point, Webster apparently drafted General Counsel's Exhibit 9 and, as he did the day before, went

³⁵ Asked if this is the cabinet to which Folkman referred, Webster replied, "If he got into a cabinet, yes. That would be the cabinet."

³⁶ Asked if new drill bits are kept separate from used ones, Webster said, "What I do is I keep one bit out for the employees to use on each size. If I have new ones, I lock them up. But, in this case, there is not a size in there, there may be a new bit in there, but it is the only bit for that size. It could be an oddball size that we didn't use If I have more than one bit of the same size, I keep the rest of them locked up."

³⁷ As to the Don Rankin comment, according to Webster, Kevin O'Connor broke a drill bit and Webster informed Rankin about what happened. "And he told me that the next one who breaks a drill bit is terminated I went back out in the shop and I talked to Kevin O'Connor and Chris Folkman," telling them "that Don Rankin [said] the next one who breaks a drill bit is fired" because bits are expensive.

Counsel for the General Counsel questions the existence of the foregoing Don Rankin edict. In this regard, I note that Webster's testimony, as to whatever Rankin may have said, was hearsay, and Rankin himself was never called as a corroborative witness. Further, Chris Folkman testified that, on another occasion in February 1997, Webster invoked Don Rankin's name in threatening to fire someone for causing damage to the Piranha machine. According to the alleged discriminatee, he noticed a bent piece of steel, with the imprint of a punch as if such had been done without use of a "dye" in the dye holder, and showed it to Webster, and, after questioning other employees in order to ascertain who caused the damage, the latter told Folkman that Don Rankin wanted the person fired and that he would examine surveillance tapes to find the miscreant. Two days later, Folkman testified, Webster informed him that he had discovered the identity of the culprit, but the person was not terminated. Webster failed to deny this testimony. Folkman also testified that Webster once threatened to fire Kevin O'Connor for being late too often. O'Connor continued to report late for work but was never disciplined. Webster also failed to deny this testimony.

³⁸ R. Exh. 5 establishes that O'Connor spent 3 hours using the hydraulic hand punch and 4 hours sawing I-beams for project 6I139 on March 13. In addition, he did clean the shop for an hour, but, Webster explained, this was at the end of the workday.

to Len Lewis' office.³⁹ Webster gave Lewis the warning notice, "and I told him he had broke another drill bit and [Folkman] laughed. [Lewis] told me again that he would get back to me." Webster added that, in his experience, no drill bit has ever just shattered as did the second broken drill bit and that, despite extensive use, no drill bits have shattered since March 13.⁴⁰ During cross-examination, Webster reiterated that he inferred from Folkman's smiling and giggling, he had broken the second drill bit willfully. While he told this to Lewis, Webster denied that such prompted the issuance of the warning notice that day. Then, asked why did he mention Folkman's smiling and giggling, Webster said, "Because he walked up and he just, ha-ha. I broke another drill bit, what do you want to do?" Asked by me if he observed Folkman doing anything to break the second drill bit, Webster replied, "no" but added that Folkman did it by drilling "too hard" and by "not letting the drill bit drill by itself, forcing the drill bit into the steel" by pressing down on it. However, he conceded that Folkman was doing nothing wrong while he observed him at work that morning. Also, during cross-examination, asked why he recommended Folkman's termination after he broke the second drill bit, Webster stated, "Because a drill bit broke and I felt that he did it on purpose." Asked if anything, besides Folkman's smiling and giggling, caused him to believe the alleged discriminatee acted deliberately, Webster mentioned "because he's been drilling base plates for a number of months here off and on. He knew how to do it He also knew if you pressed too hard . . . you will break it." However, Webster conceded that, if, in fact, Folkman had not had extensive experience on the magnetic drill, what occurred on March 12 and 13 would not have been deliberate. Finally, during cross-examination, asked why, on March 13, he failed to give the written warning to Folkman, Webster averred, "I don't know. Because I was told the next one that breaks a bit is terminated. I don't think I had to give a written warning if that was my orders." He added that Don Rankin told him if another drill bit broke, he was to talk to a supervisor. However, he denied talking to Don Rankin that day—"Maybe he wasn't there. Maybe I went to Len. I don't know."

While Tim Webster assertedly recommended the discharge of Chris Folkman, the individual, who actually was responsible for deciding to terminate him was Lenond Lewis. The latter testified that Webster approached him in January "and asked me to terminate [Folkman]" but that he convinced Webster just to speak to the alleged discriminatee and inform him of "the problems." Lewis added that he is convinced that Webster did, in fact, speak to Folkman, for the latter "came in and asked me if the job was in jeopardy. He said that he had heard some rumors that he was going to be fired. I told him he needed to talk to Webster. He left and I went out in the shop. They were sitting down and talking." Shown the March 11 written warning, General Counsel's Exhibit 8, Lewis stated, "Tim Webster brought it to me He just told me that [Folkman] was an employee who has been totally insubordinate. He keeps telling [Folkman] to stay at his station and do his job, and he is con-

stantly wandering. [Webster] said he is fed up, [the employee] won't listen." Lewis assured Webster that "I would take care of it."⁴¹ The next day, according to Lewis, Webster "came in and told me that Chris Folkman broke a drill bit. He reminded me about the warning which I already was aware of. I told him that I am busy and I would take care of it."⁴² The warning, Lewis testified, was "one he had given Chris Folkman seven months prior about people breaking a drill bit will be fired."⁴³

The next day, March 13, at approximately 8:15 in the morning, Webster entered his office, saying Folkman "broke another bit, what are we going to do. I told him that I am busy. I will take care of it." Then, 10 or 15 minutes later, at approximately 8:30 a.m., Webster returned to his office with another written warning notice, General Counsel's Exhibit 9, and requested "that Chris Folkman be fired." Thereafter, based "on the facts that Tim Webster had given [him]," and without speaking to either Don or Cheryl Rankin, Lewis reached the decision to terminate Folkman and drafted the discharge letter, General Counsel's Exhibit 7. Asked, by Respondent's counsel, whether that document summarizes the reasons for the termination, Lewis said, "Yes, it does." Asked, by me whether the discharge was based on the written documents, which were given to him by Webster, or anything the latter said orally, the witness replied, "It was several performance items of Chris Folkman. I had no choice." Immediately thereafter, asked the identical question, Lewis changed his answer, saying "It was definitely the documents about the broken drill bits."⁴⁴ After completing the discharge letter, Lewis called Folkman into his office "to ask him some questions. I wanted to make sure he was there when the warning was given and that he was fully aware of what had gone on. I asked him if he was familiar with the warning that Tim Webster had given that Don Rankin said the next person would be fired? He told me yes he was." Also, "I asked him about the other issues. He told me things that were not consistent with what Tim told me. I can't remember exactly." Folkman said much of what was in the letter was untrue, specifically the he did not break the drill bit 2 months before. "I told him that was not the reason I was letting him go. That is what prompted the warning. The reason I was letting him go was he had been warned." Finally, during direct examination, Lewis stated that there were no reasons for the discharge other than those set forth in General Counsel's Exhibit 7

⁴¹ Asked, during direct examination, why he did not terminate Folkman on receipt of this warning notice, Lewis replied, "I was in a circumstance I had never been in. I received a letter from Local 150 saying if I did anything to Mr. Folkman they would file charges. I had not had any experience I wanted to make sure that I was extra careful. This was new to me." During cross-examination, he added that "I called a lawyer I felt could help me in that situation." Also, "[W]e have certain books, legal books. I just started looking through them to see what I could find."

⁴² Asked why he did not terminate Folkman on speaking to Webster, Lewis answered, "It was toward the end of the day. I didn't want to make any rash decisions. I would have made the decision on the 13th no matter what. I just wanted to investigate what I was doing."

⁴³ Asked, by counsel for Respondent, "The rule you are referring to is Don Rankin's statement about the warning," Lewis replied, "Yes, sir."

⁴⁴ Lewis stated that the work rule, which Folkman violated, was "he broke two drill bits."

³⁹ Either on this day or the day before, he spoke to Cheryl Rankin before speaking to Lewis. He told her "about what Don had told me. He gave me directions that the next one who breaks a drill bit is terminated. I told her and she told me that she agreed and to go talk to Len about it." Cheryl Rankin failed to corroborate this testimony.

⁴⁰ Webster denied any knowledge of Folkman's union activities on March 11, 12, and 13.

and that Folkman's activities, on behalf of the Union, were not a factor in his discharge—"if anything, it saved him a day."⁴⁵

During cross-examination, asked if the only reason why he decided to terminate Folkman was his apparent violation of the work rule, which had been announced by Don Rankin, Lewis said, "Yes, it was"⁴⁶ and added, "I was acting on the fact that he had broken two bits that cost \$200."⁴⁷ However, Lewis then admitted that, prior to the instant hearing, he had stated, in writing, that a basis for terminating Folkman was violation of Respondent's written work rule regarding malicious or negligent destruction of company property. Further, asked if excessive talking was the reason for Folkman's discharge, Lewis answered, "No, the reason for the discharge was the drill bits. When I looked at the drill bits I looked at his prior performance" and "the reason I fired him was for the breaking of the drill bits." He added that he would not have terminated Lewis but for the broken drill bits. But, when asked why he also included paragraphs one through four in the discharge letter, Lewis replied, "I was just making sure that he was aware of his record." And, when asked to what work rules he referred in the last paragraph of the discharge letter, Lewis mentioned, "Talking on company time, that's against company rules." Asked again to state the work rules to which he referred, Respondent's CEO stated, "The main rule that was broken was Don Rankin told Tim Webster . . . the next person to break a drill bit would be fired . . . Two, he was asked to work and he did not show up . . . [Three], he received a verbal warning . . . for talking and interrupting others during work hours." Finally, in these regards, as impeachment, counsel for the General Counsel offered an excerpt from Lewis' pretrial declaration, dated April

⁴⁵ Lewis denied ever discussing the Union's letter, regarding Chris Folkman, with Webster, and he testified that "the only thing I heard about it was I was told by Cheryl Rankin that we received a letter from the Union." Asked if such was the extent of his discussion with her about the letter, Lewis said, "Yes, it was."

⁴⁶ Lewis conceded that he had never heard Rankin utter such a rule and that his only knowledge of the existence of such a rule came from Webster.

⁴⁷ There is considerable record evidence that Respondent tolerated costly damage to machinery and other property without disciplining those responsible. Thus, besides causing \$3000 worth of damage to company vehicles in March 1997, employee Randy Britt was once caught smoking while helping to erect a gas station canopy and while gasoline was being pumped beneath him and, in March 1995, had a "fender bender," which cost Respondent \$608. Moreover, according to Folkman, in December 1996 or January 1997, employee Allan Zufelt "brought some pieces of sheet metal over to me . . . he had men over stacking and would go back and bring more. And I was punching holes in these pieces of sheet metal the whole time he was doing this . . . [O]ne of the times I took a stack over to the shelf, he took like four or five pieces . . . together . . . and tried to punch through all of them at the same time . . . which caused the punch to break," causing damage valued at \$100. Webster was immediately told but did not discipline Zufelt in any way. Neither Zufelt nor Webster denied the foregoing testimony. On another occasion, according to Folkman, a welder used the Piranha machine to bend a piece of steel but "he went to far," placing "too much pressure on . . . the attachment and . . . [breaking] a bolt that held up the attachment." Webster observed what happened, shouted at the welder that he should not have done what he did, but did not discipline the person any further. Webster failed to deny this testimony. Further, Darren Reynolds testified that the machine, to which he was assigned, cut and routed aluminum panels and utilized two different cutting blades and that, several months apart, he broke the same set of blades, causing damage costing in excess of \$500 for which he was not disciplined.

11. Therein, Lewis set forth several "factors" in his decision to terminate Folkman. Among these were prior written and verbal warnings, which he had received, for substandard work performance and violation of Rankin work rules, the two broken drill bits, Folkman's admitted knowledge of the Don Rankin rule, and the company rule against malicious or negligent destruction of its property.

The final element of Respondent's defense to the instant unfair labor practice allegations is its contention that, in a March 19 written statement to all its employees, Respondent issued a statement, disavowing any intent to interfere with its employees' Section 7 rights and, thereby, curing any "technical violations" of the Act. That document, issued by Cheryl Rankin, reads, as follows:

Since I addressed the topic of unionization in the last edition of the Rankin Review, several of you have been asking me questions about the subject. I would like to take this time to clarify things. First of all, let me emphasize that although we strongly believe that a union is not in this company's best interest, nothing bad will happen to any employee for supporting union efforts. *You have the right to make up your own minds.* We just want to give you the facts you need to make an informed decision about whether [sic] you want a union here The most important fact to remember is that *Unions cannot guarantee job security.* In our business, the only way to ensure job security is to do top quality work and remain competitive in the marketplace. Take a look at what happened to two of our competitors Each of these Unionized companies went under because they could not remain competitive in our marketplace. Unions could not guarantee job security for employees of those companies, nor could a union provide similar guarantees here. In fact, Union cannot make any guarantees. Unions can promise you the moon, but who can deliver on those promises? Only we can, by working together. . . . The only thing a union can promise is that, if elected, it will make employees pay union dues. In exchange for those dues, the union can negotiate with a company and, if it does not get its way, call a strike. We all know that no one wins in a labor strike. We support a union-free environment because together we have built a terrific company, and we value the right to sit down one-on-one with you and figure out ways to make Rankin & Rankin even better. With a union comes endless negotiations, bureaucracy and red tape, all of which cost companies lots of time and money. Having a union also means that an employer cannot talk to employees about their jobs or problems except through a third party. Finally, the union doesn't know us. We have all worked hard to make this company what it is. The union didn't help us build this company, and it doesn't understand what a great thing we have going. We do not believe that a union has anything to offer the employees of Rankin & Rankin, but we encourage you to make up your own minds. Just remember, if you have any questions at all, we are here to give you the facts.

B. Legal Analysis

Initially, I shall discuss the violations of Section 8(a)(1) of the Act, which are alleged in the instant complaint, and, in this regard, turning to the comments of Respondent's corporate president, Cheryl Rankin, during the March 11 incident in the

employee lunchroom, I note that there is no dispute as to what she said to the employees. Thus, taking into account the respective testimony of Darren Reynolds, Chris Folkman,⁴⁸ and Jason Bos and the admissions of Rankin, I find that, after receipt of the Union's letter, which identified Folkman as a supporter of the Union and a member of an employee organizing committee, at approximately 12 noon on the above date, Rankin entered the lunchroom, placed the letter on a table in front of Folkman, and asked, "[W]hy he had done this to them" and "[W]hat he was trying to do?" I further find that, after several employees, including Folkman, answered her questions and after she pointed out that, according to their 1997 W-2 forms, she and her husband each had only been paid \$20,000 or \$25,000 by Respondent in 1966 and said that they had "put everything they have into the company" and "couldn't afford a union," Rankin warned "that they'd fight the Union if [the employees] tried to bring it in, and that they'd close the doors before . . . they'd ever have a union there." Rankin admitted, and I find, that she uttered this latter comment because something Folkman said had "irritated" her. Also, I find that, after Rankin left the room, production manager, Chris Koski, and Scott Zufelt entered and that, after ascertaining what had been said by Rankin, Koski said, "[T]hey will shut it down" and "I can't believe we've got a bunch of [fucking] queers trying to pull this stuff."

The General Counsel alleges, in the complaint, that Rankin's comment, regarding her intent to close Respondent's doors rather than accepting union representation for its employees, constitutes an unlawful threat of plant closure. Citing two Board decisions, *Benjamin Coal Co.*, 294 NLRB 572 (1989), and *Kawasaki Motors Mfg. Corp.*, 280 NLRB 491 (1986), counsel for Respondent argues that, rather than uttering a threat, Rankin was merely stating a lawful prediction for the assembled employees. While, of course, pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may "make a prediction as to the precise effect he believes unionization will have on his company" as long as such is "carefully phrased on the basis of objective fact," rather than being a mere prediction, in agreement with counsel for the General Counsel, I believe Rankin's comment constituted an explicit threat, to the assembled employees, of adverse consequences if they engaged in support for the Union. Thus, in one of the cited Board decisions, *Kawasaki Motors Mfg. Corp.*, supra, employees were presented with information and figures on "the respondent's losses, layoffs, payroll decreases, shortened workweek, and overstocked inventory" justifying possible closure of its plant. In contrast, Cheryl Rankin merely told the employees that she and her husband could not afford union representation and, as proof, offered nothing more than what she and her husband had been paid the year before. Moreover, Rankin did not utter her comment in conjunction with her statement that they could not afford the Union. Rather, what I perceive as a threat of plant closure followed her statement of resolve to fight the employees' organizing efforts and was uttered in an admitted moment of pique having nothing to do with Respondent's ability to afford to operate with union-represented employees. In these circumstances, I must con-

clude that Cheryl Rankin's warning was an explicit threat of plant closure, blatantly coercive and violative of Section 8(a)(1) of the Act. *Baby Watson Cheesecake*, 320 NLRB 779, 786 (1996); and *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995). With regard to the allegedly unlawful interrogation of Folkman, I am cognizant that the legality of such conduct involves consideration of the circumstances surrounding the questioning. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In this regard, notwithstanding that Folkman had been identified, in the Union's letter, as a union adherent, I agree that Rankin's interrogation of him was impermissibly coercive. Thus, Respondent's president neither gave the alleged discriminatee any assurance against reprisals nor had any valid reason for her questioning of him. Further, and of utmost significance to my conclusion, is my finding that Rankin's interrogation of Folkman was closely followed by her threat of business closure. In these circumstances, Rankin's questioning of Folkman was coercive and violative of Section 8(a)(1) of the Act. *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1011-1012 (1991); and *Action Auto Stores*, 298 NLRB 875, 902-903 (1990).

Concerning the comments of Chris Koski after he entered the lunchroom, whether his comments may be attributed to Respondent is, of course, dependent on his alleged status as a supervisor within the meaning of Section 2(11) of the Act or as an agent within the meaning of Section 2(13) of the Act. In these regards, the record is uncontroverted that Len Lewis, Respondent's CEO, had been the production manager prior to being promoted to his current position; that his prior position was a supervisory position; that Lewis moved Koski into his former position on receiving his promotion; that, as production manager, Koski assigns work to shop employees, reassigns employees from job to job when necessary, requires that employees work overtime when necessary, approves requests for sick and vacation leave, and issues discipline to employees. Further, admitted Supervisors Jeff Lovejoy and Tim Webster, report directly to him. In these circumstances, there can be no question that Koski is a supervisor within the meaning of Section 2(11) of the Act and that his comments in the lunchroom may be attributed to Respondent. I have previously concluded that Rankin's threat to close the doors rather than accept a union as the bargaining representative for Respondent's employees constituted a coercive threat of plant closure, violative of Section 8(a)(1) of the Act. Accordingly, by reiterating her threat to the employees in the lunchroom, Koski likewise acted in violation of Section 8(a)(1) of the Act, and I so find. Further, by terming those employees, who supported the Union, "fucking queers," Koski clearly disparaged them before other employees. The Board has held, and I find, that, when uttered in the context of other unlawful comments, a disparaging characterization, such as Koski's, has the coercive effects of holding employees' protected concerted activities up to ridicule and frustrating such activities and is, therefore, violative of Section 8(a)(1) of the Act. *Montgomery Ward & Co.*, 288 NLRB 126, 126-127, 177 (1988).

Turning to the employee meeting, which was held at the close of the work on March 13, and the respective testimony of current employees, Todd DeGraff and Jason Bos, and of Darren Reynolds, I note that neither Lewis nor any other supervisor, who was present, controverted the accounts of DeGraff and Reynolds, each of whom impressed me as being an honest witness, testifying to the best of his recollection. While DeGraff's

⁴⁸ While, as shall be subsequently noted, Folkman did not impress me as being an entirely straightforward witness, I did not find him to be an inherently deceitful one. Thus, I see no reason not to credit him when uncontroverted or when corroborated by other witnesses.

recollection of what occurred at the above employee meeting obviously was shaken during cross-examination, as Reynolds corroborated DeGraff as to an important aspect of his testimony and as I was not impressed by Bos' recollection of events,⁴⁹ I shall credit and rely on DeGraff's version of what occurred at the above meeting. Therefore, I find that Respondent's CEO, Lewis, conducted the meeting and, in the course of speaking to the assembled employees, said that he wanted to explain "some of the benefits or non-benefits" of being represented by a union; that, if the union demanded higher wages and the company disagreed, the union could call a strike and the employees could be replaced⁵⁰ by new employees, hired for less money; and that, if the employees chose to be represented by a union, other union members would have greater seniority "and they'd come in and work for us and we'd have to wait for other jobs." Further, I find that Lewis also told the employees "that he was not opposed to anybody being pro-union or against the Union. Either way it was fine as far as the company was concerned." The complaint, and counsel for the General Counsel, alleges that, by what Lewis said, Respondent threatened employees with loss of employment because they engaged in activities in support of the Union. In defense, counsel for Respondent argues that Lewis simply described "the nature of the bargaining process" to Respondent's employees—in the event of a strike, Respondent retains "the option" of replacing striking employees. I agree with counsel for the General Counsel that Lewis' comments, regarding replacement in the event of a strike, were violative of the Act. Thus, counsel for Respondent is correct that, in normal circumstances, "an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike." *Eagle Comtronics, Inc.*, 263 NLRB 515 at 515 (1982). However, if "the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threat," it is not privileged by Section 8(c) of the Act. *Id.* at 515–516. Here, while Lewis was obviously speaking about an economic strike situation, his comment came just 2 days after Cheryl Rankin, who was present during Lewis' comments, had unlawfully threatened employees with plant closure if they continued to engage in activities in support of the Union. Moreover, immediately after speaking about replacing employees who engaged in a strike, in a comment having no basis in law, Lewis warned the assembled employees that selecting the Union as their bargaining agent would mean that they could be replaced by union members, who have greater seniority—a statement clearly calculated to frighten employees with the possibility of job loss if they continued to support the Union. Accordingly, I believe that, when taken in the totality, Lewis' comments to the assembled employees, at the March 13 employee meeting, constituted an implicit, if not explicit, threat of job loss if they engaged in support for the Union and were, therefore, violative of Section 8(a)(1) of the Act.⁵¹ *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); and *Baddour, Inc.*, 303 NLRB 275 (1991).

⁴⁹ While seeming to be a candid witness, his accounts of the March 11 lunch incident and of what was said during and after the March 13 meeting were vague and sketchy in comparison to other witnesses.

⁵⁰ DeGraff could not recall if Lewis said the employees would be replaced or fired; I think it more likely that Lewis used the former word.

⁵¹ Contrary to Respondent's counsel, I do not view Lewis' comments at the conclusion of the meeting as vitiating the coercive nature of his earlier comments.

As to the final alleged violation of Section 8(a)(1) of the Act, the testimony of employee DeGraff was uncontroverted that, on March 14, the day following the scheduled union meeting at alleged discriminatee Folkman's home, a meeting which had been publicized by only word of mouth, Supervisor Jeff Lovejoy approached him and asked, "How did the Union meeting go last night?" In a case involving a similar fact situation, *Pepsi Cola Bottling Co.*, supra at 1011, the Board concluded that, when a management official approached an employee and questioned him as to whether he had attended a union meeting the previous day, not only did the conduct constitute unlawful interrogation, it also unlawfully created the impression that the employer had engaged in surveillance of its employees' union activities. Here, while DeGraff and Lovejoy were friends at work, they were not social friends, and Lovejoy neither explained the reason for his question nor assured the employee there would be no reprisals. Moreover, the question most certainly revealed, and was intended to reveal, to DeGraff that Respondent was aware a union meeting had been scheduled. In these circumstances, I find that Lovejoy's conduct not only constituted interrogation regarding Respondent's employees' union activities but also created the impression that Respondent was engaging in surveillance of its employees' union activities—conduct violative of Section 8(a)(1) of the Act. *Id.*

I now consider the most contentious of the several complaint allegations—that Respondent issued two warning notices to and terminated Chris Folkman in violation of Section 8(a)(1) and (3) of the Act. At the outset, I note that significant evidentiary points are the subject of admissions, are the subject of documentary evidence, or, such as the fact that the alleged discriminatee broke two drill bits on March 12 and 13, are not in dispute. However, with regard to certain matters, about which there exists contradictory testimony, it is necessary to analyze and compare the respective credibility of two witnesses—Folkman and his supervisor, Tim Webster. In this regard, while nothing about the testimonial demeanor of either witness suggested an inherent lack of credibility, neither Folkman nor Webster impressed me as being a consistently honest witness. Indeed, based the testimonial demeanor of each and the record as a whole, I believe that each dissembled as to important aspects of his testimony in order to buttress his party's legal position, and, as a result, undermined his overall credibility. In particular, given the documentary evidence that Kevin O'Connor performed extensive work each day on project 6I139, I find it impossible to place any reliance on the alleged discriminatee's assertion that, during the mornings of March 12 and 13, he observed Kevin O'Connor menially sweeping the floor of the shop. Also, noting Webster's contradictory testimony regarding General Counsel's Exhibit 14, the purported January 29 file memo, and the appearance of his name as "Tom" Webster on General Counsel's Exhibit 15, the purported February 21 file memorandum, I am unable to credit his testimony regarding oral discipline of Folkman for excessive talking during January, February, and March. Nevertheless, as compared to Webster, Folkman appeared to be the more consistently straightforward witness, and I shall rely on his version of events whenever he and his supervisor were in conflict. Finally, with regard to the credibility of Lenond Lewis, his testimonial demeanor was that of an utterly disingenuous witness. Moreover, as will be discussed in detail *infra*, his testimony was contradictory and inconsistent. Accordingly, unless cor-

roborated by more credible evidence or by document, I shall not credit his version of events.

In determining whether Respondent acted in violation of Section 8(a)(1) and (3) of the Act by issuing warning notices to and terminating Folkman, I utilize the analytical framework, set forth by the Board 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); and *Lewis Mechanical Contractors*, 285 NLRB 514 (1987). Thus, in order to prove a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel has the burden of establishing that the alleged discriminatee engaged in union activities; that Respondent had knowledge of such conduct; that Respondent's actions were motivated by union animus; and that Respondent's termination of the alleged discriminatee had the effect of encouraging or discouraging membership in the Union. *WMRU-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the foregoing matters by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). However, while the above analysis is easily applied in cases in which a respondent's motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both a lawful and an unlawful cause for the allegedly unlawful conduct. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established a causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel 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.* at 1089. Four points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act." *Id.* at 1089 fn. 4. Second, once the burden has shifted to the employer, the crucial inquiry is not whether Respondent could have engaged in its alleged unlawful acts and conduct, but, rather, whether Respondent would have done so in the absence of the alleged discriminatee's support for the Union. *Structural Composites Industries*, 304 NLRB 729 (1991); and *Filene's Basement Store*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright Line*, supra at 1084 at fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.*, 291 NLRB 39 (1989). As to the latter point, "it is . . . well settled that when a respondent's stated motives for its actions are found to be false, the circumstances . . . warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970 at 970 (1991); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Here, there can be no doubt that the General Counsel has established a prima facie showing that Respondent was unlawfully motivated in issuing warning notices to and terminating Chris Folkman. Thus, it was uncontroverted that Folkman fomented the union movement amongst Respondent's employees; that Folkman was the employee who contacted the Union;

and that he arranged for a meeting at his home on March 13 so that the employees could discuss a campaign for representation by the Union. It was also uncontroverted that, in order to protect himself from retaliation, Folkman requested that the Union send a letter, identifying him as a union supporter, to Respondent and that the Union complied with his request. In this regard, there is no dispute that Respondent received this letter before noon on March 11, and I have previously found that Respondent's president, Cheryl Rankin, reacted by immediately confronting Folkman with the letter and unlawfully interrogating him as to his purpose. Further, there is a surfeit of record evidence, establishing Respondent's animus toward its employees' support of the Union in general and toward the alleged discriminatee in particular. Initially, I note that the suspicious timing of the first warning notice to Folkman, occurring on the same day the Union's letter was received by Respondent, and of Folkman's discharge, occurring a scant 2 days after Respondent received the above letter, are suggestive of unlawful considerations underlying Respondent's actions. *Q-1 Motor Express*, 308 NLRB 1267, 1278 (1992). Moreover, I have previously concluded that, immediately after unlawfully interrogating Folkman and listening to other employees' explanations for seeking representation by the Union, Rankin blatantly threatened the assembled employees with closure of the business rather than acquiescence to union representation of her employees. Also, I have concluded that, within hours of discharging the alleged discriminatee, Len Lewis conducted a meeting with Respondent's employees during which he warned them that a consequence of representation by a union could be loss of their jobs. As to Folkman himself, the record evidence of Respondent's unlawful animus is striking. In this regard, Rankin admitted that underlying her admitted threat to close the business were the "many things" which were "beating" on her at the time, including "I had an employee that I trusted back stab me." The depth of Respondent's animus and exactly to whom she was referring is made manifestly clear from the issue of the Rankin Review, which was published shortly after Folkman's discharge and in which, after listing the "cons" of union representation, informing the employees that the "shop is our entry level place where we weed out undesirables," and explaining the many personal and business difficulties, which she had endured in the past weeks, including "receiving the letter about Folkman trying to unionize my plant," Rankin wrote that she and her husband "didn't work this hard to allow someone who's only been with us a matter of months to come in and start telling us how we are going to run our business. Even without the courtesy of coming and talking to us before he took this action to see if the problems could be worked out without another party involved." Given the foregoing, I find that the General Counsel has made a prima facie showing sufficient to compellingly establish that Respondent was unlawfully motivated in terminating Chris Folkman.⁵²

In these circumstances, the burden shifted to Respondent to establish, by a preponderance of the relevant record evidence,

⁵² I am cognizant that there is record evidence, including Len Lewis' comments during the March 13 employee meeting and Cheryl Rankin's remarks in her March 19 letter, showing Respondent's respect for its employees' union activities. However, in analyzing whether the General Counsel has established a prima facie showing of unlawful animus, I must not quantify the extant unlawful animus. Moreover, as will be evident herein, I doubt the sincerity of Respondent agents when they expressed themselves in this manner.

that, notwithstanding the clear evidence that it harbored unlawful animus toward the alleged discriminatee, it, nevertheless, would have terminated Folkman for business considerations. At the outset, as I stated at the hearing and in agreement with counsel for the General Counsel, in light of the General Counsel's rather convincing termination of Folkman, is that the latter was discharged for having broken two drill bits prima facie showing of unlawful discrimination, Respondent's burden in the above regard was a substantial one. *Venco, Inc.*, 304 NLRB 911, 912 (1991); and *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991). With this precept in mind, Respondent's defense to the complaint provision, concerning the alleged unlawful bits, each costing in excess of \$100, after having been warned, by his supervisor, Tim Webster, that the next person, who broke a drill bit, would be fired. In this regard, Respondent's defense is, in part, predicated on a portrayal of Chris Folkman as a reprobate employee, one whose misbehavior ultimately resulted in Webster drafting the purported March 11 written warning notice and recommending the alleged discriminatee's termination. While Webster testified, at length, as to Folkman's asserted misconduct—continually leaving his own work station in order to speak to other employees, thereby interrupting them while they worked, his testimony is the only record evidence of such extensive misconduct, and, as mentioned previously, I did not find Webster to have been an entirely reliable witness, and credit Folkman's denials that he received an oral warning, concerning his job performance, from Webster on January 29 or that the latter ever orally disciplined him concerning speaking to other employees during work time.⁵³ My conclusion is fully supported by the record. Thus, Webster initially testified that he gave Folkman a written warning during the asserted January 29 disciplinary meeting but that "I didn't actually write it myself . . ." however, after identifying General Counsel's Exhibit 14 as the warning notice, he contradicted himself, stating that the document was merely a note he made for himself and that he never actually gave it to Folkman. Further, while identifying General Counsel's Exhibit 15, which is alleged to be a February 21 memorandum describing an oral warning given that day to Folkman for interrupting other employees while they worked, as a document, which he drafted and placed in Folkman's personnel file, Webster could not explain why it bears the signature, "Tom" Webster. Clearly, given Webster's admission, regarding the purported January 29 document, that he did not write it himself and the wrong name on the February 21 document, the record warrants the inferences that neither document is genuine; that each was drafted after the fact by someone other than Webster in order to justify Respondent's discharge of the alleged discriminatee; and that Respondent was unlawfully motivated in engaging in the acts and conduct. Further, a like inference is warranted as to the purported March 11 warning notice. Thus, not only is it suspiciously dated the same day on which Respondent received the Union's letter, revealing Folkman's identity as a union adherent,⁵⁴ but also

⁵³ In so concluding, I do not mean to suggest that Folkman never spoke to other employees during worktime or that Webster never cautioned Folkman about speaking to other employees during worktime. By discrediting Webster and crediting Folkman, I believe only that the latter was never threatened with termination or other discipline for engaging in such misconduct.

⁵⁴ I place no credence in Webster's testimony that he was not aware of the Union's letter. Certainly, Cheryl Rankin did not hide its existence, having shown it to her husband, interrogated Folkman about it,

Webster conceded that there was nothing different about Folkman's misconduct that day and, while the former claimed that the alleged discriminatee's behavior "got worse" on March 11, he offered no evidence as to this assertion and, notwithstanding the apparent procedure for written warnings, Webster neglected to give the written warning notice to Folkman or to solicit his response.

There is no dispute that Webster, in fact, issued his broken drill bit termination warning approximately 2 months prior to Folkman's termination after another employee, Kevin O'Connor, had broken one and that Webster attributed this new rule to Respondent's vice president, Don Rankin; however, what is disputed is whether, in fact, Don Rankin had imposed such a new, unwritten policy directive or whether Webster was merely hectoring in order to stress, to Respondent's employees, the importance of being careful in their use of company equipment. In this regard, the only record evidence of Don Rankin's work edict is what Tim Webster testified Rankin told him, and, as stated above, Webster was not a straightforward witness. Moreover, the source of this unwritten policy, Don Rankin, failed to testify; Respondent offered no explanation for his absence; and Cheryl Rankin testified that her husband does not become involved in matters involving the employees. Further, Len Lewis, who based his decision to terminate Folkman on the latter's violation of this rule, admitted having no direct knowledge of its existence and only knowing what Webster told him. Finally, there is record evidence that Webster had a propensity for invoking Don Rankin's name while admonishing employees and that he was not above posturing in dealing with the employees. Thus, the former failed to deny Folkman's testimony that he once cautioned the alleged discriminatee not to permit Don Rankin to see him talking; that, after someone had used the piranha machine in a negligent manner, he told Folkman that Don Rankin wanted that employee fired and that, despite repeatedly threatening Kevin O'Connor with termination for reporting late for work, he never disciplined O'Connor. In these circumstances, I do not believe that Respondent has, by a preponderance of the evidence, proven the existence of the so-called Don Rankin work directive.

Nevertheless, Len Lewis maintained that he decided to terminate the alleged discriminatee solely because he had acted in violation of the Don Rankin rule by breaking two drill bits, each of which cost in excess of \$100.⁵⁵ However, while Lewis testified that this purported directive was the actual underlying reason for Folkman's termination, as stated above, his demeanor, while testifying, was that of a mendacious witness, and his testimony on this point was utterly contradictory. Thus, although Lewis did aver that the breaking of the drill bits in violation of the Rankin rule was "definitely" the cause of Folkman's discharge, he also admitted that the discharge was based on "several performance items of Chris Folkman." Moreover, in the discharge letter, General Counsel's Exhibit 7, which, Lewis admitted, summarized the reasons for the alleged discriminatee's termination, he emphasized Folkman's asserted prior warnings for talking and interrupting others during work hours and, in the concluding paragraph, explicitly justified Folkman's termination on the latter's "unwillingness to comply

and discussed it with Len Lewis. Given the letter's shock value, I can not believe that Webster would not have been told about it.

⁵⁵ It must be emphasized that it was for violating the Rankin rule and not merely for breaking the two drill bits that Folkman was assertedly terminated.

with company rules” and emphasized that “we have rules and we expect them to be followed.” Lewis conceded that, by the plural “rules,” he was also referring to “talking on company time, that’s against the rules.”⁵⁶ In this same regard, in a sworn pretrial “declaration,” Lewis listed the factors underlying his decision to terminate the alleged discriminatee, including past violations of company “work rules” and the company handbook, which lists “malicious or negligent destruction of company property” as a first offense termination rule. Furthermore, contrary to what occurred here, there is substantial record evidence that Respondent has tolerated costly damage to machinery and other property without disciplining those employees responsible. Thus, Darren Reynolds once broke two sets of saw blades, costing in excess of \$500, and was not disciplined. Also, Allan Zufelt caused damage, valued at \$100, to the piranha machine without any discipline, and Randy Britt had an automobile accident, which cost Respondent in excess of \$600, and was not disciplined. Also, there is record evidence that Respondent has failed to enforce its disciplinary policy against other employees for violating company rules. Thus, as stated above, Kevin O’Connor repeatedly reported late for work, and, despite threatening to fire him, Tim Webster never disciplined him for this work rules violation. Finally, while Lewis disclaimed any unlawful animus in deciding to terminate Folkman, I note that he and Cheryl Rankin contradicted each other regarding the extent of their conversation on March 11 after the latter received the Union’s letter about the alleged discriminatee and that Rankin admitted that she instructed Lewis to find a “solution” to the “union business,” which had been instigated by Folkman. In these circumstances, including the surfeit of record evidence establishing unlawful animus, the conclusion is warranted that Respondent has failed to establish, by a preponderance of the evidence, that it would have issued the March 11 and 13⁵⁷ written warning notices regarding Folkman and terminated him notwithstanding his support for the Union,⁵⁸ and,

⁵⁶ I have already concluded that such was pretextual in nature.

⁵⁷ I believe this warning notice was nothing more than an after-the-fact justification for Respondent’s unlawful termination of Folkman and do not credit the testimony of either Lewis or Webster as to it. Further, as to whether the second drill bit was a new or used one, I credit the more reliable testimony of Folkman that it was a used bit, coated with oil. In this regard, I note that Webster was contradictory, testifying, at one point, that the cabinet, in which the drill bit was located, was unlocked and, later, that the “new” drill bit was kept “locked up” in a cabinet. Further, based on my assessment of his obsequious testimony, I believe that Webster dissembled by characterizing Folkman as “smiling and giggling” when he informed Webster of the second broken drill bit.

⁵⁸ In his posthearing brief, counsel for Respondent opined that the record warrants a “strong inference” that Folkman broke the two drill bits purposely, believing that the Union’s letter would protect him from retaliation, and that he desired to “test” his protected status. While I agree with counsel that Folkman did believe that the letter would offer him some protection against retaliation for engaging in protected concerted activities, I reject his assertion that the alleged discriminatee deliberately provoked his own termination. Thus, I agree with counsel for the General Counsel that the point of the Union’s letter was to keep Folkman employed. His actions were those of an employee intent on seeking union representation for himself and his fellow employees. It is specious to suggest that he could or would better accomplish this goal by getting himself fired. Finally, in this regard, other than Webster’s and Lewis’ conjecture, there is, of course, no record evidence that Folkman operated the magnetic drill in an improper manner on either March 12 or 13.

accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by engaging in the above acts and conduct, thereby ridding itself of the ringleader of the nascent union organizing campaign amongst its employees.

CONCLUSIONS OF LAW

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

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

3. By issuing warning notices to an employee because he engaged in union or other protected concerted activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

4. By discharging an employee because he engaged in union or other protected concerted activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

5. By interrogating employees about their union sympathies and activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

6. By threatening employees with closure of the facility if they selected the Union as their collective-bargaining representative, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

7. By disparaging employees, who engaged in union or other protected concerted activities, in the presence of other employees in order to discourage them from supporting the Union, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

8. By threatening employees with loss of their jobs if they selected the Union as their collective-bargaining representative, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

9. By creating the impression amongst its employees that it was engaging in surveillance of their union organizing activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

10. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in serious unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have concluded that Respondent terminated its employee, Chris Folkman, because he engaged in union or other protected concerted activities. Accordingly, I shall recommend that Respondent be ordered to offer Folkman immediate and full reinstatement to his former position of employment or, if the position no longer exists, to a substantially equivalent one, without prejudice to his seniority and other rights and privileges of employment and to make Folkman whole for any loss of earnings and other benefits he may have suffered as a result of Respondent’s unlawful discrimination, with interest. Such amounts shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that Respondent be ordered to remove from its files any references to Folkman’s unlawful written warning notices and discharge and to notify Folkman, in writing, that this has

been done and that those unlawful acts will not be used against them in any way.⁵⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁰

ORDER

The Respondent, Rankin & Rankin, Inc., Roseville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Issuing warning notices to employees because they engaged in union or other protected concerted activities.
 - (b) Discharging employees because they engaged in union or other protected concerted activities.
 - (c) Interrogating employees about their union sympathies and activities.
 - (d) Threatening employees with closure of its facility if they select a union as their collective bargaining agent.
 - (e) Disparaging its employees, who engage in union or other protected concerted activities, in the presence of other employees in order to discourage the latter employees from supporting the Union.
 - (f) Threatening employees with loss of their jobs if they selected the Union as their collective bargaining representative.

⁵⁹ In his posthearing brief, Respondent's counsel contends that, pursuant to *Passavant Memorial Hospital*, 237 NLRB 138 (1978), Cheryl Rankin's statement ("nothing bad will happen to any employee for supporting union efforts. You have the right to make up your own minds") in her March 19 letter to Respondent's employees constituted a disavowal of any desire to interfere with Respondent's employees' Sec. 7 rights and effectively cured any "technical" unfair labor practices, which may have been committed by her. Insofar as such is relevant to this case, in order to be effective, an asserted repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." Further, the asserted repudiation must also assure the employees that the employer will not interfere with the exercise of their Sec. 7 rights in the future. *Id.* at 138. Contrary to counsel, Rankin's comments fall far short of the *Passavant Memorial Hospital* standards. Thus, while perhaps timely, as Rankin's above-quoted comments occur in the midst of what must be characterized as an antiunion diatribe, as she failed to specifically address the unfair labor practices which she is accused as having committed, as she failed to specifically assure employees that she will never again interfere with their guaranteed Sec. 7 rights, and as, most significantly, her purported repudiation occurred in the context of other, serious unfair labor practices, I must conclude that her alleged repudiation was ineffective and that a cease-and-desist order remains necessary to remedy the unfair labor practices in which, on behalf of Respondent, she engaged. *Teksid Aluminum Foundry*, 311 NLRB 711 at 311 fn. 2 (1993); and *Wireways, Inc.*, 309 NLRB 245 at 245 (1992).

⁶⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Creating the impression amongst its employees that it has been engaging in surveillance of their union or other protected concerted activities.

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

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

(a) Offer Chris Folkman immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges and make him whole, with interest, for his all earnings lost as a result of its discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any references to Chris Folkman's unlawful warning notices and termination and, within 3 days thereafter, notify him, in writing, that this has been done and that the unlawful written warning notices and termination will not be used against him in any way.

(c) 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 terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Roseville, California, copies of the attached notice marked "Appendix."⁶¹ Copies of the notice, on forms provided by the Regional Director of Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 1997.

(e) 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.

⁶¹ 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."