

**NACCO Materials Handling Group, Inc. and Teamsters Local 651, an affiliate of the International Brotherhood of Teamsters, AFL-CIO.** Case 9-CA-35318-2

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
HURTMEN AND BRAME

On April 30, 1999, Administrative Law Judge John H. West 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,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating employees Pamela Poff and James Rowlett. We find merit in the Respondent's exceptions to these findings. Specifically, we find that the General Counsel has failed to carry his burden of demonstrating that the suspensions and discharges were unlawfully motivated.

The facts are exhaustively set forth in the judge's decision. In brief, the events in this case occurred in the context of the eighth organizational campaign conducted at the Respondent's Berea, Kentucky facility. So far as the record shows, no prior unfair labor practices have been committed at this plant.

The Respondent has a pond on its property and, in September, there are hundreds of ducks and geese at the pond. Employee Rowlett testified that on September 19, 1997, a goose wandered into his work area and that he "talked" to it. Rowlett picked up the goose by its feet and told other employees that it "want[ed] to sign a union card to join the union." Employee Poff wrote "Vote Yes" on a small card, attached it to a string about two feet long, and placed the sign over the goose's head while Rowlett held it. Rowlett then proceeded to drive the goose through the plant on a forklift truck. The record shows that a Canada goose weighs approximately 14 pounds and has a 5-foot wingspan.

At the conclusion of the goose escapade, the Respondent sent Rowlett and Poff home early. The Respondent

conducted an investigation and collected statements from witnesses. Rowlett and Poff were given the opportunity to explain their conduct, but they declined to participate in the investigation. After considering all the information it compiled, the Respondent discharged Rowlett and Poff on September 24, 1997. The basic reasons for the discharge decision were that the employees' behavior did not meet adult expectations, posed a safety hazard to them as well as to others, and disrupted production activities of the plant.

In his decision, the judge appeared to recognize that the goose incident was not protected by the Act because he said that the employees' conduct "should have a [disciplinary] consequence."<sup>2</sup> The judge concluded, however, that the discipline imposed was unlawfully motivated, relying on what he termed "direct evidence of animus" and an inference of animus that he drew "from all the circumstances." That is, the judge appears to have found that antecedent lawful union activity, and not the "goose" incident, was the reason for the discharge.

Contrary to the judge, we find that the record, when fairly considered as a whole, does not contain substantial evidence of antiunion animus. It is true, as the judge pointed out, that the Respondent's employee handbook expressed the view that a union "could seriously impair the relationship between the Company and the employees, and could retard the growth of the Company and the progress of the employees." The Board has held that statements such as these, although alone not rising to the level of unfair labor practices, may still be used to show animus.<sup>3</sup> However, the judge failed to accord weight to the significant countervailing evidence. No 8(a)(1) violations were found by the judge. No antiunion comments were made to the alleged discriminatees. No unfair labor practices were committed in the previous organizational campaigns conducted at the Berea plant. The same employee handbook that the judge relied on as evidence of animus expressly "acknowledge[s] the right of our employees to join a union if they wish." In sum, the Respondent's op-

<sup>2</sup> At another point in his decision, however, the judge stated that "Poff and Rowlett were terminated for union activity. Poff and Rowlett used a goose to promote the union." Along the same lines, the judge also stated: "However inappropriate the use of the goose was, Rowlett was engaging in union activity on September 19 when he drove the goose around the plant on his fork lift truck with the goose wearing a vote yes sign." Of course, the judge's findings are not necessarily inconsistent. An activity can be "union" activity and yet, because of its nature, can be outside the protection of the Act, e.g., throwing a rock at the employer's plant in support of a union's dispute with the employer.

We cannot agree with the judge's suggestion that the misconduct here may have been protected union activity. Parading a live goose through a manufacturing plant obviously does not fall within the activities protected by Sec. 7. Conduct of that kind has been considered to be unprotected horseplay. See, e.g., *Publishers Printing Co.*, 272 NLRB 1027, 1030-1032 (1984). Placing a "vote yes" sign on a wild animal does not transform otherwise unprotected "gooseplay" into activity protected by the National Labor Relations Act.

<sup>3</sup> E.g., *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989). Members Hurtmén and Brame find it unnecessary to rely on this precedent.

<sup>1</sup> 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.

position to unionization is not, in the circumstances of this case, sufficient to warrant the inference that it would unlawfully terminate these employees because of their union support or activities.<sup>4</sup>

According to the judge, even without direct evidence, the entire record supported an inference of unlawful motivation because the Respondent proffered varied justifications for suspending and discharging Poff and Rowlett. We do not agree with the judge's suggestion that the Respondent's reasons for its action were in any way conflicting. The Respondent's officials involved in the investigation and/or decisionmaking aspects of this incident consistently, albeit in different words, explained their actions as concerns for maintaining safety, production, and discipline in the Respondent's plant. Having reviewed the record, we can find no basis for finding that these concerns were not the foundation for the Respondent's decision to suspend and discharge both Poff and Rowlett.

Finally, we reject the judge's finding that these discharges constituted disparate treatment because the only earlier incidents of employee misconduct that resulted in discharge involved dishonesty, attendance problems, and sexual activity on the job. It is true that the record contains no evidence of previous incidents of "gooseplay" resulting in termination. However, an "essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." *Thorgren Tool & Molding*, 312 NLRB 628 fn. 4 (1993). We can find in the record no incident of a similar nature that the Respondent tolerated. Thus, we conclude that there is no evidence of disparate treatment.<sup>5</sup>

In sum, we find that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent was unlawfully motivated in suspending and discharging Poff and Rowlett. Accordingly, we shall dismiss the complaint.

#### ORDER

The complaint is dismissed.

*Debra Jacobson, Esq.*, for the General Counsel.  
*William P. Barrett, Esq. (Maupin, Taylor, & Ellis, P.A.)*, of Raleigh, North Carolina, for the Respondent.

<sup>4</sup> In finding direct evidence of animus, the judge also relied on (1) plant manager, James Grey's, testimony that before the goose incident he thought Rowlett "was just a regular employee doing his job and [I] had no inkling that he was promoting any type of union"; and (2) Manager Ken Holt's statement to employee Jerry Owens that Holt thought Owens was "a good moral Christian man and to see you come out against the company really surprised me." Again, these statements, which are themselves not alleged as violative of the Act, do not warrant a finding of animus against the Union and its adherents such as would be necessary to support the inference of unlawful motivation.

<sup>5</sup> The very nature of the misconduct is such that it is unlikely that it ever happened before. But, that does not mean that the Respondent cannot discipline employees for the conduct.

#### DECISION

##### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed in this case by Teamsters Local Union 651, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Charging Party or the Union) on September 26, 1997,<sup>1</sup> as amended, on November 25, a complaint was issued on November 28 alleging that NACCO Materials Handling Group, Inc. (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by engaging in surveillance of its employees' activities on behalf of the Union and having the police called while employees were distributing literature near Respondent's property on August 28, and (2) violated Section 8(a)(1) and (3) of the Act by suspending on September 19, and then discharging its employees Pamela Poff and James Rowlett on September 24. Respondent denies violating the Act.

A hearing was held on August 4, 1998, and on October 8 and 9, 1998. On the entire record in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and by Respondent,<sup>2</sup> I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a corporation, has been engaged in the manufacture and sale of forklifts and materials handling equipment at Berea, Kentucky. The complaint alleges, the Respondent admits, and I find that during the past 12 months, Respondent, in conducting the above-described operations, sold and shipped from its Berea facility goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky. I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### The Facts

Plant Manager James Gray testified that the Berea plant has about 600 employees, approximately 450 of whom are production employees. Gray sponsored Respondent's Exhibit 39 which lists the union campaigns that have occurred at the involved Berea plant from April 1975 to October 1997. He testified that there have been a total of eight union elections at the involved Berea facility. With respect to Respondent's policy on unions and union organizing, Gray testified as follows:

The company believes that a Union is not the best thing for our company. They acknowledge the right of an employee to

<sup>1</sup> Unless indicated otherwise, all dates are in 1997.

<sup>2</sup> Counsel for the General Counsel has filed a motion to strike Respondent's "Reply to the General Counsel's Post-Hearing Brief." It is pointed out that Respondent had not requested or received permission to file an additional brief in this matter; and that the Board's Rules and Regulations, Sec. 102.42, provide for the filing of posthearing briefs to the administrative law judge, and permit such filing within the period set by the administrative law judge or such extensions of time as may be granted by the chief administrative law judge. Respondent replied. The Board's Rules do not provide for reply briefs at this stage of the proceeding and Respondent neither asked to be allowed to depart from the customary practice nor has it shown any real need for such departure. Accordingly, the above-describe motion of counsel for the General Counsel is granted.

belong to a Union but Nacco believes that our management philosophy and our employee involvement philosophy and participation of management style and the team environment is the proper way to run a business that needs to be competitive in this world and we don't believe that a Union is conducive to that environment.

As set forth in the employee handbook, Respondent's Exhibit 40, and as here pertinent, Respondent's policy with respect to Unions is as follows:

We do not believe that union representation of our employees is in the best interests of either the employees or the Company.

We acknowledge the right of our employees to join a union if they wish. When they do so, however, they assign to the Union the right to represent them as sole agent in respect to most matters relating to their conditions of employment. For this reason, we believe that the mere existence of a third party between the Company and its employees diminishes the rights of the individual and deters each employee from realizing his/her full potential. We sincerely believe that any third party could seriously impair the relationship between the Company and employees, and could retard the growth of the Company and the progress of the employees.

Respondent hired Rowlett in April 1993. He worked on the second shift, from 3:20 p.m. to 1:40 a.m., the whole time he was with Respondent. Normally he worked Monday through Thursday and if overtime was required, he worked Friday or Saturday. In the beginning of 1997 he was transferred from optional equipment to the wheelabrator where metal is prepared for painting. He held that position at the time of his termination. Robert Jones was his supervisor on the second shift. Rowlett testified that he has never received counseling from the Respondent and he has never been called into the office for disciplinary reasons; and that General Counsel's Exhibits 3(a) through (j) are his evaluations while at Respondent's.<sup>3</sup>

On August 12 Rowlett first heard about the union organizing campaign when Poff told him about it during a break. He signed and dated (August 12, 1997) a union authorization card she had given him and he gave it back to Poff. (GC Exh. 2.)

Owens testified that on the first of two occasions that he distributed union handbills at the involved plant, he left the plant at the end of the first shift at 3:20 p.m. and walked to the end of the driveway; that there were people there already who were handbilling; that he and Respondent's employee Danny Mize started to hand out handbills to the first-shift workers who were leaving; that Union Representatives Shively Pierce and Carl Simpson were present; that Tom Stewart, who is Respondent's human resource manager, was standing within 10 to 15 feet of the handbillers; and that he handbilled for approximately 30 to 45 minutes and Stewart was there during this entire period. On cross-examination Owens testified that the road that the plant is on is very congested at that time of day; that he handed out pretty much every handbill that he had that day; that the employees kept stopping and taking the handbills; that Stewart stood with his arms crossed and every now and then he would wave at someone who was pulling out; that he saw Stewart

have a brief conversation with Simpson; and that he did not see Stewart with a camera, recording device, notepad, or clipboard. On redirect Owens testified that Stewart was in a position to see the people in the cars who stopped to get a handbill.

Mize testified that he participated in the first handbilling of union leaflets which occurred in August 1997; that he was the one who contacted the Union in August 1997; that he was the lead in-plant organizer; that he was working on the first shift on the day of the first handbilling; that when he went to the end of the plant's driveway to handbill he saw Stewart standing there in the area of an oak tree;<sup>4</sup> that at one point an employee exiting the plant stopped to talk to the handbillers, people behind him started blowing car horns and Stewart stepped out to the driveway and started motioning for vehicles to go around the stopped car; that there is a stop sign at the end of the employer's driveway; and that he handbilled for about 30 to 40 minutes.

Simpson, who is assistant to the president of Local 651 and its chief organizer, testified that the Union handbilled at Respondent's plant on three to five occasions in 1997; that the handbilling occurred out by the highway; that during the first handbilling session the police were summoned; that he arrived at the plant for the first handbilling session about 2 p.m.; that Stewart came out of the plant, came to the end of Respondent's driveway and told him that the handbillers were on Respondent's property; that at the time he was standing about 3 feet off the berm of the road; that Stewart pointed to an imaginary line indicating that it was Respondent's property line; that Stewart used a two-way radio to ask someone to telephone the police; that a police officer arrived, left his car on the road, which did not have heavy traffic at that point, and said, "[w]e got a call that you're on company property and that you're also impeding traffic"; that he told the officer that he could see that they were not impeding traffic; that the officer spoke with Stewart and, as the officer was leaving, he said that the only problem he saw was that the truck parked across the street from the Respondent's plant would have to be moved; that he handbilled for about 1 hour after that and Stewart stood under a tree a few feet from the handbillers; that at some point Stewart said the handbillers were blocking traffic; that he told Stewart that traffic was not being blocked and Stewart was trying to influence the employees not to take a handbill; that Stewart stepped out from under the shade tree and stood among the handbillers gesturing and telling the people to keep moving, indicating that he needed to get the plant emptied out; and that the handbillers did not block traffic. On cross-examination Simpson testified that this was the only time he saw Stewart or any other company official at the end of the driveway; that when Stewart was referring to the property line he did point to one stake; that he doubted Stewart's assertions because in the involved county handbilling is allowed in the easement off the roadway up to 15 feet from the center of the road; that the one stake Stewart pointed to was several feet into the easement; that he did not see Stewart with a clipboard or notepad or anything like that; that they had a good response to the handbilling that day; that after the officer left, Stewart told Simpson, "[N]ow you are impeding traffic leaving the plant"; that before the officer arrived Stewart said that the handbillers were impeding traffic on the two lane public road; that the officer arrived on the scene while the second

<sup>3</sup> According to the evaluations, Rowlett received overall excellent ratings on all but two of the evaluations and on those two he received overall satisfactory ratings.

<sup>4</sup> According to the record, Mize testified that Stewart was 30 to 40 feet from the handbillers.

shift was arriving, which was prior to the first shift leaving; and that he believed that about 100 to 150 cars left the parking lot after the first shift. Subsequently, Simpson testified that he was sure that there could have been cars backed up on the roadway when the occupants of the second-shift cars were handbilled as they came in; and that the one stake Stewart pointed to was about 3 feet from the side of the road.

Poff testified that she arrived at the plant to handbill at 2:45 p.m.; that she parked her truck along the side of the road; that a few minutes after she arrived she saw Stewart who talked to Simpson and asked them to leave because they were on company property, and she was standing about 10 feet from the edge of the road when this occurred; that Stewart said that he would call the police if they did not leave; that Stewart radioed the office and told them to call the police; that Stewart continued to watch the handbillers while standing about 10 or 12 feet from them; that subsequently a police officer arrived and asked those who were parked along the road to move their vehicles;<sup>5</sup> that she handbilled until 3:15 p.m. when she had to go into the plant for the second shift; and that while handbilling that day she did not stand in front of any cars to make them stop and she did not see any other employees engage in such conduct. On cross-examination Poff testified that Stewart was in the road in the shade; that she understood Stewart to mean that he wanted them to leave altogether or he would call the police; and that cars did not get backed up and she did not hear anyone honk their horn while she was there. On redirect Poff testified that she was not there when first-shift employees were leaving the plant and being handbilled.

Stewart testified that on August 26 employees and union organizers were engaged in handbilling at the end of the Company's driveway; that he went down to the end of the driveway after receiving a telephone call about 2:45 p.m. regarding some people at the end of the driveway; that he walked to the end of the driveway and asked Simpson what was going on; that Simpson said he had a right to be there handbilling; that he told Simpson that he was on company property which is marked by a post; that Respondent's employees Donna Wilson, Ray Overbey, and Poff were there with Simpson, along with an associate of Simpson, Pierce; that he told Simpson that the handbillers were on company property which is designated by a stake and he asked Simpson to leave company property; that he did not have a conversation with Poff while she was handbilling; that when Simpson and his associate wandered back on company property as they were handbilling he asked them to step back across the line and they did; that he stayed at the end of the driveway because he did not believe that Simpson and his associate would stay off company property; that the road in front of the plant is a two lane road; that he stayed at the end of the driveway until about 3:25 p.m.; that two or three times he pointed out to Simpson or his associate that they had strayed over the property line; that while he was at the end of the driveway he did not have a conversation with any employee other to acknowledge them; that he did not take notes of what he saw, and he did not have a camera or recording device with him; that only once did he signal employees to proceed and that was when an employee stopped to talk with Simpson and the employees who were backed up behind that individual started blowing their car horns; that at the time there 20 cars behind the individual and additional cars coming out of the parking lot

onto the driveway; that he radioed back to the office and asked that the police be summoned because there were vehicles parked in front of a traffic sign directly across the road from the plant entrance and in his opinion the vehicles were obstructing traffic and Respondent had employees coming into and leaving work and a schoolbus travels down that road about 3:15 to 3:25 p.m.; that he did not tell Respondent's employees that they could not be on company property and he did not tell them to leave; that he did not interfere in the handbilling in any way; that when a police officer arrived he told Simpson that a truck parked in front of a sign had to be moved; that on subsequent occasions when employees and the Union handbilled he did not go to the end of the driveway; and that Respondent has not stopped employees from handing out or wearing union paraphernalia in the plant. On cross-examination Stewart testified that he went to the end of the driveway after the handbillers started their activity and he left before the handbillers left; that he stayed at the end of the driveway during the approximately 10 minutes it took for the first-shift employees to leave the premises; that before this handbilling he had contacted Kokoku Rubber and he was advised that it had contacted the police regarding obstructing traffic and trespassing by the handbillers when the teamsters handbilled at that facility, and that Simpson and the Teamsters were instructed by the police to leave; that he neither asked the employee whose truck was parked across from the entrance to move the truck nor did he ask Simpson to have the employee take this action; that he had no idea when the accident had occurred which resulted in damage to the fence by the end of the driveway but the damage was not present when the involved handbilling occurred; and that he did not go to the end of the driveway any other time when there was handbilling. On redirect Stewart testified that with the handbilling the traffic flow of the first shift exiting the plant was slower than normal and it was more congested; and that there was an instance when Simpson was talking to someone leaving the premises and when the drivers behind that car commenced to blow their horns he, Stewart, directed them around the stopped car.

On August 27 the Union filed a petition for an election at the involved facility, General Counsel's Exhibit 5.

By letter dated August 28 to Respondent, General Counsel's Exhibit 7, the Union identified employees on the organizing committee, including Poff. Respondent's employee Jerry Owens, who was one of the employees on the Union's organizing committee in 1997 and who was included on the list of employees in General Counsel's Exhibit 7, testified on cross-examination that, with the exception of Poff, everyone else on the list was still working at NACCO.

General Counsel's Exhibit 6 is a copy of a page from the stipulation for an election at the involved plant which was signed the second week of September 1997 and calls for an election on October 9.

On Friday, September 19, Rowlett worked an overtime shift from 1 to 9 p.m. Rowlett testified that there was very little to do since the day shift, as usual, had done most of the work; that three or four employees, including Poff, bring parts back to the wheelabrator to be prepared for painting; that he ran out of work this evening at about 5 or 5:30 p.m.; that his instructions were to sweep the floor and clean up when he ran out of work; that he cleaned up and took his break between 7 and 7:30 p.m. that night; that a goose came into his work area during his

<sup>5</sup> She moved her vehicle to the employee parking lot.

break and he “talked” to it;<sup>6</sup> that he touched the goose on the back and then picked it up by its feet; that the goose flapped its wings a time or two and then settled down; that he took the goose on the forklift and went to the small parts paint booth and told the employees there<sup>7</sup> that the “duck had come in the back, wanting to sign a union card to join the union”; that Bullens put a union button on his, Rowlett’s, cap; that Poff, who was standing across the aisle, wrote “Vote Yes” on a 3- by 5-inch card and attached it to a string which was about 2-feet long; that Poff placed the sign over the goose’s head while it rested in his lap; that he then went to Tommy Johnston’s work station where backrests are made and told him that the duck wanted to sign a union card; that Johnston laughed but another employee, Johnny King, “tried to tell me it was animal abuse”; that he went back to his work station and placed the goose on the floor; that the goose walked outside the building and the sign fell on the floor; that at most 10 minutes elapsed from the time he picked the goose up to the time it walked back out the door; then subsequently that evening Leadman James Chaney came to his work station while Poff was there; that Chaney asked where the badge was that she had pinned on the goose; that Poff explained to Chaney that she did not put a badge on the goose and they continued the conversation outside while out of his presence; that at about 7:55 p.m. Jones came to his work station and told him and Poff, who was there at the time, to go home and come back in on Monday and see Stewart; and that he was pretty sure that he still had the union button on his cap when Jones came to his work station that night.<sup>8</sup> On cross-examination Rowlett testified that Chaney did tell him what things to do at work; that his breaktime is not 6 p.m. but rather he can take the break any time he wishes; that he believes that he started with the goose shortly after 7 p.m.; that he started with the goose at the time that the other employees in his area were going to break; that he did not think that he picked the goose up around 6 p.m. because it was not 2 hours from the time it happened and when Jones sent him and Poff home; that he looked at his watch when he was sent home and it was 7:55 p.m.; that the bird he picked up was a Canada goose like those in the pictures received as Respondent’s Exhibit 1(a); that the involved pond is accurately depicted in Respondent’s Exhibit 1(b); that he had never picked up a Canada goose before; that other employees saw him with the goose but he did not stop and talk with them; that while on the forklift he held the goose with his left hand and he steered the forklift with his right hand; that the steering wheel has a knob on it that you can drive only with one hand; that he never uses two hands on the steering wheel of the forklift; that Chaney came to his work station about 10 minutes after the goose went outside; that Chaney never saw the goose; that Chaney asked him where the badge was that was pinned on the goose; that the goose was not inside when Chaney came back to the area where he, Rowlett, was at the time; that earlier when he was holding the goose it did not struggle and try to get free; that he did not go near the welders when he had the goose; that when he became an employee of the company he received a company handbook, Respondent’s

<sup>6</sup> Respondent has a pond on its property and in September there are hundreds of ducks and geese at the pond.

<sup>7</sup> Stacy Gillespie, Joe Causey, and Tommy Bullens.

<sup>8</sup> Subsequently thereafter, Rowlett testified that the union button was about 2 or 3 inches in diameter, that it had something about the Union printed on it, and that he wore it on the front of his cap which was facing Jones.

Exhibit 3;<sup>9</sup> that he estimates that he had the goose in his possession for about 10 or 15 minutes and he released the goose about 7:10 or 7:15 p.m.; that Robert Jones came by about 10 to 15 minutes after Chaney spoke to him; and that Jones told him and Poff to go home and come back in on Monday and see Stewart. On redirect Rowlett testified that no supervisor ever told him that he had to have two hands on the forklift steering wheel when he operated it, he has seen other forklift operators drive forklifts with one hand and he had never seen a supervisor tell them to use both hands. And on recross Rowlett testified that Bullens gave him the union button that night and he had never worn a union button before that night; that about one half of the employees wore union buttons; and that another employee brought a dead ground hog into the plant after he killed it, and a picture of the dead ground hog appeared in the company bulletin.<sup>10</sup>

Poff, who worked for Respondent for 12 years (not including layoffs), testified that she always worked the second shift;<sup>11</sup> that when she worked an overtime 8-hour shift on Friday or Saturday the employees combined their two 10-minute breaks into a dinner break (there was no lunchbreak); that there was no designated time when she took the 20-minute break; that while she worked at Respondent she was involved in three union campaigns;<sup>12</sup> that she signed an authorization card for the Teamsters, General Counsel’s Exhibit 8;<sup>13</sup> that during the 1997 Teamsters campaign she signed up to be on the organizing committee, she talked to people, had cards signed, wore a union button, answered any question she could and when she could not answer a question she would get the answer for the employee, and she handbilled three times;<sup>14</sup> that Mize was the most active union supporter on the first shift and he contacted her when he wanted to find out what was going on on the second shift; that there was no work, “nothing,” on Friday, September 19, her last day of work; that she is a material handler, she drives a forklift truck and she gets parts for the welders; that she took overhead guards and backrests to Rowlett to have them wheelabrated; that on September 19, 1997, at about 7 p.m. she first saw a goose where the parts are in the back; that the goose followed Tim VanWinkle, and Richard Northern and

<sup>9</sup> That portion of the handbook introduced herein contains the following:

Our philosophies are reflective of an “audit system” in which each individual makes a deep and respectful commitment to the entire group. Our employees are expected to conduct themselves using food common sense and intelligent thinking.

<sup>10</sup> GC Exh. 4 is Respondent’s Berea Newsletter for September 1997. On p. 9 there is a picture of what appears to be a dead groundhog stretched out on a hard surface. The caption to the picture reads as follows:

And this critter also made a recent appearance. *Where was he on Ground Hog Day, February 2?* (Larry Sims, Electric Tire Press first shift, said he was taking him home to his mom for dinner.) [Emphasis in original.]

<sup>11</sup> She worked Monday through Thursday from 3:20 p.m. to 1:40 a.m. Also there were occasions when she worked overtime, viz, Friday and Saturday from 1 to 9 p.m.

<sup>12</sup> The first campaign she recalled was the Electrical Workers. During that campaign she went to meetings and had cards signed. The second campaign she recalled was the UAW in 1995. During that campaign she passed out union authorization cards and literature, got cards signed, and wore UAW T-shirts and buttons. Poff testified that supervisors saw her wearing the union T-shirts and buttons.

<sup>13</sup> The card is dated August 12.

<sup>14</sup> Poff testified that she handbilled two times before her discharge.

Rowlett were present; that she then went inside the building to see if anyone needed anything because Rowlett said that he did not have anything to work; that she next saw the goose when Rowlett had it riding with him on the forklift inside the plant in the welding department; that she got a blank card and a string, wrote "yes" on the card, made a sign with the string and the card and put the sign over the goose's head while Rowlett was holding it in his arms; that she did not touch the goose; that subsequently King came up to her and told her that she was cruel; that she told King that she was not cruel and that she did not believe in being mean to animals; that she then asked Johnny Gilbert and Bobby Witt if they had anything to go to the wheelabrator for Rowlett to work and they had nothing; that King came up to her again and told her that she ought to be ashamed; that she told King that she was not ashamed and she was a vegetarian; that she went to the breakroom and purchased cake from a vending machine; that she took the cake to the wheelabrator room and put it on the floor for the goose which was loose on the floor at the time; that she left the wheelabrator room but she returned a few minutes later; that she had been driving around trying to find something for herself and Rowlett to do; that when she returned to the wheelabrator room Chaney came into the room; that when Chaney came into the room Rowlett was there but the goose was not; that Chaney accused her of putting a badge on the goose and she told him she did not; that Chaney told her that she could be fired for putting a union badge on the goose and she told him again that she did not put a badge on the goose; that Chaney followed her as she left the wheelabrator room and entered the main plant; that Chaney showed her what he said was a Local 651 Teamsters card, indicating that he had lost his job; that she told him that he had been in management; that Chaney then asked her what did she think the Union was going to do for her and she told him change referring to a recent incident involving fumes, the fact that in her opinion a temporary manager was inebriated at work and an employee on the way to work was run off the road by the same individual; that she asked Chaney if he put the company before his family and he said that he did; that her conversation with Chaney took place about 7:30 p.m.; that at 7:55 p.m. she and Rowlett were in the back where the parts are and Supervisor Jones approached them and asked them to leave and come back in Monday and discuss the goose with Stewart; that she spoke with Simpson that evening or over the weekend and he told her to refuse to answer any questions concerning her union activities; that during the 12 years she worked at NACCO prior to this incident she had never received any kind of disciplinary action, she had never been called to the office to be talked to about any kind of a problem and she had never been chewed out on the floor by any supervisor; and that she did not know if Rowlett was wearing any kind of union insignia when Roberts told them to go home. On cross-examination Poff testified that she had been active enough in all three union campaigns that the Company was aware she was a union supporter; that she handed out literature in the plant during previous union campaigns; that people in the welding department on overtime Fridays combine the two breaks into supper; that on overtime Friday, September 19, there were no parts set out, no overhead guards welded, no backrests to go to the wheelabrator; that she pulled a part for one welder and helped put the part up because there was nothing to do; that she did not know why they even worked that day because they had absolutely nothing; that other employees on the first and second

shift who were active for the Union were still working at the plant at the time of the hearing herein; that she first saw the goose that evening around 7 p.m. outside the building where parts are stored; that the next time she saw the goose was 10 minutes later when Rowlett came down the aisle with it; that the little "vote yes" sign she made had a 8-to-10-inch long string; that she placed the sign around the goose's neck while Rowlett was holding it; that King did not say that he thought that the two of them should turn the goose loose; that Respondent's Exhibits 8(a), (b), and (c) are photographs of the inside of the plant; that the second time King approached her it was about 5 minutes after he approached her the first time and during this conversation King did not say that she and Rowlett should turn the goose loose; that when she gave the cake to the goose it was loose on the floor of the wheelabrator room; that when Chaney came into the wheelabrator room the only forklift in the room was hers; that Chaney did not ask her and Rowlett to turn the goose loose; that Chaney asked her if she knew that she could be fired for putting a union badge on the goose; that Chaney is a lead man in fabrication and he has the authority to instruct employees in what to do; that when the supervisor is not there the leadperson acts as a supervisor; that Chaney talked to her that night between 7:30 and 8 p.m.; that Jones approached her and Rowlett in the back by the racks about 15 minutes after she spoke with Chaney; and that she received a copy of the company handbook and she was familiar with the adult expectation policy contained therein. On redirect Poff testified that she did not have anything to do with Rowlett bringing the goose on his forklift through the plant; and that she never touched the goose.

Regarding September 19, King testified that he was a welder in Respondent's upright weld department;<sup>15</sup> that on that Friday he worked the second-shift overtime and his area took breaks at 3:30 and 6 p.m.;<sup>16</sup> that he had just come back from the 6 p.m. break and it was between 6:15 and 6:25 p.m. when another employee, Bobby Witt, asked him to come over and look at this goose that Rowlett had; that when he got to Rowlett's forklift he said, "[W]hat were you all doing catching this thing"; that Poff walked up with a sign on a string and placed it around the goose's neck; that he then said to Poff, "Pam that's . . . cruelty to animals, I wouldn't do that"; that he then pet the goose;<sup>17</sup> that he then went back to his work station and told another employee, Chuck Hensley, "[L]ook what they're doing up there to that . . . goose . . . I can't believe they're doing that"; that Hensley said, "[W]ell, Johnny . . . you ought to tell somebody"; that Rowlett proceeded to drive around with the goose; that about 1 minute after speaking with Hensley, he, King, went to get a drink of water and Chaney, who was the leadman over the paint booth and, therefore, Rowlett's supervisor in the absence of the regular supervisor, asked him what was going on; that he explained the situation to Chaney who said that he would talk to Rowlett and tell him to turn it loose;<sup>18</sup> that as he was going back to his work station Poff approached him and said that she was not cruel to animals and she was a vegetarian; that about

<sup>15</sup> At the time of the hearing, he was a temporary supervisor.

<sup>16</sup> King testified that he came back from the 6 p.m. break at 6:15 p.m.

<sup>17</sup> The transcript at this point indicates that he testified "to pick up the goose" but as indicated on cross-examination he pet the goose and did not pick it up.

<sup>18</sup> Subsequently King testified that Chaney said that he was going to tell them to turn the goose loose.

45 minutes to an hour later his supervisor, Jones, came to his work station and asked him what happened; that he explained what happened to Jones; that he did not remember or recall seeing a union button on Rowlett's hat that evening; that he never told Poff that she should be ashamed; that Jones asked him if Poff and Rowlett had a goose in the building and he told Jones that they did over at Witt's work station and Rowlett was driving it up and down a couple of times; that Jones came up to him about 7:10 or 7:15 p.m. or about 45 minutes to an hour after he first saw the goose; that at that time he only had one conversation with Poff; that he received a telephone call from Stewart that night at home and Stewart asked him to write out a statement while it was fresh in his mind and bring it to Stewart's office on Monday; and that he brought the statement to Stewart's office on Monday morning. The statement, Respondent's Exhibit 14, reads as follows:

On Friday Sept. 19, 1997, during normal working hours. Between the hours of 6:15-7:15 p.m. Bobby Witt said for me to come and see the horn [goose] that was on James Rowlette[s] forklift. Then as I proceeded toward his forklift I noticed that he was holding a goose in his lap. Then as I turned around and looked to see what Pam Poff was doing I noticed a sign that she was making to go around the goose's neck. I then petted the goose. I then said to Pam that I thought it was being cruel to animals. Pam's reply was that she would not be cruel to animals she is a vegetarian. I then walked over to where Chuck Hensley was working and told Chuck what James and Pam were doing. Chuck said to me he thought that I should tell Robert Jones what was going on. So I then saw James Chaney who has got a radio so he could contact Robert for me and explain to Robert the situation. So then Robert came to my work station about 20 min. later and asked me if I had seen what Pam and James had done and I replied that yes I had seen them make the sign for the goose. I also told Robert that James had paraded around Fab shop showing the goose to different people.

[signed by Johnny King]  
9-19-97

King further testified that he did not overhear Chaney's conversation with Poff and Rowlett; and that he did not telephone the humane society about this incident. On cross-examination King testified that when he indicated in his statement that it occurred between 6:15 and 7:15 p.m. he was referring to the whole incident from start to finish that evening; that he never saw the goose loose in the plant before he saw Rowlett holding it; that he did not see Rowlett pick up the goose; that he petted the goose on its wing while Rowlett was holding it; that the goose was not struggling and it appeared calm; that he was open about his opposition to the Union; that he realized that the sign "vote yes" that Poff placed around the goose's neck was prounion; that he then told Poff that she was being cruel to animals; that he told Hensley that Rowlett held the goose while Poff placed a "vote yes" sign around the goose's neck; that Hensley did not say that he should tell Jones but rather Hensley said that he ought to tell somebody because they should not be doing that, they should be working; that Hensley's concern was that Rowlett and Poff were using the goose to push the Union and making a joke out of it; that he heard that Rowlett said that the goose wanted to sign a union card and Poff said that the goose was their mascot; that the wheelabrator operator can only operate the

wheelabrator when there is something to be wheelabrated; that since his statement was written soon after the incident it is more accurate than his memory with respect to Hensley saying that he should tell Jones what is going on; that he did not read his statement in preparation for his testimony herein and the last time he saw it was the day he turned it in at Stewart's office; that Rowlett was not physically involved in making the sign for the goose; and that he did not tell Jones that he saw both Poff and Rowlett make the sign for the goose. On redirect King testified that the wheelabrator normally is pretty busy throughout the shift; that on September 19, 1997, there was a full crew welding and the wheelabrator is used for overhead guards, backrests, cowls, and fender welds, there were between seven and nine welders and the welding was still going on until 8:45 p.m.; that Rowlett feeds the small parts paint booth and that system was working that night; and that he and the other welders had work to do that entire day and "they wouldn't bring us in on overtime if there wasn't plenty of work to do."

With respect to what occurred on September 19, 1997, Hensley testified that the breaktimes were 3:30 and 6 p.m.; that he saw a goose in the plant about 6:20 p.m. after they had come back from their break; that he saw Rowlett going up and down the aisle on a forklift with a goose; that he could not recall whether Rowlett was wearing any union insignia anywhere; that he could not recall seeing a union button on Rowlett's cap; and that on September 19 Jones came by after the incident and asked him what he had seen. On cross-examination Hensley testified that he did not see Poff with the goose; that he noticed that the sign around the goose's neck indicated "vote yes"; that before this incident he had never seen anybody bring a goose in the plant and ride it around on the forklift truck; and that he did not suggest to anyone that they go and tell someone in management about the incident.

Chaney testified that on September 19 he was the second-shift leadperson over the table wheelabrator, small parts paint system, frame paint system and counterweight paint system;<sup>19</sup> that at the time his supervisor was Joey Centers who worked on the first shift and part of the second shift; that Rowlett was one of the employees that he was a leadperson for; that on a Friday overtime day the second-shift break occurs at 6:30 p.m.; that when he was coming back from break about 7 or 7:30 p.m. King who is a welder in an area that he did not supervise approached him and told him that Poff and Rowlett, "was bringing a goose through there and it had a string and a badge . . . on it . . . [and the badge] . . . was a 'Vote yes' union badge"; that King said that it needed to be stopped; that he tried unsuccessfully to get Jones on the radio and then went looking for him; that when he could not find Jones he went to the wheelabrator room where he found Poff and Rowlett and a Canadian goose sitting on the floor; that no one was holding the goose at that time; that he did not see a string on the goose at this time; that he asked Poff and Rowlett if they had a string and badge on the goose and Poff said, "[Y]es"; that Poff then said what is this cruelty to animals, you eat them don't you: that he said, "[N]o, we just don't need this trouble with people trying to work"; that Rowlett never said a word; that as he walked out of the wheelabrator room Poff came up to him on her forklift truck and told him that he was "a damn liar just like Jimmy Gray"; that he

<sup>19</sup> In January 1998 he became the second-shift supervisor of these systems. The leadperson's job description was received as R. Exh. 16. Chaney testified that if there was a problem in one of the departments when he was a leadperson he would get one of the supervisors on the second shift, namely, Robert Jones or Lonnie Case.

asked her what she meant by that and Poff said that he lied in that while he said that at his prior job he was in the Union he was a manager; that in his prior job he was in the Teamsters Local 651 bargaining unit and then he became a manager but he never previously discussed this with Poff; that Poff also talked about the National Guard and people stealing stuff but he did not have a clue what she was talking about; that Respondent's Exhibit 9 is a picture of him standing in "the location in the plant where this conversation with Ms. Poff took place";<sup>20</sup> that he did not tell Poff that "don't you know that you can get fired for putting a union badge on a duck"; that during this incident he did not pull a Teamsters union card out of his pocket and he did not ask Poff what she thought about the Union; that Poff told him that he should be ashamed of the way Respondent treats the National Guard employees when the Guard was trying to help the people like his sister during the flooding in northern Kentucky; that when Poff asked if he put the Company or the job before his family he answered, "[N]o"; that he again tried to page Jones and when he could not reach him he went looking for Jones; that when he found Jones in the office of Mark Pool, a manager in fabrication, he told Jones "that Pam and J.R. had a goose in there and Johnny came to me, and I couldn't get ahold of you, so I went out there myself and told them to turn it loose" and what Pam said to him when she pulled up to him as he walked out of the wheelabrator room; that he did not see a union button on Rowlett's hat in the wheelabrator room that evening; that later when he was working up the overtime Jones told him that he should put Rowlett down until 8 p.m. when he, Jones, sent him home; that at about 10 p.m. that night Stewart telephoned him at home and told him to write a statement about what he remembered happening; that he was not present when Jones told Poff and Rowlett to go home on September 19; and that he did not recall what the workload was like on September 19. On cross-examination Chaney testified that he was opposed to the Union coming in at NACCO and he felt strongly about that; that Poff, who was not in the group that he was the leadperson for, was very vocal about her support for the Union; that on the night of September 19 he did not have to speak to anyone about not getting their work done and the people in his area of responsibility all got their work done that night; that Rowlett could have been wearing a union button the night of September 19 but he did not see it; that as lead man he took his break at the same time as the people that he had working under him; that King approached him after he, Chaney, came back from his break about 7 or 7:30 p.m. that evening; that after King told him about the goose being in the plant he did see Rowlett going down the aisle with the goose under his arm on the forklift truck; that when he saw Rowlett holding the goose on the moving forklift, the goose was sitting calmly in Rowlett's arm, it was not "flopping around"; that he had a full view of the goose in the wheelabrator room and he could see very well that there was nothing around its neck; that

after telling Poff and Rowlett to turn the goose loose he asked them "did you have a string or . . . a badge on it"; and that at no time did he see Poff holding the goose or doing anything to restrain it and that is what he told the Company. On redirect Chaney testified that he did not tell Poff that he lost a prior job because of the Union; that he asked Poff and Rowlett about the string and badge because he "didn't know for sure if they were going to turn it loose or not." Subsequently Chaney testified that he was, in effect, directing Poff and Rowlett to have the goose which was loose on the floor of the wheelabrator room leave the plant building but notwithstanding his above-described doubts, he did not remain there to make sure that the goose did leave the plant building.

With respect to the involved September 19 incident, Jones, who is a production supervisor on second shift, testified that Rowlett worked for another supervisor, Centers, who was the supervisor for the first and second shift, but Chaney took care of the duties during the second shift; that in Center's absence, Chaney had supervisory authority; that Chaney approached him in Pool's office and told him what had occurred regarding King, the goose, Poff and Rowlett;<sup>21</sup> that he asked King what happened and King told him;<sup>22</sup> that he also spoke to Hensley and Johnston both of whom told him that they saw Rowlett riding with the goose on his forklift; that he telephoned his boss Pool at his house and Pool's wife told him that Pool was visiting his mother in a nursing home; that he telephoned Pool at the nursing home and he explained to him what happened; that Pool "instructed . . . [him] just to go ahead and send him home, and tell him to come back to personnel on Monday and let them deal with it"; that he went to the wheelabrator room at 7:50 p.m. and Rowlett and Poff were there; that he did not see a goose in the room; that he told them to go home and report back to Personnel on Monday, and he would pay them for 7 hours; that he did not ask Poff or Rowlett any questions at this time; that Rowlett told him that he "was just trying to have some fun" and he told Rowlett that he would need to bring that up with personnel; that Stewart telephoned him at home at about 9:30 p.m. and asked him what happened and to write what happened down while it was fresh in his mind; that he drafted a statement that night; that he did not see any union insignia on Rowlett's cap but Rowlett always wore a cap; and that at this point in time he did not know that Rowlett was engaged in union activities. On cross-examination Jones testified that in testifying on direct and initially on cross he was not intentionally leaving anything out when he testified as to what Chaney and King told him about what occurred; that his written statement of September 19 indicates that Chaney told him that Poff and Rowlett had tied a string around the goose's neck and hung a union badge on the string<sup>23</sup>; and that he could not remember whether King told him about the "Vote yes" sign around the goose's neck.

Pool testified that he has worked as a manager in fabrication for over 10 years; that on September 19 while he was visiting

<sup>20</sup> The specific testimony is as follows: [BY MR. BARRETT]:

Q. Mr. Chaney, I'm handing you what's in evidence as Respondent's Exhibit 9, if you'll take a moment and look at that.

(Witness handed document)

A. (Witness complies.)

Q. Is that—do you recognize anyone in that photograph?

A. That's me standing there.

Q. Okay. And, is that the location in the plant where this conversation with Ms. Poff took place?

A. Yes.

<sup>21</sup> Jones testified that Chaney told him that Poff and Rowlett "brought a goose in the plant back there, and Johnny King tried to get them to turn it loose, and they wouldn't turn it loose." When he testified on direct, Jones did not testify that Chaney told him that the goose had a "Vote yes" sign around its neck.

<sup>22</sup> On direct Jones did not testify that King told him anything about the "Vote yes" sign around the goose's neck.

<sup>23</sup> Up to this point on cross Jones had not testified that he had been told that the goose had a "Vote yes" sign around its neck.

his mother in a nursing home he received a telephone call from Jones at about 7:30 or 8 p.m.; and that Jones advised him

that there was an incident in the plant where an operator was driving a lift truck, they were driving around the plant more or less parading this duck through the plant

....

[a]nd . . . when a lead person had approached the individuals involved and asked them to stop, the impression I was left with was that the lead person was verbally abused, and they ignored the request to stop parading this animal around the plant; that it was interfering with other individuals who were trying to work; that they were coming to the lead person and the supervisor complaining about it.

And he asked me what should he do, what action should be taken. Considering the fact that it sounded like an unsafe condition, where if you're familiar with out plant, anybody on lift truck has to be paying attention all the time, we were—this situation was interfering with other individuals who were trying to work, and there seemed to be an apparent lack of response to a request by a lead person to stop, and given the time of the day, I told Robert it seemed best just to remove them from the plant, send them home, and have them come in and see Tom Stewart on Monday.

Pool further testified that Jones identified the individuals involved as Poff and Rowlett; that Jones said that the goose had a sign; that Jones did not say what the sign said, "it was irrelevant to the situation. It was more about stopping the unsafe condition, than worrying about what was on the sign"; and that he then telephoned Stewart and left a message on his answer machine. On cross-examination Pool testified that while Jones, on September 19 told him that there was a sign on the goose, Jones did not tell him what was written on the sign and he did not tell him that it was a pronoun sign; that Poff was a very outspoken union supporter; and that Poff was an acknowledged supporter of the Union and the letter from the Union listed her as a supporter. On redirect Pool testified that there are 12 to 15 employees who were outspoken for the Union in 1997 and all but Poff are still employed by Respondent.

Gerald McKeon, who handles all of the security equipment for Respondent, sponsored Respondent's Exhibits 4 and 9 which are two pictures taken by a camera mounted in the ceiling inside the plant, which camera is aimed at the door by the steel yard. The door leads to the outdoors. The camera is focused on that portion of the inside of the plant just inside of the involved doorway, the doorway and that portion of the outside which is framed by the large doorway. McKeon testified that he is responsible for setting the time and the date which is superimposed on the top of the photographs; and that the date and the military time on the two photographs is accurate. On voir dire McKeon testified that the security camera is a constant video that records all of the activity at that location; that the involved small television camera is on a multiplexer along with 15 other cameras and the involved camera takes a picture every 5 seconds; and that every frame has a date and time superimposed on it and that he checks the setting of the date and time of the camera on a daily basis. Subsequently, McKeon testified that at 7:03 and 7:08 p.m. on September 19 the sun had not gone down; that the involved door faces north; and that "the way the plant is situated, the sun is actually, as it sits, is actually slightly to the north . . . of the plant." Stewart sponsored Respondent's Exhibit 22 which is a plat showing the involved

property with improvements, namely, the plant and addition as drawn by Stewart at the hearing herein. As shown on the plat, the door from the wheelabrator area to the outdoors faces in a direction between north and northwest. In testifying about that door as depicted in Respondent's Exhibit 9, Stewart testified that "the sunlight is coming through very brightly." (Tr. 587.) On cross-examination Stewart testified that the involved security camera capture a snapshot every 6 seconds; and that he reviewed all of the snapshots taken by the particular security camera that depicts the scene on Respondent's Exhibits 4 and 9 during the time period that the goose incident was supposed to have occurred, "[s]ometime prior to the alleged beginning and the alleged ending of it." (Tr. 655.) When asked if any of the other photos showed anything that he took to be a goose Stewart testified, "I would recall a photo of the goose toward the right light there and I believe it was after the photo in which you have there that you were showing me. [R. Exh. 4.]" Such a photo was not introduced herein. Subsequently, Stewart testified that he could not explain why in Respondent's Exhibit 4 the figure which purportedly is Rowlett is further away from the door to the outside then he would need to be if he were taking or letting the goose go out the door. In response to a subsequent question of Respondent's attorney, namely, who did the Company look to explain the situation, Stewart replied Rowlett and Poff.

With respect to the incident of September 19, Stewart testified that there was a message from Pool on his answering machine at home when he returned after 9 p.m. indicating that Rowlett and Poff had been sent home for having a Canadian goose in the plant and parading it around; that he telephoned Jones at home and Jones told him what happened; that he told Jones to draft a written statement regarding what happened while it was still fresh on his mind and he asked Jones to give him the statement on Monday when he came into work at 3:20 p.m.; that he telephoned King at home and asked him to document what he observed and what was said; that he was sure that King told him about the sign on the goose; that he telephoned Chaney at home around 10:30 p.m. and spoke to him as he was getting home from his shift, which ends at 9 p.m.; that Chaney told him that Poff and Rowlett had a Canadian goose in the plant, were parading it up and down the aisle way, and they had been sent home by Jones around 8 p.m.; that Chaney told him that Poff became angry and she "let him have it, as far as just flying off" (Tr. 592); that he asked Chaney to put into writing what he knew of the incident and give it to him on Monday; that it is possible that during this telephone conversation Chaney mentioned a sign around the goose's neck and if he did, he would have mentioned that it had a union-related message on it; that Friday night, September 19, he telephoned Plant Manager Jim Gray, and made him aware of the situation, relating to him what he knew; and that during this telephone call he told Gray that there were two employees in the plant with a goose transporting it around and he was sure that he told Gray that there was a sign placed around the goose's neck, this went on for upwards of an hour, a supervisor sent them home at around 8 p.m. and they were told to report to the office on Monday.

Gray testified that between 8 and 9 p.m. on Friday, September 19, Stewart telephoned him at his home and told him that Rowlett and Poff were involved with bringing a goose into the plant and Jones sent them home and advised them to come back Monday and talk with Stewart in human resources. On cross-

examination Gray testified that Stewart woke him up when he telephoned Friday night and he did not remember Stewart telling him during this telephone conversation that the two employees had hung a sign around the goose's neck.

Owens testified that he worked on the second shift for 1-1/2 years when he was first hired 5 years ago; that there are times when he has no work to do and during these times he sweeps, and talks with other employees or supervisors, sometimes about topics which are not work related; that employees use forklift trucks for nonwork-related purposes (i.e., to get to the break-room), and even though they have been told by supervisors that they should not do this they are not disciplined when they do it; and that often he has seen forklift truckdrivers operating the forklift with one hand. On cross-examination Owens testified that on the average shift he has no work to do probably 5 to 15 minutes and it has been up to an hour; that the supervisor would normally try to find something for him to do if it was going to be longer than 10 minutes or so; and that he has seen forklift drivers operate forklifts with two hands. Subsequently, Owens testified that there is more downtime (periods when an employee does not work) on the second-shift overtime than there is on the first shift.

Dan Pooler, of the United States Fish and Wildlife Service, testified that Canadian geese are protected by the Migratory Bird Treaty Act, along with other state statutes; that the capture of a Canadian at the time involved in the manner set forth in a hypothetical given by counsel for Respondent<sup>24</sup> would have been a "take" in violation of the involved Federal statute; and that he was not involved in the case prior to being contacted to testify here. On cross-examination Pooler testified that he was not aware of the involved incident when it occurred or he would have investigated it; and that if after the involved incident someone took the goose home to rehabilitate it, that would also have been a violation of the statute subject to the same penalties. On redirect Pooler testified that there are rehabilitation permits and if the person who took the goose home to rehabilitate it did not have a permit, it would have been an illegal take. Subsequently, Pooler testified that the goose coming into the plant on its own was not part of the hypothetical he was given; and that the involved situation would fall under the "capture" or "collect" portion of the definition of "take," 50 CFR 10.12. Stewart testified that Respondent did not try to have Poff and Rowlett charged or contact the U.S. Fish and Wildlife and ask them to investigate the matter.

Ronald Prichard, of the Kentucky Department of Fish and Wildlife Resources, testified that Canadian geese can weigh up to 14 pounds and have a wing span of about 60 inches; that they can be aggressive or docile; that they will try to get away if they are caught and restrained; and that it has been his experience that you cannot just walk up to a Canadian goose and pick it up. On cross-examination Prichard testified that no one contacted him or anyone in his department, to his knowledge, in September 1997 with respect to some employees who had an encounter with a goose at the involved plant; that he has fed geese out of his hand but they have not allowed him to capture them,<sup>25</sup> and that it would not be lawful for an individual who was not a licensed or certified rehabilitator to take a goose to

their home to rehabilitate it. On redirect Prichard testified that if a goose took flight in the plant it could be injured; that if the goose had escaped with the string around its neck it could have died; and that, to his knowledge, there are no statutes that regulate when you can and cannot kill a groundhog.

Linda Sesta, who is director of the Madison County Humane Society, testified that she received an anonymous telephone message on Friday evening, September 19, indicating that an incident involving a Canadian goose had happened at Respondent's plant and the caller suggested that she look into it.

On Saturday morning, September 20, Sesta telephoned Respondent and got a recording.

Gray testified that when he went to the plant on Monday Stewart told him that that evening he was going to interview the people who witnessed the episode, along with Poff and Rowlett<sup>26</sup>; and that on Monday, September 22, no one from outside the Company contacted him.

On Monday morning, September 22, Sesta telephoned Respondent. According to her testimony, later that morning Plant Manager Jim Gray returned her telephone call. Sesta testified that Gray told her that

there had been an incident at the plant involving a Canadian goose. Some employees had captured a Canadian goose and brought it into the plant, and were—they were parading it around on a piece of machinery constraining it so that it couldn't get away, and something involving a union insignia, or something like that, but that quite a few of the employees were very upset.

Sesta also testified that she told Gray that she had received a telephone call alerting her to the situation and she was concerned with what happened to the goose; that Gray said that the goose was released, it was not showing any signs of distress, and Respondent took great pains to maintain a habitat for quite a large flock of Canadian geese; that she told Gray that she would be glad to come down and take a look at the goose if he thought that there was going to be any problem with the animal's health; and that Gray indicated that he felt that the animal was all right. On cross-examination Sesta testified that in speaking with Gray she got the impression that the union insignia was perhaps draped on the goose somehow; that Gray's statements suggested to her that he knew which bird was involved; that Gray's statements to her made it clear that the particular goose had been observed and was showing no sign of distress; that she has quite a few groundhogs on her farm and when they are surprised by a person they usually run the other way; and that groundhogs are leery of people.

As noted above, King turned in his statement regarding the September 19 incident to Stewart's office on Monday morning, September 22.

Regarding September 22, Hensley testified that when he came to work on that Monday Stewart called him in and talked to him about what he, Hensley, saw; and that Stewart made notes and he, Hensley read the notes before he signed them. The notes, Respondent's Exhibit 15, read as follows:

9-22-97-Spoke to Chuck Hensley. R. Jones present.

Re: Incident 9-19 (Friday) involving Pam Poff, James (JR) Rowlette and goose.

<sup>24</sup> The hypothetical described the incident which occurred here, except that according to the hypothetical the picking up of the goose was "either inside or outside of the plant building."

<sup>25</sup> This would be done when geese have fishing line attached to them or for purposes of banding.

<sup>26</sup> Gray testified that he usually comes into the plant about 5 a.m. and leaves the plant about 5 p.m. and Stewart usually comes into the plant about 7 a.m. and stays beyond 5 p.m.

He came back from 6:00 pm break and had begun working and Johnny King hollered at him and asked whether he (Chuck) had seen that. Chuck responds "Seen what?" He looked and saw James (JR) Rowlette coming up the aisle with the goose under his left arm with a sign—(index card?) hung on neck, as he was driving the lift truck with one hand (heading west). "J.R." went to the area where thai backrests are built turned around and came back down the aisle. Not sure whether "JR" stopped or not prior to coming back down the aisle.

J.R. didn't say anything to Chuck. Chuck saw what Johnny was talking about and after seeing JR & goose go down the aisle he went back to work.

J.R. (Rowlette) was not transporting anything on his forks.

9-22-97 [signed by Chuck Hensley]

Chaney gave his statement about the September 19 goose incident, Respondent's Exhibit 17, to Stewart on Monday, September 22, 1997. It reads as follows:

On 9/19/97 at approximately 7:30 P.M. Johnny King approached me and told me that Pam Poff and James Rowlett had been driving up and down the isles [sic] with one of the Canadian Geese on their fork trucks and that it had a string around its neck with a vote yes union badge attached to the string. Johnny seemed to be upset so I went to the wheelabrator where James works, as I was walking to the area where James works I saw him with the goose on his fork truck. When I got to the wheelabrator the goose was on the floor between Pam and James fork trucks but the string and badge were not on the goose. I told them to turn it loose, Pam said what is this cruelty to animals you eat them don't you. I said no we just don't need this kind of trouble when people are trying to work. I asked them if they had put a union badge on the goose and Pam said yes, James never did speak during this conversation. As I walked away Pam drove up beside me and . . . said you are a damn liar just like Jimmy Gray. I asked her what she meant by that and she said I lied about being in the union at the factory I worked at before I came here and that I was in management, and that made me a liar just like management here. This upset me so I walked away. I located Robert Jones and told him what had happened. She also spoke about the National Guard and that she had wrote a letter how they treated the people here that were in the service. She said they fired two people for stealing, and a few people carried stuff out every day.

[signed by James Chaney]  
9/19/97

The statement was typed except for the last two sentences which were handwritten. Chaney testified that he added the last two sentences on Monday, September 22, because he was asked if anything was said and so he added this even though he did not understand it; that he did not play any role in the investigation of the incident; and that he was not involved in the decision to terminate Poff or Rowlett and he was not asked to give his opinion on the matter.

Jones gave his written statement, Respondent's Exhibit 18, to Stewart on Monday September 22. It reads as follows:

9-19-97

AT 7:30 PM THIS EVENING JAMES CHANEY CAME TO ME AND TOLD ME THAT HE HAD GONE OUT TO THE SMALL WHEELABRATOR AND ASKED PAM POFF AND JAMES ROWLETT TO RELEASE ONE OF THE DUCKS THAT THEY HAD CAPTURED AND TIED A STRING AROUND ITS NECK, AND HUNG A UNION BADGE ON THE STRING, AND PARADED THE DUCK IN THE PLANT SHOWING IT TO SOME OF THE EMPLOYEES. THESE ACTIONS UPSET SEVERAL OF THE EMPLOYEES, AND JOHN KING TOLD PAM THAT THIS WAS CRUELTY TO ANIMALS. JOHN THEN LEFT AND CAME TO FIND ME WHEN HE RAN INTO JAMES CHANEY AND TOLD JAMES WHAT HAD HAPPENED. AFTER FURTHER INVESTIGATION I MADE THE DECISION TO SEND PAM AND JAMES HOME AND REPORT BACK TO PERSONAL [sic] MONDAY.

[signed by Robert Jones]

Jones also testified that Stewart asked him to sit in as a witness on Stewart's interviews of employees regarding the incident; and that Respondent's Exhibit 19(a) are Stewart's notes of his interview of employee John Gilbert, which notes are signed by Gilbert. The notes read as follows:

pg. 1 of 2

9-22-7—Spoke to John Gilbert. R. Jones present.

—Re: Incident 9-19-97 involving P. Poff, J.

Rowlette & goose

On 9-19-97—Right after they returned from 2nd break he (John Gilbert) saw J.R. Rowlette on lift truck with goose in his lap, going towards west side of plant. . . .

—J. Rowlette stopped where he works at the carriage weld out robot and James hollered at me (John Gilbert) & said, "looky here" . . . John walks over and looked at the goose. John asked him (JR) where he got the goose and J.R. said it was outside, walked close to him (JR) and he reached down and picked it up. Pam had pulled up and was looking at goose. She left and came back with a piece of paper & string. They, J.R. & Pam, hung a sign on its neck. J.R. drove off towards backrest weld and Pam went the other way. Didn't see J.R. come back through area. Didn't pay any attention—was working.

pg. 2 of 2

—When he saw goose it didn't look too riled up over being caught. He pet the goose while J.R. had in his lap. Goose didn't want you to get close to its head, face area. Shyed away from you.

—J.R. (Rowlette) held goose with one hand and drove (guided) the truck with the other. Not for sure whether J. Rowlette had any parts on his forks. Probably didn't. Normally travels from wheelabrator to paint booth. Doesn't remember seeing anything on forks.

—John talked to J.R. & Pam for a couple of minutes. They put sign on goose & he left.

—Doesn't feel it was right for them to have had the goose held captive. Wasn't right. Doesn't agree with what was done.

—Agrees it could've turned into a dangerous, bad situation.

—"He wouldn't have done it. Wouldn't want that done to me."

If it were him he would expect to be disciplined. Not sure how much.

[Both pages of the statement were signed and dated "9-22-97" by Gilbert and Stewart.]

Respondent's Exhibit 19(b) are Stewart's notes of his September 22 interview of employee Thomas Johnston, which exhibit was sponsored by Jones. They read as follows:

9-22-97—Spoke to Tommy Johnston. R. Jones present  
Re: Incident 9-19-97 (Friday) involving James (JR)  
Rowlette, Pam Poff & goose.

Saw J.R. Rowlette driving down aisleway by backrest weld with a goose under his right arm as he was driving by. Went back to work. J.R. didn't stop. doesn't know if he turned around or went on. Dropped his . . . hood and went back to welding.

Doesn't think J.R. was carrying any parts. Doesn't know for sure. Wasn't paying any attention.

Observed J.R. sometime after 6:00 pm break.

[signed by Thomas A. Johnston]  
9-22-97

Respondent's Exhibit 19(c) are Stewart's notes of his September 22 interview of Witt, which exhibit was sponsored by Jones. They read as follows:

pg. 1 of 2

9-22-97—Spoke to Bobby Witt. R. Jones present

Re: Incident 9-19-97 (Friday) involving James (JR)  
Rowlette, Pam Poff & Goose

Was working, after 6:00 pm break, and looked up and saw J.R. (James Rowlette) on a lift truck with a goose sitting on his leg with his right arm around goose (he thinks) and was driving truck with his left hand. Was headed towards west wall of plant—backrest weld area. J.R. stopped. Bobby walked out to truck & J.R. told Bobby that the goose wanted one of the Teamster pins. Pam came through an stopped (Thinks she knew JR had goose because she already had a sign prepared) and put sign around its neck and left. J.R. continued down towards backrest weld. J.R. didn't have a load on his forks. When he left area Bobby went back to work didn't see him (JR) come back through. Goose didn't act like a wild goose—gave appearance of being tame, didn't appear to be afraid of people. Bobby was out there

.....

talking to J.R. & Pam for up to five (5) minutes. Johnny King walked up and stated it was mental cruelty to animals, or something to that effect. Not sure whether Pam responded, wasn't paying attention. Bobby, John Gilbert, Pam & J.R. were there when Johnny King walked up.

[Whitt, Stewart and Jones signed the statement which is dated 9-22-97.]

Respondent's Exhibit 19(d) are Stewart's notes of his September 22 interview of Jones, which exhibit was sponsored by Jones. They read as follows:

9-22-97  
per Robert Jones

—Johnny King told James Chaney what he had observed regarding James Rowlette & Pam Poff parading goose around the plant.

—James went to Pam & James and told them to release the goose. Pam began berating James.

—James went and advised Robert of the incident. James told Robert that Johnny King had been looking for him because he was upset with Pam & James parading the goose through the plant. As he was looking for Robert he saw James Chaney and related incident to him. James went to Pam & J.R. and told them to release the goose.

James then found Robert and related incident to him.

Robert went and spoke to Johnny King to find out what he had observed. Once he had this discussion with J. King, Robert called me (T. Stewart) no answer. He then called Mark Pool & related the incident & Mark advised him to send both individuals home and tell them to report to human resources on Monday, 9-22-97.

Robert went to the Wheelabrator area (Steel Stores) and Pam & J.R. were sitting on their lift trucks. Robert walked between them and told them "concerning the duck incident I'm going to send you two home at this time. It's five until 8:00 pm & I'm going to pay you for seven hours. You need to report to personnel on Monday (9-22) and see Tom Stewart."

James told Robert, "*I didn't mean anything by it. I was just having a little fun.*" Robert didn't respond. Robert turned and walked away. Pam said nothing.

.....

Robert didn't witness any of the incident. Never saw the goose.

A lot of people on the floor were upset.

Witnesses: —Johnny King—Bobby Witt—Tommy Johnston—Chuck Hensley—John Gilbert  
[Emphasis added.]

Jones signed the first page of this three-page statement and dated it "9-22-97." On cross-examination Jones testified that he gave Stewart the statement from September 19 on September 22 before he had his interview with Stewart; that he guessed that he told Stewart about the union badge on September 22; and that he did not know whether he mentioned the union badge to Stewart on September 22.

Respondent's Exhibit 19(e), which was sponsored by Robert Jones, reads as follows:

9-22-97

TOM

I ASKED DAVID BLACKBURN TO WRITE DOWN WHAT HE SAW FRIDAY NIGHT CONCERNING PAM & JR AND THE DUCK HE WROTE THIS DOWN ON A POCKET NOTE BOOK BUT HE SAID HE DIDN'T WANT TO SIGN IT.

[The note was signed "Robert."]

The following note was attached:

When I was leaving work Friday night (9-19-97) a duck was running around the parking lot acting crazy. I don't know what was wrong with the duck.

Respondent's Exhibit 19(f) are Stewart's notes of his September 22 interview of Poff, which exhibit was sponsored by Jones. They read as follows:

9-22-97 at 4:35 pm

Spoke to Pam Poff

R. Jones present

Re: Incident involving goose that occurred on 9-19-97

—Advised her I was in the process of conducting an investigation of the incident involving her, James (J.R.) Rowlette and a goose on Friday 9-19-97.

—Requested that she share with me what happened.

Response, “I refuse to answer on the grounds of my union activities” Requested she put her denial to respond (tell me what happened) in writing.

—Explained to her that I am conducting a fact finding investigation and without her input I would have to rely on the information gathered during my investigation to reach a decision. A decision that could result in the loss of her employment.

. . . . [The note is signed by Jones and his signature is dated 9-22-97]

Respondent’s Exhibit 19g are Stewart’s notes of his September 22 interview of Rowlett, which exhibit was sponsored by Jones. They read as follows:

9-22-97-4:10 p.m.

Spoke to James Rowlette (J.R.)

—Told him I wanted to discuss what happened on Friday, 9-19-97 involving him, Pam Poff & the goose. Asked him to tell me what happened. He replied “Due to the union activity I refuse to say anything.”

—Told him that his right. Requested he put his denial to respond in writing.

—J.R. didn’t have any union apparel on—no hat, button or T-shirt. Explained to J.R. that I regretted he has chosen not to provide me with any information regarding the incident on 9-19-97 involving him, Pam Poff and the parading of a Canadian goose thru the plant in his lap while operating a lift truck.

. . . .

Advised him that based on his not providing me with a statement during my investigation that I would have to rely on information gathered during my investigation to reach a decision. A decision that could result in the loss of his employment.

. . . .

Advised James that if he changed his mind about making a statement that he could call me. Otherwise he was to remain off work until the investigation was completed and a decision made.

Again, I told him that without his input I would have to rely on information obtained during our investigation to make my decision. A decision that could result in his loss of employment.

[The notes are signed by Stewart and Jones and dated “9/22/97.”]

Jones testified that during the September 22 interviews neither he nor Stewart asked Poff or Rowlett about their union activities and the subject of union support was not discussed.

Regarding his Monday, September 22 meeting with Stewart and Jones in Stewart’s office, Rowlett testified that Stewart asked him if he wanted to tell him what happened and he said, “No” he did not wish to make any comment on it due to the

union activities; that Mize, who is one of the union organizers, told him, before he went to Stewart’s office, not to say anything; that he was required to write “I don’t wish to make any comments on what happened Friday night” and sign and date the statement, Respondent’s Exhibit 5; and that they were told to go back home and he, Stewart, would contact them later. On cross-examination Rowlett testified that when he went to the front office to see Stewart on Monday he saw Mize who advised him not to talk to Stewart; that when Stewart asked him to explain what happened on Friday, September 19, he told Stewart that he would not do that<sup>27</sup>; that Stewart then said he regretted that Rowlett was not giving him any input on this matter and without Rowlett’s input the company was going to have to make its decisions based on the information it had available; and that it is possible that Stewart said that one possible result of the investigation into what went on Friday night was that he, Rowlett, might lose his job.

Regarding September 22, Poff testified that she spoke with Jones and Stewart after Rowlett came out of the office; that she signed a document which indicated that she refused to answer any questions about her union activities; and that she told Jones and Stewart that she did not touch the goose and she wanted to make a charge against Chaney since he was lying and she did not pin a badge on the goose. On cross-examination Poff testified that she wrote out Respondent’s Exhibit 11 which states “I refuse to answer any questions concerning my union activities.”

As noted below, Respondent’s employee Larry Sims signed Respondent’s Exhibit 13 and dated his signature “9-22-97.”

With respect to Monday, September 22, Stewart testified that the first thing there was a staff meeting of all the department managers, including Gray, for an hour plus; that in addition to discussing production he and Gray made those present aware of the situation that had arisen on Friday evening but since they did not have the details they could not discuss it at length “just made—made them aware of it. And, that was the extent of it” (Tr. 597); that King came in sometime that morning, dropped off his statement, and explained what he meant by his use of the word “paraded” in his statement; that he made notes of his 30-minute meeting with King, Respondent’s Exhibit 23;<sup>28</sup> that shortly after the start of the second shift, which commences at 3:20 p.m., Rowlett and Poff came to speak with him; that he had Jones with him when he conducted the interviews; that he interviewed Rowlett first and he was dumbfounded when Rowlett said that due to his union activity he refused of say anything because he “personally had never seen any outwardly or any behavior exhibited by Mr. Rowlett that would lead . . . [him] to believe that he [Rowlett] was actively involved with the Union organizational attempt”; that he had Rowlett put his refusal to participate in the investigation in writing and he advised Rowlett that as a result of the investigation of what occurred he

<sup>27</sup> R. Exh. 5 is a statement which Rowlett signed on Monday, September 22. It reads as follows:

I don’t wish to make any comment on what happened Friday night.

<sup>28</sup> The notes indicate, in part, “Pam was going around telling people that it (duck) was the ‘union duck’” and “estimates that they paraded goose around the plant for approx. (5) minutes.” Also, the notes indicate “Shortly after 6:00 pm break. Around 6:15 pm” and “—at 6 p.m. they have a (10) minute break” and “Sign said, ‘Vote Yes.’” The last page of the notes is a diagram of the involved area of the plant.

could end up losing his job; that he also had Poff put her “refusal to answer on the grounds of . . . [her] Union activities” in writing and he advised her that the investigation could result in her loss of employment; that in the past no employee had refused to talk to him when he investigated employee discipline situations; that during his meeting with Poff, she indicated that she wanted to file a harassment claim against Chaney because he lied about a badge on the duck; that after interviewing Rowlett and Poff he interviewed Gilbert, Whitt, Hensley, and Johnston; that Gilbert signed Stewart’s notes of their meeting after Gilbert read the notes, Respondent’s Exhibit 19(a); that he followed this practice with Johnston, Whitt, and Hensley, Respondent’s Exhibits 19(b) and (c), and 15, respectively; that he discussed the matter with Jones shortly after he met with Poff and he also took notes of the discussion, Respondent’s Exhibit 19(d), and he did not know why Jones referenced a union badge on a string in his own statement regarding what occurred on September 19, Respondent’s Exhibit 18, but he, Stewart, did not include anything about the union sign in his notes of his discussion with Jones on September 22; that Respondent’s Exhibits 4 and 9 “are among the photographs from the camera that . . . [he] reviewed in the investigation” (Tr. 613); that he concluded that the involved conduct violated the rule or policy of the company dealing with reasonable adult expectations; that the involved conduct was not in the best interest of the goose, of Poff and Rowlett, or their fellow employees or of the objectives of the company; that there was potential for great harm to occur to them, other employees and the equipment in the facility; that the company has a policy known as the adult expectations policy and it is incorporated into the company’s employee handbook which is given to every employee; that Poff and Rowlett were discharged for misconduct in that “they were transferring the goose throughout the building, exposing themselves and other employees to personal injury, they were not engaged in productive activity and they were detracting from other employees engaged in work”; that Poff’s and Rowlett’s union activity was not a reason for their discharges; that Poff’s activity in the Union was a consideration as far as the ramifications associated with releasing her and it was probably a plus in her corner because Respondent took into consideration the fact that it would be facing a charge; that Plant Manager Gray made the final decision to terminate; and that interviews were conducted on Monday, September 22, it was discussed at our level at the plant and with legal counsel as well as the vice president of manufacturing and the vice president of human resources in the Respondent’s division office on Tuesday and the decision was rendered on Wednesday, September 24. On cross-examination Stewart testified that when he was interviewing Rowlett on the Monday after the incident that when Rowlett said that he was not going to answer any questions because of his union activity he, Stewart, was dumbfounded; that when he interviewed Rowlett the Monday after the incident he was aware that Rowlett paraded a goose around the plant with a vote yes sign on it but he did not take that to be a showing of support for the Union by Rowlett; that if Rowlett approached an employee with the goose and said this goose wants to sign a union card he, Stewart, would not construe that to be an expression of support for the Union; that he did not make the final decision but rather merely investigated and presented the information to his superior who discussed it with the vice president of manufacturing, the vice president of human resources and legal counsel and the decision was rendered; that Poff’s

behavior toward Chaney after he requested that they release the goose could be viewed as insubordination; and that when he wrote the reasons down for her discharge on General Counsel’s Exhibit 22. (See below.) He did not write anything about insubordination. On redirect Stewart testified that Rowlett was the first person he interviewed that day other than King who came by earlier that day; and that he assumed that Rowlett got the goose from outside because he had never seen a goose in the plant before. Subsequently, Stewart testified that he received the statement of Chaney on Monday, September 22, when he came in at the start of his shift at 3:20 p.m.; that it is possible that he read the statement of Chaney before he interviewed Poff and Rowlett; that he did not testify earlier that he was dumbfounded that Rowlett was doing something which would indicate that he supported the Union in some way but rather he was “dumbfounded because of the lack of cooperation”; that “they declined to offer any explanation to me which dumbfounded me”; and that he was dumbfounded with respect to Poff also.

Gray testified that on Tuesday, September 23, Stewart shared with him the statements that people who were in the area had made and what happened with his Stewart’s attempt to talk with Poff and Rowlett; that Stewart told him what the facts were, who had seen what, when it happened and how long it lasted; that he received a telephone call, he believed on Tuesday, from the Humane Society with the caller indicating that someone had reported that a goose “was being messed with in the plant”; that he explained to the woman from the Humane Society that two individuals had taken a goose into the plant and paraded it around and then let it go; that the woman asked if the goose was injured and he replied that he did not think so—he did not see any goose that looked like it was injured at the time; and that after he went through the statements with Stewart

I called our division HR, the vice president of human resources . . . and talked to him about the incident. I also talked with my immediate superior . . . the vice president of manufacturing about it and I do this with most serious offenses and I talked with Labor Relations attorneys in Raleigh about the incident. I believe I spoke with them on Monday as well, but I didn’t have any facts on Monday. Just basically described what the situation was and we decided to wait and see what the interviews revealed.

With respect to his understanding of what the facts were Gray testified:

[R]egular employees had somehow captured a Canada goose, one took the bird on a lift truck and restrained it while he drove up and down the shop floor and showed it off to employees. His fellow employees who some stopped working and went over and talked. Some didn’t. Some just laughed and went on about their business.

As I understood it, some of the—James’ and Pam’s fellow employees raised objection to the fact that they were restraining the animal. It’s a rather large bird, I might add, and the activity continued. One of the individuals went so far as to find a group leader who was in charge of the paint system who would have been over Mr. Rowlett and told him about it and he went to James and asked him to let the animal go and during that situation James and Pam were there together with the bird between them. They didn’t let the animal go at that time. It was some minutes later that the animal was released.

.....  
Rowlett was driving the fork lift holding the animal in his lap.  
.....

It appeared to me that . . . [Poff] was actively involved in it. They had it between them when—when James Chaney went to see about it. At one point one of their co-workers mentioned that she came up and put some sign with string around the animal's neck as it was going through the shop. She was quite vocal and appeared to be the spokesperson when Chaney asked them to set the animal free. She was the one that did all the talking.

Gray also testified that what was done was unsafe because you are not supposed to drive a lift truck with passengers on it, robots are used in the plant, if an employee is distracted it could cause an accident, and there was a risk to the bird itself; that Respondent has made sure that the Canada geese have a habitat and he did not want the Company's reputation in the community to be damaged; that he concluded that the activity with the goose went on for almost an hour because the activity started after the break which would have been about 6:15 p.m. and a plant surveillance camera, which takes a picture every 6 seconds clearly showed that there was activity with the goose after 7 p.m.; and that during the investigation he became aware that Poff hung a sign around the goose's neck and vote yes was on the sign. On cross-examination Gray testified that he spoke with the person from the Humane Society on Tuesday, "she may have called Stewart on Monday because he handed me a note that the humane society had called and then I spoke with her on Tuesday"; that he did not tell the woman from the Humane Society about a vote yes sign being hung around the goose's neck and he was real certain of that because he "was so embarrassed by the whole situation and [he] didn't want to tell anybody outside the plant about something so ridiculous"; and that he did not know how much time the company lost in the whole facility as a result of the goose incident.

Mize testified that he has seen geese, ducks, birds, skunks, cats, and dogs in the plant; that years ago when he worked on the second shift a wild duck would come into the plant on a regular basis; that there were employees that fed the geese; that he has seen geese that appeared to be tame and unafraid of people; that when employees do not have work to do in some cases the supervisor will find work for them to do and in some cases the employee does as he wishes; that while at work he has seen employees making knives and work on automobile parts from home, chainsaws, weed eaters, lawnmowers; that he has seen employees bring lawn furniture from home, put it on the wheelabrator in the plant and paint it; that he has seen and he has been involved in conversations between employees in the plant regarding personal matters which conversations go on for up to an hour and supervisors have been involved; that he had worked on second-shift overtime and the majority of the time by the time the second shift got there the first shift had pretty much cleaned out all the work and most nights it did not take the whole shift to complete the rougher things that the first shift did not complete; that the supervisors liked the overtime also and they let the employees stay until the end of the shift; and that when he worked overtime on the second shift he did have periods of an hour or two with no work to do at the end of his shift. On cross-examination Mize testified that a wood duck came into the plant 10 to 15 times in 1988 and 1989 and employees were feeding the duck; that in 1988 and 1989 he saw a Canadian goose in the plant when the company was called Heyster and it was under different management; that the plant

started going by NACCO and had new management in about 1993, and he has not seen ducks or geese in the plant in the last few years; that the company expects employees to find other work to do when they finish whatever task is at hand, and that is part of the company's adult expectations; that employee Jerry Heron was the one who brought in the porch furniture and he did it in 1998; that he did not know if his supervisor told him that it was okay to work on the porch furniture in the plant; and that employee Gene McKeehan, who works in his department, would spend an hour at a time making knives in the plant in the winter of 1997–1998. On redirect Mize testified that the supervisor in the area directly across from him in the plant spends from 30 minutes to an hour discussing the Bible and religion with his employees during worktime; that in 1997 his supervisor had a fishing pole he wanted to sell and he told the supervisor that he would look at it after work but the supervisor told him "[c]ome on, we'll go get it" and they went to the parking lot during work time, the supervisor showed him how to operate the pole and he bought it; that this excursion took about 20 minutes;<sup>29</sup> that in 1988 and the first part of 1989 he worked on second shift and then he moved to the first shift; that he did not see as many wild animals in the plant on the first shift because there was too much hustle, bustle, and traffic noise; and that the second shift is quieter. On recross Mize testified that the supervisor who participates in discussions of religion and the Bible just about every day is Rusty Brandenburg;<sup>30</sup> and that the incident with Supervisor Willis selling him the fishing pole occurred in the summer of 1997.

Simpson testified that Poff was present at all of the handbillings, except one night session, and she was one of two employees, along with Mize, that he keyed on during the organizing drive;<sup>31</sup> and that he was not aware of any other employee on the organizing committee leaving Respondent.

Mize testified that Poff was his head in-plant organizer on the second shift; and that Poff helped get cards signed, passed out union information, flyers, talked to people who had questions, and tried to get answers for them if she could not answer the questions herself. On cross-examination Mize testified that Respondent's Exhibits 6(a) through (o) are handouts which were circulated to employees during the union campaign; that all of the employees on the in-plant organizing committee, except Poff, still worked for Respondent at the time of the hearing herein; that employees, including Poff, wore a Teamsters T-shirt at work; that Respondent's Exhibits 7(a) through (d) are the texts of some of the signs that he posted on his truck during the 1995 UAW organizing campaign at Respondent's involved facility; that he was also the lead in-plant organizer during the 1995 UAW organizing campaign; that after he became active with the UAW in 1995 he was disciplined in that in the spring of 1996 he was counseled for absenteeism regarding a work-

<sup>29</sup> The supervisor, Jimmy Willis, testified that he did take Mize to the parking lot about 8 or 8:30 a.m. or possibly 10 a.m. to show him a fishing rod; and that they were gone outside the plant 10 to 15 minutes.

<sup>30</sup> Brandenburg testified that he has worked 24 years at the involved plant, that for the last 4 years he has been the production control supervisor; that he discusses religion inside the workplace; that there are 10 to 12 people on the first shift that he talks to occasionally about religion; that he does this while the people are working or on break; that he does not prevent people from working, and that he spends 10 to 15 minutes with any one person and the only time it would ever be longer would be at lunch.

<sup>31</sup> Some of the handbillings occurred after Poff was terminated.

related injury; and that as indicated by a picture in the in-plant newspaper for September 1997, General Counsel's Exhibit 4, he wore a Teamsters Local 651 cap. On recross Mize testified that Willis was the supervisor who counseled him on absenteeism saying something to the effect "[y]ou're getting close on your . . . absenteeism and . . . you need to watch it. You don't need to get in any trouble right now"; and that the only days (3) he missed around that period were due to a work-related injury, viz., a pinched nerve in his back for which he filed a workers' compensation report and claim.<sup>32</sup>

Pool testified that "later in the week, the following week" (the week after the September 19 goose incident) there was a discussion about goose incident among the upper management staff as to the appropriate action and what would be deemed consistent with other actions Respondent had taken; that those who attended this meeting included himself, Plant Manager Gray, Assembly Manager Ken Holt, Quality Manager Mark Hume, Resident Engineer Dave Billings, Materials Manager Phil Shelton, HR Manager Stewart, Manufacturing Engineering Manager John Garner, Gray's secretary Dana for note taking, MIS Manager Steve Stamper, and Financial Manager Bill Teatche; and that "all decisions like that are made by Mr. Gray after he has it blessed by his bosses." On cross-examination Pool testified that there are two staff meetings with one on Monday and one on Wednesdays; that he did not think the final decision was made until that Wednesday and he thought that information was passed regarding this incident on both mornings; that they compared it to other type instances to ensure that they were looking at a level of consistency in their decisions; that the facts considered at this meeting included that Poff and Rowlett refused to stop parading the goose around the plant when Chaney asked them to; and that he was not sure if he understood this from what they were told by Stewart or Gray. Subsequently, Pool testified that because they did not do what Chaney told them to do Poff and Rowlett were insubordinate and part of the situation for which they were terminated was insubordination.

Gray testified that Wednesday, September 24, the day after he spoke with the woman from the Humane Society, there was a Canada goose walking around limping outside the plant; that he did not know if it was the same one; that employee Roseann Meade placed the goose in a large cage and she took it to her father's farm; that he assumed that it was the same bird; that sometime after diner on Wednesday September 24, 1997, he made the final decision to terminate Poff and Rowlett.

On September 24, Stewart telephoned Rowlett and asked him if he could come to the plant. Rowlett testified that he went to the plant and Stewart told him that he did not have a job any longer due to what had happened; that he told Stewart that even if he had told him the truth, he would not have believed him because of all of the rumors that had been spread; and that he told Stewart that all he was doing was trying to have a little fun out of it and that is all he meant by it. On cross-examination Rowlett testified that he was not aware that any

<sup>32</sup> Willis testified that he did not know if he had ever given Mize a counseling for attendance because he did not recall Mize ever having an attendance problem; that he would not consider giving an attendance counseling to someone because of a work-related injury; and that he maintains his own attendance record on each of his employees and he reviews these records with each of his employees periodically to let them know how they are doing in this regard.

supervisor knew that he signed a union authorization card; and that he never wore a union T-shirt to work.

Poff testified that on September 24 Stewart telephoned her right before dark and asked her to come to the plant; that she went to the plant and Stewart said that he had decided to terminate her and Rowlett; that Stewart did not give a reason at that time; that subsequently when she telephoned the plant and asked Stewart what she should give as the reason for her termination he said "structural"; that when she asked him what that meant he said that if they had any questions they could contact him; that she filed for unemployment and she eventually received it; and that, as demonstrated by General Counsel's Exhibit 9, she had received satisfactory to excellent ratings, as here pertinent, from 1988 to 1997 and she had received pay raises during this period.

Chaney testified that he spoke to employee Alan Cashin about leaving a half hour before lunch when there was work to be done, and when Cashin repeated this conduct the next day he, Chaney, told Jones about it.

Jones testified on cross-examination that Poff and Rowlett were not discharged because they refused to answer questions on September 22; that he was present for the interviews of Poff and Rowlett; that the Company conducted a campaign against the union during this period; and that the discharge of Poff and Rowlett took place in the midst of that campaign; that the first page of General Counsel's Exhibit 13 is an employee counseling form for Cashin, which is dated "4-3-97" and signed by Jones,<sup>33</sup> and which indicates "BEHAVIOR OF THIS NATURE [leaving his job early on April 3, the second consecutive day, to go to dinner] WILL NOT BE TOLERATED & ANY FUTURE INCIDENTS OF THIS NATURE WILL RESULT IN YOUR TERMINATION"; that he did not check Cashin's file before giving him this counseling,<sup>34</sup> that on January 30 he saw employee Gene Parker take 45 minutes for a break when he was supposed to take a 10-minute break; that a few days later he saw Parker leave early before the end of his shift; that the next night he saw Parker and employee Phil Bradley, who rode with Parker, leave early; that he did not give Parker any formal counseling or discipline for taking the 45-minute break but he may have spoken Parker about it, warning him not to do it anymore; that when he saw Parker leave the plant and not come back at the end of his break he decided to talk to Parker and that would take care of it; and that he was not going to fire Parker for one time. On redirect, Jones testified that he was not involved in the decision to terminate Poff and Rowlett; that excluding attendance issues he does less than five disciplinary counselings a year and the turnover at the plant is pretty low; and that Parker was terminated shortly after he caught Parker leaving early one night. On recross Jones testified that King and Hensley told him that a lot of employees were upset about

<sup>33</sup> What appear to be the signatures of Cashin and Stewart also are on the form. Page two of the exhibit is a one-page note signed by Chaney summarizing what happened on April 2, regarding Cashin leaving his work station early. Page three of the exhibit are notes of the meeting of Jones, Chaney, Lonnie Cash, who is the frame weld supervisor, and Stewart with Cashin on April 3.

<sup>34</sup> Cashin's file contains an employee counseling form dated January 9 signed by Cash, Stewart, and Cashin and a supporting memorandum dated January 9 from Cash which indicates, in part, "[t]here are two areas of concern: (1) Being out of his work area and (2) Less than expected levels of production. . . . Alan was told that if improvements were not made, more counseling and possible termination could result."

the goose incident. Subsequently, Jones testified that he could not remember what Gilbert said during his interview about where Rowlett said the goose was when it was picked up; that on September 19 King was welding the outer for the upright mast, which is part of the lifting device of the forklift; that the item that King was welding on September 19 would not have gone to Rowlett's wheelabrator to be further processed. And further Jones testified that sometimes people refer to the small wheelabrator area as "outside" because while it is an indoor area, it is not inside the main plant.

Pool, on cross-examination, testified that on December 10, 1996, he signed an employee counseling form for employee Ed Murray, General Counsel's Exhibit 15; that the form memorializes a warning he gave Murray for unsafe material handling practices and the supporting memorandum notes that this was the third unsafe practices incident that Murray was involved in.<sup>35</sup> On redirect Pool testified that, with respect to the December 1996 incident, Murray told him that he did not see the barrier post which was installed over the weekend. The supporting memorandum indicates "[t]he incident was strictly a lack of attention on Ed's part."

Sesta testified that on Thursday, September 25, she received another telephone call from Gray during which he indicated that the goose was showing signs of distress and he believed that the goose was injured; that she informed Gray that she had already spoken to Kentucky Fish and Wildlife which indicated that they did not have a problem with one of her wildlife rehabilitators picking up the bird albeit they were not sure whether it would fall under Federal jurisdiction because of it being a migratory bird; that she spoke to Tom Edwards at Kentucky Fish and Wildlife; that the rehabilitator, Carol Holland, told her that (a) when she telephoned Respondent<sup>36</sup> she was informed that someone working at the plant felt that they were competent in handling a large bird that was injured and that this person had a farm, (b) Respondent allowed the goose to go home with this person, (c) she, Carol Holland, told Respondent that the goose had to be turned over to her because it was protected and the person who had possession of the Canadian goose in question should contact her so that she could pick the bird up, and (d) no contact was ever made; and that there was no further contact with the plant after that regarding the goose. On cross-examination Sesta testified that Gray telephoned her on Thursday, September 25, and told her that the goose was showing some signs of distress; that she believed that Holland contacted Respondent the same day she, Sesta, received the telephone call from Gray who indicated that the goose seemed to be exhibiting signs of distress; that Gray might not have telephoned Holland back until September 26 but when he spoke with her he indicated that the goose was not at Respondent's facility any more; that Holland asked Gray to tell her who had the bird and Gray did not volunteer the name but rather told Holland that he would have the person contact her; that Holland told her that she informed Gray that it was not permissible for an uncertified person to take this goose; and that Gray still did not disclose to Holland where the goose was. Subsequently, Sesta testified

<sup>35</sup> One of the other incidents involved dropping a load of channels off the forklift due to unsafe driving. For the first incident, which involved an electric overhead guard, he did not give Murray a formal counseling but did talk to him. On redirect Pool testified that neither of these earlier incidents involved an intentional act.

<sup>36</sup> Sesta assumed Holland Spoke with Gray because that is who she told Holland to contact.

that she never did learn the name of the individual who supposedly had possession of the goose for a while.

Respondent's Exhibit 13 reads as follows:

9-25-97  
per Larry Sims

pg. 1 of 2

2 or 3 months ago went out to the outside rack where tires are stored to get some tires. He noticed there were tires laying in the grassy area, between the racks and the fence, so he went around to [where] the tires were and began picking them up so he could take back inside to use at the tire press. He noticed Dolphus Young moving a skid and a ground hog ran out from under the skid and ran towards the fence. Ground hog couldn't get through the fence so he turned and ran towards Larry gnashing his teeth. Larry picked up a "stick" and as he was backing up swung the "stick" at the ground hog, missing a couple of times, hitting the ground hog and breaking the "stick"/board. On the third swing Larry hit

....

Larry Sims-Ground Hogpg.

pg. 2 of 2

the ground hog in the head. The ground hog rolled over & Larry made sure he was dead. Larry ended up taking the ground hog home to his mother-in-law who prepared it for Sunday dinner.

States he was afraid the ground hog was going to bite him. Kept coming at him.

[signed by Larry E. Sims Sr.]

9-22-97

Sims testified that his job required him to go outside to pick up tires off a rack; that he noticed that some tires had fallen behind the racks so he got off of his forklift truck and picked up the tires; that while he was picking up tires Young picked up a skid and a groundhog ran out; that when the groundhog started running toward him he backed up and picked up a small stick and killed the groundhog with it; that when the groundhog started running toward him he was between it and the fence; that he backed up about two or three steps; that he put the dead groundhog on the floorboard of his forklift and drove it back into the plant; that he eats those kind of animals; that employee Lynn Hisle took a picture of the dead groundhog; and that he signed Respondent's Exhibit 13, which is a statement he prepared with the Company on the date indicated on page 1 and it accurately reflects what he told the company on that date. On voir dire regarding Respondent's Exhibit 13 Sims testified that he gave the statement about 2 or 3 months after the incident; and that the picture of the groundhog appeared in the September 1997 Berea newsletter which was received by the employees before he was asked to give this statement to the company. On cross-examination Sims testified that at least two supervisors knew about the dead groundhog at the time; that he killed the groundhog about 2:50 p.m.; that his shift ended at 3:20 p.m.; that after he killed the groundhog he spent about 15 minutes picking up the tires; that he has hunted groundhogs and he once killed a groundhog which was running away from him with a rock; that he killed the groundhog with a rock to eat it; that he was called to the office to give the statement after Poff and Rowlett were fired; and that he knew that the reason the Company wanted the statement was because people were raising questions about why the Company fired Poff and Rowlett. On recross Sims testified that the groundhog ran toward him and the fence and before the groundhog ever got to the fence he hit it with a stick and killed it; that is what happened; and that in view of the sentence in his

statement that the groundhog could not get through the fence it turned and came at him gnashing its teeth, he guessed his prior testimony that he killed the groundhog before it got to the fence was not true and when the groundhog could not get through the fence it came at him.

Young testified that he moved a skid and a groundhog ran out, tried to run through a fence and then turned, growled and ran at Sims; and that Sims ran backwards and then hit the groundhog and killed it. On cross-examination Young testified that Sims backed up 8 to 10 feet; that his statement to the company dated September 25, which he signed on the same date, General Counsel's Exhibit 10, indicates the Sims backed up 30 to 35 feet; and that when he gave the statement to the Company Stewart told him that they were trying to claim that the groundhog was the same as the employees having the goose in the plant.

Stewart testified that after the discharges of Poff and Rowlett he interviewed employees Sims and Young because the plant newspaper had an article and a picture in it about the groundhog which Sims killed; that he heard that there were people who said that the situation with the groundhog was the same as with the goose; that Respondent's Exhibit 24 is a union handout which contains the picture of the dead groundhog with the caption as it appeared in the plant newspaper along with the following: "Kill a Ground Hog . . . We'll Publish You[r] Story . . . Play with a Duck . . . You're Out of Here!!!!"; that while Poff and Rowlett willfully engaged in the activity to detain and transport a goose within Respondent's facility, Sims engaged in an act of self-defense; and that the Sims incident did not change his mind about the decision to terminate Poff and Rowlett. The picture of the dead groundhog appeared in the September 1997 Newsletter, General Counsel's Exhibit 4. Stewart testified that this newsletter would have come out in late August 1997.

According to the testimony of Gray, the Wildlife people called him about 7 days after Roseann Meade took an injured goose to her father's farm. Gray testified that the Wildlife person did not tell him that he was supposed to let a licensed rehabilitator look at the goose; and that he told the Wildlife person where the animal was. Subsequently Gray testified that he just told the Wildlife person that the goose was at an employees' father's farm; that he did not know the location of the farm; that the Wildlife person never asked for the name of the person who took the goose; that (after going off the record to check his notes) he had one call from the Humane Society and one call from the Wildlife people; and that

[t]his was several days after the incident. It was on the 30th and Nanna Holland did call me and expressed some concern and I told her that the bird and I assumed it was the same bird, had been taken by Roseann Meade and carried to her farm and that was basically the extent of the conversation.

Approximately 2 weeks after Poff and Rowlett were fired Owens had a conversation with Ken Holt, Respondent's production manager. With respect to this conversation, Owens testified that he was assembling headlights and taillights one afternoon and Holt walked up and started a conversation; that at the time he was wearing a union button and he asked Holt why Poff and Rowlett were fired; that Holt answered, "[t]hey were stealing"; that when he asked Holt what they were stealing Holt answered, "[t]hey were stealing time"; that he told Holt that

half the people in this building stand around and talk to one and another, even the supervisors also do so, and kill time, that's not anything else that any of the rest of us are not guilty off[.]

that Holt then said "Jerry, I thought you were a good moral Christian man and to see you come out against the Company really surprised me"; and that he told Holt that he was not against the company at all but he wanted to see the Company do the best by its people.

General Counsel's Exhibit 22 is a "**PROTEST OF BENEFIT PAYMENTS AND POTENTIAL CHARGES TO EMPLOYER RESERVE ACCOUNT**" which is dated "11-5-97," signed by Stewart and was submitted to Workforce Development Cabinet, Employment Service. The Employer's statement on the form reads as follows:

Individual [Poff] was discharged for misconduct associated with bringing a Federally protected species (goose) into the plant/manufacturing area and her behavior which disrupted production activities of plant, as well as, endangering the safety of her co-workers and the animal.

General Counsel's Exhibit 21 is a "**PROTEST OF BENEFIT PAYMENTS AND POTENTIAL CHARGES TO EMPLOYER RESERVE ACCOUNT**" which is dated "4-21-98," signed by Stewart and was submitted to Workforce Development Cabinet, Department for Employment Service, Unemployment Insurance. The Employer's statement on the form reads as follows:

Individual [Rowlett] was released from our, NACCO Materials Handling Group, Inc., for behavior that did not meet adult expectations, posed a safety hazard to the individual, as well as other employees, & unauthorized activity instead of work individual was being paid to perform.

Stewart testified that in the last 4 or 5 years there have been less than 10 terminations at the involved plant; that Respondent's Exhibit 25 is a separation report, dated "2-10-97," for Parker who was observed sneaking out of the facility prior to the end of his shift; that Parker accepted his invitation to resign in lieu of being terminated; that Respondent's Exhibit 26 is a separation report, dated "7-27-95" for Eddie Beach, who was released for leaving his work area and going outside and fishing at the pond which is on the premises during his work hours;<sup>37</sup> that Respondent's Exhibit 27 is a separation report, dated "2-10-97," for Raymond Phillip Bradley for leaving work, with Eugene Parker, prior to the end of his shift without authorization;<sup>38</sup> that Respondent's Exhibits 28 and 29 are separation reports, both dated "9-16-96," for two named employees who were separated because they were discovered engaged in a sexual activity away from their work station during normal

<sup>37</sup> The second page of R. Exh. 26 indicates, in part, as follows:

Eddie Beach is being discharged for cause due to his failure to meet the reasonable adult expectations of all of our employees.

1. Failure to get approval to leave the area during working hours.

2. Taking Co. time, by fishing while on the clock.

3. Expecting other employees to "cover" while he flagrantly misused his option to be away from the area.

And the third page of R. Exh. 26 describes Beach a a "weekend employee." The involved fishing incident occurred on July 23, 1995, which is a Sunday.

<sup>38</sup> Stewart testified that he was not aware of Bradley ever being caught leaving work early in the past.

working hours;<sup>39</sup> that Respondent's Exhibit 30, dated "7-20-98" is the separation report for employee Charles Bowling who, according to Stewart's testimony, was engaged in a water fight in a work area; that Respondent's Exhibit 31 is a separation report, dated "7-20-98"<sup>40</sup> for employee Bobby Dickerson who was released for leaving work early without authorization<sup>41</sup>; that Respondent's Exhibits 33 and 34, both dated "7-30-96" are separation reports for Adam Vanzant and Bret Poynter both of whom were involved in the theft of Company property;<sup>42</sup> and that Respondent's Exhibits 35 and 36, both dated "9-24-97" are the separation notices of Rowlett and Poff, respectively. On cross-examination Stewart testified that as indicated in General Counsel's Exhibit 16, which is an employee rating report for Parker issued "5/2/95," he had a rating of between unsatisfactory and satisfactory in safety, productivity, cooperation standard operating instructions and overall rating and he had an unsatisfactory rating in progress; that as indicated in General Counsel's Exhibit 17,

On 5/25/95 Gene Parker . . . admitted to the grinding of profanity into a S-70 cowl. This occurrence was discussed with Gene at great length and . . . [it] was clearly understood by Gene that he failed to meet our adult expectations. Gene was advised that this memorandum would be placed in his file for one year. To track Gene's progress in the area of adult expectations he will receive an employee rating report in one month[;]

that the profanity Parker ground into the cowl was "F-U"; that Parker's personnel file did not contain an employee rating report dated 1 month after this incident; that Respondent does not always fire someone the first time they fail to meet the adult expectations clause; that General Counsel's Exhibit 18 is an employee counseling form for Scotty Bullens, dated December 1996, which form indicates that Bowling was wasting time, not making good use of time, and spending too much time talking and not enough time working; and that General Counsel's Exhibits 19 and 20 deal with an employee counseling of Roger Payne over an incident where Payne had an accident while driving a truck of Respondent. On re-cross General Counsel introduced General Counsel's Exhibit 23 which is an employee counseling form for Terry McKeehan who made a threat to get back at another employee.

Gray testified that he is the only one at the Berea plant who can authorize the termination of an employee; that usually the first-line supervisors initiate the process and do the investigation and handle the counseling and if all efforts fail, and they see no alternative they will recommend termination; that since he became plant manager of the Berea plant in September 1993 the turnover rate has been extremely low; that with respect to General Counsel's Exhibit 7, which is the letter he received from Simpson at the beginning of the 1997 union campaign, with the exception of Poff, all of the other employees named in the letter are still working for Respondent; that he has dis-

<sup>39</sup> This was the first time they were so discovered.

<sup>40</sup> In her objection to this matter, counsel for the General Counsel pointed out that the incident occurred after the terminations in question. Respondent argued that Respondent was demonstrating numerous first instance terminations and this incident was consistent treatment therewith.

<sup>41</sup> Counsel for the General Counsel also objected in this exhibit since it dealt with a matter which occurred after the involved terminations.

<sup>42</sup> Stewart testified that these two employees had never been in trouble for this sort of thing before.

charged other employees for not meeting the plant's adult expectations, namely, (a) two employees who were stealing from the fabrication shop, (b) two employees who left their work area, went to the records retention room, where were caught in a compromising position and admitted that this was not the first time they had done it on Companytime, (c) an employee who got caught falsely claiming overtime during a 6-month period, and (d) two employees who left the plant 45 to 50 minutes early without authorization; and that he has given employees a second chance if they show remorse and make a commitment to change their behavior and cooperate in the healing process. On cross-examination Gray testified that of the employees who were discharged two were caught stealing from the plant, the two employees who left the plant early without authority were dishonest, the employee who make repeated false overtime claims (about \$6000 worth) was in a sense stealing from the company, he was involved with drugs and he was "beyond reclaiming as an individual"; that, with respect to whether he considered that Poff and Rowlett were making a joke and having fun, he put Poff's and Rowlett's involved activity in the same category as the two employees who left their work area and were caught having sex in the records retention room in that "[t]hey were having [f]un and they admitted they were having fun and had fun several times and they were grown too and that's not the kind of behavior that we can tolerate at our facility; that the duration of the involved activity of Poff and Rowlett was entirely too long even if it was a practical joke; that "[t]he disregard and the uncooperative attitude that they took and they never at one time even said Mr. Gray we were just having fun. Let us have another chance. They never asked any of that."; that he did read Jones' account of what happened the night of the incident, Respondent's Exhibit 19(d); that, after reading the Jones statement at the trial herein, he "remember[ed] it now";<sup>43</sup> that the two employees who left with their car lights off before the end of their shift had been dishonest numerous times; and that at this particular plant up until the Poff and Rowlett discharges, other than attendance, the only first-offense things he fired employees for was dishonesty or having sexual encounters in the plant on worktime. On redirect Gray testified that he had forgotten about the Beach incident, Respondent's Exhibit 26, where the employee was terminated for fishing at the plant pond during worktime; and that Bowling was terminated (on July 20, 1998) when he engaged in a water fight with another person in the plant and the other person slipped and fell and had to be carried to the hospital where he received stitches.<sup>44</sup>

#### Analysis

Paragraph 5 of the involved complaint alleges that about August 28 Respondent, by Stewart at the driveway to its Berea, Kentucky facility, engaged in surveillance of its employees' activities on behalf of the Union and had the police called while employees were distributing literature near Respondent's property. On brief, counsel for the General Counsel contends that the credible evidence established no actual trespass by Union Representatives Simpson and Pierce during the handbilling

<sup>43</sup> P. 2 of the statement contains the following: "James [Rowlett] told Robert [Jones] 'I didn't mean anything by it I was just having a little fun.'"

<sup>44</sup> Gray testified that one of the two involved in this incident "took it on himself to go out to a Wal-Mart and buy a super soaker which is a rather large water pistol and they were having a water fight."

activity; that Simpson was familiar with the State laws respecting public rights-of-way, and testified credibly that he and Pierce stayed within that right-of-way, namely, 15 feet of the centerline of the roadway; that Respondent did not introduce any evidence of the location of its property line, other than the testimony elicited about the lone stake; that the credible evidence establishes that Stewart told the handbillers to leave and he summoned the police when they refused; that when Stewart learned of the handbilling incident at Kokoku Rubber, in which the company had succeeded in persuading the local police to erroneously instruct the handbillers to leave based on the company's complaints that they were trespassing and blocking traffic, he set out to accomplish the same result; that Stewart closely observed the handbilling for approximately 40 to 45 minutes, until the first-shift employees had finished exiting the plant; that as pointed out by the administrative law judge in *Gainsville Mfg. Co.*, 271 NLRB 1180, 1188 (1984), where the employer's representatives had observed handbilling for a period of 15 to 20 minutes "[w]hether or not intended, Respondent's conduct had a clear and obvious tendency to interfere with employee receipt of the union literature. It is the tendency of Respondent's conduct to be coercive which determines the violation and not the actual effect"; that in *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986), the Board affirmed the judge's conclusion that the respondent there violated Section 8(a)(1) of the Act by engaging in surveillance of and attempting to restrict union handbilling on public property; and that Stewart's claim that he remained at the end of the driveway throughout the handbilling because of "safety concerns" is so ludicrous as to cast doubt on his overall credibility, and certainly on his account of the events surrounding the handbilling.

Respondent, on brief, argues that Simpson was on company property and Stewart asked him to remove himself from the premises; that Stewart remained near the handbilling activity because he was concerned about (a) traffic backing up at shift change and on the road in front of the plant, one or more of the handbillers' vehicles were parked in positions partially obstructing the street and (b) Simpson remaining off Respondent's premises; that the Board has long held that there can be no complaint that union activity is observed when it is done openly and at the employer's property, *Brown Transport Corp.*, 294 NLRB 969, 971 (1989), where the administrative law judge and Board determined that there had been at least minimal trespass sufficient to warrant that company's terminal manager's subsequent monitoring on several occasions of the handbilling activities, the manager's repeated monitoring was not so unreasonable as to suggest it was motivated by an intent to interfere with the union activity, and while subjective impact on employees of the terminal manager's observation is not a test for the violation alleged, it is nevertheless noteworthy that no evidence of adverse impact on employees was adduced, which suggests that none was intended; and that the fact that Stewart made no notes or otherwise attempted to record or list employees involved in the handbilling activity undermines any claim of coercive surveillance, *Phillip Industrial Components, Inc.*, 216 NLRB 885, 886 (1975).

The administrative law judge in *Brown Transport Corp.*, supra at 971 and 972, as here pertinent, concluded, with Board approval, as follows:

The Board has long adhered to the principle that union organizers and the employees they seek to organize have no cause to complain that the employer of the employees

has observed their activities where such activities are openly conducted at the employer's premises. [Case cites omitted.] In *Tarrant Mfg. Co.*, 196 NLRB 794 (1972), an administrative law judge with Board approval stated the principle in somewhat broader and clearly more forceful terms saying at 799, "The notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate is too absurd to warrant comment." The Board has suggested that the principle finds additional support in the general recognition of an employer's legitimate property rights and the "proprietary prerogative" to expel and bar nonemployee union organizers from the employer's premises. *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). Thus, the principal has particular application in those case[s] where nonemployee union organizers are found to be trespassing on the employer's premises in connection with their handbilling or other organizational efforts. *Id.* Accordingly, even an employer's close, as opposed to casual, observation of union activity at or near his premises in order to preclude trespass cannot be found to constitute unlawful surveillance of that activity. In short, the "monitoring of trespassory activity" of non-employee union representatives does not violate Section 8(a)(1) of the Act. *Id.*

Notwithstanding the foregoing, where an employer's observation of open union activity is shown not to be casual in nature, based on trespassory concerns, or concerns over safety of ingress or egress, but rather upon a deliberate attempt to interfere with the legitimate union activity of employees (as in cases where the observation is coupled with overt actions extending beyond the employer's premises or demonstrating that the observation is specifically calculated to disrupt the union activity) such observation will be found to be unlawful surveillance violative of Section 8(a)(1). [Case cites omitted.]

In determining whether an employer's observation of union activities at its premises is casual, innocent, or prompted by legitimate concerns on the one hand, or calculated to unlawfully interfere, on the other hand, a number of factors must be considered. These include the duration of the observation, the frequency and timing of the observation, the proximity of the observer to the union activity being conducted, the likelihood or actuality of trespassory actions by nonemployees engaged in the union activity, and the reasonableness of any perception on the part of the employer of any safety risks to employees or customers associated with the conduct of the union activity. Additional factors include the existence of demonstrated union animus on the part of the employer, the commission of other acts to interfere with the activity being conducted, and the employer observer's departure from customary or normal practice represented by his presence in the immediate vicinity of the union activity. Although each of the foregoing factors are significant, in the final analysis, all the circumstances surrounding the observation must be considered and evaluated.

Respondent did not violate the Act as alleged in paragraph 5 of the complaint. Simpson testified that in the involved county handbilling is allowed in the easement off the road up to 15 feet from the center of the road. The exact width of the road was not made a matter of record herein. Simpson also testified that

the property stake Stewart pointed to was about 3 feet from the side of the road. Each lane on a public road would have to be at least 12-feet wide for larger vehicles to safely pass while traveling in the opposite direction. Consequently, with the involved two lane road (one lane each way), a stake 3 feet from the side of the road would mean that the stake was 15 feet from the center of the road. If the road was wider, the easement would not extend to the stake. Simpson did not deny Stewart's testimony that more than once Stewart had to remind Simpson to move back off Respondent's property. When the police officer arrived at the handbilling site, he referred not only to this concern of the dispatch but also to an additional concern, namely, whether traffic was being impeded. The officer directed that at least one vehicle which was parked alongside the roadway be moved. Also, Simpson testified that he was sure there could have been cars backed up on the roadway when the occupants of the second-shift cars were handbilled as they came in. This one-time observation by Respondent lasted about 40 minutes and if it occurred on August 26, 1997, as alleged by Stewart, it occurred 1 day before the Union filed its petition for an election. It appears that the only time Stewart went among the handbillers was when he conversed with Simpson and when an exiting employee stopped to talk with the handbillers and the drivers held up behind this driver became impatient. In that instance Stewart's activities were limited to stepping out onto the driveway and motioning drivers to go around the stopped car. There is no evidence that Respondent in any way noted which of its employees accepted or rejected union handbills. Nor did Stewart attempt to hide his presence from Respondent's employees. In my opinion Stewart's actions did not unlawfully interfere and they were prompted by legitimate concerns. Accordingly, this allegation of the complaint will be dismissed.

Paragraph 6 of the complaint alleges that about September 19 Respondent suspended and about September 24 discharged its employees Poff and Rowlett because they formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. On brief, counsel for the General Counsel contends Poff was known by Respondent to be an active union supporter; that if Respondent did not have prior knowledge of Rowlett's union support it certainly had such knowledge when it decided to discharge him; that the timing of the discharges, just 2 weeks before the scheduled election, also supports a prima facie case that Respondent's actions were unlawfully motivated; that the evidence supports a finding that these discharges were inconsistent with Respondent's usual approach to disciplinary problems in that there had been very few discharges in this large work force; that the only examples Respondent could give of other employees who had been fired for a first offense involved employees caught stealing materials, falsifying time records, sneaking out of the plant during worktime, and engaging in sexual activity during worktime; that the Bowling incident not only occurred after the Poff's and Rowlett's discharges and could have been approached by Respondent in terms of bolstering its defense but that incident is distinguishable since it involved an injury in the plant and a trip to the hospital; that other employees who were caught grinding profanity into Respondent's work product, leaving the plant during worktime for about 50 minutes, threatening another employee, leaving their work area and having low production, and leaving early for lunch were given verbal warnings or counselings; that the unre-

liable, contradictory, and shifting testimony of Stewart reveals the pretextual nature of the reasons given for the discharge of Poff and Rowlett; that Stewart's blatant dissembling regarding being dumbfounded on September 22 reveals not only Stewart's lack of credibility but it also indicates Respondent's willingness to fabricate, twist, and distort the events here to avoid responsibility for these unlawful discharges; that another indication of the pretextual nature of the proffered reasons for the discharges is Respondent's eagerness to deny any consideration or attention to the fact that the incident involved a "Vote Yes" sign; that a completely neutral witness, Sesta, recalled quite clearly that Plant Manager Gray, contrary to his denial, told her the incident involved the parading of a goose with some sort of union insignia around the plant; that Gray's mention of a union sign to a representative of the Humane Society who would only be interested in the welfare of the goose indicates just how important Gray regarded this fact; that the reasons for the discharges shifted from Holt indicating it was for stealing time to Stewart indicating on (a) Rowlett's unemployment form that it was for not meeting adult expectations, posing a safety hazard to himself and other employees and unauthorized activity instead of work, and (b) Poff's unemployment form that it was for misconduct associated with bringing a Federally protected species into the plant/manufacturing area and her behavior which disrupted production activities of plant, as well as, endangering the safety of her coworkers and the animal, to insubordination for refusing to immediately follow Chaney's directive to turn the goose loose; that the shifting reasons are another indication of pretext; that the photo introduced by Respondent as Exhibit 4 is not dispositive of anything; that curiously Respondent failed to introduce any other photos showing the goose even though the testimony indicated that such existed; that the reliability of the time indication on the photo must be questioned since the witness responsible for assuring the accuracy of the date/time settings on this equipment is the same witness who was under the bizarre impression that "the way our plant is situated' the sun actually sets "slightly to the north"; and that Respondent seized on the goose incident, occurring shortly before the union election, to rid itself of two union supporters and make a point to the remaining employees.

Respondent, on brief, argues that Respondent reasonably believed that Rowlett and Poff were acting together in "parading" the Canada goose in that the information gathered by Respondent placed both Poff and Rowlett together with the goose on two occasions, and together without the goose on a third occasion; that the groundhog incident is distinguishable from the Canada goose incident since groundhogs are not Federally protected, Respondent did not have any indication or suspicion that Sims initiated his encounter with the groundhog, the groundhog incident occurred outside the plant and as a result it posed no threat to employees inside the plant, and Respondent has not commissioned groundhog watercolor prints for its employee awards and VIP customers as it has prints of Canada geese at the pond; that Respondent's decision to terminate was not motivated by any union activity Rowlett or Poff may have engaged in; that despite Poff's longstanding reputation as a union supporter, her job performance had always been rated favorably by management; that absent from General Counsel's case is any evidence whatsoever that Respondent harbored antiunion animus against Poff, Rowlett or any other employee; that Respondent's reasons for discharging Rowlett and Poff were legitimate in that there was a work disruption; that while there may be

lulls because Poff's and Rowlett's job duties were dependent on the needs of others, it is clear from the testimony of other employees that production work was being carried on and, therefore, there would have been work for Rowlett and Poff to perform; that the misconduct posed a threat to the Canada goose in that expert testimony established that the interior of the plant would have been a dangerous place for the bird and that the string placed by Poff posed a special threat to the goose because it could have led to serious injury or even death had it escaped or been set free with the string around its neck; that the misconduct of Rowlett and Poff caused a complaint (anonymous) to be made to the Humane Society which could have resulted in significant negative publicity at the least or possibly even government intervention; that the misconduct posed a safety threat to employees; that the misconduct of Rowlett and Poff included gross disrespect to coworkers and insubordination to a leadperson; that both Rowlett and Poff refused to cooperate in a legitimate and reasonable Company investigation into the incident; that Respondent has enforced its adult expectations policy consistently and it has consistently applied the discharge penalty when warranted to "first-offense" employee misconduct;<sup>45</sup> that the General Counsel's attempts to demonstrate disparate treatment are unavailing;<sup>46</sup> that Rowlett and Poff were not guilty of merely wasting time in that the time involved was excessive—1 hour or more; that when repeatedly asked to cease this misconduct, Rowlett and Poff not only persisted in it but became hostile with King and Chaney at the mere suggestion they were doing anything wrong; and that Poff and Rowlett were penalized for "their prolonged, *intentional* misconduct, insubordination, and refusal to cooperate." (R. Br. 41, emphasis in original.)

In my opinion, Respondent unlawfully suspended and discharged Poff and Rowlett.

<sup>45</sup> Respondent indicates that Parker, Bradley, and Dickerson were forced to leave Respondent's employment after they were observed leaving work prior to the end of their shift, Beach was terminated after he was caught fishing at Respondent's pond during work hours, two employees were forced to leave Respondent's employment after they were observed away from their work areas engaged in sexual activity, Bowling was terminated for engaging in a water fight in the plant, and other employees have been fired for stealing and falsifying timecards.

<sup>46</sup> Respondent submits that Cashin apologized for leaving his work station early for dinner 2 days in a row and GC Exh. 13 represents a significant increase over earlier counseling of Cashin in that the possibility of termination was brought up because of the Cashin's troubling pattern of behavior, that the General Counsel's attempts to equate Murray's sporadic accidents with the intentional misconduct of Poff and Rowlett deserves no further comment other than to indicate that Respondent's counseling of Murray under the circumstances was completely appropriate that Gray exercised his discretion and did not terminate Parker for the grind of a profanity into a part of one of Respondent's forklifts because he admitted his mistake and apologized; that Poff and Rowlett took no ownership of their mistake, and "their refusal to cooperate with the Company's investigation was tantamount to a challenge to Respondent's right to regulate the workplace" (R. Br. at 40); that the conduct of Poff and Rowlett went considerably beyond the mere time wasting of Bullens; that Payne was involved in an accident; that the utterance of a vague threat by McKeehen to Adams was the type of routine incident which occurs everywhere and clearly was addressed in an appropriate manner by Respondent; and that none of these instances amount to evidence of disparate treatment or evidence that Respondent approached the investigation and subsequent termination of Poff and Rowlett with a mindset intending to rid the plant of union supporters.

The following appears at page 18 in Respondent's brief:

Rowlett and Poff both testified that when leadman James Chaney approached them in the wheelabrator room, the goose had long since been set free. However, the photographic evidence from Respondent's security camera, Resp. Exhs 4 and 9, refutes that sequence of events and firmly establishes that the goose was still in their possession at the time that Chaney approached.

Poff, Rowlett, and Chaney all agree that the Poff-Chaney conversation depicted in Respondent's Exhibit 9 occurred *after* Chaney's initial approach to the two employees in the wheelabrator room. Respondent Exhibit 4 demonstrates that 5 minutes *after* the Poff-Chaney conversation outside the wheelabrator room (and after the initial conversation *inside* the wheelabrator room), Rowlett was still in possession of the goose inside the plant. [Emphasis in original.]

I believe that Respondent's Exhibits 4 and 9 are fabricated evidence in that they do not portray what actually occurred and when it occurred on the evening of September 19. The numbers on the photographs indicating the time and date can be manipulated so that while they may be represented to be factual, they are not.<sup>47</sup> What cannot be manipulated is the sun. It has been written that one picture is worth one thousand words.<sup>48</sup> When someone is willing to provide two pictures of the same background taken at two different times in the same day, it could be said that a comparison of those pictures, depending on the circumstances, may speak volumes.

For many, many years man has been aware of the fact that the light generated by the sun can be used to tell time. The Babylonians used sundials four thousand years ago. While the sundial nowadays sees little use other than as a lawn ornament, the principal behind its use will always be valid. When light shines on one side of a nontransparent, nontranslucent object it casts a shadow on the unlighted side of the object. The direction of the sun's rays dictates the direction of the shadow.

As noted above, both McKeon and Stewart testified collectively in terms of the light from outside the plant in the pictures received as Respondent's Exhibits 4 and 9 as coming from the sun. When asked twice if the sun was still up in late September at 7:03 and 7:08 p.m. in Berea McKeon testified that it was. When asked if Respondent had lighting outside the involved plant door McKeon testified that it did. When then questioned about the fact that the remaining sunlight at 7 p.m. in late September in Berea would be on the western side of the plant, McKeon testified that "the way our plant is situated, the sun is actually, as it sits, is actually slightly to the north." As noted above, Stewart, in testifying about Respondent's Exhibit 9, testified that "the sunlight is coming through very brightly." Since these pictures were allegedly taken 5 minutes apart, what appears to be "sunlight . . . coming through very brightly" in one of the pictures should be "sunlight coming . . . through very brightly" in the other, taking into consideration that there is a brightness reflected in both of these pictures.

Interestingly, Chaney was not asked by Attorney Barrett to testify that Respondent's Exhibit 9 accurately depicted him

<sup>47</sup> Here, in my opinion, the numbers have been manipulated.

<sup>48</sup> As pointed out in the 60th edition of Bartlett's Familiar Quotations, the quote was intentionally misattributed as a "Chinese proverb" by Fred Bernard in 1927 so that people would take the statement seriously.

speaking with Poff on the evening of September 19. While the photograph had already been received in evidence through sponsoring witness McKeon, Chaney, not McKeon, appears in the photograph.<sup>50</sup> One would have expected additional authentication<sup>51</sup> by the testimony of Chaney that the photograph is a correct representation of the persons, time (even though testified to by McKeon already), and object or conditions sought to be described.<sup>52</sup> Rather, as noted above, the questions and answers are as follows:

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<sup>50</sup> The following, which involves an exhibit sponsored by Stewart and which demonstrates that Barrett was full aware of the correct approach, is found in Tr. 583.

BY MR. BARRETT:

Q. Okay. Mr. Stewart, does Respondent 22 accurately reflect the property and plant layout of the NACCO plant in Berea?

A. Yes, sir.

<sup>51</sup> Barrett elicited the following testimony, Tr. 341 and 342, from McKeon:

Q. And are the dates and times on these photographs accurate?

A. The date and the time on this photograph is accurate.

Q. Okay. And—

JUDGE WEST: Plural, photographs

THE WITNESS: Photographs.

JUDGE WEST: Thank you.

THE WITNESS: Yes both.

DIRECT EXAMINATION (Cont'd)

BY MR. BARRETT:

Q. Okay. And the time that reads that's—its construed in military time. What are—in layman's terms, what time does that express?

A. That is seven-o-three and seven-o-eight p.m.

<sup>52</sup> While Rowlett and Poff were asked about R. Exhs. 4 and 9, respectively, the significance of the numbers at the top of the photographs was not explained to them. Rowlett testified at Tr. 50 and 51 as follows:

BY MR. BARRETT:

Q. Mr. Rowlett, I'm handing you what I've had marked for identification as Respondent's Exhibit 4. I'd like you to take a close look at that.

(Pause)

Q. What this is, is it's a picture taken by a security camera, that's inside the building, that's aimed at that back bay door.

A. Yeah.

Q. Is that part of your work area back there?

A. Well at the back door, yeah.

Q. Okay do you recognize anything in that picture?

A. The only thing I can make out is the forklift setting there.

Q. Do you see the gentlemen just to the—

A. I—

Q. —left side of the light?

A. I see somebody standing there, yeah.

Q. Does that look like you?

A. Well it—it's a possibility.

Q. Do you see the object that's sticking out from this man's body there?

A. I see that, yes.

Q. Do you think that might be you carrying the goose back?

A. Uh—possibility.

Q. Do you think it's a strong possibility?

A. Well no—no—no plainer than you can see, how can you tell what it is? I mean I ain't trying to say it ain't me carrying it.

Q. It could be, couldn't it?

A. Well, it's pos—possibility.

Q. As far as you know, there was no one else in the plant that night carrying a goose around, right?

BY MR. BARRETT:

Q. Mr. Chaney, I'm handing you what's in evidence as Respondent's Exhibit 9, if you'll take a moment and look at that.

(Witness handed document)

A. (Witness complies.)

Q. Is that—do you recognize anyone in that photograph?

A. That's me standing there.

Q. Okay. And, is that the *location* in the plant where this conversation with Ms. Poff took place?

A. Yes. [Emphasis added.]

For my purposes, at least three things are noteworthy about the two involved photographs (R. Exhs. 4 and 9), namely, (1) the brightness of the light emanating from what McKeon and Stewart testified is the sun, (2) the direction of the shadow behind (the indoor side of the door) the left doorpost or jamb of the door which goes outside where there is no roof or walls (outdoors),<sup>53</sup> and (3) the direction of the movement in the two involved photographs of the shadow behind (the indoor side of the door) the left doorpost or jamb of the door which goes outdoors.

Regarding the brightness of the sun, as noted above, more than once McKeon was asked if the sun was still up at the involved time in late September. Both times he responded af-

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A. Well, no.

Q. You didn't see any other employee—

A. No.

Q. —carrying a Canadian Goose around—

A. No.

Q. —did you?

A. No.

Poff testified at Tr. 248 and 249 as follows:

BY MR. BARRETT:

Q. I'm showing you what I've had marked for identification as Respondent's Exhibit 9, Ms. Poff, and ask you to take a look at that for a moment. What this is, is a photograph from a security camera that's aimed at that back bay door. Do you see Mr. Chaney in the photograph?

(Witness handed document.)

A. Yes.

Q. Okay. Would that be you on the forklift talking to him? Is that about where the conversation took place that you're referring to?

MS. JACOBSON: Could we break that question down, Your Honor?

CROSS-EXAMINATION (Cont'd)

BY MR. BARRETT:

Q. Is that you in the forklift, do you believe?

A. I'm not sure.

Q. When you've had this conversation with Mr. Chaney, were you riding your forklift?

A. Yes.

Q. Okay. Is this the part of the building that you were in when the conversation occurred?

A. It could have been. It was as—as we was coming in the door.

Q. Okay. Is the wheelabrator area anywhere near here?

A. Yes.

Q. Okay.

A. It's to the right.

<sup>53</sup> As noted above, sometimes "outside" is used to refer to the wheelabrator area of the plant because while the area does have a roof and walls, it is outside the main plant structure.

firmatively. Again, as noted above, Stewart testified that, “the sunlight is coming through very brightly.” One would expect that at Berea in late September at 7:03 and 7:08 p.m. the sun would be about to go over the western horizon if it had not already set. For my purposes, I need only rely on an irrefutable fact, namely, if the sun had not set at the times involved here, its rays would be coming from the west. That being the case, one need only look at the pertinent shadows in the two involved photographs to determine whether Respondent’s Exhibits 4 and 9 are fabricated evidence. As shown by Respondent’s Exhibit 22, the doorway (to the outdoors) in question faces approximately 330 degrees north by northwest. As noted above, the involved camera is inside the plant, it is on the ceiling, it faces the involved door, and it photographs the inside of the plant just inside the door, the door and that portion of the outdoors framed by the involved door (when it is open if indeed it can be closed). Since the sun rises in the east and sets in the west, this would mean that, to the extent the sun was still shining in this area at the involved times, its rays would be coming from the left side of the two involved photographs. With the sun’s rays coming from the left side of the photographs, the shadow running off the indoor side of the outermost left doorpost or jamb would extend from the doorpost to the right (i.e.), and very late in the day the shadow would go from the involved left doorpost across the floor into the area just behind (on the indoor side) the right doorpost of the outermost door. In Respondent’s Exhibit 9 (the alleged 7:03 p.m. picture) the shadow extending from the involved left doorpost runs in the wrong direction. Instead of running off the doorpost to the right (i.e.), it extends from the involved doorpost to the left (i.e.). This is physically impossible if the picture was taken at the time it was alleged to have been taken and the shadow was caused by the sun’s rays. Even more ridiculous is the fact that Respondent’s Exhibit 4 (the alleged 7:08 p.m. picture) shows the shadow behind (on the indoor side) the involved left doorpost moving even further to the left (i.e.). To accomplish this on the same day with the sun’s rays would mean that the sun moves from the west to the east. It does not. If Respondent’s Exhibits 4 and 9 were taken on the same day utilizing only the sun’s rays, (a) Respondent’s Exhibit 4 (the alleged 7:08 p.m. picture) was taken earlier in the day than Respondent’s Exhibit 9 (the alleged 7:03 p.m. picture), and (b) both appear to have been taken about midday. Obviously Respondent’s Exhibits 4 and 9 will not be given any weight whatsoever.

As set forth by the National Labor Relations Board (the Board) in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991):

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),<sup>4</sup> the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.<sup>5</sup> The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer

animus in the absence of direct evidence.<sup>6</sup> That finding may be inferred from the record as a whole.<sup>7</sup>

<sup>4</sup> Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>5</sup> *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

<sup>6</sup> *Association Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

<sup>7</sup> *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

To determine what happened and the underlying motivation it will be necessary to make findings with respect to the credibility of certain witnesses. In making credibility resolutions one should never fail to keep in mind the words of Chief Judge L. Hand in *NLRB v. Universal Camera Corp.*, 170 F.2d 749, 754 (2d Cir. 1950), that:

[I]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Counsel for the General Counsel has established that Poff and Rowlett engaged in union activity and Respondent knew about it. Poff and Rowlett both engaged in union activity before Respondent decided to discharge them. The statements both gave or made to Stewart on September 22 indicating their refusal to cooperate was due to their union activity are sufficient to support such a finding with regard to their discharges. With respect to their suspensions on September 19, it cannot reasonably be disputed that Respondent was aware of Poff’s union activity. Her name was included in the letter, General Counsel’s Exhibit 7, the Union sent to Respondent regarding which employees were on the organizing committee. Regarding Respondent’s knowledge of Rowlett’s union activities before he was suspended on September 19, it is noted that before Rowlett was suspended Respondent knew that Rowlett drove a goose around the plant on his forklift truck and the goose had a prounion sign hanging around its neck. King told Chaney about the prounion sign on the goose. Chaney asked Poff and Rowlett about the prounion sign on the goose. Chaney then told Jones about the prounion sign on the goose. When asked by Jones if he had seen what Poff and Rowlett had done King told Jones that he, King, “had seen them make the [prounion] sign for the goose.” (Emphasis added.) Respondent’s Exhibit 14.<sup>54</sup> Jones subsequently told Poff and Rowlett on Friday September 19 to go home before the end of the shift and report to Stewart on Monday September 22. Jones’ written statement dated “9–19–97,” Respondent’s Exhibit 18, indicates that “I MADE THE DECISION TO SEND PAM AND JAMES HOME AND REPORT BACK TO PERSONNAL [sic] MONDAY.” According to this written statement of Jones, he

<sup>54</sup> While King testified that he did not say this, his written statement of “9–19–97” speaks for itself.

was indicating that he and not someone else, made the decision to suspend Poff and Rowlett. Other evidence of record indicates that Jones, who is the production supervisor on second shift, engaged in disciplinary action regarding other employees. There was no indication on the record that he did not have the authority to take such action. Additionally, the September 19 written statement of Jones makes no mention whatsoever of Jones discussing the matter with Pool on September 19 and Pool being the one who decided to send Poff and Rowlett home.<sup>55</sup> Pool was not a credible witness with respect to his role on September 19. While, on the one hand, testifying that Jones told him about a sign on the goose but never told him about the content of the sign, Pool testified, on the other hand, that on September 19 during his telephone conversation with Jones he, Pool, was under the impression that Poff and Rowlett “ignored the request to stop parading this animal around the plant” and “there seemed to be an apparent lack of response to a request by the lead person to stop.” Chaney testified that he did not remain in the wheelabrator room to make sure that the goose did leave the plant. That being the case, it was not explained how Chaney would have been in a position to know on September 19 whether the goose was taken or ushered or just walked out of the plant. If Chaney did not know, how would Chaney have been in a position to tell Jones? If Chaney did not tell Jones, how would Jones have been in a position to relay this information to Pool? Chaney did not testify that on September 19, after he spoke with Rowlett, Rowlett disregarded his directive to turn the goose loose. Chaney did not testify that he told Jones on September 19 that Rowlett disregarded his directive to turn the goose loose. Chaney’s “9/19/97” written statement similarly makes no mention of Rowlett disregarding Chaney’s directive to turn the goose loose. And Stewart’s notes of his September 22 interview of Jones, Respondent’s Exhibit 19(d), make no mention of Rowlett and Poff disregarding Chaney’s directive. Rowlett did not disregard a directive from Chaney to turn the goose loose. I credit the testimony of Poff and Rowlett that the goose had already left the plant when Chaney came into the wheelabrator room. Only three people were present at this meeting. Two of the three testified that the goose was not present at the time. The third, Chaney, was not a credible witness in view of, among other things, the false portions of his September 19, typed/written statement, his testimony about Poff admitting that she put a badge on the goose and his lack of candor regarding Respondent’s Exhibit 9.<sup>56</sup>

<sup>55</sup> Stewart’s notes of his interview of Jones, R. Exh. 19(d), refer to Jones telephoning Pool and Pool telling Jones to tell Poff and Rowlett to go home and report to human resources on Monday. At the same time Stewart’s notes make no mention of the prounion sign worn by the goose even though Jones’ written statement, which he gave to Stewart on September 22 refers to a “A STRING AROUND [goose’s] NECK, AND . . . A UNION BADGE ON THE STRING . . .”

<sup>56</sup> As noted above, Chaney’s typed/written September 19 statement indicates, “I asked them if they had put a union badge on the goose and Pam said yes.” Chaney also made this same assertion while testifying here. Rowlett testified that Poff explained to Chaney that she did not put a badge on the goose. And Poff testified that when Chaney accused her of putting a badge on the goose she told him she did not. Stewart conceded that during his September 22 interview with Poff she indicated that she wanted to file a harassment claim against Chaney because he lied about a badge on the goose. Stewart did not include this in the notes of the interview he sponsored here, Resp. Exh. 19(f). On cross-examination he claimed this was written on another sheet or sheets but they were not offered in evidence here. To believe Chaney

Accordingly, I do not credit that portion of Jones’ written statement which refers to Chaney asking Poff and Rowlett to release “ONE OF THE DUCKS.”

Jones testified that he did not see a union insignia on Rowlett’s cap and on September 19, he did not know Rowlett was engaged in union activities. Rowlett was only pretty sure that he still had the union button on his cap when Jones came to his workstation on the night of September 19, 1997. Nonetheless, one must wonder whether there is that much of a difference, in terms of union activity, in wearing a cap with a union insignia on it and carrying a goose around with a prounion sign on it. Certainly the latter will get a lot more attention. While Stewart testified that he did not take Rowlett’s parading of a goose in the plant with a vote yes sign around its neck to be a showing of support for the Union, one must take into consideration Stewart’s interest. However inappropriate the use of the goose was, Rowlett was engaging in union activity on September 19 when he drove the goose around the plant on his forklift truck with the goose wearing a vote yes sign.

For the reasons given below, it has been demonstrated that there was antiunion animus on the part of Respondent.

Would Respondent have discharged Poff and Rowlett notwithstanding their protected conduct? Stewart testified that Poff and Rowlett were discharged for misconduct in that “they were transferring the goose throughout the building, exposing themselves and other employees to personal injury, they were not engaged in productive activity and they were detracting from other employees engaged in work.” In November 1997 Stewart wrote, General Counsel’s Exhibit 22, that Poff “was discharged for misconduct associated with bringing a Federally protected species (goose) into the plant/manufacturing area and her behavior which disrupted production activities of plant, as well as, endangering the safety of her coworkers and the animal.” In April 1998 Stewart wrote, General Counsel’s Exhibit 21, Rowlett “was released . . . for behavior that did not meet adult expectations, posed a safety hazard to the individual as well as other employees, and unauthorized activity instead of work individual was being paid to perform.” And at page 41 of its brief Respondent indicates that Rowlett and Poff were discharged “for their prolonged, *intentional* misconduct, insubordination, and refusal to cooperate.” (Emphases in original.)

Respondent, allegedly relying in part on Respondent’s Exhibit 4<sup>57</sup> and certain employees who indicated that sometime after their 6 p.m. break they saw the goose in the plant, alleges that the activity with the goose went on for almost one hour. Rowlett testified that on September 19 during his break between 7 and 7:30 p.m. he picked up a goose that came into his work area; that 10 to 15 minutes elapsed from the time he picked the goose up to the time it walked back out the door; that Chaney came to his work station about 10 minutes after the

one would have to discredit the testimony of Poff and Rowlett on this point and then try to explain, if Poff conceded this point on September 19 why she would take such a strong stand going the opposite way on September 22. Poff and Rowlett were credible witnesses. Chaney’s typed/written statement and his testimony on this point are not credited.

<sup>57</sup> Interestingly Chaney’s “9/19/97” statement begins “at approximately 7:30 p.m. . . . King approached me . . .” Obviously King would have had to tell Chaney before Chaney spoke to Poff and Rowlett. The time set forth in the picture received as R. Exh. 9 could not be correct if this part of Chaney’s statement is correct. For the reason specified above, this exhibit is not being given any weight. It is noted that when he testified herein Chaney expanded the time to about 7 to 7:30 p.m.

goose went outside; and that he believed he released the goose about 7:10 or 7:15 p.m. Poff testified that she saw Rowlett come down the aisle with the goose at 7:10 p.m.; and that Chaney met with her and Rowlett at 7:30 p.m.<sup>58</sup> and the goose was not there at the time. It appears that Rowlett picked the goose up shortly before 7:10 p.m. and released it around 7:20 p.m. If Supervisor Willis can take 15 to 20 minutes to show Mize a fishing rod during worktime, then why is Respondent making an issue over 10 minutes? Respondent, however, did not have the benefit of Poff's and Rowlett's perspective of the time line in September 1997. With respect to the time line of the goose incident, Respondent had written statements from (1) King indicating between "6:15-7:15 pm [told to] see . . . [goose] . . . on . . . Rowlett[']s forklift"; that he then spoke to Chaney; and that 20 minutes later Jones asked him about the incident, (2) Chaney indicating that "[o]n 9/19/97 at approximately 7:30 p.m. . . . King approached me," and (3) Jones indicating that at 7:30 PM THIS EVENING . . . CHANEY CAME TO ME . . ." Also Stewart drafted notes of his interviews with (1) Hensley, who indicated that after he came back from 6 p.m. break he saw Rowlett, the goose and the sign around the goose's neck, (2) Gilbert, who indicated he first saw the goose with Rowlett on his forklift right after he returned from second break and he spoke with Poff and Rowlett for a couple of minutes, (3) Johnston who indicated that he observed Rowlett sometime after the 6 p.m. break, (4) Witt, who indicated that after the 6 p.m. break he saw Rowlett on a lift truck with a goose, (5) Jones, who indicated he sent Poff and Rowlett home at 7:55 p.m. and (6) King who indicated shortly after the 6 p.m. break, around 6:15 p.m. he saw Rowlett with goose, and he estimated that they paraded the goose around the plant for approximately 5 minutes. (Emphasis added.)

Even without the participation of Poff and Rowlett in the investigation, there was no reasonable basis for concluding that the incident continued for a prolonged period of time. Chaney's typed statement of September 19, 1997, indicates that at approximately 7:30 p.m. King approached him about the incident and he then spoke with Poff and Rowlett. King's written statement of September 19, 1997, indicates that when he saw Rowlett with the goose it could have been 7:15 p.m.<sup>59</sup> and he then spoke to Hensley and Chaney. Jones written statement dated September 19 refers to Chaney coming to him at 7:30 p.m. Based solely on the statements which were drafted by King, Chaney and Jones on September 19 Respondent could have concluded that the incident occurred over a period of at most 15 minutes between 7:15 and 7:30 p.m.<sup>60</sup> Chaney's typed

<sup>58</sup> As noted above, Chaney's "9/19/97" statement indicates that King approached him at approximately 7:30 p.m. and he, Chaney, then went to the wheelabrator room.

<sup>59</sup> King's testimony that when he indicated in his statement that it occurred between 6:15 and 7:15 p.m. he was referring to the whole incident from start to finish that evening is not credited. As set forth above, the pertinent portion of the statement reads: "Between the hours of 6:15-7:15 p.m. Bobby Witt said for me to come and see the horn that was on James Rowlette[']s forklift. Then as I proceeded toward his forklift I noticed that he was holding a goose in his lap." The time period specified refers to when Witt told him about the goose and when he, King, saw the goose. Like certain other of Respondent's witnesses, when he testified here he attempted to modify a prior statement so that it would be read in a light more favorable to Respondent.

<sup>60</sup> As noted above, the two photographs, R. Exhs. 4 and 9, one of which contradicts Chaney's September 19, 1997 statements as far as his 7:30 p.m. estimate is concerned, are not given any weight.

and written statement of September 19 refers to "approximately 7:30 P.M." and there is no evidence of record that he changed this time before Poff and Rowlett were discharged. Instead Respondent chose to take the position that the incident began shortly after 6 p.m. and, as allegedly shown by the two photographs, Respondent's Exhibits 4 and 9, it continued until after 7 p.m. As noted above, it is my opinion that the two photographs are fabricated evidence. In addition to the above-described September 19 statements, Stewart met with five employees, not including Poff and Rowlett. Stewart drafted notes of his interviews with these five employees. And Stewart had the employees sign the notes. None of the notes indicate that Rowlett had the goose in these employees' presence for a prolonged period of time. In fact a fair reading of the notes of these interviews indicates that Rowlett and the goose were in the presence of the employees for just a few minutes. As King indicated during his interview, Rowlett paraded the goose around the plant for approximately 5 minutes. Stewart's notes also indicate that with the exception of King, the employees returned to work within moments of seeing Rowlett and the goose. It was not asserted by any employee that Rowlett interfered with any of their work. The momentary stoppages were voluntary on the employees' parts. And King's taking the time to speak to Chaney was a voluntary act on his part. In introducing Respondent's Exhibits 4 and 9 Respondent chose a time line which was not in accord with the September 19 statement it had from Chaney. As indicated by one of Respondent's own witnesses, Rowlett paraded the goose around the plant for approximately 5 minutes. This is not prolonged.

And with respect to breaktime on September 19 Chaney testified that as lead man he took his break at the same time as the people that he had working under him. Rowlett, who worked under Chaney, testified that he took his break between 7 and 7:30 p.m. Chaney testified that he came off his break between 7 and 7:30 p.m. and that King worked in an area that he, Chaney, did not supervise.

Could Rowlett, who was the only one who drove the goose around the plant, have been engaged in productive activity at that time? Rowlett's wheelabrator job was dependent on other employees producing items so that he could use the wheelabrator to prepare the items to be painted. King tried to leave the impression that there was work for Rowlett in that he, King, and the other welders were still going on until 8:45 p.m. on September 19. However, Jones, who is the production supervisor on the second shift testified that the items King was welding on September 19 would not have gone to Rowlett's wheelabrator to be further processed. Chaney testified that he did not have to speak to anyone about not getting their work done and the people in his area of responsibility, which included Rowlett, all got their work done that night. Employee Owens testified that there is more downtime on the second-shift overtime than there is on the first shift. And employee Mize testified that when he worked overtime on the second shift he did have periods of an hour or two with no work to do at the end of his shift. Rowlett's testimony that he ran out of work that evening at about 5 to 5:30 p.m. is credited. Poff's testimony that Rowlett told her that evening that he did not have anything to do and that she tried to find work for herself and Rowlett is credited. No credible attempt was made to contradict this testimony of Rowlett and Poff. With respect to Stewart's testimony that Rowlett and Poff were not engaged in productive activity, it

appears that this was due to a lack of work that night and not to the goose.

Was the involved conduct intentional misconduct? What occurred was not an accident; it definitely was done intentionally. One of the objections to the conduct raised by Respondent is that Rowlett operated the forklift truck with only one hand.<sup>61</sup> A picture on page 5 of Respondent's September 1997 Berea Newsletter shows a driver on a forklift with a knob on the steering wheel, General Counsel's Exhibit 4. When such a knob is used for turning the steering wheel you cannot have two hands on the wheel or you would defeat the purpose of the knob, namely to be able to turn the wheel faster than when you use two hands. The fact that such knobs exist on such equipment means that Respondent allows, if it does not encourage, the use of a mechanism which permits the driver to operate the equipment with one hand.

With respect to the involved conduct of Rowlett and Poff, Gray testified that it was his decision to terminate Poff and Rowlett; that he was the only person at the plant who could authorize the termination of an employee; that the duration of the involved activity of Poff and Rowlett was entirely too long even if it was a practical joke;<sup>62</sup> that neither Poff nor Rowlett ever said to him "Mr. Gray we were just having fun"; and that he read Stewart's notes of his September 22, 1997, interview of Jones, Respondent's Exhibit 19(d). When counsel for the General Counsel asked Gray if he read that part of the September 22, 1997 notes of the Jones interview where Jones indicated that on September 19, 1997, Rowlett said he "didn't mean anything by it, I was just having fun." Gray asked, at that point in the hearing, to see the notes. After reading the notes, Gray testified, as here pertinent, "[y]es, I remember it now." So the goose incident did not involve almost 1 hour<sup>63</sup> and Rowlett indirectly told Gray that he, Rowlett, was just having fun. Nonetheless Rowlett and Poff were terminated.

With respect to Respondent's assertion that Poff and Rowlett were discharged for, among other things, insubordination, it is noted that Stewart did not write this 15-letter word when he gave the reasons for the terminations of Rowlett and Poff on their unemployment insurance claims forms, General Counsel's Exhibits 21 and 22, respectively. Respondent cannot argue that there was not enough room in the area provided for the "Employer's Statement" on both forms for Respondent left two and one quarter lines blank on Rowlett's form while it averaged about 10 words per line on the three and three quarter lines it used. Respondent had room to write over 20 additional words on Rowlett's form. Yet insubordination is not specifically

mentioned on Rowlett's form. On Poff's unemployment insurance form Stewart left two and three quarter lines blank and he averaged nine words per line on the four and one quarter lines he did use. Stewart could have written 24 additional words in the space he left blank. In terminating someone for something other than criminal conduct, "insubordination" is perhaps one of the sharpest arrows in an employer's quiver. Yet while Respondent now claims insubordination, this assertion does not appear on Rowlett's or Poff's above-described unemployment insurance forms. As concluded above, the goose was gone when Chaney spoke with Rowlett and Poff in the wheelabrator room on September 19. For the reasons given above, I do not credit Pool's testimony about Rowlett's and Poff's lack of response to a directive Chaney never gave. I do not credit Pool's testimony that insubordination on the part of Rowlett and Poff was discussed at the September 24 manager's meeting. Holt was at this meeting<sup>64</sup> and when he subsequently told Owens the reason for the terminations he cited only stealing time<sup>65</sup> which, as Owens told Holt at the time" even the supervisors also do so, and kill time, that's not anything else that any of the rest of us are not guilty of." Owens did not testify that Holt told him that he, Holt, saw pictures which allegedly demonstrate insubordination or that he, Holt, was told at a managers' meeting on September 24 that there were pictures which allegedly demonstrated insubordination or even that he was told at a managers' meeting on September 24 that Rowlett and Poff were insubordinate. Again we have a member of management indicating at the time why Poff and Rowlett were terminated and that member of management makes no reference whatsoever to insubordination. The goose was already out of the plant when Chaney entered the wheelabrator room at approximately 7:30 p.m. on September 19. There could be no insubordination of the type now alleged by Respondent because there was no need for Chaney to give the alleged instruction and Rowlett and Poff did not disobey the instruction which was never given. Additionally, Stewart's belated attempt, see transcript page 672,<sup>66</sup> to treat what Poff said to Chaney on September 19 as insubordination was obviously something he thought up while he was testifying here. There is no credible evidence that Respondent fired Poff and Rowlett for insubordination. Pool, Gray, and Stewart were not credible witnesses with respect to their testimony regarding insubordination.

With respect to Respondent's assertion that one of the reasons Poff and Rowlett were terminated was their refusal to cooperate in the investigation, as noted above, Jones, who was with Stewart when he interviewed Poff and Rowlett, testified that Poff and Rowlett were not discharged because they refused to answer questions on September 22. While Jones later testified that he was not involved in the decision to terminate Poff and Rowlett, it is noted that Pool and Holt, both of whom attended the upper management meeting on September 24 did not specify this as a reason for Poff's and Rowlett's termination; that when he testified herein Stewart did not specify refusal to cooperate as a reason for terminating Poff and Rowlett; that

<sup>61</sup> As set for a Tr. 40, Barrett asked Rowlett the following questions on cross-examination:

Q. And you know that you're supposed to drive a forklift with two hands, right? Isn't that how they teach you?

A. Well I—there was nobody ever taught me anything about driving with both hands. If that's the case, why did they have—a knob on it, that you can only drive with one hand?

Q. They don't have that anymore, though, do they?

A. I—that truck I had did.

<sup>62</sup> As concluded above, in my opinion a fair reading of the statements Respondent had should have led Respondent to conclude that the involved conduct went on for at most 15 minutes and not the almost 1 hour alleged by Gray.

<sup>63</sup> As noted above, according to Rowlett's testimony, the goose approached him during his break. It is not clear from his testimony if he had any breaktime remaining when he picked the goose up and started driving with it on his forklift.

<sup>64</sup> Pool placed Holt among those managers in attendance at the meeting where they discussed the appropriate action to be taken which would be deemed consistent with other actions Respondent had taken. As Stewart and Gray testified that they did not have the details at the time of the September 22 managers' meeting, such a discussion could only have occurred at the September 24 managers' meeting.

<sup>65</sup> Holt did not testify herein. Owns testimony is credited.

<sup>66</sup> Stewart testified: "[I]t could be viewed as insubordination."

when Stewart specified the reasons for termination on the above-described unemployment forms of Poff and Rowlett he did not specifically cite refusal to cooperate as one of the reasons; and that while Gray, who allegedly made the final decision, testified that Poff's and Rowlett's refusal to cooperate severely hampered the investigation and was disappointing, he did not specifically indicate that this was one of the reasons Poff and Rowlett were terminated.<sup>67</sup>

Poff and Rowlett were treated disparately by Respondent in that, other than attendance, before Poff's and Rowlett's terminations the only thing Gray fired employees for was dishonesty<sup>68</sup> or having sexual encounters in the plant on worktime. While Gray attempted to compare the conduct of Poff and Rowlett to that of the two who had the sexual encounters, it is obviously, at best, a strained comparison. Poff and Rowlett did not leave their work areas and hide in a part of the plant where they thought they would not be discovered. And certainly no matter how "ridiculous"<sup>69</sup> the goose incident was, it did not rise to the level of having sexual encounters in the plant during worktime. Consideration of the discipline for the above-described water fight must take into account the fact that the incident took place well after Poff and Rowlett were terminated, the above-described charge was filed and the complaint herein was issued. Consequently, Respondent could have fashioned the discipline to bolster its defense in this proceeding. Additionally, as noted above, one of the two combatants in the water fight had to be taken to the hospital which distinguishes the two situations. Poff had worked for Respondent for 12 years. Rowlett had worked for Respondent since April 1993. Both had good work records. Neither had been disciplined previously. As noted above, Stewart testified that Respondent does not always fire someone the first time they fail to meet the adult expectations clause. While the conduct of Poff and Rowlett should have a consequence, the discipline given to Poff and Rowlett by Respondent far outweighs what would appear to be reasonable in terms of the discipline given in the past to other employees. Respondent has not demonstrated that it would have discharged Poff and Rowlett notwithstanding their union activity.

Gray's attempt to deny that he focused to any extent on the goose's message by denying that he told Sesta, who was called as a witness by Respondent, about the sign the goose was wearing only serves to highlight Respondent's animus and unlawful motivation. Sesta, the director of the Madison County Humane Society, has no interest in the outcome of this case. Her testimony is credited. Gray told her about the union insignia. As pointed out by the General Counsel on brief, Gray, in testifying that he was real certain he did not tell Sesta about the vote yes sign, lied in order to buttress his claim that he paid no attention

<sup>67</sup> It is noted that at Tr. 741 Gray testified as follows:

The disregard and the uncooperative attitude that they took and they never at one time even said Mr. Gray *we were just having fun. Let us have another chance.* They never asked any of that. They just decided that they would just not cooperate with us and it put me at a disadvantage not being able to talk with them and that was their choice. The decision I made to terminate them, I thought about what in the world am I going to do with this for several days, ma'am. And I finally decided that the best thing we can do is sever our relationship.

<sup>68</sup> This would include the pond fishing of Beach for he left the plant and expected others to cover for him.

<sup>69</sup> This is Gray's description.

to the fact that Poff and Rowlett were supporting the Union in their respective activities with the goose.

Sesta also testified that on September 25 which was the day following the discharge of Poff and Rowlett, Gray telephoned her again<sup>70</sup> and this time he indicated that the goose was showing signs of distress and he believed that the goose was injured. Even after reviewing his notes at the hearing here, Gray never testified about this telephone call. Instead Gray testified that the Wildlife people called him on September 30 after one of Respondent's employees took an injured goose to her father's farm. Sesta did not testify that Gray told her when he telephoned her to tell her about the goose in distress that during that telephone conversation he told her about an employee taking the goose to care for it. Sesta was a credible witness. Gray was not a credible witness. The testimony of Sesta is credited. Did Gray expect to be able to report an injured goose to the Humane Society, create a record of a report of an injured goose and not have anyone indirectly verify the validity of his claim by attempting to care for the animal? Didn't Gray anticipate that the Humane Society for the Wildlife people would want to pick up the goose which allegedly was distressed? When this occurred, Gray did not make the goose which allegedly was distressed available to the Wildlife people.

Gray testified that on Wednesday September 24 ("I want to think it was Wednesday," Tr. 717) there was a Canada goose walking around limping outside the plant, he assumed it was the same goose, and an employee took the goose to her father's farm.<sup>71</sup> Gray also testified that he usually leaves the plant about 5 p.m.; and that sometime after diner on Wednesday September 24 he made the final decision to terminate Poff and Rowlett. In other words, according to Gray's testimony, before he made the final decision to terminate Poff and Rowlett he, Gray, was aware that there was an injured goose and he assumed it was the goose Rowlett had on his forklift. Gray attempted to use the Humane Society to bolster Respondent's position with respect to the terminations of Poff and Rowlett. That is why Respondent called Sesta as a witness, and in my opinion, this plan was formulated before Poff and Rowlett were terminated. Sesta's testimony, however, shed some light on the true nature of the disciplinary action taken against Poff and Rowlett. Gray did not want to concede that he considered the vote yes sign and went so far as to tell Sesta during the first telephone call about the union insignia. Gray was trying to build a case for termination where such a case did not exist. Poff and Rowlett were terminated for union activity. Poff and Rowlett used a goose to promote the Union.

With respect to animus in general on the part of Respondent, as set forth above, Respondent's employee handbook, after acknowledging the right of an employee to join a union, points out that a union "diminishes the rights of the individual and deters each employee from realizing his/her full potential" and "could seriously impair the relationship between the Company and the employees, and could retard the growth of the Company and the progress of the employees." Also Gray testified herein that before the goose incident he thought Rowlett "was

<sup>70</sup> The first time Gray was returning Sesta's telephone call to the plant to follow up on an anonymous message left at the Humane Society that there was an incident at the plant involving a Canadian goose and she should look into it.

<sup>71</sup> If an employee took the goose Wednesday, September 24, to rehabilitate it, why didn't Gray tell Sesta this when he telephoned her on Thursday, September 25?

just a regular employee doing his job and [I] had no inkling that he was promoting any type of Union.” It appears that to Gray’s way of thinking someone who promotes the Union is other than a regular employee. Perhaps this is why when Owens asked manager Holt about Poff’s and Rowlett’s termination Holt said “Jerry, I thought you were a good moral Christian man and to see you come out against the company really surprised me.”<sup>72</sup> In my opinion there is direct evidence of animus. Additionally, I believe that on the total state of this record an inference of animus on the part of Respondent against the union activity is justified. As pointed out in *Electronic Data Corp.*, 305 NLRB 219 (1991), even without direct evidence, the Board may infer animus from all circumstances. Pretextual reasons support an inference of an unlawful one. *Keller Mfg. Co.*, 237 NLRB 712 (1978). Terminating Poff and Rowlett during a union campaign 2 weeks before a union election under the circumstances of this case would tend to discourage union activity. *Washington Nursing Home*, 321 NLRB 366 (1996). Respondent has failed to meet its *Wright Line* burden by demonstrating that it would have taken the same action against Poff and Rowlett absent their union activity. Respondent violated that Act as alleged in paragraph 6 of the complaint.

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<sup>72</sup> As indicated above, all Owens did was point out to Holt that everyone, including supervisors, kills time.

#### CONCLUSIONS OF LAW

1. The 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 suspending and terminating Pamela Poff and James Rowlett because they formed, joined, or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities Respondent violated Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent did not otherwise violate the Act in the manner alleged.

#### REMEDY

Having found that the Respondent unlawfully suspended and discharged Pamela Poff and James Rowlett, it will be recommended that Respondent be ordered to reinstate them to their former positions and make them whole for any loss of earnings and benefits they may have suffered as a result of the Respondent’s unlawful conduct, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]