

**Martech Medical Products, Inc. d/b/a Martech MDI and Teamsters Local 384 a/w International Brotherhood of Teamsters, AFL-CIO.** Case 4-CA-27466

June 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 30, 1999, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief. They also filed an answering or a reply brief in response to the other party's exceptions.

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 as modified below and to adopt the recommended Order as modified.<sup>2</sup>

We adopt the judge's findings that on or about September 4, 1998,<sup>3</sup> the Respondent violated Section 8(a)(1) of the Act by telling employees they had better stop thinking about the Union, and threatening them with plant closure and job loss; coercively interrogating employees; creating the impression of surveillance of employees' union activities;<sup>4</sup> and discriminatorily prohibiting "chit chat" about the Union. We also adopt the judge's dismissal of the 8(a)(3)

and (1) allegation that on September 4, the Respondent engaged in a retaliatory mass layoff. With respect to the judge's findings in regard to the Respondent's selecting specific employees for layoff on September 4, we agree that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off Dottie O'Connell, Kathleen Harper, Ruth Bickings, and Patricia Tracey. However, for the reasons that follow, we reverse the judge and find that the Respondent also violated Section 8(a)(3) and (1) of the Act by laying off Sue McNamara.

Before her layoff on September 4, Sue McNamara had worked as an assembler for the Respondent for more than 13 years. She regularly ate lunch in the company lunchroom with her longtime friends and coworkers, Patricia Tracey and Kathleen Harper, and her sister Ruth Bickings. Along with employee Dottie O'Connell, who made the initial contact with the Union, Harper, Bickings, and Tracey were among the most outspoken and active union supporters at the plant. McNamara had also expressed an interest in the Union and assisted the others in directing other interested employees to her sister for further information about the Union.

On September 4, the Respondent singled out McNamara, Harper, Bickings, and Tracey for layoff. Scott Nicholas, president and CEO of the Respondent, testified that Stu Krompetz, the Respondent's director of operations, "had great familiarity" with certain employees and had made the initial selection of McNamara, Harper, Bickings, and Tracey for layoff. With respect to Harper, Bickings, and Tracey, Krompetz initially testified that he selected these three because of their high rate of pay. The Respondent's other witnesses, however, contradicted Krompetz' testimony, and he then offered different reasons for his selection. The judge discredited Krompetz' shifting, unconvincing explanations and found the layoffs to be unlawful, a finding which we adopt.

Regarding McNamara, Krompetz testified that his selection of her was based on her poor communications skills and an inability to follow instructions correctly, as purportedly reported to him by unidentified lead persons on unspecified occasions. As with Harper, Bickings, and Tracey, the judge found Krompetz' testimony as to the reasons for McNamara's layoff to be "vague and uncorroborated." However, in McNamara's case, the judge found that the General Counsel had failed to establish that her layoff was discriminatorily motivated, because he found insufficient evidence from which to infer that the Respondent was aware of her interest in the Union. In this regard, however, the judge wrongly failed to consider McNamara's open friendships with known union supporters Harper, Bickings, and Tracey.

In cases alleging violations of Section 8(a)(3) and (1) that turn on employer motivation, the applicable test of

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

There were no exceptions to the judge's dismissal of the 8(a)(1) allegations involving Connie Ottie and the 8(a)(3) allegations involving Marion McGuire and Thomas Ledgerwood.

We note that the judge's paraphrasing of *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-718 (7th Cir. 1992), in sec. III, B,2,a, par. 4, of the decision, is incomplete. The exact language from that case reads, as follows:

[C]oincidence in time between union activity and discharge or discipline is one factor the Board may consider. *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1983). But mere coincidence is not sufficient evidence of antiunion animus. 962 F.2d at 717-718.

<sup>2</sup> We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>3</sup> All dates are in 1998 unless otherwise noted.

<sup>4</sup> In determining whether an employer has created an impression of surveillance, the Board considers whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance. See *United Charter Service*, 306 NLRB 150 (1992). Contrary to our dissenting colleague, we find that Supervisor Kennedy's statement that she had "heard that there was a list circulating with 80 names," to employees Julia Croisette and Dottie O'Connell, the latter of whom the Respondent knew to be a major union supporter, clearly meets the Board's test. See, e.g., *Flexsteel Industries*, 311 NLRB 257 (1993) (unlawful to tell employee that manager had "heard" rumors about the employee's union activity; irrelevant whether employer had actually spied on employees, since the impression of monitoring alone is coercive).

causation is set forth in *Wright Line*.<sup>5</sup> Under that test, the General Counsel has the burden of proving that union activity was a motivating factor in the layoff selection of McNamara. Once that burden is met, then the burden shifts to the Respondent to prove that its selection of McNamara for layoff would have taken place even in the absence of the protected union activity.

Our precedent holds that it is not necessary for the General Counsel to prove that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters. See, e.g., *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987), enf. 847 F.2d 835 (2d Cir. 1988). Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pretextual reasons for the discharge asserted by the employer. See *General Iron Corp.*, 218 NLRB 770, 778 (1975), aff. mem. 538 F.2d 312 (2d Cir. 1976). See also *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985), enf. 804 F.2d 808 (3d Cir. 1986). In addition, the discharge of an employee who is not known to have engaged in union activity, but who has a close relationship with a known union supporter may give rise to an inference of discrimination. See *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), enf. 657 F.2d 512 (3d Cir. 1981), cert. denied 455 U.S. 940 (1982). Thus, a layoff motivated by an employer's belief or suspicion that an employee engaged in union activity violates Section 8(a)(3) and (1) of the Act.

Here, Krompetz admitted that McNamara was selected for layoff because she was part of a group of employees of whom he had personal knowledge. Other members of this group included Harper, Bickings, and Tracey. Given the Respondent's antiunion animus toward Harper, Tracey, and McNamara's sister, Bickings, the judge's finding that their layoffs were unlawful, and the timing of the layoffs, we find that the inclusion of McNamara as a part of a terminated group of longtime, veteran employees who ate lunch together every day in the company lunchroom, supports an inference that the Respondent also had suspicions regarding McNamara's union activity or support. For these reasons, we reverse the judge and find that the General Counsel established that protected union activity was a motivating factor in the Respondent's decision to lay off Sue McNamara. Given the judge's discrediting of Krompetz' vague and uncorroborated testimony as to his stated reasons for McNamara's layoff, we further find that the Respondent failed to meet its *Wright Line* burden. Accordingly, we find that Sue McNamara's layoff was unlawful.

<sup>5</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), overruled in part on other grounds, *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276-278 (1994).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Martech Medical Products, Inc. d/b/a Martech MDI, Harleysville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(a) Within 14 days from the date of this Order, offer Dottie O’Connell, Kathleen Harper, Ruth Bickings, Patricia Tracey, and Sue McNamara full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for all their earnings lost as a result of its discrimination against them in the manner set forth in the remedy section of this decision.”

2. Substitute the following for paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

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

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

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

MEMBER BRAME, concurring in part and dissenting in part.

I join my colleagues in finding that Sue McNamara's layoff was unlawful. I also agree with my colleagues' adoption of the rest of the judge's decision,<sup>1</sup> except in the following respects. For the reasons stated below, I agree that the judge properly found that the Respondent unlawfully interrogated employees Julia Croisette and Dottie O'Connell. However, contrary to my colleagues, I would dismiss the 8(a)(1) allegations involving the creation of an impression of surveillance of employees' union activities.

1. As interrogation is not per se unlawful, “[t]o fall within the ambit of §8(a)(1), the words themselves or the context in which they are used must suggest an element of

<sup>1</sup> In adopting the judge's findings that the Respondent unlawfully laid off Dottie O'Connell, I note that the judge discredited Stu Krompetz' and Scott Nicholas' denials of knowledge of union activists on both demeanor and nondemeanor grounds. I adopt these credibility findings on demeanor grounds only.

In adopting the 8(a)(3) violation based on employee Kathleen Harper's layoff, I find it unnecessary to rely on the judge's discussion about the cost effectiveness of selecting more or less senior employees for layoff.

coercion or interference.” *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980), cited by the Board with approval in *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The traditional test for determining whether interrogations violate the Act is “whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Id.* In analyzing whether alleged unlawful interrogations are coercive of employees’ Section 7 rights, useful indicia include the *Bourne*<sup>2</sup> factors—history of employer hostility, nature of information sought, identity of questioner, place and method of interrogation, and truthfulness of reply. “[T]he *Bourne* factors are a primary analytical tool in determining whether an employer’s questioning of employees is coercive and therefore unlawful and, as such, they offer a systematic application of the totality of the circumstances analysis.”<sup>3</sup> Nonetheless, “[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the ‘totality of the circumstance.’” *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998) (quoting *Timsco v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987)).

There are two interrogations alleged as unlawful. I agree with my colleagues that both indeed were unlawful, but only for the reasons stated here.

The first is straightforward. In late August, just after the union organizational drive commenced, employee O’Connell posted a notice on a lunchroom bulletin board advising fellow employees of their organizational rights. Within about an hour, front-line supervisor, Kennedy removed the notice from the board and, holding the notice in her hand, approached O’Connell. Kennedy, according to credited testimony, declared that “[Owner] Dave Markel will close this place down if anybody tries to get a Union in here,” and, on the heels of this statement, asked O’Connell if she knew who had posted the notice. O’Connell denied knowing. Since a threat of plant closure prefaced the question to O’Connell, there can be no doubt as to the coercive nature of the interrogation. *Midwest Stock Exchange*, *supra* at 1267.

A closer question is presented as regards the alleged unlawful interrogation of employee Croisette, also by Supervisor Kennedy in late August. Kennedy asked Croisette, on the production floor, if she had heard anything about a union list circulating among the employees. Croisette falsely replied that she had signed a “Christmas card,” which the judge found to be a union card. That Kennedy was a front-line supervisor and that the conversation occurred in a production area militate against a finding of a

violation. Likewise, no unfair labor practices had been committed at the time of the incident. On the other hand, it is significant that the nature of the question called for a direct declaration as to Croisette’s union sympathies and that Croisette was untruthful in her response. On the whole, after fully considering the relevant *Bourne* factors and the surrounding circumstances, I concur in finding that Kennedy’s question violated Section 8(a)(1).

2. Unlike my colleagues and the judge, I find that there was no unlawful creation of an impression of surveillance of employees’ union activities. In separate conversations with employees Kathleen Harper and Dottie O’Connell on the same day, Supervisor Kennedy said that she had “heard that there was a list circulating for a union with 80 names.” Her isolated question suggests that she was interested in verifying information that she had “heard.” Indeed, there is no evidence that the Respondent had spied on its employees or otherwise had engaged in covert activity. In my view, Kennedy’s innocuous statement about “a list” indicates that she was commenting on a rumor rather than suggesting a spy operation and surveillance by the Respondent.<sup>4</sup> Thus, I would dismiss the 8(a)(1) complaint allegations based on creating an impression of surveillance.

#### APPENDIX

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

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

WE WILL NOT threaten our employees with plant closure, work relocation, and/or other reprisals if they engage in activities on behalf of or otherwise support Teamsters Local 384 a/w International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

WE WILL NOT order our employees to stop even thinking about representation by the Union.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of, support of, or sympathy for the Union, or any other labor organization.

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

WE WILL NOT more strictly and discriminatorily enforce rules regulating working time employee discussions in order to discourage support of the Union, or any other labor organization.

WE WILL NOT discriminatorily select employees to be laid off because of their actual or suspected activities for,

<sup>2</sup> *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), cited with approval in *Rossmore House*, 269 NLRB at 1178 fn. 20.

<sup>3</sup> See my separate opinion in *Medcare Associates, Inc.*, 330 NLRB 935, 950 (2000).

<sup>4</sup> See my dissent in *Westwood Health Care Center*, *supra*, slip op. at 21, citing *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252–1253 (5th Cir. 1978).

support of, or sympathies for representation by the Union, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Dottie O'Connell, Kathleen Harper, Ruth Bickings, Patricia Tracey, and Sue McNamara full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dottie O'Connell, Kathleen Harper, Ruth Bickings, Patricia Tracey, and Sue McNamara whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Dottie O'Connell, Kathleen Harper, Ruth Bickings, Patricia Tracey, and Sue McNamara, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

MARTECH MEDICAL PRODUCTS, INC. D/B/A  
MARTECH MDI

*Lea F. Alvo-Sadiky, Esq.*, for the General Counsel.

*Jerome A. Hoffman, Esq.* and *Alfred J. Monte, Esq.* (*Dechert Price & Rhoads*), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On September 15, 1998, Teamsters Local 384 a/w International Brotherhood of Teamsters, AFL-CIO (the Union) filed the original charge and on December 31, 1998, the amended charge against Martech Medical Products, Inc. d/b/a Martech MDI (the Respondent). After an investigation, the Regional Director for Region 4 issued a complaint against the Respondent on December 31, 1998. The complaint alleges that on one occasion in August 1998 and on September 4, 1998, various Respondent supervisors and/or agents engaged in acts of coercion in violation of Section 8(a)(1) of the Act. The complaint further alleges that on September 4, 1998, the Respondent engaged in a retaliatory mass layoff of 43 employees because of the late August union organizing activities of some of its employees. The complaint also alleges, and the General Counsel alternatively argues, that even if the mass layoff was economically motivated, eight of the employees laid off were specifically selected because of their union organizing activities or their support of the Union. However, not all union activists were laid off, while nonactivists were laid off.

The Respondent filed an answer on January 14, 1999, which denied the commission of unfair labor practices. The Respondent has argued subsequently that although it may have been generally aware of some union organizing activity in its facility shortly prior to September 4, its layoff of that date was economically motivated, despite evidence of union animus evidenced by lower level supervisors, including threats of closure, some of which were denied and some of which were not contested. The Respondent

further argues that its decisionmakers as to the selection of employees to be laid off were unaware of the specific identity of employee activists on behalf or supportive of what was in fact a very embryonic union organizing effort.

The primary issue, therefore, is whether the mass layoff was purely coincidental to the initiation of union organizing activity or whether it was retaliatory. Resolution of that issue is difficult because the Respondent has adduced substantial evidence of economic justification. The General Counsel argues that despite evidence of some economic adversity, the mass layoff was economically unnecessary and, in any event, would not have occurred when it did had it not been for the employees' incipient union organizing efforts. The Respondent's economic judgments are thus directly contested, and evaluation of financial data is necessary.

A resolution of the subsidiary discriminatory layoffs of eight union activists or supporters follows a more routine evaluation of activity, knowledge, animus, and proffered reasons for their selection.

The foregoing issues were litigated in trial before me in Philadelphia, Pennsylvania, on February 16-18, 1999, at which time the parties were given full opportunity to adduce relevant testimonial evidence as well as documentary evidence which in itself exceeded the number of pages in the 478-page transcript. The parties were also afforded the opportunity to submit posttrial briefs, which were received on April 16, 1999.

Those lengthy and exhaustive briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated here, sometimes modified, particularly as to undisputed factual narration. However, all factual findings here are based on my independent evaluation of the record. Based on the entire record, the briefs, and my observation and evaluation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all material times, the Respondent, a Pennsylvania corporation with an office and place of business in Harleysville, Pennsylvania (the plant), has been engaged in the manufacture and sale of medical products. During 1997, the Respondent, in conducting its business operations, sold and shipped goods valued in excess of \$50,000 directly to points outside the Commonwealth of Pennsylvania.

It is admitted, and I find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Respondent is an original equipment manufacturer of disposable medical products, primarily catheters and other single-use, disposable medical and plastic products that are used in postcardiac surgery. These included the Tesio Catheter Adapter that had to be totally recalled from the market beginning in March 1998 because of a production fault and the Ashwood Split Catheter that

replaced it. The Respondent's customers run the gamut of the major cardiac health care companies such as C.B. Bard, Baxter, Johnson & Johnson, Cardiomed, Medtronic, and Mallinckrodt Medical. Its largest customer by dollar volume is Medical Components or (Med Comp), a commonly owned sister company currently located on an adjoining property which, until a recall last year, accounted for 40 percent of Martech's orders. The Respondent also maintains a facility in Mexicalia, Mexico, identified variously as M & M West of Lab Ten.

The Respondent was formed 2 years ago at the beginning of 1997 with the merger of two previously separate companies, each with a comparably sized work force—Martech Medical Products, Inc. located on Delp Drive in Lansdale, Pennsylvania; and MDI then located in Conshohocken, Pennsylvania, approximately 30 miles away. The new Company, Martech MDI (the Respondent), rehired most of the preexisting Martech Medical Products work force but rehired only a small percentage of what had been the MDI work force. Prior to September 4, 1998, it had a total employment of about 181 persons.

David Markel is part owner of the Respondent and Med Comp. Since April 1988, Scott Nicholas has been the president and CEO of the Respondent with the responsibility of overseeing the operations of the Respondent, carrying out the directives of Markel, and improving the Respondent's profitability. Lee Hoffman is the chief financial officer. In July 1998, Stu Krompetz was promoted to director of operations from production manager and directs the production operations of the Respondent from incoming orders until the product is shipped. Directly under Krompetz is Barry De Dominicis, production manager; Karen Nyce, materials manager; Bill Tomlinson, maintenance supervisor; and Pat Nailon, the extruder foreman or supervisor.

Production consists of assembly, molding, and extrusion. The production supervisors are Donna Kennedy, James Morgan, second shift, and Carla "Penny" Wertz. Andy Moretti is the molding room supervisor. As of May 30, 1998, Kennedy supervised 37 first-shift employees in production. As of September 3, 1998, Kennedy supervised 56–57 first-shift employees in production and, as of February 1999, supervised between 35–40 employees. Wertz also supervises first-shift production employees but not the same employees that Kennedy supervises. As of September 3, 1998, Wertz supervised about 15 employees. Currently, she supervises about 14 people—12 group leaders for different productions and 12 assemblers. As of May 30, 1998, Morgan supervised 27 second-shift production employees, and Moretti supervised 4 molding room technicians on the first shift. There were also two second-shift molding technicians. As of May 30, 1998, Pat Nailon supervised four extrusion employees.

Until November, John Bolles was the quality assurance manager responsible for the quality control department. Currently, Maurice Pennoch holds that position. The quality control department consists of document control and quality control inspection. Until March 1998, Patricia Tracey was the quality control supervisor. Thomas Lynd, who replaced her, is the quality control supervisor. Tracey became a quality control inspector. As of May 30, 1998, there were 27 inspectors in quality control—21 on the first shift and 6 on the second shift. As of September 3, there were 18 inspectors on the first shift and 5 on the second shift. As of May 30, 1998, there were three employees under document control. Currently, there are three employees in document control.

Since January 1998, Peter Whitticar has been the warehouse supervisor subordinate to Karen Nyce. As of May 30, 1998, Whitticar supervised three employees. As of September 3, 1998,

Whitticar supervised four employees. Currently, Whitticar supervises one regular warehouse employee and two temporary warehouse employees.

Christopher Heines is the manager of engineering. As of May 30, 1998, he supervised five persons in the engineering department and four employees in the shop. Currently, there are about seven employees in engineering, including drafting, and four in the machine shop.

As of May 30, 1998, there were two employees under Maintenance Supervisor Bill Tomlinson. As of September 3, Tomlinson supervised three employees. As of May 30, 1998, the Respondent had three groundskeeping employees and three additional employees who did housekeeping, kitchen cleanup, and general handy work, who were not included in maintenance. They are still working for the Respondent.

## 2. The union campaign

On August 14, Dottie O'Connell, a warehouse associate, placed a telephone call to the Union because she had received a companywide memorandum issued by Nicholas which stated that employees would have to start clocking in and out for breaks and work 9-hour days. The Union told her she had to induce a certain number of employees to come to a meeting. O'Connell told other employees about the meeting with the Union, including Tom Ledgerwood and Pat Tracey.

On August 24 or 25,<sup>1</sup> after work at 3 p.m., O'Connell and employees Kathy Harper, Dave Bruder, Marion "Midge" McGuire, Tom Ledgerwood, Jeffrey Garber, Beaujana "Beau" Karguliewicz, Anke "Connie" Costa, and Marcy Hart met with Gerard Moran, union representative, at the Family Heritage Restaurant in Harleysville, Pennsylvania. At the meeting, Moran told them they needed to have a certain percentage of the Respondent's employees interested in receiving information about the Union before the Union would proceed. Moran told them to solicit names and addresses of interested employees so the Union could send them information and union cards.

Following the meeting with Moran, O'Connell, Harper, Karguliewicz, and McGuire started collecting names and addresses from fellow employees in the plant, as did Ruth Bickings who was not at the meeting. Bickings collected 14 to 15 names and addresses. Harper provided Karguliewicz with a list of employees who came from MDI. Sue McNamara, Bickings' sister, and Tracey, who did not attend the meeting, did not collect names and addresses but did ask for union information and direct other employees in the plant who tried to give their names and addresses to give them to Karguliewicz or Bickings. About 10 employees in the production department on both shifts tried to give Tracey their names and addresses who referred them to Karguliewicz. Ledgerwood did not collect names but spoke to employees in the plant on breaks about the Union. According to O'Connell's estimate, a total of about 80 names and addresses were collected between August 25 and September 3.

## 3. The posting

The morning after the meeting with the Union, Karguliewicz brought into the plant a memo she had printed out from her computer which she had downloaded from the Internet and which discussed employees' union organizational rights. About 5:45

<sup>1</sup> O'Connell testified that the meeting was on August 24. Harper testified that it was on August 25. Bruder, Ledgerwood, and McGuire were unable to give an exact date for the meeting but knew it was in mid to late August.

a.m., she gave it to O'Connell in the ladies room before they clocked in. O'Connell immediately posted the notice on the lunchroom bulletin board before starting work at 6 a.m. On that same bulletin board were notices for sales, casino trips, Tupperware parties, and thank you cards. O'Connell testified that before 7 a.m. and before the other supervisors came in, Donna Kennedy, production supervisor, approached her with the notice in her hand and said, "Dave Markel will close this place down if anybody tries to get a Union in here." According to O'Connell, she then asked O'Connell if she knew who had put the notice up and O'Connell responded that she did not know.

Kennedy testified that sometime in August, she became aware of an organizing effort for the Union because she heard about it in the plant production area as she was walking through. She heard that there was a list being sent around and that 80 percent of the employees had signed it. That same day, she asked data control employee Julia Croisette if she had heard anything about a list going around. Croisette said that she had been given a "Christmas card" to sign and she had signed it, not realizing what it was. She also told Kennedy that she went back to the person who gave it to her to have her name taken off it. Kennedy, of course, realized the true nature of the list. After she talked to Croisette, Kennedy spoke to Krompetz. She asked him if she had heard the union organizing rumor she had heard and he said that he had. According to Krompetz, that same day he told President Nicholas that there was a union card going around the plant. Nicholas acknowledged in his testimony that Krompetz told him twice in late August about the union campaign. Nicholas admitted that he is not in favor of unions and does not think they are needed in this day and age.

Kennedy testified as an adverse witness for the General Counsel. Although she testified that she asked one employee about the union solicitation list, she did not categorically contradict O'Connell, or other General Counsel witnesses who preceded her as a witness regarding other union-related conversations. The Respondent did not examine her nor did it recall her to testify as its own witness. Kennedy demonstrated a hesitancy and lack of spontaneity that rendered her testimony less credible than the testimony of the General Counsel's witnesses. In view of her less than convincing demeanor and the lack of categorical contradictions, I discredit any implicit denial in her testimony of other union-related conversations and credit the testimony of the General Counsel witnesses.

#### 4. September 3, 1998

On September 3 between 10 a.m. and 1 p.m., Quality Control Inspector Bickings had a problem with her paycheck. She discussed it with Krompetz in the coaxial room. She testified that she was angry after her discussion with Krompetz and entered the molding room through the glass door connected with the coaxial room and after walking 10 "paces" into the room looking at six employees there, she loudly yelled, "If anyone hasn't give me your names for the Union list, do it now while I'm still [angry]." She testified that she "believed" that Supervisor Moretti was standing in the back of the room at one of the molder machines. She failed to testify that he gave any indication of hearing her but testified that through a window, she saw that Krompetz was still in the coaxial room talking to someone. She testified that the coaxial room is quiet enough that "voices" and "noises" from the molding room can be heard. She testified that she turned around, grabbed the glass door that was still closing, and departed. She failed to testify that Krompetz, who was standing talking to someone at a

table, gave any indication of having heard her or having looked in her direction. Moretti did not testify.

Krompetz testified that he did not hear Bickings' comment. His testimony that the connecting glass door takes from 3.4 to 4.7 seconds to close is uncontradicted. Although it is possible for Bickings to have entered the room as far as 10 paces, not feet, made such statement facing six employees, and have had time to retreat and watch the closing door and also notice what Krompetz was doing, I find it unlikely. Furthermore, there is insufficient evidence as to conditions in the molding room at the time of the statement for me to conclude that both Moretti and Krompetz, who were involved with business of their own, heard and comprehended the statement.

Bickings testified that the same day, as she was returning from her break with McNamara, her sister, she started singing "Look for the Union label" in the hallway right outside the quality control department and across from the production room. Marcy Hart was behind them. When they turned the corner from the breakroom, Charlotte Fredricks, data entry person and a former production supervisor, was coming out of the production room and getting ready to go into the document control area. Fredricks laughed. However, there is no evidence that any supervisor or agent of the Respondent witnessed this incident.

#### 5. September 4, 1998—the day of the layoff

O'Connell testified that one of the employees who had given her name and address to O'Connell to obtain information from the Union was Production Supervisor Wertz. According to O'Connell, Wertz' name was on a piece of paper that had not yet been added to the master list of names and addresses that O'Connell was assembling from many collected short lists. O'Connell testified that on the morning of September 4, Wertz came to her in the warehouse and told her, "Never mind. Take my name off the list," and stated that she did not want any more information on the Union. O'Connell did not put her name on her master list.

Wertz testified as an adverse General Counsel witness. When cross-examined by the Respondent's counsel as to whether she "signed a union card," she flustered and agitatedly responded, "No, I did not." She was then asked:

Q. So I take it if you never signed one, you never asked somebody to withdraw your name.

A. No. I did not.

In further examination by counsel for the General Counsel, she was asked whether she signed "anything requesting anything for information for a union," and whether she gave her name to O'Connell, Harper, or Bickings. She responded negatively and thus implicitly, if not categorically, contradicted O'Connell. Wertz, however, admitted awareness of employee union-related discussions on her shift, as will be more fully discussed hereafter. Wertz, a supervisor, exhibited an extreme discomfort during the examination of her alleged interest in obtaining union representation information. In other areas, she became evasive and had to be prodded by counsel for the General Counsel's resorting to Wertz' pretrial affidavit. I found her to be far less spontaneous and convincing than O'Connell whom I credit.

At about 9 a.m. on September 4 Supervisor Lynd asked Kathy Harper to work Saturday overtime. He said, "Kath, can you come in on Saturday? I could really use your help."

At about 9:15 a.m. that same morning, Kennedy approached Harper and Bickings who were working in quality control and sat down. Kennedy said, "I hear there's a list going around for a

Union with eighty names on it.”<sup>2</sup> Harper answered, “Well, we’ve already lost a lot.” Kennedy said, “Well, I need my job. I don’t know about you,” and then left.

O’Connell testified that at about 9:30 a.m. that same day, Wertz came back to the warehouse through the glass doors.” O’Connell was standing at the long table along with Whitticar and Dave Bruder. Lynd was standing at the other doors getting parts to go back into his area. Wertz said, “Dottie, this come directly from Stu [Krompetz], if the stuff with the Union doesn’t stop, David Markel is going to close the plant and move it to Mexico.” Lynd said he had to go tell his people the same thing.

O’Connell first testified that Wertz stated, “we’re going to close the plant” and testified on cross-examination that Wertz stated, “Dave Markel is going to close the plant.” Given the rest of the statements made to employees that day, the latter is more likely to be correct. Bruder, a current employee who was not present during O’Connell’s testimony, corroborated that Wertz said Krompetz “was putting the word out that the owner would shut the place down if they continued any more attempts to get a Union in the company.” Bruder first testified that Lynd’s response was that he was told that also and he was going to go back and speak to his subordinates to put that message out. Lynd, an admitted supervisory agent of the Respondent, did not testify. Wertz, an adverse General Counsel witness, was questioned as follows by the Respondent’s counsel in reference to her pretrial affidavit, which was not placed into evidence:

Q. Now, in the same paragraph [in reference to another issue] you say you did not tell any employees that the plant would close or move to Mexico. Is that true?

A. I do not remember.

Q. And Donna Kennedy is the person who told you. That is what you say in the paragraph?

A. Yes, I do.

Q. You did not say anything that it was coming from Stu Krompetz?

A. No, I did not.

Thus, in the totality of Wertz’ testimony regarding the alleged threat, I find it to be ambiguous, enigmatic, uncertain, a result of leading examination by the Respondent and uncorroborated by Lynd, Whitticar, or the other supervisors present, and insufficient as a categorical contradiction to O’Connell and Bruder whom I credit.<sup>3</sup> If anything, the response to the Respondent’s examination implies that such a threat indeed emanated from at least some agent of the Respondent.

Harper testified that about 9:30 a.m., Lynd came into the quality control area to where Harper and Bickings were working. Lynd said, “Kath, I just came from Stu [Krompetz] and Stu said that if there was any more talk about the Union that David

[Markel] will close the place and move it to Mexico.” Harper replied, “Tom, that’s a threat and I could go to the Labor Board with it.” Bickings said, “I’m a witness.” Lynd said, “Well, I’m just relaying a message,” and then left.

Bickings testified that Lynd said that the talk of a union would stop or their jobs were going to leave and they would be without them, the Respondent was going to send them away, back to Mexico. Bickings’ testimony on this point, while less exact than Harper’s, effectively corroborated her testimony. More importantly, Lynd did contradict their testimony, which I credit.

According to Midge McGuire’s credible testimony, which was not effectively contradicted, between 9:30 and 9:45 a.m., Kennedy came though the coaxial room where McGuire, Tracey Schultz, Bob Sewell, and Karem Zillul from the molding department were sitting inspecting parts. Kennedy said, “if anybody is thinking about getting a union, they better knock it off.” Kennedy did not say anything else. She just kept walking and went out the doors into the extrusion room.

McNamara testified without contradiction that on that same morning, group leader Connie Ottie approached McNamara’s workstation in the production department. There were other people also sitting at the long production table. Ottie spoke to all at the table, “Talk of the Union had reached the office and it was coming from Stu [Krompetz] that it had to stop now or the company would close and our jobs would go to Mexico.” After she said that, she moved on to another part of the table and, from what McNamara could hear, she appeared to be repeating what she had just said to those employees.

Bolles testified that on that morning Kennedy related to Quality Assurance Manager Bolles a conversation that she had with an employee in the hall. Kennedy told Bolles that the employee had indicated that there was some union activity taking place and she told the employee that if Owner David Markel found out about that, he would close the plant and move the operators to Mexico. Bolles failed to testify that he in any way assured her that Markel would not retaliate. Wertz admitted that sometime that day, Kennedy instructed her to tell the employees she supervises to stop talking about the Union. Wertz was evasive as to whether she actually told the employees to stop the “chit chat” about the Union, as was stated in her pretrial affidavit and initially testified to by her, or whether she told them to “desist the conversation” about the Union, either of which order, in any event, was conveyed to her by Kennedy. Ultimately, she agreed that her affidavit was correct. In leading examination by the Respondent’s counsel, she testified that the employees were having “general conversation” while they worked and there is some kind of rule about it. She testified that employees are allowed such conversations but that it ought to be kept to a minimum but that she never enforced the rule in any event. She failed to testify that the ongoing union-related conversation exceeded the “minimum” ordinarily allowed or the normal level of conversation she had previously tolerated. In any event, the restriction that she had been ordered to announce was discriminatorily limited to union “chit chat” and was absolute in nature, unrelated to the amount of conversation or to actual disruption of work, of which there was no evidence at the time of announcement.

#### 6. The September 4 layoff decision

The General Counsel adduced evidence that from the employee perspective, the plant was operating at normal production levels which included weekday and sometimes weekend overtime work—processed orders were accumulated and ready to be shipped; supervisors talked to employees about intended plant

<sup>2</sup> Bickings, who was not present during Harper’s testimony, testified that Kennedy said, “I heard there was a list going around with eighty people on it that wanted information on a Union.” Although there are slight differences in what was said, the differences are minimal and she corroborates Harper’s testimony. Bickings testified that Kennedy retorted, “I don’t [know] about you people, but I need my job and you know if you continue to talk about a Union, David Markel will shut us down, jobs will go to Mexico and you will be without a job.” Again, while not exactly the same words as testified to by Harper, she corroborates Harper’s testimony. Kennedy did not testify concerning this incident. For the reasons stated above, I discredit any arguable implicit contradiction in her above-described testimony.

<sup>3</sup> Whitticar testified as a respondent witness regarding other issues. He did not contradict O’Connell and Bruder.

building renovations and/or expansions; employees were hired on an ongoing basis; advertisements for production and/or quality control department inspectors were placed in newspapers, right up to September 4, 1998; and a third shift was being contemplated. The Respondent does not challenge that evidence. Indeed, its position is that the decision-maker as to the layoff was Scott Nicholas who did not take line supervision into his confidence until September 4, the day of the announcement. In fact, Wertz, a recently appointed supervisor, was herself admittedly shocked by the announcement.

Nicholas testified that when he was hired in April 1998, he was instructed that the Respondent's business had not been doing well for the last few years and it was his objective to improve the profits and revenues. He testified that he found the state of the Respondent's financial records "chaotic," "confused," and "sparse."<sup>4</sup> He testified that he discovered that the Respondent was spending money without restraint and hiring employees and granting overtime without regard to cost and control. Nicholas testified that before he could assert control over the financial situation, he had to spend the better part of his first several months coping with the disaster of national recall of one of its major products—the Tesio Adapter that it sold to Med Comp—with its significant impact on the Respondent's production capabilities.

The recall of the Tesio Adapter had had two immediate impacts on Martech.<sup>5</sup> First, there was an immediate shutoff of total production of the Tesio Adapter. Second, because physicians could no longer use the Tesio Adapter, there was an immediate, albeit short-term spike in production orders to resupply the empty pipeline of catheters with the new, more complex Ashwood Split Catheter. Krompetz testified, "we had to flood the market with this product . . . to keep from losing the market." According to Nicholas, the Ashwood Split Catheter production required a large work force and resulted in considerable overtime and the aggravation of the serious economic situation.

Krompetz testified that by August 1998, the recall of the Tesio Adapter was under control and the pressure of meeting the "fill the pipeline" Ashwood Split Catheter requirements for Med Comp had largely been met. Nicholas claimed that he then could refocus on the financial situation.

Nicholas ordered his accounting department to provide him with "weekly shipping reports" which showed the quantity of materials shipped, the dollar value, and a breakdown by customer and product. They also provided him with weekly shipping reports and weekly reports showing the same information for orders coming in and the "shipping date information as to when the customer wanted it," to be used as a basis for manpower planning. Nicholas testified that he also requested "the bi-weekly payroll register," a complete printout of payroll by individual, initially loosely organized but subsequently by 19 departments for the company. He also obtained the 5-month financials for 1997 and 1998 and the yearend financials for 1997.

Nicholas testified that he was confronted with the following information:

<sup>4</sup> In 1997 there were only three income statements, May, October, and December; in 1998, there was none before Nicholas requested one for the period January through May.

<sup>5</sup> The Respondent's customer, Med Comp, had learned about injuries and deaths associated with the use of this product. They contacted the FDA and initiated a voluntary recall. The problem related to the bonding of a plastic tube in the fitting—glue—that was substandard. The gluing process was performed at Martech in the production/inspection departments. The magnitude of the recall is undisputed.

(1) Monthly incoming orders that had been declining precipitately (from \$1,522,763 in May to \$637,890 in August).

(2) Coincident to a drop in incoming orders, the average employee headcount had been steady climbing in that same period from 154 in April to 181 in August.

(3) Coincident to a drop in headcount, the cost of goods sold had been rapidly increasing.

(4) And, correspondingly, net operating income was showing a \$136,000 loss.

Nicholas testified that he had set as his goal a monthly net revenue of \$1 million, i.e., product sales actually shipped out the door minus credits, returns, and customer paid tooling charges. He offered no explanation as to how he arrived at that particular figure or the precise date he fixed that as his goal.

Nicholas testified that when he received the foregoing information on an unspecified date in August 1998, he concluded that the Respondent, having deteriorated from a 1997 profit of \$353,000 to a \$136,000 loss as of May 31, 1998, for the same period and having increased costs of goods sold and personnel headcount, that some "drastic action had to be taken to resuscitate the health of the Company." He testified that he decided that the quickest reduction of costs could be had from a layoff of "between 40 to 50 percent within the plant." However, Nicholas decided first to determine the source of the drop in incoming orders. To do this, he testified that he obtained individual customer information on an unspecified date at the end of August and the very beginning of September and found confirmation that the drop in incoming orders was an across-the-board phenomenon among the Company's major customers. Having obtained that information, Nicholas told David Markel, that he, Nicholas, had to take the extraordinary action of a production work force cutback of 40 to 50 percent.

Even with Markel's approval, Nicholas still decided to wait a few more days, until he had sufficient additional August financial data to confirm the trend. He testified that he obtained this data during the first few days into September. The data he replied upon, he testified, disclosed the following:

(1) Total monthly orders received were now showing an even greater drop of nearly \$200,000.

(2) Sales from an array of important customers were down by a significant 24.2 percent (1998 vs. 1997).<sup>6</sup>

(3) Gross payroll had hit a high of \$190,075 and a headcount of 181.<sup>7</sup>

Nichols did not wait for the August 31, 1998 financial statement which, in fact, he did not receive until 1 or 2 months later. He testified that he decided immediately to implement a layoff. He testified that he had determined to lay off "somewhere between 40 or 50 percent of the employees." He did not explain how he arrived at this percentage nor did he indicate whether there had been any definitive projection of the precise dollar savings of such layoff. There was no explanation as to what specific dollar savings projections were made in relation to the types, categories, or departments from which layoffs were to be made.

<sup>6</sup> One of their major customers, Pace Setters, had stopped placing orders. It was later discovered that this stoppage was permanent. Similarly, business with Med Comp was down in 1998 and still revealed no sign of recovery.

<sup>7</sup> Total persons employed by the Respondent in 1998 were January–160, April–154, June–164, July–174, and August–181. These included salaried persons, including managers, supervisors, etc., as well as production employees.

Nicholas testified that he discussed his decision with Krompetz “and gained his agreement.” Nicholas also communicated with the Respondent’s legal counsel and with Lee Hoffman prior to implementing the layoff decision. Krompetz testified that Nicholas had warned him at the end of August that the reduction in sales was “severe,” that the economic conditions of the Respondent were “very bad,” and that he should anticipate a layoff. According to Krompetz, on September 4, Nicholas summoned him and announced his decision to effectuate a layoff. Krompetz did not participate in Nicholas’ determination as to the percentage of employees to be laid off or in the decision that it would be limited to the production, maintenance, and quality control employees but would exclude supervisors, managers, clericals, sales staff, engineering personnel, administrative staff, and other support staff, all of which contributed to the previously described total employment of 181 persons.

Although the actual total headcount of all persons employed by the Respondent rose from 154 in April to 181 in August, the employment of hourly rated employees rose from somewhere between 127 to 133 on May 31 (see R. Exh. 10) to 147 by August 29 (see G.C. Exh. 19). Much of that can be attributed to the crash split catheter project. There is no explanation why the actual layoff was much less than the 40- to 50-percent figure initially determined by Nicholas, nor what determined that 43-person figure, except that production managers were to select as many workers for layoff as was possible without crippling production. Apparently production would have been utterly impossible if an actual 40- to 50-percent reduction in the production force had been implemented.

Nicholas did not explain why he permitted hiring to continue up to August 31. Between August 24 and 31, the Respondent hired seven new hourly rated employees and maintained newspaper advertisements for more hourly rated employees.

Nicholas testified that on September 4, he summoned all the managers in a group and, in the presence of Krompetz, announced the layoff and “told them the criteria by which to effect the layoff, as far as the selection process of individuals.” Nicholas testified:

I gave, for the most part, the responsibility of selecting the individuals to the managers who knew the individuals much better than I did, and were familiar with their work habits, their performance and their absenteeism, which were the criteria—and the rate of pay, which were the criteria I had set out as the benchmarks for determining who would stay and who wouldn’t.

According to Nicholas he and Krompetz then “released the managerial group and then brought the managers in one at a time and sat down with them” to review an outdated but only available list of persons employed as of May 30, 1998. Nicholas testified that he allowed the individual manager to select “who they wanted to keep and who would have to leave.” He did not tell them that any specific number of persons were to be laid off from each department.

According to Krompetz, he and Nicholas:

called the managers in and let them know of the lay-off and then Scott [Nicholas] and I went over the list ourselves to determine that we were going to use productivity, wages, to try to reduce the economic level of the impact on the company.

He testified that they decided to lay off part-time employees first.<sup>8</sup> Later, in cross-examination, Krompetz defined “productivity” so loosely that it constituted a catch-all category for any work, behavioral, or perceived personality deficiency that might in some strained way affect production.

Nicholas admitted that he relied on the managers and supervisors to select layoff candidates and that he approved their selection “if they felt they could run the operation effectively after releasing that number of people.”

Nicholas testified that at about the time of his layoff discussions with Krompetz he had received reports of “thirty seconds” duration of “union activity” in the plant but that it bore no relation to the layoff decision. He and Krompetz denied knowledge of union activities of any specific employee and the relationship of union activity to the layoff selection process.

There is a proviso in the employee handbook that Respondent provides to employees that states:

If it is necessary to lay-off employees, every attempt will be made to make decisions by employee seniority. When hiring is resumed after lay-off, the company will make every reasonable effort to recall former employees.

The handbook does not explain whether such policy applies to mass economic layoffs or whether the seniority referred to is plantwide, department or shift seniority.

It is undisputed that there had been two prior general layoffs in 1995 and 1997, but there is little or no evidence that seniority actually was followed and, if so, what kind of seniority was applied. In any event, Nicholas testified that he was aware of the handbook proviso but felt that he was not constrained to follow it in what he considered to be an economic necessity to retain better employees.

The factor of seniority was disregarded to the extent that a disproportionate number of recently hired probationary employees were retained to the detriment of employees of many years’ employment. Nicholas also testified that he had been confirmed by Krompetz that in the 1997 layoff, seniority was deferred to ability in the selection process. It was not explained why employees who were not laid off in 1997, when ability was the criteria, were laid off in 1998.

#### 7. The selection of layoff candidates

Krompetz made specific initial, premanager consultation recommendations to lay off certain employees. Krompetz selected 15 first-shift employees: Faith Corbo, part-time employee Bonnie Christman, Judith Deuber,<sup>9</sup> Barbara Jean Holmes, Nancy Lloyd, Sandra Lynch,<sup>10</sup> Sue McNamara, Nalini Patel, Terry Rose, Rositta Slotterback,<sup>11</sup> Faye Smith,<sup>12</sup> Patricia Tyler, Barbara Williams, Jay

<sup>8</sup> In cross-examination, Nicholas amended his testimony to accord with that of Krompetz. He explained that Krompetz “had great familiarity” with former employees of MDI and had made an initial selection of layoff candidates before calling in the managers.

<sup>9</sup> Krompetz stated that Judith Deuber had late work issues. On cross-examination, Krompetz did not deny that he authorized two raises to Judith Deuber within a year, one of them being a \$1-per-hour raise.

<sup>10</sup> Krompetz testified that Sandra Lynch had a problem with productivity because she occasionally turned around and talked to other employees while working. Sandra Lynch’s last evaluation, dated July 6, showed that she was rated good in five areas and excellent in two. The evaluation states, “Sandra is diligent with her work methods. She is very good, very easy going and seldom has any problems.”

<sup>11</sup> Rositta Slotterback’s last evaluation, dated June 30, had three good ratings and four excellent ratings. The evaluation stated, “Rose is

Dietterich, and Midge McGuire. Krompetz gave work habits and/or productivity as the reason for selecting these employees,<sup>13</sup> except for Corbo, for which he gave no reason; McNamara, with whom he stated the Respondent had communication problems and issues with respect to fulfilling her work assignments; McGuire, who he stated had absenteeism problems and higher wages;<sup>14</sup> and Dietterich, who he stated was the highest paid person in his department. On cross-examination, Krompetz admitted that he also selected three employees from quality control whom he knew from MDI—Harper, Bickings, and Tracey. His stated reason for choosing these three was that they were some of the higher paid employees in that department.

Wertz testified that around lunchtime on September 4, she was called into Nicholas' office. In the office were Nicholas, Krompetz, Kennedy, Moretti, Hoffman, and Fred Monte. Nicholas stated that the Respondent was not doing well business-wise, that cutbacks were needed, and that the Respondent was going to have a layoff. They then proceeded to go down a list of names of people in production, name by name, stating whether they would be laid off or not. Wertz could not remember who made the decision to lay off employees.<sup>15</sup> Wertz, who was upset, could not recall whether reasons were offered as to why some people were being laid off and some people were not. After that, Wertz, Kennedy, and Moretti went into another office with the list to do the paperwork that needed to be done for the layoff. They then went back to Nicholas with the names of two new employees who were not on the list. Wertz specifically recalled that Sue Adams and Bonnie Christman, part-timers; Audrey Corbo,<sup>16</sup> a new employee; Judy Deuber; and Sue McNamara<sup>17</sup> were selected to be laid off. During this time, the Respondent did not check any personnel records.

Bolles testified that on September 4, Scott Nicholas instructed him to lay off approximately 50 percent of his department because of the Respondent's financial problems. This approach in the quality control department differs from Nicholas' testimony that he told managers to lay off as many employees as they can but only up to the point where it would not cripple production. Bolles had not heard about a layoff prior to that. Bolles testified that he made the decision on which quality control employees to lay off with inspection supervisor using as criteria the quality of the work

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one of the few employees that really care about what she is doing, asking for help, asking questions, and having input of her own when there is a problem."

<sup>12</sup> Faye Smith's last evaluation, dated June 30, had three good ratings and four excellent ratings.

<sup>13</sup> Krompetz defined work habits and productivity very broadly. It could be not filling out paperwork correctly, not putting the product away at the end of the day, not cleaning up one's table, or not producing as much as a coworker, etc.

<sup>14</sup> McGuire received a written employee warning notice for excessive absenteeism the day before the layoff because she had used all of 160 hours of vacation and 40 hours' personal leave and was 7 days over that limit. She was absent frequently the last 2 years, from 1996 to 1998, due to some personal tragedy in her life. After her last review, she received a 27-cent-per-hour raise.

<sup>15</sup> Wertz could not remember whether Krompetz specifically named employees to be laid off from production. Wertz admitted that she did not make any of the decisions to lay off employees because she was a new supervisor.

<sup>16</sup> Wertz testified that Audrey Corbo's performance was not up to what was expected.

<sup>17</sup> Wertz claimed that she did not know whether McNamara had substantial seniority but ultimately agreed that McNamara probably did have substantial seniority.

performed, how much employees were paid, and how well the inspection department could function without those employees. Using these criteria, he selected Anke Costa because she allegedly had a tendency to over inspect and to reject products that did not need to be rejected, which caused delays; Bickings because her supervisor had expressed problems interacting with her and getting cooperation,<sup>18</sup> Sandy Frazier, who did packaging operations, because she was not as good at detecting problems in the product as Betty Shellenberger who also did packaging; Harper, primarily because her salary was higher compared to other employees;<sup>19</sup> Mao Tsung Lin because he was unable to read English, which is important in following documented procedures; Vim Patel because she took a leave of absence that stretched out to 6 months instead of 3 months; Edythe Morris and Lorraine Nyce because they were part-time employees; Pat Tracey because of her high salary and a previous history of unreliability—she had quit a couple of times; Cathy White from document control because of her salary and issues of quality with her work; and a brand new employee from the second shift of quality control.

Whitticar testified that he never met with Nicholas that day. Karen Nyce called him into Krompetz' office and told him that because of the lack of sales, it had been decided to do a companywide layoff of 50 percent. Thus, there was no discretion as was allotted to general production employees. He testified that he and Nyce selected O'Connell and Linda Wolfgang for layoff. Whitticar testified that he concluded that he could handle half the tasks under his supervision and Bruder could handle the other half. He further testified that he determined that Sanjay Patel, a new warehouse employee who had been there for only about 2 weeks, would be able to handle the other tasks. On cross-examination, Whitticar admitted that he had nothing to do with the decision to lay off O'Connell. Nyce told him to lay off O'Connell because she had been told to lay her off.

Tomlinson testified that he was called into Nicholas' office about the layoff and told that money was out of control and the Respondent needed a reduction of 30 percent in the maintenance department. How that figure was set is not explained. Nicholas told him that he would have to let someone go in his department. He decided to lay off Tom Ledgerwood because he was just the general maintenance man. He decided to choose Ledgerwood over Jeff Garber because Garber was training for ISO quality program compliance.

Thus, the Respondent selected 43 employees for layoff, including Bickings, Harper, Ledgerwood, McGuire, McNamara, O'Connell, and Tracey. Of the 43 employees selected, 2 were selected by Nicholas personally—Mark Fisher and O'Connell. Nicholas stated that he selected Fisher because of his extremely high rate of pay. Nicholas testified that he reversed his decision and recalled Mark Fisher the Tuesday after Labor Day after several managers came and asked him to reverse his decision because of Fisher's needed expertise. Fisher has the reputation of being David Markel's personal friend. Nicholas also testified that he selected Dottie O'Connell because she was not a "team player" and that her continued employment was not in the "best interests" of the Respondent. Nicholas testified that O'Connell had come to him sometime in August before the start of the workday and com-

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<sup>18</sup> Bolles' testimony regarding Bickings was puzzling. After he stated the above, he denied that Bickings was known as somebody who had a temper. He also testified that he did not know anything about problems with Bickings.

<sup>19</sup> Bolles denied that Harper's cooperativeness was a significant issue.

plained about a memorandum which changed the work hours for certain departments and eliminated paid breaks. He testified that O'Connell had become "confrontational" and insisted that the change in policy was "unfair" and "illegal" inasmuch as she had previously been paid for work breaks and had received 8 hours' pay for 7-1/2 hours of work. He also testified that he had personally observed her during the workday when she visited the office several times a day to collect paperwork and in so doing had spent an "inordinate" amount of time milling about the office engaging in loud "chit chat." He failed to testify that he or any other supervisor verbally or in writing admonished her about these incidents or that he complained to O'Connell's supervisor. Nicholas provided no times, dates, duration or frequency of incidents, or any other details. He admitted that his pretrial investigatory affidavit, which had been reviewed by the Respondent's attorney and faxed to the Regional Office, was silent as to the alleged office malingering incident.

With respect to the pay policy confrontation, Nicholas testified in further cross-examination that he had "no problem" with an employee making a complaint about working conditions but that he objected to O'Connell's direct approach to him rather than to go through the supervisory hierarchy. When he was reminded of his admitted announcement to a group of employees that he had maintained an "open door policy," he shifted emphasis by answering:

Yes to talk, but not shout.

O'Connell did not rebut Nicholas' testimony. Nicholas, however, admitted that he had not issued a warning to O'Connell for the alleged August incident. There is no evidence that he complained to her supervisor about it. Thereafter, he tried to explain by referring to bypassing of hierarchy as a "small issue." He admitted that the alleged malingering and August confrontation solely motivated his personal decision as CEO to lay off the hourly rated O'Connell.

#### 8. O'Connell's layoff

O'Connell was in the production room around 12:30 p.m. performing inventory tasks. Kennedy asked her if she was aware of a list going around with 80 names on it. O'Connell said yes. Kennedy said, "Do you know I'll lost my job if this place turns into a Union." O'Connell replied, "Yes. Good." Kennedy then said that Dave Markel would close the plant and move it to Mexico. Whitticar was knocking on the glass partition at this point, motioning for O'Connell to come out of the room.

When O'Connell came out of the room, Whitticar asked her to follow him. She followed him all the way to the back of the warehouse. He told her that there was a companywide layoff and that she was being laid off. According to O'Connell, the following conversation ensued. She said, "I know I'm going because of the Union." Whitticar replied, "No, it's not that, it's money." O'Connell said, "No, it's the Union." He said, "Well, it's the Union and your track record." O'Connell responded, "I don't have a track record." Whitticar said, "Yeah, and you got to go." She told him she knew it was because of the Union. She said she thought the layoff was supposed to go by seniority, referring to the Respondent's personnel manual that Respondent obliged employees to sign at the beginning of the year. Whitticar told her that he did not have to go by that book. He told her he had to walk her out to her car. She asked if she could clock out and was told she was not allowed to clock out. He walked her to her car, handed her his cellular phone number, and told her he was really sorry,

that she was a good employee and he would give her an excellent reference. He waited until she entered her car and left.

Whitticar testified in contradiction to O'Connell on only one point. According to him, when O'Connell suggested that she was laid off because of the Union, he denied it. Whitticar testified convincingly that he was genuinely distressed at having to lay off O'Connell, and contrary to Nicholas' strained efforts to disparage O'Connell. Whitticar clearly valued and made no effort to corroborate that disparagement. He was ordered by his supervisor, material manager, Karen Nyce, to lay off O'Connell. In cross-examination, he testified that he had more than one discussion with Nyce about the predetermined decision to lay off O'Connell. He testified "we had some back and forth conversation." The implication is that he resisted that decision. However, Whitticar testified that Nyce told him that she, herself, had been ordered to lay off O'Connell. Whitticar was sincere and convincing in his demeanor. I conclude that O'Connell was so convinced of union animus motivation that she subconsciously made explicit what was only her inference. I credit Whitticar, whom I find to be a basically honest witness.

O'Connell, the first employee laid off and selected by Nicholas, was ostentatiously ushered out of the plant so quickly that she did not have time to turn in her company-owned lab coat—an act ordinarily required before receipt of a final paycheck by a laid-off employee. Whitticar, on her subsequent telephone inquiry, absolved her of that obligation and told her that he would substitute another extra lab coat to be turned in by him on her behalf and that the Respondent would mail her paycheck to her. This is undisputed.

Whitticar last evaluated O'Connell on July 14, 1998. He rated her as excellent in three categories, good in two, and satisfactory in two.<sup>20</sup> Her overall rating was good. The evaluation stated that O'Connell took pride in her work. As a result of this evaluation, Whitticar authorized a 4.3-percent wage increase, the maximum that he was allowed to give at that time. It is undisputed that in July 1998, Whitticar asked O'Connell, who packaged products, if she would like Wolfgang's shipping job when Wolfgang went on pregnancy leave. O'Connell rejected the offer. She was not recalled from this, her first layoff from the Respondent's employment since she was hired in March 1996.

On September 4, after O'Connell's layoff, Bruder told Whitticar that Sanjay Patel, a new warehouse employee who had started 2 weeks previously, had just told him good-bye and that he was not going to be coming back. Whitticar testified that Patel decided to quit that day and move back to California. Bruder asked Whitticar, "What are we going to do because we'll be shorthanded. Does that mean we'll call Dottie back?" According to Bruder's uncontradicted testimony, Whitticar replied, "That will never happen." Whitticar testified that he decided not to bring anybody back after Patel quit because he thought he and Bruder would be able to handle the duties of the warehouse.

#### 9. The layoff of the quality control employees

Lynd brought quality control employees Harper, Tracey, Bickings, Dinwa Patel, Mao Tsung "Chuck" Lin, and Sandra Frazier into one of the empty offices at about 1:30 p.m. With the exception of Patel and Frazier, all the employees at this meeting had given their names and addresses to be put on the union list. Al-

<sup>20</sup> The only mildly negative comments in her review were that her general housekeeping needed improvement and that she needed better initiative during her downtime. There was no reference to malingering or to insubordinate behavior.

though Bolles was there, Lynd spoke. He said, "I'm sorry to have to inform you, but you're being permanently laid off. Go back to your stations and gather your personal belongings and leave the building as soon as possible, and anyone who had any keys, would they please turn them in and their lab coats." He did not give a reason for the layoff and no one asked questions. After Harper went back into quality control to clear out her desk, Lynd came and said that it was a pleasure working with her and he appreciated all the help that she had given him. She said, "Thank you" and clocked out and left.

This was the first time Harper (employed 19 years), Bickings (employed 10 years), and Tracey (employed 20 years) had been laid off by the Respondent. They were the most senior employees in the quality control department. They had survived the layoffs of 1995 and 1997. According to Nicholas, it was his understanding that merit—not seniority—was the 1997 criteria. There were no layoffs in that department in 1997. None of the employees in quality control after the layoff approached their seniority other than union activist Karguliewicz who was not laid off. Harper was the only group leader in quality control. She held that position 12-1/2 years at MDI and 1-1/2 years at the Respondent's combined facility. As a group leader, she trained employees on their jobs, processed work through the department, released the work into shipping, checked the inspection reports to make sure they were filled out properly, made sure all the signatures were on it, and that the addition was correct. She also inspected. Her last review, in January 1998 when Tracey was her supervisor, states that she is cooperative and patient with fellow employees. As a result of her review, she received a 4-percent raise to \$11.95 per hour.<sup>21</sup>

In January, then-supervisor Tracey gave Bickings a performance review that stated that Bickings was dependable, helpful, cooperative, thorough, and had excellent productivity. Bickings received the maximum raise allowed at that time of 4 percent.

Tracey became an inspector after resigning in March, shortly before the Tesio recall. She testified that she met Bolles when she went to pick up her last paycheck and asked him to consider taking her back as an inspector and he agreed. Bolles did not effectively contradict her. Her pay was cut 5 percent from \$13.20 to \$12.60 per hour, but everything else remained the same. She received a 29-cent-per-hour raise. Her ending salary was \$12.83 per hour. Bolles testified in response to grossly leading examination by the Respondent's counsel that yes, Tracey had "quit a couple of times," one of which occurred under his supervision. No dates, times, circumstances, or any details were elicited from the vague and unconvincing Bolles. He was corroborated by no other testimony or by any documentary evidence. Tracey denied that she ever walked off the job and left the plant without telling anybody. She testified that her superiors always knew where she was. She admitted that one time in 1997, under Al Benedict, the previous quality control manager, she was upset and left the building but pointed out that Benedict knew where she was because he departed and obtained her paycheck to give to her. When she returned to the plant, she spoke with him and they discussed the incident which resulted from a "problem" they had with each other.

Harper testified on cross-examination that to her knowledge, Tracey had quit and come back to the Company only once and

<sup>21</sup> Group leaders in other departments earned comparable wages in September and were not laid off. Sara Murphy earned \$9.85, Tracey Schultz earned \$10.25, and Theresa Ridge earned \$11.20.

that Tracey was absent for 1 week. Bolles testified that Tracey performed her work as an inspector and that there were no problems with her work from March on. Lynd did not report any problems with Tracey.

I credit Tracey who was a far more assertive, confident, spontaneous witness and discredit the vague, unconvincing, uncorroborated testimony of Bolles as to the allegation that Tracey had a tendency to walk off the job.<sup>22</sup>

#### 10. The layoff of production employees

In the afternoon of September 4, group leader Connie Ottie quietly instructed McNamara, "Get your pocketbook and any personal belongings and go to the cafeteria." Including McNamara and McGuire, there were 15 to 20 people there from production. Supervisors Kennedy, Moretti, and Wertz were present. Wertz stood near the microwave, molding room Supervisor Moretti stood to the right of employees, with Kennedy in the middle. McNamara testified that Wertz told them that due to financial considerations, the Respondent had to lay off some of the employees; that there was no special reason why one was chosen, it was random; that they were very sorry but the employees were being let go.<sup>23</sup> Both McNamara and McGuire testified that a recently hired employee named Sarah \_\_\_\_\_ questioned why they would hire her and her daughter if they knew that they were going to be laid off within a week or two. Wertz responded that they did not have any control over company policy. Moretti stated that the month was bad moneywise. Midge McGuire testified that someone asked why or how they were picked for the layoff and that Wertz or Moretti responded that it was just random.<sup>24</sup>

McNamara questioned Moretti about insurance and he told her how to obtain it. Unlike O'Connell, they were told to clock out, hand in their lab jackets, and not to worry about their work area or the paperwork that had to be done. Wertz collected the lab jackets. The employees then clocked out and were escorted from the building by Moretti or Kennedy and Wertz. Neither McNamara nor McGuire, both with 13 years' seniority and with more seniority than most employees in production, had ever been laid off before by the Respondent. Employees with less seniority that were not laid off were Stephanie Ottie, Bob Sewell, Karem Zillul, and Tracy Schultz.

<sup>22</sup> The suggestion in the Respondent's brief that Tracey inflated employee evaluations as a supervisor or that she was demoted for that reason is unsupported by record evidence.

<sup>23</sup> On questioning by the Respondent's counsel, Wertz testified that Kennedy did the talking. But she further testified that "as upset as I was, I really couldn't remember exactly if I even said anything." Wertz' testimony as to what Kennedy said was not specific. She merely stated that Kennedy told employees that business was slow, the Respondent needed to make cuts and a few people would have to be let go. She could not recall that any questions were asked employees or even who some of the employees were. Kennedy did not testify about this meeting.

<sup>24</sup> Both McNamara and McGuire testified that a supervisor at this meeting used the word "random." McNamara testified that it was Wertz who said it as described above. McGuire first said it was Wertz; then, on further questioning, McGuire said it was Moretti's response to a question from an employee as to why they were chosen for the layoff. While McGuire was confused as to who actually spoke at this meeting, her account as to what was said corroborates McNamara's testimony. In cross-examination, she admitted she was not certain of the exact word used. They were not explicitly contradicted by Wertz and Kennedy. Admitted Supervisor and Agent Moretti did not testify. I therefore find that the employees were told that they were randomly selected for layoff.

Ledgerwood testified to the following conversation: Tomlinson called Ledgerwood, who was at home on leave, at about 4 p.m. that day and told him that he was 1 of 40 people laid off. He said that O'Connell was the first to go, that they had called her and escorted her out of the building. He also told Ledgerwood that Mark Fisher was laid off and that David Markel's lawyers came to the plant and talked to Nicholas that morning before this happened. Ledgerwood replied that it was probably "because they found out about the Union meetings or something about the Union." Tomlinson said, "You're probably right" or "You may be right," but something to that effect. He also told Ledgerwood that Respondent did not make enough money to pay the employees' salary that month, "or something to the effect."

Tomlinson testified that he telephoned Ledgerwood and told him that he was laid off pursuant to an economically necessitated reduction in staff. He denied that he made any reference to the Union but he did not otherwise contradict Ledgerwood. I found Ledgerwood to be the more evasive, less certain, and less convincing witness. He was extremely hesitant and ill at ease. The so-called admission of possible union-related motivation is too obscure and uncertainly postulated to be of probative value. However, I must credit the remainder of Ledgerwood's uncontradicted testimony as to Tomlinson's reference to the layoff of O'Connell, after a quick consultation with the Respondent's attorneys. Unless Tomlinson told Ledgerwood of the pre-O'Connell layoff legal consultation, he would most probably not have known it. Clearly, Tomlinson said more to Ledgerwood than to which he testified. I therefore credit Ledgerwood's version of the balance of the conversation.

Whitticar testified that around 3:30 or 4 p.m. at the end of the workday, he and Nyce went to Linda Wolfgang in the shipping area and told her that she was being laid off. He stated that the reason Wolfgang was allowed to work to the end of the day was that he and Nyce had not yet finalized their decision as to whom they were going to lay off. Unlike O'Connell, Wolfgang was allowed to clock out before she left.

The impact of the September 4 layoff on those employees who had attended the August meeting with the Union mirrored the impact of the reduction in force on the entire work force (Karguliewicz, Bruder, Garber, and Hart were not laid off). Actually this group fared better because Connie Costa who was laid off on September 4 was actually one of eight called back several weeks later.

#### 11. The postlayoff events

Nichols testified that after the layoff, the Respondent determined that it had cut personnel too severely in some areas and was unable to operate the business effectively with such a reduced staff. As a result, Nicholas authorized the recall of eight employees. On September 7, the Respondent recalled Mark Fisher. On September 14, the Respondent recalled Faith Corbo, Sandra Lynch, and Faye Smith. On September 16, the Respondent recalled Barbara Jean Holmes, Terry Rose, and Barbara Williams. On September 28, the Respondent recalled Anke Costa but she had taken a job elsewhere. On February 15, 1999, the Respondent recalled Cathy White.

Bruder testified that it was very busy for him and Whitticar in the warehouse after the layoff because there were only the two of them. Bruder testified without contradiction that after the layoff, he asked Whitticar if they were going to get help and Whitticar said he was working on it. He told Bruder sometime in October that he had approval to advertise and had put an advertisement in a paper for two people for the warehouse. Advertisements were

placed in two local newspapers—the *Bucks-Mont Courier* and the *Mercury* on September 21 and 24, respectively, for warehouse employees. O'Connell, who saw the *Bucks-Mont Courier* advertisement, was not called by the Respondent. Bruder testified without contradiction that 2 days later, Whitticar told him that he was told he had to pull it back because of "legalities." Whitticar admitted that he and Nyce wanted to advertise for a warehouse person but that the advertisement was retracted. Whitticar did not know by whom. Instead, the Respondent hired two temporary warehouse employees from Manpower Temporary Services. Craig \_\_\_\_\_ was hired in November and Jennifer \_\_\_\_\_ started in the beginning of February 1999.

On September 7, an advertisement appeared in the *Bucks-Mont Courier* seeking inspectors for the Respondent. On September 7 and 8, another advertisement ran in *The Reporter* seeking quality control inspectors for the Respondent. The advertisement, which was identical both dates, states in part: "QC INSPECTOR Needed for rapidly growing Medical Device Mfg." Both Harper and Bickings saw the September 8 advertisement. They were not recalled. The advertisements had been placed before the layoff but not canceled.

After the layoff, the Respondent hired as assemblers Jagruti Patel starting September 8, Suk Poon-Meister starting September 14, Aiping Zhang starting September 21, and Muoi Gang starting September 28. The Respondent also hired Ray \_\_\_\_\_ from Med Comp as an inspector. Scott Nicholas testified that Med Comp had been doing inspection work for the Respondent for some time since September 4. On November 2, Ruth Anderson, who had been a temporary employee, became a full-time employee of the Respondent to replace receptionist Susanne Schier.

Wertz testified that there were 15 employees in her group before the layoff, 3 were laid off, and currently there are 14 employees in her group. Wertz testified that since September 4, the Respondent has not hired any new employees into production. Wertz also testified that since three employees in her department had been laid off, it was difficult after the layoff but that she was able to switch employees from Kennedy's group to hers to help out for however long it takes to complete a project. She was not specific.

In November, Bruder was concerned because of the layoff as to whether the Respondent would stay in business the following year and spoke to Whitticar about it. Whitticar told him the Respondent was doing pretty well and that September and October were excellent months. On November 4, Krompetz issued a memorandum to employees stating that the Respondent had achieved 93 percent of its shipping goals for October due to the additional efforts put forth by everyone.

Employees also worked a significant amount of overtime after the layoff. In the latter half of September and October, the Respondent's employees worked almost as much overtime as had been worked before the layoff. For the payroll periods ending September 26, October 10 and 24, hourly employees worked 1000, 1035, and 890 hours of overtime, respectively. The amount of overtime decreased around the end of November and the beginning of December. During the payroll period ending December 19 and January 23, 1999, the Respondent's employees worked 1464 and 1110 hours of overtime. The Respondent issued a memorandum on December 9 thanking 29 people for working above and beyond the call of duty on the weekend of December 4 to meet a critical deadline for its customer Sims Deltech.

*B. Analysis*

1. The 8(a)(1) allegations

*a. The threats*

It is well settled that an employer violates Section 8(a)(1) of the Act by threatening employees with adverse consequences for engaging in union activities. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969); *Cumberland Farms Dairy of New York*, 258 NLRB 900, 905 (1981), *enfd.* 674 F.2d 943 (1st Cir. 1982). Threats that an employer will close its plant because of unionization are inherently destructive of the right of employees to engage in union activity. *NLRB v. Gissel Packing Co.*, *supra*. An employer's prediction concerning what will happen if employees unionize "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618. If there is any implication that an employer may act on his own initiative for reasons unrelated to economic necessities, "the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion." *Id.*

As found above, the Respondent's admitted supervisors and agents engaged in the following conduct. The day after employees met with the Union on about August 26, 1998, O'Connell put up a notice given to her by another employee on the lunchroom bulletin board about employees' right to organize. Within an hour, production supervisor, Kennedy, came to her with the notice and threatened that the Respondent's owner would close the plant if anybody tried to get a union in.

On September 4, 1998, at about 9:30 a.m., Production Supervisor Wertz, threatened O'Connell in the warehouse in the presence of employee David Bruder, saying it came directly from Krompetz that "if the stuff with the Union doesn't stop, Dave Markel is going to close the plant and move it to Mexico." Supervisor Lynd said he had to go tell his people the same thing. Lynd followed through with his warehouse remark by entering the quality control area to where Harper and Bickings were working and threatening them as Wertz had done, that "Stu [Krompetz] said that if there was any more talk about the Union that David [Markel] will close the place and move it to Mexico." Such conduct constitutes clear violation of Section 8(a)(1) of the Act. I also find Kennedy's order "to knock it off" regarding union sympathies to contain an implied threat and also a violation of Section 8(a)(1).

The General Counsel argues that the threats of group leader Connie Ottie ought to be imputed to the Respondent because of her nonsupervisory agency status.

Section 2(13) of the Act states:

In determining whether any person is acting as an "agent" of another person so as to make such other persons responsible for his acts, the questions of whether the specific acts performed were actually authorized or subsequently notified shall not be controlling.

The Board has held that the test for agency is whether, under all circumstances, an employee could reasonably believe that the alleged agent was reflecting company policy and speaking for management. *American Lumber Sales*, 229 NLRB 414, 420 (1977); *Aircraft Plating Co.*, 213 NLRB 664 (1974). Essentially, this test is one of determining whether the employee had apparent authority to act for the employer in the matters in question. *Den-tech Corp.*, 294 NLRB 924, 925–926 (1989).

An employee who is placed in the position of one who routinely or in union organizing campaigns relays the employer's

position and policy may be found to be an agent of the employer, although not a supervisor. See *Propellax Corp.*, 254 NLRB 839 (1981); *Tyson Foods*, 311 NLRB 552 (1993). I find insufficient evidence that Ottie enjoyed such position, and I do not conclude that she acted as the Respondent's agent or acted in a way that reasonably would imply such authority. Her conduct, however, is evidence of the publication of the threats among nonsupervisors and also evidence of the Respondent's knowledge of the union activity.

*b. The interrogation*

Interrogation of employees of their own or other employees' union activities or sympathies is coercive unless ameliorated by the context in which it occurs. *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

As found above, Kennedy interrogated O'Connell in late August as to whether she knew who had put up the notice on the lunchroom bulletin board regarding the right of employees to self-organization. O'Connell responded that she did not know. Kennedy offered no assurances against reprisals and suggested no legitimate reason as to why she needed to know who had put up the notice which discussed the employees' general right to organize. In addition, this interrogation followed a threat to close the Respondent's facility. O'Connell's response was to pretend that she did not know who placed the notice. *Comcast Cablevision of Philadelphia L.P.*, 313 NLRB 220, 252 (1993). Moreover, while the Respondent clearly suspected that O'Connell was responsible for the notice, given Kennedy's reaction, O'Connell was not obvious about her union activities at that time.

Also in August, Donna Kennedy admitted that she asked employee Julia Croisette if she had heard anything about a union list that was circulating. Croisette answered yes, explaining that she had signed, not realizing what it was, but then went back to the individual to have her name removed. Again, Kennedy offered no assurances against reprisals and suggested no legitimate reason why she needed to know about the list. I find that Kennedy's interrogations of Croisette and O'Connell were coercive and violated Section 8(a)(1) of the Act.

*c. The impression of surveillance with threats*

The Board has set forth the standard to be applied in cases where the unlawful impression of surveillance is alleged:

The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.

*Parsippany Hotel Management Co.*, 319 NLRB 114 (1995), quoting *The Broadway*, 267 NLRB 385, 400 (1983). Alternately, the Board has held that the test is "whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance," and that an employer unlawfully creates an impression of surveillance by indicating that it is "closely monitoring [the degree of]" employees' union involvement. *Acme Bus Corp.*, 320 NLRB 22 (1995). This standard is an objective one based on the perspective of a reasonable employee. *Flexsteel, Inc.*, 311 NLRB 257 (1993).

I find that at around 9:15 a.m. on the morning of September 4, Kennedy created the impression of surveillance when she ap-

proached Harper and Bickings in quality control and told them that she heard there was a list going around for a union with 80 names on it. In addition, I find that when Harper denied knowledge of a list but stated that she heard 80 percent of the employees were interested in the Union, Kennedy followed the impression of surveillance with a threat that the Respondent's owner would close the plant and move it to Mexico. She also threatened job loss by telling Harper and Bickings that she did not know about Harper but she needed her job.

I find that Kennedy engaged in similar unlawful conduct with O'Connell. Immediately before O'Connell was laid off, Kennedy created the impression of surveillance by asking O'Connell if she was aware that there was a list going around for a union with the names of 80 people. I further find that Kennedy followed the unlawful impression of surveillance by threatening job loss when she stated that she would lose her job if a union came in and, thus, implicitly threatened O'Connell with the same job loss. Lastly, I find that she followed that with a threat that the Respondent's owner would close the plant and move it to Mexico. Thus, I find that by its agent Kennedy, the Respondent violated Section 8(a)(1) of the Act by unlawfully creating an impression of surveillance and threatening job loss and threatening to close the Respondent's facility if employees attempted to unionize. See also *United Charter Service*, 306 NLRB 150 (1992); *Medlin Corp.*, 307 NLRB 497 (1992); *Berg Product Design, Inc.*, 317 NLRB 92, 96 (1995).

#### d. The antiunion "chit chat" rule

Wertz entered the production room on September 4 and ordered employees to stop the "chit chat about the Union." There was no evidence that any such chitchat had interfered with production or that it exceeded normally tolerated conversations during production work, but there was evidence that generally nondisruptive conversations had been tolerated and Wertz never prohibited such general conversation. Clearly, the discriminatory enforcement of a rule against nondisruptive, union-related, light conversation even during working time in working areas is violative of Section 8(a)(1) of the Act.<sup>25</sup>

### 2. The 8(a)(3) allegations

#### a. Mass layoff

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). It is not sufficient that the Respondent can demonstrate that a lawful economically valid reason may have existed. It must be proven that the lawful motivation actually motivated the adverse action, notwithstanding the coexistence of union animus. *Pace Industries*, 320 NLRB 661, 662, 709 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 525 U.S. 1020 (1998).

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances—union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondis-

crimatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); and *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Motivation of union animus may also be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490-491 (7th Cir. 1993). *Data Systems Corp.*, 305 NLRB 219 (1991); *Fluor Daniel, Inc.*, supra. Direct evidence of union animus is not required to support such inference. *NLRB v. 50-White Freight Lines*, 969 F.2d 401 (7th Cir. 1992).

An inference of animus has been found to have been appropriately raised by timing, knowledge, and the manner of adverse action implementation. *Sawyer of Napa*, 300 NLRB 131, 150 (1990), citing *NLRB v. Rain Ware*, 732, F.2d 1349, 1354 (7th Cir. 1984). However, mere coincidence alone, without other circumstantial evidence, may not always support an inference of animus. *Chicago Tribune Co. v. NLRB*, 962 F.2d 712 (7th Cir. 1992)

Knowledge of an employee's protected activities acquired by a lower level foreman may be imputed to the higher managerial decisionmaker. *GATX Logistics, Inc.*, 323 NLRB 328, 333 (1997).

The General Counsel has established that almost immediately prior to its decision to effectuate a layoff, the Respondent obtained knowledge of the Union's incipient organizing effort among its employees, of which it was aware 80 employees were supportive to some degree. The General Counsel has adduced evidence of union animus expressed by the Respondent's front line supervisors, some of whom identified owner David Markel as the source of this animus. The expressed animus was severe, i.e., plant closure threats. Markel did not testify; thus, he did not deny authorship of these threats. David Markel was also consulted and gave final approval to the layoff decision. The General Counsel adduced evidence that right up to the day of layoff, the Respondent was issuing statements to employees and conducting business in a manner of a flourishing enterprise which, to all outward appearances, expected business expansions. The layoff itself was directed from the top of the Respondent hierarchy who engaged in a subjective selection process unrelated to personnel file data or seniority and based upon vague and ambiguous criteria. Higher management selected 20 of those 43 employees laid off. Those laid off included four union activists but admittedly not all who attended the August 25 union meeting. O'Connell, one of the more active union organizers, was selected to be laid off first in a unique and ostentatious manner. The decision to lay her off was made at the very highest level and practically dictated to her own supervisor.

There was no explanation as to just how Nicholas initially divined the layoff need to be 40 to 50 percent of the hourly rated employees, exclusive of managerial and salaried employees. There is no explanation as to why only 7 of 32 newly hired probationary employees were laid off or why those probationary employees were retained. The most startling example of this was the intended retention of Sanjay Pate, an employee of only 2 weeks' tenure over experienced employees O'Connell and Wolfgang.

The nature of the layoff decision and its execution admittedly crippled the Respondent's ability to operate and it had to recall

<sup>25</sup> See *Dilling Mechanical Contractors*, 318 NLRB 1140, 1144-1145 fn. 16 (1995), enfd. 107 F.2d 521 (7th Cir. 1977), cert. denied 522 U.S. 862 (1997), where preexisting solicitation rules were more strictly enforced because of a union organizing effort.

eight employees soon afterward. Such action is evidence that the Respondent's conduct was precipitous and not the result of detailed planning.

The Respondent argues that it had past experience of union organizing efforts and, thus, no reason to be concerned. However, there is no evidence as to when these organizing attempts occurred. Did they occur at the time of the 1995 and 1997 layoffs? We do not know whether 80 hourly rated employees supported those past efforts or were known by the Respondent to have supported it. However, the General Counsel had no evidence of prior animus. In any event, Nicholas was a new manager and as pointed out by the Respondent not bound by past seniority policy. Arguably, therefore he was not bound by past union organizing toleration. As Nicholas testified, it was decided that a newer, tougher managerial oversight was decided on and that was his hiring mandate.

The Respondent also argues that the pattern of union activist layoff follows the general plan of layoff and statistically they even fared better. The General Counsel rightly responds that the failure to discriminate against all known union activists does not necessarily militate against a prima facie showing of discrimination, citing *Vemco, Inc.*, 304 NLRB 911, 913 (1991), enfd. in relevant part 989 F.2d 468 (6th Cir. 1993). *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); and *Link Mfg. Co.*, 281 NLRB 294, 299 fn. 8 (1986), enfd. 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988).

Moreover, the evidence establishes that the Respondent was aware that at least 80 of its hourly rated employees were sympathetic to union representation or at least receptive to information about union representation. Clearly, it had knowledge of the identity of at least some of those soliciting union interest and those responding to the solicitation by virtue of its admissions in the interrogations. We do not have evidence that the Respondent knew precisely the identity of all employees involved. In any event, the nature of a general bludgeon regardless of union involvement would serve as well as a deterrent as would an accurate surgical strike.

I conclude that based on the foregoing findings, the General Counsel has established a prima facie showing that the Respondent was at least partially motivated by union animus to initiate a layoff at the time that it did, even within the context of evidence that there were coexisting good business reasons to engage in some sort of costcutting. I find that the burden has shifted to the Respondent to prove that it would have laid off those 43 employees regardless of the union activities of some of them, and that it did so on September 4 because of compelling business need. *Wright Line*, supra. As noted above, merely demonstrating that a layoff made good business sense is insufficient. The Respondent must prove that the business need motivated it to decide upon a layoff of that proportion and motivated it to implement it when it did. *Pace Industries*, supra. See also *Alterman Transport Lines*, 308 NLRB 1282, 1285 (1992). Conversely, merely because other economic courses of action could have been taken, or that different interpretations of economic data could be obtained that might suggest that a layoff was not absolutely necessary, and that the Respondent could have survived by exercising a more humane, economic, altruistic course of action does not necessarily discredit the proffered economic defense characterized in the Respondent's brief as an aggressive "draconian" economic attempt to effectuate a new "leaner and meaner" operation. The issue then is whether the Respondent effectuated the layoff when it did because of a brutal

but good-faith necessary business decision intended to avoid an honestly perceived "financial disaster."

Nicholas testified that his mandate was to assert control over inflated costs, install order in a chaotic operation, and improve the poor financial return of recent years. The evidence in support of this testimony was not effectively rebutted. Indeed, Nicholas promoted Krompetz as part of his efforts. He also made cost-cutting changes, one of which directly impacted O'Connell and motivated her to seek out union representation, i.e., the August 1998 change in breaks and compensation.

As of December 31, 1997, its first year in business, the newly merged Company attained gross sales of \$9,009,929 and net operating income of \$414,725, a return on sales of slightly under 5 percent. However, as of May 31, 1997, Martech already had achieved gross sales of \$3,783,356 and had net operating income of \$353,593, a return of 10 percent on sales. A comparison of these figures substantiates the Respondent's contention that the operation of the business after May 31, 1997, was essentially losing money and justified fears for its economic viability.

The Respondent postulated the cause of this stagnation and negative financial trend in the second half of 1997 on certain data, i.e., the cost of operations as a percentage of sales was increasing primarily due to excessive personnel headcount and wages. Thus, during 1997, the gross payroll grew from \$261,483 in January to \$471,076 in October (an increase of nearly 80 percent) and the number of persons employed grew from 148 in March to 183 in September (an increase of nearly 25 percent). However, sales and incoming orders were not increasing proportionately.

Nicholas was aware that the Respondent reduced costs in 1997 by significant layoffs in the months of October and November which caused the average total employment headcount to drop by 36, from 183 to 147 and the gross payroll to drop by 50 percent from \$471,076 in October to \$233,951 in December. Thus, in the last 2 months of 1997, a period reflecting the effects of the reduction in force, average plant production wages were reduced to appropriate \$253,000 per month after it had risen to an average of \$296,000 per month between June and October. The reduction in force in 1997 was accomplished by choosing employees for layoff based on management's perception of ability, not by seniority according to un rebutted record evidence, unless layoff candidates were of equal ability and/or experience.

Beginning in 1998, both the gross payroll and the production employee headcount started to climb again. Krompetz testified that early in 1998, the Respondent had expected an increase in sales based on the introduction of some new products for which it had been "gearing up." The March 1998 recall of the Tesio Adapter caused a total halt in the production of that product and a rush to production for its substitute—the Ashwood Split Catheter—that caused an increase in production steps from 5 or 6 to 14. The Respondent then attempted to "flood the market" with the Ashwood Split Catheter, hence the increased production activity. About the end of July or early August 1998, the Respondent had satisfied the market demand for the Tesio Adapter substitute, Nicholas had settled in as CEO in charge of all phases of operations, and Krompetz had replaced former General Manager Dave Roberts. However, net operating income in the 5-month period January-March 1997 had receded from a profit of \$350,000 in the 1997 period to a loss of \$136,000 for the same 5-month period in 1998, with concomitant increase in total employment in August 1998 to 181 and hourly rated production employment from between 127 to 133 on May 31 to 147 by August 29, with rising

costs and loss of customers, as detailed in the above factual findings.

There is no rebuttal to the Respondent's evidence as to the financial state of the Respondent in 1997, Nicholas' hiring mandate, the timing of the Tesio Adapter recall, the surge of productivity concurrent with the rush to production of the Ashwood Split Catheter, the termination of the production demand for that product, and the loss of business from Med Comp and other customers, all about the time of the onset of the embryonic union activity in which 80 employees expressed a desire not for union representation but for information about union representation.

The General Counsel argues that the Respondent's proffered financial data is misleading, that there was no impending financial disaster, and, in any event, the draconian economic remedy of a mass layoff was unnecessary.

The General Counsel argues by reference to a variety of comparative data that the Respondent was really not much worse off at the end of August 1998 than it had been in 1997, i.e., in the second 5 months of 1997, June through October wage costs were slightly higher than in the 5 months of 1998, and that a rise in plant wages of \$100,000 for the 5-month period ending May 31, 1998, is not as dramatic, given the larger number of employees involved. The Respondent's goal, however, was to significantly improve on the disappointing 1997 performance. Indeed, it argues, a reduction in persons employed from 183 in November 1997 to 147 in December 1997 was necessitated because of that disappointing performance.

With respect to the data revealing costs of goods sold—beginning inventory which was \$750,000, more than 1997 and materials cost of \$300,000, more than 1997, the General Counsel argues that those increased costs were related to the March 1998 Tesio Adapter and the inability to sell inventory of that product. However, the General Counsel argues that the Tesio recall as of the time of the 1998 layoff was 6 months past and the Respondent had survived with a gross profit of \$531,983 for the 5-month period ending May 31, 1998. That gross profit, however, came with a net operating loss of \$136,192 after subtraction of operating expenses within a rates total of \$3,656,894.<sup>26</sup> The General Counsel argues that the Respondent's costs related to the recall were an aberration and reliance upon that factor does not reveal the true state of its financial health, i.e., the high beginning inventory due to the recall would not be repeated.

The problem with that argument is that an aberration or not, the costs were real in 1998. Nicholas was looking at the immediate profit-loss bottom line and he made cost-cutting measures based upon recent immediate costs, not upon future hopes, which, by loss of business from Med Comp and others, did not warrant optimism according to Nicholas. Moreover, the beginning inventory cost continued to rise through August 31, 1998. For the 3-month period ending August 31, 1998, it was \$4,140,803 compared to the 5-month period ending May 31, 1998 figure of \$3,837,453. However, for the same periods, the comparative materials costs were \$587,658 and \$1,065,488, respectively. Despite the reduced materials costs, the gross profit for the 3-month period ending August 31, 1998, was only \$307,501 and net operating loss as \$64,505.

With respect to an increase in the cost of goods sold, Nicholas relied on then-available data which disclosed a rise in that factor

as a percentage of sales from 76 percent as of the 5-month period ending May 31, 1997, to slightly less than 86 percent as of the May 31, 1998 period. The General Counsel argues that there was no dramatic rise in cost of goods sold to justify the September 1998 layoff because the greater portion of the increase had already occurred in 1997, before Nicholas entered on duty, and the cost of goods sold as a percentage of sales for the last 7 months of 1997 equals that same factor for the first 5 months of 1998, i.e., 85.4 percent. However, it should be recalled that it was Nicholas' original objective to reduce the 1997 costs. Although the rise to nearly 86 percent of sales may not have been a singularly dramatic event at the time of layoff decisions, its nonabatement at that time was a bona fide business consideration.

The Respondent's financial data disclosed that monthly incoming orders had declined from \$1.5 million in May 1998 to \$637,890 in August. The General Counsel argues that the reference to \$1.5 million as a baseline is misleading. It is argued that the \$1.5 million figure, which exceeded Nicholas' monthly goal of \$1 million, was too extraordinary to serve as a baseline. There is no evidence of the source of these orders but it can be reasonably inferred that the production surge for the Ashwood Split Catheter was its cause and was partly responsible for the June figure of \$1,010,547. However, July through August suffered about \$200,000 less for each succeeding month, ending with \$394,838 in September. The high May figure exceeded the preceding April figure by \$1 million. April apparently bore the brunt of cancellation of Tesio Adapter orders following the March recall. January, February, and March were \$796,745, \$653,777, and \$932,071, respectively.

In 1997, monthly orders exceeded \$1 million in February, April, and September. They declined to \$612,205 in December. Monthly averages were \$791,279 for 1997 and \$795,491 for 1998 inclusive of its nonrepetitive Ashwood Split Catheter production surge.

Monthly net revenues for both years fluctuated widely from a high of \$916,505 in August and lows of \$638,981 in December and \$673,474 in June 1997, and from a high of very slightly over \$1 million in July to lows of \$662,856 in May and \$606,778 in November 1998. The net revenues for August, September, and October were \$710,598, \$746,950, and \$944,816. The monthly averages for both years were about the same, substantially less than the arbitrary objective of \$1 million set by Nicholas. The total net revenue was about the same for each year but slightly better in 1998.

In comparing the first 8 months of each year, the Respondent ran ahead in 1998 by nearly 10 percent. However, this again includes the Ashwood Split Catheter surge in orders, a nonrepetitive phenomenon. The monthly orders received in September 1998 were the lowest of the year and less than April 1998, the second lowest which absorbed the loss of Tesio Adapter orders. Only one other month was lower and that was in April 1997 which, however, was sandwiched between 2 months of orders in excess of \$1 million each. The low orders actually received in September 1998 warranted Nicholas' pessimism and projection of declining revenue. His documentation is un rebutted as to a decline of 24 percent in sales to 43 major customers exclusive of Med Comp as of the first 8 months of 1998 compared to 1997.

The decline in orders received from September to December 1997 was accompanied by a reduction in total personnel for the same period from 183 to 147, which is roughly comparable to the 1998 reductions.

<sup>26</sup> Gross profit equals costs of goods sold subtracted from gross sales. Cost of goods sold equals cost of goods available for sale less ending inventory.

The General Counsel argues that the Respondent's continued hiring and hiring solicitations right up to the September 1998 layoffs without explanation, and therefore against a background of other similar evidence, infers that the Respondent had plans to expand its business until union organizing activity started. However, Nicholas offered explanation. Upon becoming CEO, he had concluded in evaluation of the Respondent's business that the Respondent had a history of uncontrolled hiring. He intended to bring that under control. The crash Ashwood Split Catheter production program intervened. It was not until August that the market demand for that product had been satisfied and Nicholas could seriously evaluate the state of the Respondent's financial affairs. It is one thing to hope for expansion but another to face the reality of incoming orders. There is no evidence that Med Comp's placement of orders with the Respondent was not based upon bona fide business consideration. The General Counsel postulates suspicions of Med Comp's relationship to the state of production at the Respondent, but there is no direct evidence that Med Comp was purposely starving out the Respondent to frustrate the union activity or that it was performing work for the Respondent. There is no rebuttal evidence to the Respondent's evidence of the loss of business of its major repetitive customers.

The General Counsel argues that the Respondent found it necessary to utilize overtime employment after the layoffs and had to recall eight employees to maintain production. However, the use of overtime does not necessarily mean that such is more costly than the reinstatement of laid-off employees with their related benefits costs increases and the loss of cost effective flexibility that came with sporadic overtime when and where it is needed. That overtime and sporadic, limited use of temporary employees rather than recalling laid-off employees is an adverse business decision is a matter of speculation, not evidence.

The timing of the layoff within a context of threats of closure by line level supervisors imposed a serious burden on the Respondent.<sup>27</sup>

However, based on the foregoing evaluation of record evidence, I find that the Respondent has sustained that burden by adducing sufficient evidence that its decision to make and effectuate a mass layoff of extreme proportion when it did was made and would have been made regardless of its awareness of and animus toward the desire of its employees to obtain union representation or information about union representation.

#### *b. Discriminatory layoff implementation*

The General Counsel argues that notwithstanding a finding that the September 4, 1998 layoff was lawful, the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily selecting certain employees as layoff candidates because of their known or suspected union activities or sympathies. The employees in issue are Ruth Bickings, Kathleen Harper, Thomas Ledgerwood, Marion McGuire, Sue McNamara, Dottie O'Connell, and Patricia Tracey.<sup>28</sup>

<sup>27</sup> It is of some significance that the threats of closure consisted of future retaliation if employees persisted in union activity. That activity was extremely incipient. The employees were seeking information about union representation, not membership or representation. The layoff was immediate and the result of a decision of the CEO who kept his evaluations and plans from lower managers and supervision until the last minute. Indeed, the supervisors were clearly caught by surprise at the announcements.

<sup>28</sup> The complaint also alleges that employee Christopher Kipple was discriminatorily laid off. There is no evidence concerning his union

#### 1. Dottie O'Connell

O'Connell was responsible for contacting the Union and initiating the union campaign at the Respondent's plant. The evidence establishes that the Respondent's supervisors were soon aware that O'Connell was involved in the union activity and were unhappy about it. The day after meeting with the Union, O'Connell placed a notice on the lunchroom bulletin board regarding employees' right to organize. Within less than an hour, Supervisor Kennedy discovered the notice, removed it, and interrogated O'Connell about it and threatened her with plant closure if she persisted in union activity. Both Kennedy and Supervisor Wertz went out of their way on September 4 to threaten O'Connell, who was not under their supervision, that if the union activity did not stop, the Respondent would move the work to Mexico. Kennedy also told O'Connell that she was aware of the list of union supportive employees that O'Connell maintained.

O'Connell was laid off on September 4 instead of a probationary employee in her department. O'Connell was 1 of only 2 employees chosen by Scott Nicholas out of 43 for layoff—in his words, because “she was not a team player.” The method by which the Respondent laid off O'Connell, compared to other employees and especially as compared to Linda Wolfgang, the only other warehouse employee to be laid off, is especially noteworthy. O'Connell was the first employee laid off. She was personally escorted out of the building to her car, by herself and not even allowed to clock out. The Respondent did not even allow her to return to the facility to return her lab coat. Whitticar's explanation that he personally escorted her out of the plant because of his personal respect for her does not fully satisfy all aspects of the singularity of her treatment.

Although the Respondent needed warehouse help after the layoff, the Respondent made it clear that it would never recall O'Connell. In fact, it even paid for two temporary employees in the warehouse department rather than recalling her.

I find Krompetz' and Nicholas' testimonial denials of specific identity of union activists to be improbable. That these supervisors—who knew precisely the number of employees who had signed the union lists and, by implication, the identity of those who aided and assisted the list distribution and who were so concerned as to threaten those suspected of involvement—would not report their shocking discovery to their superiors strains credulity. I further found the testimonial demeanor of Krompetz and Nicholas in this regard to be unconvincing.

The shifting nature of Nicholas' strained explanation of alleged misconduct of O'Connell and the dictation of her selection from on high, unsupported by supervisory input, necessitates an inference of knowledge. It is no defense that Nicholas also selected one other employee because of his extremely high wages. In that employee's situation, Nicholas quickly deferred to managerial objections. That employee had not engaged in union activities. O'Connell, who was an activist, was steadfastly refused recall consideration. Her recall was characterized as an event “that will never happen.”

I find that the General Counsel has adduced sufficient prima facie proof that O'Connell was laid off because of her union activities and that the Respondent's shifting, unconvincing explanation that she would have been laid off regardless of her union activity fails its *Wright Line* burden of proof. I find that the Respondent

activities or circumstances warranting an inference of the Respondent's suspicion of such. The General Counsel's brief does not refer to him.

violated Section 8(a)(1) and (3) of the Act by its September 4, 1998 layoff of Dottie O'Connell.

## 2. Kathleen Harper

After O'Connell, Kathy Harper was one of the more active union employees who was one of the original employees to attend the meeting with the Union. She also collected some names and addresses to be given to the Union. She was also good friends with Bickings and Tracey, who were also involved in the union campaign. I conclude that as it had of O'Connell, Respondent had knowledge of her union activity as further evidenced by Kennedy's remarks to her and Bickings regarding the list with 80 employee names on it and Harper's response that she had heard that there was a list with 80 percent of the employees on it. In addition, Harper was outspoken in telling Supervisor Lynd, when he threatened plant closure if the union activity continued, that this was a threat and she could report it to the Labor Board. Thus, it is clear that the Respondent had knowledge of Harper's union activities and sympathies and animus toward them when it selected her for layoff.

Harper, Bickings, and Tracey were all employed in the quality control department, which had not been subject of the 1997 layoffs. They were among the most senior and, thus, most experienced employees in that department. As noted above, Nicholas' instruction to the production department as to the number of employees to be laid off was not absolute as it was for the quality control department. There is one explanation for this disparity. Bolles testified that he selected the three employees to be laid off. Krompetz, however, admitted that it was he who selected them based upon his knowledge of them when they had been employed by MDI. Yet, both he and Bolles testified that Harper was selected solely because of her high rate of pay. The implication is that it saved the Respondent more money to lay off higher paid workers. However, no analysis appears to have been made as to the cost effectiveness of dispensing with the greater expertise that results from experience. Nicholas admitted that he recalled a highly paid nonunion activist because his managers protested the loss of his expertise. It is unexplained just why Krompetz claimed to have made the selection of Harper because of his greater familiarity with her work when the proffered reasons for her layoff was unrelated to personal awareness of her ability. Clearly, Krompetz shifted the reason for Harper's selection in mid-thought in cross-examination when he apparently realized he had no basis to complain about Harper's performance. Neither Krompetz nor Bolles testified that Harper was selected because her quality of work performance either at MDI or the Respondent did not justify her higher pay.<sup>29</sup>

Harper was one of the higher paid employees because she was a group leader. Harper made \$11.95 per hour as a group leader, similar to other group leaders. However, Harper was the only group leader chosen for layoff in the plant. Harper was chosen not by the quality assurance manager for layoff but, admittedly for shifting reasons, by Stu Krompetz, who was not her supervisor or manager. Krompetz could not give a good reason as to why he chose Harper. I therefore find that the General Counsel has adduced sufficient evidence on which to find that the Respondent was motivated to select Harper for layoff because of her union activities and that the Respondent failed to sustain its burden of

<sup>29</sup> In examination by the Respondent's counsel, it was suggested that Harper was lacking in cooperativeness, but Bolles rejected that lead and denied that it had ever been an issue. Her last evaluation rated her highly in cooperation.

proving that she would have been laid off regardless of those activities. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by laying off Kathleen Harper on September 4, 1998.

## 3. Ruth Bickings

After O'Connell and Harper, Ruth Bickings was one of the more active union employees. Although she was not one of the original employees to attend the meeting with the Union, she collected names and addresses to be given to the Union. As found above, the Respondent was aware of the identity of such activists as evidenced by the coercive conduct of its supervisors discussed above. Furthermore, Bickings was also good friends with Harper and Tracey who were involved in the union campaign. Bickings was willing to openly and publicly state her union sympathies in the plant. On September 4, when Supervisor Lynd unlawfully threatened plant closure if the union activity continued and Harper responded that that was a threat, Bickings did not remain quiet but stated, "I'm a witness." Thus, it is clear that the Respondent had knowledge of Bickings' union activities and sympathies and animus toward them when it selected her for layoff.

Bickings, also a long-term employee who had never been laid off previously by the Respondent, was chosen for two different reasons by two different supervisors. Krompetz admitted on cross-examination that he chose Bickings even though he was not her supervisor or manager. As with Harper, he explained that he did so because he was familiar with her work performance when both were employed at MDI. Again, shifting his proffered explanation for her selection, Krompetz testified that he chose Bickings solely because she was one of the higher paid employees in her department. He did not relate it to work performance at MDI. Although a long-term employee, Bickings did not have a substantially higher salary than other quality control inspectors, roughly about \$1 higher per hour. In contradiction to Krompetz, Bolles testified that he chose Bickings for layoff because her supervisor expressed some problem interacting with her. Bolles, however, could not state what that problem was. On questioning by counsel for the General Counsel, Bolles stated that he did not know anything about Bickings having any problem. Her last evaluation shows that Bickings was considered a valuable employee, especially in the area that the Respondent cited as a reason for laying off so many other employees. In the words of her evaluation, Bickings had excellent productivity; nonetheless, the Respondent laid her off. I find that the General Counsel has satisfied the *Wright Line* burden of proof. Given the fact that the Respondent has been unable to explain satisfactorily why the Respondent laid off Bickings, the Respondent has not met its burden in showing that it would have chosen Bickings for layoff absent her union activities and sympathies.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by its layoff of Ruth Bickings on September 4, 1998.

## 4. Pat Tracey

Like Harper, Pat Tracey is a long-term veteran of the Respondent. Harper, Bickings, and McNamara ate lunch together almost every day in the lunchroom. Although Tracey was not one of the employees who attended the union meeting, about 10 employees came to her in the plant to give her their names and addresses to be put on the list for information. She directed them to Beau Karguliewicz who was collecting names and addresses.

As found above, the Respondent was aware of the solicitation of union support and its participants and harbored animus toward

that activity. Krompetz testified that he was more familiar with Tracey's, Harper's, and Bickings' work performance at MDI than were other supervisors and, therefore, he selected them for layoff. However, like Harper and Bickings, he testified that he selected Tracey because he was aware that she was one of the more highly paid employees and again slipped into a shifting non sequitur by failing to relate that factor to her MDI work performance.

Again, Bolles testified that it was he, Tracey's supervisor, who selected her for layoff. He testified that he did so because of her high rate of pay and, pursuant to the Respondent's leading examination, because she had walked off the job. In redirect examination, he testified that it was he and Lynd who selected Tracey for layoff because of her high pay and a "history of unreliability." He attributed no participation in the decision to Krompetz. Lynd was not called to testify in corroboration of Bolles.

While Tracey in fact quit her position as quality control supervisor in March, it is undisputed that she was rehired the following week by the Respondent as an inspector with only a slight reduction in pay. In July, the Respondent granted Tracey an increase in pay. There were no complaints about her work. Although asserted by Bolles as a general accusation, there was no evidence that she had quit her job on more than the one occasion she described. As found above, I credit Tracey and discredit the unperceptive, unfounded, uncorroborated testimony of Bolles which I find to be a disingenuous concoction.

Having found that the General Counsel has adduced evidence that the laid-off Tracey, of whom there is sufficient evidence to support an inference of Respondent knowledge of union activity or union sympathy, and upon inconsistent testimony as to the decisionmaker and for false and shifting reasons within a context of union animus, I conclude that the General Counsel has sustained the *Wright Line* burden of proof and the Respondent has failed the burden of proof shifted to it under that precedent. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by the September 4, 1998 layoff of Patricia Tracey.

#### 5. Marion McGuire

McGuire had been employed by the Respondent and MDI for 13 years. Her last position was that of a molding room inspector in the production department. For 10 years at MDI, she held the position of group leader until she voluntarily transferred to a production assembler job. Having held the position of group leader, it must be inferred that her work performance at MDI was recognized as superior. Krompetz testified that he was more familiar with the work skills of former MDI employees than were the other supervisors. Her immediate supervisor at the time of layoff was Moretti.

McGuire attended the restaurant union meeting. She solicited her coworkers in the plant for their interest and desire for union representation. She obtained names and addresses from about eight of her coworkers who were receptive to union representation information and passed those names to Harper and Karguliewicz. On the morning of September 4, she was sitting in the coaxial room with coworkers Bob Seawell, Karen \_\_\_\_\_, and group leader Tracey Schultz when Kennedy entered and ordered "anybody thinking about getting a union" to knock it off. Clearly, McGuire, the only activist present, was Kennedy's target. As discussed and found above, Kennedy was well aware of the employees who were soliciting for the Union and conveyed this information to the layoff decisionmakers. Kennedy's targeting of McGuire confirms this finding.

Krompetz testified that McGuire was one of the employees that he personally selected for layoff. He did not explain why he did

not delegate that decision to Moretti, her immediate supervisor, as he did for other employees under Moretti's supervision. The reason offered by Krompetz for her selection was unrelated to McGuire's work performance at MDI. He testified very cryptically that he selected McGuire because of her absenteeism and high salary. He gave no details as to date or frequency of absenteeism known to him or the source, if any, of the complaint. He was not corroborated by Moretti.

Evidence of Respondent union animus, the targeting of its animus to McGuire, the singular unexplained selection by McGuire for layoff by high management compared to the other molding department employees, and the vagueness of Krompetz' testimony regarding her absenteeism warrants an inference of unlawful motivation and satisfies the General Counsel's *Wright Line* burden of proof.

McGuire acknowledged receipt of an "Employee Warning Record" document dated September 3, 1998, given to her by Moretti and signed by Krompetz. Written in the "warning" section as "nature of violation" was "absenteeism." The remarks stated that she had used up all of her allotted vacation leave, all of the allotted 40 hours' sick leave, and "7 days without permission" and has received a "verbal warning," first by Kennedy—undated—and a second by Moretti on September 3, 1998. McGuire acknowledged the oral warning by Moretti. She admitted her excessive absenteeism, which she attributed to an unidentified "personal tragedy." Given the evidence adduced by the General Counsel as to the flimsy, subjective criteria applied by the Respondent in selecting many nonunion activists, I conclude that the Respondent has sustained its burden of proving that McGuire would have been laid off regardless of her union activities. Excessive absenteeism was a far more objective criterion than many such reasons relied upon in the nondiscriminatory layoffs. The acknowledged warning notice of September 3, 1998, signed by Krompetz, explains why he focused attention on McGuire. That document and McGuire's admissions override the lack of Moretti's testimonial corroboration. I find that McGuire was not discriminatorily laid off.

#### 6. Sue McNamara

McNamara had been employed by the Respondent since 1985. She last worked as a first-shift assembler. She did not attend the restaurant union meeting and did not solicit other employees' union support or interest. She did eat lunch daily in the cafeteria with her sister, Ruth Bickings, Tracey, Harper, and Karguliewicz. On one undated occasion in mid-August 1998, someone in that group asked her if she were interested in obtaining information about union representation, and she responded affirmatively. She testified that on some unspecified occasions during the distribution of the union lists in the plant, an unidentified "couple" of "people" at some unspecified location offered their names to her to be submitted to the Union. However, she testified that she directed them to Bickings.

Krompetz testified that he selected McNamara for layoff because she was part of a group of employees (including numerous nonunion supporters) of whom he had some personal knowledge of their productivity. He testified that he chose McNamara because of her poor communications skills and her inability to follow instructions correctly, as reported to him by unidentified lead persons on unspecified occasions.

Despite the vague and uncorroborated nature of Krompetz' testimony, I find that the General Counsel has failed to establish a prima facie showing that McNamara's layoff was discriminatorily motivated, even in part. Her expression of a mere interest in union

representation and the vague testimony of referring a “couple” of “people” to Bickings is insufficient to infer Respondent awareness and animus.

The General Counsel argues that her known blood relationship is sufficient evidence. As discussed above, the General Counsel does not have to show complete retaliation against all union activists to support a violation of the Act. However, the hit-and-run discrimination in this case fails to support a finding that the Respondent’s animus was so persuasive that it targeted even blood relatives of very little activity, of which activity is most difficult to infer knowledge.

Accordingly, I find no violation in the layoff of Sue McNamara.

#### 7. Thomas Ledgerwood

Ledgerwood, a maintenance department employee, attended the first union meeting. He did not participate in the solicitations of employee names and addresses for a list to be submitted to the Union. He testified that he “nonchalantly” talked about the Union to a “few” unidentified employees and at lunch breaks outside the plant about 1 week before his layoff. He did not testify as to what he said to them about the Union. His testimony in this regard is as vague and uncertain as was his testimony regarding his layoff notification conversation with supervisor Tomlinson discussed above.

Tomlinson testified that he was instructed to lay off someone in his department and that he selected Ledgerwood rather than Garber, the more senior employee who not only possessed greater seniority but also had more specialized training and skills. Garber had also attended the union meeting. Ledgerwood, in fact, had just completed his probationary employment period. Garber and Tomlinson successfully performed the maintenance department work thereafter.

I find that the General Counsel has failed to adduce sufficient evidence to support an inference that the Respondent was aware of, or suspected union activity by, or sympathies of Thomas Ledgerwood, upon which to find that such served as even a partial motivation for his layoff selection by Tomlinson. Accordingly, I find that Ledgerwood’s layoff did not violate the Act.

#### CONCLUSIONS OF LAW

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

2. As found above, the Respondent has violated Section 8(a)(1) and (3) of the Act, and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other manner.

#### REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Having found that the Respondent unlawfully laid off Dottie O’Connell, Kathleen Harper, Ruth Bickings, and Patricia Tracey, I recommend that it be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings

and other benefits, computed on a quarterly basis from the date layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

#### ORDER

The Respondent, Martech Medical Products, Inc. d/b/a Martech MDI, Harleysville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with plant closure, work relocation, and/or other reprisals if they engage in activities on behalf of or otherwise support Teamsters Local 384 a/w International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

(b) Ordering its employees to stop even thinking about representation by the Union.

(c) Coercively interrogating its employees concerning their activities on behalf of, support of, or sympathy for the Union, or any other labor organization.

(d) Creating the impression among its employees that their activities on behalf of the Union are under its surveillance.

(e) More strictly and discriminatorily enforcing rules regulating working time employee discussions in order to discourage support of the Union, or any other labor organization.

(f) Discriminatorily selecting employees to be laid off because of their actual or suspected activities for, support of, or sympathies for representation by the Union, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer to Dottie O’Connell, Kathleen Harper, Ruth Bickings, and Patricia Tracey full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its Harleysville, Pennsylvania facility copies of the attached notice marked “Appendix.”<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where

<sup>30</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

employees employed by the Respondent at any time since August 15, 1998.

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