

Fansteel VR/Wesson and Teamsters Local Union #651, affiliated with the International Brotherhood of Teamsters, AFL-CIO. Case 9-CA-36083

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On December 1, 1999, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fansteel VR/Wesson, Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James E. Horner, Esq., for the General Counsel.

Eric Hemmendinger, Esq., of Baltimore, Maryland, for the Respondent.

Carl E. Simpson, of Lexington, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Lexington, Kentucky, on January 5, 6, and 7, 1999, pursuant to a charge filed against Respondent Fansteel VR/Wesson by Teamsters Local Union No. 651, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) on July 1, 1998, and a complaint issued on August 19, 1998, and amended on January 5, 1999. On January 26, 1999, after the close of the hearing, counsel for the General Counsel filed a motion, opposed by Respondent, to amend the complaint; this motion is denied for the reasons set forth below

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

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by soliciting grievances and impliedly promising employees benefits during lunchroom meetings, we note that no exceptions were filed to the judge's findings that these allegations were closely related to timely filed unfair labor practice charges.

in section II,B,3,a.¹ The complaint in its final form alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by telling an employee that he was being harassed and kept busy because of his union activities, by threatening employees with plant closure if the Union became the employees' collective-bargaining representative, and (during meetings with employees in the lunchroom) by soliciting employee complaints and grievances and implying that Respondent would remedy them. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Gary Vinegar because of his union activities.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs and subsequent memoranda filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation which is engaged in the manufacture of tungsten carbide products at its Lexington, Kentucky, facility. During the 12 months preceding the issuance of the complaint, Respondent sold and shipped from its Lexington, Kentucky facility goods valued in excess of \$50,000 directly to points outside Kentucky. I find that, as Respondent admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In the summer of 1995, the Union engaged in an effort to organize Respondent's plant. During this campaign, employee Gary Vinegar distributed union literature and spoke to other employees on behalf of the Union. He also acted as union observer in an October 1995 representation election, which the Union lost.

In October 1997, Vinegar and employee Mary Sturgill (who had engaged in union activities in the summer of 1995) went to the union hall and discussed with the Union's chief organizer, Carl Simpson, a renewed effort to organize Respondent's plant. About 2 weeks later, Simpson mailed to Vinegar a number of blank union authorization cards, which were distributed among the employees by employees Vinegar, Sturgill, Rose Rhodus, and Dennis Howard. Operations Manager Larry Fraher (admittedly a supervisor) admittedly learned from Plant Superintendent Stephen Meuler (admittedly a supervisor) that the employees were discussing unionization. On an undisclosed date in the spring of 1998, upon seeing Vinegar and Sturgill eating lunch together, Meuler remarked that he did not like them, because they had tried to get the Union in before, and that he could not

¹ The complaint in its final form does not allege that Respondent engaged in unlawful interrogation. Accordingly, such allegations in the General Counsel's posthearing brief (p. 27) will be disregarded.

believe they had “brought the Union back out here.” Fraher testified that Respondent was opposed to the organizing campaign. On February 23, 1998, the Union, through Simpson, filed with the Board’s Regional Office a representation petition seeking certification as the representative of Respondent’s production and maintenance employees.

B. Alleged Independent Violations of Section 8(a)(1)

1. Alleged threats of shutdown

When Vinegar started to distribute union cards in the fall of 1997, he began to wear a union jacket to and from work and while he was in the plant. Also, beginning in late February, he regularly wore to work a union button which said, “Promises, Promises, Promises Let’s Get It In Writing/Vote Teamsters.” In late February or early March 1998, while he was in the bathroom, Foreman Allan Bartlett (admittedly a supervisor) entered the bathroom and told Vinegar, “Well, you’re a sorry ass.” Vinegar replied, “[Y]ou’re one to talk . . . it looks like you’ve been sitting in your office all morning and I’ve been working.” Bartlett said, “I don’t know about all this union stuff, I believe if the Union gets in here they’ll close the plant down”. Vinegar replied, “[A] man’s got to do what a man’s got to do.”²

About March 31, 1998, when employees Charles Hisle and Ernest Winburn were discussing the Union while awaiting the beginning of their shift, Supervisor Bartlett approached. After listening to them for a minute, Bartlett said that during a foremen’s meeting, Group General Manager Robert Hughhey had said that he “won’t tolerate a union . . . if you all vote it in, they would close the place up.”³

2. Alleged statement to employee that he was being harassed and kept busy because of his union activity

As previously noted, employee Howard was one of the employees who were involved in union activities in the fall of 1997 and the spring of 1998. He signed a union card on October 21, 1997, tried to induce other employees to sign cards; and wore a union button which he had received from Vinegar.

Howard is a maintenance employee whose duties required him to work at various locations in the plant. He credibly testified that during the union campaign, while he was working he did not initiate conversations about the Union, but did give a favorable opinion about the Union if other employees brought up the subject and asked him about it.

On a day in late February or early March (see fn. 4, below), Meuler received a call from Eva Hall, an inspection employee who worked in the basement, asking what Howard was supposed to be doing in the inspection area. Meuler replied that he had no idea. Hall said that Howard was interrupting people from getting their work out by trying to get union cards signed.

² My findings in this paragraph are based on Vinegar’s testimony. Although admitting having called Vinegar a “sorry ass” in the bathroom in about January 1998, Bartlett denied having ever “discussed” with employees the prospect of the plant’s being permanently closed. To the extent that this may constitute a denial, for demeanor reasons I credit Vinegar.

³ This finding is based on the testimony of Winburn, who at the time of the hearing was still in Respondent’s employ. For demeanor reasons, I do not credit Bartlett’s denial. Hughhey and Hisle did not testify.

Meuler thereupon telephoned Bartlett and asked what he had Howard assigned to do. Bartlett replied that he did not know what Howard was doing at that moment. Meuler said that he had received a call from “inspection” that Howard was “down there bothering people, talking about the Union.” Meuler told Bartlett to make sure that Howard was kept busy. Inferentially after this conversation, Bartlett began “riding [Howard] pretty hard,” and getting “on [his] back,” while Howard was performing on a machine work which was dangerous and required his full concentration. Also, while Howard was still working on the machine, Bartlett told him to perform two or three other jobs. Eventually, Howard told Bartlett that he was going to have to “get off [Howard’s] back,” he could not keep his mind on his work. Bartlett said that Meuler had told Bartlett to “ride the hell out of” Howard, that all he was trying to do was solicit union votes. Howard said that this was “a damn lie . . . The management will get all the votes we need.” Howard asked Bartlett who had told “him” (inferentially, referring to Meuler) that Howard had been soliciting union votes, but Bartlett refused to tell him. Bartlett said that there were “some piddling jobs back here in maintenance . . . just go on back there and do them and just stay out of trouble the rest of the day.” Two or 3 days later, Bartlett told Howard that Bartlett wanted to “rephrase” Meuler’s message, that Meuler had told Bartlett “to just keep [Howard] busy.”⁴

Thereafter, during an employee meeting convened by management about March 28 (see infra sec. II,B,3,a), Howard asked Meuler about Bartlett’s remarks. Meuler replied that this was none of Howard’s business. Howard said that it was his business, because it concerned his job. Meuler merely repeated that this was none of Howard’s business.

3. Alleged solicitation of employee complaints and grievances and implied promises of remedial action

a. Background; the conference room meetings

Between about March 9 and about April 2, 1998, Fraher conducted a series of 20 employee meetings in the conference room during working hours. The employees were divided into 5 groups, consisting of 8 to 11 employees each, and each group was required to attend one 45-minute meeting per week over a 4-week period. From the appearance of the posted schedule for these meetings, and from Vinegar’s credible testimony as to

⁴ My findings as to this incident are based on a composite of credible parts of the testimony of Meuler, Bartlett, and Howard. My finding as to the date is based on Howard’s testimony. Bartlett and Meuler dated these events as late December 1997, more than 6 months before the charge was filed. However, when asked whether he had heard before the February 1998 filing of the representation petition about Vinegar’s and other employees’ campaigning for the Union, Meuler replied, “Not really anything specific, no.” Further, when asked whether he had heard before the filing of the petition that a union organization campaign was about to begin, he replied, “Not really.” Moreover, although Meuler testified that Bartlett’s report to Meuler (allegedly in Dec. 1997) about Howard’s union activity caused Meuler to report to Fraher that union cards were being circulated in the plant, Fraher testified that until about March 9, 1998, he did not know the names of any employees who favored the Union. For these and demeanor reasons, except as reflected in the text I do not credit Bartlett’s testimony as to the contents of his conversation with Howard.

who else attended the four meetings attended by him, I infer that the employee personnel in each group remained about the same throughout the meetings.

As of the close of the hearing on January 7, 1999, the complaint included no allegations that Respondent made any unlawful statements during these conference-room meetings. Over date of January 26, 1999, the General Counsel moved to amend the complaint to add, as paragraph 5(d), an 8(a)(1) allegation which reads as follows:

During March 1998, Respondent, by Larry Fraher, in a series of weekly meetings with small groups of employees in the conference room . . . solicited employee complaints and grievances and implied that Respondent would resolve those complaints and grievances.

Respondent opposed this motion on the ground, inter alia, that "if [Respondent] had been placed on notice of the issue, it would have offered testimony that Fraher was aware of the rules against making promises of benefit before an election, that he used the employees' complaints as a springboard to argue why the issue was not a good reason to vote for the union, and that he did not promise, implicitly or explicitly to remedy grievances." In view of this representation by Respondent's counsel, the motion for leave to amend is hereby denied, on the ground that as to the conference-room meetings the issue was not fully litigated. *Great Scott Supermarkets*, 206 NLRB 447 (1973). However, because events at these conference-room meetings are material to issues raised by the complaint as of the first day of the hearing, such events will be described here on the basis of the evidence which was in the record as of the close of the hearing.

Fraher testified that the purpose of these meetings was to give the employees Respondent's position on the union organizing campaign. Normally, at the beginning of each of these meetings, Fraher would show a 10- or 15-minute videotape and then would allow a set period of time, probably for at least half of the meeting, where employees could voice their opinions or concerns that they might have. According to Fraher, "I encouraged people to speak freely."

The first of these meetings, on about March 9, was attended by about 11 employees, including Vinegar, Howard, Tommy Rhineheimer, Ray Doolin, and John Van Dyke. Management was represented by Fraher, and Company Attorney Mike Mocniak, whose office is in North Chicago, Illinois. Fraher said that he had come into Respondent's Lexington, Kentucky plant after the 1995 election, and that he was "appalled" that the employees at Respondent's plant would want a union to represent them. He showed a videotape, asked the problems that people had, and then opened the meeting up for discussion. The first employee to speak was maintenance employee Rhineheimer. He said that no matter what he did, Foreman Bartlett (Rhineheimer's immediate supervisor) would always be on him about it at the end of the day. Rhineheimer said that he did not care if Bartlett dropped dead under his feet.⁵ Fraher looked at Rhine-

heimer and said, "[W]ell, we won't have none of that in here" and that it was not very nice to say that. Rhineheimer said that Bartlett was not a very nice person. Employee Howard said that Bartlett rode the employees all the time, that the employees had nobody to go to, and that Meuler told Bartlett to ride Howard because he was downstairs trying to recruit union votes (see sec. II,B,2, above). Fraher said that they could talk about that at a later time. Howard asked about raises for office people and the rest of "us" in the shop that had not had raises in about 8 years; Fraher said that this "wasn't none of [Howard's] damn business." Fraher said that he had heard that the biggest problem which had led the employees to seek union representation was Respondent's attendance policy. Vinegar said that this was not an issue, and that the issue was that Bartlett and Meuler were "allowed to approach people and talk to them any way they wanted to and certain individuals [in the] plant did not get talked to in that manner." Vinegar said that Bartlett would never use customary pleasantries in approaching employees, but "would just come up to you and [say], I want you to do this or I want you to do that."

Some of the employees believed that as to personnel matters, Respondent's management was favoring certain employees with whom Plant Manager Meuler socialized outside of working hours. Employee Van Dyke complained that he had been transferred in order to give his old job to an employee favored by management. Vinegar too, complained about favoritism in job assignments and job rotation and about Respondent's failure to post vacancies. Vinegar also brought up certain safety matters, including the presence of tungsten carbide powder particles in the air and a claim that some machines were unsafe because they had cardboard where there should be shields. Fraher said that he agreed that Respondent needed a better system of monitoring the particles that got into the atmosphere when a press was cleaned. However, he said, putting guards on the machines would make no sense, because the employees just took off the guards. Employee Ray Doolin told Attorney Mocniak that the employees had previously told him about the problems with favoritism, "it's not as if you don't know about it." Mocniak replied that he and management had heard about these problems before, but had ignored them in the belief that they were "no big deal."

The second such meeting was attended by about 10 employees, including Sturgill. She complained about perceived favoritism in requiring employees to rotate between jobs, disregard of seniority in job placement, and failure to post vacancies. Sturgill credibly testified that Fraher responded to her favoritism complaint by saying that he had not been there long enough, "I don't know; I will have to check into that, that kind of answers."

The fourth conference-room meeting was attended by about 10 employees, including Rhodus. During this meeting, Rhodus said that favoritism "was one of the issues of why we needed a union, so things would be fair." She said that job assignments were given on the basis of the employees' personal friendship with management. Fraher said that management gave jobs to the employees whom management believed to be more qualified. Rhodus said that she had been replaced on her laboratory job, which she had held for a year and a half, by an employee

⁵ This finding is based on Howard and Vinegar's testimony, partly corroborated by Ray Doolin. For demeanor reasons, I do not credit Fraher's denial.

whom she testimonially identified as David Johnson, who had been hired as a temporary employee and whom Rhodus had trained to perform her job. Fraher said that he was not going to discuss that at this time.

The sixth meeting, on about March 20 or 21, was attended by about the same employees as the first meeting. Some of the employees complained about perceived favoritism. Employee Howard complained that employee Rhodus's laboratory job had been transferred to another employee after she had trained him for it, to which Fraher replied that the latter employee "had schooling background and other knowledge in that area in which he could run the lab operations."⁶ Vinegar again complained that the use of cardboard instead of metal safety shields on a particular machine presented a safety hazard. This time, Fraher said that he would look into the problem right away; the following week, guards were put on six machines. Some of the employees complained that jobs were assigned without being posted; Fraher said that he was going to look into it and see why these jobs had not been posted.

Because of the number of employee complaints during the first 10 meetings, about Meuler's perceived favoritism with respect to employees with whom he socialized outside of work, Meuler attended the third batch of meetings (the 11th through the 15th). The first meeting in this batch was held about March 28, and was attended by about the same employees who had attended the first and sixth meetings. As to the "favoritism" complaints, Meuler said at this meeting that it was no one's concern whom he socialized with. Vinegar stood up and said that this became the employees' concern when the people with whom Meuler socialized brought "our business back into work." Thereupon changing the subject, Meuler said that the Union could not guarantee any merit raises, that Respondent could, and that he knew this was something that management stood behind. Employee Howard said that Meuler had told Supervisor Bartlett to "ride" Howard because he was downstairs trying to get union votes. Meuler said that this was none of Howard's business. Howard said that it was his business, because it concerned his job. Meuler again said that this was none of Howard's business.

At the 12th meeting, where management was represented by Fraher and Meuler and which was attended by (among other employees) Shirley Storie,⁷ Kevin Adkins, Willie Honshul, and Sturgill, Fraher said that because there were so many complaints about Meuler's conduct, Fraher had brought him there to take up for himself. Meuler said that as to his socializing with plant employees, that was his business. Sturgill said that it "was okay to socialize but you do not bring it back into the

⁶ This finding is based on Vinegar's uncontradicted testimony. Vinegar testified that Howard identified the allegedly favored employee as Chris Boggs; as previously noted, Rhodus testimonially identified the allegedly favored employee as Johnson. Both Boggs and Johnson are laboratory technicians. Which employee in fact replaced Rhodus, and what name was given by Vinegar at this meeting, are irrelevant to the issues in the instant case.

⁷ The record indicates that Shirley Storie attended only two meetings (the fourth and the 12th) and that the other employees present during the first meeting she attended were different from the other employees present at the second meeting which she attended.

plant. You do not flaunt it in front of the other employees. You do not make special concessions for [the employees you socialize with] nor do you tell our personal business that we have told you in privacy, to these people and then they come back into the plant and everybody knows about it. [That's when it becomes] our business." Meuler did not reply. Fraher asked why the employees wanted a union (see fn. 1, above), and said that the meetings were to let the employees tell him how they felt, or what was bothering them.

Respondent has a practice of conducting an annual vote among its employees as to whether they want a 6 a.m. starting hour during the summer, and of honoring the result of the vote. Employee Adkins said that Meuler would probably kill him for saying this, but that a majority of the employees wanted to come in at 6 a.m. all year round, and asked why management could not just let everybody come in at 6 o'clock. After Meuler said that the employees would have to vote on it, Fraher asked why Adkins had said that Meuler would probably kill him. At this point, Shirley Storie said that people were afraid to speak up. Fraher asked why, and Honshul said, "Retaliation."

At the 14th of these meetings, where management was represented by Fraher and Meuler, Fraher said that Meuler was present to speak for himself, because the employees were picking on him. As to employee complaints about perceived favoritism on jobs and with respect to taking time off, Meuler said that it was none of the employees' business whom he socialized with in his personal life, and that the employees should not say anything more about his personal business. Employee Rhodus then said that it became business when it involved work and he brought it into the office.

The 16th of these meetings, on about April 2, was attended by about the same employees who had attended the first meeting. At this meeting, management was represented by Fraher and Group General Manager Robert Hughey, Fraher's immediate supervisor. Hughey said that he had heard that there was a rumor going around that if the Union was elected, people would get a raise of \$2 an hour. Vinegar said that he had heard a rumor attributing such a statement to himself, and that he had not promised anyone anything because he could not promise anyone anything. Vinegar said that the employees had gone to the Union, the Union had not come to the employees. Hughey asked whether management had ever closed the doors to Vinegar. Vinegar said that since October 1997, members of management had walked around the plant and greeted other employees in front of Vinegar and would not even acknowledge Vinegar's presence. Vinegar said that Fraher would fail to acknowledge "hellos" from Vinegar and would not wish him a merry Christmas. When Hughey looked at Fraher, he said, "I know what [Vinegar is] talking about."⁸ At the end of this meeting, Hughey said that he believed Meuler and Fraher were doing a good job, and that Hughey was going to stay with them.

⁸ When Fraher started to work at the plant in April 1997, he had started to follow the practice of greeting the employees, and exchanging customary courtesies, on a daily basis. Shortly before Christmas 1997, he orally delivered Christmas greetings in the plant to at least most of the employees, but did not thus greet Vinegar, who credibly testified to the belief that he was being deliberately snubbed.

Hughey was also one of management's representatives at the 17th meeting, which was attended by about the same employees who had attended the second, seventh, and 12th meetings. Employee Sturgill asked Hughey why he had failed to keep his promise, during the 1995 union campaign, to work beside the Kentucky plant employees and find out why they were dissatisfied. Hughey, who is responsible for Respondent's Connecticut plant as well as the Kentucky plant, said that he had "a lot more things to do besides just worry about this place." Sturgill asked him why he had made all these promises. He did not reply.

During one of these meetings, Sturgill said that Bartlett was an abusive man who misused his supervisory power, that she thought something should be done about this, and that she had repeatedly seen him follow Vinegar into the bathroom.

Sturgill had passed a written fork-truck examination about early 1997 but had never received a license. About February 1997, she had asked Clyde Corman, who was her immediate supervisor when she was driving the fork truck, why she had never received her license. He had said that he would check into the matter, but nothing happened. Thereafter, she asked Fraher whether she had received her license. He said that he would talk to supervisor Bartlett about this matter. She testified that this conversation occurred during one of the March conference-room meetings; Fraher did not testify about the context of this conversation. His eventual response to her inquiry is summarized below section II,D,2.

b. Management's records of individual employees' union views

On an undisclosed date in March 1998, Fraher and Meuler prepared a list of employees who they believed were in favor of the Union, and a list of the employees who they believed did not favor the Union. The list also showed whether each employee in question was believed to have strong views on the subject. Fraher and Meuler concluded that 18 employees (10 of them strongly) favored the Union and 27 (18 of them strongly) did not. On undisclosed dates in March, Fraher also prepared a list of 24 employees who he believed would vote against the Union, and a list of 12 employees of whose likely vote he was uncertain. For reasons not shown by the record, Vinegar's name was not on either list. Fraher testified that these lists were made for the purpose of "tallying up our results where we thought we were at a particular point in time; where we might need to direct our future efforts" and focus management's attention.

On an undisclosed date during the period of time (March 9 to April 2) when the group meetings were in progress, Fraher, Meuler, and employees Shirley Storie and Pat Christin conferred about which employees on a written list (namely, a copy of a list, which had been posted on the plant bulletin board, of which employees were required to attend which meetings) favored the Union, and which did not. In the others' presence, Christin made an appropriate entry beside each name on the list. The group concluded that 21 employees favored the Union and 26 did not.⁹

⁹ My findings as to Meuler's and Fraher's participation are based on Shirley Storie's testimony. Meuler was not asked about this matter. For demeanor reasons, I do not credit Fraher's and Christin's denials. Christin's testimony that Rochelle Petrucelli was present during this

c. The one-on-one meetings in the lunchroom

During the election campaign, Fraher conducted three management meetings, attended by Meuler and all the supervisors, during which the supervisors discussed which individual employees favored the Union, which individual employees opposed the Union, which individual employees' views were unknown, and which individual employees would constitute a possible "swing vote." Vinegar's name came up in these meetings. Also, during these meetings, the supervisors discussed trying to find out why some of the prounion employees wanted the Union. During the third batch of conference-room meetings with the employees, Fraher announced that he would be meeting with each employee individually. Thus, during the 11th conference-room meeting, which was attended by employees Vinegar, Howard, Hall, Carolyn Bartlett (Supervisor Allan Bartlett's wife), and four or five other employees, Fraher said that such one-on-one meetings were to be conducted with each individual in the plant "to try to discuss what their problems was and how they felt about the Union." During the 12th conference-room meeting, with a group which included employee Sturgill, Fraher said that "he would be meeting with [Respondent's employees] one on one and he wanted to know the things that [the employees] felt . . . could be changed to make things better, [the employees'] complaints." During the 14th meeting, with a group which included employee Rhodus, Fraher said that "he would like to meet one-one-one to . . . work out the problems with the management."

Fraher prepared a list of the 47 employees who were eligible to vote in the election, and checked off the name of each employee on meeting with him or her. Fraher conducted individual interviews with 42 or 43 of these employees; but in consequence of the Union's April 2 withdrawal of its petition (see below, sec. II,C), he decided not to interview the others. These March 1998 meetings were the first such meetings he had conducted since becoming operations manager in April 1997.

As to what happened during each of these one-on-one lunchroom meetings, Fraher credibly testified to the following effect: He asked the employee if he or she had any concerns. Some of the employees stated that they had concerns. The three primary concerns related to perceived favoritism (which was largely attributed by employees to Meuler's socialization with allegedly favored employees), job rotation (related to the favoritism complaints), and the attendance policy (also related to the favoritism complaints); one of the employees complained about the starting time in the winter versus the summer. As to some of these concerns, Fraher replied that nothing could be done about them, and explained why. As to complaints about perceived favoritism with respect to temporary transfers (which many employees disliked) and promotions (which had previously been handled by Meuler), Fraher said that he was not sure how he would handle such personnel actions, but that in the future

incident was not corroborated by Petrucelli, who testified for Respondent, or by Shirley Storie. I find that Petrucelli was not there.

they would be decided by him and that they would be handled as equitably as possible.¹⁰

During the one-on-one meeting with employee Rose Rhodus, who was wearing a union button and whom the Meuler-Fraher list identified as a strong union supporter, Fraher asked why she wanted the Union (see supra fn. 1). She said that she wanted to keep her rights protected—more specifically, that, “when you report something to someone in authority, no matter what, they should report that,” and that a laboratory job had been given to an employee whom she had trained rather than to her. Fraher’s sole reply was to look at her.

Fraher began his one-on-one meeting with employee Ray Doolin, whom the Meuler-Fraher list identified as a strong union supporter, by explaining why Respondent did not want a union, and why Fraher did not think a union was needed. Then, Fraher asked Doolin why he thought one might be needed (see fn. 1, above). Doolin replied that he was not sure whether the employees needed a union, that the employees had a lot of problems they needed to solve, and that the employees needed somebody to go to, to solve these problems. Doolin said that one of these problems was favoritism as to promotions. Fraher said there was no such thing as favoritism out there. He said that if the employees had a problem, they could always come to management. Doolin said that he had done this several times, that it just did not work.

During Fraher’s one-on-one meeting with employee Sturgill, whom the Meuler-Fraher list identified as a strong union supporter, he asked “what [she] had to say that maybe would make things better for the people in the plant, . . . that maybe things we could change and . . . make it a better environment.” Sturgill complained about Supervisor Bartlett, including his perceivedly abusive conduct, and about perceived favoritism by Meuler. Fraher said that he stood by his management “110 percent.”

During employee Howard’s one-on-one meeting with Fraher, he asked Howard, who was wearing a union button and whom the Meuler-Fraher list had identified as a strong union supporter, why he was for the Union (see fn. 1, above). Howard replied that there was “a brick wall between management and the people,” and that Howard believed that the Union was the only way to get people to work together and enable Respondent to survive. Howard further said that Bartlett “rode” him all the time, that Meuler’s response to the employees’ complaints about this was to tell the employees to ignore Bartlett, and that “you shouldn’t have to ignore your foreman.”¹¹ Fraher asked whether Howard thought it would do any good to send Bartlett to school. Howard replied that he did not know.

During Fraher’s one-on-one meeting with Vinegar, Fraher asked him how he felt about the Union and why he was such a strong union supporter (see fn. 1, above). Fraher said that Vinegar showed great leadership, and that people in the plant would talk to him about problems which they would not talk about to

management. Vinegar said that the employees were tired of management’s not taking their issues “at hand,” and that the employees needed a union to speak for them. Vinegar also asserted that only a “select few” employees did not have to rotate between jobs. Fraher said that management “have to look into the job grades [which affect employees’ wages; see infra sec. I,D,1] again because they [weren’t] too for sure on the grades that they had made up and how to place people to where everybody would do equal work.”¹²

C. *The Union’s Withdrawal of its Petition*

On April 2, 1998, the Union (through Simpson) asked the Regional Director for leave to withdraw its representation petition, and the Acting Regional Director approved the withdrawal. This action was taken following discussions between Vinegar, Sturgill, Howard, and Rhodus, and a conference between Vinegar, Sturgill, and Simpson. The Union requested such withdrawal because the 1995 election had been very close (the Union had lost by a 3-vote margin), the Union anticipated that the forthcoming election would be close, two of the Union’s supporters would be absent from the plant because of surgery on the date for which the election was scheduled, the Union believed that their votes would be needed for an election victory, and the Union preferred the 6-month election bar by virtue of the withdrawal of the petition¹³ to the 1-year bar which by virtue of Section 9(c)(3) of the Act would result from a union election loss. Fraher credibly testified that he had no knowledge of the employees’ discussions about whether the petition should be withdrawn.

During the discussions which led up to this decision, the employees discussed giving management a chance to do something about the issues that had been brought up during the union campaign, and also discussed refileing the petition after 6 months. During the conferences with Vinegar and Sturgill which led up to this decision, Simpson told Vinegar to “start the campaign right back,” and gave him some more blank authorization cards.

Fraher testified to the opinion that almost all of the employee complaints advanced during his group and one-on-one meetings were either unmeritorious (including the complaints about Bartlett) or stale. He testified to the opinion that there was not in fact any favoritism in the plant, and further testified that throughout Meuler’s exchanges with the employees during the election campaign, he had said that he would continue the socializing practices to which Vinegar and other employees had attributed the perceived favoritism about which they had complained. On April 3, the day on which the cancelled election was to have been held, Hughey and Fraher went onto the production floor and looked up at Vinegar. Hughey told the employees that there were no hard feelings. Then, Hughey told Vinegar that there were no winners and there were no losers.

¹⁰ My findings in this paragraph are based on Fraher’s testimony. To the extent inconsistent with these findings, I do not credit his testimony that he made no promise that things were going to be taken care of.

¹¹ I credit Meuler’s denial that he ever told Howard to ignore Bartlett. Howard may well have misunderstood something said by Meuler. In any event, the issue is immaterial.

¹² My findings in this paragraph are based on Vinegar’s testimony. To the extent inconsistent with these findings, I do not credit Fraher’s testimony that he made no promise that things were going to be taken care of.

¹³ See *Sears, Roebuck & Co.*, 107 NLRB 716 (1954); NLRB Case-handling Manual (Part Two), Representation Proceedings, Sec. 1114.1a (Sept. 1989).

Vinegar said that he agreed. Hughey said that “we needed to try to work together to solve the problems in the plant . . . to keep this to where we all could come in and work together and get along.” Vinegar said that Hughey was right, and that “if we don’t do something about the situation here, we’re looking at the same thing.” Hughey and Fraher did not reply. For a few days thereafter, Vinegar continued to wear his union jacket.

After the Union had withdrawn its petition, employee Ray Doolin told Hughey that the employees were trying to organize a union because of perceived favoritism and for other reasons. At the end of this conference, Doolin told Hughey, “I guess you know when you leave here, I’ve had it.” Hughey replied that he would “guarantee” that nothing would ever be said about Doolin’s talking to Hughey. A week or so later, Fraher approached Doolin while he was working at his machine, and began to holler at him about “talking to people” and “running [his] mouth.” Doolin said that he did not appreciate Fraher’s screaming in Doolin’s face. Fraher said the he could do “anything” to Doolin, and “there wasn’t a damn thing [Doolin] could do about it.” Doolin said that he could indeed do something about it. Fraher said, “[Y]es, and I can fire you too.”¹⁴ At the time of the January 1999 hearing, Doolin was still employed by Respondent.

D. The Allegedly Unlawful Discharge of Gary Vinegar

1. Vinegar’s work history

Gary Vinegar began to work for Respondent in January 1990. In May 1993, his then supervisor, Robert Sparks, gave him a 2-day disciplinary suspension. The relevant “Disciplinary Action Form” (signed by Vinegar, Sparks, and Meuler) states:

Employee objected to being given alternate work assignment for the day. Employee openly argued with the supervisor in the shop using objectionable language.

Further instance of this type to result in termination.¹⁵

So far as the record shows, this document is the only document unfavorable to him which is in his personnel file. Meuler testified that according to Sparks’ report to him, Vinegar was asked to do a different assignment for the day, to which he replied by using a defiant obscenity. In the event, Vinegar went home for the rest of the day, but Meuler asked him to return to work on the following day, that Meuler needed him. This was the only written discipline issued to Vinegar during his more than 8 years of employment with Respondent.

Meuler further testified that on a date he was not asked to give, Joan Webb, who was the lead person on Vinegar’s shift, told Meuler that Vinegar had been spending a good deal of

working time conversing with off-duty employee Sturgill. Meuler thereupon told Foreman Clyde Corman to tell Vinegar that the employees could not have visitors while they were working. After Corman reported to Meuler that Corman had given this message to Vinegar, Webb told Meuler that when she left the premises that day during her lunchbreak, Vinegar had followed her, become verbally abusive with her, threatened her that he would make trouble for her if she tried to make trouble for him, and told her to stay out of his business.¹⁶ Meuler thereupon told Vinegar that Webb was Respondent’s “authority figure” on Vinegar’s shift and that it was her business to report any problems to management. Meuler did not write down anything concerning this incident, because (he testified) the incident did not occur on Respondent’s premises and had been addressed with the employee.

On a date preceding 1994 but not otherwise shown by the record, while Vinegar was setting up a press whose weight was incorrectly stated on the label, the punch exploded and sent steel fragments into his safety glasses and his chest. Vinegar reported these events to Foremen Jack Pittman and Bartlett, admittedly supervisors. Thereafter, in 1994, Pittman told Vinegar that he was too slow in setting up presses. Vinegar said that he was slow setting up the presses, but that he was making sure that the presses were set up right, because if they were not, someone could get seriously hurt. Later, Pittman told Vinegar that because Vinegar was too slow setting up the presses, Meuler did not want Vinegar to set them up any longer. Then, Vinegar was transferred to another department. Thereafter, on a date not shown by the record, Meuler told Vinegar that there was a shortage of press set-up operators, and that Respondent needed him to go back and set up the presses. Vinegar reminded Meuler that Vinegar was slow. Meuler said, “Don’t worry about that. Take your time and do it right.”

In the late winter or early spring of 1997–1998, Pittman again questioned Vinegar’s speed in setting up. Vinegar replied that he was slow, but that he was being slow on purpose to be careful, because if anything happened in being a little too fast somebody could get hurt. Pittman replied that being careful was good, but that Vinegar was supposed to reduce his setup time to the level of other setup men. Pittman credibly testified to the opinion that Vinegar “sort of got a little hot about it . . . got a little offensive about it.” After that, Pittman told Meuler that Vinegar was a good worker who did not like to take orders.

My findings as to the 1994 incident are based on credible parts of Vinegar’s testimony; I believe that Pittman was mistaken in testifying that no such incident occurred at that time. My findings as to the 1997 or 1998 incident, including its date and the content of Pittman’s report to Meuler, are based on Pittman’s testimony. As to the date, Meuler initially testified that Pittman made his report about 2 weeks before Vinegar’s discharge in late June 1998, and then testified that this report was made “a couple months” before Vinegar’s discharge. For demeanor reasons, except to the extent corroborated by Pittman

¹⁴ The complaint does not allege that these remarks by Fraher violated the Act.

¹⁵ The original of this document was not produced at the hearing. A photocopy was received into evidence without objection. After considering the physical appearance of this document, and notwithstanding Vinegar’s testimony that he did not remember this last sentence’s being on the original form when he signed it (although this sentence “could have been there”), I conclude that the sentence was in fact there when he signed it. I note, however, that Respondent (inferentially, through Sparks) had refused his contemporaneous request for a copy, and that company witness Meuler was not asked about this matter.

¹⁶ Meuler’s testimony about Webb’s and Corman’s reports to him was not received to show the truth of the reports. Vinegar and Corman were not asked about these at least alleged contacts between them and Webb, who did not testify.

I do not credit Meuler's testimony about the contents of Pittman's report, or of Meuler's reply.

Respondent divides its jobs into grades one through six, grade one being the most skilled and highest paid. Vacancies in jobs graded three through six are at least sometimes posted, and are primarily filled by awarding the job to the bidder with the highest seniority. At the time Vinegar was discharged, he was in a grade three job. On occasion, he filled in for a grade two operator. On an undisclosed date which likely fell before Fraher became operations manager in April 1997, Vinegar bid on a grade two vacancy. Respondent advised the bidders that the job would be given to the bidder with the highest score on a mathematics test administered by the personnel department. Because Vinegar did not receive the highest score, he did not receive the position.

Foreman Corman, an admitted supervisor who was Vinegar's immediate superior for about the 3 years immediately preceding his discharge, testified that Vinegar was a good worker and that his attendance was good. Corman testified that he had told Vinegar he was too slow setting up presses, but that Corman had never written him up for this or any other reason. Supervisor Pittman, who directly supervised Vinegar, on and off, for 4 or 5 years, testified that he was a good worker who did not like to take orders, and that Pittman had never issued him a written reprimand for anything. Supervisor Bartlett, who directly supervised Vinegar for about 3 years, testified that Vinegar "would do you an excellent job as long as you let [him] do it his way. I never had a problem with him as far as . . . the competency of his work;" that at no time while he was under Bartlett's supervision had he ever written him up; but that sometimes Bartlett complained that Vinegar was too slow in setting up presses. Bartlett further testified that he had no particular simmering personal disputes or arguments with Vinegar (although "we'd had our little discussions, like everybody"); and that Bartlett did not regard him as distasteful.

2. Vinegar's union activity; union-related events between the withdrawal of the petition and his discharge

As previously noted, Vinegar was an active participant in the Union's 1995 campaign, with employee Sturgill initiated the union campaign in October 1997, distributed union cards, regularly wore union insignia in the plant, and (during the meetings conducted by Fraher for the avowed purpose of finding out why the employees wanted the Union) voiced a number of complaints, some of which Respondent did not want to satisfy. Fraher credibly testified that he and Meuler discussed between themselves that Vinegar was a union supporter. In late February or early March 1998, foreman Bartlett, who was then Vinegar's immediate supervisor, told him that Bartlett believed the plant would close down if the Union got in. The day after the Union withdrew its petition, Vinegar told group manager Hughey, in effect, that if Respondent did not make any changes, the union drive would be renewed; as noted above, section II,B,3,d, Respondent did not intend to effect a number of the changes which the employees had requested of Fraher during the conference room and lunchroom meetings. A week before Vinegar's discharge, when Sturgill expressed dissatisfaction at Fraher's statement that according to Bartlett and Meuler she had

not passed the fork-truck license test, he asked whether this meant she was thinking of the Union, she said yes, and he said, "I guess this means the Union is going to try to come back in."¹⁷

3. Vinegar's discharge

During a period which began before Bartlett became maintenance foreman about June 1995, some of the employees had followed the practice of taking their lunch breaks in the maintenance shop. Maintenance employee Howard, at least, preferred to eat there because it was quieter during lunchtime than the lunchroom. About early June 1998, Vinegar and Sturgill joined the group of about six other employees (of whom only Howard was a maintenance employee, so far as the record shows) who had been habitually eating lunch there. In consequence of the lunchtime use of the maintenance shop, certain portions of the maintenance shop housed chairs which were used for break purposes only. After repeatedly stumbling over these chairs, Bartlett told maintenance employee Howard on the morning of June 26, 1998, that Bartlett was tired of tripping over the chairs and picking up trash, that nobody but Howard and maintenance employee Bobby Doolin Jr. (not to be confused with employee Ray Doolin) would be permitted to eat lunch in the maintenance shop, and that in order to discourage other would-be lunchers, Bartlett would prefer that Howard and Bobby Doolin not eat lunch there either.¹⁸ Later that morning, during the lunch break, Howard told Vinegar and Sturgill that Bartlett had said they could no longer take their lunch breaks in the maintenance area.¹⁹ Vinegar and Sturgill went to Meuler and asked to talk to Fraher about what Bartlett had said concerning "us" taking a break in the maintenance area. Meuler replied that Fraher was

¹⁷ Respondent's insurance company requires any operator on the forklift to have a license. The record fails to show whether issuance of the license would have affected Sturgill's pay. After administering the test to her and employee Webb about January 1997, Bartlett told both of them, as well as Meuler, that the two employees had "done okay." Meuler thereafter issued a license to Webb. However, although Sturgill (as well as Webb) had passed the written part of the test, Bartlett told Meuler that Bartlett thought Sturgill needed more training on driving the fork truck itself. Sturgill had been operating the fork truck for three years when she was first told, in June 1998, that she had failed to pass the January 1997 test. There is no evidence that anyone ever told her that she had passed the January 1997 written test, and that her perceived need as of January 1997 for more training on the fork truck was the reason for Fraher's June 1998 statement that she had not passed the fork truck examination.

¹⁸ My finding that Howard and Doolin were exempted from this order from the outset is based on Howard's testimony, which is indirectly corroborated by Vinegar's uncontradicted testimony that after Howard had reported to his fellow employees on June 26 regarding Bartlett's June 26 order, during a conversation with Fraher later that same day Vinegar described the exemption (see below). I believe Bartlett was mistaken in testifying that not until the following week did he exempt Howard and Doolin from this order. However, the issue is immaterial.

¹⁹ In the absence of corroboration by Howard or Vinegar, I do not credit Sturgill's testimony, on cross-examination by Respondent's counsel, that Howard said Bartlett did not want her and Vinegar in there talking union. Respondent's counsel did not ask me to limit the purpose for which such testimony by Sturgill was received; but there is no other evidence (from Howard or anyone else) that Bartlett so advised Howard.

out of the plant at that time, but was expected back that afternoon.

After the lunch break, Vinegar returned to the task of using a fork truck to pull baskets of materials from a shelf in the shipping and receiving area and transport these baskets to the wheelabrator wash area. When the bell rang at 1:30 p.m. for the afternoon break, Vinegar parked the truck in the shipping and receiving area and walked toward the breakroom. His path led him through the brazer room, where he had been setting up welders earlier that day. He put his safety glasses on top of a welder and proceeded into the breakroom.

When the bell rang for the end of his break, he walked back to his fork truck, where he believed he had left his safety glasses. On realizing that he had left them in the brazer room instead, he picked up his move tickets, which he was supposed to attach to the baskets after transporting them to the work area, and walked back toward the brazer room. His route initially took him to the inspection area, where he encountered his immediate supervisor, Corman. Corman asked Vinegar whether he had finished pulling the job, to which Vinegar replied that he had, that he was on his way to get his safety glasses, and that he would be right back. Then, Vinegar left the inspection area for the brazer area, a route which required him to go through the wheelabrator wash room.

When Vinegar entered the wheelabrator wash area, the sandblaster, the wheelabrator, and (perhaps) the degreaser were operating, and the area was exceeding noisy.²⁰ Vinegar proceeded along a yellow-painted walkway on which the fork truck is to be driven in the area, and which is considered the safe route to use when walking through the area. Safety glasses are required to be worn in that area. At that time, Bartlett was in the area putting some tools into a basket. When Vinegar was 20 or 25 feet away from him, Bartlett yelled, “[H]ey bud, you need to get your safety glasses on.” Vinegar raised his hands a little above shoulder level, with the palms away from him, and made a little pushing gesture. He said that he had told his foreman that Vinegar was on his way to get his safety glasses, that Bartlett should verify this by talking to Vinegar’s foreman (who was in the next room about 50 feet away), and that other than that, Bartlett did not need to say anything to Vinegar.²¹ Then,

²⁰ This finding is based on the testimony of Winburn, who at that time was working in the wheelabrator wash area, and Vinegar. A memorandum prepared by Meuler and dated July 1, which with some doubt I received into evidence as a business record under Rule 803(6) (at the hearing mistakenly described by me as 802(6)) of the Federal Rules of Evidence, states that on June 29, Winburn had told Fraher, Meuler, and Bartlett that he could not hear what was said during the Bartlett-Vinegar conversation “due to the amount of noise in that work area.” Bartlett testified that when all the machinery is running, the wheelabrator wash room is the “most noisiest room in the house.” I do not credit Bartlett’s testimony that none of the machinery was running at that time. Respondent’s witness Corman, who at that time was in a physical position to hear whether this machinery was operating, was not asked about this matter.

²¹ On direct examination, Vinegar testified to having said, “I had told my foreman, Clyde Corman, that I was on my way to get my way to get my glasses, other than that [Bartlett] didn’t need to say anything to me.” On cross-examination, Vinegar testified to having said that “if [Bartlett] would talk to my foreman, [Bartlett] would know that I was

Vinegar continued on his way to the brazer room to retrieve his safety glasses.

After Vinegar had left the area, Maintenance Foreman Bartlett engaged in some work-related discussion with maintenance employee Winburn. Meanwhile, Vinegar retrieved his safety glasses, put them on, came back to the wheelabrator wash area, put his move tickets into the baskets, and got his weight count off the ticket. Then, Bartlett told him that Bartlett did not appreciate the way Vinegar had talked to him, and that he was going to see Meuler. Bartlett thereupon walked toward the shipping and receiving area, and Vinegar went to the office of Corman, Vinegar’s immediate supervisor. Vinegar said that Bartlett had said something to him about not wearing his safety glasses and that Vinegar had told Bartlett that Vinegar had told Corman that Vinegar was on his way to get his safety glasses. Corman nodded his head, and Vinegar went back to work.²² Meanwhile, Bartlett went to Meuler’s office.

My findings as to the Bartlett-Vinegar conversation are based on the testimony of Vinegar and Winburn, who at the time of the hearing was still in Respondent’s employ. Bartlett’s testimony that his remarks to Vinegar were made in a conversational tone, while the two men were side by side and during a period when the machinery in the area was not operating, is inconsistent with the testimony of Winburn, as well as Vinegar, that at least two machines were then operating in the area, and with Winburn’s testimony that Bartlett and Vinegar were “talking kind of loud to each other . . . louder than they needed to be talking.”²³ Bartlett’s testimony that Vinegar “was waving his arms” at Bartlett is inconsistent with Winburn’s credible testimony that Vinegar made a pushing motion with his raised arms. For these and demeanor reasons, I credit Vinegar’s version of

on my way to get my safety glasses, other than that [Bartlett] had nothing to say to me.” During one of Fraher’s March-April meetings with employees, Fraher said that if “someone had a problem or situation with you then they should go through your foreman [and] then to his chain of command, which is Steve Meuler, and then to Larry Fraher.” Moreover, Vinegar’s immediate supervisor, Corman, testified that if there was a problem, you go through the chain of command. However, Meuler testified that Bartlett had authority to give direction to Vinegar. Further, Vinegar testified that Bartlett had the right to speak to him as a boss if Vinegar was out of line.

²² My findings as to the content of this Vinegar-Corman conversation are based on Vinegar’s testimony. I regard as unlikely Corman’s testimony that Vinegar was not then wearing his safety glasses, that he did not say he was looking for or had misplaced his safety glasses, that he brought up the subject of safety glasses by saying that he thought he did not have to wear his safety glasses in the back but he had to wear them up front, and that he then said that he was upset because Corman was his supervisor and Corman rather than Bartlett should have talked to Vinegar about his safety glasses. I note that both Bartlett and Vinegar testified that Vinegar was wearing his safety glasses during their second conversation.

²³ At that time, because Vinegar had a 60-percent hearing loss in one ear, he was wearing hearing protection which consisted of both ear inserts and ear muffs. The file memorandum at least allegedly prepared by Meuler on July 1 states that on June 29, Winburn advised him, Fraher, and Bartlett that Winburn could not hear what was said during the Bartlett-Vinegar conversation “due to the amount of noise in that work area.”

the conversation, and do not credit Bartlett except to the extent specified in my findings of fact.

As to the Vinegar-Bartlett conversation in the wheelabrator wash room, Bartlett testified as follows: Bartlett was walking on the walkway toward the shipping and receiving area, and Vinegar was walking on the walkway toward the production area. The machinery in that room was not operating at that time. When the two men were side by side, Bartlett said in a pleasant tone of voice, at a conversational pitch, "Gary, you need to get your glasses on, bud." After taking a single step beyond Bartlett, Vinegar "hollered . . . and I mean hollered" that Bartlett "had no right to tell him to wear his glasses, that if [Bartlett] had to say anything to anybody about [Vinegar's] glasses, to see his supervisor." Vinegar said that he had thought he had his glasses on his head, and that he was on his way to get them off the forklift. Vinegar used a "very belligerent" tone of voice, and "was waving his arms and shouting at" Bartlett. After Vinegar had left this area and returned with his glasses on, Bartlett told him that Bartlett was going to talk to Meuler about the way Vinegar had just talked to Bartlett. Then, Vinegar "started on [Bartlett] again, in the same type of voice and everything. [Vinegar] said [Bartlett] had no right to tell him anything about his glasses."

A few minutes after his conversation with Vinegar, Bartlett went to Meuler's office. As to what Bartlett told Meuler, Bartlett (who had just given the foregoing testimony about his conversation with Meuler), testified, "Just the same thing I told you"—that is, Respondent's counsel. As to what Bartlett told him, Meuler testified as follows:

[Bartlett] told me that he had been going through the basement area, and that he observed Mr. Vinegar in that area without his safety glasses on, and that he walked up to him and said something to the [effect] of "Hey, buddy, get your safety glasses on."

[Bartlett] said, at that point, that Mr. Vinegar became very irate and began to . . . to scream back at him and shout, telling him he had no business telling [Vinegar] what to do, [Bartlett] was not [Vinegar's] supervisor, and . . . he'd get his glasses but [Bartlett] had no business telling him what to do, and began to verbally argue with him.

[Bartlett] said he then walked away a little bit. [Vinegar] went to get his glasses. [Bartlett] turned around to say something further to [Vinegar], and [Vinegar] again started . . . becoming very loud and argumentative with [Bartlett].

After making his report to Meuler, Bartlett went to his office, where he recorded "the events of what had happened."²⁴ About 10 minutes later, Meuler called Bartlett to Meuler's office and asked him to tell Meuler again what had happened. Bartlett testified that during this conversation, he told Meuler "again what happened."²⁵ Meuler testified that he "discussed the situa-

tion with [Bartlett], got the details," and that after Bartlett recounted the incident, Meuler told him that Meuler "would not tolerate that sort of insubordination towards our management, that [Meuler] thought . . . it was above and beyond . . . what should be expected of any employee and . . . that [Meuler] would terminate [Vinegar] for it." Meuler went on to testify that he told Bartlett that Meuler "would like to . . . run it by" Fraher; that Meuler tried to get in touch with Fraher "I guess to . . . tell him what I thought, my decision;" and that when Meuler could not reach Fraher Meuler "decided to go ahead with [his] decision."²⁶

Then, Vinegar was summoned to Corman's office, where he met with Bartlett and Meuler. Meuler told Vinegar that Meuler would not tolerate disrespect for management. Vinegar said, "What disrespect?" Meuler said, "You're fired." Vinegar said that he did not believe that his failure to wear safety glasses had anything to do with his being fired, and that he was being fired because he was the head of the union organizing. Meuler said that Vinegar's discharge had nothing to do with the Union. Meuler credibly testified that during this discharge interview, neither he nor any member of management asked Vinegar to relate what had happened between him and Bartlett. Meuler testified that no such question had been asked because "I had no reason to not believe Mr. Bartlett's account." Meuler knew that over the years, employees had had difficult times working with Bartlett.²⁷

Vinegar thereupon left the office, followed by Meuler and Bartlett at a distance of 10 or 15 feet.²⁸ Vinegar went to the timeclock to punch out, but his card was not in the rack. Then, he went toward the locker area to retrieve his personal effects. Bartlett caught up with him and told him to wait across the street for employee Sturgill, whose car was parked in the employee parking lot, to get off work. Vinegar said that he had ridden to work with Sturgill, and that he would sit in the car and wait for her until she got off work, about 25 minutes later.

the May 1993 disciplinary memorandum issued to Vinegar. Neither Meuler's testimony about his conversation with Bartlett, nor Meuler's subsequent file memorandum on this subject, refers to this 1993 matter. Accordingly, and for demeanor reasons, I do not credit the testimony of Bartlett described in this footnote.

²⁶ During a meeting of employees about mid-1997, group manager Hughey, in the presence of Fraher and Meuler, had stated that Meuler was not allowed to fire people, and that any firing was strictly up to Fraher. However, Meuler testified that he was responsible for hiring and firing decisions.

²⁷ My findings as to the discharge interview are based on a composite of credible parts of the testimony of Vinegar, Meuler, and Bartlett. Bartlett's testimony, and to some extent Meuler's testimony, suggest that Vinegar said his leadership in the union movement precluded him from being terminated. Particularly because all three witnesses testified (and Meuler's file memorandum states) that Meuler replied by saying that Vinegar's discharge had nothing to do with the Union, I credit Vinegar's testimony that he said he was being fired because he was head of the union organizing, and his denial that he said that he could not be fired because he was a union organizer.

²⁸ This finding is based on Vinegar's and Bartlett's testimony. I believe Meuler was mistaken in his testimony that after telling Vinegar that he was discharged, Meuler told Bartlett to see to it that Vinegar left the premises, and then left the area.

²⁴ This finding is based on Bartlett's testimony. For unexplained reasons, the record which he prepared was not offered into evidence.

²⁵ Bartlett testified that during this conversation, Meuler said that this was "the second time it happened. And [Vinegar] was told the last time if it happened again what would be happening." Inferentially, Bartlett's testimony referred to the incident which was the subject of

Bartlett said that if Vinegar did not wait across the street, Bartlett would get the police to escort Vinegar across the street. Nonetheless, after retrieving his personal effects, he went to the car to wait for Sturgill.

A few minutes later, Fraher, who had been conducting some business away from the plant, drove into the plant parking lot, parked his car there, and went to his office. After being advised that Meuler wanted to see him, he went to Meuler's office, where Meuler (according to Fraher's testimony) told Fraher that Meuler had terminated Vinegar for insubordination toward Bartlett. Meuler testified, without giving further particulars, that he told Fraher "what I had done" in connection with Vinegar. Fraher testified, without giving further particulars, that he approved of the discharge when Meuler "told me the circumstances."

While sitting in Sturgill's car, Vinegar saw Fraher pull his car into the parking lot. Vinegar thereupon went back into the building and knocked on Meuler's door. When Meuler said, "Come in," Vinegar came in and saw Fraher and Meuler. Vinegar told Fraher that Meuler had terminated Vinegar for disrespect to management. Fraher said that he had talked to Meuler and stood behind his decision. Vinegar said that the reason he had been fired was that he was a union organizer. Fraher said that he had nothing to do with it and that he stood behind the decision which Meuler had made. Vinegar said that he guessed Fraher had not received Vinegar's message requesting a meeting about Bartlett's ban on breaks in the maintenance area. Fraher said that he had not, and asked what Bartlett had said. Vinegar said that Bartlett had told Howard that Bartlett did not want anyone besides Howard and Bobby Doolin Jr., to take breaks at the maintenance table any longer. Fraher said that the maintenance area was not a break area. Vinegar replied that neither were any of the other places in the plant where employees worked, but they were nevertheless allowed to take their breaks there and eat there.

As previously noted, Meuler testified that he had not asked Vinegar what had occurred between him and Bartlett on the day of his Friday, June 26, discharge, because Meuler saw no reason to disbelieve Bartlett. On the following Monday, June 29, Meuler, Fraher, and Bartlett approached employee Winburn, and asked him what he had seen or heard during the Bartlett-Vinegar conversation. Meuler testified that Winburn "told me that he observed Mr. Vinegar and Mr. Bartlett in some kind of discourse, but [Winburn] was on the other side of the room and he really did not know what had gone on." On timely objection, this testimony was not received to show the truth of Winburn's report to Meuler. Company witnesses Fraher and Bartlett, and General Counsel's witness Winburn, were not asked about this Meuler-Winburn conversation. Winburn testified that during the Vinegar-Bartlett conversation, they were standing about 12 steps from him, but that because of the machinery noise in the area, he could not understand what they were saying. As previously noted, Bartlett testified, contrary to Winburn as well as Vinegar, that during the Vinegar-Bartlett conversation, the machines were not operating. Meuler's file memorandum (dated July 1) states that Winburn told him, Bartlett, and Fraher that Winburn "had heard [Vinegar] get quite loud but that [Winburn] could not hear what was said [during the Vinegar-

Bartlett conversation] due to the amount of noise in that work area."

My findings as to the events on the day of but after Vinegar's discharge are based almost entirely on his testimony. Bartlett testified to the following effect: When Bartlett told Vinegar, shortly after the discharge interview, to wait on the other side of the road, Vinegar said that the only way Bartlett was going to get Vinegar off the property was with the police. Then, Vinegar reentered the plant to pick up his tennis shoes. While Bartlett was accompanying him toward the location of his tennis shoes, Vinegar (who is non-Caucasian) told Bartlett (who is white), in a "loud, aggravated voice," that Bartlett was a "racist" who had got three or four people fired. Vinegar said that he was going to "put the word out on the street to have you taken care of . . . no, better still . . . me and you will meet out on the street and we'll settle this man to man. And you can bring your little pistol with you if you want to."

Bartlett did not testify that he told anyone else about this alleged incident. Neither Meuler nor Fraher testified to any report by Bartlett that Vinegar called him a racist. Meuler did testify, and stated in his file memorandum dated July 1, that during Vinegar's postdischarge conversation with Meuler and Fraher (both of whom are white), Vinegar said that he had been discharged because Bartlett was a racist. However, Fraher did not corroborate Meuler's testimony that Vinegar made this statement. Meuler testified that shortly after the termination interview, Bartlett told Meuler that Vinegar had been "even more abusive," had threatened Bartlett with the use of a gun, and had said that Vinegar would not leave the property unless management called the police. However, Meuler's file memorandum and Bartlett's testimony attribute to Vinegar the statement that he and Bartlett could meet on the street to settle their dispute and *Bartlett* could bring his little gun if he wanted to. In view of the foregoing, and for demeanor reasons, I credit Vinegar's testimony that when asked to wait across the street, he did not become loud or say that he would leave the property only if the police were called; and that he did not tell Bartlett that Vinegar would meet him on the street to settle this, or that Bartlett could bring his little gun if he wanted to. Although Vinegar was not asked whether he had raised a "racist" accusation against any member of management, in view of the mutual inconsistencies in Respondent's evidence as to who was present when Vinegar made this accusation I find that no such accusation was made. In any event, both Meuler and Bartlett attributed Vinegar's alleged "racist" accusation to a time after his discharge, and Respondent does not contend that such a remark, if made, would affect Vinegar's reinstatement rights.

On an undisclosed date prior to June 24, 1998, Meuler said that if work was slow, the inspectors would have to start working on the brazer. On June 24, Foreman Corman instructed inspector Rochelle Petrucelli to work on a brazer which is sometimes referred to in the record as the Big Blue. Petrucelli became angry, threw her arms, and loudly hollered, "I'm not going to do that, I don't want to work on Big Blue . . . I've had a turn, and I'm not going until the rest of [the inspectors] go," naming inspectors Eva Hall and Walley Goldey. Petrucelli thereupon began to perform inspector work. About 15 minutes later, Meuler, Corman, Petrucelli, Hall, and Goldey (but not

Shirley Storie) met for 20 minutes in Corman's office.²⁹ During this discussion, which Vinegar could see through the office window but could not hear, Petrucelli began to cry. After the meeting broke up, Petrucelli asked Meuler whether he wanted her to operate Big Blue now. Meuler told her no, to forget it, and that Vinegar should run it. Corman then told Vinegar to stay on the Big Blue for the rest of the afternoon. Vinegar thereupon commented, "so you mean some people can cry and get off the job where others have no say so at all." Corman replied that he did not want to discuss it. The Big Blue was operated that day by Vinegar and not Petrucelli, who was not disciplined in connection with this incident.³⁰

About October 1997, when Petrucelli was not wearing her safety glasses in an area where they were supposed to be worn, during an argument with Bartlett she threw her arms and loudly hollered, "Get out of [my obscenity] face;" whereupon he just walked on.³¹ On other occasions, the most recent of which occurred in September or October 1998, she failed to wear safety glasses, where she was supposed to wear them, in the presence of Bartlett, who said nothing to her.³² Petrucelli was never disciplined in connection with any of these incidents. On six or eight occasions in 1998, Bartlett, Meuler, and/or Fraher saw Shirley Storie without her safety glasses in areas where she was supposed to wear them; but Meuler and Fraher said nothing to her about the matter, and there is no evidence that Bartlett said

²⁹ My finding as to the length of this conference is based on the testimony of Shirley Storie; I believe that Vinegar was mistaken in testifying that the conference lasted for an hour and half. Storie and Vinegar could see the conference, but could not hear what was said.

³⁰ My findings in this paragraph are based on a composite of credible parts of the testimony of Shirley Storie, Corman, Vinegar, Meuler, and Petrucelli. Petrucelli testified that the June 24 meeting consisted of "a discussion . . . pertaining to the inspection department, because there's a lot of conflict [sic] . . . of 'He say, she say, we say,' a lot of exaggerations of . . . pertaining of what [Shirley] Storie has claimed that I have done"; Petrucelli denied having refused a foreman's assignment to work on Big Blue. Corman denied having ever had any problems with Petrucelli. Meuler denied that Petrucelli had objected to operating Big Blue that day. He testified that inspector Shirley Storie was present during the June 24 conference; that it was prompted by the fact that the inspection area was slow; that the purpose of the meeting was to explain that at some time after that day, management was going to start rotating inspectors onto the brazer as Corman needed them; and that Petrucelli expressed no objections to this proposed practice. For demeanor reasons, I do not credit the testimony summarized in this footnote to the extent it is inconsistent with my findings in the text.

³¹ This finding is based on Shirley Storie's testimony. My finding as to the date is based on her November 1998 affidavit, which I accept because given closer to the event than her January 1999 testimony. She initially testified that this incident occurred in the fall of 1998; but after being shown her affidavit, she testified that it occurred a year or two before November 1998. Partly on the basis of this inconsistency as to dates, Respondent asks me to credit the denials of incumbent personnel Christin (who according to Storie was present during this incident), Petrucelli, and Bartlett. Because Storie gave her affidavit while still working for Respondent, because no reason appears why she would add to a fabricated story the fabricated presence of Christin, and for demeanor reasons, I credit Storie.

³² This finding is based on the testimony of Shirley Storie and Howard. For demeanor reasons, I do not credit Petrucelli's testimony that Bartlett told her to put on her safety glasses and she did so.

anything either. When asked on direct examination whether he mentioned it every single time he saw somebody without safety glasses, Bartlett replied, "Not every single time, no."

On September 3, 1993, Bartlett prepared written formal warnings for employees Gertrude Storie and Shirley Storie (Gertrude's sister-in-law) alleging that they had started to wash themselves up, in anticipation of stopping work, before they were permitted to stop.³³ Notwithstanding the employees' assertions that they had gone to the bathroom for purposes other than washing up, Bartlett told them to sign their respective warnings. The confrontation caused Gertrude Storie to become, at the least, visibly upset. In Bartlett's and Meuler's presence, Shirley Storie told her not to sign her warning slip. Neither employee ever signed her warning slip, and neither of them was ever disciplined in connection with the absence of such signatures.

Fraher credibly testified that nobody had been discharged for insubordination for at least 3 years prior to Vinegar's discharge.

E. Analysis and Conclusions

1. The independent 8(a)(1) allegations

a. Alleged threats

In agreement with the General Counsel, I find that Respondent violated Section 8(a)(1) of the Act when Supervisor Bartlett told employees Winburn, Hisle, and Vinegar that if the Union came in, Respondent would close the plant down. *Gene-see Family Restaurant*, 322 NLRB 219, 223 (1996), enfd. 129 F.3d 1264 (6th Cir 1997); and *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044-1045 (4th Cir. 1997). Further, I agree with the General Counsel that Respondent violated Section 8(a)(1) when Bartlett told employee Howard that plant superintendent Meuler had told Bartlett to "ride the hell" out of Howard because he was trying to get union votes. *Sunland Construction Co.*, 307 NLRB 1036, 1043-1045 (1992). Because Bartlett's statement was not limited to prounion solicitation by Howard when he and the solicited employee were supposed to be actively working and during periods when Respondent prohibited all conversations unrelated to work, such comments violated the Act even assuming that they were prompted by reports of such activity by Howard. See *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965); and *Laidlaw Transit, Inc.*, 315 NLRB 79, 84 (1994).

b. Alleged unlawful solicitation of grievances and implied promises during the lunchroom meetings

(1) Respondent's 10(b) defense

On January 5, 1999, at the outset of the hearing, the General Counsel moved to amend the complaint so as to add paragraph 5(c), which alleges, "During the weeks of March 22 and March 30, 1998, Lawrence Fraher, during meetings of employees in the lunch room . . . solicited employee complaints and grievances and implied that Respondent would resolve those complaints and grievances," in violation of Section 8(a)(1). Respondent opposed this motion on the ground that these allega-

³³ The record is unclear as to whether these events immediately preceded their break, or immediately preceded the end of their shift. The question is immaterial.

tions were insufficiently related to the allegations in the only charge in this case, which charge was served on July 2, 1998.³⁴ At the hearing, I granted the motion for leave to amend, on the ground that the amendment was “sufficiently close to the allegations in the charge and to the subject matter and the union campaign involved in the charge.”³⁵ Although Respondent’s post-hearing brief does not advance such a defense, I nonetheless regard it appropriate to address it in this decision.

The charge in this case alleges as follows (emphasis added to the typewritten material; the rest of the quoted material is part of the printed charge form):

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsection (1) and . . . (3) of the National Labor Relations Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about 1–5–98 and since such date, the above named employer has threatened Gary Vinegar and other employees with plant closure, and by other acts and conduct which interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act.

The above named employer has, in order to discourage membership in [the Union], discriminated in regard to the terms and conditions of employment of Gary Vinegar by terminating him on 6–21–98 for his Union Activities.

The lunchroom meetings occurred less than 6 months before this charge was filed, although more than 6 months before the General Counsel moved to amend the complaint as to such meetings.

A complaint may be amended to add allegations relating to conduct more than 6 months old as long as the conduct occurred no more than 6 months before the filing of the charge underlying the complaint, and as long as the allegations in the amendment are closely related to that charge. *Don Lee Distributor, Inc. v. NLRB*, 145 F.3d 834, 844 (6th Cir. 1998), cert. denied 119 S.Ct. 866 (1999); and *Burlington Times*, 328 NLRB 750, 751 (1999). In the case at bar, both the charge and the amendment to the complaint allege 8(a)(1) conduct during the same union campaign, during the same period (between January 5 and June 21, 1998); moreover, the typewritten portion of the charge alleges 8(a)(1) violations by means of threats of plant closure “and other acts and conduct.” Furthermore, as discussed below in section II,D,2, Fraher’s lunchroom conversation with Vinegar was one of the events at least allegedly leading up to Vinegar’s discharge, which the charge unambigu-

ously claims to be unlawful. For the foregoing reasons, I hereby adhere to my action at the hearing in permitting the amendment of the complaint to allege that during the lunchroom meetings, Fraher solicited employee grievances, and impliedly promised to remedy them, in order to induce the employees to reject union representation. *Burlington*, supra at 751 and *Ross Stores*, 329 NLRB 573.

(2) The merits

During the conference-room meetings, which Fraher testified were conducted for the purpose of giving the employees Respondent’s position about the union organizing campaign that Respondent admittedly opposed, Fraher admittedly told the employees that he was going to meet with them individually. During various conference-room meetings, Fraher told the employees that the purpose of these projected one-on-one lunchroom meetings was to try to find out how the employees felt about the Union, to try to discuss what their problems were, to work them out with the management, to make them better. Also, by Fraher’s admission, during the conference-room meetings employees had attributed perceived favoritism toward certain employees to their personal, off-the-job friendship with Meuler; and during the one-on-one lunchroom conversations with employees, Fraher admittedly told them that in the future, he (and not Meuler) would handle personnel actions, and that Fraher would handle them as equitably as possible. Further, during Fraher’s one-on-one lunchroom conversation with Vinegar, who had previously complained that because of some employees’ personal friendship with Meuler they were not required to rotate between jobs, Fraher responded to Vinegar’s reiterated complaint about job rotation policy by saying that he would “look into” the job grades in order to make sure that everybody would do equal work. Unlike Respondent, I perceive nothing in such remarks by Fraher which would suggest that he was thereby trying to provoke a dialogue about the need for union representation. Rather, I conclude that Fraher was thereby promising benefits to employees in the form of a promotion and job-content policy without the at least perceived effect of Meuler’s out-of-plant socialization.³⁶ Because Fraher’s explanations for conducting these one-on-one lunchroom meetings show that he gave such promises in order to induce employees to reject union representation, I find that such promises violated Section 8(a)(1) even though he did not condition such promises on the employees’ rejection of union representation. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1996); *Hertz Corp.*, 316 NLRB 672, 686–687 (1995); *Complete Carrier Services*, 325 NLRB 565, 566 (1998); *Gull, Inc.*, 279 NLRB 931, 946–947 (1986); see also *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408–410 (1964).³⁷

³⁴ Respondent’s counsel took no issue with the General Counsel’s statement that prior to the opening of the hearing, he had sent counsel a letter notifying him of the intended motion.

³⁵ Respondent’s opposition to the General Counsel’s posthearing motion to add a similar amendment as to the conference-room meetings did not rely on Sec. 10(b). This posthearing motion has been denied for other reasons (see sec. III,C,3,a, below).

³⁶ See *Andrex Industries Cora*, 328 NLRB 1279 (1999); *Traction Wholesale Center*, 328 NLRB 1058 (1999); *Raley’s Inc.*, 236 NLRB 971 (1978), enfd. 608 F.2d 1374 (9th Cir. 1979), cert. denied 449 U.S. 871 (1980); and *Forrest City Grocery Co.*, 306 NLRB 723, 728–279 (1992).

³⁷ The cases cited by Respondent do not hold that promises for such a purpose are unlawful only if accompanied by an express or implied suggestion that the grievance would be resolved or acted upon only if

2. Vinegar's discharge

By its own admission, Respondent was opposed to the Union's organizing drive. In late February or early March 1998, foreman Bartlett told employee Vinegar that Bartlett believed the plant would shut down if the Union got in. Similarly, about late March 1998, Bartlett told employees Hisle and Winburn that if the employees voted the Union in, Respondent "would close the place up." In March 1998, Respondent required employees to attend, during their working hours, a number of meetings during which Fraher attempted to induce them to vote against the Union by, among other things, promising that in the future, promotions would be decided upon by him rather than, as in the past, by plant manager Meuler, whose personnel decisions the employees believed to be influenced by friendship.

Further, the evidence shows that employee Vinegar was the Union's principal advocate during the 1997-1998 union drive, and that Respondent knew this. Thus, Vinegar had been an active participant in the Union's unsuccessful 1995 campaign, and had served as the Union's observer in that election. The first 1997 contact with the Union was made by him and Sturgill. During the 1997-1998 union campaign, Vinegar distributed union cards and regularly wore union insignia in the plant, as well as to and from work. Moreover, during Fraher's March 1998 meetings with employees, for the purpose of ascertaining what dissatisfactions had caused the reactivation of the union movement, Vinegar voiced a number of complaints many of which Respondent did not want to satisfy. Furthermore, after the Union had withdrawn the petition in early April 1998, Vinegar told management, in effect, that if the employees' problems were not resolved, the union movement would resume, and he continued to wear his union jacket to work. A week before Vinegar's June 26 discharge, a conversation with Sturgill about her failure to receive a fork-truck license led Fraher to conclude that the Union was going to resume its organizing efforts. Finally, foreman Bartlett's March 1998 statement to employee Howard, that Plant Superintendent Meuler had told Bartlett to "ride the hell" out of Howard because he was trying to get union votes, shows that Respondent's management was prepared to take personnel action against individual employees because of their union activity.

Both the General Counsel's and Respondent's brief assume, without discussion, that Bartlett accurately reported to Meuler what had in fact happened between Bartlett and Vinegar. I conclude that Bartlett did in fact make such an accurate report, and discredit Meuler's testimony about what Bartlett told him. Such an inference gains some support from Meuler's failure (so far as the record shows) to spell out to Vinegar Bartlett's report of his conversation with Vinegar, and Meuler's admitted failure to ask Vinegar for his version of this conversation, even after Vinegar had claimed (in effect) that he had not engaged in any conduct which he thought was insubordinate, and further claimed that he was being discharged for union activity rather than for failing to wear safety glasses; Bartlett's testimonial

version of this conversation would have been a far more effective response to Vinegar's comments than a description of this conversation in conformity with my findings (mostly based on Vinegar's testimony) about what was in fact said. On the basis of my inference that Meuler received an accurate account of this Bartlett-Vinegar conversation, I conclude that this conversation was not a motive for Vinegar's termination. Vinegar's response to Bartlett's somewhat discourteous reminder to put on safety glasses was a "calm-down" gesture accompanied by the truthful statement that Vinegar's own foreman knew Vinegar was on his way to get his safety glasses and an expression of irritation that Bartlett had brought up the issue with Vinegar directly, and not with his foreman. Such conduct by Vinegar would appear to be significantly less serious than Petrucelli's refusal to comply with a direct order to operate the Big Blue, with the Stories' refusal to comply with Bartlett's direct order to sign their warnings, with Shirley Storie's conduct in telling Gertrude Storie to disobey that order, and with Petrucelli's conduct in angrily directing an obscenity toward Bartlett, on an occasion when she was not wearing her safety glasses in an area where they were supposed to be worn; nevertheless, Respondent did not discipline either Petrucelli or the Stories for such conduct.³⁷ Further indicating that this Bartlett-Vinegar conversation was merely a pretext is Meuler's admitted failure to ask Vinegar what had happened, even though Meuler knew that over the years, other employees had had difficult times working with Bartlett.³⁸ Meuler's "failure to afford [the dischargee] an opportunity to respond to the allegations against him . . . lends support to an inference of unlawful motivation, and shows that [Meuler] was not interested in determining whether misconduct had actually occurred." *National Assn. of Government Employees*, 327 NLRB 676, 701 (1999). Indeed, Vinegar's timecard had been removed from the rack by the time he reached it upon proceeding thereto immediately after his discharge interview. Nor do I credit Meuler's testimony that he discharged Vinegar in June 1998 partly because of the 1993 incident involving Vinegar's objections to a work assignment, partly because of the Webb off-premises incident on an undisclosed date, and partly because foreman Pittman reported to Meuler that Pittman was having trouble with directing Vinegar in that he was argumentative when told that he was using up too much indirect time setting up a press. None of these incidents was mentioned in Meuler's file memorandum regarding Vinegar's discharge nor (so far as the record shows) during

³⁷ Fraher and Meuler both testified, in effect, that their treatment of Petrucelli and of Shirley Storie in personnel matters was unaffected by these employees' personal friendship with Meuler.

³⁸ Meuler's testimony that he made no such inquiries because he had no reason to not believe Bartlett's account is somewhat difficult to reconcile with Meuler's and Fraher's admitted efforts to ascertain from employee Winburn, the next working day after Vinegar's discharge, what had occurred during his conversation with Bartlett. Moreover, there is no evidence that Winburn's statement led Meuler to investigate the veracity of Bartlett's account, even through Bartlett's alleged attribution to Vinegar of screaming, shouting, and loud speech is somewhat difficult to reconcile with Winburn's statement, according to Meuler's memorandum, that because of the noise in the area, Winburn could not understand what Bartlett and Vinegar had been saying.

the employees reject union representation. The reference in some of these cases to such a condition relate to the motive for the promise and to the condition's enhancement of the promise's coercive tendency (i.e., a stick as well as a carrot).

Vinegar's discharge interview; the Webb and Pittman incidents were not noted in Vinegar's personnel folder; and Pittman credibly testified that his only report to Meuler about Vinegar was made in late 1997 or early 1998, when Pittman reported to Meuler that Vinegar "was a good worker. He didn't like to take orders." Moreover, I regard it as inherently unlikely that Respondent discharged Vinegar—a good worker for more than 8 years—even partly because of a verbal incident which had occurred 5 years earlier.⁴⁰

In short, the record shows as follows: Respondent opposed the Union's organizational effort, and had expressed willingness to take retaliatory personnel action to discourage union activity. Vinegar had been an open union advocate during an unsuccessful union campaign in 1995, and was an open and known union advocate during the 1997–1998 union campaign. After the Union withdrew its petition in early April 1998, Respondent was advised that the Union would likely engage in still another organizational effort. In June 1998, Respondent summarily discharged Vinegar, and advanced several pretextuous reasons therefor; including a 5-year-old offense which was not mentioned in the file memorandum about his discharge (nor to him when he was discharged, so far as the record shows); and a report, which Respondent never asked him about, that he had engaged in conduct which was less serious than conduct for which other employees were never disciplined at all. I conclude that the record preponderantly shows that Respondent discharged Vinegar at least partly because of his union activity. The pretextuous nature of the reasons advanced by Respondent for his discharge precludes any contention that the evidence preponderantly shows he would have been discharged for lawful reasons even if he had not engaged in union activity. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995); and *Aero Metal Forms*, 310 NLRB 397, 399 (1993). Accordingly, I find that his discharge violated Section 8(a)(3) and (1) of the Act.

I would reach the same result even were I to find that Bartlett in fact gave to Meuler about the Bartlett-Vinegar incident the untruthful report to which Meuler testified at the hearing. Although testifying that Vinegar was a good worker with whom Bartlett had had no particular personality clashes, Bartlett had described the Union in scatological terms, regarded Vinegar as "the number one ringleader of the Union" and testified that he agreed with the discharge decision because Vinegar's attitude had changed to a bad attitude "Right after the last union vote," referring to the Union's October 1995 loss of the election at which Vinegar had served as the Union's observer after urging his fellow employees to vote for it. Bartlett's temporal coupling of this event with "ringleader" Vinegar's perceived development of a bad attitude indicates that Bartlett was equating this development with Vinegar's continuing (and, perhaps, increasing) desire for union representation.⁴¹ I conclude that any misrepresentation to Meuler by Bartlett (an admitted supervisor)

which adversely reflected on Vinegar's conduct during this conversation was motivated by Bartlett's opposition to Vinegar's union activity, by Bartlett's hope and/or expectation that this misrepresentation would lead to adverse personnel action against Vinegar, and/or by Bartlett's belief that because of Vinegar's union activity, his superiors would be pleased by being afforded an opportunity to take such action and would likely not look into, or care about, the accuracy of Bartlett's report. Accordingly, I conclude that Vinegar's discharge violated Section 8(a)(3) and (1) even assuming that Bartlett inaccurately reported the incident to Meuler and Meuler believed Bartlett's report when deciding on the discharge. See *Grand Rapids Die Casting Co. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (per then Circuit Judge Breyer); and *NLRB v. E.D.S. Service Corp.*, 466 F.2d 157 (9th Cir. 1972).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:
 - (a) Threatening employees with plant closure if the Union organizes the shop.
 - (b) Telling an employee that he is being harassed because of his union activity.
 - (c) Promising employees benefits in order to discourage union activity.
4. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employee Gary Vinegar.
5. The unfair labor practices described in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to offer Gary Vinegar reinstatement to his former position, or, if such a position no longer exists, to a substantially equivalent position, and to make him whole for any loss of earnings and other benefits he may have suffered by reason of his unlawful termination, 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). In addition, Respondent will be required to expunge from its records all references to Vinegar's unlawful termination and to notify him in writing that this has been done and that the actions and matters reflected in these documents will not be used against him in any way. Also, Respondent will be required to post appropriate notices.

⁴⁰ In a possibly subconscious effort to depreciate this problem, Meuler testified that the May 1993 incident had occurred "a couple years" before Vinegar's June 1998 discharge.

⁴¹ See *L. S. Ayers & Co. v. NLRB*, 551 F.2d 586, 587 fn. 1 (4th Cir. 1977); *GATX Logistics, Inc.*, 323 NLRB 328, 335 fn. 23 (1997), enf. 160 F.3d 353 (7th Cir. 1998); *L. A. Baker Electric*, 265 NLRB 1579, 1591 (1983); and *Eby-Brown Co.*, 328 NLRB 496 (1999).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴²

ORDER

The Respondent, Fansteel VR/Wesson, Lexington, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure if the shop is organized by Teamsters Local Union No. 651 affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

(b) Telling employees that they are being harassed because of their activity on behalf of Local 651, or any other labor organization.

(c) Promising employees additional benefits, for the purpose of inducing them to refrain from choosing representation by Local 651 or any other labor organization.

(d) Discouraging membership in Local 651, or any other labor organization, by discharging employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(e) 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 Gary Vinegar full reinstatement to his former position or, if such a position no longer exists, a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to Gary Vinegar's unlawful termination, and within 3 days thereafter, notify him in writing that this has been done and that the action and matters reflected in these documents will not be used against him in any way.

(d) 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, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 9, post at its facility in Lexington, Kentucky, copies of the attached notice marked "Appendix."⁴³ Copies of the notice, on forms provided

by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Lexington facility at any time since February 15, 1998.

(f) 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.

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 ordered us to post and abide by this notice.

WE WILL NOT threaten you that the plant will close if you choose to be represented by the Teamsters Local Union No. 651 affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT tell you that you are being harassed because of your activity on behalf of Local 651 or any other union.

WE WILL NOT promise you additional benefits, for the purpose of inducing you to refrain from choosing representation by Local 651, or any other union.

WE WILL NOT discourage membership in Local 651, or any other union, by discharging you, or otherwise discriminating in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

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

WE WILL make Gary Vinegar whole, with interest, for any loss of earnings and other benefits he may have suffered by reason of his termination.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all reference to Gary Vinegar's unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and the actions

⁴² 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.

⁴³ 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."

and matters reflected in these documents will not be used against him in any way.

FANSTEEL V/R WESSON