

Teledyne Advanced Materials and United Steel Workers of America, AFL–CIO, CLC. Case 10–CA–29555 and 10–CA–29908

September 29, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 2, 1997, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting and answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified and restated in full below.

1. We agree, for the reasons stated by the judge, that the Respondent violated Section 8(a)(1) by the statements of Supervisor Robert Justice in August 1996² that employees were not to talk to anyone about the Union or to anyone who was involved with the Union and that they could be written up if they were caught talking about the Union. In its exceptions, the Respondent contends that it maintained a valid no-solicitation/no-distribution rule in its employee handbook and that Justice “simply informed” the employees of this rule. In this regard, the Respondent relies on the credited testimony of employee Ballinger, who stated on cross-examination that Justice said they could discuss the Union on “our own time or at break or lunch.”

We find no merit in this contention. Michael Ballinger testified, without contradiction, that employees routinely talked about “ball games, church, the weather” and other subjects unrelated to work during working time without any objection by the Respondent. Thus, it is clear that whatever Respondent’s no-solicitation rule may have prohibited, it did not prohibit talking about nonwork-related matters during working time, and the Respondent was not simply informing employees of that rule when it promulgated its ban on conversation about the Union. It is well established that an employer violates Section

8(a)(1) when, as here, employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees’ activities in regard to the union organizational campaign. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), *enfd.* 608 F.2d 762 (9th Cir. 1979). Accordingly, we affirm the judge’s findings in this regard.³

2. The judge found that the Respondent violated Section 8(a)(3) and (1) when it issued a written “final warning” to employee Edward Norwood on April 24, 1996, based on alleged misconduct which the Respondent had tolerated on the part of other employees. The Respondent does not except to this finding. The judge, however, dismissed the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by its discharge of Norwood on August 28. The General Counsel excepts to this dismissal. For the reasons set forth below, we find merit in this exception.

The General Counsel and the Respondent agree that the judge applied the proper analytical framework in assessing whether Norwood’s dismissal violated the Act. As the judge observed, in order to establish that an employer’s discharge or discipline of an employee violates Section 8(a)(3), the General Counsel must establish that union activity was a motivating factor in the action taken against the employee. Once the General Counsel has met this burden, the burden shifts to the employer to establish, by a preponderance of the evidence, that it would have taken the action even in the absence of the employee’s union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), approving *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). As the Board has explained, “[u]nder *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.” *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991).

The judge found that the General Counsel met his burden of establishing that Norwood’s union activity was a motivating factor in the Respondent’s decision to discharge him. The Respondent does not dispute this find-

¹ The General Counsel 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.

² All dates are in 1996 unless otherwise noted.

³ The Respondent does not except to the judge’s finding that it violated Sec. 8(a)(1) by Supervisor Stanley Carnegie’s statement in September 1996 that the elimination of overtime was based on the employees’ union activities.

ing.⁴ The judge further found, however, that the Respondent met its burden of establishing that it would have discharged Norwood, even absent his union activity. Specifically, the judge found that the Respondent established that Norwood had been insubordinate and that other employees had been similarly discharged for insubordination. We find, contrary to the judge, that the record does not support these findings.

The essential facts surrounding Norwood's discharge are undisputed.⁵ On August 27 Maintenance Supervisor, Roy Smith observed Norwood talking to two employees. Smith asked Norwood what he was talking about and if he did not have some work to do. Norwood responded, "Well, ain't none of your damn business what we're talking about," and said that if Smith wanted to know whether or not he was working or what he should be doing, then Smith could ask his supervisor. On August 28 Norwood was discharged. The disciplinary form given to Norwood by the Respondent stated that he had been insubordinate to a supervisor and the box was checked indicating that the discipline imposed was "[t]ermination upon review of overall work record." Further, Norwood testified, without contradiction, that Supervisor Bill Reeves told him that since he had "already received my final warning three weeks earlier, that I was being terminated."

Although we do not disagree with the judge's finding that Norwood engaged in insubordinate conduct, we find, contrary to the judge, that the Respondent has not met its burden of establishing that it would have discharged Norwood for this conduct alone, even in the absence of his union activities. To begin with, it has not proven its claim that it discharged Norwood for this conduct alone. The disciplinary form, on its face, indicates that the discharge decision was based "upon review of [Norwood's] overall work record." Thus, the form itself demonstrates that the Respondent did not discharge him for the insubordination alone. Moreover, Reeves made specific reference to the prior warning when notifying Norwood of his discharge.

Further, Norwood had worked for the Respondent for 3 years, and the only discipline he had received was the April 1996 "Final Written Warning," in which the Re-

⁴ In their briefs, the General Counsel and the Respondent dispute the strength of the General Counsel's prima facie case: the General Counsel contends that it was "strong," whereas the Respondent contends that it was "weak." We find it unnecessary for purposes of this decision to decide this issue.

⁵ The judge found it unnecessary to make credibility findings regarding some of the events leading up to Norwood's discharge. Acknowledging that witnesses put the events "in a little different light," he found that there was not a "great deal of difference" among the witnesses' testimony.

spondent stated that any future violation of company policy will result in immediate termination. This final warning, however, was found unlawful by the judge and, as noted above, the Respondent does not contest this finding. Consequently, the Respondent is not privileged to rely on this unlawful warning as a basis for further discipline against Norwood. Under these circumstances, and in light of the evidence indicating that the Respondent's decision to discharge Norwood was reached only after a review of his work record, we find that the Respondent failed to establish its claim that it discharged Norwood solely for the act of insubordination.

We further find, contrary to the judge, that the Respondent failed to establish that its work rules mandated dismissal on the first act of insubordination and that employees John Davis and Gary Baker were terminated on the basis of their first act of insubordination. The Respondent's work rules are cast in discretionary rather than mandatory terms. They are prefaced as follows:

The following general standards for employee conduct provide an understanding of what conduct is inappropriate and what disciplinary action *may* be appropriate if employee misconduct occurs. . . . All disciplinary situations will be evaluated in light of their individual circumstances, including the employee's overall record of performance. Therefore, the list provides only a guide as to what discipline *may* be appropriate for the situations listed. . . .

Group A

Violation of the following rules *may* result in immediate discharge:

. . . .

(14) Insubordination, refusal to perform assigned duties or refusal to follow the instructions of your supervisor. . . . [Emphasis supplied.]

Given this prefatory language that discharge for insubordination is not mandated, the Respondent has clearly failed to establish its claim that an act of insubordination inevitably results in discharge.

Nor did the Respondent establish its claim that employees Gary Baker and John Davis were discharged for an act of insubordination. Although the Respondent's vice president, Mae Dell Davis, testified that Baker and Davis were terminated for insubordination, she did not establish that their acts of insubordination were the sole cause of their terminations, without regard to their prior work record. That testimonial gap is telling in view of the Respondent's stated policy, noted above, that "[a]ll disciplinary situations will be evaluated in light of their individual circumstances, including the employee's overall record of performance." Moreover, the documentary

evidence in the record regarding these employees fails to indicate the reason for their discharge. In these circumstances, we find that the Respondent failed to establish that these employees were discharged for a single act of insubordination. Accordingly, the discharges of these two employees, standing alone, do not warrant an inference that Norwood would have been discharged for insubordination even absent his union activities.

For all these reasons, we find that the Respondent has failed to meet its burden of establishing that Norwood would have been discharged even absent his union activity and therefore it failed to rebut the General Counsel's showing that Norwood's discharge was motivated by his union activities. Accordingly, we find that the Respondent violated Section 8(a)(3) by discharging Norwood, and we shall order that the Respondent offer reinstatement to Norwood and make him whole for any loss suffered as a result of his unlawful termination. Backpay shall be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Teledyne Advanced Materials, Huntsville, Alabama, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Issuing final warnings to or discharging employees because they engaged in union activities.

(b) Promulgating and maintaining a rule prohibiting employees from talking about the Union while not prohibiting talking about other subjects.

(c) Threatening employees with discipline if they talked about the Union during working time.

(d) Informing employees that their overtime work was being reduced in retaliation for engaging in union activities.

(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 Edward Norwood full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any rights or privileges previously enjoyed.

(b) Make the above-named employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning or discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the warning or discharge 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 necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Huntsville, Alabama facility, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 24, 1996.

(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.

MEMBER HURTGEN, dissenting in part.

I would remand this case for further critical findings.

In brief, the facts are as follows: On August 27 maintenance supervisor, Roy Smith, observed Norwood talking to two employees. Smith asked Edward Norwood what he was talking about and if he did not have some work to do. Norwood responded, "Well, ain't none of your damn business what we're talking about." Norwood added that if Smith wanted to know whether or not he was working or what he should be doing, then Smith could ask his supervisor. On August 28 Norwood was discharged.

⁶ 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."

My colleagues concede that Norwood engaged in insubordinate conduct. They also concede that Respondent's rules provide that insubordination may result in discharge. Finally, they concede that the discharge form given to Norwood specifically mentioned "insubordination to a supervisor" as the reason for the discharge. However, my colleagues seize upon the fact that the form also had a checked box that read: "[t]ermination upon review of overall work record." In the view of my colleagues, this brought into play all of Norwood's employment history, including the fact that he had received an unlawful warning on April 24. Thus, according to the majority, Respondent has not rebutted the General Counsel's case.

I disagree with this reasoning. The specific reference to insubordination, and the factor of timing, make it clear that Respondent relied, at least in substantial part, upon the insubordination of August 27. The checking of the box cannot negate this obvious fact. Further, two other employees have previously been discharged for insubordination. In this regard, my colleagues note only that Respondent's witnesses did not testify that insubordination was the *sole* reason for these discharges. However, the General Counsel failed, upon cross-examination, to establish that there were other specific reasons for these discharges.

On the other hand, I recognize that there is some evidence that Respondent (through Supervisor Bill Reeves) referred to the warning when he told Norwood that he was discharged. The judge did not mention this evidence. Thus, I would remand this case to the judge for him to evaluate this evidence and to consider whether Norwood would have been discharged even if there had been no warning.

APPENDIX B

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT issue final warnings to or discharge our employees because they engage in union or other concerted activity protected by the Act.

WE WILL NOT promulgate and maintain a rule prohibiting our employees from talking to other employees about the Union, while not prohibiting talking about other subjects.

WE WILL NOT threaten to discipline our employees if they talk about the Union during worktime.

WE WILL NOT inform our employees that their overtime work was being reduced in retaliation for employees engaging in union activities.

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

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

WE WILL make the above-named employee whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

TELEDYNE ADVANCED MATERIALS

John D. Doyle, Esq., for the General Counsel.
Kurt A. Powell, Esq. and *Thomas E. O'connor Jr., Esq.* (*Hunton and Williams*), for the Company.

BENCH DECISION AND CERTIFICATION

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial proceedings conducted in Huntsville, Alabama, on May 1-2, 1997. At the conclusion of trial proceedings on May 2, 1997, and after hearing oral argument by the Government counsel and company counsel, I issued a Bench Decision pursuant to Section 102.35 (a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law.

For reasons stated by me on the record at the close of the trial, I found Teledyne Advanced Materials (the Company), violated Section 8(a)(1) of the National Labor Relations Act (the Act), as amended, when in August 1996 it promulgated and maintained a rule prohibiting its employees from talking about the Union while they were working, while not prohibiting talking about other subjects; by threatening its employees with discipline if they talked about the Union during worktime; by on or about September 1996 informing its employees that their

overtime work was being reduced in retaliation for the employees engaging in union activities; and, violated Section 8(a)(1) and (3) of the Act by on or about April 24, 1996, issuing a final warning to its employee Edward Norwood (Norwood). I concluded the Company did not violate the Act when on or about August 28, 1996, it discharged its employee Norwood. Accordingly, I dismissed that portion of the complaint.

I certify the accuracy of the portion of the trial transcript (pp. 328–343) containing my Decision, and I attach a copy of that portion of the transcript, as corrected,¹ as “Appendix A.”

CONCLUSIONS OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above; and, that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully issued its employee Norwood a final warning on or about April 24, 1996, I recommend the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Norwood’s final warning and within 3 days thereafter notify Norwood in writing that his has been done and that the unlawful warning will not be used against him in any way. I also recommend the Company be ordered, within 14 days after service by Region 10 of the National Labor Relations Board (the Board), to post an appropriate notice to its employees, copies of which are attached hereto as “Appendix B” for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company’s obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]

APPENDIX A

BENCH DECISION

APPENDIX A

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JUDGE CATES: I find as follows, that the charge in Case 10–CA–29555 was filed by the Union on August 28, 1996 and timely thereafter served on the Respondent. I find the charge in Case 10–CA–29908 was filed by the Union on January 27, 1997 and thereafter timely served on the Company. I find that an amendment to the charge in Case 10–CA–29908 was filed by the Union on March 12, 1997 and thereafter served on the Company.

I find that the Company is a Delaware corporation with an office and place of business in Huntsville, Alabama, herein

¹ I have corrected the transcript by making physical inserts, cross-outs, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

called the Company’s facility, and it is the only facility involved in this proceeding, and that the Company is engaged in the business of manufacturing refractory metals.

Additionally, I find that during the past 12 month period, a representative period, the Company in conducting its business operations purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Alabama.

The complaint alleges the Company admits and the evidence establishes that the Company is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

I find that at all times material herein, the United

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Steel Workers of America, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

Based on the evidence presented, the allegations of the complaint and the admissions in answer, I find that Stanley Carnegie, Maedell Davis and Robert Justice are supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

From this point on, I shall address the complaint allegations essentially in the order that they are outlined in the complaint.

Before I do that, let me make a few brief words with respect to credibility. I have obviously had the opportunity to observe each witness that testified and I have weighed their testimony in light of the testimony given by other witnesses and if any testimony has been supported or substantiated by documentation, I have considered that.

I shall not discuss in totality all of the testimony and evidence that has been presented. Any evidence upon which I base a finding, I have credited that evidence, if there is evidence to the contrary.

I will try to explain my rationale for any credibility resolutions that I make.

I take full note of the fact that witnesses when they are testifying about their own conduct, actions or words, may testify about it more completely and thoroughly and in

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some cases clearer than they actually did when they were going through the events. I recognize there is the potential for bias on a number of the witnesses who have testified. For example, certain of the officials testifying for the company may wish to continue to please the company. The alleged discriminatee, that is the discharged individual, Mr. Norwood, certainly has among other things a job future and a pecuniary interest in the outcome of the proceeding.

I’m not unmindful of those facts.

Having said that, I turn now to the allegations in paragraphs seven and eight of the complaint. Did the Company promulgate a rule prohibiting its employees from talking to other employees about the Union while they were working and did the Company threaten its employees with discipline if they talked about the Union during work time.

The testimony in support of that came from a witness, Michael Ballinger. Mr. Ballinger testified that supervisor Justice

instructed the employees in August not to talk to anyone about the Union and that he did not want them to talk to anyone that was involved with the Union. Ballinger said he asked how you would know if anyone was involved with the Union and that he was told that the employees could be written up if they were caught talking about the Union.

Mr. Justice testified he gave no such instructions

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to the employees, that his policy simply was that they were not to hang around too long with other employees, but he never told any employee not to talk about the Union or to those involved with the Union.

Further, in support of supervisor Justice's testimony, Mr. Eric Harris testified that he was not aware of any such rule and that he didn't hear any such instructions made, that it was simply a reminder by Mr. Justice to the employees that they were not to be loitering or talking extended times when they should be working.

Who is telling the truth? Mr. Ballinger, what reason did he have to misspeak the truth or Mr. Justice and Mr. Harris? These are tough questions but I am crediting Mr. Ballinger's testimony. He appeared to me to be truthful as he was testifying. Also, I'm persuaded that Mr. Harris and Mr. Ballinger could have been talking about two different occasions. Mr. Harris said they were just pushing the rules at that time.

I have concluded and I'm crediting Mr. Ballinger's testimony. Mr. Justice, for example, acknowledged that he held meetings at different times in different places. I didn't give much weight to Mr. Osborne's testimony because he said something to the effect that he thought it was a three minute limitation on talking or whatever and then he said that was a policy he just sort of had in his mind when he came to the company.

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I have concluded and will find that the Company has violated the Act as alleged in paragraphs seven and eight of the complaint.

Next, we come to paragraph nine of the complaint. That deals with whether supervisor Carnegie threatened employees by informing them that the elimination of overtime was based on their Union activities or Union activities that was going on at the plant.

I don't think there is much dispute that Mr. Carnegie made such a comment. I gave particular attention to Mr. Milam's testimony, if I have my names correct, because I believe Mr. Milam stated somewhere in his testimony that Mr. Carnegie was his father-in-law. Not only is he testifying about matters that happened at the plant, he's testifying, if my recollection is correct, about matters that concerned his father-in-law.

I'm giving credit to Mr. Milam's testimony on that point. I don't think there is any dispute that Mr. Carnegie said it.

Then we come to the issue—before I get to Mr. Carnegie's actions after making the comments, that I find he did make, there was one other witness, a Mr. Merks, who indicated Mr. Carnegie said they were eliminating the overtime before 6:00

a.m. I believe it was or 7:00 a.m., the 6:00 a.m. overtime because of the

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Union.

I recognize Mr. Carnegie said that could have been one of the reasons, but I'm persuaded he said it stronger than that. I'm persuaded that as he described it, he said all hell had burst loose and that things were not going very well, so in his frustration, he made those comments.

Then he indicates, "he" being Mr Carnegie, that he went to Bob Moore, and I think Mr. Moore's title is Vice President of Production, but it's not important, he's a supervisor and agent of the company, and in a position higher in the hierarchy of management than was Mr. Carnegie, and said I've put my foot in my mouth, I've said things I shouldn't have said, and a decision according to Mr. Carnegie was made to call a meeting the next day of the individuals and apologize and make a retraction.

Carnegie goes in the next day, and here again, I don't think on this part there is any dispute, and said he wanted to apologize for his comments the day earlier, that he was frustrated and that there really wasn't anything to that as a reason. The reason was the T&A problems they were having out there at the plant, that was the reason they were doing away with the early morning overtime.

The Company would argue that apology and retraction clears the matter up. I'm not persuaded it does for the simple reason it wasn't as complete as Board law would

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require it to be. There is no evidence that he indicated such to everyone that was present at the earlier meeting. There is no evidence that he made it clear that what he had done would violate the Act and that was not the Company's policy, and that it would not happen again.

I find as alleged in paragraph nine of the complaint, that the Company violated the Act as outlined therein and that their retraction, such as it was, and apology is insufficient to negate the need for any corrective action.

Paragraph ten of the complaint, which attributed conduct to Maedell Davis was amended out of the complaint, so there can be no finding there with respect to any conduct that may or may not have taken place. I say that only so that anyone reviewing the record will see that paragraph ten of the complaint was amended out and as such, there is nothing there for me to make any ruling on.

Then we come to what I consider to be the heart of the case in the next two paragraphs of the complaint, and I shall again deal with those in the order that they are set forth in the complaint.

The Government alleges that the Company issued a final warning to Mr. Norwood on April 24, 1996, and that they did so because of his Union activities. They also allege that on August 28, 1996, the Company discharged Mr. Norwood and again did so because of Mr. Norwood's Union activities.

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The Company says no, we did not do it because of any Union activities or lack thereof on the part of Mr. Norwood, that we had

valid, legitimate and business justified reasons for doing so and would have done it even if you should conclude that he had Union activity and we had knowledge of that activity, and that calls for the analytical framework as outlined in a case called *Wright Line*, which is reported at 251 NLRB 1083, a 1980 case that was enforced at 662 Fed 2nd 899 by the First Circuit in 1981 and cert to the United States Supreme Court was denied in an order of the Court found at 455 U.S. 989, an 1982 case.

Wright Line provides the analytical mode for resolving discrimination cases turning upon the employers motivation. Under that test, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct.

It is also well settled, however, that when a respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is the one that the respondent desires to conceal. Motive may be inferred from the total circumstances proved. Under certain circumstances, the Board

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will infer animus in the absence of any direct evidence. That finding may be inferred from the record as a whole.

When does the Government make out a prima facie case? A prima facie case is made out when the Government establishes Union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging Union activity.

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence, evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences.

Once the Government has made out a prima facie case, the burden shifts to the respondent or in this case, the company. That burden for the company requires the company to establish its *Wright Line* defense only by a preponderance of the evidence. The company’s defense does not fail simply because not all of the evidence supports it or even because some evidence tends to negate it.

That’s the analytical framework under which I will examine the discipline that was given to Mr. Norwood.

First, the warning that Mr. Norwood was given on April 24, 1996. There is no question he was given a warning on that day, nor is there any dispute about the reasons

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asserted by the company for doing so.

First, let’s look at the knowledge of Union activity on the part of Norwood prior to April 24, 1996. The following evidence would tend to indicate the Company’s knowledge of Mr. Norwood’s Union activity prior to that event.

Mr. Norwood testified, and on this particular point, I credit his testimony, that he signed a card in February of 1996—February of 1995, and informed his supervisor, Mr. Webster, of that fact,

and again in either December of 1995 or January of 1996, he signed a card, and that once a week, between 1995 and April 1996, he talked with his supervisor, Webster, about the Union and/or his Union activities and/or the activities of others.

There is also the testimony of Janet Denny, whose testimony on this particular point I credit, that the Union was discussed in Human Resources’ meetings in March of 1996, to the extent of wanting to know who else was involved, et cetera.

Now, we have Mr. Norwood involved in Union activity. We have evidence that the Company knew of the activity and we have actions taken against him. Is there any evidence of animus with respect to his receiving the warning in April.

There are a number of factors that persuades me that animus was a factor in that action. The number of items that Mr. Norwood was disciplined for needs be addressed. First, he was

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disciplined for a violation of the visitor policy. There are a number of factors that would tend to indicate others did so without any adverse action against them. For example, sales persons. For example, those coming to the plant to pick up paychecks.

Also at the time Mr. Norwood visited the plant on Sunday, I believe it was April 21, he first reported through the security provided by the Company, a Huntsville off duty police officer, and he made no effort to prevent Mr. Norwood from entering the facility, nor did he warn him in any manner. The office where Mr. Norwood could have signed in if he had wanted to was closed. Mr. Norwood, when observed by supervisor Kennemore, no corrective action was taken, not even to the extent of saying you ought not be in here.

Mr. Norwood was also charged with violating the badge policy. The evidence is somewhat overwhelming on that point, that badges are not consistently or uniformly worn by employees at the plant, even to this very day. Mr. Norwood was also charged with the failure to obtain management’s approval before bringing visitors onto the facility. Again, the offices were closed and the person involved for management made no effort to correct the situation. There is evidence that children are brought into the plant, at least have in the past on pay days, and into the Hygiene Building.

Much was made about the fact that the Hygiene Building

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is not a production and maintenance part of the plant. There is evidence in the record that indicates there are blenders, crushers, a machine shop and locker room facilities in that building.

I conclude from all that there must have been some other reason that the Company gave Mr. Norwood this warning rather than his conduct. Each of the items for which they charged him in violation was items they had tolerated in others.

I find as alleged in paragraph 11 of the complaint, that the Company issued a final warning to its employee, Edward Norwood, on or about April 24, 1996, in violation of the Act.

Then we come to the termination of Mr. Norwood on August 28, 1996. Let’s go through the elements of what it takes to make out a prima facie case. Union activity on the part of the alleged discriminatee. Mr. Norwood testified and in fact, the Company concedes knowledge, that he wore a tee shirt that contained the

markings of the Union, God Bless the Steel Workers, and USWA Local 915. He also wore Union buttons, Work With Dignity, Steel Workers, USWA, AFL-CIO, CLC, and a button that said Steel Workers, Yes, USWA, AFL-CIO, CLC.

Other indications of his Union activity and Company knowledge of it is that on the day of the incident that led

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to Mr. Norwood's discharge, Mr. Norwood had laid some Union cards on a golf cart and Mr. Webster came by and picked them up and examined them.

Also, there is the testimony from a staff meeting that Maedell Davis had said that if the Union came in, heads would roll.

Animus is also established by the General Counsel by among other things, a statement by Craig Saline that all Union stewards were assholes. There is the comment as testified to by witness Milam that Mr. Moore had said there were trouble makers down in the electric shop.

There is no question that you have Company knowledge and you have Union activity, you have adverse action and you have animus.

Has the Government made out a prima facie case? I conclude they have. Has the Company come forward and met its burden of proof that the same action would have taken place even in the absence of any protected conduct on the part of Mr. Norwood. I'm persuaded they have.

The basis of that is, and there is no question at least in my mind based on the testimony presented, that Mr. Smith came by (and even if you use Mr. Norwood's testimony), asked Norwood what he was talking about and if he didn't have some work to do. Mr. Norwood said what he was talking about was none of Smith's business and that if he

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wanted to know whether or not he was working or what he should be doing, then Smith could ask his supervisor.

Others put it in a little different light but I don't find a great deal of difference between the facts regarding what took place on the occasion in August.

The question comes, were they joking. Was this simply a joke between Mr. Smith and Mr. Norwood and the Company knew or should have known that it was a joke between them.

I'm persuaded the Company did not view it, nor were they informed sufficiently, if at all, that it was a joking situation. I base a lot of that on the testimony of Mr. Smith when he said that if he had been joking, he would not have come back a second time and told Mr. Norwood to go back to work.

The fact that it was not a joking matter is perhaps bolstered to some degree by the comments attributed to Mr. Murphy that he was somewhat embarrassed by Mr. Norwood's conduct and that it was not a joke.

Based on the demeanor of Mr. Smith, I conclude that he did not threaten to whip the shirt off either Farron or Cy Harbin when he spoke with Norwood on the day in question.

Stated simply, it doesn't matter that there is anti-Union animus, that there is Union activity and Company knowledge, and even that the Company was happy to see this individual go, if the individual does what the Company says

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he did and other employees, such as Mr. Baker and Mr. Davis, were terminated for like insubordination, then the fact that Norwood had Union activity and that the Company was happy to see him go doesn't insulate him or protect him from being rightfully discharged or stated differently, for being discharged without the Company having violated the Act.

If the individual does what he is accused of doing and if that constitutes insubordination and if others are discharged for the same like offense, then you must conclude that the Company would have discharged Mr. Norwood in light of all of the Union activity that he engaged in and all of the animus that this Company has demonstrated towards the Union activities of its employees.

With respect to paragraph 12 of the complaint, which alleges that the Respondent unlawfully discharged its employee, Mr. Norwood, on August 28, 1996, I shall dismiss that paragraph of the complaint.

I shall in due time, once I have received a copy of the transcript, certify my decision to the Board and it is my understanding that all appeal rights run from the time of the certification of my decision to the Board.

I want to thank each of you for your participation and for the cooperation that the parties have demonstrated between each other. It has been my pleasure to hear the case because I don't know if I asked more than one or two

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questions in the entire trial, because all counsel, the Government counsel and the Company counsel, came fully prepared and put their case on in an outstanding manner, both sides.

You are to be commended, each side, for the party you represent. You have done an excellent job.

Unless there is anything further, this hearing is closed.
(Whereupon, the hearing was closed.)