

Avondale Industries, Inc. and New Orleans Metal Trades Council AFL-CIO. Cases 15-CA-14551, 15-CA-14552 15-CA-15019-3, 15-CA-15003, 15-CA-15109, 15-CA-15208, 15-CA-15212, 15-CA-15280, 15-CA-15419, 15-CA-15648, and 15-CA-15804

March 15, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On November 7, 2000, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions. The Charging Party filed exceptions and a supporting brief. Both the Respondent and the Charging Party also filed answering briefs.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Avondale Industries, Inc., Avondale, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Stacey M. Stein, Esq., and *Wayne L. Johnson, Esq.*, for the General Counsel.

Steven R. Cupp and *Stacey C. S. Cerrone, Esqs.*, for the Respondent.

William Lurye, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on May 22 through 25, and June 19 through 22, 2000,¹ on numerous charges.² The

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

² All dates are in 1998 unless otherwise indicated.

³ The charges in Cases 15-CA-14551 and 15-CA-14552 were filed on November 19, 1997, and were amended on February 23; the charge in Case 15-CA-15003 was filed on September 4; the charge in Case 15-CA-15019-3 was filed on September 17 and was amended on December 22; the charge in Case 15-CA-15109 was filed on November 25; the charge in Case 15-CA-15208 was filed on February 25, 1999; the charge in Case 15-CA-15212 was filed on February 26,

hearing closed on July 13, 2000, in an on-the-record conference call in which all parties participated. The seventh consolidated complaint issued on February 29, 2000. That complaint, as amended, alleges an 8(a)(1) and (3) violation of the National Labor Relations Act in November 1997, multiple 8(a)(1) and (3) violations of the Act between September and December 1998, two 8(a)(3) violations in May 1999, and one 8(a)(3) violation in November 1999. An eighth consolidated complaint that incorporates a charge filed during the course of the hearing and that alleges violations of Section 8(a)(3) and (4) of the Act issued on June 2, 2000.³ Respondent's answers deny any violation of the Act. I find that Respondent did commit several violations of Section 8(a)(1) and (3) of the Act. I find no violation of Section 8(a)(4) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Avondale Industries, Inc., the Company, is a corporation, engaged in the building of ships at its facility in Avondale, Louisiana, at which it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Louisiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that New Orleans Metal Trades Council, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This is the third in a series of cases involving alleged violations of the Act by the Company at its construction facility in Avondale, Louisiana. The first case, *Avondale Industries*, 329 NLRB 1064 (1999), referred to by the parties as *Avondale I*, involved 165 days of hearing before Administrative Law Judge David L. Evans. That hearing opened on July 11, 1994, and closed on July 15, 1996. Subsequent to that hearing, another lengthy case, referred to by the parties as *Avondale II*, was heard by Administrative Law Judge Philip P. McLeod. The instant case involved only 8 days of testimony. Although the violations alleged in the case before Judge McLeod predate the allegations, there is no contention that any allegation is dependent on any finding that Judge McLeod may make. Thus, there is no reason to defer making findings on the evidence before

1999; the charge in Case 15-CA-15280 was filed on April 14, 1999, and was amended on April 16 and July 22, 1999; the charge in Case 15-CA-15419 was filed on July 2, 1999; the charge in Case 15-CA-15648 was filed on December 9, 1999; and the charge in Case 15-CA-15804 was filed on May 25, 2000, after the commencement of the hearing.

³ The General Counsel withdrew the allegations of pars. 14 and 15 of the complaint that related to employee Clarence Scoper III.

me that, for the most part, relates to alleged violations of the Act in 1998, some 2 years ago.

The Company, at its Avondale facility, builds ocean-going ships for the United States Navy and performs some commercial repair work. The Company's operations are described in full detail in *Avondale I*, supra.

Union activity began at the Company on March 2, 1993. An election was held on June 25, 1993, to which the Company filed objections and in which there were 850 challenged ballots. The Board certified the Union on April 27, 1997, following a lengthy hearing in which the Company's objections were overruled and a determination was made on 515 of the challenged ballots. On September 16, 1997, the Union wrote the Company and advised that the individuals identified on an attached list were union stewards. These employees began wearing red T-shirts bearing the word "steward." The Company tested the certification of the Union by refusing to bargain. *Avondale Industries*, 324 NLRB 805 (1997). On June 25, 1999, the Court of Appeals for the Fifth Circuit invalidated the election. *Avondale Industries v. N.L.R.B.*, 180 F.3d 633 (5th Cir. 1999). Shortly after this, the Company was purchased by Litton Ship Systems. On November 2, 1999, the Company and the Union entered into an agreement on neutrality pursuant to which the Company agreed, inter alia, to recognize the Union as the collective-bargaining representative of the employees on the basis of a card check. Thereafter, prounion employees solicited their fellow employees, and a majority of them designated the Union as their collective-bargaining representative. The Company recognized the Union. The allegations, except for the warning issued to Archie Triggs and the alleged discrimination against Bobby Williams after he testified, predate the foregoing agreement.

B. The 8(a)(1) Allegations

1. Denial of access

On November 15, 1997, Respondent launched a ship at its facility. The launching was accompanied by a ceremony attended by various dignitaries and employees. Employees who were not working had been invited to attend with their families. Production areas were cordoned off. Access to the launch area was provided through specified gates at which security personnel, including the Company's admitted agent Clyde Cutren, were present. Employee Gregory Bridges and his wife attempted to attend the launch. Bridges was denied entry. Cutren, who was wearing a suit rather than a uniform, stopped Bridges and informed him that, because he had recently participated in a prounion demonstration in front of the corporate offices, a building referred to as the Rock House, he could not enter. "Anybody that was out [in] front [of] the Rock House was not allowed to go into the launch." Respondent stipulated that Bridges was one of the most active prounion employees in its workforce, and Bridges confirmed that he had indeed participated in the prounion demonstration. On November 15, he was not wearing a union T-shirt and was not carrying any banners or other paraphernalia consistent with leading a demonstration. When he pointed out to Cutren that he was not wearing a union T-shirt, Cutren replied, "Well, you're still affiliated with them." Mrs. Bridges remained with her husband. They

went to another gate and were again denied entry by a security guard. When Bridges inquired regarding who had told the security guard not to let him enter that gate, the security guard replied that he had "just got a call from the other gate not to let you in."

Employee Mark Cancienne also attempted to attend the launch. He was wearing a red union steward T-shirt, but he was not carrying any banners or other paraphernalia. Cancienne attempted to go into the launch area with his girlfriend, her father, and her son. He was stopped by a man wearing a suit and carrying a communication radio. The man asked Cancienne to unzip his jacket. When he saw Cancienne's red steward shirt, the man stated that Cancienne could not enter. His friends were permitted to enter and did so. Cancienne asked the man in the suit for his name, but he refused to give it, saying that he did not have to tell him his name.

Respondent presented no witness regarding the foregoing events and did not address these allegations in its brief. Bridges acknowledged that other union supporters who had participated in the demonstration at the Rock House attended the launch.

The complaint, in paragraph 7, alleges that the denial of access to employees because of their union activity violated Section 8(a)(1) of the Act. The fact that union supporters other than Bridges and Cancienne were admitted to the launch does not alter the undisputed evidence that they were denied entry. Respondent's actions are similar to restrictions of movement placed on union adherents in industrial settings. See *Florida Tile Co.*, 300 NLRB 739, 741 (1990). Respondent, by prohibiting prounion employees from attending the launch, interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act.

The complaint, in paragraph 13, alleges that the denial of access violated Section 8(a)(3) of the Act. Respondent's actions in no way related the jobs of these employees who were on their own time. Thus, Respondent's interference with their Section 7 rights did not relate to the terms and conditions of their employment. I shall, therefore, recommend that the 8(a)(3) allegation be dismissed.

2. Retaliation against protected concerted activity

On September 10, employee Donnell Tucker and several other employees in the cleanup during construction (CDC) department were working on the top deck of a ship. It began raining. The employees who were exposed to the elements spoke with Foreman Roy Toledano at noon and stated that, because of the rain, they could not continue to work. The group included Tucker and employees Carolyn Ratcliff, Clarence Doyle, Charles Veals, and Lawrence Brumfield. Toledano reported to CDC Superintendent Leroy Cortez that the employees wanted to leave, and Cortez told Toledano to send them home. The following morning the employees were directed to see Cortez before signing in. Toledano joined the meeting at some point after it began. Cortez explained to the employees that the Company had rain gear such as rainsuits and protective rubber gloves for them to use when it rained. The employees referred to other departments in which employees were assigned work inside the ship to avoid the rain, and Cortez

told them not to worry about other departments. Tucker acknowledged that Cortez stated that he needed them to stay and work because he was behind schedule on the ship. Despite this statement by Cortez, Tucker testified that Cortez allegedly stated to Toledano that “when a cloud comes in the sky,” that is, when it looks like rain, to “send them home.” On this day, September 11, a hurricane was approaching the New Orleans area. Cortez asked whether the employees wanted to leave or stay and work 10 hours. Tucker, Doyle, and Ratcliff stated they wanted to leave, and Cortez permitted them to do so.

Cortez recalls informing the employees that there was work to do even though it was raining and that there were safe ways to work in the rain. He told them, “I’m the bad guy if I send you home. I’m the bad guy if I work you. Either way this conversation goes, I’m going to lose.” He repeated that he was trying to work the employees 40 hours and that there was work available. Cortez, corroborated by Toledano, denied making any statement about sending any employee home because there was a cloud in the sky or because it looked like rain.

On September 18, Tucker was working with Doyle. It began to drizzle. Tucker testified that he recalled working for about an hour and that around 8 a.m., Toledano came to them with a sign out sheet and told Doyle and him to “knock off,” that he had to send them home.

Toledano denied that he sent Tucker and Doyle home. He testified that they came to him and requested to leave. The Company’s man-hour-control report for September 18 reflects that Tucker and Doyle worked 6 hours, from 0700 until 1300, i.e., from 7 a.m. until 1 p.m.

Paragraph 9(a) of the complaint alleges that, on September 11, Cortez threatened to send employees home before the end of the workday, and paragraph 11 alleges that, on September 18, Respondent sent Tucker and Doyle home early in retaliation for their protected concerted activity of complaining about working in the rain on September 10. The foregoing actions are alleged to violate Section 8(a)(1) of the Act. There is no 8(a)(3) allegation.

The only evidence presented by the General Counsel in support of the foregoing allegations was the testimony of Tucker. Tucker was a union steward, as was Ratcliff. Ratcliff identified Doyle, Veals, and Brumfield as also being union stewards. The only employee other than Tucker who testified at the hearing and who was present at the meeting with Cortez on September 11 was Ratcliff. She was not asked about the meeting; thus, she did not corroborate Tucker’s testimony regarding Cortez’s alleged threat to send employees home if there was a “cloud in the sky” or if it looked like rain. Tucker admitted that Cortez stated that he was behind schedule and needed the employees to stay and work. A threat to send employees home would have been inconsistent with his need to have the employees work. Union stewards Doyle, Veals, and Brumfield did not testify. I credit Cortez and Toledano, and I find that Cortez made no threat on September 11.

Tucker recalled working for 1 hour on September 18, at which time he testified that Toledano sent Doyle and him home. Toledano denied sending Tucker and Doyle home; he says that they requested to leave. Tucker acknowledges requesting to leave on September 10 and 11. Documentary evi-

dence establishes that Tucker and Doyle worked 6 hours, not 1 hour, on September 18. Doyle did not testify. In view of Tucker’s demonstrably faulty recollection regarding how long he worked on September 18, and in the absence of corroboration from Doyle, I credit Toledano that on September 18, as on September 10 and 11, Tucker and Doyle requested to leave and were permitted to do so.

I find that the General Counsel has failed to establish by the greater weight of the evidence that Cortez threatened employees or that Toledano sent employees home early in retaliation for engaging in protected concerted activity. I shall recommend that these allegations be dismissed.

3. Conduct relating to union stickers

Employee Carolyn Ratcliff began displaying her support for the Union by wearing pronoun T-shirts and stickers sometime prior to 1998. She testified that, about 2 months before her termination in December, Superintendent Cortez told her to “get the damn stickers” off of her hardhat. Ratcliff’s testimony does not establish that Cortez referred to union stickers. In response to this comment, Ratcliff first testified that she began “to scratch the stickers off,” but she immediately thereafter testified that she “started to scratch it,” implying that she was scratching only one sticker. The General Counsel next asked Ratcliff if she ever replaced “those stickers.” She answered that she did not. Ratcliff’s hardhat, three photographs of which were placed in evidence, has several union stickers on it. Ratcliff had no need to replace any union stickers because she did not remove any. In November, as hereinafter discussed, Cortez stated to employee Bobby Williams that it was his choice “to wear union stickers or not.” Cortez denies directing any employee to remove union stickers except when they obscured the department number or employee number on the hardhat. I credit Cortez. I shall recommend that this allegation be dismissed.

In late 1998 employee Bobby Williams placed two union stickers on his hardhat. He testified that Foreman Roy Toledano told him to take off the two union stickers, “not to get caught up in the mix . . . don’t keep the stickers on and I don’t have to worry about anything.” Williams testified that Toledano further stated that, if Williams put them back on, he would be “treated like the rest of them,” that he was “out for Donnell Tucker and Carol Ratcliff,” and that he was “going to be watching Carol Ratcliff.” Toledano asked Williams who had given him the stickers, and Williams stated he had received them from Tucker. Williams removed the stickers and never thereafter wore any union stickers.

Toledano testified that he did not recall any conversation with Williams regarding wearing union stickers, and he denied promising Williams that if he took them off he would not have anything to worry about. He also denied making any threats towards Williams or any other employees. Toledano did not specifically deny asking Williams who had given him the stickers.

I do not credit Williams’ testimony relating to purported threats to other employees. No such threats are alleged in the complaint, and Williams’ testimony naming Tucker and Ratcliff was inconsistent with a pretrial affidavit in which he

stated that Toledano “did not mention any names of specific employees” that he was going to be watching. Although Toledano testified that he did not recall any conversation, I find that a short conversation did occur.

In a separate conversation, after he had removed the union stickers, Williams testified that Toledano requested that he go to Superintendent Cortez and tell him that Tucker and Ratcliff were making people wear union stickers. He said that Toledano told him that, if he did not do so, he would “make things hard” for him and that he would lose his job; but that, if he did do so, it would “look good” for a raise. Williams asserted that “we set up this little thing” pursuant to which Williams was to tell Cortez that Tucker and Ratcliff were making people wear union stickers. Williams testified that he did as Toledano asked and that, after speaking with Cortez, Toledano suggested that he make the same report to personnel and that he did so.

In direct contradiction of the foregoing testimony, Toledano testified that Williams came to him and reported that Donnell Tucker and Carolyn Ratcliff were harassing him by requesting that he put union stickers on his hardhat but that he did not want to do so. Toledano replied that he did not have the authority to act on the accusation, but that Williams could speak with “Personnel.” Williams did so, and after doing so, asked to speak to Cortez.

I was not impressed by Williams’ demeanor. I have not credited his testimony, contradicted by his pretrial affidavit, that Toledano named any employees that he was going to be watching. If I were to accept his testimony that Toledano solicited him with threats and promises to make a false report, I would also have to find that Williams was willing to make an untruthful report when he deemed it to be in his best interests. In short, I have serious concerns regarding Williams’ credibility. Notwithstanding my concerns regarding Williams’ credibility, I find it unlikely that he would voluntarily go to Toledano and make an accusation against two fellow employees. Something prompted his action.

Although Foreman Toledano testified that he did not recall any conversation with Williams regarding union stickers, I find that a conversation did occur. I find that, on observing Williams wearing union stickers, Toledano stated that Williams should not “get caught up in the mix” and that he asked Williams who had given him the stickers.

I find that Williams’ going to Toledano was prompted by the foregoing comment and question by Toledano. I do not credit Williams’ testimony that Toledano solicited him to make a false report and made threats, including a threat of termination, and promises when doing so. I find, consistent with the testimony of Toledano, that Williams approached him. The probative evidence establishes that Williams approached Toledano because of the disapproval that Toledano expressed when he observed Williams wearing union stickers. Williams sought to deflect Toledano’s disapproval to Tucker and Ratcliff by accusing them of putting pressure on him to wear the stickers.

Whether before or after Williams went to personnel, it is undisputed that he did speak with Cortez. Cortez recalls telling Williams that nobody had the right to force him to wear union stickers, that he could wear them or not. Williams acknowl-

edges that Cortez told him that it was “my choice whether I wanted to wear union stickers or not.”

Paragraph 10 of the complaint alleges that Toledano interrogated employees regarding their union activities and the union activities of other employees, solicited employees to report alleged harassment by employees engaged in union activities, and promised benefits and threatened discharge in connection with the foregoing solicitation. The complaint does not allege that Toledano directed employees to remove union stickers. Although not specifically directing Williams to remove the stickers, Toledano’s reference to not getting “caught up in the mix” when he observed Williams wearing union stickers, conveyed disapproval. Immediately following this expression of disapproval, Toledano asked Williams who had given him the stickers. This interrogation regarding the union activities of a fellow employee was coercive and violated Section 8(a)(1) of the Act. *Action Auto Stores*, 298 NLRB 875, 895 (1990).

I have not credited the testimony that Toledano solicited employees to report alleged harassment and promised benefits and threatened discharge in connection with the foregoing solicitation. I shall recommend that these allegations be dismissed.

C. The 8(a)(3) and (4) Allegations

1. Facts

Employee Bobby Williams testified before me regarding the foregoing incidents on May 23, 2000. On May 24, 2000, Williams reported to work. He gave the subpoena pursuant to which had gone to the hearing to his foreman Billy Ledet in order to assure that his absence was excused. About 11:30 a.m., Ledet took the subpoena to Superintendent Cortez and later returned it to Williams. Williams testified that, when Ledet did so, he asked Williams what he had done. The subpoena was not mentioned. Although Williams had been working for over 4 hours, he testified that he did not know what Ledet was talking about when he asked him what he had done. He testified that Ledet then commented that he heard that Williams did not want to work for him anymore and advised that he was being sent to work for Foreman Roy Toledano. Toledano showed Williams what he wanted him to do. According to Williams, as he was making this explanation, Toledano commented, “I heard you went to court on me.” Williams did not respond, and Toledano continued with the job instructions. None of the foregoing comments, denied by Ledet and Toledano, are alleged to have violated the Act. Consistent with his denial regarding the going to court comment, Toledano credibly testified that he did not learn that Williams had appeared at this hearing until he was contacted regarding the charge filed on May 25, 2000, in Case 15-CA-15804, on behalf of Williams.

The CDC department is responsible for the erection of scaffolding on which employees in various crafts stand when constructing a ship. Toledano assigned Williams to run a handrail wire on a scaffold in the hull of a ship that was under construction. This was what is referred to as “overhead work,” up to 100 feet above the deck. Williams described it as the “most dangerous job on the yard.” In performing this work, employees use a device called a “condo lift” which was described as being similar to the buckets used to raise linemen to the height necessary to work on telephone and electrical wires on tele-

phone poles. With 3 years experience, Williams is classified as a fourth class employee. He is a licensed condo lift operator, and he acknowledged having previously performed similar work on another ship. Williams performed this work on the afternoon of May 24, on May 25, and possibly on May 26. Three other employees were performing the same work: Donnell Tucker and an employee identified as Doug, both of whom are classified as first class employees, and an employee identified as Calvin, a second class employee. Williams acknowledged that employees who erect scaffolding are regularly moved around to different jobs and that the work he had been performing for Ledet was almost complete.

Williams testified that he observed Toledano watching Tucker and him for about an hour. Initially a leadman was with Toledano. The leadman left, and then General Foreman George "Junior" Kinchen joined Toledano for about 15 minutes. Williams testified that Ledet was also present for some time. Ledet confirms that he was present to confer with Toledano concerning the work that the night crew was going to be assigned.

Ledet acknowledges that, on May 24, 2000, he asked Toledano if he needed anyone, and Toledano replied that he needed someone to run the condo lift. Williams was the only person assigned to Ledet who was licensed to run the condo lift. Williams continued to be carried for timekeeping purposes on Ledet's crew. Thus, he was not actually transferred; rather, he was assigned to perform the necessary work.

Toledano denied watching Williams. He credibly testified that he watched the whole job, "looking to make sure everything is up intact." He noted that he had only 5 days "to finish these decks."

2. Analysis and concluding findings

The complaint alleges that Williams was transferred, assigned more onerous work, and more closely supervised in retaliation for his testimony at this hearing and because of his union activity. There is no evidence that Williams was transferred. He was assigned to perform a specific job. I find that the evidence does not establish that Williams' testimony or union activity was a motivating factor in his job assignment or close supervision. Nevertheless, should a reviewing authority disagree with this conclusion, I find that, even if it be assumed that the General Counsel established a prima facie case, Respondent established that it would have made the same assignment to Williams in the absence of his testimony or union activity.

In evaluating alleged discrimination in violation of Section 8(a)(4) of the Act, the Board utilizes the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). See *Williamhouse of California*, 317 NLRB 699, 715 (1995). Ledet and Cortez were both aware that Williams had been subpoenaed. Toledano credibly denied knowing of Williams' involvement in this proceeding until he was advised that a charge had been filed. Nevertheless, it was Ledet who initiated the job assignment by asking if Toledano needed anyone. When he permitted Toledano to borrow Williams from his crew, Ledet was aware that Toledano needed someone to operate a condo lift. Thus, the supervisor who permitted Williams to be borrowed was aware that Williams had been absent

and had a subpoena to this hearing. There is no evidence that Ledet was aware that Williams had testified or that he was aware of the substance of his testimony. Nevertheless, I shall infer that Respondent, not having itself subpoenaed Williams, assumed that he not only attended the hearing but gave testimony favorable to the Union and, in view of its animus towards the Union, viewed his action with animosity. Thus I shall analyze the evidence as if the General Counsel established a prima facie case with regard to a violation of Section 8(a)(4) of the Act.

Regarding the 8(a)(3) aspect of this allegation, I find that Respondent bore animus toward employee union activity. The last actual union activity in which Williams engaged was in 1998, when he put on and then removed two union stickers from his hardhat. He testified that he never replaced them. Nevertheless, I shall infer that Respondent interpreted his appearance at the hearing, albeit pursuant to subpoena, as voluntary activity on behalf of the Union and shall analyze the evidence as if the General Counsel established a prima facie case.

Having assumed that the General Counsel established a prima facie case, I find that Respondent rebutted that case and established that Williams would have been given the same job assignment in order to complete the job in a timely manner. It is obvious that the overhead work to which Williams was assigned was more onerous than the work he had been performing for Ledet, but he had previously performed this work on another ship and was the only employee in Ledet's crew who was licensed to operate a condo lift. No evidence was presented contradicting Toledano's need for another condo lift operator in order to complete erection of the scaffolds in a timely manner. The work to which Williams was assigned was also being performed by three other employees: Tucker, a known union advocate, and two other employees. There is no allegation that this work assignment was discriminatory with regard to those employees. Toledano acknowledges watching the employees. He watched the whole job. Accepting Williams' testimony that this work was dangerous, Toledano would have been remiss if he had not actively supervised this dangerous work.

Williams acknowledged that he is regularly moved from one job to another. Williams was assigned to perform work to which he had previously been nondiscriminatorily assigned and for which he was specifically qualified to by virtue of his condo lift operator's license. He was assigned the same work as three other qualified employees whose assignment to that work is not alleged to be discriminatory. The evidence that the work needed to be performed and completed within 5 days is undisputed. He was not transferred to Toledano's crew. Close supervision of the whole job was demanded due to its dangerous nature. The record does not establish that Williams' testimony or union activity was a motivating factor in his assignment or close supervision. Even if it had been, Respondent has established that the assignment to this closely supervised job would have been made without regard to Williams' testimony and union activity. I shall recommend that these Section 8(a)(3) and (4) allegations be dismissed.

D. The 8(a)(3) Allegations

1. Discharge of Christopher Wheat

a. Facts

Chris Wheat worked for the Company as a sheet metal mechanic for slightly over a year, from August 1997 until he was terminated on September 21. In April, Wheat placed a union sticker on his welding hood. When Wheat was first hired, his supervisor was Foreman Kenny Collins. Soon thereafter, Collins was transferred to the plate area and Sam Gasper became Wheat's supervisor. Wheat engaged in conversation regarding the Union with union steward Michel Boudreaux, who was named in the union's letter dated September 16, 1997, and who regularly wore one of the red steward shirts. Collins observed these conversations and, on one occasion, suggested that Wheat keep his conversations regarding the Union "down low." Wheat's supervisor Sam Gasper, both before and after Wheat began wearing a union sticker, told Wheat to tell the union stewards that he was too busy to talk with them. Boudreaux recalled giving union stickers to Wheat about 3 months before Wheat's discharge, which would have been in June, and recalls him wearing three of them. Employee Donald J. Williams recalled that Wheat wore a union sticker on his hard hat. There were approximately 68 employees in the sheet metal shop in 1998. Boudreaux testified that Wheat was one of only 10 employees who publicly exhibited support for the Union.

Respondent points out that Wheat, Boudreaux, and Donald Williams disagree regarding the number of stickers Wheat wore, where he wore them, and when he began wearing them. Collins denies telling Wheat to keep his conversations regarding the Union "down low," and this comment is not alleged as a violation of the Act. Gasper did not testify. Regardless of whether any comment was made, I credit Wheat's testimony that supervisors observed his conversations with union stewards. The events occurred some 2 years ago. I find the absence of mathematical agreement in the credible testimony of Wheat, Boudreaux, and Williams regarding the number of union stickers worn by Wheat to be immaterial. I find that Wheat did identify himself as one of only 10 prounion employees in the sheet metal shop and that Respondent was aware of this.

It is undisputed that employees in the sheet metal shop have made personal items out of scrap sheet metal. Boudreaux testified to making various items for former supervisors. He acknowledged that, about 3 to 6 months after the representation election, employees were told that they could not use scrap metal to make personal items. Despite this, Boudreaux credibly testified that employees continued to do so. Boudreaux fabricated tool boxes for use on the job from scrap metal. Respondent's witness, employee Mitchell "Tanker" Scherb, acknowledged that employees would make small drawers for their tool boxes out of scrap metal. Sheet Metal Superintendent Mike Torres Sr., did not deny that employees did this.

Scrap sheet metal is placed in scrap bins or buckets. Boudreaux testified that there are "certain bins they throw" scrap into. When making an item from scrap he would always take metal "from the scrap buckets." Donald Williams referred to scrap metal being placed in tubs. When questioned whether scrap might also be on a pallet, he responded that "[b]y the

burning machine, they might have . . . a couple little squares or whatever . . . everything is supposed to be in tubs."

In mid-September, Wheat decided to make a lay-out drawer in which he could lay his tools, thereby permitting himself to work more efficiently since he would not have to dig through his tool box to find a tool when he needed it. He testified that he obtained a piece of sheet metal from a pallet next to the burning machine. When questioned whether scrap metal would ever be on a pallet next to the machine, Wheat responded, "There was some at times, yes." Wheat testified that he assumed the metal was scrap since it had nothing on it identifying it as being for a job. He claims to have begun constructing the layout drawer prior to September 19, but no witness testified to observing him working on the drawer prior to September 19. The layout drawer constructed by Wheat is 48 inches long, 24 inches wide, and 2-1/4 inches deep. Wheat acknowledged that the piece of metal he used was large enough to be used on a job.

On September 19, a Saturday, Wheat was repairing his automobile. He discovered that he needed a pop-rivet gun and drove to the Avondale facility in order to obtain his personal pop-rivet gun. He went through gate 5, which is located next to, and within 200 feet of, the sheet metal shop. Wheat did not sign in, but he claims he waved to the security guard. When he got to his work area, he moved some sheet metal in order to get to his tool box and his pop-rivet gun. He observed Mike Torres Jr., when doing this and assumed that Torres Jr., saw him. He did not speak to Torres Jr. He testified that, while he was there, he also took out his hammer and "tapped on a couple of corners [of the lay-out drawer] a few times to straighten it all up." He claims that this was the only work that he performed on the drawer. He testified that he then picked up his pop-rivet gun and left the facility, "I proceeded to leave out the gate."

Mike Torres Jr., son of Sheet Metal Superintendent Mike Torres Sr., is currently a foreman in the sheet metal shop. On September 19 he was working as a foreman over a crew performing maintenance work. He went to the sheet metal shop to obtain a tool that he needed. When he entered the shop he observed Wheat working on the pan break, a machine used to form the edges of a fabricated piece of sheet metal.⁴ He did not approach Wheat and ask him what he was doing. Instead, he called his father and asked if Wheat was supposed to be working. Superintendent Torres replied that he was not and directed his son to call the maintenance general foreman, John Breaux, who was at the facility, and to notify security. Torres Jr., called Breaux and then prepared to walk the short distance to the security gate. As he was locking the office door, he observed Wheat walking to the front of the shop. Torres Jr., walked the short distance to gate 5 and asked the guard if he had seen anyone come in. Upon receiving a negative response, Torres Jr., returned to the shop and called Foreman Kenny Collins, who lived nearby, to come and deal with the situation so that he could return to work. Although Torres Jr., did not testify to further contact with security, a request was made for assistance. General Foreman Breaux arrived. He and Torres Jr., went to

⁴ The transcript incorrectly refers to the "pan break" as the "hand brake."

Wheat's work area where they observed the lay-out drawer on his work bench. They looked around for the source of the sheet metal. At the shear machine they observed a piece of material on the machine and another piece, referred to as "drop off," with a job number written on it on the floor. A security guard entered the building. Torres Jr., reported what he had observed. The security guard took Wheat's tools and the layout drawer. Collins arrived. He and Torres Jr., took the piece of drop-off bearing the job number and placed it next to the office door of Superintendent Torres.

Wheat testified that, as he was leaving the facility, he encountered employee "Tanker" Scherb in the vicinity of the guard shack at gate 5. Scherb was on the telephone next to the guard shack. When Scherb completed his call he spoke with Wheat, asking what he was doing out at the shop. Wheat replied that he was getting his pop-rivet gun, which he testified he was carrying. Scherb informed Wheat that "security and everyone was in the shop," that "there's a big commotion going on over there in the shop. . . . If I was you, I wouldn't go back there." Wheat then left. He testified that he waved to the security guard as he left.

Scherb confirms that the foregoing conversation occurred; however, Scherb testified that he observed Wheat coming from the front of the guard shack at gate 5, "he was coming in." Scherb had received the information regarding security from Foreman Breaux. After Scherb spoke with Wheat, they walked a few steps, but Wheat did not enter the sheet metal shop.

Both Scherb and Torres Jr., place these events at between 8:30 and 9 a.m. Wheat places his arrival in the vicinity of 10 a.m. and his departure about 10:30 a.m. The security report reflects that Torres Jr., called at 10 a.m.

I have difficulty reconciling Wheat's testimony regarding his minor activity at the shop, which would have taken only a very short amount of time, with the undisputed fact that Scherb informed him that security was present in the sheet metal shop. Wheat acknowledged that he saw Torres Jr., and that he assumed that Torres Jr., saw him. He contends that he was moving material to get to his pop-rivet gun at this time. Torres Jr., testified that he observed Wheat using the pan break. Wheat's testimony places him only in his work area, thus, he would have observed anyone approaching his work area. He testified that, when he left his work area, "I proceeded to leave out the gate." It was at this point that he testified he saw Scherb who knew that security was in the building. In order for this to have occurred, security had to have arrived at the shop when Wheat was not present. The only way that a security guard could have been in the shop at the point that Wheat saw Scherb without having encountered Wheat as he was leaving was for Wheat to have left "out the gate" and then attempted to return to the shop. The most logical explanation consistent with the foregoing facts is that Wheat, having come for his pop-rivet gun, decided to construct a layout drawer. When he was observed by Torres Jr., he was using the pan break. He quickly finished this task and left. In his haste, he forgot his pop-rivet gun. Torres Jr., observed him as he was walking to the front of the building. Wheat encountered neither Torres Jr., nor a security guard because he left the building before Torres Jr., made the report to security. Having received the report from Torres Jr., a security

guard went to the building where Torres Jr., and Foreman Breaux had discovered the layout drawer and piece of drop off. When Wheat realized that he had forgotten the gun, he began to return to the sheet metal shop but encountered Scherb. Scherb knew that "security . . . was in the shop," and he told this to Wheat. Wheat left. The foregoing explanation is confirmed by the testimony of Scherb, whom I credit. Scherb did not observe Wheat carrying a pop-rivet gun. When he saw Wheat, "he was coming in."

On Monday, September 21, when Wheat got to work, he discovered that his work area had been cleaned out. His personal tools were not there. He was directed to report to the security office where, after waiting for about 10 minutes, he was interviewed. Wheat testified that he was first interviewed by Assistant Director of Security Sam Capaci, in the presence of two other security employees. Wheat denied knowing that he was not supposed to be on the premises when he was not working, explaining that he simply came to get his pop-rivet gun. Capaci pointed out the Company rule regarding unauthorized entry, and Wheat repeated that he was unaware of the rule. He was also questioned about working on a piece of metal, and Wheat acknowledged that he was making a layout drawer, a drawer to go underneath his lay-out table. He explained that the purpose of the drawer "was to lay out tools . . . it would make it a lot faster . . . instead of going into the . . . tool boxes and digging for my tools."

Following this interview, security employee Clyde Cutren took a statement from Wheat. Cutren asked, "Did you check in with security?" Wheat responded "No." Wheat denied performing any work on the drawer on Saturday. He responded, "Not on that Saturday. I did during the week, during my lunch period and between jobs." When asked about the source of the material for the lay-out drawer, Wheat responded, "We have 3 or 4 scrap areas around the shop." When asked whether he had obtained permission to use the sheet metal in question, Wheat responded, "You don't have to ask permission. If you want to make something in your work area, you just go to one of the scrap piles and get what you need."

Wheat returned to the waiting area. About an hour later, a security employee came in and asked him what he was still doing there. Wheat responded that he had not been told to go anywhere else. The employee laughed and went into one of the offices. In about 15 minutes, Cutren approached Wheat, asked for his badge, and told him that he had been terminated.

Assistant Director of Security Capaci supervised the investigation. He denies speaking with Wheat. He acknowledges that he relied on the stated opinion of Superintendent Torres that the material used by Wheat was not scrap, and he admits that no written statement was taken from Superintendent Torres.

Superintendent Torres testified that the metal from which the layout drawer was fabricated was "definitely not" scrap, "[i]t's too big of a piece." Scherb, having acknowledged that employees made small drawers from scrap metal, when shown the layout drawer, testified, "Nobody has a tool box that big." The door to a toolbox placed into evidence by the General Counsel measures 32-1/2 by 20 inches. Wheat's layout drawer was 48 by 24 inches.

Superintendent Torres testified that, on September 21 he had seen the piece of sheet metal with the job number at his office and, thereafter, observed the layout drawer in the security office. He told Sam Capaci, "I have the rest of the sheet in my shop." He told Capaci that he knew this "because of the gauge and because of the ID marking on it," referring to the manufacturer's identification stamp. On the basis of the portion of the stamp that was visible, Torres was certain that it would match perfectly if the sides of the drawer were unfolded. His certainty was proved correct at the hearing. Superintendent Torres disassembled the layout drawer and matched it to the piece with the job number. The point at which the cut occurred in the stenciled name and logo of the manufacturer was a perfect match. (The piece bearing the job number measures 56 inches by 31 inches, virtually the same size as Wheat's drawer when it is unfolded.) The General Counsel and counsel for the Charging Party objected to this demonstration since any match could not have played a part in Respondent's decision. I overruled the objection since this objective demonstration would either establish that the two pieces were unrelated, thereby providing probative evidence that the piece of sheet metal had not been designated for a job, or would match, thereby confirming the observation of the Company's experienced sheet metal superintendent.

Torres Jr., testified that, on September 19 when he and Foreman Breaux discovered the piece of drop off with the job number on it there was also a piece of metal on the shear machine. I am mindful that, when asked if it was clear that the piece lying on the ground and the piece remaining on the table "were two halves that went together," Torres Jr., answered, "Right." Torres Jr., gave no basis for this response. The demonstrative evidence of the match between the piece of drop off and the layout drawer reveals that this testimony was inaccurate.

Capaci testified that he called Superintendent Torres and recommended that Wheat be terminated for unauthorized entry, plus "willful damage." Torres recalled that Capaci called him and stated that he had made his final decision. Torres met with Capaci and concurred in that decision, signing the termination notice. The notice states that Wheat was terminated for:

MAJOR OFFENSE: #10—Unauthorized entry to or exit from Company premises at any location at any time.

IMMEDIATE DISCHARGE OFFENSES: #3—Theft, unauthorized removal or willful damage to any property belonging to another employee, a contractor employee, the Company or to a customer or contractor of the Company.

Capaci professed ignorance of a policy relating to termination, distributed to supervisors in 1994, that provides that employees should be suspended without pay pending an investigation of misconduct. Capaci testified that, in his experience, in some investigations the employees are suspended, and in others "they're terminated without suspension." Wheat was terminated without receiving a warning or being suspended.

There is no evidence that the Company has tolerated stealing or damaging Company property. The General Counsel presented no evidence to the contrary. In *Avondale I*, 329 NLRB 1064 (1999), the Board upheld the dismissal of allegations of

discrimination regarding employee James (Danny) Cox who defaced a wire-spool machine by writing a prouion slogan on it. In that case, the machine was defaced but still functioned.

b. Analysis and concluding findings

I have found that Wheat was one of only 10 employees in the sheet metal shop who exhibited support for the Union and that the Respondent was aware of Wheat's union sympathies. Respondent bore animus towards employees who engaged in union activity, and Wheat's termination constituted an adverse action. The General Counsel established a prima facie case. Thus, the burden of going forward with evidence to demonstrate that it would have taken the same action against Wheat in the absence of his union activity shifts to Respondent. I find that Respondent has met that burden.

Unauthorized entry is a major offense. Although Wheat claimed ignorance of the rule, if that had been his only offense he should, at worst, have been suspended.

Respondent contends that the piece of sheet metal used by Wheat was designated for a job and that his unauthorized use of it constituted damage to company property, an immediate discharge offense. The General Counsel and Charging Party, relying on the testimony of Wheat, contend that the sheet metal he used was scrap. I have difficulty crediting Wheat. His testimony that he was proceeding to the gate after leaving his work area when he encountered Scherb is impossible to reconcile with the presence of a security guard in the sheet metal shop. Wheat's credibility is further compromised by inconsistencies between his testimony and the responses he made to the Company's investigator. When asked if he had checked in with security, Wheat responded, "No." Wheat had to have understood the significance of this question since, according to his testimony, Capaci had just finished showing him the rule regarding unauthorized entry. Although Wheat testified that he waved his identification badge to the security guard when entering and leaving the shipyard, he did not state this to the investigator. In that same interview, Wheat was asked where he had obtained the sheet metal. He responded, "We have three or four scrap areas around the shop." He did not acknowledge that he had taken in from a pallet next to the burning machine.

Although employees regularly fabricated items out of scrap sheet metal, they obtain that metal from scrap bins. Wheat took a piece that exceeded four feet in length from a pallet. He did not acknowledge that he took the piece from a pallet when responding to Respondent's investigator regarding the source of the sheet metal. The piece he took was virtually same size as the 56 by 31 inch piece bearing a job number. Wheat admitted that the piece was large enough to be used for a job. If scrap sheet metal was to be found on a pallet, employee Donald Williams testified "they might have . . . a couple *little* squares or whatever . . . everything is supposed to be in tubs." (Emphasis added.) Superintendent Torres knew that the sheet metal used by Wheat was "definitely not" scrap, "[i]t's too big of a piece."

The General Counsel argues that the failure of Torres Jr., to approach Wheat and inquire about his presence in the shop suggests that he saw this as a "chance to get [union adherent] Wheat." Respondent argues that if Wheat was unaware that his presence was unauthorized and that he was present only to

obtain his pop-riquet gun, there is no reason that he would not have “approached Mr. Torres, Jr., and explained why he was there.”

It may well be true that Torres Jr., having observed Wheat using the pan break, suspected that he was doing something that he ought not be doing, was delighted that prounion employee Wheat had provided such an opportunity, and called his father for further instructions. Even if I attribute an antiunion motive to Torres Jr., the issue is the conduct of Wheat. Torres Jr., was not a sheet metal foreman on September 19; thus, I find no significance in Wheat’s failure to approach him and explain his presence. The more probative evidence that Wheat was aware that he was doing something improper is provided by Scherb’s credible testimony that Wheat did not enter the sheet metal shop after being advised that security personnel were present. If Wheat was unaware of any rule relating to unauthorized entry and had simply moved some sheet metal around in order to get to the pop-riquet gun, there would have been no reason for him not to have entered the sheet metal shop, explained the situation, and retrieved the forgotten pop-riquet gun. Even if he had “tapped a couple of corners” on the layout drawer that he claimed to have begun fabricating 2 or 3 days earlier, there was no reason not to give a timely explanation of his innocent activities. Wheat’s failure to give a timely explanation, coupled with his failure to acknowledge to the Company’s investigator that he had obtained the piece of sheet metal from a pallet, suggests that his fabrication of the layout drawer began on the morning of September 19 rather than 2 or 3 days earlier. No witness testified to seeing Wheat work on the drawer prior to September 19.

Respondent argues that, on the morning of September 19, Wheat sheared off the portion of the sheet metal bearing the job number and then sheared off the piece he intended to use. Whether he did so is immaterial. Respondent’s investigation concluded that the piece of sheet metal used by Wheat had been designated for a job. Superintendent Torres stated that he had “the rest of the sheet” at the shop. The perfect match obtained when the sides of the drawer were unfolded at the hearing confirmed Capaci’s reliance on Superintendent Torres’ statement. The evidence confirms that the sheet metal used by Wheat was not scrap. Wheat could not have reasonably believed that it was scrap. It was “too big of a piece,” and, by Wheat’s own admission, it was not in a scrap bin.

The record does not establish that Respondent seized on a pretext in order to discharge Wheat. Respondent has previously discharged employees for damaging company property, including employee Cox in *Avondale I*, supra. In that case, the function of the machine that Cox defaced was not affected. In the instant case, the piece of sheet metal could no longer be used to cut out the parts prescribed by the computerized sheet bearing cutting directions. Respondent’s evidence establishes that it would have taken the same action against Wheat in the absence of his union activity. I shall recommend that this allegation be dismissed.

2. Warning, suspension, and discharge of Sidney Jasmine and Warning of James “Pat” Page

a. Facts

Employee Sidney Jasmine worked for the Company for 9 years. He was alleged as a discriminatee in *Avondale I*, and the Board affirmed the finding that the Company violated Section 8(a)(3) of the Act by transferring Jasmine, a first-class communications electrician, to another crew where he was assigned the more onerous task of cable pulling. 329 NLRB at 1064. Jasmine was a union steward. On July 20, a local newspaper printed a picture of Jasmine participating in a prounion demonstration and carrying a cutout figure of Al Bossier, who at that time was the Company’s chief executive officer. On that same day, Jasmine went to Washington, D.C., where he lobbied on behalf of the Union for a week.

Employee James (Pat) Page also supported the Union and regularly wore T-shirts reflecting his prounion sympathies.

On November 16, Electrical Supervisor Johnny Campbell, assigned employees Jasmine and Page to pull cable on the starboard side of a ship in cargo hold 4. This assignment is not alleged as a violation of the Act. In preparation for pulling the cable, Jasmine began laying out the cable, “figure eighting the cable,” while Page checked the route. The route appeared to be longer than the cable, so Page went to the office to check the routing. He returned with the drawings. After reviewing the drawings, he and Jasmine concluded that the route was not properly prepared. Jasmine described the problem as an absence of collars through which the cable would be run and “T-bars” to which it would be attached. Page returned to the office to inform Supervisor Campbell of the problem, and Jasmine began searching for ladders. Page found Campbell and informed him that he and Jasmine had two problems, no ladders were immediately available and there were problems with the layout route on the starboard side. Campbell, when testifying, confirmed that “[s]tuds were missing on the starboard side.” Campbell directed Page and Jasmine to work on the port side of the ship. They did so, using a scaffold.

When two employees use a scaffold, only one can actually work on top of it. The second employee slowly pushes it. The deck of a cargo hold has anchors to which cargo is secured. Page explained that, because of the deck anchors, “you have to be real careful how you move it [the scaffold].” When being pushed with a person on top, there can be only a “minor amount of movement.” When the scaffold needs to be repositioned, the person on top has to come down. Page was pulling the cable and Jasmine was pushing the scaffold.

Notwithstanding the change in their job assignment to the port side and the presence of a pipe insulator who did not move completely out of their way until about 3 p.m., Jasmine and Page completed much of the work on the port side when the workday ended at 3:30 p.m. Respondent’s records reflect that they achieved 84 percent of the goal of running 50 feet of cable per person per hour. Because the delays they had encountered, Jasmine and Page had been unable to complete the port side. Thus, contrary to Campbell’s testimony, they did not begin work on the starboard side at the beginning of the shift on November 17.

On the morning of November 17 Page informed Campbell that he and Jasmine still had a problem with the layout on the starboard side. Jasmine and Page completed their work on the port side. About 10 a.m. Campbell came down and inspected the starboard side. He agreed that the area was not properly prepared, but directed the manner in which he wanted the employees to run the cable, stating, "It's not up there yet. I'll get the layout people to put it up. Just go ahead and run it this way."

Campbell testified that he inspected the problems on the starboard side on November 16 and brought them to the attention of the layout man. He acknowledges that he told Page to run the cable, "the studs would be added later." Although he testified that he did this on November 16, I credit Page and Jasmine that this occurred about 10 a.m. on November 17 after they had completed the port side.

On the starboard side, Page and Jasmine had difficulty moving the scaffold due to hose lines, power lines, and motor operated dampers around which they had to maneuver. As they were pulling the cable, they discovered that some 50 to 60 feet of another cable on the starboard side had been pulled incorrectly, "so we had to pull it back as we pulled our cable to do it all correct." Jasmine was pushing the scaffold. Page pulled 395 feet of new cable. They reached the vicinity of a stairwell. At that point there were four cables that needed to be run to the stairwell. Page testified, "We left the cables all ready so we could move them into the stairwell the next morning. . . . [It] was the four cables, the two for the port and two for the starboard, and it was approximately 30 to 40 feet each." Jasmine recalls that they "pulled the cable to the wall as far as we could . . . Johnny [Campbell] didn't come back down until the next day to give us instructions. . . . [W]e did what we could until we got more instructions from Johnny Campbell." Campbell never asserted that the work on the port side was deficient. He did not contradict Page's testimony that the cables on the port side had been pulled to the same position relative to the stairwell as the cables on the starboard side.

On November 18 Page advised Campbell that he and Jasmine had the small amount of cable left to pull into the stairwell. Campbell said, "Don't worry about running them in the stairwell and coiling them up. I want you to go back to the [next] cargo Hold [Hold 5] . . . and get cables for it." He told Page that he wanted Jasmine and him to work separately due to obstructions in the cargo hold in which they were being assigned to work. Campbell then changed the assignment to hold 6 because of the obstructions in hold 5. He repeated to Page that he wanted the employees to work separately on ladders in order to get more footage. He then commented, "I think Sidney's laying on your leg." Page asked, "What do you mean?" Campbell replied, "Well, I don't think he's pulling his share of the job." Page responded, "Why didn't you tell us this up to now? Why are you bringing this up now?" Campbell replied, "Because you didn't finish what you had." Page explained, "Well, we did run into problems down there." Campbell repeated that he wanted them to work separately. They did so. Shortly after this, Campbell came and asked Jasmine to come with him. Nothing was said to Page.

On November 17, Campbell testified that he watched Jasmine, who he says was talking with other employees, for 5 minutes, "to see how long Sidney was going to stay down there without doing any work." He asked Jasmine what he was doing, and Jasmine explained that he was waiting for Page to tie the cable. On receiving this explanation, Campbell did not respond. Campbell confirmed that both employees could not be on the scaffold. Campbell testified that he observed Campbell and Page a couple of other times. Although claiming that he again observed Jasmine talking, he said nothing to him. Campbell asserts that he saw that there was not enough work done, that the cables should have been run "out to the stair tower." Despite this, he had no discussion with the employees either during the day or at the end of the day. He did not deny telling Page on the following morning that they need not worry about running the cable into the stairwell.

Electrical Superintendent Robert "Bob" Terry testified that he had concerns regarding Jasmine prior to November. He testified that, following a final warning issued to Jasmine on April 27 for wasting time, he counseled him on May 7. For that meeting, Terry had a productivity report created that reflected Jasmine's daily productivity since February 25. Terry has directed that such a report be created on only two occasions: for the May 7 meeting and for the meeting with Jasmine on November 18. On May 7, when reviewing the report with Jasmine, Terry observed that Jasmine had a pocket computer and that, when a specific day was mentioned Jasmine "read to me his notes on why his productivity was below acceptable standards. He named several things like he needed a stepladder and he couldn't find one conveniently. He had to put on hardware on the stud layout to be able to support his cables. That he didn't have sufficient time to review and study his drawings before he actually went and did the work." On receiving these responses, Terry acknowledged that he "could recognize and give him the benefit of the doubt, even though I thought it was a little far-fetched some of the things, the reasons he was giving me that prevented him from accomplishing his normal work."

The Company's work effort analysis sheet for November 17 reflects that Jasmine and Page pulled 395 feet of cable. Because they were working together, each was credited with half of this total, and each received an efficiency rating of 49 percent. On November 18, Electrical General Foreman Henry McGoe, called Terry and advised that Jasmine's performance had been below acceptable standards the previous day and that he had directed Campbell to prepare a warning. Terry testified that he knew he had to interview Jasmine at that time because he had a final warning. The warning prepared by Campbell states: "Inefficiency, Failure to complete job assigned. Completed 49 percent of task given." Terry testified that, when he met with him, Jasmine started "giving me some excuses." He asserted that Jasmine did not give him a "single concrete reason" for his low productivity. Jasmine, Terry, McGoe, Campbell, and Gayle D. Gregoria, Terry's secretary, were present at this meeting. Contrary to Terry's testimony, a summary of the meeting prepared by Gregoria and signed by Terry reflects that, when questioned about his low productivity, Jasmine replied that he was working with another employee and that he and his coworker had asked Campbell "to come to their work area to

show him the trouble that they were having” and that when Campbell did not show up, they went to work on another cable. Campbell is not reported as saying anything. He was not questioned regarding the layout problems that Page brought to his attention, his direction on November 16 that the employees work on the port side, or his ultimate direction on November 17 that they proceed to run the cable without the studs being in place. Jasmine stated that he “was being singled out.” Terry handed Jasmine the warning. Jasmine refused to sign it. He was suspended and, on November 24, terminated.

I do not credit the testimony of Campbell that, before this meeting, he asked McGoey to come look at the amount of work that had been done. There was no reference to any inspection at the meeting, only the purported efficiency rating of 49 percent as reported on the work effort analysis sheet. Terry did not mention any inspection. If the purported inspection had occurred, McGoey would have learned at that time that two employees were working together. Neither McGoey nor Terry knew that Jasmine was working with Page. Jasmine told them this. When McGoey directed Campbell to prepare the warning to Jasmine, he did not direct that he prepare any discipline regarding Page. It was at or after the meeting with Jasmine in Terry’s office, where Jasmine explained that he had been working with another employee, that McGoey “told me [Campbell] to warn Page.” Campbell protested that Page had been working. McGoey told him that he could not give one without the other “because [they were] working together.”

The absence of an earlier inspection is further established by the credible testimony of Page who explained that, some 2 hours after Campbell had left with Jasmine, Campbell returned and asked him to wait for McGoey. Thereafter, Campbell and McGoey requested that Page show them the work that he and Jasmine had performed the previous 2 days. They went to cargo hold 4 where Page pointed out what they had done, noting that they had used a scaffold and encountered problems with insulators in their way and layout problems. At this point, McGoey informed Page that he was going to “get a citation because I hadn’t done enough that day.” He informed Page that Jasmine was being suspended. Page asked why no one had told them that their work was deficient when they were working and whether McGoey had “taken into consideration the delay factors, the fact of the scaffold, the fact of the insulators, the layout problems.” McGoey responded that they had. Contrary to this response, there is no evidence that McGoey was ever advised about the layout problems and that, ultimately, Campbell had told the employees to run the cable without the studs being in place. McGoey assured Page that he need not worry about the citation, “It doesn’t mean anything.” The warning states: “Failure to complete job assigned. Completed 49% of task.”

After the warning was issued to Page, McGoey had Campbell actually measure the cables that had been pulled on the starboard side, even though every cable has the length on it. Campbell confirmed that this was the only occasion that he had ever actually measured the cable with a tape measure, and “it was McGoey’s idea.” There is no evidence that the cable pulled on the port side before 10 a.m. on November 17 or that the 50 to 60 feet of cable that had been improperly installed and was repulled by Jasmine and Page was measured. Terry re-

quested that photographs be taken of the cable upon which Jasmine and Page had been working in anticipation of an “unfair labor practice complaint.” Campbell’s testimony establishes that the single picture received into evidence does not reflect all of the cable that was pulled. Terry admitted that this was the “only time in the last 5 years” that he had photographs taken.

After Jasmine was terminated, employee Thomas Gainey spoke with Electrical Supervisor Mark Pouche. Pouche and Gainey are both Caucasian. Campbell and Jasmine are both African-American. Pouche told Gainey, “We all know the reason why Sidney [Jasmine] was transferred to Johnny Campbell, and we all know the reason why you was transferred to me, is because . . . it was white on white and black on black, and that Avondale would be in the right this time. . . . You know the reason why they transferred . . . Sidney Jasmine to Johnny Campbell, to be fired.” I do not credit Pouche’s denial of Gainey’s credible testimony regarding this candid admission that Pouche made to him.

Electrical Supervisor Pouche was questioned by counsel for the General Counsel regarding assigned quotas. Pouche denied that quotas were mandatory, testifying that, “you have to try and obtain, or make a certain amount . . . that’s a goal for you to . . . try to make this goal. But there’s no set quota, that you have to make a quota every day. No. . . . You work towards the goals. You don’t have to make the goal.” The examination of Pouche continued:

MS. STEIN: It’s my understanding that in the electrical department, if you don’t make your goal in a particular day, you can get a citation for not making your goal; or suspended or terminated?

MR. POUCHE: For not making your goal in a day?

Q. Uh-huh.

A. That’s not so. Not to my knowledge.

Q. What happens if you don’t make your goal for a few days?

A. It’s noted on a report that we do. I mean, there’s a task sheet that’s filled out.

Q. But you’re not going to be suspended or terminated?

A. No, ma’am.

Q. Okay.

A. Not to my knowledge.

Respondent presented documentary evidence of warnings issued to electricians for wasting time and evidence that two employees had been terminated for intentional negligence, citing their failure to meet production quotas. Those quotas did not relate to pulling cable. Employee Samuel Humbles, who was assigned to perform transit packing, was terminated in July 1998 for intentional negligence after performing at 50 percent or less efficiency on 5 separate days in a 15 day period, then performing at zero percent on the next 3 days, and a week later packing one transit in a 5 hour period, an efficiency rating of 33 percent. Employee Garrick Slack was terminated in July 1997 after performing at less than 70 percent efficiency on 8 days in a 2-week period and then, on July 18 and 21, 1997, performing at 57 percent and 33 percent respectively.

b. Analysis and concluding findings

There is no dispute regarding Jasmine's union activity, Respondent's knowledge of that activity, and its specific animus towards him as established by his prior unlawful transfer. Page was also a known supporter of the Union who regularly wore pro-union T-shirts. The termination of Jasmine and warning of Page constitute adverse actions affecting their hire and tenure of employment. The General Counsel has established a prima facie case.

Although the warnings issued to Campbell and Page assert that they completed only "49% of task," the evidence reveals otherwise. The 49-percent figure is based on the amount of new cable Respondent measured as being pulled on the starboard side over 8 hours. Campbell testified that the task had not been completed on the starboard side because the two cables had not been run "out to the stair tower." He did not contradict Page's testimony that this involved pulling 30 to 40 additional feet. Accepting the higher 40 foot figure, the employees should have pulled 80 more feet than the 395 feet reflected by Respondent's records. Insofar as the employees pulled 395 of a total of 475 feet, they completed 83 percent, not 49 percent of their assigned task.

Even when the work performed by Campbell and Page is evaluated on the basis of Respondent's quota, rather than their assigned task, it was not deficient. Respondent's brief argues that Page admitted pulling only 400 feet of cable, ignoring his mention of "the cable we had to pull back." Respondent's 395 foot figure does not include the 50 to 60 feet of cable on the starboard side that had been incorrectly installed and that was repulled by Jasmine and Page or the cable they pulled when completing the port side. Jasmine and Page worked on the starboard side not for 8, but for a maximum of 5-1/2 hours, from 10 a.m. until 3:30 p.m. If each was expected to pull 50 feet an hour, the goal would be 550 feet. When the 50 to 60 feet that they repulled is added to the 395 feet that Respondent acknowledged was pulled, the total is 445 or 455 feet yielding an efficiency rate of 80.9 or 82.7 percent, which exceeds Respondent's 80-percent acceptability standard.

Campbell did not testify that the work on the port side was incomplete, but the cables on that side had been pulled to the same point as the cables on the starboard side. Page credibly testified that all four cables, two on the port side and two on the starboard side, had been pulled to within 30 to 40 feet of the stairwell. Jasmine recalls that they "pulled the cable to the wall as far as we could." Page testified, "We left the cables all ready so we could move them into the stairwell the next morning." On the morning of November 18, Campbell informed Page that they need not pull the cables into the stairwell in cargo hold 4 and contemporaneously assigned them to another hold. There is no evidence that Campbell was contemplating discipline of the employees at that time. It was not until McGoey directed Campbell to write up Jasmine that disciplinary action was mentioned.

Even assuming that Jasmine and Page performed only 49 percent of their quota, the testimony of Electrical Supervisor Pouche, reveals that employees are not disciplined for failing to make their quota. Although the percentage of the quotas completed by employees is cited on various disciplinary actions

introduced by Respondent, each employee cited had multiple deficiencies within a 4-week period. There is no instance in which the basis for discipline was an employee's failure to meet the quota on a single day.

Respondent also introduced numerous warnings issued to employees for wasting time. The warning issued to Jasmine on April 27 was for wasting time. Although Campbell asserts that he observed Jasmine talking instead of working on November 17, he did not warn him for wasting time. Campbell's testimony confirms that the reason no warning was given was because, when he confronted Jasmine, Jasmine credibly explained that he was waiting for Page to finish tying up the cable before moving the scaffold. He was not wasting time.

The evidence establishes that, on November 18, General Foreman McGoey observed the reported efficiency figure of 49 percent next to Jasmine's name on the work effort analysis sheet and, without any investigation whatsoever, directed that this outspoken union proponent be disciplined. It was not until the meeting with Terry that McGoey became aware that Jasmine had been working with another employee. McGoey was unaware of the specific work that had been performed by Jasmine and Page at the point that he directed that Jasmine be disciplined. Page credibly testified that Campbell removed Jasmine from the job and did not return for about 2 hours. After Campbell returned, he had Page show McGoey and him the work that he and Jasmine had performed on the previous 2 days. Respondent conducted no investigation regarding the difficulties the employees had encountered. There is no evidence that Campbell was asked about, or that he informed McGoey of, the delay caused by the absence of a proper layout on the starboard side and that he had directed that the employees install the cable despite the absence of studs. The reason there was no discussion with Campbell was admitted to Gainey by Pouche, "[T]hey transferred . . . Sidney Jasmine to Johnny Campbell, to be fired."

Respondent has not rebutted the prima facie case of the General Counsel. The record establishes that McGoey seized on the reported efficiency figure next to Jasmine's name, a figure computed on the basis of an 8-hour day, and, without any investigation, directed that he be disciplined. The pretextual nature of this action is established by the evidence that McGoey was unaware that Jasmine had been working with Page. The evidence establishes that the union activity of Jasmine was the motivating factor for Respondent's action. *Manno Electric*, 321 NLRB 278 (1996). This conclusion is confirmed by Respondent's belated warning to Page in an attempt to make the discipline appear evenhanded. The hypocritical nature of Respondent's action is highlighted by McGoey's statement to Page that he need not worry about the warning he was being given because "[i]t doesn't mean anything." The warning of Page was a transparent attempt to hide Respondent's true motive behind the discipline of Jasmine. *Fast Food Merchandisers*, 291 NLRB 897, 898 at fn. 7 (1988). Respondent, by warning, suspending, and discharging Jasmine in retaliation for his union activity and by warning Page in an effort to mask its true motive with regard to the discipline of Jasmine, violated Section 8(a)(3) of the Act.

3. Warnings, suspension, and discharge of Carolyn Ratcliff

a. Facts

Carolyn Ratcliff worked for the Company as a shipfitter from September 1990 until July 1994. She was rehired in November 1994 and assigned to the CDC department building scaffolding. Although it is unclear when Ratcliff began openly supporting the Union, she acknowledged doing so before she was terminated in 1994. She continued to support the Union after being rehired, and it is undisputed that she wore prounion insignia, including a red steward T-shirt, in 1998. She wore prounion stickers on her hard hat. I find it incredible that Superintendent Cortez, who testified that he was unaware of Ratcliff's union sympathies, was oblivious to her display of union insignia. Foreman Roy Toledano made no such denial.

In September, at the beginning of a shift, Ratcliff recalls being present at the gang box with employees Donnell Tucker, Clarence Doyle, Robert Williams, and two other employees, all of whom were wearing red steward shirts. She recalls Foreman Toledano stating that it "looks like they have a fire down there," to which she replied, "[Y]ou can't put it out." Tucker corroborated the foregoing statements by Toledano and Ratcliff. Toledano did not deny the foregoing comments.

Foreman Toledano has numerous tattoos on his body, including a swastika on his forearm that is covered when he wears long-sleeved shirts, a cross on his hand, and a star under his right eye. Counsel for the General Counsel represented that, although Ratcliff had observed the swastika, she did not know what it was. On September 10, the day that Ratcliff, Tucker, Doyle, Veals, and Brumfield left work because of the rain, Ratcliff and the other employees had, at lunch, gone underneath the ship. She testified that Toledano spoke with them, stating that the tattoos of the cross on his hand and the five pointed star near his eye, "meant that he was a Klansman," referring to the Ku Klux Klan. The tattoo on Toledano's hand is of the familiar Latin cross, with the lower limb being the longest. It is not the "blood drop" cross or cross within a circle, both of which have limbs of equal length and are acknowledged to be Klan symbols on its website, www.KKK.com. The General Counsel presented no evidence, and I am aware of no evidence, that a five pointed star is a symbol of the Klan.

Toledano, a Caucasian, denies having any conversation with any employee regarding his tattoos. Ratcliff is an African-American. Tucker, who is also African-American, was the only employee who testified and who was identified by Ratcliff as being present when Toledano made the alleged comment. He was not asked about this alleged comment. I am satisfied that, if Toledano had made the Klansman comment in the presence of numerous employees, at least one of them would have corroborated the comment. The only other testimony relating to racist comments by Toledano came from Bobby Williams who asserted that, on one occasion, Toledano called him a "boy." He acknowledged that Toledano denied doing so. Williams also claims that, on another occasion, Toledano stated to him that the star under his eye represented "white power" and that he used to be a "skinhead." The Ku Klux Klan was not mentioned. Bobby Williams thought that employee Robert E. Williams Jr., was present when this allegedly occurred. Robert

Williams testified, but he was not asked about these alleged statements by Toledano. Tucker testified that he never heard Toledano make any racist comment. General Foreman George "Junior" Kinchen, who is an African-American, testified that he was unaware of any complaints from employees regarding Toledano being racist and that Toledano had never said anything racist to him. In view of the foregoing, and in the absence of any corroboration regarding the comments attributed to Toledano by Ratcliff and Williams, I credit Toledano's testimony that he did not discuss his tattoos with employees.

Bobby Williams testified to an occasion on which Ratcliff asked everyone in the crew if they thought Toledano was harassing her and that everyone raised their hand. Ratcliff was not asked about this incident. Toledano testified that he recalled it and that two or three employees raised their hands.

Ratcliff testified that she complained about alleged harassment by Toledano to human relations on four or five occasions prior to October, reporting that Toledano was "humiliating me and harassing me." Her first two complaints occurred prior to her receiving two warnings in September, neither of which is alleged in the complaint. No evidence was introduced establishing the dates of her complaints or the manner in which Ratcliff claimed that Toledano was allegedly harassing her. She did not testify that she complained that her alleged mistreatment was related to her union activity. Ratcliff testified that, after her first contact with human resources, "every time" she would go to the restroom, Toledano "would follow me and time me." I have no doubt that, if Toledano had engaged in such obvious conduct over a period of 4 months, other employees would have observed his actions. No employee corroborated such action by Toledano and he credibly denied such conduct.

On October 7, Ratcliff received a warning for an incident that occurred on October 6. On October 6, Ratcliff had been directed to erect a scaffold some 80 feet above the deck. She was working with employee Charles Veals. Ratcliff testified that she had to carry the boards to the scaffold. She advised Toledano that she couldn't "get all the material at one time." Toledano called Cortez who, according to Ratcliff, informed her that, if she did not "do the damn job," he was going "to fire my ass." Cortez told Toledano to issue a citation to Ratcliff, stating, "I don't give a damn what it is; just give her a citation." Ratcliff began to cry and went to human relations to "report that I had been harassed by my foreman again." Ratcliff testified that Veals witnessed this exchange involving Toledano and Cortez. Veals did not testify. The warning resulted in Ratcliff being placed on probation for having received three citations in a 2-month period. Her placement on probation is not alleged as a violation of the Act. Ratcliff testified that she did not sign the document placing her on probation, but her signature is on it.

The warning of October 7, which Ratcliff was shown when she testified, cites her for the improper installation of handrails. Nothing is mentioned regarding any controversy regarding carrying boards. Ratcliff wrote on the warning, "I did not fail to install handrail correctly;" however, in her testimony, Ratcliff did not even mention handrails.

Handrails on scaffolds should be at 21 inches and 42 inches above the boards on which employees stand. Toledano states that Ratcliff installed the bottom rail too low and the top rail too high. "So that made a hole, . . . [i]f somebody would have got on that scaffold, not paying attention, they could fall through the hole. . . . So I gave her a citation." Cortez had no independent recollection of this warning.

Lifelines are cables to which craft employees performing work attach their safety clips. There are four components to a lifeline. The first is a small square piece of metal (a "pad") with a protruding edge on one side containing a hole (an "eye") through which the lifeline cable is threaded. This square piece of metal is called a "pad-eye," a "clip," or a "lug." The pad-eyes are welded onto the ship about 10 feet apart. The protruding edge containing the "eye" should be horizontal since if it were vertical it could bend outward. The second component is the lifeline, a cable that is threaded through the "eye." After the end of the cable is threaded through the eye, it is secured with the third component of a lifeline, a cable clamp. A cable clamp is a double "U" shaped metal clamp with bolts that are tightened to clamp the end of the cable to the main cable. To properly secure the end of the cable, two of these cable clamps should be used. The fourth component of a lifeline is a turnbuckle. The cable is threaded through the end of the turnbuckle and secured with cable clamps. After the cable is installed, the turnbuckles are tightened to remove any slack in the lifeline.

On December 8 Ratcliff was assigned to attach a lifeline to the bulkhead of a ship. Ratcliff was assisted by a helper, employee Robert E. Williams Jr. Williams recalls that they were observed by Foreman Toledano who was shouting at Ratcliff, saying, "That's wrong. You know how the lifelines go. It don't go like that." Ratcliff replied that "she was going by the way Junior [Kinchen] told us to put it up." Toledano directed her to take it down and do it again. Williams testified that Ratcliff did so, putting two turnbuckles on the lifeline. Ratcliff did not testify to reinstalling the line, and she testified that, as she was working, she was observed by General Foreman Kinchen, not by Foreman Toledano.

Ratcliff acknowledges that she used only one, not two, cable clamps when securing the cable ends. Ratcliff explained that she only used only one clamp "[b]ecause they didn't have any more clamps in the gang box, and I asked Mr. Kinchen, was it okay to put one up, and he said, yes." Although Kinchen denied ever advising Ratcliff that she could use only one cable clamp, he admitted that, at the unemployment hearing involving Ratcliff, he had testified that he did tell Ratcliff to put up just one clamp because there were not enough clamps to go around. I credit Ratcliff on this point and find that Kinchen told her she could use only one cable clamp.

At some point, Williams was placed on another job. Ratcliff finished the lifeline. Sometime after this, Toledano directed Williams to "get Ms. Carolyn [Ratcliff] . . . to come help us put some boards up." Williams did as he was directed and found Ratcliff working on "the scaffold next over from the lifeline." Ratcliff confirms that when Williams came for her she had completed the lifeline. I note that the decision regarding Ratcliff's unemployment claim reports that she claimed that she

did not complete the lifeline because she was assigned another task.

Upon reporting to Toledano, Ratcliff recalled that he "wanted the scaffold built on the other side." Ratcliff claimed that she was not feeling well. She asked for a pass, went to first aid, went to "Public [sic] Relations to let them know I was still being humiliated and harassed," and went home. Ratcliff's testimony does not establish the basis for her complaint. At human relations, Ratcliff requested to be transferred and was advised that she could talk with Carroll Danos, vice president of production about a transfer. Thereafter, Ratcliff received a telephone call at her home stating that she could speak with Danos in the morning.

After Ratcliff left, Toledano showed the lifeline that she had installed to Cortez and Kinchen. Cortez observed that one of the clips, i.e., a pad-eye, was installed vertically instead of horizontally, one instead of two cable clamps had been used, and the line was not taut. Photographs of the lifeline taken the following day show the foregoing deficiencies. Cortez stated that he wanted to speak to Ratcliff when she reported to work the next day.

On December 9, Ratcliff reported to the office in order to speak with Danos. Cortez was called. As Cortez arrived, Danos came out and stated that he had received a telephone call and had to go to the Rock House, the main office, immediately. Ratcliff and Cortez proceeded to the ship. Cortez rode his motor bike. When Ratcliff arrived she was called to speak to Cortez. Toledano and Kinchen were present. What happened next is in significant dispute.

Ratcliff testified that Cortez "hollered" at her saying that if she "ever put up a damn lifeline like that with one missing clip" he was going to fire her. Ratcliff said, "Do not holler at me." She testified that Cortez continued to holler, saying that she could cry, go to anybody she wanted to, "get your lawyers, the union lawyers, whatever you want. . . . But I have won eleven cases." Ratcliff says that she responded to this saying, "Well, I am your twelfth case, and I'm not going to cry anymore, and I don't want you hollering in my face, and you cannot build a scaffold and Roy cannot build one either. . . . Mr. Kinchen told me to put up one clip." (Ratcliff obviously meant to say "clamp.") Ratcliff testified that she then stated that she wanted to speak to Danos "because Roy Toledano has stated that he was a Klansman, and I don't think that's fair to the employees, that he can state something like that to me." She states that Kinchen started to walk off, that Cortez called him back saying, "Did you hear what she said; she called him a Klansman." He then addressed her saying, "You can go; you can go now." She states that he followed her off the ship. Ratcliff denies cursing during this exchange.

Kinchen testified that Cortez asked Ratcliff if she knew why she was there and "she started hollering and walked off." In the course of her hollering, Kinchen says he heard her call Toledano "a Ku Klux Klan motherfucker."

Toledano testified that Cortez showed the line to Ratcliff and began to explain how it had been improperly installed. As he began doing so, Ratcliff started hollering, saying that Toledano and Kinchen did not "know what the fuck they're doing out here." She stated, "You all won so many cases in court, but

you're not going to win this one." Toledano then recalls that Ratcliff said, "Roy [Toledano] is a fucking Klansman, with that tattoo under his eye." At that point, Cortez said, "Let's leave the boat, young lady." Toledano testified that Cortez followed Ratcliff off the boat and that he began working.

Cortez testified that he began pointing out to Ratcliff the deficiencies in her installation of the lifeline, beginning with a pad-eye that was installed vertically and then mentioning her use of one, rather than two, cable clamps. According to Cortez, at this point, Ratcliff went "ballistic." She started screaming, hollering that "I didn't know how to do my fucking job. . . . That Roy Toledano did not know how to do his fucking job. . . . Junior Kinchen was the worst general foreman that she's ever seen in her life. He didn't know how to do his job." She commented that Cortez had won 11 cases in court but that she would not be his twelfth case. Cortez attempted to get Ratcliff to be quiet, telling her that he was trying to help her. Ratcliff began crying, saying that she was "not a scaffold person. She didn't want to be a scaffold person. She didn't want to work for us. We didn't know how to do our job. . . ." At this point, Cortez noticed that employees were gathering. He told them to go back to work. He returned to Ratcliff, stating again, "We're trying to help you. We're not trying to hurt you." Ratcliff screamed at Toledano, "By the way, you are a Klansman." At that point, Cortez says he stated, "[Y]ou have crossed the line. This is it. I have to suspend you." Cortez denied yelling or cursing.

Although several employees purportedly were in the area, none testified to hearing the foregoing exchange. Robert Williams, who had been Ratcliff's helper during a portion of the time that she was installing the lifeline, was coming up the gangplank. According to Williams, Ratcliff was crying and Cortez was yelling at her. A pretrial affidavit by Williams acknowledges that he "could not really hear what was being said."

The foregoing confrontation in December 1998 occurred some 18 months before the witnesses testified. Many minor discrepancies in the testimony, such as Cortez's misstatement that he had, on December 8, looked at the handrail, rather than the lifeline, that Ratcliff had installed are of no significance. There is no question that the installation of the lifeline was the issue. Toledano's claim that he called Cortez when Ratcliff arrived at the ship on the morning of December 9, whereas, Cortez actually arrived first on his motorbike, and Cortez's statement that he instructed Toledano to escort Ratcliff to the gate, whereas, Ratcliff recalls that Cortez accompanied her and Toledano confirmed that he stayed on the ship, can be attributed to failed memory. Each witness was either impeached or contradicted by probative evidence regarding some aspect of his or her testimony. Many transcript pages relate to the specific profanity that may or may not have been uttered in the exchange on the morning of December 9. Both Cortez and Kinchen testified regarding their recollection of the specific curse words used, and both were shown to have testified slightly differently at Ratcliff's unemployment hearing. Kinchen's admission at the unemployment hearing that he told Ratcliff she could use one cable clamp directly impeaches his denial at this hearing. I have little confidence in his testimony.

There is no evidence that either Cortez or Toledano was aware that Kinchen had told Ratcliff that she could use only one cable clamp. Ratcliff's recollection is suspect as established by her denial that she signed the document placing her on probation, but her signature is on it.

In determining what actually occurred in the exchange on the morning of December 9, I have taken into account the contradictions and exaggerations in the testimony of the witnesses, the logical consistencies and inconsistencies in their testimony, and their overall demeanor. The photograph of the lifeline Ratcliff installed is consistent with the testimony that one pad-eye was incorrectly installed and that the lifeline was not taut. Nevertheless, Ratcliff felt that she was being unjustly criticized when Cortez mentioned her use of one instead of two cable clamps. In view of Ratcliff's frequent complaints that she was being harassed, including the complaint that she had made on December 8 as she left work, I am satisfied that Ratcliff did not believe that Cortez was trying to help her. If, as Ratcliff testified, Cortez stated that he was going to fire her if she "ever put up a damn lifeline like that," the threat was of future discipline. Thus, there would have been no reason for Cortez to have referred to having won 11 cases. I credit the testimony of Cortez that Ratcliff made the reference to him having won 11 cases, the nature of which was not specified. I note that he testified that he was unaware of how many times he had been to court; thus, he was not keeping a tally. Ratcliff's admission that she said she was not going to cry any more just before her statement regarding Toledano confirms that she was emotionally distraught. There is no probative evidence that Toledano ever was a Klansman, ever stated to any employee that he had been a Klansman, or ever stated that his tattoos related to Klan membership. No employee corroborated Ratcliff's testimony that he made such a statement on September 10. There is no evidence that Toledano's star tattoo related to Klan membership.

I find that, on the morning of December 9, Cortez began pointing out the deficiencies in Ratcliff's installation of the lifeline, beginning with an incorrectly installed clip, i.e., a pad-eye. Cortez then referred to her use of one rather than two cable clamps. At this point Ratcliff, who unbeknownst to Cortez had been told by Kinchen that she could use one cable clamp, "went ballistic." She began screaming and, either with or without profanity, accused Cortez and Toledano of not knowing how to do their jobs and stated that Kinchen "didn't know how to do his job." Ratcliff specifically stated that neither Cortez nor Toledano could build a scaffold. She told Cortez that he had won 11 cases, but that she was not going to be his twelfth case. Ratcliff began crying. Cortez directed some employees who had begun to gather to return to work. He returned to Ratcliff stating "We're trying to help you. We're not trying to hurt you." Ratcliff screamed at Toledano, "By the way, Roy is a Klansman, with that tattoo under his eye." At that point, Cortez loudly stated, "[Y]ou have crossed the line. This is it. I have to suspend you."

Cortez wanted to get Ratcliff off the ship "before it escalated again." He asked her for her badge, but she refused to give it to him. He followed her off the ship. Ratcliff went to human relations. She did not testify what occurred at human relations.

Cortez prepared a warning for Ratcliff, and she was suspended. Although it is company policy to give employees the opportunity to sign any discipline, Ratcliff was not asked to sign the warning because “she was being an irate employee causing trouble. We had to get her out of the yard.”

Cortez prepared a summary of the incident that was signed by Toledano and Kinchen. Photographs were taken of the improperly installed lifeline. The statement regarding the incident refers to the lifeline being installed improperly; it does not specify the specific deficiencies. It does not appear that Kinchen was ever questioned regarding permitting Ratcliff to use only one cable clamp. Ratcliff was cited for insubordination, an immediate discharge offense, and she was discharged on December 14. The termination document states:

Employee is being terminated because of the following actions: (a) The employee failed to install a lifeline correctly, this action could have caused an accident. (b) Upon the superintendent trying to work with the employee to help her understand the problem, the employee became hostile and began to yell & curse. (c) During the yelling the employee made remarks toward her foreman calling him a Klansman and added remarks concerning a tattoo located on the foreman’s right cheek.

Respondent introduced numerous exhibits reflecting terminations for insubordination, including terminations that occurred after Ratcliff was terminated. I find three of Respondent’s exhibits to be probative. On November 4, 1997, several employees were observed throwing their lunch trash on the ground instead of into a trashcan. Cortez directed that they pick it up, and they began doing so. Cortez noted that they would not throw trash in their homes, and employee Sylvester Jackson disagreed, stating that he would. Cortez responded that, even so, if he did it at Avondale he would be disciplined. Jackson responded angrily, calling Cortez a “white motherfucker.” He was escorted to the gate and thereafter terminated. On February 11, employee Corrie Brown sought to punch out at a different clock in order to catch a ride home. He had not previously advised his foreman of this, and the foreman denied him permission to do so. In the ensuing argument, another foreman became involved and Brown called that foreman a slob and a drunkard. Brown was escorted to the office, suspended, and thereafter terminated. On September 9, employee Wilfred Wright was tardy. When his foreman came to check on him shortly thereafter, he discovered that Wright had not begun work. He advised Wright that he would be issued a warning for wasting time. Wright began addressing the foreman with vulgar language. Cortez was called and Wright began “bickering” with him. His badge was taken, he was taken to the gate, and, thereafter, terminated.

b. Analysis and concluding findings

Ratcliff wore prounion insignia, including stickers on her hardhat. I find that Respondent was aware of her union sympathies. In view of Respondent’s animus towards employee union activity and the adverse actions taken against Ratcliff on October 7 and in December, I find that the General Counsel has established a prima facie case. I further find that Respondent

rebutted that prima facie case and established that it would have taken the same action against Ratcliff in the absence of any union activity on her part.

Ratcliff was warned on October 7 for improperly installing a handrail. Although shown the warning which clearly specifies that she “placed the handrails wrong,” Ratcliff’s testimony related to a controversy over carrying boards. Toledano described the deficiencies in Ratcliff’s installation and his testimony is rebutted. The General Counsel introduced no evidence establishing that Respondent ignored such improper installations. Employee Robert E. Williams Jr., acknowledged that he was terminated and that one of the reasons for his termination was for building unsafe scaffolding. His termination is not alleged as discriminatory. Respondent has established that it would have taken the same action against Ratcliff regardless of her union activities. I shall recommend that this allegation be dismissed.

Respondent does not contend that Ratcliff’s prior warnings played any part in her termination. Rather, the termination was based solely on her conduct on December 9. I have found that Ratcliff did improperly install the lifeline on December 8. Although she justifiably relied on Kinchen’s permission to use only one cable clamp, the lifeline that she installed contained two other deficiencies: one of the pad-eyes was installed vertically and the cable was slack. Respondent had experienced problems with Ratcliff’s installations in the past, as reflected by the warning of October 7. Cortez began by referring to a deficiency other than the cable clamps, the vertically installed clip or pad-eye, that Ratcliff recalled as a reference to a “missing clip.” I find that Respondent’s action in attempting to bring the deficiencies in Ratcliff’s installation of the lifeline to her attention would have occurred regardless of her union activity.

The Charging Party cites Respondent’s employees’ guide, noting that immediate discharge offense number 1 states: “Insubordination. Willful disobedience of authorized instructions issued by supervision.” The Charging Party, treating the “willful disobedience” language as a definition of insubordination rather than a related offense, argues that Ratcliff did not disobey any instruction. Insubordinate is defined as “[n]ot submissive to authority.” *The American Heritage Dictionary* (4th Ed., 2000).

Ratcliff was insubordinate. She did not state that Kinchen had said she could use only one clamp. She “went ballistic” and impugned the ability of her foreman, general foreman, and superintendent to do their jobs. She then called her foreman a Klansman. Foreman Toledano, a Caucasian, supervised a number of African-American employees including, at various times, Ratcliff, Bobby Williams, Robert E. Williams Jr., and Donnell Tucker. There is no probative evidence that Ratcliff’s statement was true; indeed, the evidence is to the contrary. Ratcliff had, for several months, accused Toledano of harassing her, even taking an informal poll in this regard in his presence. Ratcliff had previously only asserted that Toledano was harassing her individually. Her unfounded assertion that Toledano was a Klansman raised an issue of racial prejudice that could potentially embroil other African-American employees in her ongoing personal dispute. Cortez was justifiably concerned about the disruption this could cause and removed Ratcliff from

the ship and from the shipyard; “We had to get her out of the yard.”

The General Counsel introduced no evidence of any incident in which statements similar to those that resulted in the terminations of employees Jackson, Brown, or Wright have been tolerated. Ratcliff’s Klansman comment was at least as, if not more, inflammatory than Jackson’s calling Cortez a “white motherfucker,” Brown’s referring to his foreman as a slob and drunkard, and Wright’s vulgarity towards his foreman followed by “bickering” with Cortez. I find that Respondent has established that it would have terminated Ratcliff for her conduct in the absence of any union activity on her part. I shall recommend that the allegations relating to the warning, suspension, and termination of Ratcliff for her conduct on December 9 be dismissed.

4. Warning and suspension of Thomas Gainey

a. Facts

Thomas Gainey was an active supporter of the Union. He was named as a steward on the union’s list of September 16, 1997, and he regularly wore pronoun T-shirts. On May 6, 1999, employee Gainey had eaten some crawfish. Having finished eating, he placed the scraps, crawfish heads and tails, in a plastic grocery bag. He acknowledges that he improperly disposed of the bag containing the scraps by throwing it into a scrap cable container. He asserts, and I credit his testimony, that his action was inadvertent and unthinking. He testified, “I dumped them in there, before I realized that the sign [CABLE SCRAP ONLY] was on there.” He notes that there was other trash in the container, because he “looked and saw that there was other trash in there.” Foreman Frank Lee observed Gainey throw the bag into the container. Lee told Gainey to retrieve the scraps, and Gainey explained that his back, which had previously been injured, was bothering him and that he was going to the doctor.

Thereafter, Gainey’s foreman Mark Pouche met with him. Gainey presented Pouche with his list of restrictions. The medical document prohibits working for extended periods in awkward positions. It does not specify that Gainey could not bend over. Pouche stated to Gainey that he was “going to climb into that dumpster and get them crawfish heads out of there.” Gainey replied, “Well, Mark, if I could, I would, but I can’t because I can’t even bend over.” He went on to state that he would “get a shovel or a vacuum cleaner” to clean out the crawfish scraps. The following morning Pouche again directed Gainey to remove the crawfish scrap, and Gainey repeated that he could not bend over. Pouche directed Gainey to see the tool room attendant to obtain a shovel or vacuum cleaner. Gainey did so, but no shovel was available and the vacuum cleaners were not working.

The scrap cable containers are between three and four feet high and about six feet wide and long. An employee would get into the container by using two ladders, climbing up one and then moving to the other to climb down into the container.

Pouche reported the situation to General Foreman Jerry Gerdes. Gerdes told Pouche to issue a warning to Gainey. He initially testified that he told Pouche that “this should be a general offense. I think it was number 16 in the rule book, creating

an unsanitary condition on company premises.” Gerdes then testified that he stated that Gainey should be cited for a “major offense.” He did not change his description of the incident as creating an unsanitary condition. General offense number 6 prohibits creating unsanitary conditions. Major offense number 16 prohibits “immoral, indecent, or unsanitary conduct on Company premises.” Pouche testified that Gerdes told him to write the warning for major offense number 16.

At 3:45 p.m., Pouch asked Gainey to accompany him to the office of Electrical Superintendent Robert “Bob” Terry. Gainey, Pouche, and Terry, as well as Gerdes, Terry’s secretary Gail Gregoira, and Frank Lee, the supervisor who saw Gainey throw the scrap into the container, were also present. Terry informed Gainey, “I’ve chosen to give you three days off without pay.” Gainey apologized for his action and stated that he did not do it intentionally. Terry responded, “You know what these tubs are used for. You know that you’ve created an unsanitary condition. You know that your fellow coworkers are going to have to clean this . . . bucket to get rid of these crawfish heads and all. And I don’t accept that. Here’s your citation. You have a right to make any comment on it that you wish and all, but this is going to require me to put you on suspension.” Gainey began to speak about misconduct by Pouche, but Terry cut him off stating that they were there to discuss crawfish heads. Terry informed Gainey that he was going to give him another chance to clean up the crawfish scraps and asked if Gainey was working the next day. Gainey stated that he had to keep his children on Saturday. Terry replied the he could do it on Monday and stated that he would have the tub put in the precut area. Gainey agreed. “[E]verybody was in concurrence that it was going to be Monday that I was going to come in and do this task.” Terry stated that he would hold the citation until “this is concluded.” The warning was not issued at that time.

After returning to the ship, Gainey was again summoned to Terry’s office. Pouche accompanied him. Terry told Gainey that, after reading the rule book further, “he would be remiss if he did not give me three days off and a citation.” Terry concurred that he changed his mind and “I had no choice other than to go ahead and issue him the citation.”

Terry testified that he changed his mind after discussing the situation with Gerdes. He claimed that Gerdes spoke to him saying that the scraps were “really going to create a much worse unsanitary condition . . . I think they need to be cleaned up now.” He testified that he thought about what Gerdes purportedly had said and, “I changed my mind.” Gerdes did not testify to mentioning a worsening condition or the need to clean up “now” rather than on Monday. He testified that he told Terry that “it was a gross violation . . . [that] would merit a three-day suspension.” I do not credit the testimony of either Terry or Gerdes. Even if Gerdes had mentioned a worsening unsanitary condition, Terry had stated that he was going to have the scrap tub moved. Terry does not claim that Gerdes made any statements regarding the seriousness of the offense, that it was “a gross violation.” Their conflicting testimony suggests that they did not want to reveal what was actually discussed and that their conversation related to Gainey’s union activity.

When Terry was questioned regarding why the warning specified the major offense of engaging in unsanitary conduct instead of the general offense of creating an unsanitary condition, Terry responded that he did not write the warning, that the warning was done by Gerdes and Pouche. When asked whether he could have rewritten the warning, Terry agreed that, as superintendent, he could have done so.

b. Analysis and concluding findings

Gainey was a known active supporter of the Union. He participated in an OSHA walk-through of the shipyard. In view of the animus established by the record and the discipline imposed on Gainey, the General Counsel has established a prima facie case.

Respondent has not rebutted the prima facie case. Respondent introduced no evidence of any employee suspended for a similar offense. Respondent's witnesses repeatedly described Gainey's offense as creating an unsanitary condition, a general offense. Gerdes directed that Pouche prepare a warning for major offense number 16, unsanitary conduct. His direction to do so, despite his testimony describing the incident as creating an unsanitary condition, confirms that he sought to have the most severe discipline possible imposed on union proponent Gainey. Terry, after discussing the situation with Gainey, committed himself to an agreement not to impose the discipline if Gainey cleaned up the crawfish scrap on Monday. Gerdes, who had directed Pouche to write the warning for a major offense, then spoke with Terry. Terry testified that he was convinced to renege on his commitment to Gainey based on comments by Gerdes. Gerdes testified that those comments related to the purported seriousness of the offense, but Terry was aware of all of the circumstances surrounding the offense when he made the commitment to hold the discipline in abeyance. Terry's testimony that he decided to impose the discipline because of comments by Gerdes regarding the worsening unsanitary condition by Monday is not corroborated by Gerdes and is inconsistent with his stated intention to move the scrap container.

Terry acknowledged that, as superintendent, he had the authority to alter the proposed discipline. Indeed, he had done so by agreeing to impose no discipline if Gainey, who was under a medical restriction, cleaned up the crawfish on Monday. Terry purportedly changed his mind because of a statement by Gerdes regarding the worsening unsanitary condition, a statement to which Gerdes did not testify. I have not credited either account of their conversation. The severity of the discipline imposed on Gainey after Terry had committed to impose no discipline convinces me that the real reason he reneged on his prior commitment was Gainey's union activity. Respondent has not established that Gainey would have been disciplined in the absence of union activity. I find that the motivating factor in Respondent's decision was Gainey's union activity. Respondent, by suspending Gainey for engaging in indecent, immoral, or unsanitary conduct, violated Section 8(a)(3) of the Act.

5. Warning of Archie Triggs Sr.

a. Facts

On November 2, 1999, following the purchase of Avondale by Litton Ship Systems, the Company and the Union entered into a "Neutrality Agreement." Pursuant to the agreement, the Company agreed, inter alia, to recognize the Union as the collective-bargaining representative of its employees on the basis of a card check. A letter dated November 1, 1999, was mailed to all employees advising them of the agreement and the right of the Union to engage in organizational activities. In the third paragraph it states: "During work time (for example, other than lunch time or other non-working time) . . . employees are not to engage in activities related to union representation . . ." The Union explained the provisions of the agreement to pronoun-employees who would be engaged in solicitation, including Archie Triggs. Triggs, an expediter in the steel department, understood that the Union had "approval to get these petitions signed by the workers or the employees, as long as you don't engage in stopping employees from working, so it was supposed to be before work, lunchtime and after work."

On November 4, 1999, employee Oscar Martinez, who is also an expediter, testified that Triggs was walking around getting signatures for the petition, that he got signatures from the employees with whom Martinez worked and then came to him, "asking me about signing up." Martinez says he replied, "I'll have to think about it." Martinez further testified that later, as he was leaving work, he observed Triggs raise his arms, "like what [am I] going to do." Martinez does not claim to have heard any statement when he observed this gesture.

Although Martinez claims that the improper solicitation by Triggs occurred at 8 p.m. during working time on the second shift, he did not make any report to Foreman Bruce Williams at the time. Rather, he waited until after lunch the following day and called General Foreman Dennis Zeringue. Martinez testified that he did not report Triggs to Williams because Triggs and Williams are good friends, and "they wouldn't have done nothing." Notwithstanding this assertion, Martinez admitted that Triggs did not receive special treatment, "[I]t's not special treatment. I wouldn't say that. . . . [I]t just seems like he [Williams] don't bother . . . about what he [Triggs] does." He cited no example of improper conduct by Triggs that Williams had ignored.

Zeringue received a telephone call from Martinez at about 1 p.m. on November 5. Martinez reported, "I'm being harassed by Archie. He wants me to sign a union card, and I told him I'm not interested but he doesn't accept that answer. Every time he sees me he hollers at me, 'Come on, we need you on the team.' I told him I don't want to get on it and he doesn't want to leave me alone." Zeringue questioned Martinez as to whether this occurred during working hours, and Martinez replied, "Yes, he's doing it with everyone." Steel Control Superintendent Ursin Roux was not available on November 5, so Zeringue reported his conversation with Martinez to Vice President of Production Mike Simpson.

On the evening of November 5, 1999, Day Foreman Floyd Fontenot presented Martinez with a statement that Fontenot had written in the first person stating that Martinez "has brought it

to my attention that Archie Triggs . . . has been passing a union petition during working hours. Triggs is also harassing Oscar [Martinez] about signing the petition.” The statement is signed by both Fontenot and Martinez.

On November 8, 1999, Superintendent Roux received the foregoing statement from Vice President of Production Simpson who gave it to him “with directions to issue a warning to Triggs.” Roux spoke with Fontenot, Zeringue, and Martinez. Roux recalled that Fontenot and Zeringue told him that Martinez reported that Triggs was passing a petition and had asked him to sign it during working time. Roux did not elicit exactly what Martinez had stated to them. Roux then called Martinez who told Roux that Triggs “was trying to get him to sign the petition during working hours and he did not appreciate it, that he even followed him to his car when he knocked off work.” Roux did not speak with Triggs.

On November 8, 1999, Foreman Williams asked Triggs to come to the office of Superintendent Roux. Triggs, Williams, Zeringue, and Roux were present. Roux presented Triggs with a final warning that stated:

Interfering with fellow employee in the performance [of] their duties on Company premises, engaging in oral solicitation of another employee during work time, engaging in the distribution and handing out [of] written material to another employee not related to the accomplishment of work during work time.

Triggs read the warning and stated that he was not signing it, that “it was a bunch of bull.” Roux stated, “Well, I don’t know what’s going on, but I’m just trying to do my job. . . . [J]ust put on there why you refuse to sign it.” Triggs replied that he was not putting anything on the warning and that he did not care what Roux did with it. Triggs’ foreman, Williams, commented, “That’s bullshit; that man didn’t do that.” Roux directed Williams to sign the warning as a witness, and he did so. The name of the employee who Triggs had purportedly solicited on company time was not revealed.

I do not credit Martinez who, so far as this record shows, stated three different versions of his purported encounters with Triggs. At the hearing he testified that Triggs asked him “about signing up” and that he responded that he would have “to think about it.” As he was leaving work, Martinez observed Triggs raise his arms in a gesture of futility, as if he were saying, “what [am I] going to do.” Despite this alleged single oral solicitation that Martinez purportedly was going to think about, he told Zeringue that he had told Triggs that he was “not interested” but that “every time” Triggs saw him he hollered, “Come on, we need you on the team.” When speaking with Roux, Martinez further embellished his report. He reported that Triggs “was trying to get him to sign the petition during working hours” and that Triggs “followed him to his car when he knocked off work.”

Triggs did not recall whether he had solicited Martinez to sign the petition. He credibly denied engaging in solicitation at any time other than before and after work and on breaks. Williams, the foreman on duty when the solicitation purportedly occurred, was present when the warning was issued. At that moment, Triggs credibly testified that Williams stated, “[T]hat

man didn’t do that.” Respondent did not call Williams as a witness. The statement by Williams was made in his capacity as a foreman. It is not hearsay, and constitutes an admission under Rule 801(d)(2) of the Federal Rules of Evidence. Respondent’s brief does not mention Foreman Williams.

b. Analysis and concluding findings

Employees who engage in union activities are not immune from nondiscriminatory discipline when they violate lawful plant rules unrelated to employee Section 7 rights. Respondent’s reliance on the report it received from Martinez might well prove persuasive in circumstances involving misconduct disassociated from protected activities, but solicitation on behalf of a labor organization is an activity protected by Section 7 of the Act. When an employee is disciplined for an alleged violation of a lawful rule while engaging in activity protected by Section 7 of the Act, the employer is not privileged to act on a reasonable belief if, in fact, the employee is innocent of any wrongdoing. *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 319 (1990). See also *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). The Board, in *Keco Industries*, 306 NLRB 15, 17 (1992), repeated longstanding precedent that, “[w]here an employee is disciplined for having engaged in misconduct in the course of union activity, the employer’s honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur.” The burden of proof is on the General Counsel to show that the employer’s honest belief was mistaken, that the alleged misconduct did not in fact occur.

Roux did not question Fontenot or Zeringue regarding exactly how Martinez claimed he had been solicited and harassed by Triggs. Roux did not speak with Triggs. There is no evidence that he spoke to Williams. At the moment the warning was issued, Williams stated that Triggs did not engage in the conduct cited by the warning. Triggs credibly denied engaging in solicitation at any time other than before and after work and on breaks. Even if I were to assume that it was reasonable for Roux to rely on the word of Martinez, the General Counsel has established that the alleged solicitation during working time did not occur. Respondent issued Triggs a final written warning for an offense that he did not commit. In so doing, Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By restricting employees from attending a public event because of their union activities and by coercively interrogating an employee concerning the union activities of his fellow employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By warning, suspending, and discharging employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent, having discriminatorily warned and suspended employees, it must rescind the warnings and suspensions and make the employees whole for any loss of earnings and other benefits as a result of the suspensions, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged Sidney Jasmine, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

The General Counsel has requested that I recommend special remedies, specifically the same remedies as were prescribed in *Avondale I*. Respondent has recognized the Union, thus, I find no need for an order relating to access. Insofar as the Board issued a broad order in *Avondale I*, a second such order would be superfluous. The only violation that I have found that occurred after the Respondent and the Union entered into the agreement on neutrality is the warning to Archieve Triggs. In these circumstances, I shall recommend the traditional remedies noted above and the posting of an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Avondale Industries, Inc., Avondale, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restricting employees from attending a public event because of their union activities.

(b) Coercively interrogating employees concerning the union activities of their fellow employees.

(c) Warning, suspending, discharging, or otherwise discriminating against any employee for supporting New Orleans Metal Trades Council, AFL-CIO, or any other union.

(d) 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, rescind and remove from their files the unlawful discipline issued to Sidney Jasmine, James Page, Thomas Gainey, and Archieve Triggs.

(b) Within 14 days from the date of this Order, offer Sidney Jasmine full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Sidney Jasmine and Thomas Gainey whole for any loss of earnings and other benefits suffered as a result of the

discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Sidney Jasmine, James Page, Thomas Gainey, and Archieve Triggs and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(e) 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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Avondale, Louisiana, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt 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 November 15, 1997.

(g) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

⁵ 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.

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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you for supporting New Orleans Metal Trades Council, AFL–CIO, or any other union.

WE WILL NOT restrict any of you from attending a public event because of your union activities.

WE WILL NOT question any of you about the union activities of your fellow employees.

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

WE WILL, within 14 days from the date of the Board's Order, rescind and remove from their files the unlawful discipline issued to Sidney Jasmine, James Page, Thomas Gainey, and Archieve Triggs.

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

WE WILL make Sidney Jasmine and Thomas Gainey whole for any loss of earnings and other benefits resulting from our discrimination against them, 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 discipline of Sidney Jasmine, James Page, Thomas Gainey, and Archieve Triggs and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

AVONDALE INDUSTRIES, INC.