

Bolivar Tee's Manufacturing Company and Sheet Metal Workers' International Association Local Union #146, affiliated with Sheet Metal Workers' International Association, AFL-CIO. Cases 17-CA-19569 and 17-CA-19632

August 17, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN AND WALSH

On September 24, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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 as modified.

1. The judge found that the Respondent violated Section 8(a)(1) by the manner in which it distributed donuts to employees on March 2, 1998. On that day, Plant Manager Irene Justet announced to employees that there were donuts in the breakroom, but she could not say why because she did not want another lawsuit. During the break, while passing out antiunion T-shirts, employee Charlene Scott said that the donuts were for nonunion employees only. According to the judge, the Respondent violated the Act because it provided donuts under circumstances that suggested to employees that the donuts were only for antiunion employees.

The Respondent excepts, arguing that Justet routinely gives donuts to employees, and that her statement to employees—that she could not say why she was providing the donuts—is meaningless. The Respondent said the judge erred by failing to consider pertinent evidence. Furthermore, the Respondent stated that Scott's comment cannot be attributed to the Company since she is a non-supervisory employee.

We find merit in the Respondent's exceptions. Justet's comment that she could not say why she was providing the donuts for fear of another lawsuit, is not violative of any provision of the Act. Furthermore, the judge found

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

that Scott was not an agent of the Respondent, and there were no exceptions to that finding. On that basis, Scott's comment cannot be attributed to the Respondent. Therefore, contrary to the judge, we find no violation.

2. Contrary to our dissenting colleague, we agree with the judge that employee Geraldine Housel was constructively discharged on March 6, 1998, in violation of Section 8(a)(3). To establish a constructive discharge, two elements must be proven: (1) the burden imposed upon [the employee] must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

Our dissenting colleague greatly understates the burdens imposed on Housel. As more fully described below and by the judge, in the 48 hours leading up to her discharge, Housel was faced with: (1) the Respondent's clear condonation of her harassment by antiunion employee Scott; and (2) the Respondent's unlawful, disparate imposition of a stringent production quota with virtually no notice and with a harsh prospective penalty (immediate discharge for Housel at the end of her shift, if she was unable to meet the quota).

On March 4, 2 days before Housel's employment ended, the Respondent assigned Scott to work in Housel's work area, right next to Housel. Scott told Housel that if Housel was not a union supporter, she might be able to meet her production quota. Scott also told her that Scott was one of Plant Manager Justet's "people you are scared to death of." Housel asked Scott to leave her alone, and then complained to Justet about Scott's harassment. Justet told Housel that she would check into the matter, but later that day Scott approached Housel and told her that Housel had gotten her in trouble and that "now it was on." Scott continued to make comments to Housel, who again asked Scott to leave her alone. Scott told Housel that she was not going to leave her alone.

The next day, March 5, shortly after she arrived at work, Housel gave Floor Supervisor Dianne Jones (an agent of the Respondent) a letter from Housel to Justet complaining about Scott's harassment. Later that morning, Justet ran up to Housel on the work floor, pointed her finger in Housel's face, and told Housel never to look at Justet while Justet was present on the work floor.

Later that day, Justet summoned Housel to a meeting in which Justet questioned Housel about her husband's union activity, and his complaint to a local newspaper that it was only telling part of the story about union support within the Company. Housel again complained to

Justet that Scott was harassing her. Later in this conversation, Justet told Housel that she could fire Housel if she wanted to, because “after eight weeks of being here, the company does not have to keep you if you do not make your piece rate.” At the end of this conversation, Justet announced to Housel that she had 1 day to bring her production up: “One day. That’s it.” Justet told Housel that if she did not do so, “you don’t have a job here. One day.”² Justet then repeated this threat of discharge. The conversation ended with Housel again telling Justet that Scott had been harassing her, and Justet replying that Scott “ain’t going to bother you.”

The harassment did not cease, however. The next day, March 6—what turned out to be Housel’s final day of employment with the Respondent,—Scott greeted Housel by telling her that she was a “fat ugly pig.” Scott subsequently became enraged when she found out that Housel had drafted a letter to Justet, with the help of the Union, complaining about Scott’s harassment and Justet’s failure to intervene. Later that day, following a series of employee meetings conducted by Justet to address the Union’s claims that Floor Supervisor Jones and Scott were both agents of the Respondent, Scott again harangued Housel at her work station, telling Housel that she was going to kick her ass. Graphically and forcefully emphasizing that threat, Scott kicked a box on the floor next to Housel’s work station. Indeed, Scott challenged Housel, saying, “[L]et’s take this outside right now.” Housel declined. Scott said, “You get outside right now.” Housel said, “Leave me alone.” Scott said, “I will not leave you alone.”

After this confrontation, Housel wrote another note to Justet, again complaining about Scott’s harassment, and claiming that Scott was an agent of the Respondent. Justet called Housel into her office and told her that the Respondent did not have agents, that Housel was responsible for herself, and that the Respondent was not her protector. When Housel told Justet that Scott had threatened to kick Housel’s ass, Justet replied that the Respondent was not a babysitter, and was not responsible for Scott. Instead, Justet suggested that Housel fight Scott outside the plant. In any event, Justet said she did not believe Housel’s statements about Scott, and she reminded Housel that unless she made her production quota by the end of the day, “you’re automatically terminated.”

² At the hearing, Justet admitted that until then the Respondent had been very tolerant of Housel’s substandard production. The judge found, and we agree, that Justet’s change in attitude was caused by Housel’s union activity and that Justet’s conduct violated Sec. 8(a)(1) and (3) of the Act.

As to the production deadline, during her 6 months of employment with the Respondent, Housel had consistently failed to make the minimum required production rate. The Respondent never warned Housel to raise her rate until it became clear that Housel supported the Union.³ There is no record evidence that the Respondent had ever imposed such a stringent production ultimatum. Given that Housel never before made the production rate, it is highly improbable that she could have done so in 24 hours, particularly under the pressure of a discharge threat, as well as the distraction caused by Scott’s incessant harassment.

Justet’s refusal to intervene when Housel complained about Scott’s harassment created a coercive work environment that not only undermined Housel’s ability to work at her highest level of productivity, but also caused her to fear for her physical safety. Not only did Justet fail to end Scott’s harassment of Housel, she facilitated it by moving Scott to a work area next to Housel. On March 6, after being physically threatened by Scott while attempting to work, and on realizing that she could not meet the new production quota, Housel finally quit.

In these circumstances, we agree with the judge that it was reasonably foreseeable that Scott’s continued harassment, as well as imposition of the production deadline, would cause Housel to quit. Accordingly, we also conclude that Housel was constructively discharged in violation of Section 8(a)(3) and (1) of the Act.

Our dissenting colleague asserts that there is no showing that the Respondent *instigated* Scott’s conduct. The record is crystal clear, however, that the Respondent *condoned* Scott’s conduct. Our colleague disputes this conclusion, arguing that while the Respondent may have failed to deal adequately with Scott’s conduct, it did not *forgive* her for engaging in it. The cases⁴ relied on by the dissent are inapposite here. They involve the issues of whether employers condoned—i.e., forgave or “clearly and convincingly . . . wipe[d] the slate clean” of—the strike misconduct (*White Oak*) or arguably unprotected strike participation (*General Electric*) of striking employees, and whether the employers thus were required to reinstate those strikers. The behavior arguably condoned in those cases was conduct adverse to the employer’s interest. Thus, evidence that the employer “forgave” the behavior would be necessary to deprive the employer of its defense to the duty to reinstate the strik-

³ On January 25, Housel was observed at a union meeting by a co-worker who did not support the Union. The next day, during a meeting with employees, Justet stated that she knew which five employees attended the union meeting.

⁴ *White Oak Coal Co.*, 295 NLRB 567 (1989); *General Electric Co.*, 292 NLRB 843 (1989).

ers. In contrast, the issue here is whether the Respondent should be held accountable for misconduct that is consistent with the Respondent's antiunion animus, Scott's harassment of Housel. The standard invoked by the dissent does not apply here, and liability is appropriate even if the Respondent did not explicitly forgive Scott.⁵ The two situations are in no way parallel. While the word "condone" may be used in both contexts, the forgiveness element of the strike-related condonation doctrine just does not come into play in this case.

Finally, we disagree with our colleague's assertion that there is no showing that the Respondent's inaction in the face of Scott's misconduct was discriminatorily motivated. There is, in fact, copious record evidence, again as summarized above, that the Respondent's refusal to intervene against Scott's harassment of Geraldine Housel was motivated by antiunion animus.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bolivar Tee's Manufacturing Co., Bolivar, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Delete paragraph 1(k) and reletter the subsequent paragraphs.
2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues in all respects except with regard to their finding that the Respondent violated Section 8(a)(3) by constructively discharging employee Geraldine Housel. As my colleagues acknowledge, the General Counsel must establish the following elements in this case:

- (1) the burdens imposed . . . must cause, and be intended to cause, a change in [her] working conditions so difficult or unpleasant as to force [her] to resign.

⁵ There is no shortage of Board decisions holding employers responsible in similar circumstances for harassment of prounion employees by antiunion employees. See, e.g., *Taylor Machine Products*, 317 NLRB 1187, 1209 (1995), enfd. in relevant part 136 F.3d 507 (6th Cir. 1998); *Champagne Color, Inc.*, 234 NLRB 82 (1978); *Becton-Dickinson Co.*, 189 NLRB 787, 787-788 (1971) (constructive discharge). Our dissenting colleague would distinguish these cases on their facts, but we see no meaningful distinction. In none of the cited decisions, moreover, did the Board apply the "forgiveness" test advanced by the dissent. The dissent cites no cases involving employer responsibility for harassment in which its proposed test was applied.

- (2) it must be shown that [the employer imposed burdens on the employee] because of [her] union activities.

Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).

The "burdens" imposed on Housel were as follows:

- (1) harassment by employee Charlene Scott; (2) the imposition of a production quota. Thus, the General Counsel must prove that these burdens were imposed for antiunion reasons, and that they were of such a character as to force Housel to resign.

As to (1) above, the harassment was by employee Scott, not by the Respondent. My colleagues recite an extensive description of Scott's alleged mistreatment of Housel. However, it is clear that Scott is not an agent of the Respondent, and there is no evidence that the Respondent instigated Scott's conduct. Nor does the General Counsel allege that the Respondent is responsible for Scott's conduct through the principle of ratification.

My colleagues then say that the Respondent "condoned" Scott's conduct. As Board cases make clear, a finding of condonation requires a clear showing of forgiveness. There is no showing that the Respondent forgave Scott for her conduct.¹ At most, the Respondent failed to deal adequately with it. (Respondent suggested that Scott and Housel settle their differences "outside.") While it may have been more prudent for management to react differently, there is no showing that the Respondent's inaction was discriminatorily motivated. That is, there is no showing that the Respondent has taken different steps when confronted with prior situations of "employee vs. employee" harassment. Similarly, although the Respondent assigned Scott to work near Housel after Housel's complaint about Scott, the General Counsel does not allege that this assignment was unlawfully motivated.

My colleagues seek to distinguish the "condonation" cases on the ground that they involve strike misconduct. However, this distinction is without legal significance. In both strike situations and here, an employee has engaged in unprotected misconduct, whether it be threatening an employee who crosses a picket line during a strike or threatening an employee in a work context. The issue in both cases is whether the employer forgave the misconduct.

My colleagues argue that the two situations are different. They say that strike misconduct is contrary to the employer's interest, and that (absent condonation) an

¹ See generally *White Oak Coal Co.*, 295 NLRB 567, 570 (1989); *General Electric Co.*, 292 NLRB 843, 844 (1989).

employer would not be required to reinstate the striker. The argument has no merit. The salient point is not that the misconduct is not contrary to the employer's interest. The salient point is that the misconduct is not protected by Section 7.

Further, to the extent that there is a difference in the two situations, the difference cuts against the position of my colleagues. That is, in the strike situation, condonation means only that the employer must reinstate the striker notwithstanding the misconduct. In the instant case, my colleagues say that condonation means that the Employer *approves of* the misconduct and is thus responsible for it. Significantly, not even the General Counsel contends that the Respondent was responsible for Scott's misconduct, i.e., that it approved and ratified it. In sum, the cases relied on by my colleagues are clearly distinguishable.

The cases relied on by my colleagues are distinguishable in other respects as well. In *Taylor Machine Products*,² management made light of antiunion employees' harassment of union supporters, going as far to congratulate the antiunion employees for their conduct, in plain view of the employees that complained of harassment. In *Becton-Dickinson Co.*,³ employee Ralph Kinsell, who supported the union, was harassed by fellow employees after the union lost the election. Management was unresponsive to his complaints. When his machine broke down, knowing he had a bad back, management assigned him to a job which required him to do heavy lifting. After sustaining a back injury, Kinsell was assigned to work in the chemical department, even though the respondent knew he had severe allergies. After suffering an allergic reaction, and continued harassment by his coworkers, Kinsell walked off the job. Finally, in *Champagne Color, Inc.*,⁴ the administrative law judge and the Board found that the Respondent's explicit antiunion attitude, its enforcement of rules prohibiting union solicitation and discussion, and its inaction in response to an antiunion employee's harassment of a union supporter "could not but [have left] the employees with the impression that Respondent welcomed and encouraged employee efforts to defeat the Union" *Id.* In that case, the supervisor stood no more than 10 feet away when antiunion employee Carl McKinney told union supporter Brian Gilmartin that "[s]omebody ought to kick your ass" and "[y]ou're too chicken to fight your own battles. You have to get the Union to do it for you."⁵ Although

he heard the threatening words and the harassing tone, and was physically present, the supervisor did nothing to stop the conduct.

By contrast, I stated earlier, the Respondent here at most failed to deal adequately with the harassment of Housel by Scott. There is no evidence that Plant Manager Irene Justet witnessed any of the harassment, and insufficient evidence that she condoned it.

As to (2) above, I assume *arguendo* that the production quota was imposed on Housel for antiunion reasons. Thus, if she had failed to meet that unlawful quota, and had been discharged therefor, the discharge would likely have been unlawful. However, she did not even try to meet the quota. Instead, she abruptly quit. Accordingly, this is a "constructive discharge" allegation, rather than "actual discharge" allegation. The issue is whether the production quota was so difficult or unpleasant as to force a reasonable employee to resign. I do not believe that the quota was so unreasonably high as to meet that standard. For example, there is no showing that other employees have been unable to meet that quota. Thus, it cannot be said that it was virtually impossible for Housel to achieve, even within 24 hours, what others regularly achieved every day.

Accordingly, I would dismiss the constructive discharge allegation in this case.

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

WE WILL NOT suspend or discharge Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel, or any other employee because they engage in union activity on behalf of the Sheet Metal Workers' International Association Local Union #146, affiliated with Sheet Metal Workers' International Association, AFL-CIO; the United Food and Commercial Workers

² 317 NLRB 1187, 1193-1196 (1995), *enfd.* in relevant part 136 F.3d 507, 512 (6th Cir. 1998).

³ 189 NLRB 787 (re Kinsell) (1971).

⁴ 234 NLRB 82 (1978).

⁵ *Id.*

International Union, AFL-CIO, or any other labor organization.

WE WILL NOT prohibit employees from engaging in union solicitation and activities.

WE WILL NOT threaten employees with the loss of pay and benefits if they engage in union activity or if a union represents the employees.

WE WILL NOT threaten employees that the Respondent's plant will close if a union represents them.

WE WILL NOT tell employees they should quit their jobs if they do not like the Respondent's unlawfully threatened antiunion actions.

WE WILL NOT have our agents circulate antiunion petitions for employees to sign.

WE WILL NOT interrogate employees about union activities.

WE WILL NOT create the impression that we are surveilling our employees' union activities.

WE WILL NOT threaten employees that union representation, collective bargaining, or other protected concerted activity would be futile.

WE WILL NOT threaten employees with physical violence or other retaliation because they file charges with the Board or engage in other union or protected concerted activity.

WE WILL NOT send employees home early or reduce their incentive wages because they engage in union or other protected concerted activities.

WE WILL NOT issue production warnings or improvement deadlines to employees because they engage in union or other protected concerted activity.

WE WILL NOT condone harassment of employees because of their union or other protected concerted activities.

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, offer Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel whole for any loss of earnings and other benefits resulting from our unlawful 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 suspensions and discharges of Donna Pitts, Angela

Carneal, Darla Reaves, Nona Box, and Geraldine Housel, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their suspension and discharges will not be used against them in any way.

BOLIVAR TEE'S MANUFACTURING COMPANY

Naomi L. Stuart, Esq., for the General Counsel.

Terry L. Potter, Esq. and *Randall Thompson, Esq.*, for the Respondent.

Mike Krasovec, for the Charging Party Union.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. This case involves numerous issues of whether the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union, the Sheet Metal Workers' International Association Local Union #146, affiliated with Sheet Metal Workers' International Association, AFL-CIO (the Union); and the United Food and Commercial Workers International Union, AFL-CIO (the UFCW), are labor organizations within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates a nonunion T-shirt manufacturing plant in Bolivar, Missouri. Irene Justet (Justet) is the plant manager. Justet's husband, Jerry Justet, is the office manager; Gerald Fisher is the shipping supervisor; and Dianne Jones is the floor supervisor.

III. PITTS' UNION AUTHORIZATION CARD

On January 8, employee Donna Pitts and Floor Supervisor Dianne Jones had a dispute about whether Pitts could have a water bottle at her workstation. Pitts told Jones if she could not have the bottle she would have to give 4 weeks notice. Pitts was subsequently permitted to have the water bottle. Shortly after the matter was settled, Justet came to Pitts, hugged her, and said she knew Pitts had not intended to resign. Justet said, "I wouldn't accept it anyway because it wasn't in writing." Pitts testified that Justet had told her on several other occasions that resignations of employment should be in writing.

In January, the Union was engaged in an organizing campaign at Tracker Marine Company, also located in Bolivar, Missouri. On the evening of January 8, Pitts attended a union

¹ This case was heard at Bolivar, Missouri, on June 2-5, 1998. All dates refer to 1998 unless otherwise stated.

² 29 U.S.C. §158(a)(1) and (3).

organizational meeting for the Tracker Marine employees. Pitts had a discussion with Union Agent Mike Krasovec about the Union conducting an organizational campaign at the Respondent's plant. Krasovec gave Pitts some union authorization cards and she said she would talk to her fellow employees about joining the Union.

On January 9, Pitts was in the Respondent's restroom and left a blank union authorization card on the sink. After the first break, Justet came to Pitts with the card. Justet asked Pitts if the authorization card belonged to her. Before Pitts could answer, Justet handed the card to her and said in an angry voice, "If it does, keep it to yourself." Justet denied this event ever took place. Considering the demeanor of the witnesses I found Pitts to be the more convincing witness. I credit Pitts' version that Justet gave her back the union authorization card and warned her to keep it to herself.

When Pitts sought support from fellow employees by leaving the card in the restroom she was engaged in protected union activity. Justet's order that Pitts keep the union card to herself was an unlawful prohibition against union solicitation. Such a warning would reasonably tend to coerce Pitts in the exercise of her rights under Section 7 of the Act. I find Justet's statement is a violation of Section 8(a)(1) of the Act.

During the January 9 lunchbreak, Pitts talked to employees Darla Reaves, Jackie Greenlee, and Angie Carneal about the Union. Pitts continued to discuss union organization with other employees thereafter. On January 15 Pitts attended another union organizing meeting where she signed an authorization card. Pitts received additional cards to distribute to Respondent's employees. She gave some of these cards to Reaves and Carneal.

IV. PITTS' PRODUCTION WARNING

On the morning of January 19, Justet told Pitts that her production rate needed to increase. Pitts said that she was making \$6 an hour, which is over the minimum production rate of \$5.15. Justet retorted that Pitts' production was not good enough. Justet's warning to Pitts about her production did not have a foundation in fact as shown by Pitts' production records. I infer from the record as a whole that the warning was based on Pitts' union activities. I find that the unjustified warning was a violation of Section 8(a)(1) and (3) of the Act.

Justet then allegedly had Pitts assigned to work exclusively on extra large-sized T-shirts. Some employees consider this work to be less desirable because it may be more difficult to achieve rates on the larger sized shirts. The Government alleges that this assignment was due to Pitts' union activity and thus a violation of the Act. The Respondent's records show, however, that it is unlikely that Pitts worked exclusively on one size T-shirt. I find the Government has failed to prove by a preponderance of the evidence that Pitts was discriminated against by her work assignments. I find that the Respondent did not assign Pitts more onerous work in violation of Section 8(a)(1) and (3) of the Act.

V. PITTS' SUSPENSION AND DISCHARGE

On January 26, Pitts had problems with her car and could not get to work. She telephoned Justet, explained her problem and

said she would not be to work that day. Pitts said she would make up her lost time on Saturday. On January 27, when Pitts arrived for work her timecard was missing. She then met with Justet and Jones in the office. Justet confronted Pitts about taking all day to get her car repaired. Pitts responded that the car was still not fixed. Justet told Pitts that her absenteeism was going to have to stop. Pitts retorted that she only missed a single day's work since she had returned to work from medical leave and questioned whether absenteeism rules were being fairly applied to her. Justet told Pitts to get out of her face and said that Pitts made her sick. Justet then suspended Pitts for 3 days.

On January 29, Jones telephoned Pitts and told her she did not need to return to work. Jones explained that Justet had decided to accept Pitts' January 8 resignation. Pitts told Jones that she had only given notice when Justet had removed a water bottle from Pitts' workstation, and that after that decision was changed nothing more had been said about the matter. Justet who had been listening to the conversation on a speakerphone joined the discussion. Justet said that she knew Pitts had not intended to resign but she was accepting the resignation. Pitts told Justet that it was a shame that Justet had Jones do her dirty work, and the conversation ended.

On January 30, Pitts telephoned Justet. Union Agent Krasovec listened to the conversation unbeknown to Justet. Pitts told Justet that she did not understand what went on with her job the day before. Justet said that Pitts was a "lowlife mother fucking son of a bitch" and she did not want to talk to her. Pitts started to explain that she had only offered her resignation when she was denied the water bottle on the work floor. Justet responded that she knew Pitts did not intend to resign, but that she was accepting the resignation regardless.

After the telephone call, Pitts and Krasovec immediately sent Justet a letter requesting either reinstatement or a termination letter pursuant to the Missouri State statutes. The letter also states Pitts' intention to pursue organizing Respondent's employees regardless of whether she was reinstated to employment.

On January 31, Justet wrote a response to Pitts' letter. Justet's letter states that Pitts had been warned several times about her attitude, and that Pitts had been told that she would have to leave if her attitude did not change. Justet, Floor Supervisor Dianne Jones, Shipping Supervisor Gerald Fisher, and Office Manager Jerry Justet, signed the letter. Pitts denied ever receiving such warnings and the Respondent offered no evidence to substantiate the letter's assertions.

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v.*

Transportation Management Corp., 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

The Respondent had knowledge of Pitts' union activities commencing January 9 when Justet confronted her with the union authorization card. The timing of Pitts' suspension and discharge closely followed this encounter. The Respondent's union animus is shown initially by Justet telling Pitts to keep the union card to herself. Moreover, as set forth below, the Respondent's additional violations of the Act further demonstrate the element of animus. Justet's unlawful and pretextual production warning is another element of animus. Thus, I find that the Government has established the necessary initial showing of illegal motivation regarding Pitts' suspension and discharge.

The Respondent's defense does not overcome that showing. The Respondent asserts at one point that Pitts in effect was not discharged but her resignation was accepted early. This I find disingenuous. The credited testimony shows that the resignation was a forgotten issue when Pitts was allowed to keep her water bottle on January 8. The next day, however, Justet discovered Pitts had a union card and illegally told Pitts to keep it to herself. On January 19, Pitts received another illegal warning for production problems that did not exist. In both the January 29 and 30 telephone conversations, Justet acknowledged she knew Pitts had not intended to resign. The fact Pitts was absent from work January 26 is not relied upon by Respondent for her suspension and discharge. Moreover, the fact Pitts questioned whether Justet was fairly applying the absentee rules to her does not adequately explain Justet's reaction of suspending Pitts for raising the question. The Respondent's attempts to shift its basis for discharging Pitts from an acceptance of her resignation to various asserted infractions by Pitts' does not withstand scrutiny. I do not credit the asserted reasons for Pitts' discharge and find that the reasons advanced for that discharge are a pretext. I infer that because of the false reasons given for the termination that there was another motive, which the Respondent wished to conceal. I conclude that reason was Pitts' support for the Union. *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983); *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966); and *Holo-Krome Co.*, 302 NLRB 452, 453 (1991). I find that Pitts' discriminatory termination is a violation of Section 8(a)(1) and (3) of the Act.

VI. EVENTS OF FEBRUARY 2

A. Employee Meetings

Justet held a series of employee meetings at the start of the February 2 workday to discuss Pitts' January 30 letter. Justet showed Pitts' letter to the employees and said it "scared the shit out of her." Justet proclaimed that she was not going to go through this union "stuff" again. Justet said that Respondent's owner, Alan Heller, had spent \$75,000 opposing a prior union

campaign and he was not going to do it again. Justet said that it only took 5 days to move a company, and that there was a company that shut down just 7 miles from her farm in Kentucky. Justet stated that if the Union came in she would leave and that without her there would be no Bolivar Tee's. Justet warned the employees that "the Union will come in and lower your rates." Justet told the employees she did not want to hear anything more about the Union, that she was tired "of this union shit" and that it would not be brought up again. Justet concluded by saying if employees did not like the way things were, they could get another job.

Justet's statements to employees at the February 2 meetings included threats that the Respondent's Bolivar facility would close if the Union represented the employees. She also made threats that their wages would be reduced, that they should not discuss union representation, and they should quit their jobs if they did not like conditions as they were. These statements had the tendency to restrain and coerce employees in the exercise of rights granted them under the Act. *NLRB v. Noll Motors, Inc.*, 433 F.2d 853, 855-856 (8th Cir. 1970), cert. denied 402 U.S. 906 (1971); *Temp-Rite Air Conditioning Corp.*, 322 NLRB 767 (1996). I find that Justet's February 2 statements are violations of Section 8(a)(1) of the Act.

B. Antiunion Petition

Shortly after the February 2 employee meetings, Floor Supervisor Jones openly circulated an antiunion petition to employees during worktime. Jones continued to distribute the antiunion petition until lunchbreak began at 11:30 a.m. Justet was on the work floor when Jones was distributing the antiunion petition.

Jones asked employee Darla Reaves to sign the petition. Reaves asked if there was a "happy medium petition" for people who were neither for nor against the Union. Jones replied there was no "happy medium petition." Reaves declined to sign the petition. Geraldine Housel testified that Jones asked her to sign the petition, but she declined to sign. Nona Box testified that Jones told her that Justet was upset and Jones wanted employees to sign the petition so Justet would feel better. Box signed the petition.

Jones, as the floor supervisor, was Justet's contact with the employees working in the plant. She participated in disciplinary interviews conducted by Justet; Jones told Pitts of her discharge, and Jones acts as the conduit of information and job direction between Justet and employees. Justet was on the work floor during part of the time Jones distributed the antiunion petition. The petition was consistent with the message that Justet had just given the employees that she did not want to hear anything more about the Union. Under circumstances where employees reasonably believe that a nonstatutory supervisor is reflecting company policy and speaking and acting for management, the employee is an agent of Respondent within the meaning of Section 2(13) of the Act. *Southern Bag Corp.*, 315 NLRB 725 (1994); *Dentech Corp.*, 294 NLRB 924 (1989). Respondent's employees could have reasonably believed that Jones was acting on behalf of Respondent in distributing the antiunion petition. I find that Jones was acting as the Respondent's agent in distributing the petition. I further find that the

Respondent did violate Section 8(a)(1) of the Act by Jones solicitation of employee signatures on the antiunion petition.

VII. DISCHARGE OF ANGIE CARNEAL

Donna Pitts' daughter, Angie Carneal, was also employed by the Respondent. Carneal shared her mother's support for the Union and signed an authorization card on January 16. Carneal also voiced her union sympathies to other employees. During lunchbreak on February 2, Carneal told several employees that Pitts, was going to try to get a union to represent the employees.

Carneal was not invited to Justet's February 2 employee meetings, nor did Jones ask her to sign the antiunion petition. Immediately after lunch on February 2 Carneal was summoned to Justet's office. Justet told Carneal that she wanted an explanation about a conversation that Carneal had with Jones before work on January 30. (Carneal and Jones had argued on that date about the role Jones played in Pitts' discharge.) Carneal initially said that the conversation was not Justet's business because the conversation took place before work. Justet responded it was her business because Carneal had talked about Justet during the conversation. Justet then stated that Carneal had told Jones she was even "lower than Irene" (Justet). Carneal acknowledged that she made such a statement to Jones because of her participation in Pitts' discharge. Justet then told Carneal if she wanted to see sorry, she should look in the mirror.

At this point Carneal noticed that Justet was holding Pitts' January 30 letter that stated her intent to organize Respondent's employees. Justet was looking through the letter as she talked to Carneal. Justet said that Carneal's mother had been pushed down in the parking lot before. Carneal responded, "[S]o." Justet said that it could happen again. Carneal responded that she did not think Justet could do it, but if she wanted to try, to go ahead. Justet then told Carneal that no one wanted Carneal at Respondent's facility. Carneal responded that she was not going to quit, that if Justet wanted her out, Justet was going to have to fire her. Justet pointed her finger at Carneal and screamed "push me and I will." Carneal said, "[G]o ahead and fire me and I'll draw unemployment." Justet responded Carneal was a welfare case. Justet then said, "I think that I will fire you, you're fired." Carneal called Justet a bitch and left.

Justet testified she summoned Carneal to the office to discuss Jones' complaint that Carneal had abused her in their conversation that morning. It is undisputed nothing was mentioned in the meeting about any abuse that took place that morning. I find that Justet was in error and that the record shows the conversation occurred before work on January 30. It was unexplained why Carneal was not called to any of the antiunion employee meetings on the morning of her discharge. As noted, she was not asked by Jones to sign the antiunion petition. As already found, Carneal's mother was fired by the Respondent for being a union supporter. From these facts I infer that the Respondent viewed Carneal as a union sympathizer.

The tone of the February 2 meeting was hostile. Justet invoked the fact that Carneal's mother had been pushed down in the parking lot before and it could happen again. This was said at a time Justet held Pitt's union organizing letter in her hand.

There was no explanation why the veiled threat regarding Pitts being pushed down was invoked during a meeting allegedly to investigate Carneal's conversation with Jones. I find that Justet was looking for an excuse to discharge Carneal because of her own, as well as her mother's, union sympathies. Carneal had voiced her displeasure at Jones for her role in her mother's unlawful discharge. Justet provoked Carneal by telling her that no one wanted her working at the plant, saying she was "sorry" and insulting her about being a welfare case. The fact that Carneal called Justet a bitch is not to be condoned, but under the circumstances does not insulate the pretextual discharge of an employee because of her statutorily protected rights. I find that the Respondent violated Section 8(a)(1) and (3) of the Act when Justet discharged Carneal. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

VIII. FEBRUARY 19 EMPLOYEE MEETINGS

On February 12, the UFCW filed unfair labor practice charges regarding the discharges of Pitts and Carneal. On February 19, Justet held a series of meetings with employees to discuss these charges. Justet told employees that there seemed to be a pipeline going out of the plant regarding what happened in the plant and she knew who the pipeline was. Justet said that she did not know there were any union activities at the facility on January 15 and asked if any employees knew about union activities at that time. Justet said she and Jones would probably have to go to Kansas City to testify about the unfair labor practice charges, and that they might have to kick Pitts' and Carneal's asses in the parking lot.

Justet denied saying at the February 2 employee meetings that the facility would close if the Union came in. Justet stated that what she had said in the earlier meeting was that she would not work for the Union. Justet also denied that she had fired Pitts or Carneal for improper reasons. Justet explained that Pitts had given 4 weeks notice and Justet had accepted Pitts' resignation. Justet also told employees that Pitts was a "fucking bitch," and asked employees to submit letters regarding how Pitts had verbally abused Jones. Justet also asked the employees to write letters to her to support Respondent's position in the unfair labor practice cases.

Justet told the employees that she had fired Carneal because Carneal had refused to discuss the January 30 conversation with her. Justet related that Carneal had said, "[W]ell, fire me bitch." Justet told employees, "[S]o, I fired the bitch."

Justet told employees that Respondent's owner already gave all of the money Respondent made back to the employees, so there was nothing to negotiate. Justet said that companies did not sign contracts with unions anymore so the Union could picket for 10 years and it would not make a difference because the Respondent would just hire new people. Justet stated the Union would charge employees dues, and charge Respondent money and give the money to the Mafia.

Justet's comments during the February 19 employee meetings were incautious. She interrogated employees about their knowledge of union activity. This questioning was conducted by the highest level management official in the plant, it was not for any proper purpose, and occurred without assurances

against reprisals in a context of other coercive statements. I find Justet's interrogation of employees is a violation of Section 8(a)(1) of the Act. *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996).

Justet created the impression of surveillance by stating she knew who was communicating with the Union. I find that this statement reasonably conveyed to employees that their union activities were under surveillance by the Respondent. I find that this statement is a violation of Section 8(a)(1) of the Act. *Electro-Voice, Inc.*, 320 NLRB 1094 (1996).

Justet made clear to the employees in the February 19 meeting that union representation and collective bargaining were futile acts. Statements indicating the futility of bargaining, and suggesting the inevitability of a strike with employee replacements if employees selected union representation, are violative of the Act. *Pyramid Management Group, Inc.*, 318 NLRB 607, 608 (1995); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 512 (1995). I find that Justet violated Section 8(a)(1) of the Act by her statements regarding the futility of union representation and bargaining.

Justet stated she might have to kick Carneal and Pitts' asses when she went to Kansas City regarding the unfair labor practice charges. This threat of physical harm to Pitts and Carneal for having filed charges with the Board is found to be a violation of Section 8(a)(1) of the Act.

IX. FEBRUARY 20 EMPLOYEE MEETING

On February 20 Justet held additional employee meetings. Justet read from a union handbill that had been distributed at Tracker Marine. She then told employees that she and Jones were sticking together; that they were in the process of suing Pitts and Carneal for lying; and that Pitts and Carneal could go to prison because it was against the law to lie about an employer.

Justet's February 20 comments about suing Pitts and Carneal and their going to jail referred to their protected activity of filing unfair labor practice charges with the Government. I find such comments reasonably tended to coerce employees in the exercise of their protected activities. I find that Justet's comments violated Section 8(a)(1) of the Act.

X. FEBRUARY 23 DRESS CODE MEETING

On February 23, Justet held another meeting and reminded the employees of the Respondent's dress code. Justet said that they could not wear halter tops, short shorts, or open-toed shoes. Employees were told they could be terminated if they did not follow the dress code. Prior to this meeting some employees were not aware that there was a dress code. The record as a whole does not show that the dress code was linked to the union organizational activity at the plant. I find that the Government has failed to prove by the required preponderance of the evidence that the dress code reminder is a violation of Section 8(a)(1) of the Act.

XI. REDUCTION IN REAVES' WAGES

On February 2, employee Darla Reaves declined to sign the antiunion petition distributed by Jones. Thereafter Reaves signed union authorization cards in both the Union and the UFCW. She also solicited fellow employees to attend union

meetings. Reaves was not asked to sign a second antiunion petition that was distributed by employees on February 25.

On February 25 Jones informed Reaves that she was being assigned to work on a new batch of shirts. The piece rate for such work was approximately \$1 to \$2 per hour in pay less than Reaves had previously received.

XII. FEBRUARY 25 UNION MEETING

The Union held an employee meeting on February 25. Five employees attended this meeting: Donna Pitts, Angie Carneal, Darla Reaves, Geraldine Housel, and Kathy Housel. Employee Janet Raines came to the meeting and handed an antiunion petition to Union Agent Krasovec. Raines observed the five employees who were in attendance.

Reaves reported to Krasovec at the meeting that her incentive rate had been cut. He and Reaves composed a letter dated February 26 protesting the cut. The letter was to be hand delivered to Justet the next day. The letter was signed by Reaves, and showed that copies were sent to Krasovec and Gary Comer (an organizer for the Union).

XIII. FEBRUARY 26 EMPLOYEE MEETINGS

On February 26, Reaves appeared at work wearing a union hat, T-shirt, and button. She was the only employee wearing prounion items. At about 8 a.m. Reaves gave Justet the letter that she had prepared regarding the cut in her incentive rate.

Justet conducted several employee meetings on the morning of February 26. Geraldine Housel testified that at the meeting she attended Justet stated the union had their meeting yesterday and now "I'm going to have mine." Justet then began to cry and said that this work was how she supported her family, that she cared about the employees, that she helped people when they needed it. Justet said that she was going to fight for the 95 percent of the people who did not want a union, that "they can't force us to have one." Justet said that if the union came in, Respondent would have to pay \$2700 a month to the Union. Justet said she would "love" for the Union to come in because then she would not be allowed to work on the floor, the Respondent would have to hire more employees, and the Respondent would then go broke. Justet said she did not want that to happen for the 95 percent of the employees because she loved them.

Justet said that she had been able to get improvements at the plant like air-conditioning, that she had written personal checks for employees when they needed help, and rehired people who quit. Justet continued that she had done things for employees, but she guessed that she could go back to the old ways with no air-conditioning, only 4 days vacation, and she would not reinstate employees after they quit. Justet said that the Respondent had not made any profit in the past year. Justet stated that she was not sure exactly what she had said in the prior meetings, but denied that she had previously threatened to close the plant because of the union. Justet repeated that she would never work for the Union.

Justet told the employees that just because they had a family member working at Tracker Marine, "don't bring that over here." (Geraldine Housel's son worked for Tracker Marine at the time.) Justet then said that she was going to have employee Charlene Scott talk about the Union. Scott then discussed why

she opposed the Union. At the end of the meeting, Justet stated she knew who the five people were that attended the union meeting on February 25, and that two of them were Pitts and Carneal. Justet then nudged Janet Raines, the employee who had delivered the antiunion petition to the January 25 union meeting.

Reaves attended the last employee meeting on February 26 and she secretly tape recorded what was said. At this meeting Justet stated that she had done a lot for the employees: that she had rehired people “which I shouldn’t of never done, which I will never do again.” Justet referred to several improvements that had been made including air-conditioning, health insurance, holiday and vacation pay, and she said, “[W]e should go back,” “[W]e should just take this and just wipe it out,” and “[G]o back to what we was six years ago. Everyone like that?” Justet claimed that Respondent did not make much profit; that a union would cost Respondent \$2700 a month and Respondent could not afford it. Reaves challenged Justet regarding the \$2700 figure. Justet referred to the unfair labor practice charges and stated that she would never take Pitts or Carneal back, that she would fight, “to the president of the United States”; that lawsuits were expensive; but the cost “doesn’t matter to me. . . . It’s just profit out of your pocket.”

Justet made statements to the employees about how much money the Respondent would lose if the Union represented them and how the Respondent would go broke. I find that when Justet implied to the employees that unionization would cause the Respondent to close the plant that this statement violated Section 8(a)(1) of the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB at 490–491.

Justet proclaimed that fighting the Union would cost money, which would be profit out of the employees’ pocket. Justet also threatened to take away improvements such as air-conditioning, insurance, and holiday and vacation benefits if the employees selected a union. Additionally, Justet threatened to change her policy on rehiring employees in retaliation for union activities. Threats to reduce benefits because of employees’ union activities are coercive of employees’ protected rights. I find that the Respondent violated Section 8(a)(1) of the Act when Justet threatened employees with reduced benefits because of the Union.

Justet said that she knew that the Union had a meeting the day before, and that she knew who the five people who went to the meeting were. I find that Justet’s statement of her knowledge of the union meeting and who attended unlawfully creates the impression of surveillance of employee’s union activities. *Electro-Voice, Inc.*, 320 NLRB 1094 (1996). I find that the Respondent violated Section 8(a)(1) when Justet made these statements.

Justet also said that the Respondent did not want a union and that no one could force the Respondent to have a union. Justet’s statements that “they can’t force us to have a union,” indicate the futility of union organization. Additionally, Justet indicated the futility of union and protected activity of filing board charges by stating she would fight the unfair labor practice charges and never take Pitts or Carneal back. I find these statements of the futility of activity protected under the Act are violations of Section 8(a)(1) of the Act.

XIV. REAVES SENT HOME

At midmorning on February 26, Jones told Reaves that there was no work for her and sent her home. Reaves was the only employee sent home that day. Reaves testified that she knew of no prior occasion when a single employee was sent home for lack of work. Rather, a whole line was sent home, or other work is found for employees to perform. Kathy Housel testified that she was never sent home when her machine broke or her line was out of work.

After Reaves left work she spoke to Union Agent Krasovec who told her he was planning to handbill at the plant the following day. Krasovec asked Reaves to park on the public street in front of the building the next day so they could handbill from the car if the sidewalk was private property. Krasovec and Reaves then drafted a letter to Justet dated February 27 protesting Reaves being sent home early.

XV. REAVES’ FEBRUARY 27 SUSPENSION

Again on February 27 Reaves arrived at work wearing her union T-shirt, hat, and button. She parked on the public street in front of the plant in the area the Respondent had posted as “no parking.” (Krasovec had checked with the local police the day before and been told the street was public in front of Respondent’s “no parking” sign.) Several employees, including Scott, told Reaves she should move her car. Reaves told Scott that it was a public street, anyone could park there, and if Justet wanted her to move her car, Justet would have to tell her to move it. Reaves said that Justet’s husband frequently parked there and had not been towed.

Shortly after Reaves entered the plant Justet called her to the office. Reaves started up the stairs to the office when Justet appeared at the top of the stairs. Reaves had a secreted tape recorder going at the time. Justet told Reaves to move her car. Reaves asked why. Justet said, “The company says to move your car.” Reaves replied, “[O]kay.” Justet then said don’t push me anymore, “cause you think I won’t fire you? I will.” Reaves said, “Go ahead, fire me if you want.” Justet responded that she did not “give a shit if your union sues me.” Justet said, “[D]on’t push me . . . do not park there again, if you want to see how tough you are, I’ll show you how tough I am.” Justet told Reaves to go home and to not come back until Justet called her. Justet then asked Reaves “why don’t we just step outside?” Reaves replied, “It’s up to you.” Justet’s husband intervened by yelling “Irene,” and Justet told Reaves to go home and not return until Justet called her. Reaves then left. Reaves had not had the chance to give Justet the letter dated February 27 she and Krasovec had prepared the previous evening.

Reaves immediately contacted Krasovec and they faxed Justet the February 27 letter. They also faxed her another letter on union stationary and signed by Reaves regarding Reaves’ suspension. In this letter Reaves asserted that she had been suspended because of her union activities. Justet faxed a response to the Union dated February 27 regarding the reduction in Reaves’ incentive rate, and Reaves’ suspension.

At approximately 11 a.m., Justet telephoned Krasovec and accused him of harassing her. Reaves and Pitts handbilled at about 2:30 p.m. on the sidewalk outside the entrance to the facility. The handbilling continued for 20–30 minutes. Justet

observed Reaves handbilling. The handbill referred to the pending unfair labor practice charges and was titled "Aren't You A Little Tired Of Being Bullied, Manipulated, Ridiculed and Lied To By Irene!! Is Your Job at Bolivar Tee's and Your Fear of Irene Worth Possible Perjury Charges for Lying to the Federal Government."

XVI. DISCHARGE OF REAVES

On March 4 Reaves received a termination letter dated March 2 signed by Justet, Dianne Jones as "plant supervisor" and by Jerry Justet as "office manager." Justet's letter characterizes the February 27 conversation where Reaves was suspended. Justet's letter states that in response to Justet's direction to move her car, Reaves replied that she was union. The tape recorded conversation does not disclose this is what was said. I credit the tape recorded version as being accurate. Reaves denied other assertions made in the letter including the claim Reaves dropped a cigarette butt on the sidewalk, and that she flipped Justet off during the conversation. I credit Reaves' denials.

The "no parking" area of the public street was a creation of the Respondent. It was not recognized by the city as a legitimate prohibition against parking. The record shows that Justet's husband parked there without repercussion. Other employees who violated Respondent's no parking rules were verbally warned. The only employee, other than Reaves, who was disciplined for violation of no parking rules, was Heidi Shannon. Shannon was issued a written warning and sent home for a day after she repeatedly parked in a no parking area. Reaves had no disciplinary record while working for the Respondent.

XVII. ANALYSIS OF ACTIONS INVOLVING DARLA REAVES

A. Reduction in Incentive Rate

Reaves was assigned to a lesser paying piece rate without satisfactory explanation. This occurred shortly after Reaves refused to sign two antiunion petitions and solicited fellow employees to attend union meetings. As set forth below this action was a precursor to additional adverse action against Reaves that quickly followed. I infer from the record as a whole that the unexplained reduction in piecework pay was the result of Reaves' protected concerted activities. I find that such conduct by the Respondent is a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

B. Being Sent Home

Reaves was singled out on February 26 as the only person sent home for lack of work. Reaves was singular for another reason that day—she was the only employee wearing a union hat, button, and T-shirt. Moreover, Reaves questioned Justet's statement at the employee meeting that day that the Union would cost the Respondent \$2700 a month if it represented the employees. Reaves was sent home for alleged lack of work. Respondent did not satisfactorily explain why only Reaves was sent home or the exact cause that required this unusual action. I find from the record as a whole that the reason Reaves was removed from work on February 26 was her protected union

activities. I find this action was a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

C. Suspension

Reaves suspension allegedly for parking in the front of the Respondent's self-constructed "no parking" sign on a public street was shown to be a pretext. Others who violated a company parking policy were verbally warned. Only a repeated offender had ever been sent home. There was no legal prohibition to parking in that area. Finally, as the tape reveals, Reaves immediately acquiesced to Justet's command to move her car. Justet's rage at Reaves nonetheless continued and Justet said she did not care if the Union sued her. Justet then challenged Reaves to fight. I find that Reaves' suspension was a direct result of her union activities and that the Respondent violated Section 8(a)(1) and (3) when it suspended Reaves on February 27.

D. Discharge

Reaves credibly denied that she flipped off Justet at the point of her being suspended. Based on the demeanor of the respective witnesses, and the record as a whole, I do not credit Justet and Jones' testimony to the contrary. The tape reveals that despite Reaves immediately agreeing to move her car, Justet raged at her. Respondent's widespread union animus, Reaves' status as a visible union advocate, and Respondent's lack of a credible, nondiscriminatory basis to support its termination of Reaves, I find, establish Reaves was discharged in violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

XVIII. INCIDENTS OF MARCH 2

On the morning of March 2, Justet announced there were doughnuts for employees at breaktime. Justet added she could not say why she was providing doughnuts to employees, because she did not want another lawsuit filed against her. At the break, Charlene Scott passed out antiunion T-shirts and told employees that the doughnuts were for antiunion people only, that the union people could get their own doughnuts.

The Respondent provided doughnuts to employees under circumstances that suggested to employees that the doughnuts were provided only for antiunion employees. I find this disparate treatment of employees because of their union sympathies is a violation of Section 8(a)(1) of the Act.

XIX. GERALDINE HOUSEL

Employee Geraldine Housel (Housel) and her daughter-in-law Kathy Housel worked for the Respondent. Housel's son works at Tracker Marine where the noted union organizational campaign was occurring. Housel refused to sign the February 2 antiunion petition that Jones was circulating to employees. In declining to sign, Housel told Jones she thought that it was illegal for Jones to be distributing the petition. Housel attended union meetings conducted by the UFCW and the Union. She signed union authorization cards for both organizations. Housel also declined to sign a second antiunion petition on February 25. Housel was one of the five employees who attended the February 25 union meeting where employee Janet Raines delivered an antiunion petition to Krasovec. Raines observed Housel's presence at that meeting. Justet stated at the February

26 employee meetings that she knew who the five employees were who had attended the union meeting the night before. On March 2 Scott asked Housel if she would like an antiunion T-shirt. Housel responded that she would put a big button over the no and it would work fine.

Immediately after Justet's February 26 employee meeting, Housel told Floor Supervisor Jones that it was hard to work in an environment "where you feel threatened and harassed." Housel was soon summoned to see Justet in the lunchroom. Also present were Jones and employee Charlene Scott. Justet told Housel that she never threatened Housel. Housel responded that she felt threatened. Justet repeatedly asked Housel why she felt threatened and Housel responded that it was the statements made at the meetings. Justet wanted to know what she had said that caused Housel to feel threatened. Housel said that the references about union dues going to the Mafia made her feel threatened. Justet responded that Housel should have her head examined and demanded Housel to repeat specifically what she had said about the Mafia. Housel attempted to do so, but Justet and Scott met her efforts with laughter. Scott told Housel that she did not know what she was talking about. Justet demanded that Housel give additional examples and Housel did so. Scott heatedly denied that the examples cited by Housel had occurred. Scott angrily came physically close to Housel and asked if she "was accusing her of being a liar." Justet pushed Scott away from Housel.

Justet stated that she had never threatened Housel when Housel did not make her production rate, that she had only made notes for her to come up to standards. At the end of the meeting, Justet turned to Jones and said that Housel felt threatened because Housel had attended the union meeting the night before. After the meeting, Jones came to Housel's work area. Jones changed Housel's work assignment from small sleeves to large size sleeves. According to Housel this made it more difficult for her to achieve her production rate.

The Government alleges that during this meeting Scott, acting as the agent of the Respondent, interrogated Housel concerning her union activity and physically threatened Housel. While I found Housel to be a forthright witness as a whole, her account of this meeting was confused and she exhibited poor recollection of what was said. I do not find that her testimony was persuasive that Scott was acting as the Respondent's agent at this meeting. I conclude that what Scott said and did on this occasion has not been proven by a preponderance of the evidence to have violated Section 8(a)(1) of the Act.

XX. EVENTS OF MARCH 3

On March 3, Housel arrived at work to find that her work chair seat had been soaked with oil. The matter was reported to Justet, who obtained another chair for Housel. At midmorning Justet called Housel into the office and gave her a written warning for low production. The warning stated that Housel should have made rate at \$5.15 an hour by the end of her 8th week of employment. Housel typically did not make production during her 6 months of employment with the Respondent. She had never before received a written warning concerning her production.

Before 11:30 a.m. Justet announced over the public address system that employees with antiunion T-shirts should go or report to the lunchroom. The antiunion employees met with Justet for awhile and then went outside. A crew from a local TV station was outside the plant and filmed the employees conducting an antiunion demonstration. Antiunion banners were hung on the side of the building, and the banners remained posted the rest of the week.

A few employees did not join in the demonstration and remained inside the facility working until the beginning of the lunch break at 11:30 a.m. The employees who remained at work included Housel, Kathy Housel, and Nona Box. As the antiunion employees left, Housel asked Jones what was going on. Jones responded that Housel would not be interested because the employees were engaged in antiunion activities. During the antiunion demonstration, Justet commented to Housel that there were not many employees left inside working.

XXI. DISCHARGE OF NONA BOX

Employee Nona Box signed the first antiunion petition on February 2 but declined to sign the second petition circulated on February 25. Box accepted a handbill when the Union handbilled at the plant on February 27. On March 2, Box declined an employee's offer of an antiunion T-shirt. On Box's refusal to accept the shirt, the employee told Box, "Why don't you work somewhere else then." When Box reported for work on March 3, employee Charlene Scott asked her where her antiunion T-shirt was.

Later in the morning of March 3, Box asked Justet if she could do anything about all the antiunion activity in the plant. Justet responded that she could not help how her employees felt. Box then said if the employees were so strong in their nonunion beliefs, there should be a vote to "get this all over with." Justet responded that she could not do that.

Box remained at work during the antiunion demonstration outside the facility on the morning on March 3. During the demonstration, Box told Justet that her father had been a union man for 31 years and that there was no way that Box could wear an antiunion T-shirt.

At about 1 p.m., Charlene Scott accused Box of stabbing her nippers at Scott that morning. Box denied having done such an act. Scott stood immediately behind where Box was seated at her workstation and made a derogatory statement about Box's boyfriend. Scott worked about 20 feet from Box's station. Subsequently Box went to Justet's office to complain about Scott's harassment. Scott was already in the office with Justet. Box commented to Scott that what happened between her and her boyfriend was none of Scott's business. Box told Scott that Box did not have to wear an antiunion T-shirt if she did not want to. Scott "got into Box's face" and yelled that Box was not as bad as Box thought she was. Box responded that she had a temper and it was her right not to wear an antiunion T-shirt. Box asked Justet if she was going to do anything about the matter. Justet shrugged her shoulders but did not reply verbally. Box said she could not work under those conditions and that she was giving her 2 weeks notice. Justet did not say anything. Box then returned to work and completed her shift.

Box discovered her timecard was missing when she reported to work on March 4. Justet called Box into the office and, in the presence of Floor Supervisor Jones, told Box that she was terminating Box. Justet said Box had not been making quota. Box said that she was going to ask Justet to withdraw her 2 weeks notice because everyone had been angry the day before. Justet responded that she could not permit that. Box had never received any written warnings regarding her production but on one occasion had been told by Jones that she needed to speed up her production.

Box had made clear that she was not antiunion. She refused to sign the second antiunion petition and declined offers of antiunion T-shirts. Box asked Justet to stop the antiunion activity at the plant. Box did not join in the March 3 antiunion demonstration and told Justet on that date that she could never wear an antiunion shirt because her father had been union for 30 years. When Box complained to Justet about harassment from antiunion employee Scott Justet answered with silence. The Respondent's brief asserts that Box was not discharged but rather her resignation was accepted. I find the record supports the conclusion that Box was indeed terminated before she could rescind her hasty resignation. Box's discharge was timed with her refusal to engage in antiunion activity and requests that Justet end such activity. The Respondent did not satisfactorily explain why Box's alleged production problems were a factor in accepting her "accepting her resignation." She had received little criticism about such problems. The record confirms that production standards were routinely overlooked for other employees. I find that the discharge of Box was not shown by the Respondent to be legitimately tied to any work problems. I conclude from the record as a whole that at least part of the motivation for the termination was Box's protected activity of refusing to engage in antiunion conduct with other employees. I find that the Respondent has violated Section 8(a)(1) and (3) of the Act by terminating Nona Box. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

XXII. HOUSEL'S COMPLAINTS ABOUT CHARLENE SCOTT

On March 4 the Respondent reassigned Scott to a new workstation that was immediately between Housel and her daughter-in-law. Scott had not previously worked in Housel's work area. As of this date the Housels were the only persons still employed by the Respondent that had attended the February 25 union meeting.³ Following the reassignment Scott made several comments to Housel including that if Housel was not a union supporter, she might be able to make production; and that Scott was "one of Irene's people you are scared to death of." Housel told Scott to leave her alone. Later in the afternoon Housel complained to Justet about Scott's harassment. Justet said she would check into the matter. Subsequently Scott approached Housel and said Housel had gotten her in trouble, now "it was on," and that she would continue to talk to Housel. Scott continued to make comments to Housel and again Housel

told Scott to leave her alone. Scott responded that she was not going to leave Housel alone.

On the evening of March 4 the Union held an employee meeting. In attendance were Pitts, Carneal, Reaves, Geraldine, Housel, and Kathy Housel. At the meeting Krasovec helped Housel write a letter to Justet dated March 5 regarding Scott's harassment of Housel.

XXIII. 24-HOUR DEADLINE FOR HOUSEL

When Housel arrived at work on March 5 Scott told her, "I see you're still here." Early the same morning Housel gave Jones the letter she and Krasovec had prepared the night before. Later in the morning while Housel was working, Justet ran up to her, pointed her finger in Housel's face and told her never to look at Justet while Justet was on the floor.

Justet subsequently called Housel to the lunchroom. Housel secretly tape recorded their conversation. Justet angrily questioned Housel about the fact Housel's husband (who does not work for the Respondent) had complained to the local newspaper about its coverage of the March 3 antiunion demonstration. Housel denied having any knowledge regarding her husband's actions. Justet told Housel that Justet was going to confront Housel's husband in the parking lot that night about the matter. Justet continued:

[T]his is a bunch of bullshit. I gave you a job here. You don't even earn your money that we pay you, but you continue to stay here. And the company allows you to. But you go on and on and on with this bullshit.

Housel complained that Scott was harassing her. Justet responded, "[W]ell then, why are you calling the newspaper about me?" Justet objected to Housel talking to her husband about what went on at work; and said, "If your husband knows anything about me it came from you." Housel responded that her husband knew that she was stressed "because of all this union stuff." Justet denied that she had ever talked to Housel about the Union. Housel pointed out that Justet talked about the Union at the employee meetings. Housel again denied that she had anything to do with her husband talking to the newspaper. Justet angrily replied:

Yes, you do. Yes, you do. You have everything to do with it. Because you're the only one that can tell him, because that man don't know me.

Justet told Housel if she wanted to fire Housel she could because "after eight weeks of being here, the company does not have to keep you if you do not make your piece rate." Justet said, "I have every grounds to fire you, if I wanted to fire you." Housel pointed out that employee Jolene Moore had been employed 3 years and Moore did not make rate. Justet responded that Moore made her rate "off and on." At the end of the meeting Justet said: "I'm going to give you . . . one day to bring your production up. One day. That's it." Housel asked what would happen if she didn't bring her production up. Justet responded, "Then you don't have a job here. One day." Housel asked why the Respondent had kept her 6 months. Justet responded, "[B]ecause I was hoping you'd come up." Justet repeated for the third time that Housel had 1 day to bring her

³ Kathy Housel voluntarily quit her employment with the Respondent on March 5.

production rate up, and if she did not make the production rate, “you’re not gonna work here.” The meeting concluded with Housel saying that Scott had been harassing her. Justet responded that Scott “ain’t going to bother you.”

That evening Justet confronted Housel’s husband in the parking lot after work. Again Housel taped this conversation. Justet angrily accosted Clyde Housel by saying, “Well, let me tell you what, you son-of-a-bitch, you don’t work for me. So why did you go down to the newspaper.” During the conversation Justet told Clyde Housel to “get out of that car and I’ll show you, you don’t scare me.”

Justet’s questioning of Housel on March 5 centered on Clyde Housel’s union activity and Geraldine Housel’s role in that activity. Justet blamed Housel for her husband’s actions. Justet admitted that the Respondent had been very tolerant of Housel’s substandard production. Justet, however, was angry at the Housels’ support for the Union and changed her tolerance to a 24-hour deadline, which if not met, would lead to Geraldine’s discharge. Justet’s sudden imposition of a stringent production requirement and the accompanying threat of discharge were the result of Housel’s protected concerted union activity. I find that this conduct was a violation of Section 8(a)(1) and (3) of the Act.

XXIV. GERALDINE HOUSEL’S MARCH 6 CONSTRUCTIVE DISCHARGE

A. Scott’s Threats

On March 6 after Housel arrived at work Scott came up to her. Scott told Housel she was “a fat ugly pig.” Shortly thereafter Justet conducted a series of employee meetings to discuss two letters the Union had sent the Respondent. The subject matter of the letters included the issue of whether Floor Supervisor Jones and antiunion employee Charlene Scott were agents of Respondent. After the meeting both Jones and Scott wore buttons that said “agent.”

After the employee meetings Scott again harangued Housel at her workstation. Scott told Housel that she was going to kick Housel’s ass. Scott then kicked a box on the floor by Housel’s workstation. Housel tape recorded part of this conversation. Scott said, “Let’s take this outside, right now.” Housel responded, “I’m just sitting here sewing.” Scott said, “You get outside right now.” Housel said, “Leave me alone.” Scott responded, “I will not leave you alone.”

B. Justet’s Refusal to Intervene

After Scott’s provocations Housel wrote a note to Justet complaining about Scott’s conduct:

Right after that meeting Charlene Scott said that she was going to kick my butt she also stated to me she was an agent of the company and was wearing a sticker saying she was. If she attacks me when I go outside I consider the company is also responsible.

Justet then called Housel into the office. Housel tape recorded this conversation. Justet told Housel that Respondent did not have agents; and that Housel was responsible for herself; Respondent was not her protector. Housel stated Scott was threatening to kick her butt. Justet responded that the Respon-

dent was not a babysitter. Justet said, “If a woman was harassing me, I’d step outside with her. And I’d say okay, let’s handle it. Let’s settle it right now. We can’t settle it in the factory, let’s settle it outside.” Housel repeated that Scott would not leave her alone. Justet stated, “The company is not responsible for another machine operator.” Justet drew the analogy that Respondent was not responsible for damage to an employee’s car while the employee was working. Justet said that she was not a protector or a babysitter. Justet said that she did not believe Housel’s statements about Scott because Justet knew Housel “made up lies on me.” Housel asked what lies, but Justet declined to explain. Justet reiterated that unless Housel made her production rate by the end of the day, “you’re automatically terminated.”

Housel was convinced that she was going to be terminated that day. Housel testified that she could not have made her production rate even if she had stayed and worked until the end of the shift. After the lunchbreak Housel told Jones that she knew that she would be terminated at the end of the day and asked for her check so she could leave before the shift ended. Jones obtained Housel’s check and Housel left.

There are two elements that must be proven to establish a constructive discharge. First, the burden imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee’s union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

The record supports the Government’s showing of illegal motivation by the Respondent in causing the constructive discharge of Housel. The timing of her termination was contemporaneous with her union activity of attending union meetings, signing authorization cards, and her declining to participate in antiunion activity at the plant. Justet knew that Housel attended the February 25 union meeting. Housel and her husband had incurred Justet’s wrath for his complaint that the local newspaper was telling only part of the story about union support at the plant. Justet blamed Geraldine Housel for her role in her husband’s union activities. I find that the Respondent had knowledge of Housel’s union activities. The record as set forth herein amply demonstrates Respondent’s union animus. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Although Housel had worked for the Respondent for some 6 months she did not consistently make her production rate. This had never resulted in any discipline. Yet when Housel and her husband’s union activities became an issue, Justet imposed a 24-hour deadline for improvement. There is no evidence that other employees had ever been given such a deadline for improvement. To the contrary the record shows that the Respondent was tolerant of low production by employees.

The Respondent ignored Scott’s harassment of Housel. This despite the fact the conduct was occurring on the plant premises and was of obvious serious concern to Housel. The Respondent does not satisfactorily explain Justet’s condonation of Scott’s conduct. On March 6, Scott threatened physical violence to Housel but Justet continued to ignore this workplace threat to an employee. The solution Justet suggested was for Housel to

invite Scott "outside" so they could settle their differences. Justet then again warned Housel that if she did not make production that day she was terminated.

The record shows that Housel was harassed because of her union sympathies and the Respondent condoned this activity. Additionally, the Respondent imposed an immediate disparate production improvement deadline on Housel for reasons I find were based on her and her husband's union activities. I conclude that when Housel resigned in the face of this ill treatment she was constructively discharged. I find that Housel's constructive discharge is a violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Bolivar Tee's Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association Local Union #146, affiliated with Sheet Metal Workers' International Association, AFL-CIO, and United Food and Commercial Workers International Union, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Bolivar Tee's Manufacturing Company, Bolivar, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting union solicitation and activities.

(b) Threatening employees with the loss of pay and benefits if they engage in union activity or if a union represents the employees.

(c) Threatening employees that the Respondent's plant will close if a union represents the employees.

(d) Telling employees they should quit their jobs if they do not like the Respondent's unlawfully threatened antiunion actions.

(e) Having Respondent's agents circulate antiunion petitions for employees to sign.

(f) Interrogating employees about union activities.

(g) Creating the impression that the Respondent is surveilling its employees' union activities.

⁴ 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.

(h) Threatening employees that union representation, collective bargaining, or other protected concerted activity would be futile.

(i) Threatening employees with physical violence or other retaliation because they file charges with the National Labor Relations Board or engage in other union or protected concerted activity.

(j) Sending employees home early or reducing employees' incentive wages because they engage in union or other protected concerted activities.

(k) Disparately providing benefits to employees based on their antiunion activities.

(l) Issuing production warnings or improvement deadlines to employees because they engaged in union or other protected concerted activity.

(m) Condoning harassment of employees because of their union or other protected concerted activities.

(n) Suspending or discharging Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel for engaging in union or other concerted protected activities.

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

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

(a) Within 14 days from the date of this Order, offer Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges of Donna Pitts, Angela Carneal, Darla Reaves, Nona Box, and Geraldine Housel, and within 3 days thereafter notify the employees in writing that this has been done and that their suspensions and discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Bolivar, Missouri, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the

⁵ 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 Judge-

Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where 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 in-

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

volved 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 January 9, 1998. *Excel Corp.*, 325 NLRB 17 (1997).

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

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