

Grand Industries, Inc. and Great Lakes Regional Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.
Cases 7-CA-42513 and 7-CA-42680

August 27, 2001

DECISION, ORDER, AND ORDER REMANDING
BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE AND WALSH

On July 6, 2000, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision, Order, and Order Remanding, to adopt the recommended Order as modified and set forth in full below, and to remand this proceeding for further consideration as discussed herein.

The judge found that the Respondent violated Section 8(a)(3) and (1) by suspending employee Brian Phipps from October 28, 1999¹ through November 15. In the absence of exceptions, we adopt this finding.

The amended consolidated complaint (complaint), at paragraph seven, also alleged multiple violations of Section 8(a)(1). In its amended answer, the Respondent admitted these allegations, and, at the hearing, counsel for Respondent acknowledged that the Respondent was admitting those allegations. Accordingly, the judge found that the Respondent had violated Section 8(a)(1) as alleged in paragraph seven of the complaint. In light of the Respondent's admission, and in the absence of exceptions to these allegations, we adopt this finding.

We further find that it would effectuate the policies of the Act to sever these uncontested violations from the issue being remanded herein and to issue an appropriate remedial Order as modified and set forth in full below.²

¹ All dates refer to 1999, unless otherwise specified.

² The judge found, inter alia, that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule prohibiting unauthorized solicitation or distribution of literature whether written or printed on company premises during working hours. (The rule was twice stated to employees on October 22.) The judge inadvertently failed to require the Respondent to rescind this provision.

The judge also inadvertently failed to include a preservation of records remedy in his Order, and failed to specify that, *within 3 days* after removing from its files any unlawful reference to Phipps's unlawful suspension, the Respondent must notify Phipps in writing that this has been done and that the suspension will not be used against him in any way. We shall modify the judge's Order accordingly and issue a new notice to employees. Finally, we shall modify the judge's recom-

The complaint also alleged that the Respondent violated Section 8(a)(3) by disciplining employees "known to the Respondent" pursuant to the more stringent enforcement of its disciplinary rules.³ The judge dismissed this complaint allegation. The General Counsel has accepted to this dismissal. We find that it is necessary to remand this allegation for further consideration by the judge.

The relevant facts regarding this allegation are set forth briefly below. The Respondent, at its Grand Haven facility, is engaged in several operations, the most labor intensive of which is the construction of wooden boxes, pallets, and skids. The Respondent employs approximately 30 hourly employees. Twenty of these employees work on the day shift and 10 work on the night shift. The Union began an organizational campaign among Respondent's employees in August; a representation petition was filed on October 28.

The Respondent's employee handbook lists various infractions for which discipline may be imposed. Excessive absenteeism, excessive tardiness, and failure to report properly absences are specifically listed as "causes for disciplinary action and/or dismissal." The handbook includes an attendance rule which provides for progressive discipline resulting from excessive tardiness and unexcused absences. An incident of tardiness is one half of a point, and an unexcused absence is one point. When employees accumulate a certain number of points, they may be disciplined accordingly, i.e., they may receive warnings and, upon accumulating more points, suspensions.⁴

mended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

³ The complaint allegation states, at par. 11, that "[b]eginning about October 25, 1999, Respondent, through its agent Bradley J. Billingham at its Grand Haven plant, discriminated against employees whose names currently are unknown to the General Counsel but are well known to the Respondent[,] by suspending said employees pursuant to its actions described above in par. 10." Par. 10 of the complaint, in turn, states that, "[b]eginning about October 25, 1999, Respondent, through its agent Bradley J. Billingham at its Grand Haven plant, enforced discipline rules in a more stringent manner because employees had joined or supported the Charging Party Union."

⁴ With respect to the suspension of employee Phipps, the judge found that the Respondent had unlawfully retroactively revoked its waivers of Phipps's suspensions and suspended him because of his union activities. Importantly, the judge found that, on October 26, Billingham told Phipps that, "in the past we would have let this [Phipps's attendance violations] slide, but since we brought up the attendance issue. . . . we are going to enforce it"; he further found that Billingham admitted that he was "going back retroactively and enforcing the three and 10-day suspensions that [he] had previously waived." See sec. II.C.1 of the judge's decision.

The complaint alleged, *inter alia*, that, on October 25,⁵ the Respondent had threatened employees with more rigorous adherence to disciplinary rules set forth in the employee handbook because employees had joined or supported the Union. This allegation was uncontested. The General Counsel further alleged that the Respondent followed through on this threat by imposing a “massive increase” in discipline, *i.e.*, suspensions, given to employees after October 25.⁶ The Respondent contends that it consistently applied its disciplinary policy and that the discipline for attendance infractions imposed following the advent of the organizing effort would have taken place even in the absence of the protected conduct.

In *Wright Line*,⁷ the Board set forth a test of causation for all cases alleging violations of Section 8(a)(3), or violations of Section 8(a)(1) turning on employer motivation: The General Counsel must show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer’s decision; once the General Counsel has made this required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected activity.

The judge found that the General Counsel had established a *prima facie* case that the Respondent had unlawfully imposed its disciplinary rules more stringently. However, he also found that the Respondent had rebutted the General Counsel’s *prima facie* case because it demonstrated that its disciplinary policy was not unlawfully applied, and would have been utilized in the same manner even in the absence of employees’ protected conduct. In this regard, the judge found that the documents in the record imposing suspensions upon all disciplined employees reflect those employees’ attendance violations, and no attendance records were introduced showing that, prior to any union activity, violations that should have resulted in discipline were ignored.

The judge examined the number of suspensions imposed during the 6-month period before August, when the Respondent became aware of the organizing campaign, and the 6-month period following that month. Using this timeframe for analyzing whether the amount

of discipline increased after Respondent’s knowledge of the campaign, the judge found that there was a relatively consistent pattern of suspensions for attendance infractions 6 months before August and 6 months after August, and that the suspensions were justified. Specifically, he found that from February through July, the Respondent issued three suspensions for a total of 16 days of suspensions, and that from September through February 2000, the Respondent issued four suspensions for a total of 19 days of suspensions.⁸ The judge also found that the three attendance-related suspensions issued by the Respondent in March 2000, and the three attendance-related suspensions it issued in April 2000, were, in light of the documents imposing those suspensions, justified.

In its exceptions, the General Counsel contends, *inter alia*, that the judge erred in using August as the benchmark month for analyzing this allegation. The General Counsel asserts that, instead of using August, the judge should have used October, the month when the Respondent unlawfully threatened employees with more rigorous adherence to its disciplinary rules because employees had joined or supported the Union, as the benchmark month for analysis, as alleged in the complaint. Thus, the General Counsel contends that the appropriate timeframe for analyzing whether the Respondent more stringently enforced its disciplinary rules would be 6 months before, and 6 months after, October 25. The General Counsel further contends that the judge erred in excluding Phipps’s suspensions (which were imposed on October 26) from his analysis of this allegation, and did not, in analyzing this allegation, take into account the fact that the Respondent stopped waiving discipline for attendance violations on or about October 26.

We find that these contentions warrant further examination by the judge of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by disciplining employees “known to the Respondent” pursuant to the more stringent enforcement of its disciplinary rules.⁹ Accordingly, we remand this proceeding to the judge to resolve the following issues.

First, because the Respondent unlawfully threatened employees with more rigorous adherence to its disciplinary rules on or about October 25, the judge is instructed, on remand, to analyze whether the Respondent consistently applied its disciplinary rules regarding attendance infractions 6 months before and 6 months after that date, *i.e.*, April 25, 1999, through April 25, 2000.

⁸ The judge did not include Phipps, who, as discussed above, unlawfully received a 3-day suspension and a 10-day suspension on October 26, in this analysis. And, it is unclear whether the judge included suspensions (if any) imposed in the month of August in his analysis.

⁹ See *fn. 3*.

⁵ Although the complaint refers to the date of Billinghamst’s unlawful threat to enforce more rigorously the Respondent’s disciplinary rules as occurring “about” October 25, it appears that Billinghamst may have actually made this remark on October 22. This minor discrepancy does not affect our analysis of this issue, and because the complaint refers to “about” October 25, we shall refer to that date as the date on which Billinghamst made the statement.

⁶ See *fn. 3*.

⁷ 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Second, because Phipps received a 3-day suspension and a 10-day suspension on October 26 (after the Respondent had unlawfully revoked its previous waivers of those suspensions), the judge is instructed to include these suspensions in his analysis of this allegation.

Finally, the judge is instructed to determine whether any of the employees who were suspended for attendance violations in the 6 months after October 25 would have had their suspensions postponed or waived but for the Respondent's unlawfully threatening employees with more rigorous adherence to its disciplinary rules.¹⁰ The judge may, if necessary, make credibility resolutions, and reopen the record to obtain evidence required to resolve these issues.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Grand Industries, Inc., Grand Haven, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Suspending or otherwise discriminating against any employee for supporting Great Lakes Regional Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other union.
 - (b) Prohibiting distribution of union literature on company property on nonworking time in nonworking areas or requiring employees to obtain permission before engaging in such distribution.
 - (c) Prohibiting employees from discussing the Union during nonwork time.
 - (d) Threatening employees with plant closure, loss of benefits, and unspecified reprisals if they select the Union as their collective-bargaining representative.
 - (e) Coercively interrogating employees concerning their union activities and the union activities of other employees.

¹⁰ The judge found that the Respondent waived discipline for employees' attendance violations in September and October 1999. Thus, consistent with this remand, the judge should determine whether the Respondent postponed or waived discipline for attendance violations from April 25, 1999, through August 1999 (as well as Sept. and Oct. 1999) or at any time from October 25, 1999, through April 25, 2000.

The judge also found that "the waivers of discipline for Locke, Mengel, and Phipps in September and October of 1999 occurred after Respondent became aware of union activity [and] [t]he waivers of discipline given to Locke and Mengel were not revoked." See sec. II,D,2 of the judge's decision. Insofar as the judge relied on this finding to conclude that the Respondent did not violate Sec. 8(a)(3), we instruct him to reconsider this finding consistent with this remand, i.e., to use October 25, 1999, as the benchmark date for analyzing this allegation, not August 1999, when the Respondent became aware of the organizing campaign.

(f) Soliciting employee grievances and implicitly promising to remedy them in order to discourage employees from supporting the Union.

(g) Promising employees that Respondent would consider implementing a 401(k) plan as a means of discouraging employees from supporting the Union.

(h) Threatening employees with more rigorous adherence to disciplinary rules because of their membership in or support of the Union.

(i) Threatening employees with reduction of their profit-sharing payment due to corporate legal fees paid in connection with the Union.

(j) Advising employees that organizational efforts are futile and that they will be discharged if they select the Union as their collective-bargaining representative.

(k) 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) Rescind the unauthorized solicitation/distribution rule promulgated on or about May 1, 1999, and notify all its employees at its Grand Haven, Michigan plant that this has been done.

(b) Make Brian Phipps whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Brian Phipps, and within 3 days thereafter notify him in writing that this has been done, and that the suspension will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary 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 Grand Haven, Michigan, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's author-

¹¹ If this Order is enforced by a judgment of the 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."

ized 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 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 September 4, 1999. 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the portion of Cases 7-CA-42513 and 7-CA-42680 alleging that the Respondent violated Section 8(a)(3) and (1) by disciplining employees "known to the Respondent" pursuant to the more stringent enforcement of its rules, is hereby severed and remanded to Administrative Law Judge George Carson II for further consideration as described above, and reopening of the record if necessary.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate, on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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 otherwise discriminate against any of you for supporting Great Lakes Regional Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other union.

WE WILL NOT prohibit distribution of union literature on company property on nonworking time in nonworking areas or require you to obtain permission before engaging in such distribution.

WE WILL NOT prohibit you from discussing the Union during nonwork time.

WE WILL NOT threaten you with plant closure, loss of benefits, and unspecified reprisals if you select the Union as your collective-bargaining representative.

WE WILL NOT coercively interrogate you concerning your union activities or the union activities of others.

WE WILL NOT solicit your grievances and implicitly promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT promise to consider implementing a 401(k) plan as a means of discouraging you from supporting the Union.

WE WILL NOT threaten you with more rigorous adherence to disciplinary rules because of your membership in or support of the Union.

WE WILL NOT threaten reduction of your profit-sharing payment due to corporate legal fees paid in connection with the Union.

WE WILL NOT advise you that your organizational efforts are futile or threaten discharge if you select the Union as your collective-bargaining representative.

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

WE WILL rescind the unauthorized solicitation/distribution rule promulgated on or about May 1, 1999, and notify all of our employees at our Grand Haven, Michigan plant that this has been done.

WE WILL, within 14 days from the date of the Board's Order, make whole Brian Phipps for any loss of earnings and other benefits suffered as a result of his unlawful suspension, plus interest, and WE WILL remove from our files any reference to his unlawful suspension and within 3 days thereafter notify him in writing that this has been done and that it will not be used against him in any way.

GRAND INDUSTRIES, INC.

Steven E. Carlson, Esq., for the General Counsel.
Gary T. Britton, Esq., for the Respondent.
Bill Rose, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on May 11, 2000. The charge in Case 7-CA-42513 was filed on October 28, 1999.¹ The charge in Case 7-CA-42680 was filed on January 4, 2000, and amended on February 25, 2000. The amended consolidated complaint issued on April 24, 2000. The complaint alleges multiple violations of Section 8(a)(1) of the National Labor Relations Act. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending employee Brian Phipps because he engaged in union activities, by more stringently enforcing its disciplinary rules because employees engaged in union activity, and by disciplining employees "known to the Respondent" pursuant to the more stringent enforcement of its rules. Respondent's amended answer admits the statements alleged to violate Section 8(a)(1) of the Act. It denies that the suspension of Phipps violated the Act or that it more stringently enforced rules. I find that the suspension of Phipps did violate the Act, but that the record does not establish a more stringent enforcement of rules.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Grand Industries, Inc., a corporation, is engaged in the manufacture of wooden boxes, pallets, and skids and in the assembly and packaging of other materials at its facility in Grand Haven, Michigan, at which it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Michigan. 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 Great Lakes Regional Industrial Council, United Brotherhood of Carpenters and Joiners of America, 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

The Respondent, at its Grand Haven facility, is engaged in several operations, the most labor intensive of which is the

construction of wooden boxes, pallets, and skids. Respondent employs approximately 30 hourly employees, 20 who work of the first or day shift and 10 who work on the smaller second or night shift. In August, the Union began an organizational campaign among Respondent's employees. A representation petition was filed on October 28. Respondent's vice president of operations, Bradley Billingham had no prior experience with union organizational efforts.

B. The 8(a)(1) Allegations

The complaint, in paragraph 7, alleges multiple incidents of interference, restraint, and coercion, several of which are attributed to Billingham. Respondent's amended answer states that Respondent "does not contest" these allegations, and, at the hearing, counsel for Respondent acknowledged that Respondent was admitting these allegations. Respondent admits that it:

(a) Since on or about May 1, promulgated and maintained a rule prohibiting unauthorized solicitation or distribution of literature whether written or printed on company premises during working hours. On October 22, the foregoing rule was twice stated to employees.

(b) On September 14 and October 20, threatened employees with loss of benefits if they formed a union.

(c) On October 22, twice, and October 25, threatened employees with closure of its Grand Haven plant if employees selected a labor organization to represent them.

(d) On October 22, orally promulgated a rule requiring that employees obtain permission before distributing union literature at the Grand Haven plant.

(e) On September 22, October 22, twice, and October 27, coercively interrogated employees concerning their union activities and the union activities of other employees.

(f) On October 22, twice solicited employee grievances and implicitly promised to remedy them.

(g) On September 22 and October 22, threatened employees with unspecified reprisals for engaging in union activity.

(h) On October 22, promised employees that Respondent would consider implementing a 401(k) plan as a means of discouraging employees from supporting the Union.

(i) On October 25, threatened employees with more rigorous adherence to disciplinary rules because employees had joined or supported the Union.

(j) On October 25, prohibited employees from discussing the Union during nonwork time.

(k) On October 27, prohibited employees from talking about the Union in the plant.

(l) On October 27, advised employees that money spent on legal fees related to the Union would reduce employees' profit-sharing payment.

(m) On September 14, advised employees that organization efforts would be futile and that they would be discharged if they selected the Union as their collective-bargaining representative.³

¹ All dates are 1999, unless otherwise indicated.

² The parties have stipulated to the following corrections of the transcript:

P. 8, L. 13: Change "maintain the Rules of Evidence" to "maintained a rule prohibiting;"

P. 25, L. 6: Change "Fair Rep" to "paragraph;"

P. 86, L. 10: Change "1989" to 1999;"

P. 92, L. 21: Change "MR. CARLSON" to "MR. BRITTON."

³ I have alphabetized the separate violations alleged in the complaint for clarity in this decision. This listing does not correspond to the subparagraphs in the complaint.

C. The Suspension of Brian Phipps

1. Facts

Respondent's employee handbook sets out a list of various infractions for which discipline may be imposed, and it includes an attendance rule that provides for progressive discipline as a result of excessive tardiness and unexcused absences. Discipline is imposed after an employee exceeds two points in a 1-month period. An incident of tardiness is one half a point and an unexcused absence is one point. There is no probative evidence that Respondent deviated from its disciplinary policy at any time in 1998 nor through the first 8 months of 1999. Vice President of Operations Billinghamurst asserted without contradiction that discipline had sometimes been postponed because of production needs. Assuming this to be true, there is no probative evidence that discipline was ever actually waived except in September and October 1999. The record establishes that in September and October, Respondent waived discipline that should have been imposed upon three employees.

Tom Mengel had unexcused absences on August 16, 30, and 31 and should have received a 3-day suspension that would have begun after his return to work on September 1. A notation in his file states that the suspension was waived. Mengel also had unexcused absences on September 7, 9, and 10, and should have received a 10-day suspension. A notation reflects that this suspension also waived on September 14. Mengel had unexcused absences on October 11, 18, and 25. He was suspended for 30 days on October 25.

David Locke was late on October 4, 5, 11, 18, and 19. He signed a document stating that the 3-day suspension he should have received on October 19 was waived but that he would be suspended for 10 days if he again violated the attendance policy. Locke was late on November 3, 4, and 5 and had unexcused absences on November 8, 9, and 15. On November 16 he was suspended for 10 days.

Brian Phipps was late on September 5 and had unexcused absences on September 12 and 13, which should have resulted in a 3-day suspension. Following this, Phipps was late on September 16 and 20 and absent on September 22, 27, and 28, which should have resulted in a 10-day suspension. None of the foregoing discipline was imposed upon Phipps. On occasions after this when Phipps was late for work, his supervisor would comment, "You know you are up for ten days off," however, discipline was not imposed, and Phipps' supervisor never advised him that the discipline might be imposed at a later time. Although there is no notation in Phipps' file reflecting that the discipline was waived, Billinghamurst admitted that the discipline had been waived. When asked, "Isn't it a fact that when you suspended Phipps you told him that you were going back retroactively and enforcing the three and 10-day suspensions that you had previously waived?" Billinghamurst answered, "Correct."

Billinghamurst learned of the Union's organizational activity in August. Thereafter, union literature was observed at the facility. On October 22, Respondent purchased pizza for its employees and served it at mealtime on the day and night shifts. Billinghamurst used this opportunity to address employees regarding their organizational activity. His comments included several of the statements alleged in the complaint as violating Section

8(a)(1) of the Act including threats of closure, reiteration of Respondent's overly broad no-solicitation and distribution rule, interrogation, and solicitation of grievances. At the day-shift meeting, Phipps was wearing a button on his hat that stated, "Thanks for the pizza, but I still want a Union." In the course of the meetings, employees made comments. One comment at the day shift meeting related to favoritism regarding treatment of employees with attendance violations. Billinghamurst acknowledged that discipline had been waived for some employees due to the workload. He specifically mentioned employee David Locke, who was not identified as supporting the Union. He stated that, because there was so much work that needed to be done, Locke's 3-day suspension had been waived. Phipps complained that he could not make enough money to support his family, and Billinghamurst commented upon his poor attendance.

On October 26, Billinghamurst called Phipps to his office. He noted that the matter of attendance had been mentioned at the meeting on October 22, and that, following the meeting, he had looked at Phipps' attendance. Billinghamurst stated that "in the past we would let this slide, but since we brought up the attendance issue . . . we are going to enforce it." Billinghamurst admitted that he was "going back retroactively and enforcing the three and 10-day suspensions that [he] had previously waived." The foregoing admission establishes that Phipps' suspensions had been waived. In view of this admission, there is no basis for Respondent's argument in its brief that the suspensions of Phipps had merely been delayed. In further testimony, Billinghamurst admitted stating that he told Phipps that he was taking this action "because there was potential for a Union to be at Grand Industries, we were going to follow our handbook much closer . . . [and] that he [Phipps] recently had three-day and 10-day suspensions waived because we could not find enough people, but now he was being suspended."

Billinghamurst explained that when Locke was suspended on November 16 the manpower "situation was easing up." Although Respondent retroactively revoked its waiver of discipline as to union adherent Phipps on October 26, the waiver of the 3-day suspension of Locke in October and the waivers of the 3-day and 10-day suspensions of Mengel were not revoked. Although the original charge herein names both Phipps and Mengel as alleged discriminatees, there is no evidence that either Locke or Mengel had identified themselves as supporting the Union at the time Respondent retroactively revoked its waiver of Phipps' suspension.⁴ Indeed, the record reveals no union activity at the facility by either Locke or Mengel. Billinghamurst did not address the disparity in the treatment of Phipps vis-a-vis Locke and Mengel.

2. Analysis and concluding findings

In applying the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), to the foregoing facts, I find that Respondent was aware that Phipps was engaged in organizational activity on behalf of the Union

⁴ The portion of the charge relating to Mengel was dismissed. The General Counsel stated that there was "not sufficient evidence that that [October] suspension had anything to do with the employer's alleged unfair labor practices." The transcript incorrectly identifies Mengel as "Magden" at pp. 51 and 52.

and bore animus towards such activity. Billinghurst admitted that he revoked the previously waived suspensions of Phipps “because there was potential for a Union to be at Grand Industries,” and that he “didn’t want to be penalized down the road” for not enforcing Respondent’s rules. The foregoing admission establishes that union activity was a substantial and motivating factor for Respondent’s action. *Manno Electric*, 321 NLRB 278 (1996).

Contrary to Respondent’s argument in its brief, it is immaterial that Phipps acknowledged the infractions for which the discipline was imposed. In further argument, Respondent asserts that Respondent had previously postponed discipline and that the General Counsel did not elicit any evidence that the imposition of discipline upon Phipps was meted out “differently that it had been in the last five years.” Contrary to this argument, the record establishes that Phipps was treated differently from other employees. Respondent had waived the suspensions of Locke and Mengel, just as it had waived the suspensions of Phipps. Neither Locke nor Mengel were identified as union supporters by Respondent in October. Phipps, wearing a prounion button, had questioned Billinghurst at the October 22 meeting. On October 26, Respondent revoked its previous waiver of Phipps’ suspensions and suspended him for 13 days. There was no revocation of the waivers of the suspensions of Locke and Mengel.

Respondent has not established that it would have taken the same action against Phipps in the absence of his union activities. Respondent’s counsel did not examine Billinghurst regarding the disparity in his treatment of known union activist Phipps and two employees not identified as union supporters. I find that Respondent retroactively revoked the waiver of Phipps’ suspensions, and suspended him for 13 days because of his union activities. In so doing, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act and discriminated against Phipps with regard to his hire and tenure of employment in violation of Section 8(a)(3) of the Act.

D. Discipline of Employees “Known to Respondent”

1. Facts

The General Counsel introduced documents reflecting suspensions for attendance violations issued to a total of eight employees from December through April 2000, one in December, one in February 2000, three in March 2000, and three in April 2000. The General Counsel argues that the foregoing documents establish that Respondent, consistent with the admitted complaint allegation of a threat to more stringently enforce its rules, did exactly what it had threatened to do.

Respondent acknowledges the admitted threat but argues that Respondent “consistently applied its disciplinary policy” and that the action taken following the advent of the Union’s organizational effort “would have taken place even in the absence of the protected conduct.” Respondent introduced documents reflecting suspensions for attendance violations prior to any union activity at its plant including two suspensions in late 1997, five in 1998, as well as a suspension relating to misuse of equipment in 1998. There were a total of four suspensions affecting three employees for attendance violations in the first 4

months of 1999: R. Cushman on January 25, J. Gates on March 12 and April 1, and T. Raglin on May 13. Billinghurst testified that the discipline imposed upon the employees identified by the General Counsel was consistent with Respondent’s policy and not related to the organizing campaign.

The General Counsel argues that there was a “massive increase” in the number of suspensions issued by Respondent, and cites numbers that include the unlawful suspension of Phipps and the November suspension of Locke. The General Counsel refers to Respondent’s argument that there was no change in the enforcement of its policies and cites the testimony of Billinghurst that Respondent administered as much discipline in the 6 months before he became aware of any union activity as in the 6 months after. The record establishes that this testimony was substantially correct. From February through July, the 6 months before Billinghurst became aware of union activity in August, Respondent issued three suspensions: a 3-day suspension to Gates in March, a 10-day suspension to Gates in April, and a 3-day suspension to Raglin in May, a total of 16 days of suspensions. In the 6 months following August, from September through February 2000, not counting Phipps, the record establishes a total of four suspensions: Locke for 10 days in November, employee T. Spoelhof for 3 days in December, employee T. Sanders for 3 days in January 2000, and employee B. Davis for 3 days in February 2000, a total of 19 days of suspensions.

No attendance records reflecting violations of Respondent’s attendance policy that did not result in discipline prior to August were placed into evidence. So far as the record shows, the only employees deserving of discipline for infraction of Respondent’s rules prior to union activity were the employees that Respondent’s evidence reveals were disciplined.

2. Analysis and concluding findings

The complaint alleges that Respondent more stringently enforced its rules because employees engaged in union activity and disciplined employees “known to the Respondent” pursuant to the more stringent enforcement. In view of Respondent’s knowledge of employee union activity and its admitted threat to more stringently enforce its rules, I find that the General Counsel has established a prima facie case pursuant to *Wright Line*. I am mindful that there is no evidence of the union sympathies of the employees who were suspended after October. As the General Counsel correctly argues, in cases involving more stringent rule enforcement, discipline pursuant to the unlawful application of a warning system is, ipso facto, unlawful. See *Hyatt Regency Memphis*, 296 NLRB 259 (1989); *Joe’s Plastics*, 287 NLRB 210 (1987).

Notwithstanding the foregoing finding, I further find that Respondent has rebutted the General Counsel’s prima facie case and has established that its disciplinary policy was not unlawfully applied because the same action would have taken place even in the absence of the employees’ protected conduct.

Unlike the record in *Hyatt Regency Memphis*, supra, the record does not establish that Respondent’s prior enforcement of its rules was “lax and sporadic, and at times . . . nonexistent.” Id. at 261. The documents imposing the suspensions upon all disciplined employees reflect their attendance violations. No

attendance records were introduced showing that, prior to any union activity, violations that should have resulted in discipline were ignored. The record reveals that employees were disciplined both before and after the advent of union activity. Although the General Counsel argues that there was an increase in suspensions after October, the record reveals a relatively consistent number of suspensions from January 1999 through February 2000. The General Counsel presented evidence that reflects three suspensions in March 2000 and three in April 2000. The justification for that discipline is reflected on the documents imposing the suspensions, and I find that those documents establish more frequent violations of Respondent's attendance policy rather than more stringent enforcement of its rules. Respondent's evidence showing a pattern of consistently disciplining employees for attendance violations was not rebutted. In order for the General Counsel to prevail upon his theory of the case, evidence needed to be adduced that, prior to employee union activity, Respondent's rules were not consistently enforced. The waivers of discipline for Locke, Mengel, and Phipps in September and October occurred after Respondent became aware of employee union activity. The waivers given to Locke and Mengel were not revoked. So far as the record shows, the only employees deserving of discipline for infraction of Respondent's rules prior to union activity were those employees that Respondent's evidence reveals were disciplined. There is no evidence upon which I can base a finding that, prior to the Union's organizational effort, employees who should have been disciplined were not disciplined. Thus, there is no probative evidence upon which I can find that Respondent's postorganizational enforcement of its rules was more rigorous. I shall, therefore, recommend that the allegations that

Respondent more stringently enforced its disciplinary rules because employees engaged in union activity, and disciplined employees "known to the Respondent" pursuant to the more stringent enforcement of its rules be dismissed.

CONCLUSIONS OF LAW

1. By engaging in the conduct set out above which was admitted in its amended answer, 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 suspending Brian Phipps because of his 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 suspended Brian Phipps, must make him whole for any loss of earnings and other benefits, from October 28, through November 15, 1999, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵ The Respondent must also remove any reference to the foregoing suspension from his file.

[Recommended Order omitted from publication.]

⁵ Phipps had previously applied for and been granted a leave day on October 27.