

**Sea Ray Boats, Inc. and International Brotherhood of Teamsters, Local 385, AFL-CIO.** Cases 12-CA-19077, 12-CA-19093, 12-CA-19077-2, 12-CA-19077-3, 12-CA-19093-2, and 12-CA-19093-3

October 1, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND TRUESDALE

On September 30, 1999, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent and General Counsel each filed exceptions and the Respondent filed a supporting brief. The General Counsel filed a brief in support of the administrative law judge's decision, 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,<sup>1</sup> and conclusions and to adopt the recommended Order<sup>2</sup> as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sea Ray Boats, Merritt Island, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(c) and 2(d).

“(c) Preserve and, within 14 days of a request, or such additional time as the Regional director may allow for

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

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing a warning to employee Larry Poindexter pursuant to its newly promulgated “two strike” rule prohibiting employees from discussing the Union, we find it unnecessary to rely on the “adverse inference” drawn by the judge. The judge discredited the testimony from one employee concerning alleged harassment by Poindexter. In these circumstances, the Respondent's failure to call other employees to testify that they were harassed is simply a failure to establish its affirmative defense under *Wright Line*, 251 NLRB 1083 (1980).

<sup>2</sup> We shall modify the judge's recommended Order to conform to our decisions in *Excel Container*, 325 NLRB 17 (1997) and *Ferguson Electric Co.*, 335 NLRB 142 (2001). In accord with the General Counsel's exception, we shall substitute a notice that conforms to the language of the Order.

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 and electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

“(d) Within 14 days after service by Region 12, post at its plants in its Merritt Island, Florida facility copies of the attached Notice to Employees.<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days thereafter 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 25, 1997.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY THE 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 mutual aid or protection
- To choose not to engage in any of these protected concerted activities

WE WILL NOT threaten our employees that their attempts to organize a union will be futile.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

WE WILL NOT threaten our employees with the loss of benefits if the employees obtain union representation.

WE WILL NOT threaten our employees with discharge for engaging in union activities.

WE WILL NOT promulgate a rule prohibiting our employees from talking about a union.

WE WILL NOT impliedly threaten our employees with unspecified reprisals for talking about a union.

WE WILL NOT institute a "two strike" rule prohibiting union talk.

WE WILL NOT threaten our employees with plant closure if they obtain union representation.

WE WILL NOT direct our employees not to attend union meetings.

WE WILL NOT issue warnings, restrict our employees to their workstations, place employees on performance plans, or suspend or discharge our employees for engaging in union activities.

WE WILL NOT in any like or related manner violate the Act.

WE WILL rescind our rule prohibiting union talk and our "two strike" rule, and notify our employees in writing that this has been done.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Johnny Bailey to his former job or, to a substantially equivalent job, if his former job no longer exists and will make him whole for all loss of benefits sustained by him because of our unlawful discharge of him, with interest.

WE WILL, within 14 days, remove from our records any reference to the unlawful discipline of Johnny Bailey, Earl Williams, Terrie Rogers, and Larry Poindexter and notify them and Joseph Campanelli in writing that this has been done and that the discipline will not be used against them in any way.

#### SEA RAY BOATS, INC.

*Michael Maiman, Esq.*, for the General Counsel.

*Robert H. Buckler, Esq.* and *Michael D. Kaufman*, for the Respondent.

*Jack Barmon*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on April 27 and 28, 1999, in Cocoa, Florida. The complaint as amended was issued by the Regional Director of Region 12 of the National Labor Relations Board (the Board or the NLRB) and is based on charges filed by International Brotherhood of Teamsters, Local 385, AFL-CIO (the Charging Party or the Union) and alleges that Sea Ray Boats, Inc. (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The com-

plaint is joined by Respondent's answer wherein it denies the commission of any violations of the Act.

On the entire record including the testimony of the witnesses and exhibits submitted and after review of the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material during the 12-month period preceding the filing of the complaint, Respondent has been a corporation with an office and plants located in Merritt Island, Florida, where it has been engaged in the manufacture of yachts and has in the course and conduct of its business operations, purchased and received at its Merritt Island, Florida facility goods and material valued in excess of \$50,000 directly from outside the State of Florida, shipped and derived gross revenues in excess of \$500,000, and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION

The complaint alleges, Respondent denies, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### Background

In early September 1997<sup>1</sup> Teamsters' organizers and, Teamsters' members including United Parcel Service (UPS) employees who were then on strike against UPS, commenced informational picketing and urged Respondent's employees at its Merritt Island facility to organize. Merritt Island is the common name of the overall complex, which includes three plants, Sykes Creek, P.D.&E. (Product Development and Engineering) and the Merritt Island plant. The Sykes Creek plant manufactures large yachts from 50 to 63 feet and employed about 400 employees. The Merritt Island plant manufactures sports yachts from 33 to 40 feet and employed about 550 employees. The P.D.&E. plant as its names implies, is engaged in product development and engineering of the yachts and employed about 300 employees. Terry McNew is the production manager of the Sykes Creek plant and its highest ranking official of that plant. Randy Serfozo is the assembly manager of the Merritt Island plant and the highest-ranking official of that plant. After the commencement of the picketing the employees at these plants began discussing the Union among themselves, including alleged discriminatees Johnny Bailey, Terrie Rogers, Joseph Campanelli, Earl Williams, and Larry Poindexter.

Respondent's response to the advent of the union campaign was swift. In late September and early October 1997, Production Manager McNew at the Sykes Creek plant and Assembly Manager Serfozo at the Merritt Island plant held a series of meetings with employees. At these meetings according to witnesses presented by the General Counsel, McNew and Serfozo, both admitted supervisors, announced a "two strike" rule prohibiting union talk and providing for the issuance of a warning for the first offense and termination for the second offense. Respondent has

<sup>1</sup> All dates are in 1997 unless otherwise specified.

had since 1995, a facially neutral no-solicitation rule in its employee handbook. The no-solicitation rule was enforceable through the employee rules of conduct, which provided if an employee violated the Company's "policies, rules or procedures," they could receive a written warning and "additional violations shall subject the employee to further disciplinary action, including involuntary discharge." According to the General Counsel's witnesses McNew and Serfozo also made threats of plant closure, the futility of an attempt to organize and the loss of benefits if the employees chose union representation. Respondent also sent a letter to its employees urging them to retrieve any union authorization cards they may have signed. Also enclosed was a copy of a letter from Respondent's president setting out the cancellation of the use of the services of UPS because of the picketing of Respondent's facility engaged in by UPS employees. In the same short timeframe of the picketing, the speeches and the letters, Respondent imposed discipline on each of the named discriminatees in the case. On September 30, the Union sent Respondent a letter informing Respondent of the employee members of the in-house organizing committee which was received by Respondent on October 6, 1997.

#### A. The 8(a)(1) Allegations

##### 1. The threats of futility of organizing a union by Production Manager McNew

###### Facts

Larry Poindexter who was employed at the Sykes Creek plant in 1997 testified concerning a meeting conducted by McNew at the plant the end of September in the cafeteria. Shifts of about 100 employees at a time were taken into the cafeteria and addressed by McNew. Poindexter testified that during the course of this meeting, McNew told the employees that Respondent would not deal with the Union and if the Union came in, all benefits would go to zero, including vacation, sick leave, and insurance. Employee Michael Lee who was still employed by Respondent at the time of his testimony, testified that at a meeting on October 2, McNew told the employees that Respondent would not have the Union and would close the doors first. Current employees David Marshall and Jim Antoniewski also testified concerning this meeting around October 2, according to Marshall and in late September or early October according to Antoniewski. Marshall testified that McNew told the employees at the meeting that the plant would not be organized, that the doors would close before the plant would be organized. Antoniewski testified McNew said there would be no union at Sea Ray. Employee Joseph Campanelli, a current employee, testified that at a meeting about October 1, McNew stated the company would spend any amount of money necessary to stop the Union and that if the Union came in all benefits would go to zero including salaries and 401(k) plans.

In its defense Respondent presented the testimony of McNew that he used prepared texts, which had been reviewed by legal counsel. McNew testified that the only time he varied from the text (which Respondent notes in brief are not alleged as violations) was in his discussion of the no-solicitation rule. Respondent also called two current employees Paul Boss and Jack Lyerly who testified they attended the September and October meetings and McNew did not make the alleged statements. Respondent also argues that the General Counsel's evidence was

inconsistent. No one testified about any statements by McNew at the September meeting and Lee's and Marshall's testimony about an alleged statement of plant closure was not corroborated by Antoniewski. Respondent also argues that Poindexter's testimony that Sea Ray would not deal with the Union and that if the Union came in benefits would be reduced should not be credited as Poindexter is a disgruntled former employee.

General Counsel argues that the testimony of Lee, Antoniewski, and Marshall as current employees is entitled to considerable weight under Board law as they testified against their employment interest citing *K-Mart Corp.*, 268 NLRB 246, 250 (1983); *Shop-Rite Supermarket*, 231 NLRB 500 (1977); and *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961). General Counsel further contends that Lee, Marshall, and Antoniewski all gave affidavits close in time to the event making the accuracy of their testimony more likely than that of Boss and Lyerly who did not do so. General Counsel also argues that it is to be expected that there is some difference in the testimony of Lee, Antoniewski, and Marshall given differing perceptions by different human beings.

###### Analysis

I credit the testimony of Lee and Marshall as corroborated in part by Antoniewski substantially for the reasons cited by the General Counsel. I find their testimony to be specific and believable and attribute Antoniewski's lack of recall of the threat of closure is just that, a lack of recall. I credit Lee and Marshall that such a statement was made. I further find as contended by the General Counsel that Poindexter and Campanelli (also a current employee) should be credited with respect to a similar statement made by McNew at other department meetings, thus lending further support to the conclusion that McNew made the threats in issue. I thus find that Respondent violated Section 8(a)(1) of the Act by the issuance of a threat of futility of union organization made by Production Manager McNew and the threat of plant closure and of a reduction in benefits if the employees chose union representation.

##### 2. Threat of loss of benefits by McNew

Former employee Larry Poindexter testified that shifts of employees of about 100 employees were taken into the cafeteria in late September for a meeting held by McNew who told the employees that Sea Ray would not deal with the Union and if the Union came in all benefits would go to zero including vacation, sick leave, and insurance.

General Counsel argues that Poindexter does not stand to gain anything by his testimony whereas Respondent argues he is a disgruntled former employee who acknowledged he did not like the way Sea Ray was managed.

###### Analysis

I credit the testimony of Poindexter, which I found to be specific and believable. I find the contentions of the General Counsel persuasive with respect to the reasons for crediting his testimony and find it consistent with other testimony of Lee and Marshall concerning the threats made by McNew. I thus find that Respondent violated Section 8(a)(1) of the Act by the threats issued by Production Manager McNew that Sea Ray would not

deal with the Union and that if the Union came in all benefits would go to zero including vacation, sick leave, and insurance.

### 3. Threat of discharge by Jay Beck

Johnny Bailey testified that after his discharge by Respondent in late September for alleged unsatisfactory work performance discussed *infra*, he joined the Teamsters' picketing outside Respondent's facility. As his supervisor, Jay Beck, was leaving the plant, Bailey flagged him down and entered his automobile, which Beck drove to a nearby creek. Bailey testified that he lied to Beck and told him that Supervisor Bocci had told him that he had been fired for his union activities. Bailey testified that Beck responded that he had wanted nothing to do with it but that Bailey had been fired for his union activities. At the hearing, Beck acknowledged the meeting but denied that he had said that Bailey was discharged because of the Union. Rather he testified that he told Bailey that he could not talk about the matter.

General Counsel argues that Beck's contention at the hearing "that he kept saying he could not talk about the firing, was said in a mechanical tone that appeared rehearsed" as contrasted to Bailey who "gave a detailed account of the conversation including that they drove to a 'fishing creek' near the plant as they conversed." General Counsel further contends that when Beck told Bailey that he had been fired because of the Union, he was threatening an employee (Bailey) that employees were being and would be discharged for their union activity in violation of Section 8(a)(1) of the Act. Respondent contends that Beck credibly denied that he was aware of any union activity by or on behalf of Johnny Bailey prior to his being discharged and that Bailey's entire testimony should be discredited."

#### Analysis

I credit Bailey's version of the statement made by Beck when he entered Beck's automobile and asserted that Bocci had told him he had been discharged because of his union activities. I found Bailey's version to be credible and detailed. I find it unlikely that he contrived this story as urged by Respondent. Conversely I find Beck's assertion that he told Bailey he could not discuss the matter to be a weak denial.

I find as urged by General Counsel that Respondent violated Section 8(a)(1) of the Act by Beck's statement to Bailey that he had been discharged because of his union activity. While this was a truthful statement with Beck's part that had been solicited by Bailey's inquiry, it was nonetheless a threat of discharge to Bailey who remained an employee under the Act by reason of his unlawful discharge found *infra* in this decision.

### 4. Assembly Manager Randy Serfozo's oral promulgation of a rule prohibiting employees from talking about the union and his implied threat of unspecified reprisals made to employees

Former employee Earl Williams testified that on September 30, he was called into the office of Merritt Plant Assembly Manager Randy Serfozo. This incident occurred shortly after he had discussed the Union with other employees while he was working on a boat. Serfozo told Williams that he had heard that he was talking about the Union and trying to push the Union. He then told Williams to "shut up" about the Union. Williams said he did not realize he had been talking that much about the Union and

agreed to stop discussing the Union. At the hearing, Serfozo denied making any unlawful statements.

General Counsel contends that Serfozo's statements "constitute both an implied threat of unspecified reprisal and the promulgation of a rule prohibiting employees from talking about the Union." General Counsel urges that this statement was violative of Section 8(a)(1) of the Act because "it restrains and coerces employees in the exercise of the rights granted them under the Act." He notes also that in this instance the statement had the desired effect as Williams agreed to stop talking about the Union.

Serfozo testified that two employees had complained to him that Williams was disrupting their production by discussing the Union during work time, and that Serfozo asked Williams to stop "soliciting" during worktime which was consistent with Respondent's valid no-solicitation rule. Respondent argues that Williams admitted he had been "soliciting" for the Union but did not realize he "was pushing the Union that hard." Respondent contends Williams is a disgruntled employee who quit and should not be credited. Respondent contends that Williams' testimony was incomplete and evasive when he testified that Serfozo said, "that I was disrupting production, that it wouldn't be put up with, and that I'd better watch and not talk about it anymore."

#### Analysis

I credit Williams' testimony as set out above. I note that Respondent's witness Serfozo couched his testimony and Respondent couches its arguments in terms of violations of Respondent's no-solicitation rule. However, there was no evidence presented as to whether Williams was actually soliciting employees to join the Union or merely discussing the Union. Respondent did not choose to call the two employees who allegedly complained to Serfozo about Williams and, therefore, the details of the discussion were not presented at the hearing. I credit the testimony of Williams, who I found to be a reliable witness, who has no financial stake in the outcome of this case. I find that Serfozo's emphasis was on stopping Williams from talking about the Union rather than on the no-solicitation rule, which I find is an afterthought on Respondent's part to justify Serfozo's actions in barring union talk.

I find that Serfozo's statement to Williams that he should stop talking about the Union constituted an oral promulgation of a rule prohibiting employees from discussing the Union and the words "shut up about the Union" constituted an implied threat of unspecified reprisals and that Respondent violated Section 8(a)(1) of the Act thereby.

### 5. McNew's and Serfozo's announcement of a "two strike rule" prohibiting union talk

At the meetings held on October 1 by McNew at the Sykes Creek plant and by Serfozo at the Merritt Island plant, McNew and Serfozo promulgated a two-strike rule prohibiting union talk. Employees Poindexter, Lee, Marshall, Antoniewski, and Campanelli all credibly and consistently testified about the meetings at the Sykes Creek plant and employees Rogers and Williams testified about the meetings at the Merritt Island plant. All credibly testified that employees routinely discussed all kinds of matters while working and no discipline was ever imposed for doing so. There was no evidence presented of any prior enforcement of any rule against talking while working. At the hearing McNew

and Respondent in brief attempted to couch this prohibition based on the no-solicitation rule. However, I find that the prohibition was broader than this. Moreover the rule against talking union is more specific than the no-solicitation rule, which provide for a warning for the first offense and further discipline up to and including termination for a violation. In contrast to this the two-strike rule against talking union was more specific and imposed a warning for the first offense and termination for the second offense.

#### Analysis

I find Respondent violated Section 8(a)(1) of the Act by the promulgation of the two-strike rule against talking by McNew and Serfozo. This was clearly a new rule and not an explanation of or emphasis on the no-solicitation rule. Rather this was a vital part of Respondent's efforts to stem the union campaign by silencing and intimidating employees to preclude their discussion of the Union. On its face this was disparate treatment against union talk while other discussions of various and sundry topics were permitted while employees were working.

#### 6. McNew's threat of loss of benefits

Joseph Campanelli, a current employee, testified that at the department meeting held by McNew on October 1, McNew stated he would spend any money necessary to stop the Union and that if the union campaign was successful, all benefits would go to zero including salaries, 401(k), and insurance benefits. McNew testified he read from a prepared text and did not deviate from that text except for the discussion of the no-solicitation rule (also referred to as the two strike rule).

#### Analysis

I credit Campanelli. I found him to be a reliable witness who demonstrated excellent recall of the details of McNew's comments at the meeting. As General Counsel urges Campanelli remains a current employee and his testimony is entitled to considerable weight. I have no doubt that McNew read from the prepared text. However, I find he also offered his own comments which were designed to intimidate employees in the exercise of their rights under the Act. I thus find that Respondent violated Section 8(a)(1) of the Act by McNew's threat of the loss of benefits if they chose union representation.

#### 7. McNew's directive not to attend union meetings and threat of plant closure

Current employees Marshall and Lee testified that on or about October 2, McNew stated near the smoking area outside the wood shop that the plant would not be organized and would close before the Union came in. Marshall also testified that at the same meeting McNew also told employees not to attend union meetings. General Counsel argues that their testimony is entitled to special weight because of their status as current employees who testified adversely to their employer's interest and also notes that differences in their testimony may be accounted for by different perceptions by different people.

#### Analysis

I find that Respondent violated Section 8(a)(1) of the Act by McNew's threat of plant closure and his directive not to attend union meetings. As the General Counsel urges, it is common for

different people to take away some of the information imparted at a meeting such as this.

It is much more likely that McNew made the statements attributed to him regarding the threat of plant closure and the directive not to attend meetings. I find it unlikely that these witnesses would invent the statements by McNew regarding plant closure and the directive not to attend union meetings. I find it more likely that an employee can forget a part of what occurred at the meeting rather than invent something that was not said. I credit the testimony of Lee and Marshall concerning the threat of plant closure and of Marshall concerning the directive not to attend union meetings.

#### B. The 8(a)(3) and (1) Violations

Under *Wright Line*, 251 NLRB 1083 (1980), the Board considers several factors in analyzing discrimination cases under Section 8(a)(3) and (1) of the Act. A General Counsel must establish that the employer had animus against the Union, had knowledge that the alleged discriminate was a union supporter and/or of the alleged discriminate's union activities and took an adverse job action against the employees which was motivated at least in part by its antiunion animus. In making this determination, the timing of the adverse job action in relation to the animus and knowledge of the employees' union activities and sentiments are to be considered. In the instant case the Respondent's rush to smother the union campaign and its demonstrated animus and commission of several violations of Section 8(a)(1) by threats and intimidation clearly establish that the Respondent was aware of the union campaign by late September 1997, and harbored animus against the Union. Each of the employees who were disciplined in this case testified concerning their union activities and their support of the Union. Employees Larry Poindexter and Earl Williams received warnings pursuant to the Employer's newly established two-strike rule prohibiting conversation about the Union. Employees Johnny Bailey, Terrie Rogers, and Joseph Campanelli were all disciplined shortly after the advent of the union campaign. I find the circumstances of Respondent's efforts to stem the union campaign, and the timing of the disciplinary actions taken against five of the union supporters shortly after the Respondent learned of the union campaign support the inference that they were all known to be union supporters and that Respondent retaliated against them because of their support of the Union. The sheer volume of the disciplinary actions taken against these union supporters within the compressed time frame following Respondent's knowledge of the advent of the union campaign standing alone supports the inference that they were discriminated against because of their union sympathies and activities.

#### 1. The Campanelli suspension

Joseph Campanelli testified that he lit up a cigar in an area adjacent to the timeclock while he was waiting to clock out on September 30. He was then summoned into supervisor Bill Sullivan's office where he was suspended for 3 days for smoking in a nonsmoking area and was walked out of the plant by two supervisors, one of whom had a big grin on his face. Campanelli had protested that employees including supervisors routinely smoke in this area. On the next day he returned to the plant in an attempt to have the suspension reversed. He initially spoke to Hu-

man Resources Representative Nora Ellis who told him he had a good case and asked if he wished to present his case to Respondent's appeals board which is headed by McNew. He agreed and the board was assembled and heard the case that morning and reversed the suspension. Campanelli did not suffer any loss of pay and was returned to work with the suspension torn up. General Counsel accordingly does not seek an expungement and reimbursement remedy but seeks a cease-and-desist Order from suspending employees in retaliation for their perceived union activity, and to so advise employees in a notice posting.

Campanelli testified that many employees including supervisors smoked in the area where he had smoked and none had been disciplined for doing so. This testimony was un rebutted and I credit it. Respondent contends that it had no knowledge of Campanelli's union sentiments. However Campanelli testified that prior to his suspension he had stood in the open with union picketers outside the plant gate, as he was interested in learning about the Union. General Counsel argues that "Circumstantial evidence may be used in Board cases to establish an element such as knowledge of union activity," citing *ACTIV Industries*, 277 NLRB 356 (1985); *Lancet Arch, Inc.*, 324 NLRB 191 (1997). General Counsel contends "There are many pieces of circumstantial evidence present here which warrant a conclusion that the Respondent knew of Campanelli's union activity and disciplined him for that activity." He notes the disparate treatment of Campanelli by issuing the suspension to him for smoking in an area where many employees including supervisors routinely smoked, and the un rebutted testimony of Campanelli that one of the supervisors who escorted him off the property at the time of his suspension had a "big grin" on his face. He notes also the testimony of McNew that the suspension was reversed because the appeals Board needed to be "fair to everybody". General Counsel argues that the phrase being "fair to everybody" is a reference to the advent of the union campaign. He argues further that the fact that the suspension was "torn up shows only that Respondent realized how patently ridiculous the suspension was." In its brief, Respondent relies on Campanelli's testimony that he "had no evidence that any supervisor knew he was involved in supporting the Union until the letter announcing the union organizing committee was received," on October 6, 1 week after his suspension. Respondent also contends that its revocation of the suspension is indicative of the weakness of the allegation.

#### Analysis

I credit Campanelli's testimony as set out above I find the circumstances warrant and support a finding that Respondent had knowledge of Campanelli's union sentiments by reason of his standing with the picketers in full view of all who looked out of the plant and/or passed through the gates. I further find the disparate treatment of Campanelli, the unexplained grin of the supervisor escorting Campanelli out of the plant and the carefully couched testimony of McNew that the Appeals Board needed to be "fair to everybody" all support a finding that the Respondent's demonstrated animus against the Union and its supporters was a motivating factor in the suspension of Campanelli who Respondent's management had observed talking to the union protesters. I find that the General Counsel has established a prima facie case under *Wright Line* that Respondent had knowledge of Campanelli's

union activity and that Respondent's adverse job action of suspending him was motivated by its desire to punish union supporters. I find the suspension was patently ridiculous on its face as argued by General Counsel and the appeals board realized this in reversing it. I find the Respondent has failed to rebut the prima facie case by the preponderance of the evidence. The suspension was violative of Section 8(a)(3) and (1) of the Act.

#### 2. Warnings issued to Earl Williams

As discussed supra on September 30, Earl Williams was called to the office of Assembly Manager Randy Serfozo after talking about the Union while working in a boat with other employees and ordered by Serfozo to shut up about the Union. Subsequently on October 2, after announcing the two-strike rule Serfozo told Williams that he had had his first strike on September 30 and that if he talked about the Union during work time again he would be terminated.

#### Analysis

In this case the Respondent clearly had knowledge of Williams' union activity in talking about the Union and its animus has been amply established. Respondent's issuance of the warning to Williams was in retaliation for his engagement in protected concerted activity. The warning was thus motivated by Respondent's animus against the Union and its supporters and was part of its overall effort to stem the union campaign. I thus find that General Counsel has established a prima facie case that the warning was discriminatorily motivated and that Respondent has failed to rebut it by the preponderance of the evidence. I further find that the threat of discharge was violative of Section 8(a)(1) of the Act. *Wright Line*, supra. The warning was violative of Section 8(a)(3) and (1) of the Act.

#### 3. Prohibiting Terrie Rogers from leaving her work area without permission and the issuance of a write-up and a performance improvement plan to Rogers

Terrie Rogers worked at the Merritt Island plant in the upholstery department. On September 30 she was in a boat talking in favor of the Union while she was working with employees Earl Williams and Walt Delihn. She testified that Leadman Dale Hutchinson was eight feet away and within hearing distance. Later that day Rogers was sent to Assembly Manager Serfozo's office who told her he did not want her in a boat talking to other employees and commented that he did not like the discussion. He also told her that thereafter she would need his permission to leave her work area which was in another area. Rogers testified that on October 14, she was again called to Serfozo's office. At that time supervisor Dave Aubray and Human Resources Director Jean Winslow were also in the office. At this time Serfozo told Rogers that he had been personally checking her work the prior 2 weeks (which would be since September 30) and that her work was deficient. He also told her that from that a point forward he would personally observe her and she would need permission from him to leave her work station.

Respondent also contends that Rogers' name was not on the Union letter received by Respondent on October 6. Respondent contends that Rogers was not reprimanded for poor job performance nor told to remain in her work area because of her alleged union activity. Respondent contends that she was reprimanded

after 5 months of counseling and an objective mathematical review of her job production. Serfozo talked with Rogers in May about training on jobs that were being reengineered with the aid of a consulting firm to instruct on how to objectively measure and compare the performance of each employee. It contends that Serfozo continued to monitor her work performance which was low in the weeks prior to October 14. In a 57-hour time slot, Rogers completed only 43 hours of work while a fellow employee performing the same job completed over 61 hours of work. (Citing Tr. p. 136, 374-375; R. Exh. 23(N).) On October 14, Serfozo gave Rogers a verbal reprimand and showed her the data comparing her performance with the other employee. Respondent argues in its brief that Rogers attempted to argue through Company documents that she performed all the work required but contends that the documents she had were only a portion of all the documents needed to evaluate her performance. Respondent contends it had good work related reasons for reprimanding Rogers and for asking her to obtain permission from her lead person or supervisor before she left her work area.

General Counsel argues that Serfozo knew Rogers had been talking in favor of the Union on September 30 when he called her into his office and told her she could not leave her work station without permission as confirmed by his comment that he did not like the discussion. No other employee was so restricted. Several factors show that Rogers' union activity was the motivating factor behind the decision to restrict her movements and to discipline her. No other employee was so treated. Her testimony and paperwork show she completed her available work (citing Tr. 102-110 GC Exh. 3). The timing of her pro-union talk and the restricting of her movements occurred on the same day. There is no paper trail here as this was the only write up put in evidence (citing R. Exh. 23). The work targets cited by Respondent were secret as Serfozo admitted employees did not see or have access to the paper work upon which he was judging Rogers' performance.

#### Analysis

I find the General Counsel has established a prima facie case that the restriction of Terrie Rogers from leaving her workplace without permission and the issuance of the write-up and performance plan were motivated by Respondent's animus against the Union and its supporters. I credit Rogers and find that the incident when she was heard by a leadman talking to other employees in favor of the Union and which led to her being called into Serfozo's office on the same day and the events of that meeting and the following incidents discussed supra, support a finding that Respondent had knowledge of her support of the Union and acted quickly to restrict her movements and initiated a special monitoring of her work performance. I find that September 30 was a busy day in Respondent's response to the union campaign. This was only 6 days after the firing of Bailey. On September 30, Respondent's management met with employees in a series of mandatory antiunion meetings. On this day Earl Williams was threatened and warned. On this day Campanelli was suspended. On this day Respondent initiated its actions against Rogers. Seven days later it issued the warning to Poindexter. The timing of all of these incidents is crucial in demonstrating their inextricable relationship to Respondent's campaign to defeat the Union.

I find all of the items listed by the General Counsel as set out above fully support the prima facie case. I find that the Respondent's efforts to rebut the prima facie case have failed to do so. I do not credit Serfozo's testimony concerning his alleged reasons for the actions taken against Rogers. I find the sole reason for his actions against Rogers was her identification as a Union supporter following her talk in favor of the Union. *Wright Line*, supra. The actions taken against Rogers were violative of Section 8(a)(3) and (1) of the Act.

#### 4. The warning issued to Larry Poindexter

As set out above the Respondent received a letter from the Union on October 6, identifying the employee members of the in-house organizing committee. Larry Poindexter was one of the members identified in the letter. On October 7, Poindexter was approached at his workstation by Production Manager McNew and Nora Ellis from the human resources department. McNew told him that 12 complaints of "harassment" had been made against him by other employees. He was told to consider this his "first strike" in reference to the "two strike" rule against talking about the Union which had been promulgated a week earlier. Poindexter protested the warning and asked who had made the complaints. McNew declined to identify them. Poindexter testified nonunion talk was engaged in by employees while working all the time. The Respondent did not call all of the employees who it maintained had complained about harassment by Poindexter. It did call a relatively new employee who testified that Poindexter had threatened him with loss of his job if he did not support the Union. Poindexter testified he "never solicited anybody" which Respondent contends "is too incredible to be believed." Respondent also argues that "Poindexter is a former disgruntled employee as he admitted that he did not like the way Sea Ray is managed."

#### Analysis

I find that Respondent violated Section 8(a)(1) of the Act by issuing the warning to Poindexter pursuant to its newly promulgated "two strike" rule against employees discussing the Union. As noted above Respondent has chosen to couch its prohibition against talking about the Union as a ban on "solicitation" pursuant to its no-solicitation rule. However its prohibition was broader than merely "solicitation" as it was prohibiting any talk about the Union while working although nonunion talk was permitted. Its failure to call other employees known only to it, who it contends made the other complaints, gives rise to an adverse inference that they would not have supported Respondent's position in this case. Moreover, it would not be surprising to expect that Respondent would receive reports from co-workers of anyone talking Union after it had promulgated its "two strike" rule lest they themselves be deemed by Respondent to be engaging in union talk thus subjecting themselves to discipline for violating the rule. I find that the issuance of the warning to Poindexter was motivated by Respondent's antiunion animus and resulted in an adverse employment action taken against Poindexter because of his participation in concerted activities on behalf of the Union. I find General Counsel has thereby established a prima facie case of Respondent's violation of Section 8(a)(3) and (1) of the Act and that Respondent has failed to rebut the case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980).

### 5. The discharge of Johnny Bailey

The General Counsel conceded that "Bailey had a checkered work history." He had been disciplined on prior occasions and been placed on a performance plan in the past. Since September 1996, he had been disciplined on only one occasion prior to his discharge on September 25, 1997. He received a verbal warning for a production mistake in June 1997.

Bailey testified he had initiated the union campaign at Respondent's facility and was the employee who initially contacted the Union. On September 25 he was called into supervisor Bocci's office and Bocci told him he was being terminated for "poor performance." When he asked for the specific reason for his discharge, Bocci declined to give him the reason. He was shown a termination slip, which stated only "unsatisfactory job performance" as the reason for his termination. However, at the hearing there were two attachments to the termination slip which purported to be notes by Bocci and employee Chris Fromme concerning an incident where Bailey was towing a boat deck mold without a lookout as required and hit a boat hull mold that Fromme was working on and ran over an air hose being used by Fromme. Bailey testified he was never apprised that this was the reason for his discharge. Bailey further testified that after his discharge he joined union picketers on the picket line and flagged down his supervisor, Jay Beck, got into Beck's car and told Beck that Bocci had admitted to him that he had been fired because of his union activities and that Beck then stated that he had wanted nothing to do with it but that Bailey had been fired because of the Union. At the hearing Beck acknowledged this incident but denied having told Bailey that he was fired because of the Union. Beck contended that he had only told Bailey he could not discuss the matter. With respect to his union activities prior to his discharge, Bailey testified he handed out "a couple" of union cards to "a couple of guys" at "a store" and "when clocking out."

Respondent contends that Bailey was a long-time problem employee who had been disciplined in the past and was discharged by then-lamination manager, Steve Fielder, for unsatisfactory job performance as a result of an incident that occurred on September 24 a day prior to his discharge when he violated a published safety rule requiring a spotter when moving a boat deck or boat hull mold. In this instance Bailey was pulling a deck mold with a forklift truck without a spotter when he struck a hull mold on which employee Chris Fromme was working, thus enraging Fromme. Respondent contends it had no knowledge of Bailey's union activity until after Bailey's discharge. Beck, Bocci, and Fielder all testified they had no knowledge of Bailey's union activity prior to his discharge.

#### Analysis

I credit Bailey's testimony that he initiated the contact with the Union leading to the advent of the union campaign, went to a union meeting, handed out union cards while clocking out on Respondent's premises and that Beck made the admission that Bailey had been fired for his union activity. I found Bailey's testimony to be credible as set out above and find that the timing of his discharge within the narrow time frame during which Respondent retaliated against its employees who engaged in union activity gives rise to the inference that Bailey's discharge was the result of Respondent's identification of him as a leading union

supporter and was motivated by Respondent's animus against the Union and its desire to stem the union campaign. This is supported by Beck's admission to Bailey that he was discharged because of his union activity. I thus find that General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act, that Bailey was discharged by Respondent because of his engagement in union activities. I find Respondent has failed to rebut the case by the preponderance of the evidence. *Wright Line*, supra.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated the Act as set out in the foregoing decision.
4. The above unfair labor practices in connection with the business of the Respondent have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent violated the Act, it shall be ordered to cease-and-desist therefrom and to take certain actions including the rescinding of the unlawful discipline, suspensions and the discharge of Johnny Bailey and the issuance of the 3-day suspension of Joseph Campanelli, the warnings to Earl Williams, the restriction of Terrie Rogers to her work area and the issuance of a write-up and a performance plan to Rogers, and the issuance of a warning to Larry Poindexter and purging the record of all references to these unlawful disciplines. I recommend that Johnny Bailey be offered reinstatement to his former position or to a substantially equivalent position if his former position no longer exists, without prejudice to his seniority or other rights or privileges previously enjoyed or to which he would have been entitled in the absence of the discrimination against him from the date of his discharge. I also recommend that Respondent make the discriminatees whole for any loss of earnings and benefits they may have suffered as a result of the discrimination against them. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Sea Ray Boats, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>2</sup> 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.

(a) Threatening employees with the futility of organizing a union.

(b) Threatening the loss of benefits if the employees obtain union representation.

(c) Threatening employees with discharge for engaging in union activities.

(d) Promulgating a rule prohibiting employees from talking about a union and impliedly threatening employees with unspecified reprisals for talking about a union.

(e) Instituting a "two strike" rule prohibiting union talk.

(f) Threatening plant closure if the employees obtain union representation.

(g) Directing employees not to attend union meetings.

(h) Warning, suspending, and discharging employees because of their engagement in union activities.

(i) Prohibiting employees from leaving their work areas without permission and issuing writeups and performance improvement plans to employees because of their discussion of a union.

(f) Violating the Act in any like or related manner.

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

(a) Within 14 days from the date of this Order, offer Johnny Bailey immediate and full reinstatement to his former position or, if such position does not exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of wages or other benefits he may have suffered as a result of the discrimination against him as a result of his discharge on September 25, 1997, to the date of Respondent's offer of reinstatement of employment, with interest.

(b) Within 14 days from the date of this Order, remove from its records any reference to the unlawful discipline issued to Johnny Bailey, Earl William, Larry Poindexter, and Terrie Rogers and notify them and Joseph Campanelli in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(c) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of 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. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(d) Within 14 days after service by Region 12, post at its plants in its Merritt Island, Florida facility copies of the attached Notice to Employees. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days thereafter 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.

(e) Within 21 days after service by Region 12, 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.