

SCA Tissue North America, LLC and Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC. Case 28-CA-17548

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

On August 22, 2002, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed a brief in response to the exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, SCA Tissue North America, LLC, Bellemont, Arizona, its officers, agents, successors, and assigns shall take the action set forth in the Order.

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

² In adopting the judge's finding that the General Counsel met his burden of establishing that Sandoval's union activity was a motivating factor for his discharge, we rely on the following evidence of animus: (1) Plant Manager Graverson's warning to all employees that they could not talk about the Union on the shop floor, when no such restriction existed for other topics; (2) Supervisor Stievo's order to Sandoval to remove his union button because it violated the Respondent's "no jewelry" policy, which had never been enforced; (3) Stievo's direction to Sandoval to cover up his union T-shirt with his jacket while he was walking across the shop floor; and (4) Stievo's parting comment to Sandoval about his "attitude." Contrary to the judge, we do not infer animus from the Respondent's hiring of a labor consultant, or from the fact that members of management cried at an emotionally charged meeting with employees during the campaign. Additionally, we do not rely on the timing of Sandoval's discharge to establish a violation of the Act.

Member Liebman would rely on timing as an additional factor in finding the Respondent's unlawful motivation for the discharge of Sandoval on September 24, 2001. She agrees with the judge that, in the circumstances, Sandoval's increased organizing activity beginning in August, and the possibility of a new representation election in early December contributed to the Respondent's determination to fire him unlawfully.

William Mabry III and *Jerome E. Schmidt*, for the General Counsel.

Susan M. Love, of Milwaukee, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Flagstaff, Arizona, on April 4-5, and May 22-24, 2002. Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC (the Union), filed an unfair labor practice charge in this case on October 30, 2001. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on December 26, 2001. The complaint alleges that SCA Tissue North America, LLC (the Respondent or the Employer), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,¹ I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Delaware Corporation, with an office and place of business in Bellemont, Arizona (the facility), where it has been engaged in the business of manufacturing paper products. Further, I find that during the 12-month period ending October 30, 2001, the Respondent, in the course and conduct of its business operations, purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

¹ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Dispute*

The complaint alleges that the Respondent discharged employee Frederick Sandoval on September 24, 2001,² because of his activities on behalf of the Union. The Respondent admits discharging Sandoval, but denies the commission of any unfair labor practices. According to the Respondent, Sandoval was discharged for cause, namely leaving work early without permission on two consecutive dates, September 19 and 20. The Respondent contends that this constituted job abandonment, which was a dischargeable offense. However, it is the General Counsels position that the Respondent's stated reason for the discharge was merely a pretext, and that the true reason for Sandoval's termination was because of his activity in attempting to organize the facility for the Union.

B. *The Facts*

Frederick Sandoval was first employed at the Respondent's facility on July 10, 1995. He was originally hired as a machine operator and converted to a machine maintenance mechanic in May 2000. As a maintenance mechanic, Sandoval was responsible for machine repair and preventive maintenance on the Respondent's equipment. The facility manufactures paper products and the production equipment used in the process is frequently in need of repair or preventive maintenance. At the time of the events in question, David Stievo was the maintenance manager and the person in charge of the maintenance department.

In September 2000, the Union began an organizing campaign at the Respondent's facility. Sandoval and maintenance mechanic David Hetzler met with Union Representative Israel Vasquez at a local bar and grill to discuss organizing. Vasquez gave them union campaign material including flyers, buttons, bumper stickers, and authorization cards. The organizing efforts were conducted among the Respondent's maintenance, shipping, production, and receiving employees at the facility. Sandoval concentrated his activities on the day shift, where he worked at the time, while Hetzler concentrated on the night shift. According to Sandoval, his union activity included passing out approximately 180 flyers, distributing about 45 union authorization cards, collecting about 30 signed cards, talking with fellow employees about the advantages of a union, attending meetings, and wearing a union button.

Sandoval testified that one of the machine operators who returned a signed union authorization card to him was Laura Bliss, who was subsequently promoted to the position of crew team leader.³ Bliss, who was a crew team leader at the time Sandoval was discharged, acknowledged that she knew he was a union supporter at the time of the organizing effort. According to Sandoval, various supervisors, including General Manager Mike Graverson and Production Supervisor Karlene Nadeau, had occasion to observe him engaging in union activity during the period prior to the union election. Employee

witnesses Brenda Stokes and Michelle Eubank testified regarding the openness with which Sandoval conducted his union activity. Eubank commented that Sandoval "was pretty boisterous about it," meaning his feelings about the Union.

During the election campaign, Sandoval was one of a small number of employees to wear a union button at work.⁴ Sandoval testified that during the second week of November 2000, he wore a union button at work, however, within about 3 hours Maintenance Manager David Stievo instructed him to remove it. According to Sandoval, he and Stievo then had a conversation about whether or not the button violated the Respondent's "no jewelry" policy, with Sandoval questioning why some jewelry, like wedding rings, was allowed on the production floor but not his union button. Ultimately, Sandoval followed Stievo's request and removed the button. Curiously, Stievo testified initially that he did not recall seeing Sandoval with a union button or any conversation with him about the Respondent's "no jewelry policy." However, when he testified again later in the hearing, Stievo contradicted his earlier testimony by saying that he did remember Sandoval wearing a union button and asking him to take it off.

The Union filed a representation petition to represent a unit of employees at the Respondent's facility on October 16, 2000. General Manager Graverson testified that he learned of the union organizing campaign shortly thereafter. The Respondent immediately launched a counter campaign. While the Respondent characterizes the campaign as intended to educate the employees, it is without serious doubt that the Respondent's campaign was designed to convince the employees to vote against union representation.

Graverson testified that the Respondent hired labor consultant John Coit to instruct management on how to effectively deal with the organizing campaign. During the period prior to the election, managers and supervisors had individual conversations with employees in an effort to explain the Respondent's position and to convince them that it was in their best interest to reject the Union. Further, meetings were held with groups of employees where supervisors would explain the collective-bargaining process to employees and set out the Respondent's position that both the Employer and the employees were better off without union representation. Graverson admitted taking the organizing campaign very personally and becoming emotional at the meetings. He testified that he felt the interest his employees had in being represented by the Union reflected badly on him. It was at one of those meetings, attended by approximately 25 to 30 employees, where both Production Supervisor Nadeau and General Manager Graverson cried.

During the campaign, the Respondent also distributed pro-employer literature and made some policy changes. Graverson testified that the literature emphasized the uncertainty of union representation. The Respondent's human resources director, Samuel Hull, testified that the Employer adopted a policy of disciplinary leniency for the duration of the campaign. The

² All dates are in 2001 unless otherwise indicated.

³ The parties stipulated that crew team leader Laura Bliss was a supervisor as defined by Sec. 2(11) of the Act.

⁴ Employee witness Michelle Eubank testified to seeing only a total of four or five employees wearing union buttons, while Supervisor David Stievo testified that less than 22 employees were union button wearers.

Respondent claims that this policy was meant to create an atmosphere free of coercion. Hull testified that “[i]n fact, we really tried not to give any discipline during that period because it was during the union campaign, and we were trying to do everything possible in our power to demonstrate our fair handedness, that we were obeying the rules” According to Sandoval, it was during this period that Graverson instructed employees not to talk about the Union on the production floor. Previous to this time, there had never been any restriction as to what employees could discuss, and, thereafter, employees were still free to discuss any topic, with the exception of the Union. Although questioned about this incident, Graverson did not deny making the statement, but, rather, testified that “I probably did say that.”⁵

Sandoval testified that in November 2000, he had a conversation with David Stievo, when Stievo approached him and asked why he wanted the Union “so bad.” Sandoval explained that management had treated employees unfairly, and he felt that the Union would change such treatment. Sandoval also stated that he was going to vote in favor of union representation. Allegedly, Stievo became upset at Sandoval and from that point on did not speak to Sandoval. Stievo acknowledged that he discussed the Union with Sandoval, but he testified that he did not specifically know Sandoval was a union supporter.

The representation election was conducted on December 1 and 2, 2000. The employees voted against union representation by a vote of 82 to 22. Following the election, Sandoval continued to express his support for the Union. He informed fellow employee Michelle Eubank that another election could be held 1 year after the first election, and he told Eubank to “watch and see, and you’ll be voting next year.” Coworkers Eubank, Brenda Stokes, and Jessie Lomas all testified that following the election they heard Sandoval continue to express his support for the Union.

Approximately 4 months after the election, Lomas and Sandoval had occasion to discuss unions with crew team leader Eric Duiker⁶ at a local bar and grill. Sandoval testified that he told Duiker that a union would help morale and he intended to start another union campaign, and “hopefully the people would wise up.” Sandoval expressed fear that the Respondent would fire him because of his efforts on behalf of the Union, however, Duiker told him that would not happen. Both Lomas and Duiker recalled a conversation with Sandoval at about this same time at the bar and grill where Sandoval expressed a continuing interest in organizing a union at the facility. Further, both Sandoval and Lomas testified about conversations regarding the Union that Sandoval had in the summer of 2001 with other employees, while they were taking smoking breaks in the smoking area outside the facility. On one of these occasions, Sandoval told employees that while they had missed the opportunity to bring in the Union, they could be successful “in the

next election.” According to Sandoval and Lomas, this conversation took place in the presence of Duiker, a smoker. Also during the summer of 2001, Sandoval had an opportunity to discuss the Union with Electrical Supervisor Jeremy Reynolds.⁷ According to Sandoval, during this conversation, which took place in the smoking area, he told Reynolds that the employees “needed to go union” in order to improve conditions at the facility. Allegedly, Reynolds agreed that conditions needed to be improved, however, he was not convinced a union was the right approach.

Sandoval testified that in early September 2001, he intensified his organizing efforts by openly speaking to new hires and employees who were upset at how the Respondent treated employees. He contends that he increased his efforts because he understood that by December 2001, a new election could be held. It is the General Counsel’s position that as the Respondent’s supervisors and managers also understood a new election could soon be held, that the Respondent attempted to create a reason to terminate Sandoval. Just prior to this period of time, in July 2001, Maintenance Manager David Stievo approached Sandoval about an alleged “attendance problem.” Stievo mentioned several “sick days” which Sandoval had allegedly taken back in February and March 2001. Sandoval informed Stievo that his attendance was excellent and the days on which he was allegedly absent were actually his days off. After checking the records, Stievo was forced to admit that he had made a mistake and no discipline was issued.

In late August 2001, Sandoval, as well as several other maintenance mechanics, registered for an electrical class held at a local community college. As this class could potentially help the maintenance mechanics in the performance of their job duties, the Respondent agreed to pay the cost of tuition, depending on the grade received in the class. Although Sandoval alleged that the Respondent made it difficult for him to get off work to register for the class, he did manage to get registered. However, after starting the class, which was given at night, events occurred that made it more difficult for Sandoval to attend.

Until mid-September 2001, Sandoval had worked the day shift, from 6 a.m. to 6 p.m., which allowed him time to attend night class. In early September, however, there was a temporary vacancy in the night maintenance crew, which the Respondent decided to cover by having several day-shift mechanics alternate in working the night shift. Sandoval was one of the mechanics selected, although he contends that his selection was unfair considering his seniority. In any event, while the regular night shift ran from 6 p.m. to 6 a.m., David Stievo agreed to alter Sandoval’s night work schedule to run from 9 p.m. to 9 a.m., so as not to disrupt his class schedule.

Sandoval’s first evening of work began on September 18, when he was scheduled to work from 9 p.m. to 9 a.m. At about 4 a.m. on September 19, Sandoval informed his supervisor, Laura Bliss, that he needed to go home because he was sleepy

⁵ Any misconduct committed by the Respondent during the pre-election period would be barred by Sec. 10(b) of the Act from being alleged to constitute unfair labor practices. However, any such conduct can still be raised in order to demonstrate union animus.

⁶ Duiker’s testimony establishes his exercise of supervisory authority. Accordingly, I conclude that he is a supervisor as defined by Sec. 2(11) of the Act.

⁷ The parties stipulated that Jeremy Reynolds was a supervisor as defined by Sec. 2(11) of the Act.

and did not feel safe continuing to work in that condition.⁸ Both sides agree that Bliss informed Sandoval that he needed to wait until David Stievo got to work so he could explain his problem to Stievo. However, Bliss testified that she was even more specific, directing Sandoval to wait for Stievo in the breakroom, where he would be safe. In any event, Sandoval returned to work and periodically went to look for Stievo. Bliss left at 6 a.m., however, Stievo had still not arrived. Michael Moberly, maintenance mechanic, arrived for the start of his regular shift at 6 a.m. Moberly commented to Sandoval that he looked tired and should just go home, as there was now “coverage.”⁹ Since Moberly was now present to provide “coverage,” and as Stievo had still not arrived, Sandoval decided to leave. The Respondent contends that he did so without permission, and in direct contradiction of Bliss’ direction to wait for Stievo. It is the General Counsel’s position that as there was “coverage,” Sandoval could reasonably assume, based on past practice at the facility, that he could leave.

Sandoval clocked out upon leaving, but did not sign the “deviation sheet” located near the time clock. The purpose of the sheet was to note schedule changes apart from what the time clock would record.¹⁰ According to Sandoval, as he was exiting from the facility, his vehicle drove past Stievo’s vehicle as Stievo was arriving, and the two men waved to each other. Stievo testified that he did not recall seeing Sandoval departing the facility as he arrived. However, the security guard logs for the morning of September 19, which are handwritten, reflect that Sandoval left the facility at 6:21 a.m. and Stievo arrived at 6:20 a.m. Stievo contends he did not realize on September 19 that Sandoval had left work early that day.

On the evening of September 19, Sandoval was again scheduled to work the night shift and reported for work at 9 p.m. At the beginning of the shift, he was approached by coworker, Dan Harbottle. Reportedly, Harbottle, who worked days, wanted to begin his shift the next morning (Sept. 20) at 6 a.m. rather than 9 a.m., and he informed Sandoval that he would be available to cover if Sandoval wanted to leave early. On the morning of September 20, both Harbottle and maintenance mechanic David Hetzler arrived for work at 6 a.m. As there was adequate “coverage,” Sandoval decided to leave work early. Just prior to leaving, Sandoval had a conversation with Hetzler in which Hetzler cautioned him about leaving work without permission. Sandoval informed Hetzler that he was not concerned, as he was tired, had perfect attendance, could afford an “occurrence,”¹¹ and there was “coverage.”

⁸ Sandoval testified that at a safety meeting earlier that month, General Manager Graverson had informed the employees that if any employee felt unsafe, the employee could refuse to perform the unsafe activity and then report the incident to a supervisor.

⁹ It appears from the testimony of a number of employees that the references to “coverage” meant the presence of an employee at the facility who could perform the duties of another employee who needed to be absent for some reason.

¹⁰ The Respondent does not contend Sandoval attempted to obtain pay for work that he did not perform on either day when he left early.

¹¹ By the term “occurrence,” Sandoval apparently meant an attendance violation for having left work early on 2 consecutive days.

There is no dispute that Sandoval clocked out at 6:06 a.m. and left the facility at 6:40 a.m. on September 20, as is reflected in the gate logs. The parties agree that Sandoval did not sign the deviation sheet, nor did he seek permission from any supervisor to leave work early. However, the General Counsel contends that since there was “coverage” on the morning of September 20, Sandoval had a reasonable belief that he could leave work early, even without direct permission from a supervisor. It is the position of the Respondent that by leaving work early on a second consecutive day, Sandoval had abandoned his job. The Respondent argues that the second incident was more egregious than the first, as on the second day, Sandoval did not even attempt to obtain permission from a supervisor.

According to Stievo, he first became aware that Sandoval had left work early on the two consecutive mornings when maintenance mechanic Mark Stevenson brought the matter to his attention on September 20. Stievo then conducted an investigation, after which he concluded that Sandoval had, in fact, left work early on September 19 and 20. The investigation consisted of talking with Mike Moberly and Dave Hetzler, and checking the time records and the gate logs. However, it should be noted that Stievo did not contact Sandoval during his initial investigation of the incident.

On September 21, Stievo met with Human Relations Generalist Beth Moser and General Manager Graverson to discuss the investigation. According to Moser, after reviewing the witness statements and time records, she recommended that Sandoval be terminated. Graverson supported that recommendation and Stievo accepted it. It is the Respondent’s position, that the decision to discharge Sandoval was made because by leaving work early on 2 consecutive days without permission, he had abandoned his job.

Stievo and Sandoval were not scheduled to be at the facility together until September 24. On that day Stievo and Moser met with Sandoval and told him an investigation had been conducted which disclosed that he had left work early without permission on 2 consecutive mornings. Further, he was told that his actions constituted job abandonment for which he was being terminated. Sandoval strongly denied that he had abandoned his job and argued he had “coverage” on both days. Also, he indicated that on the first date he felt tired, had sought permission from Laura Bliss, and had left work only after he was unable to locate Stievo. Both Moser and Stievo testified that Sandoval also claimed Bliss had given him permission to leave. However, Sandoval does not acknowledge making such a statement. Although the termination papers had already been prepared, Stievo decided to contact Bliss before making the termination final. Sandoval was sent home and Stievo called Bliss. Bliss reported to Stievo that Sandoval did request permission to go home due to fatigue, but she denied telling Sandoval he could leave. Following his conversation with Bliss, Stievo called Sandoval and informed him that a final decision had been made to terminate him.

Several days following his discharge, Sandoval returned to the facility to collect his personal belongings. Stievo escorted Sandoval to his toolbox, which contained his personal items. While walking across the production floor, Sandoval removed his jacket to reveal a T-shirt. The shirt was red, with 5-inch

white lettering that read “Work Union,” or words to that effect. Stievo immediately told Sandoval to put his jacket back on, which request Sandoval ignored. While the parties disagree as to exactly what was said next, both agree that Stievo made a reference to Sandoval’s “attitude.” Stievo testified the reference was merely an expression of his philosophy that a person should try to maintain a positive attitude. It is the Respondent’s position that the final decision to terminate Sandoval was based not only on his having left work early without permission on 2 consecutive days, but also because he lied during the investigation about receiving permission from Laura Bliss to leave work early. The Respondent argues that its policy manual does not require progressive discipline, rather, it depends upon what conduct constitutes the infraction. According to the Respondent, Sandoval was not fired for an “attendance problem,” but, rather, because he violated the Respondent’s “code of conduct” by leaving work early without permission on 2 consecutive days, failing to follow the instruction of Supervisor Bliss, and lying about Bliss’ comments. The Respondent contends that these infractions were egregious, and required immediate dismissal, without the reliance upon progressive discipline. (GC Exhs. 3a, 1-073 & 1-074; 3b, 1-127 & 1-128; and 26.)

The General Counsel contends that Sandoval had an excellent attendance record during his 6 years of employment with the Respondent. Sandoval testified that he had never received any written warnings nor been disciplined in any way during his term of employment. While Sandoval’s personnel file does reflect several “employee conferences,” Production Supervisor Nadeau testified that after discussing with Sandoval the matters reflected in these documents, she may not have informed him that any written reference was being placed in his personnel file, nor given him a copy. (GC Exh. 25.) Further, it is the position of the General Counsel that under the Respondent’s attendance policy, “job abandonment” requires at least 2 consecutive days with no contact from an employee, which was not the situation with Sandoval. (GC Exh. 37–38.) The General Counsel argues that the Respondent’s stated reasons for Sandoval’s termination are pretextual, and a review of the disciplinary action issued to other employees will so demonstrate.

IV. ANALYSIS AND CONCLUSIONS

The central issue before the undersigned is the question of the Respondent’s motivation in terminating Frederick Sandoval. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or (1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the present case, I conclude that the General Counsel has made a prima facie showing that Frederick Sandoval’s pro-

ected conduct was a motivating factor in the Respondent’s decision to terminate him. In *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993), the Board held that in order to establish a prima facie case, the General Counsel must show: (1) that the discriminatee engaged in protected activities; (2) that the employer had knowledge of such activities; (3) that the employer’s actions were motivated by union animus; and (4) that the employer’s conduct had the effect of encouraging or discouraging membership in a labor organization.

There can be no doubt that Sandoval engaged in significant protected union activity. During the organizing campaign in the fall of 2000, he was very active on behalf of the Union. Sandoval distributed approximately 180 flyers to employees, distributed about 45 union authorization cards, received 30 signed cards from employees, spoke with numerous employees about the benefits of being represented by the Union, attended union meetings, and wore a union button. Of particular significance was Sandoval’s continuing union activity into the year following the representation election. Sandoval, as well as a number of other employee witnesses, credibly testified that he continued in an open and vocal manner to talk with numerous employees about the benefits of union representation. As the time approached when a new election could be held, Sandoval increased his activity. He frequently reminded employees that while he felt they had made a mistake in voting against union representation in December 2000, that they could have another chance to be represented. He explained to employees that a second election could be held 1 year later. Sandoval was, however, discharged in September 2001, less than 3 months before a second election could be held.

In my opinion, the Respondent was well aware of Sandoval’s union activity, both in the fall of 2000, and in the 10 months following the representation election in December 2000. While, as noted above, I have concluded that he was a visible union organizer, it is not necessary to draw inferences about Employer knowledge, as a number of the Respondent’s supervisors acknowledged awareness of Sandoval’s union activity. Sandoval testified that crew team leader Laura Bliss, who had been a production employee during the fall 2000 campaign, submitted a signed union authorization card to him. Regarding Sandoval’s union activity and support, Bliss testified, “We knew that he was. I knew he was.” Further, crew team leader Eric Duiker testified as to a conversation that he had with Sandoval following the election in which Sandoval told him about the benefits of union representation, and expressed a continuing interest in organizing for the Union.

Despite testimony from certain of the Respondent’s supervisors that they had direct knowledge of Sandoval’s union activity, other supervisors seemed reluctant to admit awareness. General Manager Graverson’s testimony in this regard was particularly vague and “hazy.” Regarding Sandoval, he testified, “Fred was not pro-company, so I would assume he would be for the Union.” However, when asked by counsel for the General Counsel whether he was aware that Sandoval was still in favor of the Union after the election, Graverson testified, “No, I didn’t know that.” At another point in his testimony Graverson said, “. . . I made the assumption that he [Sandoval]

was more in favor of the Union than against, and I didn't and still don't have a problem with that." Still later Graverson testified, "I don't think it was a secret that Fred was a union supporter. Union campaigner, a whole different story."

I do not find Michael Graverson to be a credible witness. I believe that his testimony regarding his knowledge of Sandoval's union activity, as well as in other areas, was at best disingenuous. It is simply incredible that Graverson was unaware of Sandoval's union activity at the same time that several of his supervisors, namely Bliss and Duiker, knew that Sandoval was actively organizing on behalf of the Union. Graverson was the facility general manager, the person in charge of the plant. It is preposterous to think that supervisors would fail to inform him of significant information regarding the attempt to organize the facility. The only reason that supervisors would have had for not discussing Sandoval's union activity with upper management would have been if those activities were so well known by management that reporting them would have been superfluous. Accordingly, I find Graverson's testimony inherently implausible, and conclude that Graverson was well aware of Sandoval's union activity throughout the time period in question.

For similar reasons, I find David Stievo to be an incredible witness. As with Graverson, Stievo's testimony is vague regarding his knowledge of Sandoval's union activity. Further, it is inconsistent. At first he denied any knowledge of Sandoval's union activity or even whether he was a union supporter. He claimed to not even recall seeing Sandoval wearing a union button or having a conversation with Sandoval in which he directed him to remove the button. However, when he testified for the second time his memory had apparently improved, because he suddenly recalled the union button incident. In my opinion, Stievo exercised selective memory. He was able to remember facts that supported the Respondent's position, such as altering Sandoval's schedule to permit him to take an evening class. However, when it came to Sandoval's union activity, his memory seemed to fail him. Further, it is foolish to think that Stievo could have remained ignorant of Sandoval's union activity when other supervisors in the Respondent's hierarchy have admitted being aware of that activity. Therefore, I am of the opinion that Stievo was also well aware of Sandoval's union activity, from the fall of 2000 through the time of his discharge.

In general, I found Frederick Sandoval to be a credible witness. His testimony was inherently plausible and was, for the most part, supported by the weight of the objective evidence. While his testimony did occasionally become emotional, that was not unreasonable considering the circumstance surrounding his discharge. His testimony appeared to have a "ring of authenticity" about it. Therefore, I accept his testimony regarding the volume and nature of his union activity, which occurred from the fall of 2000 until his discharge. Further, I conclude that the Respondent, including Supervisors Graverson and Stievo, had knowledge of that union activity.

Regarding the question of whether the Respondent's action in discharging Sandoval was motivated by union animus, the Respondent takes the position that it has not exhibited any union animus. The Respondent argues that as it has a number of

plants where employees are represented by unions and as many of the facility's managers had previously worked in union plants, it was not hostile to the organizing efforts of the facility's employees, including Sandoval. However, in my view, this argument is plainly disingenuous. While the Respondent, of course, had a legal right to oppose the Union's organizing efforts, it is a mischaracterization for the Respondent to suggest that its campaign was just intended to "educate" the employees. Rather, the Respondent was engaged in a strenuous effort to defeat the Union. The Respondent employed consultant John Coit to assist the facility managers in preparing the campaign. The campaign itself utilized the supervisors and managers in both individual and group meetings with employees where collective bargaining was discussed, and the alleged disadvantages of being represented by a union were explained to the employees.

Clearly, the Respondent considered the campaign much more than simply an academic exercise intended only for information dissemination. The Respondent's supervisors took the campaign personally. At a group meeting with employees both Michael Graverson and Production Supervisor Karlene Nadeau cried. The atmosphere was emotionally charged. Graverson testified that he took the campaign very personally. He felt the organizing efforts reflected badly on him and hoped his employees would find it unnecessary to have a union represent them. While the Respondent, obviously, had the legal right to oppose the Union's organizing efforts, it is inaccurate to characterize the Employer's efforts as anything less than strongly hostile to the Union.

There does appear to be direct evidence of union animus directed specifically against Sandoval by Supervisor Stievo. As has been set forth above, Stievo directed Sandoval to remove a union button, because allegedly it violated the Respondent's "no jewelry" policy. However, the alleged failure to uniformly enforce this policy as it applied to wedding rings remained unanswered. Stievo's union animus continued even following Sandoval's discharge when Stievo told Sandoval to cover up his union T-shirt the day Sandoval returned to the facility to retrieve his personal belongings. Further, I am of the view that Stievo's parting remark to Sandoval about his "attitude" was intended as a reference to Sandoval's union activity.

While these incidents on the part of Stievo were not alleged as unfair labor practices, and were by the hearing date time barred by Section 10(b) of the Act, they can still serve as evidence of union animus. In the same way, Graverson's statement to employees that they could not talk about the Union while on the production floor, although they could apparently discuss any other subject, shows hostility to the Union. As is noted above, Graverson does not deny making this statement. Therefore, it is apparent to the undersigned that both Stievo and Graverson have exhibited direct evidence of union animus.

But, even without direct evidence, animus or hostility towards an employee's union activity may be inferred from all the circumstances. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); and *U.S. Soil Conditioning Co.*, 235 NLRB 762 (1978). Such an inference is warranted here. As I have noted above, the Respondent engaged in a very aggressive campaign to defeat the Union's organizing efforts. While an

employer certainly has the legal right to oppose a Union's organizing efforts, this Respondent's supervisors made sure the employees understood this was a personal matter. It is undisputed that Supervisor Nadeau and General Manager Graverson both cried during their presentation to a large group of employees. Graverson, who was the highest-ranking manager at the facility, testified that he took the organizing campaign very personally and admitted becoming emotional at the meetings. He was disappointed that some of his employees found it necessary to seek union representation and felt it reflected badly on him. It was the Respondent's supervisors and managers who chose to interject a personal element into the campaign and created an emotionally charged atmosphere. Sandoval, as an active and vocal union supporter, had a certain amount of that emotion directed towards him in the form of hostility from the supervisors. This was especially true as the time approached when a second election could be held and Sandoval continued with his organizational activities. Under these circumstances, I believe my inference about the Respondent's animus directed towards Sandoval for his protected activity has considerable support in this record.

As I have noted, Sandoval was an active and vocal union supporter. He was one of only a handful of open union supporters at the facility. Further, following the election he continued to organize on behalf of the Union, and increased his efforts as the time approached when a second election could be held. Any disciplinary action taken against him because of his union activity would, unquestionably, have had the chilling effect of discouraging other employees from supporting the Union. As Sandoval's union support was widely known, and his termination seemed unduly harsh, coworkers could easily infer that he was fired for his union activity. In this way, the Respondent warned its other employees that continuing activities on behalf of the Union would not be tolerated.

The General Counsel, having met its burden of establishing that the Respondent's actions were motivated, at least in part, by antiunion considerations, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); and *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitale Co.*, 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

The Respondent takes the position that Sandoval was fired primarily because in leaving work early on 2 consecutive mornings, he abandoned his job. Also, allegedly he was insubordinate in failing to follow Supervisor Bliss' instruction and lied about receiving permission from Bliss to leave work. Specifically, the Respondent does not allege that Sandoval was fired because of an attendance problem or because of a poor employment record. It is worth noting that the Respondent does not make such a claim because Sandoval, prior to the incident in question, had an excellent attendance record and was considered a good employee. A review of his personnel file does not alter that view, despite the presence of several "employee conference" reports, which Sandoval credibly testified were never shown to him. The logical conclusion that I reach from this

unrebutted testimony is that the matters covered in these reports were not considered significant by management. (GC Exh. 25.)

Regarding the events of September 19 and 20, I am of the opinion that what occurred was far different than simple job abandonment. To begin with, on September 18-19, Sandoval did not suddenly leave work without warning, but, rather, he first approached Supervisor Bliss at about 4 a.m., and informed her that he was tired, felt unsafe, and needed to go home. While there is some dispute about precisely what Bliss told Sandoval, all agree that Sandoval was told to wait until he had a chance to talk with Supervisor Stievo. Sandoval unsuccessfully tried to find Stievo and went to his office several times. After 6 a.m., with Bliss gone and Stievo still not at work, Sandoval decided to leave. However, he did so only after determining that "coverage" was available in the form of maintenance mechanic Mike Moberly.

The parties dispute what the concept of "coverage" meant. A number of employee witnesses, including Sandoval, David Hetzler, Patrick Rush, and Jessie Lomas, testified that if an employee found a coworker willing to perform his duties, if necessary, the employee could leave work. The Respondent's managers contend "coverage" meant that a replacement employee, not scheduled to work that shift, would perform the absent employee's work, not simply another employee who was already working the shift. Also, the Respondent takes the position that with or without "coverage," an employee, who wanted to leave work early, still needed permission from a supervisor. In view of the conflicting evidence presented, all of which seemed credible, I am of the opinion that there was no consistent policy regarding "coverage." However, that does not alter the fact that prior to leaving work early on the morning of September 19, Sandoval was of the belief he had arranged "coverage," as he understood that concept. Of course, he had not secured permission from a supervisor, but he had at least made efforts to do so.

In my view, Sandoval's reason for wanting to leave work early on September 19, and his efforts to obtain permission to do so, constitute mitigating circumstances which need to be considered in determining whether his discharge for job abandonment was merely a pretext. The Respondent contends that Sandoval compounded his misconduct by lying to Stievo and Moser about receiving permission from Bliss to leave work early. Sandoval testified that he made no such claim and I credit his denial. For the reasons stated above, I have found him to be a credible witness. In any event, it appears to me that this is really a nonissue. On September 24, Stievo had concluded the investigation, had decided to terminate Sandoval, and had already prepared the termination papers. The additional reason given for termination, namely that Sandoval lied about Bliss' instruction, seems like an "after the fact" attempt by the Respondent to justify its action. This stacking on of reasons for the termination may well demonstrate that the Respondent was not comfortable with its originally stated reason for discharging Sandoval.

Concerning his shift of September 19-20, Sandoval also did not simply leave work early. He first obtained what he believed to constitute "coverage." Sandoval departed after 6 a.m., only after he determined that employees Hetzler and Harbottle

were available to cover his shift. While the Respondent did not consider this “coverage,” surely Sandoval’s continuing interest in securing “coverage,” as he understood the term, should have been considered by the Respondent as a mitigating circumstance in evaluating whether he had abandoned his job.

The Respondent raised the issue of Sandoval’s failure to sign the “deviation sheet” on either September 19 or 20, although it does not appear that the Respondent takes the position that this was a further basis for the termination.¹² In any event, I believe that this is also a nonissue, as the deviation sheet is primarily intended to prevent employee overpayments. However, Sandoval clocked out on both dates and there is no contention that he attempted in any way to obtain pay for which he was not entitled.

It is important to note that General Manager Graverson testified the Respondent attempts to take mitigating factors into consideration when disciplining. Similarly, Supervisor Karlene Nadeau testified that the Respondent tries to be flexible when determining what discipline to issue to an employee. However, it does not appear to me that the Respondent was willing to consider significant mitigating circumstances when disciplining Sandoval. Rather, this long-term employee with a good work record was given the ultimate discipline, termination.

Both parties introduced voluminous personnel records for numerous employees into evidence. The General Counsel was attempting to demonstrate that Sandoval was treated in a disparate fashion, while the Respondent was attempting to show that its discharge of Sandoval was consistent with the discipline issued to other employees. However, the Respondent acknowledged that there was no truly analogous situation, as there was no other nonprobationary employee who had left work early without permission on 2 consecutive days. In any event, in reviewing the employee personnel records in evidence, the undersigned was mindful of the fact that the Respondent takes the position that Sandoval was not fired because of either poor attendance or poor work performance. On the contrary, his attendance and work performance were good. Rather, according to the Respondent, he was fired for job abandonment, a code of conduct violation.

After a review of the record evidence, I am of the opinion that there are a significant number of examples of employees who had left work early and who were either issued minimal or no discipline by the Respondent. However, as was argued by the Respondent, these are, for a variety of reasons, not really analogous situations. I believe it is more appropriate to compare Sandoval’s discharge to the disciplinary action issued to other employees who committed fairly significant offenses, which would certainly be considered a breach of the Respondent’s code of conduct. The employee handbook lists under “Personal Conduct” examples of behavior that is so serious, a final warning or termination may result from a single incident. (GC Exh. 26.) Leaving work without permission is one of those items listed.

The employment record of Lowell Spence is worth considering. (GC Exh. 14.) Spence was employed as a machine opera-

tor. General Manager Graverson testified he did not associate Spence with any union activity. Spence received repeated warnings about tardiness and absenteeism in late 1999. In December 1999, Spence tested positive for drugs, and between January and April 2000, there were reports of Spence sleeping on the job. However, he received only a “final warning,” until he was found sleeping on the job for a second time, at which point he was terminated on December 7, 2000. This was obviously an employee with a deeply flawed employment history, including repetitive attendance problems, illegal drug use, and sleeping on the job. Yet, he was given a number of “second chances,” while Sandoval was not.

Employee Jerry Hall is another production employee not known as a union supporter. A number of the Respondent’s managers testified about Hall intentionally listing a woman he was not married to as his spouse on his insurance forms in an effort to obtain medical care for her. Despite what certainly might be considered insurance fraud, Hall only received a 1-week suspension, and remained employed by the Respondent. His personnel file included instances of attendance problems, and several safety violations (GC Exh. 28), yet the Respondent’s managers still were willing to consider mitigating circumstances, specifically that he thought he had the right to list his “significant other” as his wife on the insurance forms. However, the Respondent was apparently not willing to consider Sandoval’s mitigating circumstances.

Another employee who should be considered is Dan Watrus, also not known as a union supporter. At the time of the hearing, Watrus had been employed at the facility for about 1-1/2 years, and was still an employee. Supervisor Karlene Nadeau testified as to Watrus’s poor employment record. In addition to attendance violations, which included a “no call, no show,” he reportedly also maintained his equipment poorly and received a warning for attitude. (GC Exhs. 21 and 34.) Watrus was an employee with much less seniority than Sandoval. His work record, which included a “no call, no show” was certainly much worse than Sandoval’s, and yet he received no discipline more severe than a written warning. It certainly appears that Sandoval, who was terminated, was treated in a much harsher fashion.

Finally, I have considered the employment record of Ken Nason, another employee not known as a union supporter. He was accused of having sexually harassed a number of female employees, spoke disrespectfully to a shift leader in the presence of other employees, and made a racist remark toward another employee. He received only a written reprimand for all that misconduct, and was still employed by the Respondent at the time of the hearing. (GC Exh. 18.) Once again, one is left to ponder why Sandoval was not shown the same “flexibility” in the area of discipline that Supervisor Nadeau testified the Respondent utilized.

I am of the opinion that the Respondent’s stated primary reason for discharging Sandoval, that of job abandonment, was merely a pretext. The record amply demonstrates that employees with much less seniority, and poor employment records, were disciplined in a less severe way for conduct considerably more egregious than that for which Sandoval was terminated. Accordingly, the Respondent has failed to rebut the General

¹² Graverson testified that there was no written policy subjecting employees to discipline for failing to complete a deviation form.

Counsel's prima facie case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of union activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

The Respondent was not able to offer any reasonable explanation for its failure to consider the several mitigating circumstances surrounding Sandoval's conduct in leaving work without permission. Its failure to exercise "flexibility," as it did for other employees, leaves the undersigned with the strong impression that the Respondent's discharge of Sandoval was not really based on job abandonment or a violation of the code of conduct, but, rather, on his union activity. Were it not for that union activity, I believe the Respondent would have been "flexible," and Sandoval would not have been discharged.

In my view, the timing of the termination explains a great deal about the Respondent's motivation. Sandoval was discharged on September 24, less than 3 months prior to when another representation election could have been held. At the time of his discharge, Sandoval was actively attempting to bring about such an election. As I have noted above, the Respondent was well aware of those efforts, as Sandoval's union activity was conducted in a rather open and vocal manner. I believe that in an attempt to avoid another representation election, the Respondent seized on an opportunity to fire Sandoval because of his failure to secure permission prior to leaving work early. However, I am convinced that were it not for his union activity and the Respondent's fear of another representation election, the Respondent would not have discharged Sandoval.

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Frederick Sandoval on September 24.¹³

CONCLUSIONS OF LAW

1. The Respondent, SCA Tissue North America, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Frederick Sandoval on September 24, 2001.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

¹³ The complaint alleges that the Respondent maintained a practice of permitting maintenance department employees to leave work early provided coverage by other employees was available. Further, it is alleged that the failure to follow that practice with respect to Sandoval constitutes a violation of the Act. However, as is noted above, I found the evidence insufficient to establish that there was a consistent policy or practice regarding "coverage." Therefore, I find the Respondent's conduct in not following the alleged practice not to be a separate violation 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 discharged its employee Frederick Sandoval, my recommended Order requires the Respondent to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended Order further requires the Respondent to make Sandoval whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date the Respondent makes a proper offer of reinstatement to him, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended Order further requires the Respondent to expunge from its records any reference to the discharge of Sandoval, and to provide him with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make reference to the removed material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Sandoval in any other way. Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, SCA Tissue North America, LLC, Bellemont, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against any employee for supporting Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, or any other union.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Frederick Sandoval full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without

¹⁴ 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.

prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Frederick Sandoval whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, 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 discharge of Frederick Sandoval, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(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 Bellemont, Arizona, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility 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 24, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

¹⁵ 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."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, or any other union.

WE WILL NOT in any similar or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

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

WE WILL make Frederick Sandoval whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

SCA TISSUE NORTH AMERICA, LLC