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TKC, a Joint Venture and International Union of Operating Engineers Local 77, AFL-CIO. Cases 5-CA-30504 and 5-CA-30554

October 17, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On August 7, 2003, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

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

² We agree that Mayer's question as to whether Lumpkin was a union member was a coercive interrogation in the context of his other remarks. In adopting the judge's finding that the Respondent coercively interrogated Lumpkin, we do not rely on the judge's unnecessary statement that "remarks denigrating union membership by a supervisor who was a purported union member would be even more coercive since he might be thought to know what he was talking about."

Chairman Battista and Member Schaumber adopt, for institutional reasons, the judge's finding that the Respondent violated Section 8(a)(1) by implying that union support was the reason for Lumpkin's layoff. Although they would find that the statement under scrutiny was part of the *res gestae* of the unlawful layoff and is subsumed by that violation, Chairman Battista and Member Schamber recognize that current Board precedent requires the finding of a violation. See *TPA, Inc.*, 337 NLRB No. 40, *sl. op.* at 2-3 (2001).

No exceptions were filed to the judge's findings that the Respondent did not violate Section 8(a)(3) of the Act by reducing employee Daniel McVicker's overtime hours or by discharging McVicker.

³ We modify par. 2(f) of the judge's recommended Order to reflect that the Respondent's unfair labor practices commenced with Lumpkin's interrogation on February 7, 2002, and not on "June 11, 2002" as the judge inadvertently stated there. See *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised by *Excel Container, Inc.*, 325 NLRB 17 (1997).

modified below and orders that the Respondent, TKC, a Joint Venture, Oxon Hill, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by Region 5, post at its Oxon Hill, Maryland facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 February 7, 2002."

Dated, Washington, D.C., October 17, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

John S. Ferrer, Esq., and Jennifer R. Simon, Esq., for the General Counsel.

A.W. VanderMeer, Esq., of Virginia Beach, Virginia, for the Respondent.

David Miller, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed on June 11 and July 8, 2002, by International Union of Operating Engineers Local 77, AFL-CIO (the Union), the Regional Director for Region 5, National Labor Relations Board (the Board), issued a consolidated complaint September 30, 2002, alleging that TKC, a Joint Venture, had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the

Act).¹ The Respondent filed a timely answer denying that it had committed any violation of the Act.

This hearing was held in Washington, DC, on April 28 and 29, 2003, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent has been a joint venture comprised of Tidewater-Skanska, a Virginia corporation, Peter Kiewit and Sons, Inc., a Nebraska corporation, and Clark Construction, Inc., a Maryland corporation, engaged in the construction of a bridge in the metropolitan Washington, DC, area. It has maintained an office and place of business in Oxon Hill, Maryland. During the 12-month period preceding the issuance of the complaint herein, the Respondent purchased and received at its worksite materials and goods valued in excess of \$50,000 directly from points located outside of the metropolitan Washington, DC area, Maryland, and Virginia. I find that, at all times material, the Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material, the Union was a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is the general contractor performing the construction of the foundations for the new Woodrow Wilson Bridge (WWB) over the Potomac River outside Washington, DC. The onsite work began in June 2001 and was scheduled to be completed in July 2003. It maintained offices in trailers inside the main gate of the project on Maryland State Highways Department property in Oxon Hill, Maryland. A smaller office was located on the Virginia side of the project. In January 2002,² the Union began an attempt to organize the Respondent's crane operators at the WWB project. On six to eight occasions in January and February, union representatives and some employees passed out leaflets and handbills at the project gates.

A. Alleged Violations of Section 8(a)(1)

1. Alleged Interrogation on February 7

Marcus Lumpkin was hired by the Respondent as a crane operator on January 11. He faxed a resume after seeing a job posting on the Internet. The following day he was called by Phillip Trombatore who interviewed him on the telephone concerning his experience and availability. Trombatore called Lumpkin back and told him to report for work the next day,

which he did. Lumpkin initially worked on the night shift but switched to the day shift at the end of January. On his first day on the day shift, he saw Local 77 representatives at the fence and stopped to talk with them. He took some literature and some union stickers which he put on his hardhat and the bumper of his car. For about an hour prior to work on the morning of February 7, he passed out handbills at the Virginia entrance to the project with some union representatives. Lumpkin testified that at about 9 a.m. that day, Area Manager John Mayer approached him near his crane and asked if he was in the Union. Lumpkin said that he was not but was trying to join. Mayer responded, "why would you want to do that? Why the fuck would you want to pay somebody to let you work?" Mayer said nothing more but he appeared "agitated." The complaint alleged that Mayer's conduct constituted a coercive interrogation in violation of Section 8(a)(1) of the Act.

Analysis and Conclusions

Mayer testified that he could not "recall" having a conversation in which he had asked Lumpkin if he had joined the Union. After considering their demeanor and the content of their testimony, I credit Lumpkin. His detailed description of this conversation was much more believable than Mayer's response to leading questions by the Respondent's counsel which did not direct his attention to the time or place or provide any context and misstated what Mayer was alleged to have said.

The test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employee's rights protected by the Act. E.g., *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Rossmore House*, 269 NLRB 1176, 1177 (1984). Here, although Lumpkin had openly demonstrated his support for the Union that morning by passing out literature at the project gate, it was Mayer who approached him and initiated the exchange by asking Lumpkin if he was a union member. Mayer's only apparent reason for doing so was to indicate his hostility and disapproval, as he immediately walked away, without further discussion, after profanely expressing his incredulity that anyone would become a member of the Union. Moreover, his suggestion that Lumpkin would be paying someone to let him work is untrue and coercive. Contrary to the Respondent's suggestion in its brief, I find that Mayer's own union membership, if any, would do nothing to lessen the coercive effect of his actions. If anything, remarks denigrating union membership by a supervisor who was a purported union member would be even more coercive since he might be thought to know what he was talking about. I find that Mayer's question to Lumpkin and his rhetorical remarks were coercive and violated Section 8(a)(1).

2. Alleged Coercive Statement on February 14

Lumpkin testified that on the afternoon of February 14, Mayer approached him while he was assisting in taking apart a crane and told him he was not needed anymore and was laid off. Lumpkin asked about his paycheck and a layoff slip. Mayer told Lumpkin to pick his check up the next day at the Maryland office. Mayer then asked Lumpkin if he had joined the Union. Lumpkin responded that he had not done so yet and

¹ An amended consolidated complaint was issued on October 28, 2002. At the hearing counsel for the General Counsel withdrew the 8(a)(1) allegations in par. 5 of the consolidated complaint.

² Hereinafter, all dates are in 2002, unless otherwise indicated.

Mayer said, “well, tell them to get you a job” and walked away. Mayer denied that he told Lumpkin to have the Union get him a job. He testified that he told Lumpkin that there was no work for him and they wanted him to go on the night shift but that the night shift would not be starting for 2 or 3 weeks. Lumpkin denied that Mayer made any such statement. The General Counsel contends that Mayer’s statement linked Lumpkin’s layoff to his union activity and was coercive.

Analysis and Conclusions

I found Lumpkin to be a more credible witness than Mayer and believed his testimony about what was said when Mayer laid him off. Moreover, the Respondent’s witness, supervisor Roger Cline, who was present when Mayer spoke to Lumpkin did not corroborate Mayer or contradict Lumpkin. Here again, it was Mayer who interjected the subject of Lumpkin’s joining the Union into the conversation. There was no reason for doing so except to imply that there was a connection between Lumpkin’s support for the Union and his layoff. I find that Mayer’s statements were coercive and violated Section 8(a)(1).

3. Written Warnings to Daniel McVicker and Clay Cunningham

After Lumpkin was laid off, the Union distributed flyers and presented the Respondent with petitions signed by employees and union members protesting his layoff. On April 18, it organized a strike and set up a picket line of about outside the main gate, which at times totaled 50 to 100 picketers. Picketers carried signs asserting that it was an unfair labor practices strike. They passed out leaflets accusing the Respondent of committing unfair labor practices and safety violations and stating that unfair labor practices charges had been filed against it. Crane operators Daniel McVicker and Clay Cunningham walked the picket line and did not work that day. It is clear that the Respondent was aware that both crane operators were at the picket line.

On the following day, as Cunningham arrived at work he encountered Supervisor Korey Young. Cunningham asked if he still had a job and Young responded that he had a job but that he had caused Young a lot of trouble and was going to be written up. Cunningham testified that he was never given a copy of a written warning in connection with this incident but the Respondent admits that one was issued to him. At about 1:30 p.m. that same day, Supervisor George Crandall issued a written warning to McVicker for an unexcused absence on April 18.

Analysis and Conclusions

The Respondent contends that the warnings were issued to McVicker and Cunningham because they were absent from work on April 18 and failed to give advance notice of their absence which violated its work rules. It is fundamental that an employer cannot discipline an employee for engaging in concerted activities that the Act protects. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). By participating in a work stoppage to protest the discharge of fellow employee Lumpkin, McVicker and Cunningham were engaged in such protected activity. Consequently, the disciplinary action taken against them violated by the Respondent Section 8(a)(1) of the Act. *LaSalle Bus Service*, 331 NLRB 1005, 1006 (2000).

B. Alleged Violations of Section 8(a)(3) and (1)

1. Layoff of Marcus Lumpkin

The complaint alleges that Lumpkin was laid off because of his support for the Union. The Respondent contends that he was laid off due to lack of work. In cases where the employer’s motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must introduce persuasive evidence that antiunion animus was a substantial or motivating factor in the employer’s decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of the employee. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To sustain his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the activity was a substantial or motivating reason for the employer’s adverse action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

There is no dispute that Lumpkin engaged in activity in support of the Union and that the Respondent had knowledge of that activity. Mayer testified to seeing Lumpkin handing out union literature at the project gate and to knowing about Lumpkin’s intention to join the Union. The Respondent’s union animus is established by its violations of the Act found herein, including, Mayer’s remarks implying that Lumpkin’s support for the Union was the reason for his layoff.³ Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence. E.g., *Abbey Transportation Services*, 284 NLRB 698, 701 (1987); *Pete’s Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983). The timing of the employer’s action can be persuasive evidence of its motivation. E.g., *Masland Industries*, 311 NLRB 184, 197 (1993); *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Here, in January, Lumpkin came to the Washington, DC area from his home in Tennessee after a representation by the Respondent’s recruiter that the job would last several years and he was never given any indication that there was a possibility of his being laid off before it actually occurred. However, in February, 1 week from the day he handed out leaflets outside the project gate he was terminated. I find that the General Counsel has met the burden of showing that Lumpkin was laid off because of his union activity.

I also find that the Respondent has failed to establish that it would have laid off Lumpkin in the absence of that activity on his part. It contends that there was no work for Lumpkin, but it

³ I find additional evidence of the Respondent’s animus was demonstrated by Mayer on February 15. Lumpkin testified that he spoke to Mayer about a discrepancy in his paycheck. Mayer asked Lumpkin “did any of your boys get you a job,” an obvious reference to his comment to Lumpkin on the previous day about the Union finding him a job. When Lumpkin said “no, not yet,” Mayer said, “well, tell them to stay the hell away from my gate.” I credit Lumpkin’s detailed testimony about this incident over Mayer’s denial.

provided little evidence to support that contention beyond self-serving testimony from Mayer. It provided no evidence of any kind as to why Lumpkin was the one crane operator selected for layoff at that time.

In its brief, the Respondent asserts that Lumpkin was laid off because the crane he was working on was being taken out of service. This crane was supposedly the “4600” that Lumpkin testified he was helping to dismantle when Mayer informed him he was being laid off. While the 4600 may have been taken out of service, there is no credible evidence to establish that it was the reason for Lumpkin’s layoff. When Mayer was called as a witness by the General Counsel and questioned about the reason for the layoff, he testified (insofar as he could be understood) that Lumpkin was loaned to him for about 2 weeks to operate the 4600 while its regular operator (whose name he said he could not recall) was needed elsewhere on the project and that when that operator was finished “he was coming back to run that crane,” instead of Lumpkin. A short time later, he was called as a witness by the Respondent and, in response to a leading question, testified that there was no work for Lumpkin because the 4600 was being taken out of service.⁴ However, Lumpkin’s credible testimony establishes that while he worked on the day shift the crane he operated, except for a few hours on a single day, was a “Link Belt 518.” The Respondent presumably has records indicating what cranes were in operation and who was operating them, but they were not offered as evidence. Instead, it relied on the confused and contradictory testimony of Mayer which I do not credit.

Finally, even if taking the 4600 crane out of service left the Respondent with an operator without a crane, it has failed to explain why it was Lumpkin who was selected to be laid off. Lumpkin’s credible and uncontradicted testimony was that he was experienced in operating a variety of different cranes. He was never disciplined prior to his layoff.⁵ According to the list of crane operators employed on the project (Jt. Exh. 1), at least two who were not laid off, William Irwin and Jesse Simpkins, were hired after Lumpkin. Without any evidence concerning how and why the decision to select Lumpkin for layoff was made, there is no basis to conclude that the Respondent would have laid him off even in the absence of union activity on his part. Accordingly, I find the Respondent’s claim that Lumpkin was laid off due to lack of work amounts to a pretext. I further find that Lumpkin was laid off in violation of Section 8(a)(3) and (1) of the Act because he engaged in activity in support of the Union.

⁴ Supervisor Roger Cline also testified that he thought Lumpkin was laid off because the 4600 was taken out of service although he did not know it “100 percent.” There is no evidence that Cline was involved in the decision to lay off Lumpkin.

⁵ There was evidence that Lumpkin had once refused a supervisor’s instruction to make a lift with his crane because he considered it unsafe. In its brief, the Respondent asserts that it took no disciplinary action against him for this incident, rather, it congratulated him “for doing the right thing.”

2. Allegations Concerning Daniel McVicker

A. Alleged Reduction in Overtime Hours

The complaint alleges that the Respondent retaliated against crane operator Daniel McVicker for his support of the Union by reducing the overtime he worked after April 18. As discussed above, McVicker had participated in the strike on April 18 and was given an unlawful disciplinary warning the next day. He had also handed out leaflets outside the project gate and had signed the petition protesting Lumpkin’s layoff. McVicker testified that prior to the strike he worked 8 hours of overtime on almost every Saturday. On April 19 he was told that he was being moved to a different crew, headed by Supervisor Roger Cline, and that he would not be working that Saturday. He testified that, thereafter, his former crew continued to work Saturdays but he did not. When he asked Cline about this in early June, Cline responded, “you know, I think you’re on the blacklist now Dan.”

Cline testified that he took over the crew that McVicker was on in March or April and that everyone on the crew worked the same schedule, which was 10 hours a day and 8 hours on every other Saturday. He also testified that the schedule was not set up to cause McVicker to lose overtime hours but was dictated by the needs of the project and because he felt he and the crew needed some time off after working 60 and 70 hours a week for 5 months. Cline denied that he ever told McVicker that he had been blacklisted but said that he had heard McVicker claim that he had been blacklisted, “six times a day, practically every day that he was on my crew.”

Analysis and Conclusions

The Respondent introduced a record of the overtime hours that McVicker worked while at the project.⁶ It shows that in 2002, during the 16 weekly pay periods prior to and including April 18, McVicker worked an average of 11.1 overtime hours per week. During the 9 pay periods after April 18 until he left the Respondent’s employ, he worked an average of 10.7 overtime hours per week. The difference is insignificant.⁷ Moreover, Cline was a credible witness and I find his testimony establishes that McVicker worked the same number of overtime hours that the others on his crew worked during the period after April 18. I do not credit McVicker’s self-serving and uncorroborated claims that he was sent to a different crew after April 18 and that his old crew worked more overtime than he did. I also credit Cline’s testimony that he did not tell McVicker that

⁶ The parties have stipulated that with respect to this record (R. Exh. 4), only the pay periods during 2002 shall be considered to be in evidence.

⁷ In their brief, counsel for the General Counsel have taken the overtime figures for 5 selected weeks prior to April 18 and assert that they establish that McVicker worked an average of 6.6 more overtime hours during that period than in 5 selected weeks after April 18. They have articulated no reasons for selecting these particular weeks. I discern no rational basis for doing so except the obvious one—it excludes weeks before April 18 when he worked little or no overtime and weeks after April 18 when he worked large amounts of overtime. I find that it makes more sense to compare all of the weeks before April 18 with all the weeks after that date.

he was on a blacklist. Accordingly, I find that the General Counsel has not established a prima facie case under *Wright Line* that McVicker's overtime was reduced after April 18 because he engaged in activity in support of the Union. I also find that the Respondent did not violate Section 8(a)(1) by telling McVicker he was on a blacklist. I shall recommend that these allegations be dismissed.

B. Alleged Discharge

The complaint alleges that Supervisor Roger Cline implied that the Respondent was going to discharge McVicker because of his union activity and that McVicker was unlawfully discharged by the Respondent on June 15. The Respondent contends that McVicker voluntarily quit his job on June 21.

McVicker testified that on Saturday, June 15, while he was working overtime, he had a conversation with Supervisor Jeff Miller. During that conversation, he told Miller that he had been called by Roy Cummings of National Engineering, a company for which he had previously worked. Cummings told McVicker about a job that might be starting in West Virginia and asked if McVicker was available. McVicker told Miller he would not know any more about the job until the following Tuesday and, if he decided to take it, he would tell Miller on Wednesday. Miller thanked him for the information. About 2 hours later, supervisor Ray Gray told McVicker that he had heard from Miller that he was going to have to replace McVicker. McVicker responded that that was not true as he did not have the new job yet. Gray told him that might have jumped the gun and not to worry about it. When he arrived at work the following Monday, he met a new crane operator who said he was there to operate the crane McVicker had been operating. The operator said he had been told by Miller that McVicker would be out of there by Friday. The operator asked McVicker to show him how to run it which he did. McVicker did not identify this operator. When McVicker was leaving work that evening Cline said him, "looks to me like you're through here" and said McVicker better find himself a job "because the game's up here." Cline also mentioned McVicker's going on strike and handing out union flyers and said, "you know how they feel about the Union around here." Beginning the next day McVicker had to operate a crane in the dock area. On Tuesday night, McVicker called Cummings about the job in West Virginia and was told it would be starting soon. He called Cummings back on Wednesday and was told he could start work on June 24. On Thursday, he told Cline about having taken the new job because no one from management had talked to him all week. Friday, June 21, was McVicker's last day of work with the Respondent. He denied that he voluntarily quit his job and said that he was "sort of pushed out of the job."

Miller denied that he ever had a conversation with McVicker about his quitting working for the Respondent. He said he learned McVicker was leaving to go to work in West Virginia when Cline or another supervisor told him that McVicker was working his last days. Cline testified that McVicker came to him and said he had been called the previous night about a new job. Shortly thereafter, McVicker told him he was leaving to go to a job in West Virginia. He testified that McVicker did not complain that he was being forced out of his job and that

McVicker had told him numerous times that, when he got a problem with "a court thing" involving a child settled, he would be leaving.⁸ Cline denied saying to McVicker anything about how the Respondent felt about unions. Supervisor Ray Gray testified that he did not know that McVicker was leaving until his last day on the job. Gray went to see McVicker in the afternoon to wish him well. McVicker told him about his new job but said nothing about being forced out of his job. Project Superintendent Jesse Erwin testified that the Respondent considered McVicker to be a voluntary quit and that is reflected in its personnel records. He said that McVicker never complained that he was being forced out and did not avail himself of the company's management review procedure which can be used by employees to protest what they consider to be unfair treatment. Erwin testified that on McVicker's last day he went down to wish him well, shook his hand, and complimented him on the work he had done. He said that McVicker remains eligible for rehire by the Respondent.

Analysis and Conclusions

The only evidence supporting the claim that he was discharged is the self-serving testimony of McVicker, which I do not credit. I find that the evidence fails to establish that the Respondent discharged McVicker. On the contrary, it shows that McVicker was offered a new job with an employer for which he had previously worked, that the job was in West Virginia where he was from and planned to return, and that he voluntarily quit his job with the Respondent, effective on the Friday before the Monday he began his new job. I consider it unlikely that, if McVicker had not left of his own accord but had been "forced out," he would have simply walked away without any protest and without demanding an explanation and documentation concerning the reasons for his alleged discharge. This is particularly true since in his testimony he claimed that Supervisor Cline had told him he had been blacklisted and had all but admitted to him that his support for the Union motivated the Respondent action toward him. Only 2 months before, McVicker had joined in the Union's protests over the allegedly unlawful layoff of Lumpkin for engaging in protected activity. It strains credulity that if McVicker had the above-mentioned reasons to believe he was also the victim of such discrimination he would not have complained about it. It also strains credulity that McVicker would volunteer to his current employer that he was considering leaving its employ not only before he decided to do so but before he even knew whether the other job would be available. I find that McVicker was not discharged by the Respondent on June 21 but that he voluntarily left its employ. I also find that Cline did not tell McVicker that he would be discharged because of his union activity. Accordingly, I find that the General Counsel has not established a prima facie case under *Wright Line* that McVicker was discharged by the Respondent because he engaged in activity in support of the Union and shall recommend that these allegations be dismissed.

⁸ McVicker acknowledged telling Cline that when his child support payments, which were being taken out of his pay, were paid off he would be free to go wherever he wanted. He is no longer required to pay child support.

CONCLUSIONS OF LAW

1. The Respondent, TKC, a Joint Venture, is an employer engaged in commerce 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 Section 8(a)(1) of the Act by coercively interrogating its employee Marcus Lumpkin on February 7, by implying that Lumpkin's union activity was the reason for his layoff, and by issuing disciplinary warnings to employees Daniel McVicker and Clay Cunningham for engaging in protected activity.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off Marcus Lumpkin on February 14 because of his activities in support of the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily laid off its employee Marcus Lumpkin, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, TKC, a Joint Venture, Oxon Hill, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively questioning employees concerning union support or union activities.

(b) Implying that an employee's union activity was the reason for a layoff.

(c) Issuing disciplinary warnings to employees because they have engaged in union support or union activities.

(d) Laying off employees because they have engaged in union support or union activities.

(e) 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 Marcus Lumpkin 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.

(b) Make whole Marcus Lumpkin 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 layoff of Marcus Lumpkin and within 3 days thereafter notify him in writing that this has been done and that the layoff will not be used against him in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings issued to Daniel McVicker and Clay Cunningham and within 3 days thereafter notify them in writing that this has been done and that the disciplinary warnings will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Oxon Hill, Maryland, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 June 11, 2002.

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

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

Dated, Washington, D.C. August 7, 2003.

⁹ 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.

¹⁰ 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."

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 coercively question you about your union support or activities.

WE WILL NOT lay you off or otherwise discriminate against any of you for supporting International Union of Operating Engineers Local 77, AFL-CIO, or any other union.

WE WILL NOT imply that union activity or support is the reason for a layoff.

WE WILL NOT issue disciplinary warnings to any of you for supporting International Union of Operating Engineers Local 77, AFL-CIO, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Marcus Lumpkin 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 Marcus Lumpkin whole for any loss of earnings and other benefits resulting from his unlawful layoff, 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 layoff of Marcus Lumpkin and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings issued to Daniel McVicker and Clay Cunningham, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary warnings will not be used against them in any way.

TKC, A JOINT VENTURE