

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
SAN FRANCISCO, CALIFORNIA

**EVANS METAL FABRICATORS, INC., and EVANS  
MANUFACTURING & FORMING, INC., as a joint  
employer**

and

**SHEET METAL WORKERS INTERNATIONAL  
ASSOCIATION, LOCAL 16, AFL-CIO**

Cases 36-CA-9247-1  
36-CA-9256-1  
36-CA-9257-1  
36-CA-9259-1  
36-CA-9265-1  
36-CA-9266-1  
36-CA-9267-1  
36-CA-9268-1

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brief) of Schwabe, Williamson & Wyatt, Portland,  
Oregon, for Respondent.*

**DECISION**

**JAMES M. KENNEDY, Administrative Law Judge:** This case was tried in Portland, Oregon on November 18, 19 and 20, 2003, based upon a consolidated complaint issued June 9, 2003<sup>1</sup> by the Acting Regional Director for Region 19 of the National Labor Relations Board. The underlying unfair labor practice charges were filed by Sheet Metal Workers International Association, Local 16, AFL-CIO (the Union or the Sheet Metal Workers) on March 17 and various dates in April. The complaint alleges that Evans Metal Fabricators, Inc., and Evans Manufacturing & Forming, Inc., (herein jointly called Respondent) violated §8(a)(1) and (3). The independent §8(a)(1) conduct allegedly consists of a variety of threats, interrogations and the creation of the impression of surveillance, all designed to coerce its employees from engaging in union organizing activities; and the §8(a)(3) conduct allegedly consists of numerous groundless warnings issued to employees and the layoff of four employees and the discharge of one in reprisal for their union activities. Respondent denies the commission of any unfair labor practices. It denies the §8(a)(1) activity altogether and asserts that four employees were laid off due to ordinary and temporary business downswings, while the fifth employee, John Bemis, was discharged for creating an extraordinarily dangerous situation.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel,

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<sup>1</sup> All dates are 2003 unless otherwise stated.

and Respondent have filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

## Findings of Fact

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### I. Jurisdiction

According to the pleadings, Respondent consists of two Oregon corporations with an office and place of business in Portland. Respondent concedes the corporations are a joint employer which operates a metal fabricating factory in Portland. It admits that during the 12-month period ending June 9, in the course and conduct of the business, it has purchased and received goods originating outside Oregon valued in excess of \$50,000. Accordingly, it admits it is engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. Respondent further admits Sheet Metal Workers is a labor organization within the meaning of §2(5) of the Act.

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### II. The Alleged Unfair Labor Practices

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#### a. Background

Chris Evans and his wife are the sole shareholders in the business in question. Evans is a former sheet metal worker who became an entrepreneur about 15 years ago, starting the predecessor to these businesses. The business took on its present character several years ago when it was located on Northwest Yeon Street in Portland. In 1999 Chris Evans incorporated Evans Metal Fabricators, Inc. Sometime during 2001, Respondent moved to its present location on Swan Island in north Portland. It moved into at least part of a larger structure previously operated by Metro Steel. That building consists of at least nine bays, all of which are quite large. One of the bays is now used for the Metal Fabricators shop, called the fab shop; Evans Manufacturing & Forming Inc., known as the forming shop, utilizes another bay. Chris Evans describes the forming business as a spinoff of the fabrication business. It was incorporated sometime in 2001.

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Evans describes the two businesses as having significantly different purposes and products. Specifically, the fab shop is used to manufacture items used in the construction industry. One of the smaller projects occurring during the time period here involved the fabrication of exterior steel walls to be used in a building construction project in Los Angeles. The much larger project in the fab shop during this time was the ongoing construction of tubular pedestals destined for the Intel Corporation's factories.<sup>2</sup> These items are built from scratch on fabrication tables in that shop. The greater portion of Respondent's manpower is dedicated to the fab shop.

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The forming shop bends metals and forms them to a customer's specifications for such items as equipment manufacturing. Evans said, " We'll take flat pieces of metal and form them. We don't cut them. We'll take those formed pieces and weld them together for, you know, sub assemblies. I would say it's other than building construction related. Like more equipment and machinery stuff." The number of employees dedicated to the forming shop is quite small. The evidence demonstrates that the manpower needs in both shops fluctuated depending on the amount of work required. That will be discussed in more detail below.

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<sup>2</sup> Pedestals are essentially stands or supports for Intel's white room manufacturing machines. Intel requires precision in their manufacture in order to use perfectly leveled instruments. The pedestals are custom-built so while their feet may stand on uneven factory flooring, their surfaces are perfectly level. They vary in size; some are small as a desk and others, when bolted together are up to 40 feet long.

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All of the incidents under scrutiny here occurred in the fab shop. The general foreman during this period was Charlie Peppers.<sup>3</sup> Peppers had authority throughout both shops. The fab shop foreman was Paul Marshall and his assistant or lead was Carlos Nash.

5 The fab shop has 8 or 10 tables (called fab decks) on which the crews work. In addition that shop has at least two overhead or bridge cranes which are used to turn or flip the products on the tables as well as to move finished products to the loading dock. Throughout the bay large amounts of welding equipment can be found, as well as other machinery. The welding equipment includes machines for a variety of welding techniques, both arc and gaseous. In addition there is a large amount of smaller power tools such as grinders, saws and drills.

10 The evidence shows that the number of fab shop hourly employees ranged from 37 in January 2002 to a high of 92 in December 2002. From that point the number declined to 36 in December 2003. There appears to have been a number of layoffs during that time frame. Similarly the smaller forming shop had only three employees in January 2002, but rising to a high of seven in October 2002 and maintaining that number into December 2002. Thereafter from January through August 2003 it employed only six and as of September 2003, five.

20 The evidence demonstrates that in late 2002 and early 2003 Local Union 290 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, (Pipefitters Local 290) had sent several employees, including Patrick Farris, to attempt to seek employment. Local 290 was clearly in the process of beginning an organizing campaign. On February 18, apparently without coordination, Sheet Metal Workers began handing out flyers to Respondent's employees as they left work for the day. Farris notified Local 290 and the two unions subsequently mounted a joint representation campaign. On March 4 they filed a joint petition for a representation election. The election was conducted on April 2, with the joint petitioners obtaining a majority of the votes, 29 in favor of representation, 16 against, with 12 challenged ballots. Respondent filed some objections to the election and a hearing was conducted after which the Board, in the absence of exceptions, adopted the hearing officer's report. The Board issued its certification of representative on July 21.

30 The complaint focuses on some pre-election conduct beginning in March and running through a time period shortly after the election when the layoffs and discharge occurred.

#### b. The Pre-Election Conduct

##### Threat to Close the Business

35 As noted above, on February 18 organizer Mike Smith from the Sheet Metal Workers distributed flyers near the parking lot as the employees left for the day. According to employee Bob Houghton, on the following day he overheard general foreman Charlie Peppers as Peppers walked through the shop speaking to another employee who Houghton did not identify. Houghton testified he heard Peppers say "he'd never let the shop be union, that they'd shut it down before that ever happened." Houghton acknowledged that he only heard a snippet of the conversation and he is unable to place the remark in any context. Moreover, his testimony itself is inexact. Was Houghton being imprecise in utilizing the word "he"? If Houghton really meant Peppers was saying "I'd never let the shop be union", Houghton has Peppers exercising powers he did not have. If Houghton is quoting Peppers as saying "he", meaning Chris Evans, then there is the distinct possibility that Peppers was expressing his opinion concerning what Evans might do since Houghton only heard part of what was said. Houghton obviously does not know whether Peppers was making a threat, expressing his own opinion or expressing a company

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<sup>3</sup> Peppers left Respondent's employ in mid-April after refusing to accept a demotion.

policy. What is also clear is that he does not even know to whom the remark was being addressed. It was certainly not addressed to Houghton.

5 Employee Pat Farris gave similar testimony, saying late that same afternoon he heard Peppers make an identical remark loudly and boisterously as he was walking through the aisles between the tables. Farris characterizes Peppers's attitude as one of intimidation. He acknowledges speaking only to Houghton about it, though he says others were able to hear Peppers.

10 Employee John Bemis testified that he heard Peppers make similar remarks on several occasions. Bemis testified: "During the organizing process, after they had found out that we had filed for an organizing vote on a couple of different occasions, Charlie made comments that Chris would close the plant before he would allow it to become union." On each occasion Bemis says he was less than ten feet away from Peppers when the remarks were made.

15 Welder Mark Wood testified on April 3, on the morning after the election, which left the Unions leading by a margin of 29 to 16, with 12 challenged ballots, he heard Peppers say angrily and loudly that in the event the Unions came in, 'he' was going to shut the plant down. Wood says he was at his worktable when he heard Peppers make the statement from where he was standing some five to eight feet away.

20 Wood also testified that later that afternoon he heard Peppers speaking to foreman Carlos Nash. Wood had gone to the rear to put away his tools as the swing shift arrived and he heard the two talking from a short distance away. He discerned that Peppers and Nash were giving the swing shift foreman some instructions regarding work to be done on a fab deck at that location. During that conversation he heard Peppers say that he was going to have 40 new welders coming the next morning to take the welding test. Wood interpreted the remark to mean that Respondent was going to hire 40 new welders as replacements for the existing staff.

25 Peppers agrees that he said something along those lines. He remembered Nash asking him that day what would happen if the employees went on strike. He testified he told Nash, "My answer was you have the option to cross the picket line, and I do believe that we have the option to keep business open. They can't keep us from earning a living, and we are able to hire people if they're willing to cross the picket line. Yeah, I did say that, that what I just said."

30 Peppers denies making any of the threats to close. He testified, " No, sir. First off, that wasn't my call. Second off, I was asked one time out at the break truck what my opinion of going union was. \* \* \* My opinion was I don't see how we can afford it when we do set bid packages and have to pay that type of a, of a wage and a benefit package. And that was the extent of my opinion. I didn't see how we could operate under those conditions."

#### Alleged Coercive Interrogation

40 On March 5, word had spread that the election petition had been filed. Employee Pat Farris testified that foreman Paul Marshall asked him about his involvement with the organizing. Farris gave the following testimony:

[Witness FARRIS] After the election papers had been filed and notifying the company of the election, and it -- that news first filtered out onto the floor, Paul [Marshall] came up to me and asked me directly what I knew about this pending election. And on that --

45 Q (By Ms. SCHELDROP) Where were you when he came up to you?

A I was working at my workstation.

\* \* \*

50 A He asked me if I was directly involved with it. I told him "Yes." And as it turned out we had a meeting later that same day up at the [Pizza Slice] restaurant. And I told him if he had any questions and he said as a working supervisor here he -- he had several questions on how this would directly affect him and his family and as to whether or not

he could stay on as a salaried employee or if he would be forced to join the Union and become hourly.

Q And what was your response to his concerns?

A I invited him and encouraged him to go up there and attend the meeting, because those were all the questions that were better answered by the business agents than me.

Marshall did attend the meeting at the Pizza Slice and in fact asked questions of the Union organizers who were there. Houghton even gave uncontradicted evidence that everyone in the plant, including supervisors, was welcome to attend the weekly union meetings which were held at nearby restaurants.

Another meeting was held a week later, on March 12. The following day, according to Art Wachtrup, a recently hired welder (Pipefitters Local 290 had earlier tipped him to the job opportunity), Marshall asked him if he had attended. Wachtrup replied that he had. Wachtrup had earlier declined to go to the March 5 meeting when he learned that Farris had invited Marshall to it. About the same time Marshall inquired, Wachtrup had begun wearing a Local 290 hat. It is unclear from his testimony, however, whether he had begun wearing the hat at the time Marshall asked him the question. When pinned down, Wachtrup could only say he had begun wearing the hat either the week before or the week after. Marshall's question is most plausible upon his recognition of Wachtrup's union leanings, most likely through seeing Wachtrup's Pipefitters hat.

#### Alleged Surveillance; Impression of Surveillance

As observed, the Union on Wednesdays held weekly meetings at nearby restaurants after work. The day shift ended at approximately 1:30 p.m. There were only two restaurants near the Swan Island facility, both about a mile away. The most popular was the Overlook Restaurant which was frequented by nearly everybody employed by the company. In fact, Chris Evans and Charlie Peppers went there almost daily. Peppers often took Intel representatives there for lunch. The other restaurant was the Pizza Slice which the Union, during this period, only used once. The Union did hold another meeting on a Saturday at the Old Chicago Pizzeria in Gresham.

Except for the March 5 meeting at the Pizza Slice, all of the Unions' weekly meetings were at the Overlook. They appear to have begun at about 2 p.m. On one of the Wednesdays before the election employee David Gerhardt, on his way to attend the meeting, noticed Chris Evans driving his pickup truck down an alleyway adjacent to the restaurant. Their vehicles passed and Gerhardt waved at Evans. He did not testify that Evans acknowledged him. Gerhardt reported to the meeting's attendees that he had observed Evans outside the restaurant. Those attendees included Farris, Houghton, Wachtrup, and Bemis.

#### Conclusions Concerning the §8(a)(1) Allegations

Counsel for the General Counsel asserts that the above-recited evidence constitutes independent violations of §8(a)(1). I am able to agree only insofar as Peppers can be seen as having made a public threat to close the plant. Moreover, I find the evidence insufficient to support such a finding concerning the interrogation and surveillance issues.

I have already observed that Houghton's testimony on the threat is too incomplete and too imprecise to support this allegation standing alone. However, the versions supplied by Farris, Bemis and Wood are mutually corroborative and do support the allegation. I have scrutinized Peppers's testimony regarding these incidents and do not find that he specifically denied them. He pointed principally to the probability that he would not make such a statement, not that he did not make the statements. This is not to say that I discredit him, because I find that he simply does not recall the incidents. Clearly he was exercised over the two Unions' appearance on the scene and the outcome of the election. As he said, he feared for the

financial viability of the business because he was aware that its success had been based upon its pricing structure to Intel. Prices were quoted to that customer based on labor costs and Peppers feared that if labor costs were to increase it could mean that the Company might not succeed in maintaining the Intel business. That fear undoubtedly led him to overstate his concern. He has an aggressive personality which fits such behavior. At the same time, he does not even recognize his overreach. Accordingly, I credit Bemis and Wood's versions. I find therefore that Peppers did threaten business closure as a consequence of unionization. Such a threat violates §8(a)(1) of the Act. The versions offered by Houghton and Farris are not specific enough to support a similar finding. Furthermore, Wood's "40 new welders" testimony is obviously incomplete. He was an eavesdropper who never understood the entire context. That context, supplied by Peppers, is simply a conversation between supervisors not aimed at employees and is an accurate, if graphic, description of an employer's right to try to continue to operate in the face of a strike. See generally, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Nor do the facts relating to the interrogation allegation support a finding of coercion. Farris certainly was not coerced in any manner. It almost appears as if Farris was inviting Marshall to join with the Union from the outset. First, Farris was an in-house union organizer. He was trolling for as many members as he could get, including first line supervisors, who worked with the tools as did Marshall.<sup>4</sup> He undoubtedly knew that both labor unions sought to represent anyone who worked with the tools. In that circumstance, it cannot be said that Marshall's question had a reasonable tendency to interfere with, restrain or coerce the employee.

The Wachtrup facts do not fare any better. Given the welcome reception which Marshall had received at the union meeting of March 5, his noticing Wachtrup wearing a union hat would likely have triggered a friendly inquiry from Marshall, since Wachtrup had not attended the March 5 meeting. Marshall's curiosity appears to have been piqued since Wachtrup had not previously announced his interest in the Union. Marshall undoubtedly thought his inquiry was perfectly innocent since the union was recruiting him as well. Marshall certainly did not pursue the matter any further.

Not only is this incident isolated, as nothing similar to it has been offered, it could not reasonably have had the tendency to interfere with, restrain or coerce Wachtrup in the exercise of his §7 right to union representation. Wachtrup was well aware that Marshall had been invited to the March 5 meeting and that the Unions were not concerned about the state of Marshall's knowledge of the union activity of employees. If they had been, they would not have invited Marshall and later, Nash. While Wachtrup may not have clearly understood that, his misgivings cannot be regarded as evidence of coercion. Objectively, Marshall made nothing more than an innocent inquiry and Wachtrup should have known that it had no coercive purpose since Marshall, like him, was an organizing target.

The General Counsel has failed to prove Marshall's questions to Farris and Wachtrup had a reasonable tendency to interfere with the exercise of §7 rights or otherwise violated §8(a)(1) of the Act.

The impression of surveillance allegation has even less weight. In essence it simply involves an employee observing the company owner near a restaurant the owner was known to frequent. It was the restaurant closest to the business; it was also the place where the owner had breakfast and lunch on a near daily basis; and, it was the location where management often took customer representatives for lunch. Therefore, in a sense, the Union had chosen the

<sup>4</sup> Marshall testified he worked with the tools approximately 7-½ hours per day.

location where the meeting was most likely to be observed by management. Such an observation, by itself, is not coercive. If a union performs its business in plain sight, it cannot complain if its business is observed.

5 Even so, there is no evidence that Chris Evans entered the restaurant on that occasion. Therefore, he did not actually monitored the employees engaging in the protected Act of seeking union assistance. Furthermore, given the fact that employees themselves regularly patronized the restaurant, if Evans recognized the automobiles of the employees, such recognition would be meaningless insofar as §7 is concerned. Evans simply would have seen what would normally be seen, employees' cars parked at a restaurant which they normally visited. He would not know a union meeting was underway inside and would not draw the conclusion that the presence of employee cars meant their owners were attending a union meeting.

10 The General Counsel seems to argue that because Gerhardt immediately told the attendees that Evans was outside, that his report resulted in a violation of the Act. Such an argument is logically fallacious. Employee reaction cannot create a violation on the part of the employer. While Gerhardt's report may have resulted in some trepidation on the part of listeners, that was the result of Gerhardt's statement, not anything Evans did. Had Gerhardt been in error, and Evans not even been present, no one could reasonably claim that the same trepidation which would follow from an identical report would be attributable to anything that Evans had done. As Evans never even entered the restaurant that day, the result is the same: no violation of §8(a)(1) occurred.<sup>5</sup>

#### c. Post-Election Matters

##### 25 Warnings to Specific Employees

The complaint alleges that shortly after the petition was filed on March 4, Respondent began disciplining those individuals it perceived to be union activists. Each individual will be dealt with separately.

30 *Patrick Farris.* Farris was hired on December 13, 2002. Pipefitters Local 290 had sent him to Respondent to assist with its organizing efforts. He was the individual who invited fab shop foreman Paul Marshall and assistant foreman Carlos Nash to union meetings. The complaint asserts that on March 7, Marshall issued him a verbal warning and that the verbal warning was, in reality, a response to union organizing. On March 12 another incident occurred in which Marshall gave him a written warning.

35 The document created on that date, G.C.Exh. 9, referred back to the earlier admonishment. It states that on March 7 he had been given a "verbal warning for not meeting production standards. Production standards were explained to him and other employees." This is followed by the statement that "each employee understands failure to meet production standards will result in termination." Then, on March 12 Marshall issued him a "final written warning for failure to meet production standards as explained on March 7."

40 Clearly, the warning is uninformative. It does not describe either transgression very well. Nor does it explain what is demanded of the employee in order to correct whatever shortcoming has been perceived. Indeed, it refers to "production standards", a term which is ambiguous

45 <sup>5</sup> I suppose it is possible that Evans somehow realized that a union meeting was underway and, exercising caution, chose to go somewhere else. However, there is no evidence to suggest that occurred, either. Such a possibility would simply be speculation. Evans himself does not recall any such incident, observing only that he is a frequent customer of the Overlook Restaurant. His visits are so common he cannot distinguish one from another.

since production standards have never been established, at least in the sense that term is generally understood. In large part, the phrase became a catchall for any shortcoming which may have been perceived in the shop.

5 Respondent has provided, in R.Exh. 3 a large number of warning slips beginning in April 2003. These are better crafted than those issued in March, but remain largely  
 10 uninformative to an outsider. They commonly use phrases such as "proper procedure has been explained. . ." or "each employee understands. . ." Such vagueness makes it difficult to determine what actually was said to the employee. Respondent also offered R.Exh. 1, a written  
 15 record of a verbal warning given in November 2002. Although in a different format, that document clearly describes the transgression, together with a paragraph delineating the corrective action the employee(s) must take. It is clearly superior to what immediately followed.

By way of explanation, the 2002 warning had been written by Kelli Inscore, an  
 15 administrative employee having safety and personnel duties.<sup>6</sup> When Inscore left the Company shortly thereafter, those duties fell upon others. Most of the March/April written warnings under scrutiny as a result of the complaint are poorly written and really do not accomplish the dual  
 20 purpose of both advising the employee what he did wrong/how to correct it and keeping accurate records for personnel decision-making. Depending on one's point of view they may be considered evasive or simply the product of inexperience.

20 In any event, there is no doubt that on March 7 Peppers admonished Farris for some sort of perceived shortcoming relating to production or schedules. Farris was unclear what Peppers was saying. Despite that admonishment, 45 minutes later Peppers, per Marshall's  
 25 recommendation, assigned Farris to make corrections on a pedestal which had been poorly fabricated by someone else. He accepted Marshall's representation that Farris was one of only a few people who knew how to operate the plasma cutter well enough to fix the problem. This resulted in some desired overtime favoring Farris. Then, on March 12, a second incident  
 30 occurred.

The second incident resulted in G.C.Exh. 9.<sup>7</sup> As noted, that document refers to the  
 30 earlier verbal warning without detail and doesn't describe the second incident very well. Farris testified that Peppers gave him no explanation. Farris recalls that shortly beforehand he and another fellow had been working together on a pedestal and they had been working extremely efficiently. Whatever happened on that job was the responsibility of both, but the other  
 35 employee, Gamber, did not receive a similar warning. Farris concluded that the entire scenario was trumped up and accused Peppers of fabricating it because he had been organizing the shop.

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40 <sup>6</sup> Although R.Exh. 1 meets the requirements of such documents, it was the first such document Respondent had ever created. The impetus for its creation was not because of the incident it described, an embarrassing safety matter, but because representatives of  
 45 Respondent's workmen's compensation insurance carrier were on site when the incident occurred. When its representatives demanded that safety records be produced, Respondent was forced uncomfortably to reveal that it had kept none. Prior to that time such matters had always been kept informal and undocumented. The carrier's representatives directed  
 50 Respondent to begin keeping records at that moment. Thus even though Inscore immediately drafted R.Exh. 1 to meet the requirements, Respondent's experience in drafting such records was nonexistent.

<sup>7</sup> The warning was actually signed by Marshall, but its impetus had come from Peppers, who signed it as a witness.

In addition, a third incident occurred which did not result in a warning of any kind. Chris Evans had observed Farris and Bob Houghton together at a welding machine, apparently talking when they should have been working. He came over to the welding machine and observed Houghton making a burn for Farris. Evans did not understand that Houghton was using the only operable burner at that moment (the others were temporarily disabled) and that it was quicker for Houghton simply to take on the small job which Farris needed to do, rather than have Farris wait for Houghton to finish and then setting it up himself. Evans asked for an explanation of the economics of the behavior, then regarded Farris's not-so-measured response as insubordinate. He went to Marshall and Nash and told them to write Farris up with a warning for insubordination. Neither Marshall nor Nash appeared to have believed the write-up to be necessary. Nash later reported to Farris that he had defused the situation because of Farris's excellent production and that the write-up would not be issued. It never was.

With respect to the last incident, Farris acknowledges that reasonable minds can differ regarding whether his standing near Houghton was one of efficiency or one of time wasting. He realizes that Evans may not have recognized that only one oxyacetylene device was operable that morning.

Respondent argues that the same logic applies to the other two incidents — that reasonable minds might differ regarding whether or not Farris was meeting production standards with respect to the verbal warning or the follow-up written warning. The problem with the argument is that there is nothing in the record which demonstrates what transgression Farris is supposed to have committed on each of those occasions. They appear to be unsupported and arbitrary. Assuming that Respondent does not act in arbitrary manner, then there must have been some purpose behind those warnings. The only purpose this record suggests is one of reprisal, though the nexus can only be inferred from the circumstances. Certainly Farris is only too willing to advance his union organizing activities as the reason. Yet it is clear that Peppers was a strict taskmaster who used bullying as a motivating technique. While bullying is unpleasant, it is not necessarily evidence of §7 coercion.

Nonetheless, because Peppers has earlier demonstrated his antipathy toward employee representation, I believe, on balance, that at least one of his purposes was to let Farris know that he disapproved of Farris's efforts to organize the employees. It is certainly easy to conceal such a purpose behind a forceful personality without always being explicit about one's purpose. If a nondiscriminatory purpose cannot be shown, a discriminatory purpose may be inferred. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accordingly, I find that the two warnings given Farris on March 7 and 12 were a reprisal for his union activities. The same cannot be said for Chris Evans's unalleged discourse and threat to warn aimed at Farris a few days later. All now seem to agree that the confrontation was the result of a misunderstanding, none of whose elements involved §7.

*Mark Wood.* Wood was hired sometime near the end of February or the first of March. Peppers interviewed him. During that interview he told Peppers he been a member of the Millwrights Union. That background did not appear to concern Peppers (himself a former Millwright), principally because Wood had shown significant experience welding, acquired while working for a locomotive repair shop in Kentucky. He is a young man who only recently had moved to Portland. According to Wood, his welding experience was extensive, since nearly everything on locomotive must be welded. He says Peppers told him during the interview that union flyers were being distributed outside the plant, observing that a number of union-organized shops had gone under, but Respondent was still in business. None of this deterred Wood, who had actually been sent to Respondent by Pipefitters Local 209. Peppers gave Wood a welding test; he passed and was immediately put to work.

After being hired, Wood immediately began attending union meetings, including the March 4 meeting at the Pizza Slice which Marshall had attended. Wood also attended the Old Chicago Pizza meeting on the Saturday before the election. About a week before the election he began wearing union-related material on his clothes and helmet. On March 24, Wood was in the process of attempting to build a pedestal from scratch, something he had not attempted before. A question arose and he believed it necessary to ask two co-workers about a step he needed to take. From afar, Peppers observed the three speaking and directed Marshall to issue a warning to Wood for standing around without working. Although Marshall appeared to accept Wood's explanation, Peppers had spoken and Marshall could not change the warning. In a sense, this incident is nothing more than a routine admonishment to get back to work, even if issued in error. It does not offend §7.

On March 26, Marshall gave Wood a written warning (G.C.Exh. 10) regarding the correct procedure on finish grinding. He had apparently left a gouge in his work. The warning recites that within an hour the explanation had to be repeated several times. Wood acknowledges that his work had received such a critique about that time. He has not asserted that the warning was without good reason. The General Counsel asserts that the warning was simply because Wood was a union activist. That warning concludes with the phrase that G.C.Exh. 10 was a "final written warning for failure to meet production standards."

On April 3, the morning after the election which the Unions had apparently won, an incident occurred which drew Chris Evans's attention. Evans was making his rounds in the plant observing production when he noticed Wood in the process of drilling a horizontal hole into a metal tube, an ordinary pedestal part. For precision, Respondent utilizes electromagnetic base drills. The base magnets clamp to the tube tightly so that a precision hole can be drilled. With the electromagnet holding the drill in place, it becomes a horizontal drill press. Being electromagnetic, the magnetism will fail in the event of an electric power loss. If not secured with the safety clamp, any loss of electric power will cause them to release and fall, either to the floor or upon a workman's foot, causing either damage to the tool or injury to the employee. Employees are supposed to utilize the safety clamp. Respondent concedes that employees did not always do so, but the evidence also shows that whenever an employee is seen failing to use the clamp, an admonishment is usually given. Furthermore, it is fairly clear that Wood's locomotive shop experience (where welds, never bolts, were always used) had not given Wood any experience at all with the electromagnetic drill. He simply wasn't that familiar or that expert with it.

In any event, early that morning Chris Evans observed Wood making a bore with the mag drill unsecured by the safety clamp. Woods's testimony is a bit disjointed:

[Witness WOOD] I was drilling a hole there, and he [Chris Evans] told me, said just stop, just stop right there, and so I stopped, and that's when he went and got Paul, and Paul come over there with a pencil and paper and started writing stuff down.

Q. (By Ms. SCHELDROP) Did Mr. Evans instruct him to write things down?

A. Yeah.

Q. You have to say yes or no, sir.

A. Yes.

Q. And what did Mr. Evans tell Mr. Marshall to write down?

A. He told him to write down the improper use of a mag drill, and he told him to write down for the -- oh, he said like sabotaging of his frames, because I was putting oil on the drills, and you know I kind of laughed about it, you know, because I just thought it was kind of funny, you know, so I probably smiled, you know, or something, and then he wrote me up for insubordination, you know, and told me to wipe the smirk off my face, and he asked me if I thought it was funny, you know, and I told him, I said, no, I

just, you know, never really heard of somebody saying, you know, sabotaging the frame, you know. I just kind of thought it was funny.

Q. What, what was he interpreting as being sabotage?

A. Putting oil on it.

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Q. On, on what?

A. Drill bits.

Q. Had you ever been told that it was proper or not proper to put oil on a drill bit?

A. I was always told you was supposed to, oil was cheaper than drill bits is what Paul said.

10

Q. And then anything else he told Paul to write down besides sabotaging and improper use of the mag drill?

A. Insubordination or the thing about the smirk on your face.

Q. And then anything else he told you or told Paul while he was there?

15

A. He had asked me if I had ever -- anybody had ever showed me how to operate the mag drill properly. I said, no. So Paul showed me right then. You, when you got it on the side of a frame, you're supposed to have a clamp on it clamping it up to the frame and all that, so the next hole I drilled, I did it like that, but there was a bunch of other people drilling the same way the same day without the clamps and everything else.

20

\* \* \*

Q. What was Mr. Evans' attitude when he was standing there and giving you -- talking to you? Was he friendly?

A. Not really friendly, kind of mad maybe, upset.

Q. And this was the morning after the election?

25

A. Yeah.

It should be observed here that Wood's description is out of sequence. He describes the so-called sabotage and insubordination as occurring before he was shown the correct use of the equipment. Moreover, he acknowledges that he was not using the equipment correctly and that he did not know how to use it correctly. By this sequence, he is saying that Respondent's owner had accused him of both sabotage and insubordination, but then asked if he had been trained on the equipment. Upon learning that Wood had not been trained, the owner then had the foreman immediately show Wood how to operate it properly. This sequence makes no sense. If the owner had seen sabotage and insubordination, he would not have wasted this time making certain that the employee knew how to use the equipment properly. Instead, he would have given the employee instant discipline and no training. Wood's testimony suggests an arbitrariness which is implausible. However, there are some issues concerning Evans's testimony, and these will be dealt with below.

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Evans's testimony is more sequential. He testified that while making his morning rounds he observed Wood improperly using the mag drill, having failed to clamp it properly. He describes what he saw and did:

40

(Witness EVANS) And I noticed that Mr. Wood wasn't using a clamp on his mag drill. I think we talked about using a clamp on the mag drill, or I said to somebody, hey, he should be using a clamp on his mag drill. And then I took leave of that situation and moved to another fab table for approximately 6 to 6, 8, 10 minutes. I took care of some other stuff. And I looked back to see Mr. Wood had indeed installed the clamp on his mag drill, but in a previous hole in the frame Mr. Wood was squirting oil, [into] the previous hole that he drilled.

45

\* \* \*

50

Q. BY MR. TRIPLETT: All right, and what's the problem with doing what he did?

5 A. I fielded a complaint from the powder coat [company] very close to this date that they had to rework some paint that almost caused us to miss a scheduled dock [delivery] date, that they had worked over, they didn't charge us for, but they said that we have a problem, and that problem is that too much oil was getting into the tubes and in the power coat process, it's a baking process that cures the coating, and we have the oil coming out some of the holes, the drilled holes, because they do this not sitting flat but lifted up in the air, and it's a recent problem. We've had oil on our tooling all the time for several years, never had this problem. And it was their sense that something we were doing differently was causing the problem at their end. And after I observed Mr. Wood squirting oil in a hole that had already been drilled for no apparent purpose, it became apparent to me that I may have found our problem. And, in fact, it occurred to me that it may be a sabotage effort to ruin our product and/or possibly an organizing tactic by the Union.

15 Q. Did you accuse him of sabotage?

A. I believe I used the word sabotage.

Q. Okay. And now, how did Mr. Wood respond to your accusation?

A. He laughed at me.

Q. And how did you respond?

A. I got pissed off.

20 Q. Okay.

A. And at that point, I think we collected everything that he had done up to that point that I observed, the clamp and the oil and grouped it all on one write-up.

25 Obviously, Evans and Wood have diametrically different descriptions concerning the alleged improper use of oil and drill bits. Wood simply says that he was properly lubricating the drill bit. Evans says that, only a few minutes after Wood was shown how to clamp the mag drill, he observed Wood commit an act which he termed 'sabotage,' squirting oil into a previously drilled hole. If Wood did so, there is no question that Evans had every right to become distressed. Obviously, excess oil will, unseen, trickle down the inside surface of the tube. The point where it leaks out is the point where the oil will contaminate the powder coat, rendering it commercially unacceptable. (Excess oil on the outside surface can be easily seen and wiped off before the powdercoat process begins.)

35 Evans would not be upset in the slightest to observe a workman lubricating a drill bit, for that is standard procedure; Wood says that is all he was doing. Evans says Wood was deliberately squirting oil into a previously drilled hole.

40 Wood agrees, however, that he further antagonized Evans by laughing at his claim of sabotage. Whatever the facts may have been, laughing was an inappropriate response. Although Evans is convinced of the accuracy of his observation, it is certainly possible that he made a mistake. Likewise, Wood could have resented the admonishment concerning his failure to clamp the drill and reacted in a spiteful manner, not realizing he was under Evans's observation. Wood also could have been lubricating the hole in preparation for tapping the hole for screw threads. Tapping bits, like drill bits, require lubrication. However, Wood does not contend that he was tapping and such a possibility seems remote, for if the hole was a bolt insert, the bolt would be fastened with a nut. In that circumstance, threading the hole would be unnecessary.

50 Evans, however, did use the word 'sabotage' in describing what he saw. He then went the further step of stating that he thought the sabotage might be part of the Unions' organizing efforts. Evans was aware that the two unions were sending employees to organize the plant and, from his perspective, some facially nonmeritorious unfair labor practice charges had been filed (some of which were administratively dismissed), some tool theft was occurring, and one of

the possibilities he was perceiving was a harassment campaign. In addition, as the General Counsel observes, the union had won the election the day before.

5 Assuming Evans's perception was correct, that Wood was squirting oil into an already drilled hole, concluding that it was an act of sabotage seems a bit of a stretch. Why not simply ask the employee what he was doing? And, his assumption that oil squirting might be part of a union plan to sabotage seems to be an even greater stretch. Certainly proof of a union connection is nonexistent, although Wood acting in a spiteful manner is well within the realm of probability. It is certainly fair to ask why Evans's thought processes took him where it did.

10 Despite concerns about Evans's thought processes, I am entirely unimpressed with Wood's testimony and his approach to the issue when Evans confronted him. Rather than denying any act of sabotage (or even asking what Evans was talking about), he laughed at Evans. When he did so, all hope for rational discourse evaporated. It is almost as if it was his purpose to antagonize Evans. Perhaps Evans was not so far wrong in assessing Wood's contemptuous attitude toward the continued success of Respondent. Wood certainly wasn't expressing a cooperative attitude.

20 In the final analysis, I can only find that Wood mischaracterized the sequence in which the events occurred, attempting to lead me to the conclusion that Evans acted out of an irrational anger over the election's outcome. I have no doubt that Evans was dismayed over the outcome, but whatever impact it may have had on his attitude, it would not have deterred him from insisting on a properly manufactured product, one which was fabricated safely and with the proper use of tools. There is no dispute that he observed Wood mishandling a magnetic drill. That is what caught his attention that morning. Evans directed that the equipment usage issue be corrected and it was. Furthermore, there is no doubt that it was minor and had things remained there, nothing further would have been said to Wood. No write-up would have occurred.

30 However, I credit Evans's testimony that he subsequently observed Wood doing something with a previously drilled hole. Whether it was sabotage, spite, or nothing of significance, Wood's response was to laugh and exacerbate the situation. That behavior was not protected by §7 and was perceived simply as disrespectful. The warning which followed had nothing to do with the outcome of the election. It had everything to do with Wood's response, essentially laughing in Evans's face.

35 Indeed, there is nothing in the record to support the conclusion that any warning issued to Wood was not work-related, whether poorly articulated or not. These allegations in the complaint will be dismissed.

40 *Arthur Wachtrup.* During the pre-election campaign, Wachtrup like others, had attended Respondent's mandatory meetings during which Evans spoke against union representation. At one of the meetings Wachtrup had disagreed with an assertion in which he says Evans claimed that the Union had embezzled some retirement trust money. He argued to Evans that it was not the Union which had done the embezzling, but some people employed by the trust's investment company. He says when he challenged Evans on the point, Evans "glared."

45 The text of Evans's speeches is in the record as R.Exh. 4. In speech number 1, Evans stated the same thing, observing that the investment company's employees had mishandled the retirement trust funds. He did not accuse anyone of embezzlement, but did observe that allegations had been made that the retirement fund's trustees had not acted properly in connection with the investments. In the circumstance, it is difficult to see what Wachtrup had said which supposedly caused Evans to "glare." Certainly a glare is not evidence of much, particularly if what prompted it is in agreement with what the speaker had just said.

In another meeting, two days before the election, Wachtrup spoke out in response to something Evans had apparently misstated. He recalls Evans as having accused the Unions of filing charges against Paul Marshall, when in fact they had been filed against the Company.

5 In any event, on the day after the election, April 3, Wachtrup had a confrontation of sorts with Peppers. This resulted in the issuance of the warning, G.C.Exh. 3, signed by Marshall. The warning states that on April 3, Wachtrup "was given a verbal warning for not correctly using the EMF equipment, a welding machine. He was shown today the correct use of CO<sub>2</sub> and welding wire. He was hired on as a welder and therefore should know how to set and correctly use a welding machine." The exhibit also referred to an earlier oral warning for improper use of 10 equipment on March 25. There is no dispute that the CO<sub>2</sub> settings need to be set at 20 psi; a failure to do so will result in a faulty weld. Peppers remembers telling Wachtrup on several occasions to maintain 20 psi before the written warning was issued.

15 Wachtrup wrote on the warning that he was "unaware of what was said on March 25 regarding the use of EMF equipment and welding machines. Furthermore, I disagree with this statement." Is not clear, however, what, if anything, happened on March 25. Marshall signed the exhibit but there is no explanation concerning the nature of the improper use of equipment that day; it may have been a CO<sub>2</sub> issue, but might have been something else as well. Wachtrup, however denies that anything was said about EMF equipment on March 25, yet his 20 written protest does not in any way address what occurred on April 3, which clearly did concern EMF equipment. In failing to focus upon the veracity of the more serious April 3 warning, was Wachtrup conceding that he had in fact improperly set the CO<sub>2</sub> levels that day? I think so.

25 On the next day, Wachtrup's troubles with Peppers continued. During the lunch period, Wachtrup, Houghton and Farris were standing together when Peppers walked by. A few moments later, Peppers returned and accused Wachtrup of smirking at him. They argued. Wachtrup testified:

30 And about five minutes later, he came back, and he walked up behind me and he said, "If you're going to fucking smirk at me, you'd better damn well have something to back it up with," and I turned to him and -- and I said, "What? I didn't smirk at you. I don't know what you're talking about." He goes, "Well, you did fucking smirk at me." And I said -- at this point, Charlie was emphatic. He was in my space. He was about two feet away from me, and he was yelling, and those were his words. And I asked Charlie, I said, 35 "Why are you yelling at me?" And he goes, "This is my fucking shop and I'll fucking yell[ ] at anybody I want to," and I'm on my lunch break at this time, so I feel that I don't need to listen to somebody's mouth when I'm not on work time, especially not in that tone.

Q What did you say?

40 A I said, "Charlie, I'm on my lunch hour," and at that point, Charlie said, "That's it. You're fucking fired for insubordination."

45 The firing did not occur, as cooler heads prevailed; instead, a warning, G.C.Exh. 4, was issued. In a sense it was double-barreled, for it not only constituted a verbal warning for addressing a supervisor in an insubordinate and provocative manner, it also constituted a final written warning for "insubordinate and provocative acts. . ."

50 Insofar as the Act is concerned, however, the latter incident is without any reference to the Union or to the election whatsoever. It is true that Wachtrup and the two individuals he was standing with, Farris and Houghton, were all union activists. Yet Peppers did not go after those two. He only went after the one he believed was being disrespectful. Whether that was the product of Peppers's imagination or because Wachtrup actually did smirk at him is beside the point. The principal observation to be made here is that there is no reason to connect the

election outcome with the outburst. There is simply no persuasive evidence of such a purpose and it would be speculation to find such a motive. This allegation will be dismissed.

As for the first incident, Wachtrup's warning for failing to keep his CO<sub>2</sub> level at the correct setting, again, I find no connection to his union activities. Indeed, it appears as if he was  
 5 virtually admitting that he had failed to do so. That being the case, it can hardly be said that the warning was without any merit. Moreover, the General Counsel's observation that Peppers and Evans had a few weeks earlier commended his work is really no answer. The fact that one  
 10 does good work on one day followed by lesser quality work on another is of no assistance to the argument.

Wachtrup continued to be employed through mid-July, when he was laid off. His layoff is not a subject of the complaint. He also testified that at the time he left, Farris still remained employed as did another Union activist, and perhaps lead organizer, Russ Jacobson.  
 (According to counsel, Jacobson was still employed at the time of the hearing.)

#### 15 Layoffs and Discharges

The complaint alleges only one individual was actually discharged discriminatorily. That individual is John Bemis. Respondent asserts that it discharged Bemis for good cause on  
 20 April 4, a date which is only 2 days after the Union's apparent victory at the polls. The complaint also alleges that about April 7 Respondent laid off employees Douglas Manning, Dave Gerhardt, Mark Wood, and Robert Houghton. Respondent admits the layoffs, but asserts they were simply an ordinary happenstance, noting that Respondent's workforce fluctuates based on the amount of work available. Indeed, as noted earlier in this decision, the workforce during this time was shrinking.

Respondent attributes the March/April manpower shrinkage to the completion of a project known as ISSI (for a Los Angeles manufacturer by that name, who had let some steel wall panel fabrication work to Respondent). That work had been performed with equipment supplied by ISSI. Peppers testified:

30 Q. (By Mr. TRIPLETT) And did the panel job stop at some time?

A. (Witness PEPPERS) On and off almost every day.

Q. Tell me what you mean by that?

A. The company that we were trying to do the job for didn't seem to want to cooperate  
 35 with us. They wouldn't hand us a blueprint so we could make the next set of panels that we needed for them, so it was an up and down almost daily thing. One day we might have enough to do 10 or 12 or 15 or 20 panels. We'd knock those out, and then we wouldn't have any more prints for the next day, so we would try to put everybody doing something else for a day or two as long as we could until it came to where it wasn't economically feasible to hold them there and we'd have to let them go. Then when the job would build back up, we would put them back on their job.

40 Q. Did there come a point where that job or that project, the ISSI project simply went away?

A. Yes, sir.

Q. You have any recollection of approximately when that was?

A. It started dwindling out right at close to the first of the year, and by March or April it was, it was gone -- completely gone. We had shipped out all of their metal, give[n] them back all their equipment. I believe even they still had a few things left in the building when I left.

50 The loss of that work (and return of the specialized machinery) meant that Respondent became almost wholly dependent upon Intel's needs for pedestal production. Even that could be seen to be slowing down.

In connection with the ISSI work loss, Respondent observes the evidence shows that during April the workforce was reduced by 21 employees. It notes that the employment roster continued to decline until November 2003 when there was a small increase. It further comments that none of the "union ringleaders" was laid off in April. Thus, Wachtrup, Farris and Jacobson remained employed. Aware that the General Counsel's theory of violation with respect to the layoffs is that the layoffs were a simple retaliation for the election's outcome, Respondent argues that there is really no need to justify each layoff; instead it observes, it is the General Counsel's obligation to demonstrate a prima facie case. It asserts that the General Counsel has not done so, specifically citing a lack of union animus and weak knowledge of anyone's union preferences. Indeed, the evidence shows that the decision to make layoffs came from administration, but that the first line supervisors, Marshall and Nash, actually chose who to lay off. The exceptions to that were Manning and Bemis, whom Chris Evans handled. Manning, a new hire, had become the toolroom attendant; on April 3 he was switched solely to janitorial duties and was then laid off. Chris Evans made that decision. Bemis was fired when Evans observed him engage in what he perceived to be dangerous crane operation. I begin with Manning.

*Douglas Manning.* Respondent operates a toolroom or tool crib, which is a cage-type locked room in which portable tools are stored each night. Until Douglas Manning was hired on January 14, the toolroom was accessible only by trusted individuals who had been given keys. These were the first line supervisors and leads. They distributed the tools and collected them at shift end.

Evans stated that as the Company grew and added more employees, it became more difficult to track tools. In addition he believed the Company was suffering from some tool theft and as more employees found themselves on the floor, the facility began to accumulate more daily trash. He thought that the problem could be solved by finding an individual to be the toolroom attendant, and that the individual could also serve as the day-shift janitor. Prior to Mannings hire, clean-up was performed by employees at the end of their shift. He says Manning was hired as a janitor but his job quickly escalated to tool room attendant in the hope he could put a better handle on tool disappearance.

Manning describes how he came to be hired:

(Witness MANNING) My stepson worked there, and he said that they laid a bunch of people off, and they were -- might have some work. So I just rode in to work with him on the chance there might be a job.

Q. (By Ms. VOLPONE) And did you meet with anyone?

A. He introduced me to Charlie Peppers.

Q. And what did you discuss with Mr. Peppers?

A. Charlie Peppers asked me if I had ever worked in a tool room, and I started to answer him, and -- give him an answer, and he told me to shut the fuck up, and if I didn't want to work -- just get -- go out the gate the way I came in.

Q. What did you do?

A. I quit talking and went to the tool room and started working.

Manning worked in the toolroom and also performed janitorial duties until April 4, when he was laid off. He was employed only about a month. Not only did his duties include signing tools out at the beginning of the shift and checking them back in at the end, plus the janitorial duties, he also repaired tools where he could and also tracked down tools which had not been returned at the end of the day. On April 3, Peppers ordered Manning out of the toolroom and limited him to janitorial work. Manning testified that he believed he was being accused of some misconduct himself, apparently due to remarks made by Marshall and Nash. They had observed him picking up tools in mid-shift on April 4, and according to Manning, believed he

was stealing them. He explained he was only following Peppers's orders and the matter was dropped.

5 Manning testified that he attended only one union meeting, the one held at the Old Chicago Pizza on the Saturday before the election. He did not attend any others. He said that Carlos Nash and Steve Evans (Chris Evans's 16-year-old son) were also in attendance.<sup>8</sup>

10 According to Evans, it was during this period that he realized that tools were continuing to disappear from the plant and that his hoped-for tool control was not working. Furthermore, since the production staff was being reduced in size, the need for janitorial work had lessened. He simply thought the economics did not justify a full-time, permanent toolroom attendant, given the diminished volume of business.

15 Manning had not engaged in any significant union activity during the course of his employment. He only attended the Union's last meeting before the election. He had done nothing more. Furthermore, insofar as he was being targeted by Respondent's opposition to unionization, he had remained silent during the company speeches. At best he would have been perceived as someone who, shortly before the election, sought to better acquaint himself with the issues. Certainly his presence at the Old Chicago Pizza did not amount to very much. Nash's presence there is insufficient to impute knowledge of his union preferences as Nash had been specifically invited and was a target for the Union. Similarly, there is no evidence that 20 Chris Evans's 16-year-old son reported Manning's presence, either.<sup>9</sup> It would be speculation to reach such a conclusion.

25 What is clear is that the Monday after the Old Chicago Pizza meeting, aside from Marshall and Nash's momentary concern about tool theft, was a routine day. Even so, Manning gave some testimony which seems a bit contrived. He says on that Monday he observed Chris Evans, who was some 75 to 100 feet away, speaking to a number of individuals including his luncheon partner Hector (whose last named he does not know, perhaps trainee Hector Villegas). He said, " Well, it seemed like every time I looked up, they were staring at me, and just kind of gave me the creeps, you know." Later, when he asked Hector what the 30 conversation was about, Hector told him he should ask Evans and "stormed" off. This testimony is basically meaningless, since Manning is simply speculating and allowing his suspicions to overtake logic. Whatever Hector's actual knowledge may have been, Hector was not a supervisor and whatever he said has no legal significance here. Furthermore, his response was nothing more than telling Manning that whatever conversation he had been having with Evans 35 was none of Manning's business; a pointedly accurate retort to what must have been perceived as prying. Importantly, nothing here has been shown to be union-related. Manning worked without incident on Tuesday, the election day.

40 On April 4, 2 days after the election, Manning had permitted an employee to come inside the toolroom to search for a part. While perhaps an innocent act, it was nonetheless contrary to normal procedure. Shortly thereafter, according to Manning, Peppers, demanding Manning's key, told Manning to "get the fuck out of the toolroom" and directed him to perform janitorial

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45 <sup>8</sup> Young Evans had quit high school to go to work as a welder.

50 <sup>9</sup> Contrary to the General Counsel's implication in her brief, it is unclear whether Marshall attended the Old Chicago Pizza meeting where Manning was present. Marshall did attend several meetings after work at the Pizza Slice on Swan Island and readily testified he did so, first upon a specific invitation and later in response to an open invitation.

work instead. Manning later observed that someone else had replaced him in the toolroom.<sup>10</sup> He swept the floors until lunchtime when he was forced to leave work due to a family emergency. On the following day, Friday, Manning remained off work due to the same emergency. On Monday, April 7 he reported for work as usual. He says he spoke to Peppers regarding a promised wage increase and that Peppers responded "all raises were put on freeze because of the fucking union and attorney fees."<sup>11</sup>

Peppers's testimony, particularly on cross-examination, seems to be in general agreement, though he denies the abrupt, coarse manner Manning described in removing him from the tool room and was not asked about the wage freeze remark. Peppers's testimony:

Q. (By Ms. SCHELDROP) Now Mr. Manning was -- you said that he was there for a month or so, and I wasn't clear if you meant he was in the tool room for a month or so or he was only employed at Evans for a month.

A. (Witness PEPPERS) I think he was in the tool -- I can't tell you how long he was there. I think he was in the tool room for a month or so.

Q. Okay, so you were -- when you said he was there for a month, so you're referring to --

A. The tool room, yes, ma'am.

Q. -- tool room? And when did the swing shift end?

A. I, I don't recall exactly when the swing shift ended.

Q. Was it before or after the Union election?

A. I think it was after. I think they still had a swing shift on the fab -- just in the fab department, not -- nowhere else in the other parts of the building. Maybe a couple of saw operators.

Q. And prior to the election they were still -- and Mr. Manning was still in the tool room at that time?

A. I believe so. I, I believe so.

Q. Do you know who made the decision to layoff Mr. Manning?

A. I can't tell you who made the decision to lay him off. I know I made the decision to pull him out of the tool room because he was no longer needed there.

Q. Did any incidents happen the day you told him to get out of the tool room?

A. Yeah. Not, not as far as an incident, but there's something that led up to it. He was in charge of the tool room. We had six \$1,000 mag bases when he took over the guardianship of the tool room, and the day that I let him go, we had three of those \$1,000 mag bases left, and he had no idea where they went except for he had signed them out each day.

Q. Did, did that -- had you already made a decision to remove him from the, the tool room?

A. I had made a decision that, yeah, we didn't need not necessarily him, whoever was in there that we did not no longer need a tool room attendant if they couldn't keep the tools in there anyway. Now we had already lost them, and the ISSI job was gone, so

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<sup>10</sup> Manning's observation of dubious value. It may well be that someone from the floor was assigned tool room duties for the rest of the day. He, however, believes he was replaced entirely. No other evidence supports that view and certainly Manning's absence the next day renders him incompetent to know what happened thereafter. Evans and Peppers both say that once Manning was out of the toolroom no other permanent employee was assigned to it. They are in a much better position than Manning to know the truth of the situation. I therefore find that no one replaced Manning as the toolroom attendant.

<sup>11</sup> This statement is not alleged to be unlawful. It was made after the election and, due to the Unions' apparent majority status, Respondent by law was not permitted to grant wage increases until the Unions agreed. *Mike O'Connor Chevrolet-Buick-G.M.C.*, 209 NLRB 701, 703 (1974), enf. denied on other grounds, 512 F.2d 684 (8<sup>th</sup> Cir. 1975).

everything else coming out was nothing but regular daily use; lenses, wire that the guys had to have anyway.

Q. This was in April?

A. I believe early April or last of March.

5 Q. And after he left, did you or anyone have somebody take his place in the tool room for awhile?

A. I didn't.

Q. Did you ever see anybody else in the tool room?

A. Every day.

10 Q. I mean as --

A. All the lead men had a -- no, not as just a tool room operator, but all the lead men had keys to the tool room after that, after I took --

Q. They had that even before, didn't they, the lead men?

A. Lead men, yeah, always had their keys.

15 Q. And did you tell Mr. Manning to get the fuck out of your tool room?

A. No, ma'am. Not at all.

Q. Do you know who informed Mr. Manning that he was being laid off?

A. More than likely Paul Marshall.

20 Later that Monday, Manning says Marshall told him he was being laid off, issuing him checks for his work up through 1:30 p.m., also telling him to continue to work 'til that time. Manning reports Peppers later profanely told him to leave right away, so he left before 1:30. He also says he received a recall inquiry in November; the record is not clear regarding what he said in response, since the job offer was to be a welder, a skill Manning did not claim to have, though he knew how to grind and bore. Even so, at one point Respondent had earlier offered to  
25 train him as a welder.

In my opinion this evidence does not demonstrate that Manning was either removed from the toolroom or laid off because of his union activities. He was a new hire who had the misfortune of working in a toolroom which was suffering losses. At the same time, the  
30 workforce was shrinking. He was essentially a support employee, not a production employee. It is not surprising in that circumstance that Evans regarded him as more expendable. Moreover, Evans himself had been involved in his hire and Evans no doubt believed it was appropriate to be involved in the decision to lay him off. But there is no evidence whatsoever that Manning was any sort of target to achieve an antiunion purpose.  
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Manning may well have been perceived in some way as being responsible for the lost tools, but even that is not clear. The fact that Marshall and Nash erroneously jumped to the short-lived conclusion that he was pilfering does not assist the argument that there was an antiunion motive in play. Clearly tools were disappearing and in some respects it was only a  
40 matter of time before someone was caught. Marshall and Nash simply did not realize Peppers had instructed Manning to collect and protect tools which were not being used during the day. Once they realized their mistake, the matter was dropped. Still, the tool loss had not been stanchd. Since one of Manning's principal duties was to prevent losses, it had become clear that the concept of a toolroom attendant solution had failed. Furthermore, with the reduced  
45 workforce which was occurring, a full-time janitor was not needed; indeed, Respondent never needed a full-time janitor.

Whatever can be made of Manning's hardly visible and minimal union activities, no union animus has ever been directed toward him. Furthermore, assuming Peppers directed invective at him on several occasions says more about Peppers's bad manners than it does about the  
50 decision to let Manning go. The evidence demonstrates that no matter what Manning's

protected activities might have been, Respondent would have laid him off as it did and when it did. This allegation of the complaint will be dismissed.

5 *Mark Wood, Dave Gerhardt and Bob Houghton.* Respondent's records show that beginning March 28, a few days immediately before the election, through April 21, approximately 3 weeks later, it laid off 18 employees. Two others were discharged; one of those was Bemis. See R.Exh. 8. One, Dibble was laid off the day before the election and another, Buchanan, was laid off the day of the election. Two, including Wood, were laid off on April 4. The other was Thomas Hill, who is not a part of his complaint. On April 7, six others including Houghton, Gerhardt and Manning were laid off. <sup>12</sup> In addition, employees Andres Paredes and Thomas Wilson were also laid off. Paredes and Wilson are not part of the complaint. About 10 days later, at least four more were laid off. Three days after that, an additional four were laid off and one was fired.

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15 None of these other individuals who were laid off are part of the complaint. Since all of the layoffs are relatively contemporaneous, one wonders why most are not part of the complaint as part of the same reprisal. However, there is no evidence, and no complaint theory offered, that Respondent was seeking to fold some discriminatory layoffs in with the nondiscriminatory layoffs. Instead, the General Counsel asserts that Wood, Houghton and Gerhardt, together with Manning, were laid off in reprisal for the outcome of the election. This theory really makes no sense, for if those three or four individuals were laid off in reprisal, what is it that distinguishes them from the remaining 13 or 14? Wouldn't all of the layoffs be discriminatory in that circumstance?

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25 The real key here, as Respondent argues, is whether a prima facie case has been made out regarding Wood, Houghton and Gerhardt. It is true that all three had been sent to Respondent by the union to assist in its organizing. However, so had others including more active individuals such as Wachtrup, Farris and Jacobson. Yet these employees were not laid off. Wachtrup, in fact, has a prickly personality, one likely to offend the quick-tempered and equally prickly Peppers. Frankly, I do not find Respondent's management to be that sophisticated. Both Peppers and Evans tend to shoot from the hip. Like the individuals they manage, they are rough-hewn. Sophistication is not part of their approach to one another. What you see is what you get. A convoluted scheme such as that which the General Counsel seems to be suggesting is simply implausible given the guileless and uncomplicated personalities involved.

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35 Therefore, even if one can discern some animus elsewhere in the record, there is no persuasive nexus between it and the layoffs. Certainly the union activities of these three were far less than others who were kept and Respondent's knowledge of their activities places them in the middle of many others with the same level of knowledge. The only element which seems to be significant is the timing of the layoffs, coming within days of the representation election favoring the union. Even the election's outcome, however, was still not settled, given the fact that Respondent filed objections to the outcome. They were about to be filed or were under initial investigation when the layoffs occurred. (Apparently the objections' merits were sufficient

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50 <sup>12</sup> Evidence was also taken regarding an April 7 verbal warning not part of the complaint. It related to an incident involving damage to a die set on the metalworker machine. The verbal warning was given Dave Gerhardt who was training an employee, Hector Villegas, on the machine. During the training process, Gerhardt left the trainee, instructing him to begin making a punch. The die set came loose and was subject to being damaged. When Villegas made the punch, it made a loud noise and Marshall intervened. Marshall gave Gerhardt a verbal warning. That occurred on the same day of the layoff. The incident does not appear to have any probative value regarding the layoff, but seems entirely discrete.

to have warranted a hearing, which resulted in a hearing officer's report recommending dismissal.) Furthermore, the timing seems much more closely connected to the business downturn which was underway. The ISSI work had just ended and nothing had replaced it. Layoffs must be seen as expected, particularly since this series of layoffs is entirely consistent with the manner in which Respondent operates. The timing, therefore, is far from dispositive.

Given the weakness of the General Counsel's case, in my opinion not really reaching the level of a prima facie case insofar as the layoffs are concerned, that aspect of the complaint should be dismissed. However, if one assumes that a prima facie case has been established, Respondent's burden in rebuttal is not particularly great. Instead, it has shown that the layoff of these three, and the others who were not a part of the complaint, came in response to a business downturn and had no discriminatory feature. All the layoffs were solely motivated by business considerations. Therefore, whatever prima facie case the General Counsel did make out must be regarded as rebutted. This portion of the complaint must be dismissed under this analysis as well.

*John Bemis.* Bemis was initially hired in February 2002 and worked until May of that year when he was laid off. He was rehired in mid-March as a welder-fitter. He was moderately visible as a union supporter, once a week wearing a union shirt, daily wearing a union hat, and had placed a union sticker on his lunchbox. He had surreptitiously posted union flyers in the lunchroom, but had not been caught doing so. He spoke to foreman Carlos Nash on a regular basis regarding his preference for union representation. In general, Bemis was regarded as a very good employee and was even considered for a foremanship during the first round of his employment. That did not materialize.

On March 26, shortly before the election, Respondent conducted a meeting of employees during which Chris Evans urged the employees to vote against unionization. Bemis testified: "Well, at the end of his anti-union rhetoric, Chris Evans asked if there were any questions. And I asked what it took to get a pay raise. What was the evaluation process? And his answer was that it -- they would see piles and piles of metal and product being produced, and if they got a good paycheck from the people that they were making the products for, they would give the people a raise." Bemis observed to Evans he had earlier lost a raise (the foremanship) and thought one-on-one negotiations weren't usually successful. Bemis says Evans's face then turned red and he declared the meeting over, directing the employees to return to work

Bemis says he attended another meeting the following day. During this meeting Bemis recalls that Evans went through a financial exercise demonstrating that union dues generally ended up costing employees money. Bemis responded: "When we are not working for a union, we are already paying union dues, [in] loss of wages and loss of benefits." Bemis testified that no one, neither Evans nor any employee, responded to his assertion.

On either April 1 or 3, the day before, or the day after the election, Marshall verbally warned Bemis about being too slow. G.C.Exh. 7, a written warning issued on April 3 principally because of the crane issue, contains a reference to the verbal warning as having occurred on the same day. However, sequentially the verbal warning incident seems more likely to have occurred before the election. Either way, Bemis regards the verbal warning as unwarranted but concedes that there is the possibility that there was an honest difference of opinion. Nevertheless, there is no evidence connecting the verbal warning to Bemis's support of the Unions.

Bemis says Chris Evans was behaving erratically the day after the election. His testimony: "The day after the election, Chris Evans came by with such an aura of fire in his eyes and stuff, that I think that if looks could have killed, I would have been killed at that point. He was very angry, and I try -- and it was very disconcerting. I tried to just keep myself involved

in my work and continue on with it without having to be disconcerted by them . . . .” I regard this testimony as suspect. It is a conclusory attempt to describe Evan as being extraordinarily resentful over the outcome of the election. Yet it points to little that objectively supports such a conclusion. In essence it is an attempt at characterizing behavior without describing it. Bemis’s  
 5 efforts to frame Respondent’s behavior has appeared earlier in describing one of Evans’s pre-election meetings, quoted above: (“Well, at the end of [Evans’s] anti-union rhetoric . . . .”) A witness who portrays events in such a fashion is always subject to doubt as exhibiting bias rather than objectivity. Some witnesses are unable to testify without characterizing, but Bemis is fully capable of being objective. He chose, probably for self-interest, not to do so here. His  
 10 testimony needs to be viewed with professional skepticism.

A common task of welders, particularly the more experienced such as Bemis, was to utilize one of the two overhead cranes (sometimes known as bridge cranes) to flip the pedestals as they lay on the fab decks. There is conflicting evidence regarding the appropriate means of securing these rather heavy items to the crane. Bemis insisted on using a method called  
 15 “choking,” Marshall told him he should be using the “sling” method, and Evans insisted upon “choking.” Some of the disagreement may be definitional.<sup>13</sup> The General Counsel asserts, however, that the instructions were confusing and inconsistent, concluding from that fact that Respondent was fabricating the written warnings which followed. G.C.Exh. 7 and 8 are written warnings resulting from what may simply be a professional disagreement. All this, however, is  
 20 beside the point. Bemis was fired because Evans observed Bemis operating the crane in what he regarded as a manner so dangerous that it risked a fatal accident.

On April 4, a furious Chris Evans discharged Bemis. From Bemis’s perspective Evans’s explosion came from the blue. He believes he and another worker were simply routinely flipping a rather small pedestal. Bemis testified, “. . . . [a]nd as [the co-worker] started raising the crane [using the electrical pendant control switch], Mr. Evans started raging and ranting that I was an unsafe worker, that I wasn’t following his correct procedures, that he wanted me off of his property, told Charlie Peppers to get my papers, get my check, and get me the hell off of his property.” On direct examination, Bemis did not describe what Evans said with respect to the  
 25 actual perceived danger. As I understand Bemis’s initial testimony, he wants me to believe he still does not understand what happened to warrant such an outburst. It was not until cross-examination that he said “What we were doing that [Evans] didn’t approve was the fact that there was a welding machine . . . that we had not moved out of the way. There was nothing about the rigging that was in [ ] question. We had not moved out of (sic) his welding machine  
 30 away from our work area.” He later agreed with Respondent’s counsel that if a load were dropped from a crane onto a welding machine an explosion would be highly likely to occur and the welding equipment would become “shrapnel.” He denied that he had ever heard of

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40 <sup>13</sup> (Witness MARSHALL) Choking can be done two ways. We -- chain and a hook, which is the improper way, and it can be done with a nylon strap, which has loops in each end of it.  
 \* \* \* Like a toe strap. That you can pass -- as you -- you can pass one loop through another, that is a choke. \* \* \* That kind of choking is the proper way of doing it. But as far as chain to hook choking, especially when turning something over, I’ve always been told it’s a big no-no. \* \* \* Because it does have a chance to slip and fall and –  
 45 JUDGE KENNEDY: So that’s your explanation for why people would have -- there might be confusion of -- there’s two types of chokes, is what you’re saying?  
 THE WITNESS: Yes.

\* \* \*

50 (Witness EVANS) Well, in terms of choking, there’s a couple of -- you’ve got to understand that what one person says a choke is may be something entirely different to another . . . .

instances where a fatality had occurred because a load had dropped upon the welding equipment. He didn't believe it was even company practice to move welding equipment out of a potential drop zone.<sup>14</sup>

5 It does appear accurate to say that Evans was so furious he did not explain all he had seen. He was fuming and mainly wanted Bemis to get his tools and go. In fact, he was so angry he had Peppers tell Bemis he could not return to the property even to get his personally-owned tools that he couldn't fit onto his truck; that if Bemis came back, he would be arrested. Bemis arranged for another employee to transport to his remaining tools.

10 Evans's explanation to me is far more sanguine. Aware of the earlier crane rigging warnings and still incensed after the passage of 7 months time he testified:

(Witness EVANS) I observed Mr. Bemis had a piece of equipment that -- or a product, a frame that he was welding on rigged, ready to lift. I believe there was another gentleman using the pendant control that was outside of Mr. Bemis' control, and he was directing the gentleman. I don't know who that was. And I also observed that Mr. Bemis had not moved the, the welding equipment out of the way of this lift or this pick. In fact, Mr. Bemis had one of the welding leads still attached to the piece he was lifting and directing another man on the pendant. Had I not intervened, it's my true belief that if to continue through, this lift would have tipped this welding machine over and knocked this cylinder to the side of the pedestal, knocking the regulator off, and we would have had a missile, and I guarantee you there would have been a fatality of which I would have been directly responsible.

15 Q. (By Mr. TRIPLETT) And was the prior warning and your observation of April 4 the basis for your decision to terminate Mr. Bemis?

25 A. You [b]et it was.

Q. Was there any other factor involved other than the prior warning and your observation?

A. Yes, there was.

Q. And what was that?

30 A. When it came to my knowledge that that was the third time, actually, no, strike that, please. I was told about the first two warnings before I observed Mr. Bemis on the third one.

Q. All right. So --

35 A. Actually, that's why I was over there watching. I wanted to make sure the guy understood just what the hell he was doing. Obviously, Mr. Bemis did not.

Evans described the danger involved where there are compressed gas tanks and high voltage in close proximity:

40 EVANS: And the majority of our fears were in two areas, one electrical and one compressed shielding gases. If you damage an electrical cord and it's carrying high voltage, it's -- the liability (sic) for electrical shock is obvious. I think we all know about that one. Shielding gas cylinders on the other hand have a regulator at the top. They are made out of bronze or brass, and it's a soft metal, and these cylinders often weigh 150,

45 <sup>14</sup> Bemis explained the basis for his belief: "If we had to move the equipment out of the way every time somebody moved a crane there, the equipment would be moved away all the time, and no work would probably be done, because loads were in the air all the time. They were transversing from one end of the building to the other. There was no way to safely move it out of the way, and they did not give us time to get equipment out of the way when they were moving loads. They just yelled at us to get out of the way, and they came over. And if we had a [welding machine] out in the middle of the aisle, they went over it."

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200 pounds. If you get a piece coming over to a welding machine that's attached with one of these cylinders and it doesn't have a safety cap on it because it's being in use, it's got a regulator attached, this thing can tip one of these things over. It's very easy, because brass is a soft metal, to get the thing knocked off. At that point, I've never seen  
 5 one go, but I have -- I've been told that at full strength they can penetrate a three-foot concrete wall. And so these items are moved well back out of harms way, and you know [where] the people and personnel are as well before any of these lifting mechanisms or lifting things occur. It's also our general procedure to move the item to the center of the bay, do any rotating or flipping, then move it back to the respective work area.

10 It should be noted here that Evans was not only concerned with the fact that Bemis had not moved the oxyacetylene welding machine from the drop zone, he also saw that an electrical lead to the high voltage arc welding machine remained attached to the load as it was being lifted. This was double-barreled danger and a cause for alarm. Furthermore, aside from  
 15 Bemis's purported bewilderment and half-hearted denial (along with the "everybody does it" defense), there is no evidence to contradict what Evans says he saw. Certainly Evans's behavior, knee-jerk anger at seeing carelessness materialize into an extremely high risk, renders his version far more credible than Bemis's disingenuous and tepid self defense. Accordingly, I find that Bemis, as Evans said, did create an unacceptably hazardous situation.  
 20 Furthermore, it can hardly be said that Bemis's union activities or preferences played any role whatsoever in Evan's decision-making. Insofar as the NLRA is concerned, Evans's decision to discharge Bemis was a nondiscriminatory response to what might well have been a fatal circumstance. The complaint as it relates to Bemis will be dismissed.

#### 25 The Remedy

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondent shall be directed  
 30 to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

#### 35 Conclusions of Law

1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.
2. Sheet Metal Workers International Association, Local 16, AFL-CIO and Local Union 290 of  
 40 the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, are labor organizations within the meaning of §2(5) of the Act.
3. Respondent, acting through Charlie Peppers, violated §8(a)(1) of the Act by threatening on various dates between mid-March and April 3 to close the business in the event the Unions  
 45 became the employees' collective bargaining representative.
4. Respondent, acting through Peppers, violated §8(a)(1) and (3) of the Act by issuing both verbal and written warnings to employee Patrick Farris on March 7 and 12 in reprisal for Farris's union organizing activities.
- 50 5. The General Counsel has failed to prove any other allegation of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>15</sup>

### ORDER

5 Respondent, Evans Metal Fabricators, Inc., and Evans Manufacturing & Forming, Inc., Portland, Oregon, its officers, agents, and representatives, shall

1. Cease and desist from:

10 a. Threatening to close the business in the event Sheet Metal Workers International Association, Local 16, AFL-CIO and Local Union 290 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO became the employees' collective bargaining representative.

b. Issuing warnings to employees in reprisal for their union activities.

15 c. 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:

20 a. Within 14 days from the date of this order rescind the warnings issued to its employee Patrick Farris on March 7 and 12, 2003, and within 3 days thereafter notify Farris in writing that this has been done and that the warnings will not be used against him in any way.

25 b. Within 14 days after service by the Region, post at its manufacturing plant in Portland, Oregon copies of the attached notice marked "Appendix." <sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since March 15, 2003. The Regional Director shall have the discretion to require Respondent also to post copies of the notice in any foreign language he deems appropriate.

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45 <sup>15</sup> If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50 <sup>16</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

c. 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.

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IT IS FURTHER ORDERED that the remainder of complaint be dismissed.

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Dated, March 25, 2004, San Francisco, California.

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James M. Kennedy  
Administrative Law Judge

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