

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

W.E. CARLSON CORPORATION

and

Cases 13-CA-40817-1
13-CA-40936-1

MILLWRIGHTS AND MACHINERY ERECTORS
LOCAL UNION NO. 1693, AN AFFILIATE OF
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

and

RICHARD LIGHTFOOT, An Individual

Jeanette Schrand, Esq., for the General Counsel.

David L. Miller, Esq., of Chicago, Illinois, for the
Respondent

Edward A. Kersten, Esq., of Chicago, Illinois for the
Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on September 8, 9, and 22, 2003. The Millwrights and Machinery Erectors Local Union No. 1693, an Affiliate of United Brotherhood of Carpenters and Joiners of America (Union) filed charge 13-CA-40817-1 on February 5, 2003, and amended it on March 18, 2003. Richard Lightfoot (Lightfoot) filed charge 13-CA-40936-1 on March 27, 2003. The Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued on April 30, 2003. The Consolidated Complaint was amended at the hearing.

The Respondent is alleged to have made statements or taken action, in the course of an organizing drive, in violation of Section 8(a)(1) of the Act, and to have placed service department employee Lightfoot on probation on March 11, 2003, and discharged him on March 25, 2003, due to his activities on behalf of the Union in violation of Section 8(a)(3) and (4) of the Act. The Respondent denied that it committed any violations of the Act and contends that Lightfoot was discharged for cause.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by counsel, I make the following findings of fact, conclusions of law, and recommended Order.

Findings of Fact

I. Jurisdiction

5 The Respondent, a corporation, installs, maintains, and services loading dock systems
in the Chicago, Illinois area. It maintains its main office and storage facility in Elk Grove Village,
Illinois, where it annually receives goods valued over \$50,000 directly from outside the State.
The Respondent admits, and I find, that it is an employer engaged in commerce within the
10 meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within
the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background

15 The Respondent specializes in installing and maintaining dock levelers and related
equipment. Other than office employees, the Respondent employs installers and service
technicians. The Respondent's installation employees are typically involved in the construction
20 of new loading docks, while the service technicians perform repair and maintenance on existing
docks. Since the mid-1970's, the installers have been covered by a collective-bargaining
agreement between the Respondent and the Union. However, the service technicians have
never been covered by a collective-bargaining agreement.

25 William E. Carlson (Carlson) is the president and sole owner of the Respondent. Rick
Leadley (Leadley) has been the Respondent's manager of the service and installation
department for the past 20 years. He reports to Carlson. As manager, Leadley has overall
responsibility for the service and installation department employees. Guy Horbus (Horbus) is
the Respondent's service technician supervisor and directly supervises the service employees.
30 Horbus reports to Leadley. Lightfoot was an employee in the Respondent's service department
from January 10, 2000, to March 25, 2003. As a service employee, he was required to service
and repair loading docks.

B. The Union Campaign

35 In late October 2002, the Union began an organizing campaign among the Respondent's
service employees. On November 5, 2002, after receiving completed authorization cards from
eight service employees, Union organizer James Atton sent a letter to the Respondent
requesting a meeting to discuss the inclusion of an addendum to the Union's current collective-
40 bargaining agreement adding the service employees. In a letter, dated November 13, 2002,
Carlson declined the request to meet due to pending litigation involving the Union's pension
fund for the installers. However, he left open the possibility of agreeing to an addendum as part
of a resolution of the litigation.

45 The Union responded to the rejection of its request for voluntary recognition by filing a
petition with the Board to represent the Respondent's 11 service employees on January 2,
2003.¹ An election, which was scheduled by the Board for February 11, was preceded by
several weeks of written and oral communications between Carlson and the service employees.
The election resulted in a majority vote by the service employees against certification of the
50 Union as their collective-bargaining representative.

¹ All dates and months, unless otherwise indicated, hereinafter refer to 2003.

1. The distribution of memoranda to employees

5 Three memoranda distributed by the Respondent to the employees during the election
 campaign are at issue. In the first memorandum, dated January 17, Carlson informed all
 service employees about the process involved in the February 11 election, urged them to vote
 and assured them that their vote would be confidential. However, he went on to explain, in
 pertinent part, that “[i]f the majority votes against the union, we can continue our business and
 you can talk to us anytime about your wages, employment and working conditions.” He also
 10 added that “[i]f both sides have drastically different positions, bargaining could last for months or
 years. During negotiations, your wages are frozen.”

On January 27, the Respondent distributed another memorandum to the service
 employees explaining the impact unionization would have on their vacation, holiday, sick, and
 15 personal leave benefits. The memorandum purported to disseminate additional information
 relevant to the union certification election and provided an outline setting forth the amount of
 leave days currently enjoyed by the employees and the corresponding monetary value of those
 benefits. However, the memorandum asserted that, “[b]ased on the Agreement the Union has
 with Journeyman, none of these benefits will be available to you should the service technicians
 20 unionize.” It further concluded, by stating, in bold letters, “**you will lose \$3,912.**”

In an individual memorandum sent to each of the service employees, dated January 30,
 Carlson reminded them about the benefits they currently received. In Lightfoot’s case, his
 customary 4 percent annual pay increase would be effectively reduced to 1.9 percent if the
 25 Union were involved in negotiations, based on a projected 4.9 percent raise, less a 3 percent
 deduction for union membership dues. Carlson also indicated that Lightfoot would lose the
 opportunity to perform overtime work and receive monetary bonuses. Based on overtime
 performed and a bonus received in 2002, Lightfoot stood to lose a total of \$5,203.90. Carlson
 revised his earlier projection of lost benefits in the January 27 memorandum and concluded that
 30 Lightfoot’s “new loss would total,” again in bold letters, “**\$9,115.90.**”

2. Meetings with employees

The General Counsel also contends that Carlson and Leadley made oral threats at
 35 several group and individual employee meetings prior to the election. The Respondent held its
 first group meeting with the service employees on January 30. The meeting, which was
 attended by all but two of the service employees, was held in the Respondent’s storage facility
 and lasted approximately 30-45 minutes. At the meeting, Carlson told the service employees
 40 that he considered them to be a part of his “family” and repeated the suggestion contained in
 the memoranda distributed to employees that they compare their present benefits with those to
 be obtained through union representation.² Carlson also told the employees that he was “not a
 big fan of Unions” and “in our world today their, their service isn’t really as necessary as it was
 back in the 1930’s and that type of scenario.” His remarks were followed by Leadley, who
 referred to the Union as “useless” and a “waste of time.”
 45

² According to Russel Knopf, a credible former employee, most of the meeting related to
 50 Carlson and Leadley explaining why they were opposed to the Union. Tr. 178. Neither Carlson
 nor Leadley refuted Knopf’s characterization of the meeting.

Upon concluding his remarks at the January 30 meeting, Carlson asked whether the employees had any questions with respect to the memoranda.³ Lightfoot responded to Carlson's "family" comment by asking how he could justify treating one family member different from another. Carlson "looked a little confused" and Lightfoot then provided an example about a parent who purchases an expensive pair of shoes for one child, but gets an inexpensive pair for another child. Carlson responded to the example by looking "a little irritated" and told Lightfoot he would "answer any personal questions on a one to one meeting."⁴ The only other service employee who spoke at the meeting was Frank Baron. He was strongly opposed to union representation.

Carlson and Leadley held the individual meetings with the employees on February 3. Their meeting with Lightfoot lasted about 45 minutes. Leadley began the meeting with an introductory statement about the informational purpose of the meeting. Carlson then asked Lightfoot whether he had any questions. Lightfoot told Carlson of his strong desire to be a member of a union and then asked Carlson why he was opposed to the Union. Carlson replied that he could not afford the costs associated with a union relationship and opined that the company "would not last" if the Union prevailed in the election.⁵ He also avowed that, if the Union won the election, he would intentionally delay negotiations and lay off employees in order to pay the higher salary costs associated with overtime work.⁶

In addition to the meetings arranged by the Respondent, Lightfoot approached Leadley around the end of January or the beginning of February and asked whether he would be receiving his annual pay increase and be paid for his scheduled February vacation. It was the Respondent's standard practice to provide for annual pay increases and paid vacations.⁷

³ Carlson initially testified that he scheduled meetings with individual employees for the following week because "we learned in the meeting" that a "couple of the employees did not feel comfortable talking with the other employees present." However, in response to a follow-up question, he contradicted himself by stating that these employees did not speak to him at the meeting, but rather, spoke to Leadley. Tr. 379. It is clear, therefore, that Carlson had already determined, prior to the group meeting, to hold individual meetings with the employees.

⁴ Lightfoot's contention that he spoke at the meeting was not contradicted by other testimony. Carlson could not recall the comments, but conceded that it was possible that Lightfoot spoke at the meeting. Tr. 394-395. Furthermore, although apparently confusing the date of the January 30 meeting with another group meeting on February 10, Russell Knopf confirmed that Lightfoot asked Carlson the question using the shoe example and Carlson responded. Tr. 177-181.

⁵ Lightfoot testified that the meeting lasted 45 minutes, while Carlson testified that none of the meetings lasted more than 15 minutes. Tr. 50, 382. I adopt Lightfoot's estimate since, unlike Carlson, he had a specific recollection of the meeting.

⁶ Carlson denied making the comments attributed to him by Lightfoot at the February 3 meeting or at any other time during the Union organizing campaign. Tr. 387, 396-398, 403-405. Leadley confirmed Carlson's version of the meeting and explained that there were only general discussions about negotiations during that meeting. Tr. 553. However, Carlson announced at the January 30 meeting, after Lightfoot pressed him about his opposition to union representation, that he would deal with any "personal questions" in individual meetings. I have no doubt that Lightfoot, who was the only service employee with the temerity to challenge Carlson at the group meeting, raised the issue of Carlson's opposition during the February 3 meeting. Therefore, the denials of Carlson and Leadley that they made statements indicating their intent to take retaliatory action should the Union prevail in the election, were not credible.

⁷ The Respondent's contention that these raises were discretionary and merit based, rather

Continued

However, Leadley told Lightfoot that all wages were “frozen” until after the election and could not guarantee that he would be paid for his vacation.⁸

C. The Alleged Discriminatory Treatment of Richard Lightfoot

5

On November 7, 2002, Leadley and Horbus held individual meetings with several of the service employees. In their meeting with Lightfoot, Leadley and Horbus discussed customer complaints, time and attendance issues,⁹ excessive travel times to work assignments, unauthorized rides by his children in his company truck, personal calls on his company cellular telephone, and napping during the workday. The meeting ended with Leadley telling Lightfoot that he needed to improve and noting that management was “cracking down” on all of the employees.¹⁰ However, the meeting was not disciplinary in nature and at no time during the meeting did Leadley tell Lightfoot that he was being placed on probation or that termination might result if there were any problems in any of the areas discussed.¹¹ In fact, there was a substantial flexibility in the Respondent’s time and attendance policies, as tardiness was not an uncommon occurrence,¹² and other employees had been permitted to call off on days they were scheduled to work or manipulate the classification of their leave days after the fact.¹³ The Respondent’s time and attendance records indicated that many of its employees benefited from this flexibility: Ken Milarski, Ron Follet, Steve Goldsmith, Mark Litrento, Scott Miller, Bob Balzano, Tom Gorman, Phil Torgeson, and Larry Iwanski. Even problem employees Dan Follett and Jim Jessen benefited from this flexibility in time and attendance policies before the severity of their performance-related problems required disciplinary action.

10

15

20

25

than automatic, was negated by its attorney’s concession that it was the Respondent’s customary practice “to award earned raises on the pay check that followed the [employees] anniversary date.” GC Exh. 11, p.5.

30

⁸ Lightfoot’s version of the conversation was credible and not refuted by Leadley. Tr. 57–58.

⁹ The Respondent’s employees were required to punch a time clock by 6:30 a.m. at the beginning of each workday and then review their daily work assignments to ensure they had the appropriate parts on their trucks before leaving the shop. Employees were also required to call in prior to scheduled workdays if they wanted to take the day off.

35

¹⁰ Lightfoot’s credibility as to his version of the meeting was enhanced by his candid concession of the deficiencies noted on GC Exh. 30(a); Tr. 71–74.

40

¹¹ Horbus and Leadley each testified that the latter told Leadley he was on probation. Tr. 212, 425, 509, 511. However, neither Leadley’s assertion, nor Horbus’ support for his supervisor’s version of the events, were credible. Leadley prepared a list of items to discuss at the meeting and referred to them at trial as “pre-probation meeting notes.” The list was written in pencil, but some items were added in blue ink shortly before the meeting. Allegedly, after the meeting ended, Leadley then wrote, in black pen, the words, “90 DAY PROBATION.” GC Exh. 30(a); Tr. 154–155, 324–329. Leadley also allegedly generated, in black ink, two pages of handwritten notes summarizing the meeting and noting at the end of the second page that Lightfoot had been placed on probation for 90 days. R. Exh. 15; Tr. 422. Leadley’s dubious explanation as to why he used blue ink to mark up the notes before the meeting, but black ink to mark up the notes after the meeting, support a reasonable inference that the black handwriting on GC Exh. 30(a) and R. Exh. 15 were not generated at or around the time of the meeting. It appears likely that they were written much later and solely for the purpose of bolstering the Respondent’s contention that Lightfoot was placed on probation on November 7, 2002.

45

¹² GC Exh. 17, 34, 37, 39, 43, 50, 58, 60–63, 68, 75, 79.

¹³ GC Exh. 20, 22, 24, 35, 38, 40, 41, 44–46, 48, 49, 61, 62, 69–71, 73, 76, 77, 80, 81, 83.

The record reveals little interaction between the Respondent and Lightfoot until after the Union's campaign for certification. At the group meeting of January 30, Lightfoot asked Carlson why he opposed unionization of the service employees and Carlson replied that all "personal questions" would be answered in individual meetings. At Lightfoot's individual meeting with
 5 Carlson and Leadley on February 3, he restated his strong support for the Union.

Around the same time, Lightfoot asked Leadley about his annual wage increase, as it has been the Respondent's customary practice to award an annual wage increase in the paycheck immediately following an employee's anniversary date. Based on this practice,
 10 Lightfoot would have been eligible to receive an increase in his January 31, 2003 paycheck.¹⁴ However, Leadley told Lightfoot that wage increases were suspended pending the outcome of the union election on February 11. During that conversation, Leadley did not mention anything about Lightfoot's performance. Subsequent to the union election on February 11, the Respondent still failed to award Lightfoot his 2003 wage increase.

In addition to declaring his support for the Union at the meetings of January 30 and February 3, Lightfoot provided information to the Board in support of the Union's unfair labor practice charge in early March. The Respondent was clearly aware of Lightfoot's involvement with the Board since its March 6 position statement responding to the Union's unfair labor charge explained the Respondent's reasons for failing to grant Lightfoot his annual pay increase even after the union election on February 11. Lightfoot was the only employee for whom such an explanation was given, as he was the only one "whose anniversary date fell within the campaign and election period" mentioned in the General Counsel's February 26 letter outlining the unfair labor charge.¹⁵
 25

On March 11, Leadley and Horbus met with Lightfoot and told him that he was being placed on a 60-day probation and that this was his last chance before being discharged. Leadley then had Lightfoot sign, for the first time during his employment with the Respondent, a "written warning acknowledgement" form. The form cited "continued attendance problems,"
 30 indicated that Lightfoot was on probation and was not to miss any more days of work, except for scheduled days off, and required that he work 40-hour weeks.¹⁶ The attendance problems were attributed to instances during January, February and early March when Lightfoot reported late to work or called to take leave on the same day that he was scheduled for work. In recent years, only one other employee was formally placed on probation.¹⁷

¹⁴ Although the Respondent occasionally withheld pay increases due to unsatisfactory work performance, there were instances in which the Respondent awarded pay increases to service employees prior to the completion of a performance evaluation or a meeting to discuss performance issues. For example, the Respondent awarded a 4 percent pay raise to Knopf before meeting with him in November 2002 to discuss his performance. Tr. 181-184. There were also instances in which others received wage increases after being involved in serious incidents or being required to repay the Respondent for excessive personal use of a company cellular telephone. GC Exh. 23, 28; Tr. 278-279, 308-309.
 40

¹⁵ GC Exh. 11, p. 5.

¹⁶ While the Respondent claims that there were performance-related issues, there was no credible proof that the Respondent spoke to Lightfoot about them at any time between November 7, 2002 and March 11, 2003. Tr. 512; GC Exh. 8.
 45

¹⁷ Jim Jessen had been placed on probation on October 18, 2000 because of performance-related problems.
 50

On March 17, Lightfoot failed to report to work on time, was called at home by Horbus and simply explained that he overslept. He arrived to work nearly two hours late.¹⁸ On March 21, Horbus spoke to Lightfoot about damage to Lightfoot's company truck that Horbus noticed 3 days earlier.¹⁹ Lightfoot's explanation was that he did not realize he was required to report minor damage to the truck.²⁰

Subsequently, on March 18, the Union filed charges with the Board alleging unfair labor practices by the Respondent in violation of Section 8(a)(1), (3) and (4). The charges, which were mailed to the Respondent on March 20 and received by it on March 24, included allegations pertaining to a specific employee. The Respondent was aware that the employee referred to in the letter was Lightfoot.²¹ Upon returning from vacation on March 25, 2003, Leadley informed Lightfoot that he was being discharged because he reported late to work on March 17, 2003, and failed to report minor damage to his company truck.²²

DISCUSSION

I. The Section 8(a)(1) Violations

The General Counsel asserts that the Respondent violated Section 8(a)(1) of the Act by attempting to discourage employees from selecting the Union as their collective-bargaining representative by: (1) on or about January 17, distributing memoranda to employees and threatening them with suspension of annual wage increases for an indefinite period; (2) on or

¹⁸ Lightfoot's testimony at trial, as well as in an affidavit submitted to the Board on April 9, 2003, that he overslept because of a power outage at his home, was not credible. Tr. 67-68. One would reasonably expect that a person in the process of being fired because he overslept would reveal the mitigating circumstances of a power outage. However, this was the only portion of Lightfoot's testimony that I found to be not credible.

¹⁹ R. Exh. 17.

²⁰ A similar incident occurred during the fall of 2002 when Russel Knopf, another service department employee, was also admonished for failing to report minor damage to his company truck. However, Knopf was not punished.

²¹ The amended charge stated, in pertinent part, that "[t]he Employer further withheld the evaluation and raise of an employee after the filing of the representation election petition by [the Union]. The Employer also changed the terms and conditions of employment unilaterally, during the term of the union representation election campaign when it changed the policy for paid vacation time. All this was punitive and aimed at known union supporters. The Employer retaliated against an employee by placing him on 'probation' for alleged poor attendance. By placing the employee on 'probation', the Employer also denied him his review and raise. All of this occurred after the Employer became aware of that particular employee giving testimony to the NLRB during the investigation of a charge of violating 8(a)(1) of the Act." GC Exh. 1(c).

²² In recent years, only two employees have been discharged by the Respondent, but the infractions leading to their termination were more serious than the alleged infractions of Lightfoot and did not involve tardiness. Dan Follet was discharged after the relevant dates in the charge, in June 2003, due to customer complaints and insubordination. Tr. 596; GC Exh. 25, 26. The only other employee, Jim Jessen, had been counseled by Horbus in October 2000 for numerous problems, including time and attendance violations, excessive travel times to job assignments, and bad driving. Contrary to the Respondent's assertion, there was no indication on the written list of deficiencies provided to Jensen at that time that he was placed on probation. However, Jessen was discharged in March 2001 after experiencing serious problems with three different customers within 1 month of his termination. GC Exh. 52-54.

about January 27, distributing memoranda to employees and threatening them with the loss of benefits pertaining to vacation, sick, personal and holiday leave; (3) on or about January 30, distributing memoranda to employees and threatening them with the loss of bonus and overtime pay, and annual wage increases; (4) in late January or early February, threatening employees with the indefinite suspension of a regularly scheduled pay increase and vacation pay pending the results of the union election; and (5), on or about February 3, threatening employees with plant closure, layoffs, loss of overtime benefits and a stalemate in collective bargaining in the event that the Union won the election.²³

The Respondent contends that the three memoranda distributed to the services employees did not contain threats, but rather, articulated an objective and truthful basis for the comparison of what the Respondent paid its employees and what the Union provides in its collective-bargaining agreements. Furthermore, the Respondent contends that its assertion in the January 17 memorandum, that wages were frozen during collective bargaining, was not coercive when considered in connection with Carlson's statement that everything was negotiable. With respect to Leadley's comments to Lightfoot that the latter should not expect a pay increase pending the union election, the Respondent contends that it is appropriate for an employer to defer an expected pay increase in order to avoid the appearance of interfering with a pending election. As to the February 3 meeting with Lightfoot, the Respondent denies any threats of plant closure, layoffs, loss of overtime benefits and an intent to cause delay of any future collective bargaining. Finally, the Respondent asserts that Lightfoot was a conduit for the Union, who was attempting to retaliate against the Respondent for the latter's refusal to voluntarily expand the bargaining unit to include the service employees.

The record reveals that the Respondent had a practice of granting annual wage increases based on merit.²⁴ The increases were discretionary as to amount. However, other than Lightfoot, no employee has been denied this wage increase since 2001. Carlson's statements that wages would be frozen until the conclusion of collective bargaining threatened to discontinue these customary annual increases if the Union prevailed in the election. It is well settled that an employer must maintain the status quo regarding benefits to unrepresented employees during the pendency of a union election. Recently, in *Jensen Enterprises, Inc.*, 339 NLRB No. 105, slip op. at 1 (2003), the Board held that an employer "violated Section 8(a)(1) by informing employees that, if the Union was voted in, wages would be 'frozen' during negotiations and they 'shouldn't expect to get any increases in wages or benefits until collective bargaining has concluded.' We agree with the judge that [the statement of the Respondent's agent] amounted to a threat of loss of benefits if the employees selected the Union as their bargaining representative."

Carlson's initial preelection campaign memorandum of January 17 warned service employees that, if the Union prevailed, collective bargaining could last for months or years and, during that time, wage increases would be suspended. Leadley augmented the scope of that warning when, at or around the end of January or the beginning of February, he told Lightfoot that all wage increases were frozen until after the election and that employees might not be paid a salary during their scheduled vacation. The statements by Carlson and Leadley threatened to suspend the Respondent's custom and practice of granting salary increases on or about an

²³ GC Exh. 1(g), ¶ V.

²⁴ This practice was conceded by the Respondent's counsel in his March 6 letter to the General Counsel and is properly chargeable to the Respondent as an admission. *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.2d 339 (2d Cir. 1994); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *Packaging Techniques*, 317 NLRB 1252 (1995).

employee's anniversary date and effectively blamed the Union for the withholding. Accordingly, the January 17 memorandum distributed to service employees by Carlson violated Section 8(a)(1) by threatening to suspend their annual wage increases for an indefinite period in order to discourage them from selecting the Union as their collective-bargaining representative.

5 *Earthgrains Co.*, 336 NLRB 1119, 1126-1127 (2001); *Grouse Mountain Lodge*, 333 NLRB 1322, 1323-1324 (2001); *Parma Industries*, 292 NLRB 90, 91 (1988); *Atlantic Forest Prods.*, 282 NLRB 855, 858-859 (1987).

10 Memoranda distributed by Carlson to the employees on January 27 and 30 warned the service employees that a union election victory would result in the loss of benefits. The January 27 memorandum specifically threatened the loss of vacation, sick, personal, and holiday leave, while the January 30 memorandum referred to the loss of opportunity to perform overtime work and receive monetary bonuses. The Respondent explained in each memorandum that it was basing its estimates on its current contract involving a different unit of its employees, but failed

15 to inform the service employees that any change in their benefits must be negotiated with the Union. Accordingly, the Respondent's statements in the January 27 and 30 memoranda violated Section 8(a)(1) of the Act by threatening the loss of existing benefits in order to discourage employees from selecting the Union as their collective-bargaining representative.

20 *Climatrol*, 329 NLRB 946, 948 (1999).

The Respondent supplemented the aforementioned memoranda with group and individual meetings with the service employees. In the January 30 group meeting, Carlson and Leadley told the service employees that unions were useless, no longer necessary and a waste of time. Other than expressing their general dislike for unions, they made no comments of a threatening nature in that meeting. However, in the individual meeting that Carlson and Leadley held with Lightfoot on February 3, Carlson threatened to close the business if the Union won the election or delay collective bargaining and lay off employees.

25

30 Under the test established by the Supreme Court in *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may tell employees the effects he believes unionization will have upon the company. His statement must be "carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control." However, the right of an employer to convey such a belief does not permit him "to jump from the unstated or unproven premise that a union's wage scale is fixed and immutable to a conclusion

35 that he may have to shut down in the event of unionization, and convey this ultimate conclusion to employees." *Debber Electric*, 313 NLRB 1094, 1097 (1997). Carlson certainly took such a leap by dangling the threats of plant closure and layoffs allegedly due to overtime wage scales. Furthermore, his threat to unduly delay collective bargaining if the Union prevailed in the election effectively told the service employees that their "efforts to organize would be an exercise in futility." *Kona 60 Minute Photo*, 277 NLRB 867, 869 (1985). Accordingly, I find that Carlson's threat to close the business, delay collective bargaining or lay off employees if the

40 Union won the election, was coercive in nature and violated Section 8(a)(1) of the Act.

45 Furthermore, Leadley's statement to Lightfoot in late January or early February, informing the latter that all wage increases were suspended until after the election and suggesting that employees might not receive paid vacations, was also coercive in nature. That statement, which came shortly before the union election, also violated Section 8(a)(1) of the Act by threatening an employee with the loss of benefits in order to discourage him from selecting the Union as his bargaining representative.

50

II. The 8(a)(3) and (4) Violations

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that the employee engaged in concerted protected activity, the employer had knowledge of the employee's protected activities, the employer took adverse action against the employee, and there is a nexus or link between the protected concerted activities and the adverse action. Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory reason.

The General Counsel alleges that the Respondent, motivated by Lightfoot's support for the Union, violated Section 8(a)(3) in several respects: (1) by failing to issue an annual wage increase to Lightfoot in late January 2003 or at any time thereafter; (2) by issuing a written warning to Lightfoot on March 11 and placing him on probation; and (3) by discharging Lightfoot on March 25. The General Counsel further alleges that the aforementioned conduct subsequent to March 11 violated Section 8(a)(4), as it was motivated by the Respondent's knowledge that Lightfoot was assisting the Union in a Board investigation involving unfair labor practice charges pending against the Respondent.²⁵

The Respondent contends that Leadley decided to deny a wage increase to Lightfoot before he knew anything about the latter's support for the Union and, in any event, that Carlson informed the service employees on January 17 that all wage increases were frozen pending the February 11 election. It also contends that Lightfoot was placed on probation on March 11 due to continued problems with time and attendance on scheduled workdays. Finally, he was discharged on March 25 because he overslept and reported to work late on March 17, and failed to report minor damage to his company vehicle on or about March 18. The Respondent further contends that Lightfoot's probation and discharge were consistent with its disciplinary policies and practices.

The first three factors of a *Wright Line* analysis clearly exist. The facts demonstrate the Respondent's awareness of the Union's effort to organize its service employees. Lightfoot engaged in concerted protected activity by advocating for the Union during the January 30 group meeting and in his individual meeting with Carlson and Leadley on February 3. In addition, the Respondent, through its position statement of March 6, was aware of Lightfoot's cooperation with the General Counsel. The Respondent's union animus is established by the aforementioned violations of Section 8(a)(1) by Carlson, the owner of the company. Furthermore, Carlson openly opposed the Union's efforts to represent the service employees in statements made in three memoranda and two meetings. While there is no direct evidence that the Respondent harbored any animus toward Lightfoot for supporting the Union, the record as a whole supports an inference of union animus and discriminatory motivation. *Tabular Corporation of America*, 337 NLRB 99 (2001); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Pete's Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983). The only remaining factor necessary in order for the General Counsel to make a prima facie case is to establish a link between the protected concerted activities and the adverse action.

²⁵ GC Exh. 1(g), ¶ VI.

5 The denial of Lightfoot's wage increase, the warning and probation on March 11, and
Lightfoot's discharge on March 25 were all strikingly close in time to critical events relating to
Lightfoot's support for the Union: Lightfoot spoke in support of the Union at meetings on
January 30 and February 3, but was not provided the customary wage increase on or after his
10 anniversary date of January 31; the warning and probationary meeting on March 11 occurred
within 2 weeks after Lightfoot provided testimony to the Board; and his discharge on March 25
was 1 day after the Respondent received notice of unfair labor practice charges based on the
threatened loss of benefits during the union campaign and the probationary action taken
against Lightfoot. Such timing strongly supports an inference that the Respondent's anti-
union animus was a motivating factor in said actions. *In re TKC*, 340 NLRB No. 102 (2003);
Kankakee Valley Rural Electric Membership Corp., 338 NLRB No. 135 (2003); *Masland
Industries*, 311 NLRB 184, 197 (1993); *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981).

15 Since the General Counsel established a prima facie case, the burden of persuasion
shifted to the Respondent to prove, by a preponderance of the evidence, that it would have
placed Lightfoot on probation or discharged him even in the absence of his union activity.
Monroe Mfg., 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was
20 required to do more than show that it had a legitimate reason for its actions. *Hicks Oil &
Hiscksgas, Inc.*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991).

25 As previously discussed, Leadley's contention that he intended to deny Lightfoot's
wage increase in January, due to unsatisfactory performance, was not credible. Leadley
failed to mention anything about Lightfoot's performance in January and, again, in early
February when Lightfoot asked him about a wage increase. Nor is it plausible for the
Respondent to argue that Lightfoot's failure to receive his annual wage increase in his
30 paycheck of January 31 was due to the Respondent's suspension of increases pending the
union election and, therefore, subsumed within the scope of its violation of Section 8(a)(1).
The Respondent prevailed in the election on February 11 and the Respondent could no
longer rely on the uncertainties surrounding future collective bargaining as an excuse for
suspending customary wage increases. Therefore, the only reasonable inference that may be
35 drawn from the Respondent's failure to award Lightfoot a wage increase is that it chose to
punish him for his support of the Union.

40 The Respondent's basis for placing Lightfoot on probation on March 11 was allegedly
due to continued problems with time and attendance on scheduled workdays in January
through March. Specifically, Lightfoot was late on several occasions and, on several other
days, called the office to say that he was taking off, causing the Respondent to reschedule the
work assignments for those days. However, the record also reveals that Lightfoot worked in
45 excess of 40 hours every week on or after the week ending December 30, 2002, and there is
no credible evidence that the Respondent spoke with Lightfoot about these dates prior to
March 11, or 44 days after the expiration of the alleged 90-day probation on February 5. The
Respondent's basis for discharging Lightfoot on March 25 was allegedly due to his reporting
late to work on March 17 and causing minor physical damage to a company vehicle. Notably,
tardiness was not one of the items listed on the probationary form. Furthermore, Lightfoot did

50

not miss any scheduled days of work between March 11 and 25, and worked nearly 50 hours each of the 2 weeks during that time.²⁶

5 As fully explained above at page 5 and footnotes 12, 13, and 20, the Respondent treated Lightfoot more harshly than the rest of its employees. As such, the disciplinary taken by the Respondent was a departure from past practices, in which it tolerated violations of time and attendance rules by other employees without placing them on probation or discharging them. *In re Whirlpool Corporation*, 337 NLRB 726, 748 (2002); *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Service Co.*, 309 NLRB 23 (1992).

15 Based on the foregoing, I find that the Respondent failed to meet its burden of proving that Lightfoot would have been denied a wage increase, placed on probation and then discharged. The reasons asserted by the Respondent for its conduct were not relied upon and were a pretext to hide the real reason, which was to punish Lightfoot for engaging in protected concerted activity. Accordingly, I further find that the Respondent violated Section 8(a)(1), (3) and (4) by denying Richard Lightfoot a wage increase on or after January 31, placing him on 20 probation on March 11, and discharging him on March 25.

CONCLUSIONS OF LAW

25 1. W.E. Carlson Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

30 2. Millwrights and Machinery Erectors Local Union No. 1693, an Affiliate of United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to suspend wage increases, threatening plant closure and layoffs, threatening the loss of benefits and threatening the futility of collective bargaining if the Union came in, the Respondent violated Section 8(a)(1) of the Act.

35 4. By denying Richard Lightfoot a wage increase, placing him on probation, and discharging him due to his support for the Union and cooperation with the Board investigation, the Respondent violated Section 8(a)(1), (3), and (4).

40 5. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

45 Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that the Respondent cease and desist from such actions and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notices. It is recommended that the Respondent offer immediate reinstatement to employee Richard Lightfoot, who was unlawfully discharged. He shall be reinstated to his prior

50

²⁶ GC Exh. 13.

position or to a substantially equivalent one if his prior position no longer exists. He shall be made whole for all loss of backpay and benefits sustained by him as a result of the Respondent's unfair labor practices. These amounts shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

10

ORDER

The Respondent, W.E. Carlson Corporation, its officers, agents, successors and assigns shall

15

1. Cease and desist from

(a) Threatening a suspension of annual wage increases, plant closure, layoffs, loss of benefits and the futility of collective bargaining if the service employees selected the Union as its collective-bargaining representative.

20

(b) Denying a wage increase to, issuing a disciplinary warning, placing on probation, discharging or otherwise discriminating against, any employee for supporting Millwrights and Machinery Erectors Local Union No. 1693, an Affiliate of United Brotherhood of Carpenters and Joiners of America, or any other union.

25

(c) Placing on probation, discharging, or otherwise discriminating against any employee for cooperating with an investigation by the National Labor Relations Board.

30

(d) 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 actions necessary to effectuate the policies of the Act.

35

(a) Offer employee Richard Lightfoot immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

40

(b) Make Richard Lightfoot whole for any loss of earnings and benefits suffered as the result of the unlawful discrimination against him in the manner set forth in the remedy section of this decision.

45

(c) Within 14 days from the date of this Order, remove from the personnel files of Richard Lightfoot all references to his unlawful probation and discharge and within 3 days notify him in writing that this has been done and that these unlawful actions will not be used against him in any way.

50

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (d) Preserve and, within 14 days of a request, make available to the Board, or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

10 (e) Within 14 days and after service by the Region, post copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these
15 proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2003.

20 (f) 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.

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

Dated, Washington, D.C. December 31, 2003

30 _____
Michael A. Rosas
Administrative Law Judge

35
40
45
50 _____
²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten employees with a suspension of annual wage increases, plant closure, layoffs, loss of benefits, or state that it would be futile to engage in collective bargaining if the service employees selected the Union as its collective-bargaining representative.

WE WILL NOT issue disciplinary warnings to any of you, place on probation, discharge or otherwise discriminate against any of you for supporting Millwrights and Machinery Erectors Local Union No. 1693, an Affiliate of United Brotherhood of Carpenters and Joiners of America, or any other union.

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

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

WE WILL make Richard Lightfoot whole for any loss of earnings and other benefits resulting from the unlawful discrimination against him, less any net interim earnings, plus interest.

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

W.E. CARLSON CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

JD-146- 03
Chicago, IL

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.