

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

UNIVAR USA, INC.<sup>1</sup>

and

Cases 27-CA-18071-1  
27-CA-18071-2

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS, LOCAL UNION NO. 17, affiliated with  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

**Mike Cooperman, Atty.**, (Region 27) of Denver,  
Colorado, Counsel for the General Counsel  
**Lawrence W. Marquess and Josh Kirkpatrick, Attys.**,  
(Littler Mendelson, P.C.) Denver, Colorado,  
Counsels for Respondent.

## DECISION

### Statement of the Case

LANA H. PARKE, Administrative Law Judge. This case was tried in Rock Springs, Wyoming June 24 through 26, 2003.<sup>2</sup> Pursuant to charges filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 17, affiliated with International Brotherhood of Teamsters (the Union), the Regional Director of Region 27 of the National Labor Relations Board (the Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the complaint) on August 30.<sup>3</sup> The complaint alleges that Vopak USA, Inc. (corrected at the hearing to Univar USA, Inc., and herein Respondent) violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act).

### ISSUES

1. At relevant times, was James Hawkins (Mr. Hawkins) Respondent's supervisor within the meaning of Section 2(11) of the Act?
2. Did Respondent violate Sections 8(a)(3) and (1) of the Act by demoting Mr. Hawkins from leadman to driver?
3. Did Respondent violate Sections 8(a)(3) and (1) of the Act by laying off Aaron Christen (Mr. Christen)?

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<sup>1</sup> Respondent's name appears as amended at the hearing.

<sup>2</sup> All dates are in 2002 unless otherwise indicated.

<sup>3</sup> At the commencement of the hearing, Counsel for the General Counsel amended the complaint to reflect the correct name of Respondent as Univar USA, Inc., the correct titles of supervisors Don Nixon and Robert Bennett as Branch Operations Manager and Regional Vice President, respectively, and to delete paragraph 6(c) of the complaint. I accepted Respondent's representation that Michael Newman was, at relevant times, counsel for Respondent.

4. Did Respondent violate Section 8(a)(1) of the Act by interrogating and/or making coercive statements to an employee?
5. Did Respondent violate Section 8(a)(1) of the Act by soliciting grievances from employees?

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On the entire record and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

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### I. Jurisdiction

Respondent, a corporation, with an office and place of business located in Rock Springs Wyoming (Rock Springs facility), is engaged in the sale and distribution of chemicals. Respondent annually sells and ships from its Rock Springs facility goods, materials, and services valued in excess of \$50,000 directly to points outside the State of Wyoming. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>4</sup>

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### II. Alleged Unfair Labor Practices

#### A. Supervisory status of Mr. Hawkins

Respondent's general offices are located in Denver, Colorado. Branch offices and facilities exist in Casper, Gillette and Rock Springs, Wyoming. Respondent hired Mr. Hawkins in September 1999 as a driver/material handler at its Rock Springs facility. In August 2001, Respondent promoted Mr. Hawkins to the position of leadman at the Rock Springs facility. Mr. Hawkins reported to Jeff Von Lintel (Mr. Von Lintel), Respondent's branch operating manager located in Denver, who visited the Rock Springs facility approximately monthly. Mr. Von Lintel reported to Roy D. Roby (Mr. Roby), Respondent's general manager based in Casper, who visited the facility approximately bimonthly.

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As leadman, Mr. Hawkins dispatched drivers, oversaw delivery schedules and warehouse and chemical mixing work, ensured safety rules were followed, counseled employees regarding safety infractions, fielded employee complaints and referred them to Mr. Von Lintel with resolution recommendations, which Mr. Von Lintel sometimes followed. Mr. Hawkins daily reported the work activities of the Rock Springs facility to Mr. Von Lintel who "let him know what to do with respect to employees." Mr. Hawkins screened employment applications, occasionally interviewed prospective employees for Mr. Von Lintel and occasionally sat in on employment interviews conducted by Mr. Roby and Mr. Von Lintel.<sup>5</sup> On one occasion, as directed by Mr. Von Lintel, Mr. Hawkins interviewed and, after discussion with and authorization of Mr. Von Lintel, hired Mr. Christen as a driver. Mr. Hawkins also asked for and received permission from Mr. Von Lintel to hire his son to perform intermittent odd jobs for a three-month period.

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<sup>4</sup> Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

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<sup>5</sup> Mr. Hawkins' application screening consisted of putting employment applications in order of qualifications; Mr. Roby then reviewed them.

5 In scheduling drivers, Mr. Hawkins considered delivery destination and driver seniority, correlating run desirability with seniority. Before making assignments, Mr. Hawkins obtained driver input as to which run would be best for each driver. Mr. Hawkins reported employee problems to Mr. Von Lintel and essentially followed his directions. For example, when one employee threatened another, Mr. Hawkins reported the matter to Mr. Von Lintel who told Mr. Hawkins what steps to take. As for employee/customer complaints, Mr. Hawkins referred them to Respondent's sales department.

10 B. Union activity, alleged union animus, and alleged 8(a)(1) conduct

10 In late February, Mr. Roby visited the Rock Springs facility from his office in Casper. He complained to Mr. Hawkins of the lack of cleanliness and general disorder at the facility. He told Mr. Hawkins he needed to get a handle on the problems since Respondent could fire the whole force and bring in workers from other branches. Mr. Hawkins discussed Mr. Roby's warning with the Rock Springs facility employees who thereupon decided to seek union representation. 15 Thereafter, on April 12, Respondent's employees at the Rock Springs facility signed authorization cards, which they turned over to the Union.

20 In the latter part of May, Rock Springs facility office administrator Marlene Eaton (Ms. Eaton) informed Mr. Von Lintel that employees were talking about a union. Mr. Von Lintel telephoned Mr. Hawkins at home and asked Mr. Hawkins if it were true that Mr. Christen was trying to start a union, which Mr. Hawkins denied.<sup>6</sup>

25 By letter dated May 21 and faxed to Respondent, the Union informed Respondent that a majority of its driver had authorized the Union to represent them and requested bargaining. On May 22, the Union filed a representation petition with Region 27 seeking representation of all drivers and warehouseman employed by Respondent at its Rock Springs facility. On May 23, Region 27 faxed a copy of the petition to the Rock Springs facility. At about the same time, Mr. Von Lintel telephoned Mr. Hawkins. He said he did not appreciate being lied to about employees starting a union. Mr. Von Lintel sounded upset and quickly concluded the call, 30 saying he would not discuss the matter at that time.

35 On June 10, Robert Sheffield (Mr. Sheffield), Respondent's Regional Operating Manager, and Robert Bennett (Mr. Bennett), Respondent's Regional Vice President, met with the Rock Springs facility employees for about an hour in the facility conference room. Mr. Bennett said Respondent would like to know why employees thought they needed a union. Mr. Hawkins related Mr. Roby's warning about firing employees if the facility's condition were not improved and said Mr. Roby had threatened employees' jobs. Mr. Sheffield and Mr. Bennett said they would talk to Mr. Roby. Other employees complained about changes in work clothing allowances and charge account access. Mr. Sheffield said that few branches had charge 40 accounts and that no branch supplied blue jeans. Employee Reay, echoed by Mr. Hawkins, complained of a lack of communication and responsiveness to employee complaints. According to Mr. Christen, Mr. Sheffield and Mr. Bennett said they would take look into it. Mr. Sheffield said employees could call him in future, and he would see if he could resolve the situation.

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50 <sup>6</sup> Mr. Von Lintel denied that Ms. Eaton named any employee to him or that he named any employee to Mr. Hawkins. I found both Mr. Von Lintel and Mr. Hawkins, generally, to be forthright and sincere witnesses. I find it unnecessary to resolve this inconsistency in testimony.

On June 13, Michael Newman (Mr. Newman), Respondent's in-house counsel, met with the Rock Springs facility employees. Mr. Newman also asked why employees felt they needed a union. Mr. Hawkins again related Mr. Roby's warning, and the other employees voiced essentially the same complaints expressed in the June 10 meeting. Mr. Newman replied that if employees had nothing more than that to say, he had wasted a trip, as employees' complaints did not show any need for a union.

The Region held a stipulated election among Respondent's employees at the Rock Springs facility on June 28 and issued a certification of representation of the Union on July 19.

### C. The demotion of Mr. Hawkins

In early 2002, during his visits to the Rock Springs facility, Mr. Von Lintel saw uncapped and unrolled hoses, chemical spills, a truck with expired inspection still in use, unclean, disordered, and even dangerous conditions such as a bucket of sodium chloride, a fire hazard. Mr. Von Lintel showed Mr. Hawkins the problems and gave him a list of things to correct. Mr. Von Lintel then reported the situation to Mr. Roby, and the two managers decided to have Lawrence "Bob" Long (Mr. Long), at that time Operations Supervisor based in Respondent's Gillette facility, visit the Rock Springs facility to train Mr. Hawkins.

In late February, Mr. Long went to the Rock Springs facility. On March 4, he emailed the following report to Mr. Roby and Mr. Von Lintel:

I arrived at the branch at 6:45 Bryan was loading a truck of Methanol, no chocks<sup>7</sup> were used, he asked me if I would watch the truck while he went over and picked up a pup<sup>8</sup> that still needed a lot of work done to it. After the Methanol was loaded he laid the hose down, with no end plug and still connected to the pump.

They hooked the pup that needed work up to a body load that the inspection was out of date on and loaded antifreeze 50/50 I asked why they were doing this with the equipment that wasn't legal. Their comment was Marlene [Eaton] told them to. I also observed that no one wore any safety glasses they all would lay hoses down with product still in them and no end plugs. Product would spill out, and no one bothered to clean it up. They would walk through the product, and go inside the office, and track product on the floor.

The place was beyond a mess. The floors had product on them that had been there, for I don't know how long. Trash was all over the place. There was Caustic Soda that had been spilled, Marlene told me that Jeff [Von Lintel] told Jim [Hawkins] to clean it up several days before. It had not been done.

When it would come time to do a job they would stand around and talk about it instead of just doing the job. There was way too much time killed doing this.

Following his report, Mr. Long recommended that Respondent discharge Mr. Hawkins. Mr. Von Lintel recommended to Mr. Roby that he demote Mr. Hawkins. In March, Mr. Long made two additional trips to the Rock Springs facility, after which he reported continuing problems to Mr. Roby and that he did not think Mr. Hawkins was doing his job. Mr. Roby visited

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<sup>7</sup> Blocks placed at vehicle tires to prevent rolling.

<sup>8</sup> A small trailer pulled behind a truck.

the Rock Springs facility on March 20 or 21 and met with Mr. Hawkins. Mr. Roby told Mr. Hawkins he had received an unfavorable report of the facility and that he had three options: to discharge, to demote, or to work with Mr. Hawkins. In response to Mr. Roby's questions, Mr. Hawkins said he wanted to keep his leadman position and felt capable of doing what Respondent required. Mr. Roby inspected the facility with Mr. Hawkins, pointing out areas that needed attention, which Mr. Hawkins noted. The following day, Mr. Roby told Mr. Hawkins he had decided to support him as leadman and received Mr. Hawkins' assurance that he could do the job. Mr. Roby then directed Mr. Von Lintel to support Mr. Hawkins.

In April, a problem with the release of a railway car occurred at the Rock Springs facility. A railway spur connects the Rock Springs facility to a railroad main line. Using the spur, the railroad delivers chemical tanker railcars to the facility. Facility employees are to unload the cars completely, then disconnect and cap all unloading hoses and otherwise secure the openings in the cars, as dictated by Respondent's Railroad Tank Car Inspection Release Form. Only when those specifics are accomplished is the release form, which notes that all release requirements have been completed, turned in to Ms. Eaton. Ms. Eaton in turn contacts the railway and "releases" the tank car for pick-up. In April, following an investigation, Mr. Von Lintel concluded that Mr. Hawkins had been responsible for releasing a railroad car prematurely and discussed the problem with him.

Mr. Roby did not visit the facility again until May at which time he did another walk-through. He told Mr. Hawkins the facility was not in as good a condition as he wished. Mr. Hawkins said employees had been very busy; Mr. Roby told him he needed to see the work got done.

On May 28, Mr. Von Lintel met with Mr. Hawkins for his annual performance appraisal. Under the following headings the following ratings (based on a scale of one through four, four being the best, with both employee (E) and supervisor (S) giving ratings) and comments were noted:

	<u>E</u>	<u>S</u>
<i>Quantity of Work</i>	2	3
Supervisor Comments:	Maintenance and cleaning has been great over last two months. Need to keep it up.	
<i>Quality of Work</i>	3	3
Supervisor Comments:	Make sure we do not have any spills. Needs to be better organized. Need to make sure drivers follow basic rules (i.e. buckets, safety glasses, chains, hard hats) to meet all customer needs.	
<i>Ability to Comprehend New Ideas/Instructions</i>	2	2
Supervisor Comments:	Better knowledge of maintenance. Need to make sure all trucks are in date.	
<i>Judgment</i>	2	3
Employee Comments:	Still learning position.	
Supervisor Comments:	Lowered overtime. Stop trying to meet everybody's needs and get the work done. Make the transition between driver & leadman.	
<i>Job Knowledge</i>	3	2



In the latter part of May, Mr. Long returned to the Rock Springs facility. By e-mail dated June 11, the day after Mr. Sheffield and Mr. Bennett visited the Rock Springs facility, Mr. Long reported his observations of facility problems to Mr. Von Lintel, as follows:

5 Up date. In the past few weeks I have been in Rock Springs here are a few things I have seen. On Monday 6-3-02 Jim Hawkins was unloading a load of Vicon with air when the truck was empty Jim did not have the hose secured properly and blew Vicon on him and the ground. Around the oil tanker they had hoses threw all over the ground oil had been blown on the side of [the] building I spent a half a day cleaning it up. On  
10 Wednesday 6-5-02 there were three railcars released two of the railcars were still connected and not empty.<sup>10</sup> We emptied the oil car Wednesday evening. The railroad showed up first thing Thursday morning to pick up the cars Brian and myself went to disconnect the cars. Brian went to the Methanol car. Some one had left the valves open and Brian started to unlatch the hose that was still full of product. Methanol started to  
15 leak on the ground. I told him to relatch the hose and I went and grabbed a bucket to place under the hose. On Monday 6-10-02 Jim called a common carrier to haul 12 drums of product to local customer. We had a truck and a driver in the yard.

20 Thereafter, Mr. Long opined to Mr. Von Lintel that the Rock Springs facility was in worse shape in May and June than it had been during his March visit.<sup>11</sup>

On June 13, the same day Mr. Newman met with Rock Springs facility employees, Mr. Von Lintel demoted Mr. Hawkins from leadman to driver. According to Mr. Hawkins, Mr. Von Lintel gave him a "write up."<sup>12</sup> Mr. Von Lintel said that after talking to Mr. Bennett and  
25 Mr. Sheffield, he felt Mr. Hawkins wasn't doing the job the way it should be done and was "causing too much controversy." Mr. Hawkins protested that he had not improperly released any railcar and tried to defend himself further against the listed infractions, but Mr. Von Lintel said the matter was not open to discussion. The Action Plan read, in pertinent part:

30 As discussed, I have a number of concerns about your work performance, which have led me to place you on this Action Plan. Your performance is unacceptable in the following areas:

- On 5/22/02<sup>13</sup> you overfilled a truck, spilling product on the ground.
- On 6/3/02 you were unloading Vicon when the hose came out of the tote and  
35 spilled Sodium Chlorite on you and on the ground.
- On 6/5/02 Bob Long spent most of the day cleaning up hoses and oil that had been spilled on the side of the building.
- On 6/5/02 you signed and released a railcar that had not been inspected or  
40 unhooked.

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45 <sup>10</sup> Concerning this railcar release, Mr. Hawkins told Mr. Long that Ms. Eaton had told him to release the railroad cars. Mr. Hawkins' assertion is implausible, as Ms. Eaton had no responsibility for seeing that railcars were readied for release.

<sup>11</sup> I found Mr. Long to be a forthright and reliable witness, and I give full weight to his testimony.

<sup>12</sup> The document Mr. Hawkins referred to was a memorandum from Mr. Von Lintel, subject: "Action Plan."

50 <sup>13</sup> The date was inadvertently misstated and should have read 5/28/02, the date of Mr. Hawkins' evaluation.

The Action Plan says nothing about demotion, but specifies that Mr. Hawkins must improve his performance in the next 90 days by never leaving a truck while loading and by not releasing "a truck without filling out and inspecting the railcar."

5 According to Mr. Von Lintel's version of the demotion interview, he met with Mr. Hawkins at the Rock Springs facility on June 13, telling him, "Jim, we need to talk." He handed Mr. Hawkins the Action Plan, which Mr. Hawkins read through. Mr. Von Lintel said, "I'm going to demote you down to a driver." Mr. Hawkins refused to sign the write-up. He then stood up, erased the boards on which were listed such items as truck inspection dates, and walked out.

10 I accept Mr. Hawkins' testimony that Mr. Von Lintel told him at the demotion interview that he wasn't doing his job properly and was "causing too much controversy." Mr. Von Lintel's portrayal of the interview is so abbreviated as to suggest that portions of the interview were omitted. After his demotion, Mr. Hawkins continued employment as a driver with Respondent at his same wage rate until December 10.

#### D. The layoff of Mr. Christen

20 The business of the Rock Springs facility is somewhat seasonal as warm summer months reduce the demand for delivery of antifreeze chemicals. Business traditionally slows between May and September and did so in 2002. In an effort to avoid layoffs in 2002, Respondent assigned Mr. Christen, least senior employee, to make two chemical pick-ups at the end of May and the beginning of June, respectively, from a regular supplier (Magnablend) located in Texas. Pick-ups from the Texas supplier were normally made pursuant to contract with a common carrier, which made available a storage tanker at the Rock Springs facility for Respondent's use. Factoring in the cost of replacing the loaned storage tanker, which would be unavailable if Respondent ceased using the common carrier, Respondent determined it was not cost-effective to make its own pick-ups from Texas.

30 On June 13, Mr. Von Lintel laid off Mr. Christen, explaining that Respondent was reducing its work force. When another employee quit in September, Respondent recalled Mr. Christen.<sup>14</sup>

### III. Discussion

#### 35 A. Supervisory status of Mr. Hawkins

40 Respondent argues that while he served as leadman, Mr. Hawkins was a supervisor and not entitled to the protection of the Act. Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey

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 50 <sup>14</sup> Counsel for the General Counsel argued at the hearing that Mr. Christen's recall from layoff should not support an inference that the layoff was lawfully motivated since Respondent sought Mr. Christen's resignation during settlement discussions. I find it unnecessary to address counsel's argument, as my conclusion herein is independent of the fact that Mr. Christen was recalled from layoff. Respondent terminated Mr. Christen following a driving accident in November. The termination is not in issue.

supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.*, 332 NLRB 74 (2000), quoting *Union Square Theatre Management*, 326 NLRB 70, 71 (1998).

5 At all times relevant, Mr. Hawkins was designated the leadman of the Rock Springs facility. The title "leadman" generally denotes a minor supervisory employee without "genuine management prerogatives." See S. Rep. No. 105, 80<sup>th</sup> Cong., 1 Sess. 4 (1947) quoted in *Chicago Metallic Corp.*, 273 NLRB 1677, 1688, *enfd. in pert. part* 794 F.2d 527 (9<sup>th</sup> Cir. 1986).  
 10 However, the Board cautions that an individual's title alone cannot establish whether that individual is a supervisor. *Pan-Osten Co.*, 336 NLRB No. 23 (2001); *Williamette Industries, Inc.*, 336 NLRB No. 59 (2001). It is, therefore, necessary to consider Mr. Hawkins' actual duties and responsibilities as leadman. While Mr. Hawkins had responsibility for seeing that the Rock Springs facility work was completed properly and efficiently, that responsibility alone cannot confer supervisory status. No evidence was presented showing that Mr. Hawkins exercised the  
 15 independent judgment characteristic of a 2(11) supervisor in overseeing the work. As leadman, Mr. Hawkins following established guidelines, and although he may have had the authority to correct or point out work mistakes, he could not reprimand or otherwise discipline employees in a manner that could "have any effect on employees' job status or tenure [or constitute] part of a progressive disciplinary system." *Williamette Industries, Inc.*, *supra*, at slip op. 3 (2001).  
 20 Mr. Hawkins daily reported the activities of the Rock Springs facility, including possible personnel problems, to his superiors. Reporting functions do not equate to supervisory authority. *Id.* While Mr. Hawkins may have been involved in some employment interviews, "mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish...supervisory authority." *North General Hospital*, 314 NLRB 14 (1994).  
 25 The evidence suggests that while Mr. Hawkins may have conducted some interviews, he did so for the convenience of upper management with the final employment decision resting firmly in their hands. Although Respondent asserts that Mr. Hawkins had the authority to send employees home in exigent circumstances, e.g. if drunk, (which authority Mr. Hawkins never exercised), such does not indicate the use of independent judgment. *Webco Industries*, 334 NLRB 608, 609 (2001). While Mr. Hawkins reported employee complaints and problems to  
 30 Mr. Von Lintel, reportorial responsibility does not confer supervisory status. See *Ken-Crest Services*, 335 NLRB No. 63 (2001).

35 The Board, charged with responsibility to determine the degree of discretion required for supervisory status,<sup>15</sup> is careful not to give too broad an interpretation to the statutory term "independent judgment" because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999). The Board does not find the exercise of only "routine" authority, i.e. that which does not require the use of  
 40 independent judgment in directing the work of other employees, to fit within the ambit of Section 2(11) of the Act. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB No. 54 (2001). Here, no evidence shows that Mr. Hawkins exercised any significant independent judgment in performing his work oversight duties. While he may have had to direct specific employees to perform specific tasks, the necessity for the tasks and how they were to be completed was established by Respondent's guidelines and procedures. The exercise of some supervisory  
 45 authority in a routine, perfunctory, or sporadic manner does not equate to supervisory status. *Medtech Security, Inc.*, 329 NLRB 929 (1999); *Masterform Tool Co.*, 327 NLRB 1071, slip op. at 1 (1999); *Polynesian Hospitality Tours*, 297 NLRB 228, *enfd.* 920 F.2d 71 (D.C. Cir. 1990); *Beverly Health*, *supra*. Mr. Hawkins' exercised his authority in a routine manner following procedures set by upper management. Nothing in his job performance demonstrated "the  
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<sup>15</sup> NLRB v. Kentucky River Community Care, 121 S. Ct. 1861, 1867-1868 (2001).

exercise of independent judgment [rather than the]...routine decisions typical of leadmen...." *Arlington Electric*, above, at p. 75. Accordingly, I conclude that Respondent, as the proponent of Mr. Hawkins' supervisory status, has not met its burden of proof.<sup>16</sup> I find Mr. Hawkins was not a supervisor as defined in the Act at any relevant time.

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#### B. Alleged union animus and alleged 8(a)(1) conduct

When Mr. Von Lintel asked Mr. Hawkins if employees were trying to start a union, he engaged in interrogation in violation of Section 8(a)(1) of the Act. *In re Norton Healthcare, Inc.*, 338 NLRB No. 34 (2002). When he thereafter expressed his strong displeasure with Mr. Hawkins' lying about union activity at the Rock Springs facility, he engaged in coercive behavior in violation of Section 8(a)(1) of the Act. Respondent's argument that Mr. Von Lintel's statements "did not meet the requisite level for actionability" is based, in part, on Mr. Hawkins' failure to testify that he felt threatened or coerced. However, "the Board does not consider the subjective reaction of the individual involved but rather whether, under all the circumstances, the conduct reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act [citations omitted]." *Con-Way Central Express*, 333 NLRB 1073 (2001). Although Mr. Von Lintel's interrogation and statement of displeasure contained no direct expression of antagonism toward employees' union activities, his censure of Mr. Hawkins' lack of candor is inextricably tied to the earlier unlawful questioning and can reasonably be expected to have a coercive effect on protected union activities.

When Mr. Sheffield and Mr. Bennet, on June 10, and Mr. Newman on June 13, met with employees, they asked employees why they thought they needed a union. The questions must have been calculated to elicit employees' complaints and grievances. There is no evidence Respondent had a past practice of inviting employee complaints; it was apparently a procedure instituted in response to employee union activity. It is reasonable to infer Respondent's grievance solicitation was intended to deflect employee involvement in union organization by demonstrating employer concern with employee opinions and problems. Soliciting grievances to discourage interest in a union, or in a manner calculated to discourage interest in a union, violates the Act. *Insight Communications Company*, 330 NLRB 431, 457 (2000); *Palm Garden of North Miami*, 327 NLRB 1175 (1999)

After soliciting grievances, Mr. Sheffield, Mr. Bennett, and Mr. Newman did not assure employees that changes would ensue, saying only that Respondent would talk to Mr. Roby about his complained-of statements and would "take care of" communication and responsiveness deficiencies. However, an explicit pledge of remedial action is not needed for a violation of the Act. Solicitations of complaints alone inherently imply a promise to remedy grievances. It also does not matter that employee complaints were not remedied. "[The] solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances." *Clark Distribution Systems, Inc.*, 336 NLRB No. 60, slip op. 2 (2001);<sup>17</sup> *Hospital Shared Services*, 330 NLRB 317 (1990). Grievance solicitation during an organizational campaign creates a "compelling inference," that the employer seeks to influence employees to vote against union representation. *Traction Wholesale Center Co.*, 328 NLRB at

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<sup>16</sup> *Dean & Deluca New York, Inc.*, 338 NLRB No. 159, at slip op. 2 (2003) ("The party asserting [supervisory] status must establish it by a preponderance of the evidence. [citations omitted].")

<sup>17</sup> Quoting *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F. 3d 399 (4<sup>th</sup> Cir. 1994).

1058 (1999).<sup>18</sup> Accordingly, I conclude Respondent violated Section 8(a)(1) of the Act on June 10 and on June 13, as alleged, by soliciting grievances in order to dissuade employees from supporting the Union.

5           Contrary to Respondent's assertion that "no evidence [was] presented at trial of anti-union animus on the part of Mr. Von Lintel or Mr. Roby, Mr. Von Lintel's unlawful conduct in interrogating and coercing Mr. Hawkins and Respondent's solicitation of grievances reveal Respondent's general union animus.<sup>19</sup> Further, Mr. Von Lintel's ascribing one basis for Mr. Hawkins' demotion to his "causing too much controversy," demonstrates specific animus  
10 toward Mr. Hawkins.

### C. The demotion of Mr. Hawkins

15           The question of whether Respondent violated the Act in demoting Mr. Hawkins rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*.<sup>20</sup> To prove an employee was discriminated against in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision; the ultimate burden of proving discrimination always remains with the General  
20 Counsel. *Wright Line*, supra. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333,  
25 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in the [employer's] decision." *Webco Industries*, supra, at fn. 3.

30           The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, all three elements are met: Mr. Hawkins was actively involved in supporting the Union, and Respondent was aware of his involvement through Mr. Hawkins' later participation in bringing employee concerns to Respondent's attention during the June meetings. As to the third element, Respondent revealed its opposition to the Union through its 8(a)(1) conduct and specifically demonstrated  
35 animosity toward Mr. Hawkins by Mr. Von Lintel's expressed anger at his concealing the union activity of a fellow employee and his later accusation that Mr. Hawkins caused controversy. The General Counsel must also show a link or connection between the protected activity and the adverse employment action. *Briar Crest Nursing*, 333 NLRB 935 (2001). Mr. Hawkins' demotion occurred shortly after the 8(a)(1) conduct herein and was accompanied by allusion to  
40 his "causing too much controversy," which could only refer to his protected activities. From these facts, it is reasonable to infer that Mr. Hawkins' demotion was, at least in part, linked to his union activities. I find, therefore, the General Counsel has met his initial burden of establishing

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<sup>18</sup> Reiterated in *MacDonald Machinery Co.*, 335 NLRB No. 27, slip op. 1 (2001).

<sup>19</sup> The relative mildness of anti-union expressions does not vitiate a finding of animus. *Wisconsin Steel Industries, Inc.*, 318 NLRB 212 (1995).

50 <sup>20</sup> *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

that Mr. Hawkins' protected activity was a motivating factor in Respondent's decision to demote him. Once the General Counsel has made his prima facie case, the burden shifts to Respondent to show, in essence, that it would have taken the same action for nondiscriminatory reasons, even in the absence of protected activity.

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In meeting its *Wright Line* burden, Respondent must do more than state a legitimate basis for its adverse employment action; it must show by a preponderance of the evidence that it would have taken the same action in the absence of protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995). Here, Respondent has met the shifted burden. Prior to any knowledge of union activity, Respondent's managers were concerned about Mr. Hawkins' oversight of the Rock Springs facility. In March, Mr. Von Lintel and Mr. Roby sent Mr. Long to review the operational and safety situation at the Rock Springs facility. Mr. Long's assignment cannot have been motivated by union animus as there is no evidence Respondent was aware of any union activity among its employees at that time. Mr. Long's March report was not favorable to Mr. Hawkins. He described the facility as "beyond a mess." Mr. Roby's subsequent meeting with Mr. Hawkins did not result in an exoneration of Mr. Hawkins but rather a commitment by Respondent to support Mr. Hawkins' promised effort to improve conditions at the facility. Respondent's support continued even after Respondent learned of employee union activity sometime around May 23, as evidenced by Mr. Hawkins' relatively favorable May 28 appraisal. While the appraisal was not fully satisfactory, revealing that Mr. Von Lintel continued to be concerned about Mr. Hawkins' lack of organization, the overall tone was positive and included recognition of Mr. Hawkins' excellence as a driver. Mr. Hawkins' appraisal comments and self-ratings suggest that, in some areas, he assessed his shortcomings more severely than did Respondent. The inference to be drawn is that Respondent had no intention, as of May 28, of retaliating against Mr. Hawkins because of the union activity at the facility even though Mr. Von Lintel knew Mr. Hawkins had attempted to conceal the activity. Counsel for the General Counsel argues that, following Mr. Hawkins' appraisal, Respondent contrived to lay serious hazardous mistakes at Mr. Hawkins' door as a pretext for his discriminatory demotion. It is true that Respondent became fully aware of Mr. Hawkins' protected alliance with employees in their union support after the June 10 and 13 meetings where he voiced employee concern about job security. It was also after those meetings that Mr. Von Lintel expressed Respondent's reactive animus toward Mr. Hawkins' by referring to Mr. Hawkins' causing controversy. Clearly Respondent based its demotion of Mr. Hawkins, at least in part, on Mr. Hawkins' protected conduct. If Mr. Hawkins' June 10 and 13 complaints to management were the only intervening occurrences between Mr. Hawkins' appraisal and his demotion, I would have to agree with the General Counsel that Mr. Hawkins was discriminatorily demoted. But his complaints were not the only intervening incidents. Credible evidence establishes that serious operational errors and problems at the facility, justifiably attributed to Mr. Hawkins, were brought to light after his appraisal. Thus, almost immediately after the completion of Mr. Hawkins' appraisal, Mr. Von Lintel discovered Mr. Hawkins negligently failed to prevent a serious chemical spill and thereafter refused to accept responsibility for it. Soon after that, Mr. Long again reported glaring operational deficiencies to Mr. Von Lintel by e-mail on June 11. These operational blunders support Respondent's contention that it demoted Mr. Hawkins for his failure to do his job properly.

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The facts herein show Respondent's dual motivation in demoting Mr. Hawkins: his union partisanship and his dereliction of leadman duties. After consideration of all the evidence, I conclude the predominating motivation was Mr. Hawkins' failure to perform his leadman position satisfactorily. While Respondent expressed animus to Mr. Hawkins for his concealment of union activity and for his causing controversy, the evidence shows Respondent had ample basis, wholly aside from its animus, for the demotion. There is no evidence of pretext or factual distortion by Respondent in assessing Mr. Hawkins' job performance. Further, there is no valid

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argument that Mr. Hawkins' dereliction of his leadman duties was insubstantial or that it did not reasonably warrant the severity of demotion. Indeed, legitimate safety concerns alone would dictate oversight changes at the Rock Springs facility. In the demotion interview, while Mr. Von Lintel referred to Mr. Hawkins' causing controversy, the focus of the interview was clearly on Mr. Hawkins' unsatisfactory job performance. According to Mr. Hawkins' testimony, he argued against the noted work transgressions but said nothing about the "controversy" accusation. It is reasonable to infer that neither Mr. Von Lintel nor Mr. Hawkins found the "controversy" statement to be particularly significant to the demotion. I find, therefore, that Respondent has shown it would have demoted Mr. Hawkins and placed his responsibilities in the hands of someone else regardless of his protected activity. I shall, therefore, dismiss the allegations of the complaint relating to Mr. Hawkins' demotion.

#### D. The layoff of Mr. Christen

Applying the *Wright Line* analysis described above to Respondent's layoff of Mr. Christen, I cannot find the General Counsel has established, as required in *Webco Industries*, supra, at fn. 3, that Mr. Christen's protected conduct was, *in fact*, a motivating factor in its decision to lay him off. Although the evidence shows Respondent to have had animus toward its employees' union activities, no specific animus was directed at Mr. Christen, and no employees were threatened with adverse consequences. The absence of such evidence is not, of course, dispositive of whether Respondent discriminatorily laid off Mr. Christen. The Board has held that "a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corporation of America*, 337 NLRB No. 13, at slip op. 1 (2001) citations omitted. Here, there is no basis for inferring a discriminatory motive from the circumstances surrounding Mr. Christen's layoff. The uncontroverted evidence establishes that in 2002 when the Wyoming weather warmed, Respondent experienced its normal seasonal slowdown, that economic considerations supported a decrease in the work force, that Mr. Christen was the least senior employee, and that Respondent's efforts to provide him with alternate work proved economically unfeasible. There is neither direct nor circumstantial evidence to suggest that Respondent laid off Mr. Christen because of his union activities. I cannot, therefore, find that Mr. Christen's protected activity was a motivating factor in Respondent's decision to lay him off. Accordingly, I find the General Counsel failed to meet his *Wright Line* burden, and I shall dismiss the allegations of the complaint relating to Mr. Christen's layoff.

#### Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act by
  - (a) Interrogating an employee about other employees' union activities.
  - (b) Making coercive statements to an employee by expressing displeasure at being deceived about the union activities of other employees.
  - (c) Soliciting grievances from employees.
2. Respondent did not violate the Act as otherwise alleged in the complaint.

#### Remedy

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

ORDER

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Respondent, Univar USA, Inc., Rock Springs, Wyoming, its officers, agents, successors, and assigns, shall

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1. Cease and desist from
  - (a) Interrogating employees about their or others' union activities.
  - (b) Coercively expressing displeasure at being deceived about the union activities of employees.
  - (c) Soliciting grievances from employees.
  - (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.

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

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- (a) within 14 days after service by the Region, post at its facility in Rock Springs, Wyoming copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 27 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2002.

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- (b) 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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<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

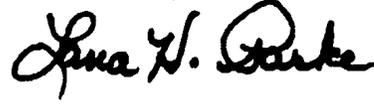
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<sup>22</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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

Dated, at San Francisco, CA, this 28<sup>th</sup> day of August, 2003.

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Lana H. Parke  
Administrative Law Judge

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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** interrogate employees about their or others' union activities.

**WE WILL NOT** express displeasure at being deceived about the union activities of employees.

**WE WILL NOT** solicit grievances from employees.

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

UNIVAR USA, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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](http://www.nlr.gov).

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433

(303) 844-3551, 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, (303) 844-3554.